

Establishment of Religion

Purpose:

In this lesson students first examine the characteristics of a society that has an officially “established” church. They then apply their understanding of the Establishment Clause of the First Amendment to a variety of situations in which it has been challenged. After they have discussed the situations, there is an opportunity for students to propose an amendment to the Constitution that would allow a more prominent role for religion in public life.

Procedure:

1. Introduce the lesson by asking students to brainstorm the characteristics of a society that has an official and/or state-supported religion. Have students limit their thinking to descriptions, rather than judgments, of such a society. The following questions may be helpful in stimulating students’ thinking:

- Who would have authority in a society with an established religion? Who would be able to vote? Hold public office?
- What would life be like for individuals in the society?
- What characteristics would leaders of the society have?
- What kinds of laws (e.g., marriage, immigration, criminal code) might be affected by the establishment of religion?

2. Extend the brainstorming by drawing two columns on the board and labeling them “Pros” and “Cons.” Ask students to list the positive and negative aspects of a society with an established religion. Post their responses on the board. Pros might include a shared sense of morality, social cohesion, a legal code that reinforces religion values, fewer controversies about religious diversity. Cons might include oppression of those with different values or beliefs, control of the church by the state or control of the state by the church, religious differences being played out through government policies, limits on who could participate in the political process, more controversies about religious diversity.

3. Ask students to take a stand on whether they would, at this point in their understanding, want to live in a country with an officially designated and/or state-supported religion. Explore the reasons for students’ responses. Mention that some nations, including Great Britain, Saudi Arabia and Iran, have official state religions; others, such as Poland, have close and explicit ties to one religion; still others, such as Cuba, have policies that are hostile to religious beliefs.

4. Briefly explore the history of the Establishment Clause, using the following information:

- The Establishment Clause of the First Amendment reads, “Congress shall make no law respecting an establishment of religion.” This was a dramatic

departure from the colonial experience but is largely taken for granted today.

- At the time of the American Revolution, nine of the colonies had state religions. Rhode Island, Pennsylvania, Delaware and New Jersey did not. Britain had the Church of England.
- The official religions of the nine colonies were Anglican (Church of England), Dutch Reformed and Congregationalist, all Protestant denominations. Massachusetts was the last state to “de-establish” its official religion in 1833. Note that the First Amendment only addressed a national establishment of religion. It did not prohibit *states* from having a religious preference. Today, of course, the First Amendment does apply to the states through what is called incorporation. The Supreme Court has extended the protections of the Bill of Rights to all levels of government through incorporation into the Fourteenth Amendment’s guarantee of due process and equal protection.
- The Establishment Clause was supported by the framers because it supported the notions of freedom *from* government coercion in matters of religion and the freedom *of* religion for each individual.

5. Tell students that while we take the Establishment Clause for granted, many controversies still arise about whether certain actions involve too much government support for religion. The Supreme Court has used several different “tests” for determining whether the Establishment Clause has been violated. Distribute the handout *Tests the Supreme Court Uses in Deciding Church-State Cases*. Review the tests with the class. Encourage students to compare the tests in terms of which allows more government involvement in religion, as well as in terms of which would be easiest to apply and which would result in less disagreement about whether the criteria were met in a particular case.

6. Read the following situations to the class. If you are limited in time, select just a couple of the cases. After each one, ask students to discuss whether there has been a violation of the Establishment Clause and develop reasons for their position. Allow approximately two to three minutes for each scenario. After the class has had time to discuss a situation, share the Supreme Court decision for that situation. (Debriefing information is under procedure 7.).

- **Situation 1** - The American Civil Liberties Union (ACLU) sued three Kentucky counties in federal district court for displaying framed copies of the Ten Commandments in courthouses and public schools. The ACLU argued the displays violated the First Amendment's Establishment Clause, which prohibits the government from passing laws "respecting an establishment of religion." Do Ten Commandments displays in public schools and in courthouses violate the First Amendment's Establishment Clause, which prohibits government from passing laws "respecting an establishment of religion?" Was a determination that the displays' purpose had been to advance religion sufficient for the displays' invalidation?

- **Situation 2** - A student elected as Santa Fe (NM) High School's student council chaplain delivered a prayer, described as overtly Christian, over the public address system before each home varsity football game. One Mormon and one Catholic family filed suit challenging this practice and others under the Establishment Clause of the First Amendment. The District Court enjoined the public Santa Fe Independent School District (the District) from implementing its policy as it stood. While the suit was pending, the District adopted a new policy, which permitted, but did not require, student-initiated and student-led prayer at all the home games and which authorized two student elections, the first to determine whether "invocations" should be delivered at games, and the second to select the spokesperson to deliver them. After the students authorized such prayers and selected a spokesperson, the District Court entered an order modifying the policy to permit only nonsectarian (not relating to a group or denomination) prayer. The district claimed its policy did not violate the Establishment Clause because the football game messages were private student speech, not public speech. Does the Santa Fe Independent School District's policy permitting student-led, student-initiated prayer at football games violate the Establishment Clause of the First Amendment?

- **Situation 3** – (Note to teacher: if you use this situation, you might omit Situation 4.) The Board of Regents for the State of New York authorized a short, voluntary prayer for recitation at the start of each school day. This was an attempt to defuse the politically potent issue by taking it out of the hands of local communities. The blandest of invocations read as follows: "Almighty God, we acknowledge our dependence upon Thee, and beg Thy blessings upon us, our teachers, and our country." Does the reading of a nondenominational prayer at the start of the school day violate the "establishment of religion" clause of the First Amendment?

- **Situation 4** - At the beginning of the school day, students who attended public schools in the state of Pennsylvania were required to read at least ten verses from the Bible. After completing these readings, school authorities required all Abington Township students to recite the Lord's Prayer. Students could be excluded from these exercises by a written note from their parents to the school. In a related case -- *Murray v. Curllett* -- a Baltimore statute required Bible-reading or the recitation of the Lord's Prayer at open exercises in public schools. Murray and his mother, professed atheists -- challenged the prayer requirement. Did the Pennsylvania law and Abington's policy, requiring public school students to participate in classroom religious exercises, violate the religious freedom of students as protected by the First and Fourteenth Amendments?

- **Situation 5** – In keeping with the practice of several other public middle and high school principals in Providence, Rhode Island, Robert E. Lee, a middle school principal, invited a rabbi to speak at his school's graduation ceremony. Daniel Weisman's daughter, Deborah, was among the graduates. Hoping to stop the rabbi from speaking at his daughter's graduation, Weisman sought a temporary restraining order in District Court - but was denied. After the ceremony, where prayers were recited, Weisman filed for a permanent injunction barring Lee and other Providence public school officials from inviting clergy to deliver invocations and benedictions at

their schools' ceremonies. Does the inclusion of clergy who offer prayers at official public school ceremonies violate the Establishment Clause of the First Amendment?

- **Situation 6** - The school administration at Westside High School denied permission to a group of students to form a Christian club with the same privileges and meeting terms as other Westside after-school student clubs. In addition to citing the Establishment Clause, Westside refused the club's formation because it lacked a faculty sponsor. When the school board upheld the administration's denial, Mergens and several other students sued. The students alleged that Westside's refusal violated the Equal Access Act, which requires that schools in receipt of federal funds provide "equal access" to student groups seeking to express "religious, political, philosophical, or other content" messages. Was Westside's prohibition against the formation of a Christian club consistent with the Establishment Clause, thereby rendering the Equal Access Act unconstitutional?

7. Information on each of these cases is provided below.

Situation 1: In *McCreary County v. ACLU* (2005), the Supreme Court held that the displays violated the establishment clause because their purpose had been to advance religion. In the case of each of the displays, the Court held, an observer would have concluded that the government was endorsing religion. The first display for presenting the Ten Commandments in isolation; the second for showing the Commandments along with other religious passages; the third for presenting the Commandments in a presentation of the "Foundations of American Law," an exhibit in which the county reached "for any way to keep a religious document on the walls of courthouses."

Situation 2: In *Santa Fe Independent School Dist. v. Doe* (2000), the Supreme Court held that the District's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause. The Court concluded that the football game prayers were public speech authorized by a government policy and taking place on government property at government-sponsored school-related events and that the District's policy involved both perceived and actual government endorsement of the delivery of prayer at important school events. Such speech is not properly characterized as "private," wrote Justice Stevens for the majority. In dissent, Chief Justice William H. Rehnquist, joined by Justices Antonin Scalia and Clarence Thomas, noted the "disturbing" tone of the Court's opinion that "bristle[d] with hostility to all things religious in public life."

Situation 3: In a controversial decision in *Engel v. Vitale* (1962), the Supreme Court ruled that neither the prayer's nondenominational character nor its voluntary character saves it from unconstitutionality. By providing the prayer, New York officially approved religion. This was the first in a series of cases in which the Court used the establishment clause to eliminate religious activities of all sorts, which had traditionally been a part of public ceremonies. Despite the passage of time, the decision is still unpopular with a majority of Americans.

Situation 4: In this well-known prayer case, *Abington School District v. Schempp* (1963), the Supreme Court found such a violation. The required activities encroached on both the Free Exercise Clause and the Establishment Clause of the First Amendment since the readings and recitations were essentially religious ceremonies and were "intended by the State to be so." Furthermore, argued Justice Tom C. Clark, the ability of a parent to excuse a child from these ceremonies by a written note was irrelevant since it did not prevent the school's actions from violating the Establishment Clause.

Situation 5: In *Lee v. Weisman* (1992), the Court held that government involvement in this case creates "a state-sponsored and state-directed religious exercise in a public school." Such conduct conflicts with settled rules proscribing prayer for students. The school's rule creates subtle and indirect coercion (students must stand respectfully and silently), forcing students to act in ways that establish a state religion. The cornerstone principle of the Establishment Clause is that government may not compose official prayers to recite as part of a religious program carried on by government.

Situation 6: In distinguishing between "curriculum" and "non-curriculum student groups," the Court held in *Board of Education of Westside Community Schools v. Mergens* (1990) that since Westside permitted other non-curricular clubs, it was prohibited under the Equal Access Act from denying equal access to any after-school club based on the content of its speech. The proposed Christian club would be a non-curriculum group since no other course required students to become its members, its subject matter would not actually be taught in classes, it did not concern the school's cumulative body of courses, and its members would not receive academic credit for their participation. The Court added that the Equal Access Act was constitutional because it served an overriding secular purpose by prohibiting discrimination on the basis of philosophical, political, or other types of speech. As such, the Act protected the Christian club's formation even if its members engaged in religious discussions.

8. Conclude this portion of the lesson by discussing these questions:

- Which situations/cases were the most difficult to decide? Why?
- With which decisions did you personally agree or disagree? Explain.
- Specifically, how might life in your school, community, state and nation be different for you and others if there was an established church system?
- What effect might an established church have on other freedoms guaranteed in the Bill of Rights?

9. Tell students that people are sometimes unhappy with the way in which the Court interprets the Constitution. Some of the students themselves may have disagreed with the decisions in the cases they discussed above. One option for people who disagree with Court interpretations is to propose a constitutional amendment, a change in the Constitution. You might have students propose the wording for a constitutional amendment that would provide a more prominent role for religion in public life.

10. To conclude the lesson, ask students to reflect on their answer to the question posed earlier in the lesson: Would you want to live in a country with an officially designated and/or state-supported religion?

Enrichment/Extension:

1. Assign students to identify and research countries with established religions. How does the established religion influence the society? Students should consider such questions as those listed in procedure 1.
2. Have students use the Internet to research other Establishment Clause cases. A good place to begin is www.oyez.org - type in "Establishment Clause" in the search box. Have students prepare reports on at least two of the cases. In their reports, ask them to analyze the cases to see if the Court has changed the way it is interpreting the Establishment Clause in recent cases.

Tests the Supreme Court Uses in Deciding Church-State Cases

The U.S. Supreme Court heard only a handful of church-state cases between 1791 and 1941. Since 1941, however, this has been a major area of Supreme Court activity. The justices have widely divergent views on this topic, and the Court tends to use a case-by-case approach to deciding difficult cases.

Justices have used the following tests in deciding church-state cases.

Lemon Test

The *Lemon* test gets its name from the 1971 decision *Lemon v. Kurtzman* in which the Court struck down a state program providing aid to religious elementary and secondary schools. Using the *Lemon* test, a court must first determine whether the law or government action in question has a secular (non-religious) purpose. Second, a court would ask whether the state action has the primary effect of advancing or inhibiting religion. Finally, the court would consider whether the action excessively entangles religion and government. Although the test has come under fire from several Supreme Court justices, courts continue to use the test in most Establishment Clause cases. In its 1997 decision *Agostini v. Felton*, the Supreme Court modified the *Lemon* test. The Court in *Agostini* identified three primary criteria for determining whether a government action has a primary effect of advancing religion: 1) government indoctrination, 2) defining the recipients of government benefits based on religion, 3) excessive entanglement between government and religion.

Coercion Test

Some justices propose allowing more government support for religion than the *Lemon* test allows. These justices support adoption of a test known as the "coercion test." Under this test the government does not violate the establishment clause unless it (1) provides direct aid to religion in a way that would tend to establish a state church or (2) coerces people to support or participate in religion against their will. Under this test, the government would be permitted to erect such religious symbols as a Nativity scene standing alone in a public school or other public building at Christmas.

Endorsement Test

The endorsement test, proposed by Justice Sandra Day O'Connor (now retired), asks whether a particular government action amounts to an endorsement of religion. According to O'Connor, a government action is invalid if it creates a perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion. For example, if through its actions the government sends a message to nonbelievers that they are outsiders and not full members of the political community, the action would be a violation of the Establishment Clause. Situations

involving such things as graduation prayers, religious signs on government property, religion in the curriculum, etc., will usually be examined in light of this test.

Neutrality Test

Neutrality means not favoring one religion over another, not favoring religion over non-religion and vice versa. This treatment allows states to provide computers to both religious and public schools and allows states to provide reading teachers for low-performing students, even if they attend a religious school. It also indicates that the faith-based initiative proposed by President George W. Bush might be found constitutional, if structured appropriately. Various conservative religious groups raise concerns with this test because they think it ignores the special place religion has historically played in constitutional law by treating religious freedom the same as every other kind of speech or discrimination claim. Strict separationist groups argue that providing government funds to religious groups violates the consciences of taxpayers whose faith may conflict with the religious missions of some groups who are eligible to receive funding using an "even-handed" approach. It is likely that for the foreseeable future a majority of justices will continue to view government neutrality toward religion as the guiding principle in interpreting Establishment Clause cases.