

TESTING THE LIMITS OF RIGHTS

A Unit Plan for Teachers



DESIRED RESULTS

Established Goals:

United States Era Three

Standard 3B

The student understands the guarantees of the Bill of Rights and its continuing significance [and can a]nalyze issues addressed in recent court cases involving the Bill of Rights to assess their continuing significance today.

Source: C3 Framework for Social Studies State Standards

CCSS.ELA-Literacy.RH.11-12.1. Cite specific textual evidence to support analysis of primary and secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.

CCSS.ELA-Literacy.RH.11-12.2. Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.

CCSS.ELA-Literacy.RH.11-12.9. Integrate information from diverse sources, both primary and secondary, into a coherent understanding of an idea or event, noting discrepancies among sources.

CCSS.ELA-Literacy.SL.11-12.1a. Come to discussions prepared, having read and researched material under study; explicitly draw on that preparation by referring to evidence from texts and other research on the topic or issue to stimulate a thoughtful, well-reasoned exchange of ideas.

CCSS.ELA-Literacy.SL.11-12.1b. Work with peers to promote civil, democratic discussions and decision-making, set clear goals and deadlines, and establish individual roles as needed.

CCSS.ELA-Literacy.SL.11-12.1c. Propel conversations by posing and responding to questions that probe reasoning and evidence; ensure a hearing for a full range of positions on a topic or issue; clarify, verify, or challenge ideas and conclusions; and promote divergent and creative perspectives.

Source: Common Core State Standards

Understandings:

Students will understand that...

- The interpretation of the First Amendment has changed over time
- The meaning of the First Amendment continues to be debated
- Different ideologies shape the debate over the appropriate interpretation of the Constitution.

Students will know...

- The First Amendment and its clauses.
- Strict and loose interpretation.
- Key Supreme Court cases that shape our understanding of First Amendment rights.

Essential Questions:

- How should the Constitution be interpreted?

Students will be able to...

- Explain strict and loose interpretation.
- Articulate their own lens for interpreting the Constitution.
- Explain how precedent impacts Supreme Court

ASSESSMENT EVIDENCE**Performance Tasks:**

In the unit reflection paper, students will describe how they would interpret the constitution.

Other Evidence:

Group products, such as document analyses and predictions, and individual tasks such as responses to reflection questions.

LEARNING PLAN**Learning Activities:**

- Short lectures followed by small group discussions
- Debate
- Reading, discussing and analyzing documents
- Secondary source readings
- Small group work
- Reflective paper

SUGGESTED GRADE LEVEL: 11-12

LESSON ONE – INTERPRETING THE CONSTITUTION

Overview: After being introduced to the unit as whole, students will consider different approaches to interpreting the Constitution, then begin to examine different ways of thinking about first amendment rights, particularly speech.

Time: 90 minutes

Procedure

Frame the unit 10 minutes

- Post the following phrase on the board:
 - *I saw a man on a hill with a telescope*
- Ask students to discuss what this utterance means. Did the speaker use a telescope to observe a man who was standing on a hill? Or did the speaker climb a hill with a telescope and observe a man? Or was there a man using a telescope while standing on the hill? Or is there a man standing on a hill that has a pay telescope on it? (This final interpretation is unlikely, but still possible and technically not incorrect.)
- After taking some responses from students, ask students what they would do if someone said this to them. Ultimately, point out that students could ask the speaker for clarification (if students do not arrive at this conclusion on their own). This is not always the case with laws or other documents intended to influence events for generations.
- The federal court system, therefore, acts as the arbiter of what these documents (the Constitution, the Bill of Rights, and laws) mean.

Access prior knowledge 15 minutes

- Ask students to brainstorm cases that they know about.
 - What were those cases about?
 - What did they do?
 - What amendment or Constitutional issue did they involve?
- Students may not be able to provide detailed explanations for all of the Supreme Court cases they have heard of – this is fine. List as many cases as possible.
- Remind students that not every Supreme Court case deals with the Constitution. The Supreme Court is also asked to interpret federal and state laws when such challenges arise.
- That said, this unit will focus on the role of the Court in interpreting several rights included in the Bill of Rights.

Unit overview 10 minutes

- Over the rest of today’s class meeting, and for the next three, students will examine how the court has interpreted specific clauses in the Bill of Rights to gain a better understanding of:
 - What those rights mean today;
 - What ideas, beliefs and values inform the court’s thinking;
 - The arguments surrounding differing interpretations of the rights in question.
- To answer these questions, students will consider recent first amendment cases.
- In each instance, we will examine some case law and then consider whether we believe the Supreme Court arrived at the correct conclusion.

Introduce models of interpretation..... 25 minutes

- Conduct two take-a-stand activities, one with each of the following paired statements.
 - **Proposition 1**
 - A. The job of a justice is to apply the Constitution to each case and not impose his/her own opinions.
 - B. The job of a justice is to use his/her judgment and experience to reach the most just outcome in each case.
 - **Proposition 2**
 - A. The founding fathers wrote the Constitution as the foundation of our democracy; justices should only consider the intentions of the founding fathers when interpreting the Constitution.
 - B. Since the Constitution was written over 200 years ago, justices have to adapt the principles of the Constitution to modern life.
- Take a few student responses in defense of each position.
- Distribute the handout (attachment A) to each student. Ask students to read it and to consider whether they agree more, on the whole, with the strict interpretation model or the loose interpretation model.
- Explain to students that these models of interpretation apply broadly to the work of the court, but that there are schools of thought around specific Constitutional issues that also come into play when looking at the work of the court.

Introduce 1st Amendment..... 5 minutes

- Post the First Amendment to the Constitution somewhere where all students can see it. It will be a focal point for the next two days.
 - 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.
- The First Amendment deals with rights of expression: speech, petitioning, press, public assembly and religion. The class will examine the clauses relating to speech and to religion.

Focus on Speech 20 minutes

- Highlight the clause of the First Amendment that deal with speech: Congress shall make no law... abridging the freedom of speech.
- Explain that this has long been understood to mean that government can place “no prior restraint” on speech. In other words, the government cannot stop a citizen from saying something. What has long been debated, however, is whether the government can take action after speech. Some people, often labeled purists, argue that government should place no limits on speech, or at least as few as absolutely necessary. Others argue that some exceptions are necessary and proper. Others, who could be labeled pragmatists argue that it is important to consider the context and the effects of speech in determining whether it should be protected.
- Distribute “Quotes about Freedom of Speech” (attachment B) to all students. Ask students to read the quotes and to circle the one they most agree with. Students should also place a checkmark next to the quote with which they most disagree.
- Place students in pairs and ask them to share their quotes.
- Hold a whole group discussion; ask students to indicate their favorite and least favorite quotes (perhaps by reading each quote – ask students to hold a thumbs up when their favorite is read and a thumbs down when their least favorite is read). Ask students to explain their choices.

Explain homework..... 5 minutes

- Distribute the homework sheet (attachment C) to all students.
- Students should review precedent cases and the tests and limits and come prepared to apply the information to actual cases. Students should identify which precedent cases most help to cla

Strict Interpretation	Loose Interpretation
<i>The Constitution is the permanent foundation of our political system; changes should only be made by the processes laid out by the founders</i>	<i>The Constitution is a “living document” designed to lay out the guidelines for our democracy; it’s meaning has to be interpreted and changed as our society grows and evolves</i>
<i>The Framers’ specific language and intentions determine what the Constitution means; the Constitution does not give courts the authority to change or amend its meaning; that power is reserved for the Congress and the people.</i>	<i>Framers deliberately used vague language so that the Constitution could be interpreted and evolve over time; the courts are best suited to this purpose since they are most resistant to heat-of-the-moment changes.</i>
<i>The Supreme Court should not be influenced by public opinion or a concern with the policy impacts of their decisions. If lawmakers or the people desire certain policies or laws not provided in the Constitution they should seek those changes in the Constitutionally designed manner: through the Congress.</i>	<i>The precedent of having the Court determine whether or not laws passed by Congress are Constitutional was established by the Marshall Court two centuries ago. This precedent has allowed the Court to help our government, our laws, and our society grow and progress since the days of our founding.</i>

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Quotes about Freedom of Speech

The following quotes are from Supreme Court Justices and all deal with some aspect of free speech.

Read the quotes then circle the one you most agree with and put a check mark next to the one you least agree with.

“Restriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us.”

Justice William O. Douglas

“First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”

Justice Anthony Kennedy

Without deviation, without exception, without any ifs, buts, or whereases, freedom of speech means that you shall not do something to people either for the views they express, or the words they speak or write... I do not believe that any [institutions of government] have power or authority to subordinate speech and press to what they think are ‘more important’ interests.

Justice Hugo Black

This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from [free expression] and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

Justice Robert Jackson

“The framers of the constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for restrained speech and thought against the abuses of liberty. They chose liberty.”

Justice William O. Douglas

Timeline of First Amendment Precedents

- 1919** *Schenck v. United States*. The Supreme Court established the “clear and present danger” doctrine: Speech that creates a “clear and present” of bringing about the “substantive evils” is not protected by the Constitution. In the case of Charles Schenck’s, the Court ruled that his attempts to convince workers to resist military recruitment processes during WWI did pose a “clear and present danger” and that government could punish him or censor his actions.
- 1942** *Chaplinsky v. New Hampshire*. Established the “fighting words” doctrine: Speech that uses words that by “their very utterance inflict injury or tend to incite an immediate breach of the peace” are not protected by the Constitution; the Court labeled such words “fighting words” and held that their use may be punished or prohibited by government. The Court reasoned that fighting words “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from [protecting] them is clearly outweighed by the social interest in order and morality.
- 1942** *Valentine v. Chrestensen*. Commercial speech is not protected by the constitution: The court ruled that a New York city law prohibiting the distribution of handbills containing commercial messages was constitutionally permissible because “the Constitution imposes no...restraint on government as respects [regulating] purely commercial advertising.” In later rulings the Court defined commercial speech as “speech proposing a commercial transaction.”
- 1949** *Terminiello v. City of Chicago*. Held that a “breach of peace” ordinance of the City of Chicago which banned speech which “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance” was unconstitutional under the First and Fourteenth Amendments to the United States Constitution.
- 1971** *Cohen v. California*. When not directed at any particular individual, shocking or vulgar language does not constitute “fighting words.” In this case, a man was improperly prosecuted for wearing a jacket into a public building emblazoned with the phrase “F**k the Draft” (in the Vietnam War context). The Court ruled that, although the message on the jacket enraged many who saw it, this is communication, protected by the free speech clause of the 1st Amendment.
- 1973** *Miller v. California*. Upheld prior Court rulings that “obscene material is not protected by the First Amendment” and that sale and distribution of such material could be restricted or prohibited. However, the Court acknowledged “the inherent dangers of undertaking to regulate any form of expression,” and said that “State statutes designed to regulate obscene materials must be carefully limited.” The Court devised a “three-pronged” test to determine when materials is unprotected obscene expression: Obscene material is that which (1) appeals to ‘prurient interest’, AND (2) is ‘patently offensive’ to community standards, AND (3) lacks serious literary, artistic, political or scientific value.
- 1976** *Buckley v. Valeo*. Upheld a federal law which set limits on campaign contributions, but ruled that spending money to influence elections is a form of constitutionally protected free speech. The decision allowed limits on contributions to campaigns (as well as requirements for disclosure and reporting the sources of contributions). But the Court found that it violates the First Amendment to place legal limitations on spending by campaigns or by independent individuals and groups (if their spending is not coordinated with the campaign), or by a candidate from personal funds.
- 1990** *Austin v. Michigan Chamber of Commerce*. Held that a Michigan law, which prohibited corporations from using treasury money to support or oppose candidates in elections, did not violate the First Amendment. The Court upheld the restriction on corporate speech based on the notion that “[c]orporate wealth can unfairly influence elections,” and the Michigan law still allowed the corporation to make contributions from a segregated fund.

2003 ***McConnell v. Federal Election Commission***. Upheld the constitutionality of the “McCain-Feingold” law restricting certain forms of campaign funding. Though the law placed federal restrictions on campaign donations to parties and candidates and restrictions on political advertising by independent groups and individuals during elections seasons, the court said that the restriction on contributions were permissible because the restriction’s impact on free speech was “minimal” and was justified by the government’s legitimate interest in preventing “both the actual corruption threatened by large financial contributions and... the appearance of corruption” that might result from those contributions.” The Court also said that the restrictions on political advertising by independent groups and individuals were permissible because such regulations were necessary to prevent campaigns, groups, and individuals from going around the restrictions on contributions by contributing money to creating ‘independent’ advertisements.

LEVELS OF SPEECH

Protected	Lower-Valued	Unprotected
Unless a written, spoken, or symbolic expression falls into one of the two categories of exceptions on the right, it is automatically considered to be fully protected by the First Amendment.	Some forms of speech may be treated as “lower valued”, meaning that government has a moderately broad authority to restrict such speech to serve legitimate state interests. Lower valued speech includes: Commercial speech (advertisements, etc.); Libel (against private persons); Erotic/adult material (which does not cross the threshold of obscenity).	Unprotected speech includes: Obscenity (expression that appeals to ‘prurient interest’, AND is ‘patently offensive’ to community standards, AND lacks serious literary, artistic, political or scientific value); Fighting words (speech that would deliberately incite hatred or violence from their target); Incitement (speech aimed at inciting an audience to conduct specific acts of crime or violence).
EXAMPLES INCLUDE: A poster advocating the elimination of bans on cigarette smoking. A book or movie in which characters smoke cigarettes. A person giving a public speech advocating allowing minors to smoke cigarettes.	EXAMPLES INCLUDE: A billboard promoting a brand of cigarettes. A magazine advertisement for a cigarette brand. A TV talk show host who is paid to tell the audience why he or she prefers a particular brand of cigarettes.	EXAMPLES INCLUDE: An outrageously inflammatory or threatening insult yelled at someone who is smoking. Obscene images of people smoking. Going to an underage gathering and trying to talk minors into lighting up and smoking cigarettes.

LEVELS OF SCRUTINY

Protected	Lower-Valued	Unprotected
Government restrictions on the content of protected speech must serve a compelling state interest, that the restriction is narrowly tailored to serve only that interest, and that it is the least restrictive means possible to serve that interest.	Some forms of speech may be treated as “lower valued”, meaning that government has a moderately broad authority to restrict such speech to serve legitimate state interests. Lower valued speech includes: Commercial speech (advertisements, etc.); Libel (against private persons); Erotic/adult material (which does not cross the threshold of obscenity).	Unprotected speech includes: Obscenity (expression that appeals to ‘prurient interest’, AND is ‘patently offensive’ to community standards, AND lacks serious literary, artistic, political or scientific value); Fighting words (speech that would deliberately incite hatred or violence from their target); Incitement (speech aimed at inciting an audience to conduct specific acts of crime or violence).
EXAMPLES INCLUDE: A state passes a law banning certain books from its library. A city named after a historical figure passes an ordinance to stop people from saying insulting things about the historical figure. The US Capitol Police refuse to allow protesters over one particular issue to hold a rally.	EXAMPLES INCLUDE: A billboard promoting a brand of cigarettes. A magazine advertisement for a cigarette brand. A TV talk show host who is paid to tell the audience why he or she prefers a particular brand of cigarettes.	EXAMPLES INCLUDE: An outrageously inflammatory or threatening insult yelled at someone who is smoking. Obscene images of people smoking. Going to an underage gathering and trying to talk minors into lighting up and smoking cigarettes.

LESSON TWO – LIMITING EXPRESSION

Overview: Students will apply the precedents, limits and levels examined for homework to a number of recent Supreme Court cases dealing with different types of speech. Students will use these case studies to evaluate the “strict vs. loose” and “pragmatist vs. purist” models of interpreting the first amendment.

Time: 90 minutes

Procedure

Examine cases 40 minutes

- Tell students that, now that they have had time to think generally about freedom of speech and the First Amendment, they will be asked to review some Supreme Court cases and to think about apply the precedent, tests and limits they have looked at.
- If there are students who lost or did not bring their handouts from the homework assignment (attachment C from the previous lesson), pass out any available extras.
- Place students in groups of four to five. Give each group sufficient copies of a case so that all students have a copy of the same case.
- Students should read the background of the case and then discuss the constitutional question and the discussion questions **BEFORE** reviewing the Supreme Court decisions.
- After reviewing the Supreme Court decisions, students should discuss the attendant questions.
- Alert students that they will be joining new groups with students who examined other cases – they should be prepared to explain their case and the relevant precedent, level and limit information to their classmates.
- Place students in new groups of four (to the extent possible) where each student examined a different case.
- Students should summarize the case they examined and explain how the precedent reviewed for homework related to the case.
- After reviewing the cases, students should discuss their personal opinions

Consider the lenses 20 minutes

- Ask the students to individually consider (and perhaps record some thoughts about) the advantages and disadvantages of the purist position on the first amendment. (Remind students that purist argue that there should be no restraint on speech.) Students should also consider the advantages and disadvantages of the pragmatist position.
- Hold a whole group discussion to list the pros and cons of each position and to use the cases to further clarify each position.

Lenses in context 15 minutes

- Recall for students the strict vs. loose framework that they examined on the first day of the unit. Ask them to discuss in pairs the relationship between strict and loose ways of interpreting the Constitution generally and the purist/pragmatist ways of interpreting the first amendment.
- Is purist another word for “strict”; is pragmatist another word for “loose”? Or is the relationship more complicated than that?
- Take a few whole group responses. Note: there is not a definitive answer to this question. In fact, these labels are merely categories to help think about “thinking about” the business of interpretation.

Reflective discussion..... 15 minutes

- Ask students to prepare to discuss the following question:
 - What limits, if any, are appropriate on expression in a democracy?
- After allowing a few moments for students to collect their thoughts, hold a whole group discussion on this question. (Alternatively, place students in groups of 5-6 and ask them to hold this discussion – OR – conduct a think-pair-share.)

Homework

- Let students know that, in the following meeting, the class will examine religious freedoms in relationship to the first amendment.
- Distribute excerpts from the Virginia Statute on Religious Freedoms (attachment E). Ask students to read the excerpt and answer the questions at the bottom of the page.

Snyder v. Phelps et al. (2011)

Background of the case:

- Starting in 2005, the tiny congregation of Westboro Baptist Church of Topeka Kansas under the leadership of Pastor Fred W. Phelps, Sr. began targeting funerals and memorial services for the military dead to protest what they believe to be America's pervasive immorality; specifically, the group claimed to be protesting against what they see as the nation's acceptance of homosexuality, same-sex marriage, fornication, divorce and re-marriage, abortion, greed, and idolatry. The group claims that America's immorality has caused God to punish the nation and in particular the U.S. military whose personnel, they claim, are being killed as God's punishment.
- On March 10, 2006, the Kansas group staged a protest outside a cemetery in Westminster Maryland during the funeral of Matthew Snyder, a 20-year-old Marine lance corporal killed while on active duty in Iraq.
- Positioning themselves in a public area about 1,000 feet from the burial site, Pastor Phelps, two of his daughters, and four children of one of those daughters picketed while holding signs that read, among other similar messages: "Don't Pray for the USA," "God Hates Fags," "God Hates America," "Semper Fi Fags," "Thank God for Dead Soldiers," and "Thank God for 9/11."
- As required by law, the Westboro Church group had notified the authorities in advance of its intent to picket during the funeral, and during their demonstration the picketers obeyed all local laws and police directions. In order to maximize media coverage of the protest, Westboro Church also issued a press alert before the event press which stated that they were going "to picket the funeral of Lance Cpl. Matthew A. Snyder" because "God Almighty killed Lance Cpl. Snyder."
- Distressed by the picketers' messages and by the "circus like atmosphere" created by the demonstration at their son's private funeral, Matthew's family sued Pastor Phelps, two of his daughters, and the Westboro church in federal District Court in Baltimore where a jury found that Phelps' group had violated Maryland laws against intentional infliction of mental and emotional distress, invasion of privacy by intrusion into a secluded event, and conspiracy to commit those acts; they awarded the Snyders a total of \$10.9 million (the trial judge upheld the jury's finding but lowered the award to \$5 million).
- On appeal, the Fourth Circuit Court ruled for the Westboro group, finding that the group's protest, while "utterly distasteful," was speech on matters of "public concern" and thus protected by the First Amendment's free speech guarantees.
- On Dec. 23, 2009 Matthew's father, Alton Snyder, appealed the case on to the Supreme Court. The Supreme Court announced its decision on March 2, 2011

Constitutional Question:

Does the First Amendment protect protesters at a funeral from liability for intentionally inflicting emotional distress on the family of the deceased?

DISCUSSION QUESTIONS:

Use the handout "Categories and Tests Developed by the Courts and Constitutional Scholars" to discuss possible answers to these questions:

1. **In your opinion, what level of speech is involved in this case and why?** (Protected speech, lower-valued speech, or unprotected speech)
2. **What level of scrutiny would you use to answer the Constitutional Question?** (Strict scrutiny, intermediate scrutiny, rational basis review)
3. **What answer would you give to the Constitutional Question?**

Snyder v. Phelps et al.

Does the First Amendment protect protesters at a funeral from liability for intentionally inflicting emotional distress on the family of the deceased?

Supreme Court's Answer:

Decision (Majority Opinion):

Yes. In this case the protest speech is protected by the First Amendment and the Westboro Baptist protest group could not be held liable for alleged harm caused by their speech. The Court reasoned that when the content of a protester's message deals with "matters of public concern," the First Amendment protects the protester from liability lawsuits. Writing for the majority in the 8-1 decision, Chief Justice Roberts reasoned that "because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest, this case [turned] largely on whether [the protesters'] speech was of public or private concern...Speech on matters of public concern . . . is at the heart of the First Amendment's protection...Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community... The 'content' of [the Phelps group's] signs plainly relates to broad issues of interest to society at large, rather than matters of purely private concern... While [their] messages may fall short of refined social or political commentary, the issues they highlight...are matters of public import...As a Nation we have chosen...to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case." *Snyder v. Phelps et al.*, 562 U. S. (2011) (some internal quotation marks omitted).

Dissent (Minority Opinion):

No. In his lone dissent, Justice Samuel Alito argued that "our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case...When grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery. In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like [Snyder]. I therefore respectfully dissent." *Snyder v. Phelps et al.*, 562 U. S. (2011) (Alito, S. in dissent).

DISCUSSION QUESTIONS:

1. Can you tell what level of speech the Court majority applied to this case? How about the minority? Did either match the level you applied?
2. Can you tell what level of scrutiny the Court majority applied to this case? How about the minority? Did either match the level you applied?
3. Do you agree more with the majority opinion or the dissent?
4. Is your own decision on this case more in line with a purist or pragmatist view of how the First Amendment should be applied?

Citizens United v. Federal Election Commission (2010)

Background of the case:

- In the midst of the 2008 presidential primary campaign season, Citizens United, a conservative nonprofit organization, planned to air a movie critical of Hilary Clinton, (*Hillary: The Movie*), which on Direct TV and to also run television commercials promoting the film (including movie clips showing Clinton in a negative light) during the primary season.
- The Federal Communications Commission (FEC) sought to block the airing of the commercials, claiming that they would violate provisions in the Bipartisan Campaign Reform Act of 2002 (known as the McCain-Feingold Act or just “McCain-Feingold”). The McCain-Feingold law restricts privately funded “electioneering communications” 30 days before primaries.
- In January 2008, the United States District Court for the District of Columbia heard the case. Citizens United argued that the McCain-Feingold ban violates the First Amendment when applied to *The Movie* and its related advertisements. The District Court rejected Citizens United’s argument and ruled that the FEC was within its authority to block the commercials during the campaign primary season. The District Court pointed to a previous Supreme Court ruling in *McConnell v. FEC* (see Timeline of First Amendment Precedents) in which the constitutionality of McCain-Feingold was upheld..
- The case was appealed to the Supreme Court and the Court heard oral argument on March 24, 2009.
- When questioned by the Justices during oral argument, the FEC lawyers opened up new concerns when they answered a hypothetical question about the limits to the FEC’s power to ban corporate speech. The FEC lawyers argued that under their understanding of the Court’s decision in *Austin v. Michigan Chamber of Commerce* (see Timeline) regarding political speech made by a “corporate entity”, the FEC “would have the power to ban the distribution of political books during campaign season, or prevent a union from hiring a writer to author a political book, if those books contained even one sentence expressly advocating the election or defeat of a candidate, and were published or distributed by a corporation or union.
- In response to the FEC’s argument, the Court ordered the lawyers for Citizens United and FEC to reargue their cases and present legal reasoning as to why the Supreme Court should or should not overturn its earlier ruling in *Austin v. Michigan Chamber*.

Constitutional Question:

Should the Supreme Court overturn its prior holding that political speech may be banned when the speaker is a corporate entity?

DISCUSSION QUESTIONS:

Use the handout “Categories and Tests Developed by the Courts and Constitutional Scholars” to discuss possible answers to these questions:

1. **In your opinion, what level of speech is involved in this case and why?** (Protected speech, lower-valued speech, or unprotected speech)
2. **What level of scrutiny would you use to answer the Constitutional Question?** (Strict scrutiny, intermediate scrutiny, rational basis review)
3. **What answer would you give to the Constitutional Question?**

Citizens United v. Federal Election Commission

Should the Court overturn its prior holding that political speech may be banned when the speaker is a corporate entity?

Supreme Court's Answer:

Conclusion:

Yes. The Court ruled that McCain-Feingold provisions prohibiting all independent expenditures by corporations and unions is unconstitutional, thus under the First Amendment corporate funding of independent political broadcasts during candidate elections cannot be limited. In its 5-4 decision, the Court's majority maintained that political speech is indispensable to a democracy, which is no less true because the speech comes from a corporation.

Dissent:

No. The dissenters argued that the Court's majority opinion constitutes "a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics." The dissenters also claimed that the Court's ruling "threatens to undermine the integrity of elected institutions across the Nation."

DISCUSSION QUESTIONS:

1. Can you tell what level of speech the Court majority applied to this case? How about the minority? Did either match the level you applied?
2. Can you tell what level of scrutiny the Court majority applied to this case? How about the minority? Did either match the level you applied?
3. Do you agree more with the majority opinion or the dissent?
4. Is your own decision on this case more in line with a purist or pragmatist view of how the First Amendment should be applied?

Hill v. Colorado (2001)

Background of the case:

- In response to intense protesting at abortion clinics in the state, Colorado passed a statute making it unlawful for any person within 100 feet of a health care facility's entrance to "knowingly approach" within 8 feet of another person, without that person's consent, in order to pass "a leaflet or handbill to, display a sign to, or engage in oral protest, education, or counseling with [that] person...."
- Leila Hill was among a group of self-described "sidewalk counselors" who point out the dangers and moral consequences of abortion and suggest abortion alternatives to women as they enter and leave abortion clinics, sometimes through pamphlets, often through protest signs and shouted messages.
- Hill went to state court seeking to block Colorado's enforcement of the statute.
- Hill claimed that by restricting her ability to communicate her views on abortion to the people she most wanted to hear them—the patients and employees of abortion clinics—the Colorado statute violated her First Amendment free speech rights.
- The lawyers for the state of Colorado argued its duty to that protect its citizens' health and safety justify a special focus on access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests.
- The state court dismissed her complaint and held that the statute imposed content-neutral time, place, and manner restrictions narrowly tailored to serve a significant government interest and left open ample alternative channels of communication.
- The Colorado Court of Appeals affirmed the lower court, and, eventually, the Colorado Supreme Court affirmed the ruling concluding that the statute struck a proper balance between a person's right to protest and a person's right to medical treatment.

Constitutional Question:

Does Colorado's statutory requirement that speakers obtain consent from people within 100 feet of a health care facility's entrance before speaking, displaying signs, or distributing leaflets to such people violate the First Amendment rights of the speaker?

DISCUSSION QUESTIONS:

Use the handout "Categories and Tests Developed by the Courts and Constitutional Scholars" to discuss possible answers to these questions:

1. **In your opinion, what level of speech is involved in this case and why?** (Protected speech, lower-valued speech, or unprotected speech)
2. **What level of scrutiny would you use to answer the Constitutional Question?** (Strict scrutiny, intermediate scrutiny, rational basis review)
3. **What answer would you give to the Constitutional Question?**

Hill v. Colorado

Does Colorado’s statutory requirement that speakers obtain consent from people within 100 feet of a health care facility’s entrance before speaking, displaying signs, or distributing leaflets to such people violate the First Amendment rights of the speaker?

Supreme Court’s Answer:

Conclusion:

No. In a 6-3 opinion delivered by Justice John Paul Stevens, the Court held that the Colorado statute’s restrictions on speech-related conduct are constitutional. The Court concluded that the statute “is not a regulation of speech. Rather, it is a regulation of the places where some speech may occur.” “Although the statute prohibits speakers from approaching unwilling listeners, it does not require a standing speaker to move away from anyone passing by. Nor does it place any restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside the regulated areas.” The majority further argued that any claim that Colorado is putting a prior restraint on constitutionally protected speech is wrong because prior restraint is only an issue in government censorship cases; in this case individuals can choose to deny or permit communication

Dissent:

Yes. The dissenters claim that the Colorado law is not content neutral as it is obviously only being applied to abortion clinics and anti-abortion messages. They further argued that protecting citizens from unwanted speech is not a compelling state interest. Moreover, they argue, the amount of places actually being covered by this statute is very large if one considers the extensive amount of healthcare facilities there are; therefore speech is being restricted very significantly. The dissenters claimed that the Colorado law removes one of the few outlets in which peaceful and civil pro-life citizens could get their point across to women considering abortion.

DISCUSSION QUESTIONS:

- 1. Can you tell what level of speech the Court majority applied to this case? How about the minority? Did either match the level you applied?**
- 2. Can you tell what level of scrutiny the Court majority applied to this case? How about the minority? Did either match the level you applied?**
- 3. Do you agree more with the majority opinion or the dissent?**
- 4. Is your own decision on this case more in line with a purist or pragmatist view of how the First Amendment should be applied?**

Ashcroft, et al. v. Free Speech Coalition, et al. (2002)

Background of the case:

- The Child Pornography Prevention Act (CPPA) was passed into law in 1996. The law prohibits “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture” that “is, or appears to be, of a minor engaging in sexually explicit conduct,” and any sexually explicit image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” that it depicts “a minor engaging in sexually explicit conduct.”
- The Free Speech Coalition, an adult-entertainment trade association, filed suit, alleging that the provisions using the terms “appears to be” and “conveys the impression” are overbroad and vague and, thus, restrain works otherwise protected by the First Amendment.
- The District Court that heard the case disagreed with the Free Speech Coalition and rejected as “highly unlikely” the group’s claim that the law is so broad that any “adaptations of sexual works like Romeo and Juliet...will be treated as ‘criminal contraband.’”
- The Court of Appeals overturned the District Court and said that the CPPA is invalid on its face, finding it to be substantially overbroad because it bans materials that are neither obscene nor produced by the exploitation of real children.
- Attorney General of the US, John Ashcroft, felt that the Court of Appeals ruling was incorrect because prior Supreme Court cases had already established two relevant categories of speech that were outside the protection of the First Amendment: In 1973, the Court had held that the First Amendment allowed the government to restrict obscenity; in 1982 the Court held that the government could restrict the distribution of child pornography to protect children from the harm inherent in making it. Moreover, in 1990 the Court allowed the restriction of mere possession of child pornography. So Ashcroft appealed the Court of Appeals decision to the Supreme Court.

Constitutional Question:

Does the Child Pornography Prevention Act violate the First Amendment by being so broad that it would prohibit speech or publication that would otherwise be protected?

DISCUSSION QUESTIONS:

Use the handout “Categories and Tests Developed by the Courts and Constitutional Scholars” to discuss possible answers to these questions:

1. **In your opinion, what level of speech is involved in this case and why?** (Protected speech, lower-valued speech, or unprotected speech)
2. **What level of scrutiny would you use to answer the Constitutional Question?** (Strict scrutiny, intermediate scrutiny, rational basis review)
3. **What answer would you give to the Constitutional Question?**

Ashcroft, et al. v. Free Speech Coalition

Does the Child Pornography Prevention Act violate the First Amendment by being so broad that it would prohibit speech or publication that would otherwise be protected?

Supreme Court's Answer:

Conclusion:

Yes. In a 6-3 opinion the Court held that the CPPA prohibitions are overbroad and unconstitutional. The Court found the CPPA to be inconsistent with earlier rulings because it lacks the required link between its prohibitions and the affront to community standards prohibited by the obscenity definition in earlier Court decisions. Moreover, the Court found that the CPPA prohibits material that records no crime and creates no victims by its production. The majority asserted that the "reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment" and abridge "the freedom to engage in a substantial amount of lawful speech."

Dissent:

No. The dissenters stated their concern that rapidly advancing technology would soon make it very difficult, if not impossible, to distinguish between pornography made with actual children and pornography made with simulated images of children. "Congress has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography, and we should defer to its findings that rapidly advancing technology soon will make it all but impossible to do so." The dissenters observed that the CPPA banned only depictions of minors engaged in actual sexual activity, not mere suggestions of sexual activity. CPPA simply outlawed "computer-generated images virtually indistinguishable from real children in sexually explicit conduct."

DISCUSSION QUESTIONS:

- 1. Can you tell what level of speech the Court majority applied to this case? How about the minority? Did either match the level you applied?**
- 2. Can you tell what level of scrutiny the Court majority applied to this case? How about the minority? Did either match the level you applied?**
- 3. Do you agree more with the majority opinion or the dissent?**
- 4. Is your own decision on this case more in line with a purist or pragmatist view of how the First Amendment should be applied?**

Excerpts from The Virginia Statue on Religious Freedom, authored by Thomas Jefferson and guided through the Virginia legislature by James Madison.

Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as it was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right; that it tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them:

Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish enlarge, or affect their civil capacities.

QUESTIONS:

- 1. What does Thomas Jefferson see as the relationship between church and state?**
- 2. Do you think that First Amendment describes a similar relationship between church and state? Why or why not?**

LESSON THREE – EXAMINING THE ESTABLISHMENT CLAUSE

Overview: Students will briefly be introduced to the free exercise clause of the first amendment before moving to a close examination of cases relating to the establishment clause. Students will use the Lemon test, as well as their interpretation of the Constitution, to debate whether the Court arrived at the correct decision. Finally, students will reflect on the unit.

Time: 90 minutes

Procedure

Introduce tensions..... 10 minutes

- Revisit the text of the First Amendment:
 - 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.
- There are two clauses that deal with religious freedom. The first, called the establishment clause, says, “Congress shall make no law respecting an establishment of religion...”
- The second, the free exercise clause, says, “Congress shall make no law...prohibiting the free exercise [of religion].”
- Alert students that the bulk of the class period will be spent diving into the establishment clause.

Review of free exercise 10 minutes

- Because students will be reviewing cases dealing with the establishment clause, it is worth spending some time explaining the free exercise clause. This clause is intended to allow churches to operate without government interference.
- There have been a few recent cases dealing with the exercise clause that got national attention.
- In one case, a religious school fired a teacher. The teacher sued saying she was fired unfairly under equal employment laws. The Supreme Court found that, because it was a religious school and because the teacher’s coursework included religious teachings, the school had acted appropriately. The case was decided narrowly, but it did help to better understand what decisions count as “religious” decisions and therefore as off-limits to government intervention. (Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 2012)
- In another case, the Supreme Court held that a Brazilian religious group in New Mexico could continue to use a form of tea that the FDA had classified as an illegal narcotic. (Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 2006)
- What limits, if any, do students think should be placed on the free exercise of religion? Briefly discuss this question.

Examining “establishment” 30 minutes

- Distribute quotes regarding the freedom of religion (attachment A) to students. After students read the quotes, they should share their reactions with a partner.
- Explain to students that they will be examining several Supreme Court cases with this ultimate question in mind: What counts as a government establishment of religion?

- Explain the Lemon Test to students: In the Lemon v. Kurtzman case in 1971, the Court established a three part test that they would use to determine whether a government action amounted to the establishment of a religion. The three “prongs” of the test are:
 - The government’s action must have a secular legislative purpose; (Purpose Prong)
 - The government’s action must not have the primary effect of either advancing or inhibiting religion; (Effect Prong)
 - The government’s action must not result in an “excessive government entanglement” with religion. (Entanglement Prong)
- Post the lemon test (or print the definition out for students).
- Place students in small groups and give each group one case (attachments B-E) to examine.
- Students should read the facts of the case and discuss the questions before reviewing the decision.
- After looking at the decision, students should share their opinions about the case. Do they think the Supreme Court got it right?
- As groups wrap up, place students in groups of four where each student examined a different case.
- All students should summarize their cases for their classmates. Students should then discuss how they interpret the establishment clause.

Newdow case 10 minutes

- Briefly explain the case of Michael Newdow:
 - Michael Newdow sued a school district, Elk Grove Unified (near San Francisco) asserting that a teacher led recitation of the Pledge of Allegiance, including the phrase ‘under God’, should be considered a violation of the Establishment clause.
- Ask students to discuss whether they agree with Michael Newdow.
- Current status: This case has been thrown out of court on standing issues; Michael Newdow does not have custody of his daughter and, therefore, the court has ruled that he has no standing to bring the case.

Reflection 15 minutes

- Ask students to discuss: What counts as a government establishment of a religion?
- Ask students to use their cases and the Lemon test to frame their answers.

Unit Reflection 15 minutes

- Ask students to describe, in their own words, strict interpretation. Loose interpretation?
- What are the benefits and drawbacks of each?

Homework

- Unit Reflection Paper: Students should write a two-three page paper responding to the following prompt:
 - Using the strict vs. loose framework to shape your answer, describe how you would go about the work of interpreting the Constitution.

FREEDOM OF RELIGION QUOTES

“Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”

Justice Abe Fortas

“People cited violation of the First Amendment when a New Jersey schoolteacher asserted that evolution and the Big Bang are not scientific and that Noah’s ark carried dinosaurs. This case is not about the need to separate church and state; it’s about the need to separate ignorant, scientifically illiterate people from the ranks of teachers.”

Astrophysicist Neil DeGrasse Tyson

“The way liberals are interpreting the First Amendment today is that it prevents anyone who is religious from being in government.”

Conservative Commentator and Author Rush Limbaugh

FREEDOM OF RELIGION

First Amendment:

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.

Mitchell v. Helms (1999)

This case summary is adapted from The Oyez Project, www.oyez.org.

Background of the case:

- A 1981 education-funding act, Chapter 2 of the Education Consolidation and Improvement Act, passed by Congress, allowed for governments to provide material assistance to both public and private schools.
- The law specifically required that the funds be used to implement “secular, neutral, and nonideological” programs.
- In Jefferson Parish, Louisiana, roughly 30% of the money went to private schools, most of which were religious institutions, mostly Catholic.
- Mary Helms and other public school parents file suit alleging that Chapter 2, as applied in Jefferson Parish, violated the First Amendment’s Establishment Clause.
- The District Court initially agreed, finding that Chapter 2 had the primary effect of advancing religion because the materials and equipment loaned to the Catholic schools were direct aid and that the schools were pervasively sectarian.
- After the presiding judge who made the initial ruling retired, the case was reviewed by a new judge, who reversed that decision.
- Helms and the other parents appealed the ruling to the Court of Appeals.
- The Court of Appeals sided with the parents, ruling Chapter 2 unconstitutional.
- The Parish appealed to the Supreme Court.

Question before the Supreme Court:

Does Chapter 2 of the Education Consolidation and Improvement Act of 1981 violate the Establishment Clause of the First Amendment?

Discussion Questions:

1. What issue does this case raise?
2. What decision would the Court reach if it applied a strict interpretation of the First Amendment?
3. What decision would the Court reach if it applied a loose interpretation of the First Amendment?
4. How does the Lemon Test impact this case, if at all?
5. What do you think the Court decided?

Mitchell v. Helms (1999)

Does Chapter 2 of the Education Consolidation and Improvement Act of 1981 violate the Establishment Clause of the First Amendment?

Conclusion:

No. Writing for the majority, Justice Thomas argued that the state, by allocating funds to different types of institutions, remained neutral. He argued that religious establishment was not the purpose of the Act and that, any religious teaching that happened was not part of the act's intent. "Whether governmental aid to religious schools results in religious indoctrination ultimately depends on whether any indoctrination that occurs could reasonably be attributed to governmental action."

Dissent:

In a dissenting opinion joined by Justices Ginsburg and Stevens, Justice Souter argued that the majority overlooked two important issues. The first issue, he explained, was the simple transferability of money. For example, while providing funds to a Catholic school's library may serve a secular aim, the school is able to use money that it would have spent on the library for religious ends. The minority's second concern was that the majority decision overlooked or misinterpreted important precedent. "It has been held to prohibit not only the institution of an official church, but any government act favoring religion, a particular religion, or for that matter irreligion. Thus it bars the use of public funds for religious aid."

6-3

Which theory of constitutional interpretation did the Court use?
Which theory did the dissenters use?
Do you agree or disagree with the Court's decision?

FREEDOM OF RELIGION

First Amendment:

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.

Marsh v. Chambers (1982)

This case summary is adapted from The Oyez Project, www.oyez.org.

Background of the case:

- Ernest Chambers was a member of the Nebraska legislature.
- The Nebraska legislature had a practice of offering a prayer at the beginning of each legislative session. The chaplain was chosen and paid by the state each year.
- Ernest Chambers sued claiming that the practice violated the establishment clause, which bars government from establishing a religion.
- At the district level, the court agreed with Chambers that paying the Chaplain with public funds violated the first amendment.
- In an appeal to the circuit level, the court supported Chamber's claim that the whole practice amounted to the state endorsing a religion.
- Marsh, the Nebraska State Treasurer, who had been named as defendant in the initial suit, appealed to the Supreme Court on behalf of Nebraska.
- The Supreme Court agreed to hear the case.

Question before the Supreme Court:

Does the chaplaincy practice of the Nebraska legislature violate the Establishment Clause of the First Amendment?

Discussion Questions:

1. What issue does this case raise?
2. What decision would the Court reach if it applied a strict interpretation of the First Amendment?
3. What decision would the Court reach if it applied a loose interpretation of the First Amendment?
4. How does the Lemon Test impact this case, if at all?
5. What do you think the Court decided?

Marsh v. Chambers (1982)

Does the chaplaincy practice of the Nebraska legislature violate the Establishment Clause of the First Amendment?

Conclusion:

No. Writing for the majority, Chief Justice Burger argued that, rather than being an act of establishing a religion, the practice of opening a legislative session with a prayer was a tradition deeply rooted in U.S. history. He argued that it is an old practice, dating back to the First Continental Congress and to the First Congress that framed the Bill of Rights. As a consequence, the chaplaincy practice had become “part of the fabric of our society.” In such circumstances, an invocation for Divine guidance is not an establishment of religion. “It is,” wrote Burger, “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”

Dissent:

Justice Brennan, writing in a dissent joined by Justice Thurgood Marshall, argued that the “historical” argument was only a cover for lack of Constitutional support for the majority’s position. “The Court makes no pretense of subjecting Nebraska’s practice of legislative prayer to any of the formal ‘tests’ that have traditionally structured our inquiry under the Establishment Clause. That it fails to do so is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause, rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.” Justice Stevens also voted in the minority, but wrote a separate dissent.

6-3

Which theory of constitutional interpretation did the Court use?
Which theory did the dissenters use?
Do you agree or disagree with the Court’s decision?

FREEDOM OF RELIGION

First Amendment:

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.

Santa Fe Independent School District v. Doe (1999)

This case summary is adapted from The Oyez Project, www.oyez.org.

Background of the case:

- Prior to 1995, a student elected as Santa Fe 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.
- 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, non-proselytizing prayer.
- The Court of Appeals held that, even as modified by the District Court, the football prayer policy was invalid.
- The District appealed to the Supreme Court, claiming its policy did not violate the Establishment Clause because the football game messages were private student speech, not public speech.

The Supreme Court agreed to hear the case.

Question before the Supreme Court:

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?

1. Discussion Questions:

2. What issue does this case raise?
3. What decision would the Court reach if it applied a strict interpretation of the First Amendment?
4. What decision would the Court reach if it applied a loose interpretation of the First Amendment?
5. How does the Lemon Test impact this case, if at all?

What do you think the Court decided?

Santa Fe Independent School District v. Doe (1999)

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?

Conclusion:

Yes. The Court held that the student-led, student-initiated prayer 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.

Dissent:

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."

6-3

Which theory of constitutional interpretation did the Court use?

Which theory did the dissenters use?

Do you agree or disagree with the Court's decision?

FREEDOM OF RELIGION

First Amendment:

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.

Van Orden v. Perry (2005)

This case summary is adapted from The Oyez Project, www.oyez.org.

Background of the case:

- Thomas Van Orden sued Texas in federal district court, arguing a Ten Commandments monument on the grounds of the state capitol building represented an unconstitutional government endorsement of religion.
- Orden argued this violated the First Amendment's establishment clause, which prohibits the government from passing laws "respecting an establishment of religion."
- The district court and the Fifth Circuit Court of Appeals ruled against Orden and said the monument served a valid secular purpose and would not appear to a reasonable observer to represent a government endorsement of religion.
- Van Orden appealed to the U.S. Supreme Court.
- The Supreme Court agreed to hear the case.

Question before the Supreme Court:

Does a Ten Commandments monument on the grounds of a state capitol building violate the First Amendment's establishment clause, which barred the government from passing laws "respecting an establishment of religion?"

Discussion Questions:

1. What issue does this case raise?
2. What decision would the Court reach if it applied a strict interpretation of the First Amendment?
3. What decision would the Court reach if it applied a loose interpretation of the First Amendment?
4. How does the Lemon Test impact this case, if at all?
5. What do you think the Court decided?

Van Orden v. Perry (2005)

Does a Ten Commandments monument on the grounds of a state capitol building violate the First Amendment's establishment clause, which barred the government from passing laws "respecting an establishment of religion?"

Conclusion:

No. In a close vote (5-4) delivered by Chief Justice William H. Rehnquist, the Court held that the establishment clause did not bar the monument on the grounds of Texas' state capitol building. The plurality deemed the Texas monument part of the nation's tradition of recognizing the Ten Commandments' historical meaning. Though the Commandments are religious, the plurality argued, "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the establishment clause."

Dissent:

Stevens' dissenting opinion essentially stated that, in formulating a ruling for this case, the court had to consider whether the display had any significant relation to the specific and secular history of the state of Texas or the United States as a whole. Ultimately, Stevens asserted that the display "has no purported connection to God's role in the formation of Texas or the founding of our Nation [. . .]" and therefore could not be protected on the basis that it was a display dealing with secular ideals. In fact, Stevens says that the display transmits the message that Texas specifically endorses the Judeo-Christian values of the display and thus, the display violates the establishment clause.

5-4

Which theory of constitutional interpretation did the Court use?
Which theory did the dissenters use?
Do you agree or disagree with the Court's decision?