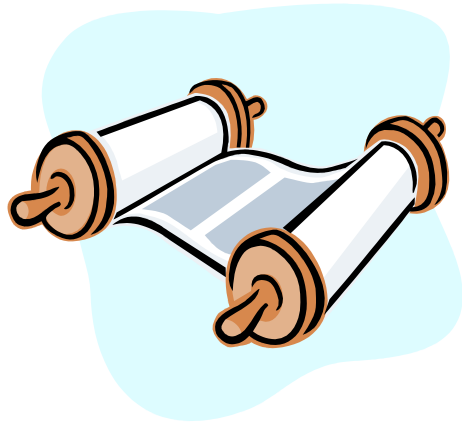


The First Amendment and Religion in Schools



TEACHING MODULE:
Grade Level: 11th or 12th

The First Amendment and Religion in Schools

Description: This is a lesson to teach during the week before or after September 17. The goal is to honor the Constitution by teaching students about its importance as a living document that confers basic rights and responsibilities upon them as young people in the school environment.

Objectives:

- 1) To learn about the First Amendment's fundamental protection against government establishment of religion, and
- 2) To understand and apply the *Lemon* test for whether a government practice violates the Establishment Clause.

Length of Lesson: 1 or 2 class periods

Supplies Needed: this packet

Age Group: undergraduate students

Part One: Background on The First Amendment

- The First Amendment
- Points to ponder: Why is freedom of religion and freedom from government imposition of religion important?

Part Two: Supreme Court Case Law

- Case Excerpts of *Engel v. Vitale* & *Lee v. Weisman*
- *Lee v. Weisman* Case Review

Part Three: Synthesis

- For the Class (an activity to be completed in class after the first two parts)

Part One
Part One: The First Amendment



The First Amendment (see *handout 1*)

The First Amendment to the United States Constitution reads:

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.

-- *United States Constitution, Amendment I.*

The Religion Clauses

The right to be free from establishment of religion by the government and the right to free exercise of one's own religion are called the **religion clauses**.

Why is it important to be studying these basic concepts of religion and democracy on Constitution Day?

Think about religion in your life. Who teaches you about your beliefs – Your family, your priests, rabbis, ministers, preachers, clerics, or yourself? There are many ways to learn about religion, but it is not taught through your Mayor, Senator, or President. While those governmental officials may express their own personal beliefs in God or a supreme being, they never tell you what you should believe. Why? The reason, in part, is the First Amendment.

What does the language of the First Amendment say: **Congress shall make no law respecting an establishment of religion**. What do we mean by “**establishment**” of religion? That is the question of this lesson.

EXERCISE

Imagine that in a small town there are 10 Catholic families, 10 Protestant families, 10 Baptist families, 10 Jewish families, 10 Muslim families, 10 Quaker families, 10 Atheist families and 10 spiritual families without any real organized religion. Every week, each family follows their respective religious traditions. All 80 families live in harmony respecting each other's beliefs. Then one day, the new Mayor of the town converts from Catholic to Quaker. He does so because of his own personal beliefs. Because he is so committed to his new religion, he proclaims that from now on – as long as he is Mayor – all families have to pray at his church to his spiritual God. He signs an order proclaiming that the Town is now a Quaker town and to live there, everyone must convert and accept the Quaker beliefs.

As you might imagine, the other 70 families would be upset if told that they now had to practice a different religious tradition. The families would rightfully complain that the establishment of this new Town religion infringed on their fundamental beliefs. The strife that would result would be very disruptive to town life. It would be hard for the 70 families to live in a town that did not respect their belief or allow them to practice their faith as they saw fit.

In some fashion, this was this type of religious conflict that the Founding Fathers were escaping from when they created America. The history of Europe with its national churches and religious wars and division was a constant reminder of the conflict that religious difference could create. The American founders

wanted a space to practice their personal religious beliefs free from governmental interference. One clear way to avoid governmental interference was to forbid the creation of a national religion.

As you sit in class right now, think of your school as being in the same position as the Town. Your classmates – like students all over the country – are from different religious backgrounds. Just as it would cause problems if the Mayor ordered everyone to pray to his god, it would cause problems if a school Principal or teacher required everyone to pray to a particular god. The “establishment” of religion by a government official would cause strife. It would make people who did not believe or who believed in a different faith to feel uncomfortable. The First Amendment was created to prevent this type of strife and discomfort.

The issue of religion in school has been a repeated issue in the courts. What kind of issues might arise in a public school setting?

For example:

- Should school officials be able to establish a morning prayer for all students? What if the prayer did not mention a specific God or religion?
- Should moments of silence or prayers be allowed during official school functions, like graduation ceremonies? What if you would be free to daydream about MTV or your math test, and never have to utter a religious thought?
- Should public high school students be allowed to elect fellow students to give a “solemnizing” invocation at football games – essentially offering a blessing at the beginning of the game? What if the blessing was non-religious?

As we will see at the end of the lesson, these complicated questions have been decided by the courts over the years.

Freedom from Establishment of Religion at School (adapted from *We the Students*, by Jamin B. Raskin)

The Supreme Court, which has the final say on constitutional issues, has long tried to develop an easy test for deciding whether a government practice violates the establishment clause. The traditional test is found in *Lemon v. Kurtzman*, which provided that a challenged government practice must (1) have a primarily secular (not religious) purpose; (2) have a primarily secular effect; and (3) avoid “excessive entanglement” with religion. If a practice failed to meet any one of these requirements, it violated the establishment clause.

Lemon Test

Government practices must have:

- 1) a secular purpose,
- 2) a secular effect, and
- 3) no excessive entanglement with religion.

Most justices have expressed dissatisfaction with the *Lemon* test, but it is still in use; Justice Scalia even compared it to a Frankenstein Monster that occasionally sits up in its coffin and scares the justices. But the Court has not been able to develop a consensus alternative. Justice O’Connor proposed her “endorsement” test, which suggests that any government endorsement of a specific religion or a religion in general violates the establishment clause. Justice Kennedy’s “coercion” test would invalidate on establishment grounds only those practices that actually coerce people into participating in religious exercises. In the meantime, the most conservative judges have been promoting the acceptability of what they call “ceremonial deism,” historically rooted public practices that invoke theistic belief, like “under God” in the Pledge of Allegiance or “In God We Trust” on the dollar bill, but do not directly try to establish a church. ...

Beginning in *Engel v. Vitale* in 1962, the Supreme Court has interpreted the establishment clause to prevent governmental promotion of religion or departure from strict neutrality in matters of religion at school. In *Engel* the Court found it unconstitutional for school authorities to lead students in organized school prayer. Many politicians vehemently disagree with this holding and blame it for the nation’s moral demise. Some even link it to disasters like the 1999 Columbine High School killings in Littleton, Colorado. Others think that the ban on organized school prayer is critical to maintaining Thomas Jefferson’s “wall of separation” between church and state.

Engel v. Vitale Case Summary (in lieu of reading the case)

The question for the Supreme Court was whether the establishment clause of the First Amendment was violated by the required reading of a prayer at the beginning of each school day.

FACTS: A New York School District decided to have the class recite the following prayer at the beginning of each school day. “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country. Ten families in the school district sued.

HOLDING: The Supreme Court held the prayer unconstitutional.

LEGAL ISSUE: The issue was whether this type of required prayer violated the establishment clause. The Supreme Court held that it did because the New York program officially supported the religious beliefs embodied in the prayer. The Court read the establishment clause to forbid this type of direct governmental involvement in religious beliefs.

EXCERPT FROM ENGEL V. VITALE

**Engel
v.
Vitale**

Supreme Court of the United States

Argued April 3, 1962
Decided June 25, 1962

Justice Black delivered the opinion of the Court

The respondent Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under state law, directed the School District's principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day:

“Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” ...

... Shortly after the practice of reciting the Regents' prayer was adopted by the School District, the parents of ten pupils brought this action in a New York State Court insisting that use of this official prayer in the public schools was contrary to the beliefs, religions, or religious practices of both themselves and their children. ...

... We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. ...

... The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.

... The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. ...

... It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion. The New York laws officially prescribing the Regents' prayer are inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself. ...

Saying a Benediction for Invocation

Even after *Engel v. Vitale*, many schools tried to circumvent the Court's decision by having teachers and students read excerpts from the Bible rather than from a prayer composed by the school system. In Pennsylvania, state law provided that "at least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school, on each school day." The Schempp family, who were Unitarians, challenged the practice of having the students read passages from the New Testament and then recite in unison the Lord's Prayer.

In *Abington School District v. Schempp* (1963), the Supreme Court found that this practice also violated the establishment clause by putting the government in the posture of leading a religious exercise. Since the schools were having students read from the New Testament, the policy automatically excluded and offended Jewish students, as well as atheists and students from other faiths. The Court emphasized that there is nothing wrong with a public school teaching about religion as a fact in the world, such as "the history of religion" or even the Bible as literature. But these inquiries into religion, "when presented objectively as part of a secular program of education," are a world apart from inviting (or requiring) students to participate in a sectarian religious ritual. Thus, whether the school system composes a prayer or selects bible passages for reading, it is unconstitutional if the purpose is a kind of devotional worship rather than academic study and critique.

But even after *Schempp*, many local schools and teachers continued to lead students in group prayer at official ceremonial events, such as graduations and homecoming games. Then in 1992 the Supreme Court decided *Lee v. Weisman*, which held that school officials could not invite clergy members to open graduation with an invocation prayer or close it with a benediction.

Lee Case Summary (in lieu of reading the case)

The question for the Supreme Court was whether a public school could have a religious leader give an “invocation prayer” or benediction at a public school graduation ceremony.

FACTS: A middle school in Providence, Rhode Island invited a rabbi to give an opening prayer at the middle school graduation ceremony. The prayer was non-denominational but religious in nature. Deborah Weisman and her father objected to the reading of a prayer by a religious figure, arguing it violated the First Amendment’s establishment clause.

HOLDING: The Court held that a required prayer violated the establishment clause, because it was a “state-sponsored and state-directed religious exercise in public school” and it was “clear that graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position” of missing a graduation ceremony because of religious objection.

LEGAL ISSUE: The issue for the Court was whether the prayer was a state endorsement of religion. Justice Kennedy reasoned that because it was a formal state sponsored activity that all but required middle and high school students’ presence, the religious nature of the ceremony was tantamount to the establishment of religion.

Excerpt from *Lee v. Weisman*

LEE
v.
WEISMAN

Supreme Court of the United States

Argued Nov. 6, 1991.

Decided June 24, 1992.

Justice KENNEDY delivered the opinion of the Court.

School principals in the public schools system of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First amendment, provisions the Fourteenth amendment applicable with full force to the states and their school districts.

I

Deborah Weisman graduated from Nathan Bishop Middle School, a public middle school in Providence, a formal ceremony in June 1989... For many years it had been the policy of the Providence School Committee and the Superintendent of Schools to permit principals to invite members of the clergy to give benedictions and invocations at middle school and high school graduations. Many, but not all, of the principals elected to include prayers as part of the graduation ceremonies. Acting for himself and his daughter, Deborah's father, Daniel Weisman, objected to any prayers at Deborah's middle school graduation, but to no avail. The school principal, Robert E. Lee, invited a rabbi to deliver prayers at the graduation exercises for Deborah's class. Rabbi Leslie Gutterman, of the Temple Beth El in Providence, accepted.

It had been the custom of Providence school officials to provide invited clergy with a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National conference of Christians and Jews. The guidelines recommended that the public prayers at nonsectarian civic ceremonies be composed with "inclusiveness and sensitivity," though they acknowledge that "[p]rayer of any kind may be inappropriate on some civic occasions." The principal gave Rabbi Gutterman the pamphlet before the graduation and advised him the invocation and benediction should be nonsectarian. Rabbi Gutterman's [invocation was] as follows:

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of the minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

Amen...

II

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

...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 public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us.

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the establishment clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise... The state's involvement in the school prayers challenged today violates these central principles...

The state's role did not end with the decision to include a prayer and with the choice of a clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers...

Petitioners argue, and we find nothing in the case to refute it, that the directions for the content of the prayers were a good-faith attempt by the school to ensure that sectarianism, which is so often the flashpoint of religious animosity be removed from the graduation ceremony. The concern is understandable, as a prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral. The school's explanation, however, does not resolve the dilemma caused by its participation. The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which, students for all practical purposes, are obliged to attend...

The degree of school involvement here made it clear that graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position. We turn our attention to the position of the students, both those who desired the prayer and she who did not.

To endure the speech of false ideas or offensive content and then to counter is part of learning to live in a pluralistic society, a society which insists upon open discourse towards the end of tolerant citizenry. And tolerance presupposes some mutuality of obligation. It is argued that our

constitutional vision of a free society requires confidence in our ability to accept or reject ideas of which we do not approve, and that prayer at a high school does nothing more than offer a choice. By the time they are seniors, high school students have no doubt been required to attend classes and assemblies and to complete assignments exposing them to ideas that they find distasteful or immoral or absurd or all of these. Against this background students may consider it an odd measure of justice to be subjected during the course of their educations to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer ceremony that the school offers in return. This argument cannot prevail, however. It overlooks the dynamic of the constitution. The First amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full participation even when the government participates, for the very object of our most important speech is to persuade the government to adopt an idea as its own. The method of protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to freedom of all. The Free Exercise Clause embrace a freedom of conscience and worship that has close parallels in the speech provisions in the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in speech provisions. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are sole assurance that religious faith is real, not imposed. ...

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizen are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position... . To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means....

The importance of the event is the point the school district and the United States rely upon to argue that formal prayer ought to be permitted, but it becomes one of the principal reasons their argument must fail. Their contention... is that the prayers are an essential part of these ceremonies because for many persons an occasion of this significance lacks meaning if there is no recognition, however brief, that human achievements cannot be understood apart from their spiritual essence. We think the Government's position that this interest suffices to force the student to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual imperative was for Deborah and Daniel Weisman religious conformance compelled by the State.... **The constitution forbids the State to exact religious conformity from a student as the price for attending her high school graduation. This is the calculus that the Constitution commands....**

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. ... The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of

singular importance to every student, one the objecting student had no real alternative to avoid....

...We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with public schools and their students. But these matters, often questions of accommodation of religion, are often not before us. The sole question presented is whether a religious exercise may be conducted at a graduation in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

For the reasons we have stated, the judgment of the Court of Appeals is *Affirmed*.

Justice SCALIA, with who the Chief Justice, Justice White, and Justice THOMAS join, dissenting.

...In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court-with nary a mention that it is doing so-lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more long standing American tradition of nonsectarian prayer to God at public celebrations generally....

I

... The history and tradition of our nation are replete with public ceremonies featuring prayers of thanksgiving and petition....

From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations. The Declaration of Independence, the document making our birth as a separate people, "appealed to the Supreme Judge of the world for the rectitude of our intentions" and avowed "a firm reliance on the protection of divine Providence." In his first inaugural address, after swearing his oath of office on a Bible, George Washington deliberately made a prayer a part of his first official act as President....

Such supplications have been a characteristic feature of inaugural address ever since....

* * *

...The narrow context of the present case involves a community's celebration of the milestones in its young citizens' lives, and it is a bold step for this Court to seek to banish from that occasion, and from thousands of similar celebrations throughout this land, the expression of gratitude to God that a majority of the community wishes to make. The issue before us today is not the abstract philosophical question whether the alternative of frustrating this desire of a religious majority is to be preferred over the alternative of imposing "psychological coercion," or a feeling of exclusion, upon nonbelievers. Rather, the question is *whether a mandatory choice in favor of the former has been imposed by the United States Constitution*. As the age-old practices of our people show, the answer to that question is not at all in doubt.

POINTS TO PONDER ON *LEE v. WEISMAN*

- The issue before the Supreme Court was whether “public prayers” at a graduation ceremony were unconstitutional. Why is it important that it was a public ceremony? Is it the nature of the ceremony that matters, or the nature of the prayer? What if a teacher, rather than a rabbi had said the same thing?
- What was objectionable about the prayer? It was a prayer for “diversity,” “liberty,” “the political process,” “the court system,” and the “destiny,” and “aspirations” of America? How can a prayer like that be considered “establishing” religion? Why is it any different than if someone gave a commencement speech proclaiming the value of diversity, liberty, etc.
- The Supreme Court makes a distinction between the First Amendment free speech clause and the First Amendment establishment clause. In terms of free speech the Court states that part of the reason for the protection of free speech is that we want government to participate, since the very idea is to persuade the government to adopt the idea about which you are speaking. According to the Court, why is the establishment clause different? Why don't we want the government to participate in our religious beliefs?
- What do you think about Justice Scalia's comments about religion in the public world? Was George Washington acting against the First Amendment when he invoked a public prayer?

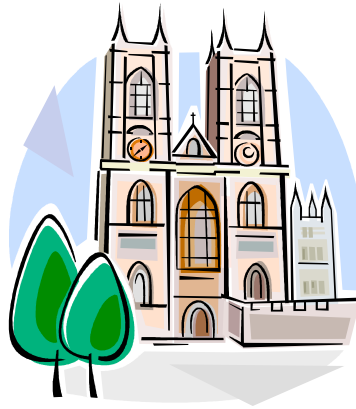
LEE v. WEISMAN FOLLOW UP

Even after *Lee v. Weisman*, many schools remained defiant about maintaining religious practices. School-organized prayers continued to be a common feature of athletic games throughout the 1990s. Nowhere was this practice more ingrained than in high school football games in the South.

In 2000, the Supreme Court took a case called *Santa Fe v. Doe* involving a challenge to organized football game prayers in the Santa Fe Independent School District in Texas. For many years, this overwhelmingly Southern Baptist community had students elect a “student council chaplain” who prayed over the loud speaker before football games. After litigation forced the school to drop the student chaplain position, the school adopted a two-part policy. It first allowed students to have a pre-game speaker “solemnize” football games if the

wanted. Second, it decided to have such a solemnizing speaker, the policy allowed them to elect the student who would give the statement or prayer.

A Mormon family and a Catholic family brought suit against this policy, alleging that it was yet another assault on the establishment clause in a district where the rights of religious minorities were routinely violated. They claimed that the football field was part of the school and the school system should not be involved with religious prayers at all. The school district answered that students did not have to choose a solemnizing statement, and the statement did not have to be a religious one. The district said the plaintiffs were making a mountain out of a molehill. The Supreme Court disagreed and held that the school's policy was a violation of the establishment clause.



Part Three: Synthesis

Activity: School Board Meeting

Students should be assigned the following roles for a mock school board hearing to determine whether to discontinue the practice of holding commencement ceremonies at the local church. There should be an odd number of members of the Board of Education, which will preside over the hearing. There should also be audience members including: parents, students, teachers, church officials, lawyers for both perspectives, and members of the community at large. The number of students per role will vary according to class size. All should use the arguments from *Lee v. Weisman* in preparing for their positions in the hearing. Advocates should try to convince the Board of Education one way or another.

Again, the agenda for the school board hearing is to discuss whether Freedom High's tradition of holding its commencement ceremony at First Church of Our Savior violates its students' right to be free from establishment of religion?

Facts:

Every June, Freedom High School holds its graduation ceremony for seniors at the First Church of Our Savior, a large, nondenominational Christian church in the town of Freedom. The church seats the most people out of any location in the town, including the high school auditorium, and there is plentiful parking in the lot behind the church. Tommy Citizen, a graduating senior who is a devout agnostic, protests the location of his school's commencement ceremony. Tommy feels it is a violation of the Establishment Clause for his public high school to hold an event as important as graduation at a church. The principal argues

that for practical, logistical reasons, there is no other alternative. Also, the principal points out that there is always a sign posted outside the church on the day of graduation proclaiming, "Freedom High School neither condones nor condemns Christianity or the First Church of Our Savior."

What are the First Amendment arguments for and against the use of a church for a public high school graduation?

FIRST AMENDMENT ARGUMENT

Questions the students should consider in arriving at a decision:

- Does the First Amendment apply?
- Does the choice of the place of the graduation run afoul of the principles of the Establishment Clause?
- Doesn't the fact that there is a logistical rather than religious purpose save the ceremony?

Analysis:

For the students arguing on behalf of Tommy

The first question Tommy's side is to answer the question of whether there is a First Amendment harm here. Where is the establishment of religion?

1. From the school's perspective, this was a secular ceremony is being held in a religious space. There is no claim that the ceremony itself is religious in nature. There is no overt prayer or oral statement about religion. The only connection is the place.
2. Thus, to establish the constitutional violation, students must argue that the fact of holding a secular ceremony in a religious space creates an endorsement of religious beliefs. The core of the argument is that you cannot separate the event from the event location.
3. Students should point out what parts of the religious space would make non-religious (or non-Christian) students uncomfortable. They also should argue about whether there would be any way to make the space less religious, and thus less offensive to the Constitution.

The students arguing for Tommy can use *Lee* to support their position. After all, it was not the content of the speech, but the religious speaker that created the

constitutional violation. Thus, by analogy it is not the content of the secular ceremony, but the fact that it is being held in a space of religious ceremony that is problematic.

1. Remember, in *Lee*, the issue was not the benign words about liberty or diversity, but the fact that a religious leader was giving the address for religious purposes. There is a real argument that the same prayer, if not called a “prayer” would have been allowed if the football coach had said the same thing as the Rabbi.
2. Students however will have to distinguish *Lee* in part, because there was a clear religious message in the prayer. Here there is no religious message, and in fact the school offered a disclaimer about it.

In addition, in looking at the principles behind the Establishment clause, students can argue that holding a ceremony in a church does not promote religious liberty or tolerance, but instead creates religious conflict.

1. Have the students discuss the issue of religious freedom, tolerance, avoidance of religious strife in discussing how having the graduation ceremony in a church supports or undermines those values.
2. Students should argue that this type of direct connection with a religious space, implicitly supports religion.
3. Students should point out the effect on students who object to entering a church in order to graduate. What do they feel like? Should it matter?

What about the logistical concerns? After all, if you find the space violates the First Amendment, you still have to hold the graduation ceremony somewhere? What if there is no other place? Should that matter? Should logistics matter?

Under the Lemon Test: There is a secular purpose to hold the ceremony at the church, but there does seem to be a religious effect. Students should argue that by holding the ceremony at the church the school is turning something with a secular purpose into something that has a non-secular (religious) effect on students.

For the students arguing on behalf of the school

Students should argue that there is nothing religious in the ceremony itself, so all of the values of the Establishment Clause are protected.

1. One argument to make is that the school has been careful not to say anything religious, and in fact has put a disclaimer out in front disavowing the religious nature of the event.
2. The cases that have struck down overt religious statements have been different in that they had government officials essentially requiring students to join in a religious ceremony. Here the ceremony is the same, the question is whether the appearance of religion changes things. The argument is why is this ceremony any different than in a field or gym? Having a graduation ceremony in the basketball gym does not signal a support for athletics... it is just the place.
3. Students should argue that there is no religious figure involved, no religious message, and in fact a specific disavowal of the religious nature of the setting. Thus, there is no "establishment" of religion.
4. Students should distinguish Lee, arguing that this situation is far less religious than Lee because there is no state compulsion to attend and listen to prayer.

Students should argue that there was a non-religious and practical reason for the decision. Under the Lemon Test, the purpose of the challenged action matters. Here it would seem that the justification is not religious but logistical. This distinguishes it from Lee... (hard to say that a benediction prayer is not religious).

1. The students' argument is essentially that not everything that happens in a church is necessarily religious. For example, if you play Bingo in a church, it does not make it a religious game.
2. Further, the parties can rely on the practical reality that there was no other alternative. Had there been another alternative, there would not be the need for the church setting.
3. The students should argue that in addition to there being a secular purpose behind the church graduation ceremony, the ceremony itself did not change. Thus, under a Lemon test analysis there is both a secular purpose and effect. The entanglement is minimal and the disclosure sign makes it even more evident that there is nothing religious about the ceremony.

Students can argue that graduation ceremonies are purely voluntary; there is absolutely no compulsion attached to attending the graduation. Should this change the analysis?

August 2, 2006

Dear Students and Teachers, Lawyers and Professors, and other Friends,

Constitution Day is just one month away! Thanks to Senator Robert Byrd's leadership, we now have a day in which, under federal law, public and private schools and universities across America will have discussions about American constitutional values. Our rights, our freedoms, our communities—this is the agenda of Constitution Day.

I'm working with the Marshall-Brennan Constitutional Literacy Project at American University Washington College of Law and Howard Law School to promote real discussion of the state of civil liberties in our schools and communities. We are encouraging students and teachers to wear black armbands—the kind I wore 40 years ago—to symbolize our ongoing national commitment to protect the rights of students to speak up and to speak out.

In my case, *Tinker v. Des Moines School District* (1969), the Supreme Court declared that neither teachers nor students “shed their First Amendment rights at the schoolhouse gate.” This module introduces fascinating questions and hypothetical problems that require you to balance competing values and interests today. You will learn a lot and open your mind by following this mini-curriculum.

In honor of Constitution Day, I will be wearing my black armband and talking about the Constitution and democracy in America. And I hope you will be wearing your black armband and talking about our constitutional rights too.

With all best wishes,

Mary Beth Tinker

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Portions of the unit were drawn from **We the Students: Supreme Court Cases for and about Students**, by Jamin B. Raskin.

Handout 1

The First Amendment to the United States Constitution:

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.

-- United States Constitution, Amendment I.

Handout 2

Engel Case Excerpt 1

... “The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.” ...

Handout 3

The Lemon Test

Lemon Test

Government practices must have:

- 1) a secular purpose,**
- 2) a secular effect, and**
- 3) no excessive entanglement with religion.**

Handout 4

Lee Case Excerpt 1

“The constitution forbids the State to exact religious conformity from a student as the price for attending her high school graduation. This is the calculus that the Constitution commands....

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. ... The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid....”