***We the People: the Citizen & the Constitution***

2019-2020 High School Hearing Questions

Information, Tips, Analysis, & Resources from the Oregon high school We the People community

Unit 5 / Q. 3

**In 1784, Patrick Henry proposed a general tax called the Bill Establishing a Provision for Teachers of the Christian Religion. In reaction, James Madison wrote, “The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”\* Do you agree with Patrick Henry or James Madison? Why?**

* How have the courts interpreted the establishment clause of the First Amendment?
* How is the right of free exercise of religion balanced against other interests of society?

\* James Madison, “Memorial and Remonstrance against Religious Assessments, [CA. 20 June] 1785,” June 20, 1785, *Founders Online*, National Archives, accessed August 19, 2019, https://founders.archives.gov/documents/Madison/01-08-02-0163.

**Collaboration Tips**

**4** different questions are in this overall question.

Historical events/context that connects to this question:

* **1760**
* **Patrick Henry**
* **Prior to the Bill of Rights - arguments in the states**
* **English Bill of Rights**
* **State Constitutions**

Possible Current Events:

* **“in God we Trust” in schools**
* **“Under God” in pledge of allegiance**
* **Muslim Ban**

Possible Court Cases:

* ***American Legion v. American Humanist Assoc.***
* ***Trump v. Hawaii***

**Comments from Justice Jack Landau:**

*Patrick Henry's proposal predated the First Amendment's Establishment Clause and, in fact, was the sort of thing that precipitated its adoption. At the time, the Church of England was the established state church in Virginia, as it was in all the southern states, while Congregationalist churches dominated the New England states. Delaware, New Jersey, Pennsylvania, and Rhode Island didn't have established churches. A statute disestablishing the Church of England in Virginia had been drafted in 1777 and introduced in 1779, but it didn't pass until 1786. Minority denominations like the Virginia Baptists were worried about the effects of government support for a favored denomination, especially if the national government were to get involved.*

*Pretty much everyone agrees that the Establishment Clause was intended to preclude establishing and financially supporting with public funds a national religion. There is debate, however, about whether the clause was intended to preclude government support for Christianity generally. Some point to the fact that the same Congress that proposed the First Amendment opened each legislative day with a prayer and voted to appropriate federal dollars to support Christian missions in Native American lands. They suggest that the Establishment Clause should be understood to apply to only certain types of government involvement: government control over doctrine, mandatory attendance at the established church, financial support of the established church, restrictions on worship in minority churches, restrictions from members of minority churches from voting or holding public office, and the like. See, e.g., Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I (2003)* <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1382&context=wmlr> .

*Others point to writings of Jefferson and Madison on the need to maintain a "wall of separation" between church and state. See, e.g., Everson v. Board of Education (1947). For general background, see generally Leonard Levy, The Establishment Clause: Religion and the First Amendment (1994).*

*S Ct cases to consider: The leading case is Lemon v. Kurtzman (1971), which held that a Pennsylvania statute authorizing the superintendent of public schools to reimburse the salaries of religious school teachers violated the Establishment Clause. The case is famous for its "purpose, effects, and entanglements" test. To satisfy the Establishment Clause, a law concerning religion must have a secular legislative purpose, its principal effect must not advance or inhibit religion, and it must not result in excessive government entanglement with religion. The test has proved easier to state than to apply, causing some to call for its abandonment. Scalia called it a "ghoul in a late night horror movie" in Lamb's Chapel. Thomas has said that Lemon should be overruled. Gorsuch has characterized Lemon as a "misadventure." Alito said that the case had "shortcomings." Kavanaugh has suggested that the case is no longer good law. Still, in McCreary County v. ACLU (2005), the petitioner asked the Court to overrule Lemon, and the Court declined to do so.*

*There are tons of cases that the students can have fun with in debating how Lemon actually gets applied. See, e.g., Marsh v. Chambers (1983) (prayers at the beginning of Nebraska legislative session did not violate Establishment Clause); ( Lynch v. Donnelly (1984) (Christmas display on public property did not violate Lemon test); County of Allegheny v. ACLU (1989) (Christmas display in county courthouse did violate the Lemon test, while a menorah display did not); Lamb's Chapel v. Center Moriches Union Free School Dist (1993) (actually the Court held that refusal to allow showing of religious film on school property after hours violated rights of free expression, but the court mentioned Lemon, and that mention prompted separate opinions on the vitality of the Lemon case); Santa Fe Independent School Dist v. Doe (2000) (student-led prayer at high school football games violates the Establishment Clause); Van Orden v. Perry (2005); (display of Ten Commandments in county courthouses did not violate the Establishment clause, according to plurality, which did not apply Lemon); American Legion v. American Humanist Association (2019) (maintenance of a Latin "peace cross" to commemorate WWI dead on public land did not violate Establishment Clause)*