

Video Transcript: First Amendment Religion Part I

[NARRATOR]

Hi, I'm Leah, and welcome to the National Constitution Center in Philadelphia.

Today we are going to talk about the First Amendment's freedom of Religion clauses.

The First Amendment says: "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."

Let's look closely at the Religion clauses. Why did the framers choose to put those words in the Constitution, and why are those words important to us today? To find out let's ask Supreme Court Justice Elena Kagan.

[KAGAN]

England always had an established religion, it was the Anglican Church. And the Anglican Church and the English government were joined at the hip. And that continued into the American colonies, that certain of the colonies had established churches. And when the revolution came, one of the things that they thought was, "We want no part of that sort of established church – the ability of a government to prefer one religion above all others and to make it the official religion of the government." But that had broader ramifications that

the Court has recognized over time. So it wasn't just the official established church that was prohibited – there was a broader principle behind that, which is that the government couldn't, in any way, prefer one religion to another.

[NARRATOR]

Actually there are two religion clauses: The Establishment Clause which prohibits the government from establishing or creating a religion in any way – that's why we don't have an official religion in the United States – and the Free Exercise Clause which gives us all the right to worship God, or not, as we choose. That means the government cannot penalize you because of your religious beliefs, or because you don't belong to a church, or believe in God. Together, these freedoms make up the foundation of our freedom of conscience – that protects our complete freedom of thought and opinion, and the freedom to worship, or not, as we please. But how do we know if the government has established a religion? How can we counteract the power of one group, usually the majority, to take away or curtail the rights of a religious minority? That question is at the heart of the First Amendment's protection of religious liberty and it remains one of the most hotly contested questions in Constitutional law today. Let's talk to Jeff Rosen, the President and CEO of the National Constitution Center, for a little more backstory.

[JEFF]

To understand the First Amendment's Religion Clauses, let's rewind to the period before the American founding. Many of the earliest American settlers –

facing religious oppression at home – crossed the Atlantic in search of religious freedom. The result was a new world defined by religious diversity. There were Puritans in New England, Quakers and Lutherans in Pennsylvania, Anglicans in the South, Roman Catholics in Maryland, Presbyterians throughout the middle colonies, and there were Jewish congregations from Newport Rhode Island to Savannah Georgia.

At the same time, many colonies had government-established churches.

Colonial governments appointed clergy. Colonists had to pay religious taxes.

Some were forced to attend church. And dissenters could be punished for preaching without a government license. James Madison and the First Congress drafted the First Amendment with this history in mind.

Now the original Constitution itself protects religious liberty. Article VI bans religious tests for federal office.

But the anti-federalists – those are the folks who opposed ratification of the Constitution – wanted more. They wanted to insure that religious liberty, which was among the most widely protected rights in state bills of rights, was also protected in the new Constitution.

Now consistent with America's religious diversity, the First Amendment was designed to protect the right of individual believers to worship God as they pleased according to the dictates of conscience. The Amendment also prevented Congress from establishing a national church, or from disestablishing state churches. The Amendment didn't reach state abuses until after the ratification of the Fourteenth Amendment, which applied the Bill of Rights against the states. Nevertheless, all states had disestablished their churches by

1833. And the Supreme Court finally began applying the First Amendment's religion protections against state abuses in the 1940s – guarding the free exercise rights of individuals and preventing the mingling of government and religion.

[NARRATOR]

Let's break down these two Religion Clauses and see how they affect us today.

Let's start with the Establishment Clause: Congress shall make no law respecting an establishment of religion...

The Framers of the Constitution, and others, were worried about the Federal Government's overreach, so they wrote into the Constitution a way to stop the federal government from designating a national church. However, at the same time there were states that had official state churches. For example, Connecticut's official religion until 1818 was Congregationalism.

The Supreme Court today has interpreted the establishment clause to address issues that are important to many people in their everyday lives. For example, the government can't force you to attend church – your parents might, but not the government. The government can't grant benefits to some religious groups, and not others without a legitimate, non-religious justification. The government cannot interfere in any way with a church's selection of clergy or its religious doctrine.

Many issues that arise today are often hotly contested, but let's find out how the Supreme Court approaches these cases.

[KAGAN]

Usually establishment clause cases come to the Court, somebody is protesting that some kind of government policy favors one religion over another. Not in that strict sense of establishment, but just in terms of preferential treatment. So for example, suppose that there was a school board that indicated that a certain kind of prayer ought to be said every day, and there were students at the school who thought, "That's not the prayer that's accepted by my religion."

Those students could come in and, and raise an establishment clause claim and the Court would almost surely strike down something like that.

[JEFF]

There's a legal test the Court has traditionally applied to these cases, and it's called the Lemon test, named after a 1971 case. To pass this test a law has to do three things: first it has to have a secular legislative purpose; second its primary effect has to neither advance nor inhibit religion; and third the law can't cause an excessive entanglement between government and religion. Now many Supreme Court justices have vigorously criticized this test, but the Court has never overruled it.

[NARRATOR]

Let's take the Establishment Clause cases and put them in to four main groupings: Government Funding, Government-Sponsored Prayer, Government Accommodations for Dissenters, and Religious Symbols on Government Property. Let's ask Jeff to give us a quick run-down on all four case groupings.

[JEFF]

Government Funding cases involve challenges to activities that are carried out by religious organizations that receive public funds – most often and most importantly – schools. Scholars have often divided in these cases. One set of scholars says that the government has to be neutral between religious and non-religious institutions. The other set of scholars says that no taxpayer funds should be given to religious institutions if they might be used to support religion or communicate religious doctrine.

Government-sponsored prayer cases involve prayer in public institutions – most notably public schools.

This is probably the most famous set of cases under the Establishment Clause – and it begins with two cases: *Engel v. Vitale* and *Abington School District v. Schempp*. These decisions struck down school prayer in the early 1960s. And while they got a lot of public backlash, the Court has stood its ground, and it's even extended restrictions to prayer at graduation ceremonies and at football games. At the same time, the Court has allowed prayer in government settings involving adults, like legislative sessions and town council meetings.

Government Accommodations for Dissenters cases involve when the government grants some special exemption to a church or religious organization – for example, the military draft exemption – and then someone goes to Court to challenge the exemption as unconstitutionally promoting religion.

Religious symbols on government property cases involve public displays of religion. These are the cases involving the displays of the Ten Commandments,

or nativity scenes, or crosses on public land. They remain controversial. The Court's main approach is called the "Endorsement Test" – and that asks the question of whether a reasonable observer would regard the display as a government endorsement of religion. The results in these cases are varied – the Court sometimes upholds the displays and sometimes it strikes them down.

[NARRATOR]

So keep an eye out on Supreme Court Cases each year. You'll see these cases coming to the Courts and find out where the Court sits on the Establishment Clause.