

THE LEGAL EAGLE

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State Immunity Ruling Calls Precedent into Question

by Michael Barbella

The Supreme Court of the United States (SCOTUS), established in 1789, is the highest court in the land and sets legal **precedent** for all lower courts, affecting decisions across the country. In the Court's history, it has **overturned** approximately 236 of its own decisions, which works out to be less than two percent of its rulings overall. According to Court statistics, between 1946 and 2016 alone, the Court made more than 8,800 rulings.

One reason for SCOTUS overturning so few of its decisions is a legal principle that the justices are bound to, known as *stare decisis*, a Latin phrase that literally means "Let the decision stand." In a 1932 **dissenting opinion**, U.S. Supreme Court Justice Louis Brandeis wrote that following *stare decisis* is "not a universal, **inexorable**



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Whose DNA Is It Anyway?

by Maria Wood

Commercial DNA testing kits from such companies as 23andMe and

AncestryDNA have helped millions of Americans uncover their genetic heritage and find long-lost relatives. In some cases, adoptees have even discovered their birth parents through DNA testing.

DNA profiles uploaded to a third-party DNA-testing company, however, have also been used by law enforcement agencies to solve decades-old violent crimes. In a practice known as **genetic genealogy**, DNA from a crime scene is analyzed and matched to similar DNA found in a DNA registry. While the DNA may not match the suspect who committed the crime, it could match a distant relative of the suspect.

Once law enforcement agents get a hit from a DNA registry, they



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Reading, Writing, Arithmetic... and Religion?

by Michael Barbella

American education has traditionally focused on three basic skills: reading, writing, and arithmetic, known as the three "R's." Today, an effort is underway in the United States to add a fourth "R" to the mix—religion.

Lawmakers in numerous states have proposed or passed legislation in the last two years to include Bible literacy classes in public school curriculum. Many of the bills are modeled after a 2017 Kentucky law that permits elective social studies instruction on the "Hebrew Scriptures, Old Testament of the Bible or New Testament." The purpose outlined in the Kentucky law is to "provide students knowledge of biblical content, characters, poetry, and narratives that are prerequisites to



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then build a family tree for that person, identifying people from his or her family who may merit further investigation in a given crime. For instance, a relative of the DNA match who may have been in the area where the crime was committed or have a connection to the victim could warrant closer scrutiny.

That's how California police caught the alleged Golden State Killer after more than 45 years. The killer committed a series of murders and kidnappings in California, spanning from 1974 to 1986, which had gone unsolved. In 2018, using genetic genealogy, investigators combed through an open, publicly accessible DNA database, GEDMatch. Using DNA from the crime scenes, police found a match to a third cousin of the killer, which led them to Joseph DeAngelo. Once identified, police followed

DeAngelo and obtained his actual DNA from his car door and also from a tissue discarded in the trash outside his home. Police charged DeAngelo with the crimes and he now faces 26 **counts**, including murder and kidnapping. His trial is set for May 2020.

Popularity grows and so do privacy concerns

According to *MIT Technology Review*, as of 2019, approximately 26 million Americans have shared their DNA with the four leading private DNA testing firms. In two years, the magazine estimates that number could grow to 100 million.

As more people submit their DNA and law enforcement continues to use genetic genealogy to close long-unsolved violent crimes, some experts have raised questions about whether DNA information should be kept private from the government. The concern is that a person who hasn't submitted DNA to a third-party company may be identified through a relative who has.

Elizabeth Joh, a constitutional law professor at the University of California-Davis School of Law, wrote in a *New York Times* opinion piece that the issue involves meaningful consent.

"You may decide that the police should use your DNA profile without qualification and may even post your information online with that purpose in mind," Professor Joh wrote. "But your DNA is also shared in part with your relatives. When you consent to genetic sleuthing, you are also exposing your siblings, parents, cousins, relatives you've never met and even future generations of your family. Legitimate consent to the government's use of an entire family tree should involve more than just a single person clicking 'yes' to a website's terms and conditions."

Tracey Maclin, a constitutional law professor at Boston University School of Law, whose areas of interest are criminal law and procedure, says when a person voluntarily submits their DNA to a third party, he or she gives up their constitutional right to privacy in that specific instance.

"The Supreme Court of the U.S. has said that when you voluntarily give information to a third party you have no constitutional protection of privacy in that information," Professor Maclin says. "In other words, you assume the risk that the third party is going to give it to law enforcement, or

law enforcement may **subpoena** the third party. This rule applies even when there is a confidential agreement or an expectation of privacy between the private parties."

The third-party doctrine

Professor Maclin refers to two U.S. Supreme Court cases—*United States v. Miller* and *Smith v. Maryland*—that provided the basis of what is known as the third-party doctrine. The third-party doctrine is a legal standard that says if a person voluntarily hands over information to a third party, that person has forfeited any expectation of privacy under the U.S. Constitution. The Court has held that the third party doctrine does not conflict with the Fourth Amendment, which prohibits unreasonable searches and seizures without **probable cause**.

The 1976 case of *United States v. Miller* involved the use of a subpoena instead of a **warrant** to obtain a suspect's bank records. The bank complied with the subpoena without notifying its client. The Court upheld the



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third-party doctrine and ruled in favor of the government.

“The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government,” the U.S. Supreme Court ruled. “This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”

In 1979, the Court again ruled in favor of the government in *Smith v. Maryland*. The case involved a thief who repeatedly called the woman he robbed to threaten her. Once the police learned the identity of the thief, they had the phone company install a pen register at its offices. A pen register is a device that records all numbers dialed from a particular phone. Through the device, the police were able to determine that the suspect was making the calls.

The suspect sought to have the evidence from the pen register **suppressed** because it was obtained without a warrant. But the Court decided that when the suspect used his phone, he “voluntarily conveyed numerical information to the telephone company and ‘exposed’ that information to its equipment in the ordinary course of business. In so doing, the petitioner assumed the risk that the company would reveal to police the numbers he dialed.”

Shaking the family tree

The controversy over DNA privacy surfaced again last year when FamilyTreeDNA, a DNA

testing lab, announced it had agreed to share DNA data with the FBI. The company struck a deal with the law enforcement agency in 2018 to let it review its bank of DNA samples to identify suspects in unsolved violent crimes.

FamilyTreeDNA noted that the FBI receives no special access to its database and can only view DNA profiles within its system that have similar genetic profiles. Agents log on as any other user would. FBI investigators upload the DNA of an individual and then look for matches in the database.

To prevent the FBI from accessing their DNA, FamilyTreeDNA users were advised that they could reverse the “matching” option on their account setting. With that option disabled, the FBI cannot view their genetic information, but neither can potentially unknown relatives, which is the point of registering with the company.

Two other major DNA testing firms, Ancestry.com and 23andMe, both require a warrant or a subpoena before they permit law enforcement access to their databases.

GEDMatch, the DNA database used in the Golden State Killer case, changed its policies in 2018 in order to make its database less accessible to law enforcement. Users must now click on an option that allows police to review their DNA. According to the company, 200,000 users out of 1.3 million have agreed to make their profiles accessible to law enforcement. However, in

November 2019, a judge in Florida issued a warrant that permitted police to override users' privacy settings, allowing them to search GEDMatch's entire database.


Should laws be changed?

As the popularity of

ancestry testing grows, questions over how much access law enforcement should have will continue.

“Blockbuster investigations, as gratifying as they are, shouldn’t obscure the very real dangers of government access to sensitive information,” wrote ACLU attorney Vera Eidelman in a *Washington Post* op-ed. “Our legal system should also recognize that just because information isn’t secret doesn’t mean that people don’t have an interest in controlling who can see it.”

The government could pass laws that restrict access to DNA websites, but Professor Maclin doesn't foresee that happening.

“Why would the government pass a law like that? Many of these crimes would not be solved except for the fact that someone turned in their DNA and they [the police] got familial matches,” Professor Maclin says. 

DISCUSSION QUESTIONS



1. What do you think about law enforcement using genetic genealogy to solve cases?
2. Should the technique of genetic genealogy be used in more types of cases, not just limited to violent crimes? Why or why not?
3. There were arguments made in the article for protecting privacy and also about the importance of solving cold cases. List the arguments for each. Which argument would you give more weight to and why?
4. What do you think of all relatives in a family tree—current and future—losing constitutional protections of privacy because one family member submitted their DNA into a registry?



State Immunity Ruling CONTINUED FROM PAGE 1

[unavoidable] command” but is “usually the wise policy, because in most matters it is more important that the applicable **rule of law** be settled than that it be settled right.”

Former New Jersey Public Advocate Ronald K. Chen, now a professor at Rutgers Law School, explains that for the Court, *stare decisis* is not so much a rule but a guideline.

“The Court usually tries to avoid overruling itself whenever reasonably possible, since our legal and social institutions depend upon the stability of the law in order to arrange their affairs,” Professor Chen says. “It is usually a good idea to be consistent in interpreting the law, since that consistency encourages stability, the ability to plan and rely on a known set of rules, and ultimately respect for legal institutions as above the fray of political discourse.”

Since it is only a principle, Professor Chen notes that there are times when SCOTUS decides that *stare decisis* does not apply. For example, the 1954 decision in *Brown v. Board of Education* ruled that **segregation** is unconstitutional. That decision overturned the Court’s 1896 decision in *Plessy v. Ferguson*, which ruled that “separate but equal” was constitutional.

The long and winding case

In May 2019, SCOTUS again overruled itself with its decision in *Franchise Tax Board of California v. Hyatt*, which deals with the immunity of states being sued in the court of another state. The Court’s decision in *Hyatt* overturned its ruling in the 1979 case of *Nevada v. Hall*.

Gilbert P. Hyatt, an 81-year-old inventor who has more than 70 patents to his name, brought the lawsuit. A patent that he filed for in 1968 was finally issued to him in 1990, earning him a lot of money.

In 1991, Hyatt moved to Nevada, which does not collect personal income tax. Suspecting a sham, the California Franchise Tax Board (FTB) began investigating Hyatt to prove his move to Nevada was really an attempt to dodge a \$10 million-plus state

tax bill. According to court documents, Hyatt claimed that the FTB sifted through his trash and contacted dozens of third parties in the fall of 1991 to confirm his residency in California.

Hyatt sued the FTB in Nevada state court in 1998, alleging, among other things, harassment, invasion of privacy, negligent misrepresentation, fraud and abuse of process. The FTB, however, pressed for dismissal, claiming immunity under the U.S. Constitution’s Full Faith and Credit Clause. That provision requires all states to respect each other’s laws and institutions.

Under the clause, the FTB asserted, Nevada must comply with California law that protects state tax collectors from lawsuits. But the Nevada Supreme Court rejected that argument, citing the 1979 U.S. Supreme Court ruling in *Nevada v. Hall* that decided states have no constitutional right to **sovereign** immunity from private lawsuits in out-of-state courts.

The FTB’s dispute with Hyatt eventually ended up before the U.S. Supreme Court three times. In 2003, the Court **upheld** the inventor’s right to sue the FTB. In delivering its ruling, the Court said it found no evidence of interstate “hostility” nor any extraordinary “burdens” to warrant granting California immunity from an out-of-state lawsuit.

“...the Constitution does not confer sovereign immunity on states in the courts of sister states,” Justice Sandra Day O’Connor wrote in the Court’s 2003 decision.

A jury trial in Nevada later awarded Hyatt \$490 million in damages, which was reduced by the Nevada Supreme Court to \$100,000. The FTB **appealed** the judgment and the

case landed before SCOTUS again in 2016. A vacancy on the Court resulted in a 4-4 split among the justices, which basically upheld the decision by the Nevada Supreme Court.

That ruling stood until May 2019 when SCOTUS—considering the *Hyatt* case for the third time—overturned precedent in a 5-4 vote, deciding that states may not be sued in other states’ courts. In reversing its earlier decisions, the Court determined its prior conclusions “misread the historical record.”

“Each state’s equal dignity and sovereignty under the Constitution implies certain constitutional limitations on the sovereignty of

all of its sister states,” Justice Clarence Thomas wrote in his **majority opinion**. “One such limitation is the inability of one state to hale another into its courts without the latter’s consent.”



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Professor Chen explains that the Court's decision in *Hyatt* upholds the notion that every state maintains sovereignty and suggests that SCOTUS was uneasy with its decision in *Nevada v. Hall*.

"Like the ancient kings and queens of Great Britain, a state is immune from being sued in court without its consent," Professor Chen says. "The core notion of sovereign immunity means that a state was immune from being sued in its own courts, and now *Franchise Tax Board* makes clear that this extends to being sued involuntarily in the courts of another state. So each state is required to give a sister state protection from being sued in its courts."

That protection is a "historically rooted principle embedded in the text and structure of the Constitution," according to Justice Thomas.

Dissenting opinion claims no immunity

Justice Stephen G. Breyer disagreed. In his dissenting opinion, Justice Breyer argued that absolute immunity is not guaranteed by the Constitution: "No provision of the Constitution gives States absolute immunity in each other's courts," he wrote. "Compelling states to grant immunity to their sister states would risk interfering with sovereign rights that the Tenth Amendment leaves to the States."

Besides the immunity argument, Justice Breyer also found fault with the ruling majority's reasons for reversing *Nevada v. Hall* and expressed the fear that the ruling could endanger other precedent-setting decisions.

A 2018 Congressional Research Service report cites five factors that SCOTUS has historically considered when either **affirming** or overruling a prior ruling. Those factors are: the quality of the reasoning in the prior decision; workability, meaning if the ruling is too hard for lower courts to apply; inconsistency with related decisions, which could mean that the reasoning of the prior ruling has eroded over time by subsequent related Court decisions; changed understanding of relevant facts, meaning there has been a societal change that undermines the prior ruling; and the final factor is reliance, meaning even if the current Court thinks a prior ruling is flawed it may not overrule it if doing so would cause injury to individuals or organizations that have relied on it.


"It is one thing to overrule a case when it 'defies practical workability' ... or when 'facts have so changed, or come to be seen so differently, as to have robbed the old rule

of significant application or justification,'" Justice Breyer wrote. "It is far more dangerous to overrule a decision only because five members of a later Court come to agree with earlier **dissenters** on a difficult legal question. The majority has surrendered to the temptation to overrule *Hall* even though it is a well-reasoned decision that has caused no serious practical problems in the four decades since we decided it. Today's decision can only cause to wonder which cases the Court will overrule next."

Justice Thomas addressed the issue of overruling *Hall*, writing,

"We acknowledge that some plaintiffs, such as Hyatt, have relied on *Hall* by suing sovereign states. Because of our decision to overrule *Hall*, Hyatt unfortunately will suffer the loss of two decades of litigation expenses and a final judgment against the board for its egregious conduct."

Professor Chen notes that if the Court changes its mind too often it can give the impression that the law is not stable.

"Deciding whether to apply *stare decisis* is a balancing act," Professor Chen says, "and in particular the justices of the U.S. Supreme Court have learned to apply that process in a number of difficult situations." 



DISCUSSION QUESTIONS

1. What do you think of the legal principle of *stare decisis*?
2. The article mentions five factors outlined by the Congressional Research Service that the Court considers before overturning a prior ruling. In overturning *Nevada v. Hall*, which factor or factors do you think the Court relied on? Why did the court do, or not do, the right thing?
3. Which factors do you think the Court considered in overturning *Plessy v. Ferguson* with its decision in *Brown v. Board of Education*? Was the Court's decision correct in your opinion? Why or why not?



understanding contemporary society and culture.”

When the measure passed the Kentucky House of Representatives in February 2017, Rep. DJ Johnson, the bill’s sponsor, said, “The Bible is the single most impactful literary work that we have in Western civilization. It affects our culture, our values, our laws.”

A proposal in Alabama, which was signed into law in May 2019, intends to familiarize sixth through 12th grade students with biblical content; the Bible’s history, literary style, and structure; and its influence on world law, literature, art, music, morals, social values and culture. The law also allows schools to display religious artifacts, monuments and symbols as part of the class.

Bible literacy classes are now legally recognized in more than half a dozen states, including Alabama, Arizona, Arkansas, Georgia, Kentucky, Oklahoma, Tennessee and Texas. Florida lawmakers are recycling last year’s unsuccessful Bible literacy measure in its current legislative session. Legislation

in Indiana, Iowa, Mississippi, Missouri, North Dakota, Virginia and West Virginia, however, either failed or stalled in committee shortly after introduction.

A Christian nation?

Efforts to establish Bible study courses have traditionally been inconsistent, but the movement has grown stronger in recent years with support from conservative Christian groups such as the Congressional Prayer Caucus Foundation. That organization launched an initiative, called Project Blitz, with the goal of protecting “the free exercise of traditional Judeo-Christian religious values and beliefs in the public square.”

Such efforts have reignited the debate over the separation of church and state. Critics of Bible literacy classes question the constitutionality of curriculum mandates, arguing the measures allow teachers to preach religion in class and are in violation of



the U.S. Constitution’s establishment clause, which says: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...”

Supporters of Bible literacy legislation

claim that America was founded as a Christian nation, pointing to “In God We Trust,” the motto of the U.S., and other ceremonial instances where God is invoked. But religious historians contend that while our Founding Fathers were Christians, they chose not to found the U.S. as a “Christian nation.”

In addition to the establishment clause, Article VI of the U.S. Constitution contains a clause stating: “...; but no religious test shall ever be required as a qualification to any office or public trust under the United States.” That means that you don’t have to be a Christian in order to hold public office. In addition, the 1797 Treaty of

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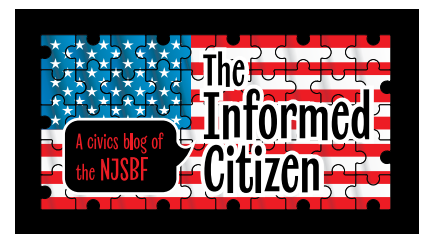
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Tripoli, negotiated in part by President George Washington and then signed by President John Adams, included a clause that stated: "...the Government of the United States of America is not, in any sense, founded on the Christian religion."

Although state Bible literacy laws warn against showing bias toward any particular religion or non-religious faith, they do not offer recommendations on Bible translations or specific scriptures to use in class. Guidelines from the Society of Biblical Literature urge teachers to use academic sources and secondary literature to supplement Bible studies. "While it is appropriate to have different translations of the Bible used as texts, courses that use it as the only text could be problematic and subject to legal challenge," the guidelines state.

Constitutional fine line

The separation of church and state has been a murky issue for U.S. policymakers. The U.S. Supreme Court weighed in on the issue with the 1963 case of *School District of Abington Township v. Schempp*. Edward Schempp, a resident of Abington Township in Pennsylvania, brought the case on behalf of his son, Ellery. The case involved a Pennsylvania law that required "at least 10 verses from the Holy Bible be read, without comment, at the opening of each public school on each school day." Schempp contended that the law violated the First and 14th Amendments.

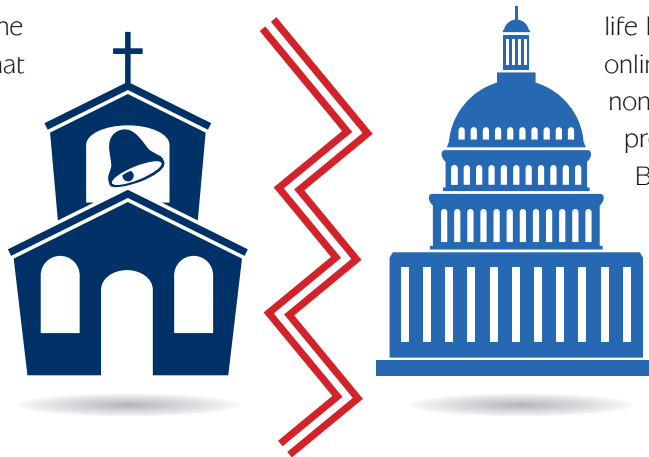
The Court ruled in favor of Schempp, outlawing school-led Bible reading, group prayer and devotional religious instruction, but permitting the Bible's study for literary and historical purposes. The Court said: "Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education,

may not be effected consistently with the First Amendment."

That means, to maintain constitutional compliance, Bible literacy classes must be **secular**, objective, non-devotional and non-promotional of any religion or faith. Or, as a circuit court put it in the 1990 case of *Roberts v. Madigan*, there is a "difference between teaching about religion, which is acceptable, and teaching religion, which is not."

Angela Carmella, a Seton Hall University law professor whose academic focus is the intersection of law and religion, says that the Court's decision in *Schempp* drew a clear line between devotional exercises and the study of religious books like the Bible for educational purposes.

"The Court recognized that the Bible is very important to understanding the world. Knowing the Bible helps us understand history, literature, art, music, politics and anthropology," Professor Carmella says, pointing out that writers and poets make references to stories within it and also that throughout history presidents have quoted from the Bible.



In addition, Professor Carmella notes that the Bible has influenced many social movements, like the Civil Rights movement.

"When we celebrate Rev. Dr. Martin Luther King Jr.'s legacy of racial equality, peace, and justice for all, we recognize

that his speeches were full of biblical images and references," Professor Carmella says.

Obeying the law

One of the keys to obeying the law is teacher selection. A guide from The Bible Literacy Project Inc. and the First Amendment Center advises districts to hire teachers with academic backgrounds in religious studies. Instructors, according to the document, must understand the distinction between "advocacy, indoctrination, **proselytizing**, and the practice of religion—which is unconstitutional—and teaching about religion that is objective, non-judgmental, academic, neutral, balanced, and fair—which is constitutional."

During a 2017 Open Records Act investigation into Kentucky's Bible literacy classes, the Kentucky chapter of the American Civil Liberties Union (ACLU) uncovered numerous constitutional issues. In a January 2018 letter to the Kentucky Department of Education (KDE), the ACLU of Kentucky cited examples of public school teachers using the class to "impart religious life lessons," providing instruction via online Sunday School lessons, using non-academic source materials, and promoting rote memorization of Biblical text.


Six months after the ACLU of Kentucky released its findings, the KDE approved Bible literacy standards. Since the approval of those standards, at least two Kentucky school districts stopped offering Bible literacy courses due to low student interest. A high school in a third district followed suit last summer, though its decision was based solely on legal concerns.

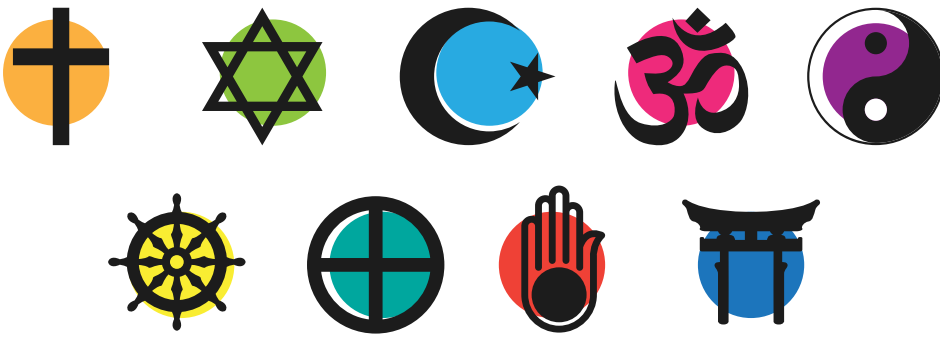
Anderson County High School in Lawrenceburg, Kentucky kicked off its 2019-2020 academic

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year with a “World Religions” elective in place of a Bible literacy course. The new class is an optional elective that covers Christianity, Islam, Hinduism and other world religions.

A course on world religions that includes the Bible among other religious works would be less open to challenge, according to Professor Carmella. She notes that opponents of Bible literacy laws are suspicious of the reasons behind them, believing they are being enacted for religious purposes as a way of proselytizing students or giving religious instruction.

“Many people are still upset that prayer and Bible reading were removed from the public schools, and there have been many efforts over the years to return them to schools,” Professor Carmella says. “Critics see these legislative efforts as a continuation of earlier ones, and are particularly concerned with offending religious minorities and dividing students based on religious identity.” 



DISCUSSION QUESTIONS



1. The U.S. Constitution references religion twice—the establishment clause in the First Amendment and the clause regarding no religious tests in Article VI. Why do you think the Founding Fathers included these clauses in the U.S. Constitution?
2. The phrase “In God We Trust” appears on U.S. money. What other religious phrases or symbols do we hear or see in the course of our everyday lives? How might this make people feel?
3. Do you think only learning about the Bible and not other religious teachings is fair? Why or why not?
4. How might students who are not Christian feel about learning about the Bible in public school? How could this potentially affect the learning environment for students who do not believe in Christianity?

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GLOSSARY

affirm — to uphold, approve or confirm.

appealed — when a decision from a lower court is reviewed by a higher court.

count — an offense.

dissenters — those who disagree with the majority.

dissenting opinion — a statement written by a judge or justice that disagrees with the opinion reached by the majority of his or her colleagues.

genetic genealogy — the use of genetic testing to infer biological relationships between individuals.

inexorable — impossible to stop.

majority opinion — a statement written by a judge or justice that reflects the opinion reached by the majority of his or her colleagues.

overturned — in the law, to void a prior legal precedent.

precedent — a legal case that will serve as a model for any future case dealing with the same issues.

probable cause — a reasonable belief in certain facts.

proselytize — to try to convert someone to one's own religion, opinion or political party.

rule of law — a legal doctrine that says the government and the governed should be subject to the same laws and no one is above the law.

secular — not sacred or concerned with religion.

segregation — the policy of separating people from society by race or social class.

sovereign — indisputable power or authority.

subpoena — a written command to appear before a court to give testimony.

suppress — to exclude evidence from a criminal proceeding.

upheld — supported; kept the same.

warrant — a written document from a judge authorizing anything from a search to an arrest to the obligation to pay a fine.