

Hazelwood School District v. Kuhlmeier / Analyzing Oral Argument Questions

Teaching Note: Consider playing excerpts from the audio recordings of oral arguments available [here](https://www.oyez.org/cases/1987/86-836) (<https://www.oyez.org/cases/1987/86-836>)

Directions:

1. Read the **Background, Vocabulary, and Precedents** sections (pages 1–2).
 2. Complete the **Analyzing Oral Argument Questions** activity (page 3).
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Background

In appellate arguments, lawyers do not call witnesses or present new evidence. Rather, they advocate for a specific position. Lawyers for the petitioner challenge the ruling of a lower court while lawyers for the respondent advocate for the ruling of the lower court. The lawyers face a panel of judges who ask them questions. Those questions often fall into the following five categories.

1. **Questions that apply precedent:** Cases that make their way from the lower courts to the Supreme Court of the United States almost always rely on precedent. Precedent cases deal with similar issues that the Supreme Court has already decided. The justices typically rely on precedent in making their decision. This is called *stare decisis* and it ensures that cases presenting the same legal question are decided the same way. This reliance on precedent builds stability and reliability into the legal system—people can typically predict how a dispute will be resolved by looking to past decisions on the same legal question. On rare occasions the Supreme Court overturns an existing precedent when the existing precedent is no longer workable or when the original decision was wrongly decided.
2. **Questions that deal with the limitations of the Court:** The court system plays an integral role in separation of powers. Judges may ask questions as to whether the court would be overstepping its boundaries by making a ruling in a certain case. Judges in federal courts may be wary of infringing on matters reserved to the states or to a co-equal branch of the federal government.
3. **Hypothetical questions:** Judges focus not just on the dispute between the two parties in front of them, but with the broader legal rule that will be established. In order to see how a new rule would work in a variety of circumstances, they often present alternate factual

situations and ask the advocates to apply their proposed solution to the current case to the hypothetical case or cases.

4. **Questions that deal with a “slippery slope”:** What comes next? This is at the heart of any slippery slope question. The case at hand may deal with a seemingly minor issue but may have far-reaching implications for future cases. Lawyers have to be prepared to address the judges’ concerns that they are not upending the American justice system without knowing it.
5. **Questions that focus on the facts/procedural history/record:**

Judges frequently want to know exactly what issues are in dispute based on the record that has been developed. They often ask factual questions or questions about the basis of a lower court’s opinion to clarify the nature of the issues in dispute. The record refers to statements made by witnesses in the trial court or decisions made by judges in lower courts. Judges may want the record clarified to arrive at a decision that is consistent with the original facts in the case.

Vocabulary

- **circuit court:** a court that sits in more than one judicial district. Circuit courts in the federal system usually act with appellate jurisdiction and serve as the courts just below the U.S. Supreme Court.
- **curriculum:** the subjects comprising a course of study in a school or college
- **extracurricular:** an activity at a school or college pursued in addition to the normal course of study.
- ***in loco parentis*:** a Latin term referring to a teacher or other adult responsible for children in the place of a parent.
- **public forum:** a public place, meeting, or medium where ideas and views on a particular issue can be exchanged.
- **trial court:** a court of law where cases are tried in the first place, as opposed to an appeals court.

Precedents

- ***Tinker v. Des Moines (1969)***

Students wore black armbands to school to protest the Vietnam War, and they were suspended for doing so. The Supreme Court ruled that the school’s actions violated the students’ First Amendment rights. They said that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” The Court decided that

if a school wants to prohibit a particular form of expression, it must show that the speech would substantially disrupt the educational process or interfere with other students' rights.

– ***Bethel v. Fraser* (1986)**

At a school assembly, a student made a speech that included sexual innuendo and references. He was suspended for giving the lewd speech. The Supreme Court ruled that his First Amendment rights were not violated. The Court emphasized that students do not have the same First Amendment rights as adults. It explained that school officials may prohibit the use of lewd, indecent, or plainly offensive language, even if it is not obscene. Schools have an interest in preventing speech that is inconsistent with the school's "basic educational mission" and in "teaching students the boundaries of socially inappropriate behavior." In addition, school officials should be able to maintain order during a school-sponsored educational program.

Analyzing Oral Argument Questions

Directions: On the following pages you will find excerpts from the oral arguments conducted at the Supreme Court of the United States for the *Hazelwood School District v. Kuhlmeier* case. Read the excerpts and answer the questions that follow. As you read, look for the types of questions the justices ask. Assess whether the lawyers are effective in their responses.

1. Argument excerpt #1

Attorney for the Petitioner Robert P. Baine, Jr.: *Thank you, Mr. Chief Justice, and may it please the Court:*

*This case comes before the court to resolve the issue of whether a school sponsored high school newspaper produced and published by a journalism class as a part of the school adopted **curriculum** under a teacher's supervision and subject to a principal's review is a **public forum** for the purpose of the First Amendment.*

Associate Justice Byron R. White: *No Court ever decided that question you just posed, did they?*

Mr. Baine: *The **trial court** found that it was a part of the curriculum and was not a public forum.*

*The Eighth **Circuit** then found that because of the numerous ideas expounded in the paper that it was not a part of the curriculum.*

And I think that is really the issue that is here before the Court is whether or not the school having adopted a curriculum matter in the teaching of journalism through a textbook and through a classroom setting where the teacher according to the written curriculum attended both the original teaching involving the textbook course which was Journalism I and then in Journalism II continued with that same class --

- a. Why do you think the attorney for Hazelwood states that the newspaper is not a public forum but part of the curriculum?

Student answers will vary, but the student should discuss the term public forum as the critical issue that will determine the application of student free speech.

- b. Within the first moments of the oral argument, Justice White asks: “No Court ever decided that question you just posed, did they?” Why do you think Justice White asked that question?

Justice White’s interest does not necessarily preclude him from applying existing precedent, but it is worth noting that he has identified the case as an opportunity to make new law. This question also allows the student to review the term *stare decisis*.

- c. What type of question did Justice White ask?

Applying precedent because he is asking the lawyer if there is a precedent in this case. Students might also answer a question that focuses on the facts/procedural history/record because he is asking about past court procedures.

2. Argument excerpt #2

Justice White: *Do you think that just the issue of whether something is part of the curriculum or not is really a question for us?*

Mr. Baine: *I think, Your Honor, whether or not the matter is a public forum is a matter for you, because this then --*

Justice White: *But I do not think that the Eighth Circuit would have held that yes, this is a part of the curriculum but it is still a public forum.*

Mr. Baine: *The Eighth Circuit found --*

Justice White: *That was not a part of the curriculum.*

Mr. Baine: *There was a finding of fact on the part of the trial court, and the Eighth Circuit never really did find that the findings of the trial court were clearly erroneous. What they did find was because of the diverse opinions that were allowed to be present in there that newspaper was in fact a public forum.*

- a. Justice White asks “whether something is part of the curriculum or not is really a question for us?” What type of question is this? Explain.

Justice White is asking a question that deals with the limitations of the Court because he seeks to determine whether the court is overstepping its boundaries.

- b. Why is it important that the justices make a clear distinction whether or not the student newspaper is a part of the curriculum as opposed to a public forum?

Students should use this question to explore, which areas of free speech are subject to limits and which areas are more likely to be protected, by the courts. Curriculum matters are typically considered to be matter reserved to the states or local districts. Whereas a public forum is generally more protected by the court.

3. Argument excerpt #3

Associate Justice William J. Brennan, Jr.: *Mr. Baine, we have not analyzed First Amendment issues in the school context in public forum terms, have we, have we not usually tested the First Amendment issue by the Tinker test?*

Mr. Baine: *I think, Mr. Justice, that in looking at [Bethel v.] Fraser, which decided on the same day, that Fraser had a curricula aspect to it.*

Justice Brennan: *But the opinion in Fraser did not turn, did it, on a public forum analysis?*

Mr. Baine: But it did not turn on the *Tinker* analysis either. It turned on the fact of whether or not in the role of the school in inculcating values in students that the school officials had some interest ***loco parentis*** in the outcome. And in this case particularly, you see the principal's interest in protecting.

Justice Brennan: But did not Fraser analyze the situation as whether or not the speech had been disruptive?

Mr. Baine: I think that it analyzed it a little bit differently than that. In fact, there was no indication in Fraser other than a few laughs that the speech was disruptive. And I think that the Court decided it on really the content and the people involved in the audience.

And here is what the trial court did in our case. It said while that there was nothing in there was really that outstandingly bad, but they reckoned that the principal could understand the school audience as well as anyone else in that some of the information in those articles might make it appear that because it was produced in a classroom exercise that the school in effect had condoned the activities of these children, of these young ladies who had gotten pregnant, for example.

- a. Justice Brennan's entire line of questioning would be best classified as which type of question? Explain.

Justice Brennan is asking the attorney to apply precedents to guide the court's decision.

- b. How did Mr. Baine apply the *Bethel v. Fraser* and *Tinker* cases?

The *Bethel* case is more favorable to the attorney's argument. This is an excellent example of the "pivot" strategy. The justice is interested in *Tinker*, which does not favor the attorney's position so Mr. Blaine's decision to make the case about *Bethel* refocuses the argument in favor of the Petitioner.

4. Argument excerpt #4

Chief Justice William H. Rehnquist: Supposing they set them [the rules of printing the student newspaper] a little bit differently, and said that this is going to be printed the way that ordinary newspapers are, it does not come out during class, you are going to work on it as an ***extracurricular activity***, but here are the rules.

You are going to be subject to review on your subject of topics, and to take Justice Scalia's example, we want to promote morality as we see it.

So if you are touching subjects such as high school sex, we will encourage and insist on one point of view rather than another.

Attorney for the Respondent Leslie D. Edwards: I think that they can do that, but I think that there would be trouble doing it with an extracurricular activity.

Chief Justice Rehnquist: Why?

Ms. Edwards: Well, because I assume that extracurricular means that they are only putting in the money and do not have a journalism instructor there.

Chief Justice Rehnquist: Well, supposing that there is an instructor.

- a. Chief Justice Rehnquist starts his line of questioning by saying "Supposing they set them [the rules of printing the student newspaper] a little bit differently." What type of question is this? Explain.

Chief Justice Rehnquist is posing a hypothetical question. He is changing the facts of the case but still focusing on the same general issue.

- b. How would you answer if the Chief Justice asked you, “Do you believe it is fair for a school district to have different attitudes towards the First Amendment for clubs and activities as opposed to classes?” Explain why.

Student answers will vary. Students may mention that classes are generally more regulated and thusly First Amendment guarantees are likely to more limited in class settings. They may also reference the *Bethel* and *Tinker* precedents.

5. Argument excerpt #5

Associate Justice Antonin Scalia: *I could set up a newspaper then and say you are not going to have any articles in it that encourage the smoking of pot, I can do that?*

Ms. Edwards: *If it is viewpoint based, I do not think that they can.*

Justice Scalia: *They cannot. So I either have to have no newspaper or I have to have a newspaper that has articles encouraging the kids who go to that school to smoke pot.*

Ms. Edwards: *Along with other viewpoints, yes. They have to allow that viewpoint, if that is what you are asking.*

Justice Scalia: *I understand your position now.*

Ms. Edwards: *I mean I think that the viewpoint discrimination is sort of a key to what they did in this case.*

- a. Justice Scalia suggests that having a school newspaper means students have the right to publish pro-marijuana articles, even though the articles published in this case were not about drugs. What type(s) of question is Justice Scalia asking? Explain.

Justice Scalia is giving an excellent example of a slippery slope question. Justice Scalia has created the conditions where if the attorney wants to argue free student speech then the attorney has to accept the hyperbolic example he has posed. Students might also point out that this is a hypothetical question because Justice Scalia is changing the facts to make the articles about marijuana.

6. You be the justice:

Write a question for each type that you would ask the lawyers if you were a justice hearing oral arguments in *Hazelwood School District v. Kuhlmeier*.

Student questions will vary but should reflect the descriptions of the 5 types of questions on pages 1-2.

- Question that applies precedent
- Question that deals with the limitations of the Court
- Hypothetical question
- Question that deals with a “slippery slope”
- Question that clarifies the facts or the record