Chapter Two: School Prayer

Overview

Questions involving school prayer are among the most contentious questions posed to the courts. The reason for this is two-fold. First, as with the other areas examined in this book, school prayer typically presents itself as a conflict among the values underlying the Free Speech, Free Exercise and Establishment Clauses. When courts are asked to resolve questions of school prayer, there is usually a student on one side who is claiming that she wishes to exercise her religion free from public school coercion and a student on the other side claiming that he is being coerced into participating or witnessing the religious exercise of his colleague. Second, individuals tend not to be neutral about their feelings regarding school prayer. Those who wish to pray at school feel victimized by those who want prayer out of school. Those who want prayer out of school feel victimized by those who wish to pray publicly at school.

The purpose of the following chapter is to determine what the law has to say about public school prayer and perhaps to give some guidance on how to educate those who feel victimized by the law's results. The chapter begins with a short description of what constitutes prayer. The chapter then proceeds to analyze situations in which public school officials permit or encourage school prayer. Those situations raise Establishment Clause issues and typically turn on the question whether the conduct of school officials "breaches the constitutional wall of separation between Church and State."[1] At the end of the chapter, I examine situations where the public school might violate the Free Exercise Clause by prohibiting prayer.

1. Prayer Is Talking to God and Also Other Things . . .

Prayer is any "address (as a petition) to God or a god in word or thought," or "a set order of words used in praying," or "an earnest request or wish," or "the act or practice of praying to God or a god," or "a religious service consisting chiefly of prayers."[2] In simple terms, prayer is talking to God or a god. During that conversation, the person praying may use his or her own words

to talk to a god, may use "a set order of words," such as the Lord's Prayer to speak to God, may "request or wish" something from a god, or may attend a ceremony that invokes such conversations with a god. That conversation may be vocal or silent. Cases involving school prayer broadly raise questions involving prayer, Bible readings, moments of silence, meditation, and invocations.[3] These cases also turn on the location of those prayer activities—in the classroom, at special ceremonies, and at other meetings.

Whether the activity in question constitutes prayer for purposes of the Religion Clauses does arise—although courts have recently been shy to address that question head on, preferring instead to resolve the case before it on alternative grounds. Most famously, the Supreme Court side-stepped the question whether the Pledge of Allegiance is a religious prayer because it contains the words "under God," concluding instead that the complaining parent was not entitled to challenge his daughter's school's regulation that students recite the Pledge of Allegiance because he did not have legal custody over her and so was not the parent principally responsible for deciding on her religious upbringing.[4] More recently, a lower court similarly sidestepped the question whether a Thanksgiving Address—rooted in Mohawk tradition, history and culture and spoken at the opening and closing of all Mohawk ceremonies—was a prayer because it thanked, among others, the "Creator."[5] Rather than reach the merits of the Religion Clause issue, the court resolved the case—which presented the question whether the school had discriminated against the Mohawks when it forbade recitation of the Thanksgiving Address over the school's public address system while allowing the Pledge of Allegiance to be recited—on grounds that the Mohawk plaintiffs failed to present evidence of discrimination.[6]

2. Institutionalized Prayer in Public Schools Is Unconstitutional

The Supreme Court has repeatedly held that official public school prayer is unconstitutional because it violates the Establishment Clause. Under Supreme Court decisional law, it is unconstitutional for public school officials to write prayers for recitation by students,[7] select prayers for recitation by students,[8] start each day with a reading from the Bible,[9] set aside moments for silent prayer or meditation if the purpose of such a moment is clearly to

foster prayer,[10] invite outside clergy to graduation to give a prayer or invocation,[11] or develop a selection process for students to vote on which students may give a prayer (or other statement) before high school football games over the school's public address system.[12]

The constitutionality of public school prayer was initially presented over forty years ago, in 1962, when in *Engel v. Vitale*[13] the Court held unconstitutional daily use of the following twenty-two word Regents' prayer in New York public school classrooms:

> *Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.*[14]

The Supreme Court explained that the Regents' prayer "violat[ed] . . . the Establishment Clause because that prayer was composed by governmental officials as part of a governmental program to further religious beliefs."[15]

In *Engel*, the Supreme Court was particularly concerned that public school officials had actually drafted the Regents' prayer, noting that "constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[16] The Court added, that "[i]t is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."[17]

It is noteworthy that the Supreme Court rejected arguments that using the Regents' prayer in public school classrooms was constitutional because the prayer was nondenominational and because reciting the prayer was voluntary.[18] In the Court's view, those facts did not insulate the public school use of the Regents' prayer from constitutional challenge, because the "Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[19]

3. Public Schools May Not Select Prayers for Recitation By Students; Nor May Public Schools Start Each Day with a Bible Reading

The Court's reasoning in *Engel* has not been limited to situations in which public schools write prayers for student recitation. The Court has similarly found that public schools cannot select pre-written or well-known prayers for recitation, nor can schools require students to read from the Bible. Notably, just one year after its *Engel* decision, the Court decided this question in *Abington School District v. Schempp.*[20] There, parents of several students attending Pennsylvania public schools challenged a state statute mandating that students read at least ten verses from the Bible and recite the Lord's Prayer each school morning. After reviewing the statute and considering the "religious character of the exercises," the Court held that "the exercises and the law requiring them . . . violat[ed] . . . the Establishment Clause."[21]

The Court stressed that the Establishment Clause requires religious neutrality. The Court then set forth the test for determining whether a particular enactment or regulation violates the Establishment Clause's neutrality requirement. That test, which is essentially a precursor to the *Lemon* test, focuses on whether the purposes or primary effect of the enactment is to advance or inhibit religion. If so, the enactment violates the Establishment Clause because "the enactment exceeds the scope of legislative power as circumscribed by the Constitution." Or to put it another way, "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[22]

Rejecting the state's argument that Bible readings should be allowed because they promoted the "secular purposes" of "promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature," the Court concluded that the purpose of the daily Bible reading and recitation of the Lord's Prayer, even if "not strictly religious" sought to accomplish a religious purpose "through readings, without comment, from the Bible."[23] The Court explained:

> *Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as*

> *the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.*[24]

The Court rejected all the public school's defenses. Recognizing a brick wall of state-church separation, the Court rejected the general proposition that those who favored implementing a religious exercise that has the "consent of the majority of those affected . . . . could use the machinery of the State to practice its beliefs."[25] Having recognized this wall, the Court found unpersuasive the argument that such readings should be insulated from Establishment Clause challenge where public schools are willing to excuse some students from listening to the required readings where their parents so requested. And the Court rejected the school's contention that relatively minor encroachments on the Establishment Clause should be tolerated. Using the words of former President James Madison, the Court noted that "'it is proper to take alarm at the first experiment on our liberties.'"[26]

Schempp is legally significant for the Court's rejection of the argument that a wall of separation establishes a "'religion of secularism'" in schools by "'preferring those who believe in no religion over those who do believe'" and by creating a hostile atmosphere to religion .[27] The Court instead acknowledged that the Bible may very well be worthy of literary or other academic study and that "such study of the Bible or of religion, when presented objectively as part of a secular program of education" would be consistent with the Constitution.[28]

4. Schools May Not Set Aside Moments for Silent Prayer or Meditation to Foster Prayer

In response to the diminishing role of religion in schools resulting from the Supreme Court's decisions in *Engel* and *Schempp*, several states enacted statutes authorizing moments of silence at the beginning of the school day as a substitute for religious exercise or vocal prayer. Moments of silence are constitutionally permissible if enacted for a secular purpose and not exploited to pressure or encourage students to pray. But if put in place to encourage prayer, moments of silence are unconstitutional.

For example, in 1981, Alabama enacted one such statute authorizing a period of silence "'for meditation or voluntary prayer,'"[29] which the bill's sponsor, a state senator, admitted was an "'effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction.'"[30] In 1985, the Supreme Court concluded in *Wallace v. Jaffree*[31] that Alabama's silent meditation and prayer statute violated the Establishment Clause.

The Supreme Court has held that one way that courts should assess public school conduct is to consider whether the school creates in-groups and out-groups based on students' religious beliefs or practices. In light of that broad principle, in *Wallace*, the Court was persuaded by a parent's argument that this mandatory period of silence unconstitutionally subjected his children to daily religious indoctrination at the school and peer ostracism for not participating.[32] The Court found that "[j]ust as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority."[33] The Court grounded its conclusion on "the central liberty that unifies the various Clauses in the First Amendment," namely, "the individual's freedom of conscience."[34] The Court then expressly rejected the position that the Establishment Clause protects only state "preference of one Christian sect over another [without] requir[ing] equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."[35]

Wallace is legally significant for reaffirming the value of neutrality underlying the Establishment Clause and for reaffirming the *Lemon* test as the main test for evaluating the constitutionality of public school involvement in religion. The Court in *Wallace* reaffirmed its position that the Establishment Clause "'requires the state to be a neutral in its relations with groups of religious believers and non-believers.'"[36] The Court then concluded that Alabama's moment-of-silence statute violated the Establishment Clause because it failed the purpose prong of the *Lemon* test: "The legislature enacted [it] . . . for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday."[37]

Wallace is also significant for refining the *Lemon* test in what is known as the endorsement test. The endorsement test, which is Justice O'Connor's interpretation of the purpose and effect prongs of *Lemon*, views

the harm of Establishment Clause violations as creating in-groups and out-groups based on the student's adherence to a particular religious practice. As Justice O'Connor explained in her concurring opinion in *Wallace*,

> *the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action* endorsing *religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."*[38]

According to O'Connor, "*Lemon's* inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."[39]

5. Prayer at Public School Functions Is Also Unconstitutional: Public Schools May Not Invite Outside Clergy to Graduation to Give a Prayer or Invocation

Cases involving school prayer often turn on the location of those prayer activities—in the classroom, at special ceremonies, and at other meetings. Almost a half-century ago, the Supreme Court in *Engel v. Vitale* established the principle that daily prayer in the public school classroom is unconstitutional. Since then, the Supreme Court has repeatedly reaffirmed that principle and has extended it to "any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."[40]

For example, in 1992, the Supreme Court, in *Lee v. Weisman*,[41] held that the Establishment Clause forbids a public school to invite members of the clergy to offer prayers as part of an official public school graduation ceremony. There, a public school invited a clergy-member—in this case, a rabbi—to speak at its official graduation ceremony (where student attendance was voluntary), and provided him with a pamphlet prepared by the National Conference of Christians and Jews, recommending "that public prayers at

nonsectarian civic ceremonies be composed with 'inclusiveness and sensitivity' . . . ."[42] The nonsectarian nature of the prayer, however, was not dispositive; the Court reasoned instead that it was the state's role in deciding to include the prayer, providing the rabbi with a copy of the pamphlet, and advising the rabbi to be nonsectarian that is controlling. The Court noted that "government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a 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."[43] Nor does it matter whether the prayer giver represents a majority or minority faith. Indeed, the clergy-member in *Lee* was a rabbi, who was invited to deliver the prayer at a school where the majority of students were Christian.

As in other Establishment Clause cases, the Court stressed its "heightened concerns with protecting [the young students'] freedom of conscience from *subtle coercive pressure* in the elementary and secondary schools."[44] The Court was particularly concerned with placing objecting children in the untenable position of "participating" or "protesting," concluding that the Establishment Clause prohibits public schools from foisting that choice on children:

> *The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. . . . [N]o doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. . . . [F]or many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. . . . It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable*

> *dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.*
>
> *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 citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.*[45]

Prayer at school board meetings has been held unconstitutional in every circuit that has examined the issue.[46] Although school boards have sought to defend school board prayers under the rationale of *Marsh v. Chambers*—where the Court held that the historical practice of opening legislative sessions does not violate the Establishment Clause[47]—that case is particular to legislatures and does not apply to school boards.[48]

Coles ex rel. Coles v. Cleveland Board of Education[49] illustrates the reasoning behind the general consensus that school board prayers are unconstitutional. There, the Sixth Circuit, applying *Lemon*, found that the Cleveland Board of Education's practice of opening each meeting with a prayer violated the Establishment Clause primarily grounded in two principles: first, to avoid the "'coercion' of impressionable young minds;" second, to avoid an official endorsement of religion.[50] With respect to the coercion issue, the court observed that school board prayer cases should be considered among the Supreme Court's decisions addressing "school-related activities," because the school board meetings "take place on school property and are inextricably intertwined with the public school system."[51] With respect to the endorsement issue, the court explained: "the constitutional problem . . . does not arise solely from the coercive effect of compulsory attendance or from concern with the malleability of young minds. . . . [C]oercion is not the full extent of the proper inquiry under the establishment clause." Rather, "[m]ixing religious activity with a government institution designed to foster and educate youth in the values of a democratic, pluralistic society is troubling because of the special nature of public schools as 'the symbol of our democracy and the most pervasive means for promoting our common destiny.'" [52] Given these reasons, the court rejected the *Marsh* "legisla-

tive bodies" exception as inapplicable to school boards primarily on grounds that school board meetings were integrated into the public school system: "the fact that the function of the school board is uniquely directed toward school-related matters gives it a different type of 'constituency' than those of other legislative bodies—namely, students."[53] The composition of the school board's constituency mattered to the Court because students "are unable to express their discomfort with state-sponsored religious practices through the democratic process."[54]

6. Student-Led, Student-Initiated Prayer Over the School's Public Address System Is Unconstitutional

Following *Lee v. Weisman*, it was clear that clergy-led, school-sponsored prayer at graduation ceremonies was unconstitutional. Schools began to find other ways to preserve prayers and do an end-run around the Establishment Clause. Many of these polices "gave the graduating class the opportunity to vote upon whether to have a prayer or other type of inspirational message at graduation, and if the graduating class elected to have an invocation, the class would elect a student volunteer to deliver the message."[55] Following these policies came more litigation. The ultimate question as to their constitutionality was whether the prayers were private student speech or school-sponsored speech endorsing religion.

The Supreme Court answered that question in 2000 in *Santa Fe Independent School District v. Doe*, concluding that even student-led, student-initiated religious speech over a school's public address system, is unconstitutional if it occurs in a context that creates the appearance of school sponsorship or support. The Court's conclusion here shows its concern not only with coercion arising from mandatory participation but also with coercion arising from subtle peer pressure.

For example, in that case, the Santa Fe Independent School District adopted several new policies dealing with prayer at various school functions. In addition to several policies regarding student-led prayer at graduation—policies that were eventually struck down as unconstitutional by the court of appeals—the school district adopted a policy initially entitled "Prayer at Football Games," authorizing student elections to determine whether invocations should be delivered before football games and then to select a stu-

dent-spokesperson to deliver them.[56] Shortly thereafter, the students voted to allow a student to pray over the school's public address system at football games.[57]

Ultimately, the Court applied the same coercion principles it had applied in *Lee v. Weisman* to conclude that the school district's football policy was unconstitutional: "Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship."[58]

The Court also determined that the pregame speech was impermissible school sponsorship of a religious message. As a threshold matter, the Court rejected the argument that the pregame speech was "private" and not "public" speech, noting that "[t]hese invocations are authorized by a government policy and take place on government property at government-sponsored school-related events."[59] To illustrate the constitutional perils involved in allowing students to determine by majority vote which expressive activities will be permitted and which will be silenced, the Court observed: "[T]his student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority."[60] The Court added that "while Santa Fe's majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense."[61]

The Court next rejected the school district's contention that it could "disentangle itself from the religious messages by developing the two-step student election process."[62] The Court explained: "Contrary to the District's repeated assertions that it has adopted a 'hands-off' approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion." The Court added, "[i]n this case, as we found in *Lee*, the 'degree of school involvement' makes it clear that the pregame prayers bear 'the imprint of the State and thus put school-age children who objected in an untenable position.'"[63] Along these lines, the Court was particularly troubled by several facts that tended to show school endorsement: The school choose to permit students to elect to give a statement or invocation; the policy allowed the principle to give direction and advice to the students conducting the election, "the invocation is then delivered to a large audience assembled as part of a regu-

larly scheduled, school-sponsored function conducted on school property," and "[t]he message is broadcast over the school's public address system, which remains subject to the control of school officials."[64] The public broadcast of the pregame message would be perceived as a "public expression of the views of the majority of the student body delivered with the approval of the school administration."[65]

Finally, the Court rejected the school district's stated secular purposes of the policy—"to foster free expression of private persons, to solemnize sporting events, promote good sportsmanship and student safety, and establish an appropriate environment for competition."[66] Invoking the *Lemon* test, whereby the Court is charged with distinguishing between sham and sincere "secular purposes" by taking account of the text and history of the regulation, the Court concluded that the football policy simply did not promote the School's stated secular policies. The Court observed: "the fact that only one student is permitted to give a content-limited message suggests that this policy does little to 'foster free expression.' . . . And it is unclear what type of message would be both appropriately 'solemnizing' under the District's policy and yet nonreligious."[67]

Santa Fe Independent School District v. Doe is legally significant because it demonstrates once again the Court's willingness to ferret out sham secular purposes by looking to the purposes and effects of a school policy. But more importantly, *Santa Fe* demonstrates the extent to which the Court is willing to protect students who are made to feel like "outsiders, not full members of the political community," from those "adherents that . . . are insiders, favored members of the political community."[68] Where a school encourages that insider-outsider environment, its actions are likely to be struck down.

7. But Students May Hold Prayer Services Before School Around the Flag Pole or in the Cafeteria So Long As Faculty or Outsiders Do Not Participate

In *Santa Fe Independent School District. v. Doe*, the Supreme Court hinted that wholly student-initiated religious activities held on campus (such as "around the flag pole") are constitutionally permissible. The Court highlighted that "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or

after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."[69] Based on these principles, some scholars had predicted that "student-initiated activities such as early morning prayer meetings around the schoolhouse flagpole should pass Constitutional muster, so long as the school authorities refrain from encouraging or discouraging students from participating."[70] But, when schools either expressly direct or permit parents to direct "See You at the Pole" events for elementary school students, or when school officials participate in such events, they violate the Establishment Clause.[71]

Where the conduct is genuinely student-initiated activity and not fostered or supported by public school staff, that conduct is constitutionally permissible. At least two federal courts have indirectly upheld such student-initiated activity. In *Westfield High School L.I.F.E. Club v. City of Westfield*,[72] the District Court of Massachusetts dealt with a student religious club's contention that a school's speech policies were unconstitutional. Responding to the school's argument that the group's religious literature distribution bears the "imprimatur of the school," the court reasoned that

> *[t]he mere facts that the school opened its channels of communication (i.e., daily bulletin, bulletin boards, student yearbook), provided an adult sponsor who acts merely as a monitor and does not actively or substantively participate in any of the Club's activities,* and opened its facilities for use before school for morning prayer at the flagpole and after school for Club meetings, *does not mean that the LIFE Club can "fairly be characterized as part of the school curriculum."*[73]

Rather, applying the principles of *Hazelwood School District. v. Kuhlmeier*,[74]—holding hat schools may limit students' speech if it occurs in the context of a school-sponsored activity so long as the restriction is reasonably related to a legitimate pedagogical purpose—the court concluded that the LIFE group's speech (including prayer around the flagpole) was private. In the court's view, "[u]nlike the newspaper and journalism classes in *Hazelwood*, no evidence tie[d] the LIFE Club's activities to the school's curriculum." To support its view, the Court explained that "[t]he school d[id] not fund the Club; the Club's activities [we]re not directly related to any subject taught in

any course that the school offers; the school d[id] not require any student to participate in the group; the school d[id] not give Club members academic credit for participation."[75]

Turning to the issue of teacher involvement in student-initiated prayers at the flagpole, in *Daugherty v. Vanguard Charter School Academy*,[76] the United States District Court for the Western District of Michigan dismissed a complaint by parents that their children had been unconstitutionally subjected to various Christian influences while attending school. In *Daughtery*, Vanguard teachers and members of the administration were present at prayers on school property during school hours or when students are required to be present, and two teachers attended open prayer meetings at the school flagpole prior to the start of the school day.[77] The court noted that the "presence of teachers and elementary students together, for prayer, on school premises, albeit during non-instructional hours, is a matter of heightened concern. Young students tend to emulate their teachers as role models and are susceptible to peer pressure."[78] But citing the principles articulated in *Tinker v. Des Moines Independent Community School District*[79]—holding that a public school may restrict speech if the speech materially and substantially interferes with the operation of the school, and, in the case of religious activity, the principle that students, parents and members of the public might reasonably perceive the activity to bear the imprimatur of the school, the court reasoned that:

> *if the teachers attended the flagpole gatherings strictly in a passive or supervisory capacity without participating in the prayer, their mere presence would not be violative of the Establishment Clause. . . . If, on the other hand, the teachers played a more active, participatory role in the prayer gathering, of which there is no evidence, then plaintiffs' claim would be stronger. . . . It follows that [the school district] could be held responsible for such teacher misconduct only if plaintiffs also showed that the need for corrective action was so obvious as to demonstrate that defendants were deliberately indifferent to and tacitly approved the misconduct. Plaintiffs have failed to present evidence to support such a finding.*[80]

Although *Daugherty* is only a district court decision, and therefore of limited precedential value, it is significant because it shows that the courts have only scratched the surface in dealing with the question of coercion.

While the court in *Daugherty* acknowledges the coercive effect of teacher-presence during student-initiated prayer, the case gives only superficial thought to the differences between passive teacher presence and teacher participation in school prayer. After all, mere teacher presence is coercive and may very well create the insider-outsider dynamic that the Supreme Court has repeatedly found offends the Establishment Clause.

8. It Is Unclear Whether and to What Extent Student Speakers at Graduations May Open Their Remarks with a Prayer, Make Religious References in Their Speeches, or Give Sermons to Attendees

After *Santa Fe*, the Supreme Court left many questions unanswered regarding when student-led prayers at school functions are private speech and when the state endorses such prayers. The courts are divided based primarily on whether the reviewing court focuses on the threat of coercion caused by public and peer pressure to attend important school functions or the public school's neutrality.

For example, in *Cole v. Oroville Union High School District*,[81] the Ninth Circuit, focusing on the effect religious speech might have on the outsider, held that a public high school could prevent a student chosen by student vote from making a sectarian speech at a high school graduation ceremony. The court noted that in "both *Santa Fe* and *Lee*, the [Supreme] Court emphasized that the threat of coercion caused by public and peer pressure to attend important school events is heightened in the public high school context because adolescents are more susceptible to such pressure, especially as to issues of social convention."[82] In finding the school's action permissible here, the court reasoned that the "invocation would not have been private speech," for the following three reasons: "the District authorized an invocation as part of the graduation ceremony held on District property, allowed only a student selected by a vote of his classmates to give an invocation and no doubt would have used a microphone or public address system to amplify the invocation."[83] Similarly, the court held that the school could prevent a student from making a sectarian valedictory speech, even though the school's valedictory speech policy neither encouraged nor discouraged a religious message, because "the District's plenary control over the graduation ceremony, especially student speech, makes it apparent [the valedictorian's]

speech would have borne the imprint of the District."[84] The facts bearing on the court's finding were as follows: (1) the District authorized the speech as part of its graduation ceremony that is paid for by state funds and held on state property, (2) the principal had supervisory control over the graduation and final authority to approve the content of the speech, (3) the student had to sign a contract which binds them to dress and act in a manner approved by the District, and (4) the message would have been broadcast to the audience over a school microphone or public address system.[85]

By contrast, in drawing the line between student religious expression and school-sponsored religious speech, the Eleventh Circuit has focused on the neutrality of the school's conduct, concluding in two cases that student-initiated prayer at graduation was constitutionally permissible where the reviewing court finds that the school district has played no role in encouraging or discouraging that speech. First, in *Adler v. Duval County School Board*,[86] the Eleventh Circuit sitting en banc held that a school district's policy that "permit[ed] a graduating student, elected by her class to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies" did not violate the Establishment Clause on its face. Citing *Santa Fe* on "just how case-specific Establishment Clause analysis must be," the court observed that whether a public school violates the Establishment Clause is "'in large part a legal question to be answered on the basis of judicial interpretation of social facts . . . . Every government practice must be judged in its unique circumstances . . . .'"[87] Applying that standard of review, the en banc court determined that missing in *Adler* were facts critical to the conclusion drawn in *Santa Fe*—namely, that the speech was subject to regulation that confined the topic of the student's message ("a hallmark of state involvement") and that the policy's terms actually encouraged religious speech.[88] In particular, the school district's policy, which forbade school officials from reviewing the content of the students' speeches, expressly denied officials the opportunity to censor any viewpoint.[89] And unlike in *Santa Fe*, where the policy encouraged religious messages by including the term "invocation" and by making the purpose of the students' message to "solemnize" the event,[90] the school district policy's terms did neither. The school district's policy contained no language at issue that implicated religious themes and was entirely neutral as to viewpoints.[91] Moreover, unlike in *Santa Fe* where the voting procedure uncon-

stitutionally subjected students to a referendum on student prayer, here the students merely voted on "(1) whether to permit a student 'message' during the ceremony, and (2) if so, which student is to deliver the message."[92] That critical fact meant the difference between endorsing public religious speech and accommodating private religious speech. The court reasoned: "Although it is possible that . . . the student body may select a speaker who then chooses *on his or her own* to deliver a religious message, that result is not preordained, and . . . would not reflect a 'majority' vote to impose religion on unwilling listeners."[93] Rather, in the court's view, "it would reflect the uncensored and wholly unreviewable decision of a single student speaker."[94]

Similarly, in *Chandler v. Siegelman*,[95] the Eleventh Circuit reasoned that a student's private religious speech at public school-sponsored ceremonies and events is constitutional as long as the school district does not take "affirmative steps . . . for prayer to be delivered at a school function."[96] The court, again focusing on the public-private distinction, wrote: "It is not the public context that makes some speech the State's. It is the entanglement with the State. What the Court condemned in *Santa Fe* was not private speech endorsing religion, but the delivery of a school-sponsored prayer. Remove the school sponsorship, and the prayer is private."[97]

9. Students May Pray Together Before a Game or Other School Event but Coaches and Other School Officials Generally May Not Participate

Cases involving the question whether student athletes may pray together before a game or whether the student-athletes' coach may participate in that prayer implicate different aspects of the First Amendment and point the way as to how conflicts among the Free Exercise, Establishment and Free Speech Clauses might be resolved. In these cases, school officials may generally permit students to exercise their religious beliefs and practices, as required by the Free Exercise and Free Speech Clauses, but will run afoul of the Establishment Clause if school officials allow the coach to participate. Accordingly, students may gather to pray, but public school coaches and other staff members may not encourage that prayer by giving students megaphones or by kneeling or by telling students that it is time for prayer.

For example, in *Doe v. Duncanville Independent. School District*,[98] the Fifth Circuit accepted a female student's argument that the school district's practice of allowing the school's basketball coach to initiate prayers before games and practices violated the Establishment Clause. Significantly, the court dealt primarily with the question whether the coach's conduct—not the students'—violated the Establishment Clause. The court rejected the school district's argument that it could not prevent its employees from participating in student prayer without violating the coach's free exercise rights, reasoning that "[t]he challenged prayers take place during school-controlled, curriculum-related activities that members of the basketball team are required to attend. During these activities . . . coaches and other school employees are present as representatives of the school and their actions are representative of [school] policies."[99]

Duncanville is one of the few federal cases discussing the constitutionality of students gathering to pray before athletic or other school-related events.[100] But at least one scholar, University of Kansas Law Professor Phillip Kissam, has concurred in the view that "[s]chool coaches and teachers should not lead their groups in such prayers, for this involves the state in *promoting* or *endorsing* religion in a manner very similar to teacher-led classroom prayers." Drawing on *Tinker* and Free Exercise Clause jurisprudence, Professor Kissam draws a distinction between teacher or coach-led prayer and student-initiated group prayer:

> *there would seem to be nothing illegal or immoral if students wish to pray collectively before they engage in a particular event that happens to be connected to a public school, as long as the prayer is not "disruptive" of the activities of other students. [This is the 'disruption' test that comes from* Tinker.*] Certainly a group of students may gather together in a nondisruptive way on public school premises to pray before an examination . . . , and this is so even if the prayer on school property may exert subtle coercive pressure upon others who necessarily will observe the prayer. If this activity is permissible as a matter of free speech and the free exercise of religion, it would seem that collective student-initiated prayers before other school events, say athletic events or theatrical performances, may also be permissible if nondisruptive to the activity.*[101]

10. Public Schools Are Often Required to Accommodate Student Requests to Be Given Temporary Space for Prayer Where Their Religion Requires Them to Pray

Given the rights accorded students under the Free Exercise Clause and *Tinker*, the question whether schools must accommodate their students' religious beliefs by giving students space and time to pray when their religion dictates is a matter of delicate balance between the Free Exercise Clause and the Establishment Clause. These cases also often turn on application of the Equal Access Act, which makes it "unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access . . . to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious . . . content of the speech at such meetings."[102] These questions are taken up in chapter three.

The question of Salat or Muslim prayer presents some unique issues, most of which have not been worked out by the courts. Practicing Muslims are supposed to pray at five different times every day. The prayers are supposed to last between five and ten minutes and consist of a series of postures that include standing, bowing, and kneeling.[103] Of the five times for praying, only two of the five occur within the school day. The religious practice of Salat raises the legal question whether a public school can accommodate a Muslim student who seeks to pray at these times. To accommodate Salat, a school would have to permit the prayers at the right times and allow the student the space for the prayer to include the appropriate movements. In keeping with *Wallace v. Jaffree*[104]—holding that Alabama's silent meditation and prayer statute violated the Establishment Clause—one court recently observed that statutes which provide for a moment of silence for meditation and prayer violate *Lemon*'s effect prong tend by favoring some religions over other religions because some religious prayers "are neither silent nor still."[105] Courts have yet to review the question whether a school may provide a place for Muslim students to pray, but it seems that such an accommodation would be constitutionally permissible so long as the space provided is not set aside exclusively for prayer.[106]

End Notes

End Notes - Chapter Two

1 370 U.S. 421 (1962).
2 A definition of prayer can be found at Merriam-Webster's Online Dictionary, *Prayer*, http://www.merriam-webster.com/dictionary/prayer (last visited Jun. 18, 2009).
3 An invocation is "'a prayer of entreaty that is usu[ally] a call for the divine presence and is offered at the beginning of a meeting or service of worship.'" Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 307 n.19 (2000) (defining invocation and quoting Webster's Third New International Dictionary 1190 (1993)).
4 Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 5 (2004). For a more in-depth discussion of the Pledge of Allegiance, see Chapter 6.
5 Jock v. Ransom, 2007 WL 1879717, *1 (N.D.N.Y. 2007).
6 *Id.* at *12.
7 Engel v. Vitale, 370 U.S. 421 (1962).
8 Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).
9 *Id.*
10 Wallace v. Jaffree, 472 U.S. 38 (1985).
11 Lee v. Weisman, 505 U.S. 577 (1992).
12 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
13 370 U.S. 421 (1962).
14 *Id.* at 422.
15 *Id.* at 425.
16 *Id.*
17 *Id.* at 435.
18 *Id.* at 430.
19 *Id.*
20 374 U.S. 203 (1963).
21 *Id.* at 223.
22 *Id.* at 222.
23 *Id.* at 223-24.
24 *Id.* at 224.
25 *Id.* at 225-26.
26 *Id.* at 225 (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785)). *Madison's Memorial* is reprinted in James Madison on Religious Liberty (Robert S. Alley ed., 1985) and is also *available at* Religious Freedom Page, *Memorial and Remonstrance Against Religious Assessments*, http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html (last visited Mar. 14, 2009).
27 *Schempp*, 374 U.S. at 225.
28 *Id.*
29 Wallace v. Jaffree, 472 U.S. 38, 40 & n.2 (1985) (quoting Alabama Code § 16-1-20.1).
30 *Id.* at 43 (ellipsis in original).
31 472 U.S. 38 (1985).

32 *Id.* at 42.
33 *Id.* at 52 (relying on West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).
34 *Id.* at 50.
35 *Id.* at 52-54.
36 *Id.* at 53 n.37 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947)).
37 *Id.* at 60.
38 *Id.* at 69 (emphasis added and quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).
39 *Id.* (internal citations omitted) (emphasis added). *See also* Walter v. West Virginia Bd. of Educ., 610 F. Supp. 1169, 1175-77 (S.D. W.Va. 1985) (finding Establishment Clause violation in as-applied challenge on moment-of-silence law where the teacher would leave the room during the moment of silence, students were expected to pray, and the Jewish student was harassed for not praying).
40 Engel v. Vitale, 370 U.S. 421, 430 (1962).
41 505 U.S. 577 (1992).
42 *Id.* at 581.
43 *Id.* at 587.
44 *Id.* at 592 (emphasis added).
45 *Id.* at 593.
46 *See* Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188 (5th Cir. 2006), *vacated and remanded en banc with instructions to dismiss on the issue of standing,* 494 F.3d 494 (5th Cir. 2007) (en banc); Coles ex rel. Coles v. Cleveland Bd. of Educ., 171 F.3d 369 (6th Cir. 1999); Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ., 52 F. App'x 355 (9th Cir. 2002).
47 Marsh v. Chambers, 463 U.S. 783 (1983).
48 *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 596-97 (1992) (holding that that *Marsh*'s legislative-prayer exception does not extend to public school graduation ceremonies); *see also* County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989) (explaining, in the context of prohibiting public crèche display, that "history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed") (internal footnote omitted).
49 171 F.3d 369 (6th Cir. 1999).
50 *Id.* at 379 (citing Lee v. Weisman, 505 U.S. 577, 609 (1992) (Blackmun, J., concurring)).
51 *Id.* at 377.
52 171 F.3d at 378 (quoting McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring)).
53 *Id.* at 381.
54 *Id.*
55 Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 Fordham L. Rev. 1147, 1160 (2002).
56 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 297 (2000).
57 *Id.* at 296-98.
58 *Id.* at 312.
59 *Id.* at 302 (rejecting the argument that a football game constitutes a public forum under Rosenberg v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) and other cases).
60 *Id.* at 304.
61 *Id.* at 305.

62 *Id.* at 305-06.
63 *Id.* at 305.
64 *Id.*at 307.
65 *Id.*at 308.
66 *Id.* at 309 (internal marks omitted).
67 *Id.* (internal marks omitted).
68 *Id.* at 309-10.
69 *Id.* at 313.
70 Kenneth Katkin & Laurie Lamb, *The Establishment Clause: A Survey of Recent Religious Cases Decided Within the Sixth Circuit*, 29 N. Ky. L. Rev. 73, 111 (2002) (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000)); *see also* Frederick Mark Gedicks, *Religions, Fragmentations, and Doctrinal Limits*, 15 Wm. & Mary Bill Rts. J. 25,40 (2006) (noting that "purely private religious ceremonies, such as the once-popular 'meet at the flagpole' prayers organized by evangelical Christian students immediately before the beginning of the public high school day, have been held constitutional by the federal courts.").
71 Doe ex rel. Doe v. Wilson County Sch. Sys., 564 F. Supp. 2d 766, 790-98, 801-03 (M.D. Tenn. 2008) (holding that even though under First Amendment forum principles the school district had to permit religious groups the same access to school facilities as it did to other groups, the school district could neither grant the religious groups preferential access to school facilities, nor permit its teachers and administrators to participate in such events with students before the school day began, because such actions showed an entanglement with religion and a message of endorsement to elementary school students).
72 249 F. Supp. 2d 98 (D. Mass. 2003).
73 *Id.* at 117 (emphasis added) (footnote with additional citations omitted).
74 484 U.S. 260 (1988).
75 249 F. Supp. 2d at 118
76 116 F. Supp. 2d 897 (W. D. Mich. 2000).
77 *Id.* at 907, 910.
78 *Id.* at 910.
79 393 U.S. 503 (1969).
80 *Daugherty*, 116 F. Supp. 2d at 911 (internal citation omitted).
81 228 F.3d 1092 (9th Cir. 2000).
82 *Id.* at 1102 n.7.
83 *Id.* at 1102.
84 *Id.* at 1103.
85 *Id. See generally* Diane Heckman, *One Nation Under God: Freedom of Religion In Schools and Extracurricular Athletic Events in the Opening Years of the New Millennium*, 28 Whittier L. Rev. 537 (2002).
86 250 F.3d 1330, 1332 (11th Cir. 2001) (en banc).
87 *Id.* at 1336 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000)).
88 *Alder*, 250 F.3d at 1336, 1337.
89 *Id.* at 1336.
90 *Id.* at 1337-38.
91 *Id.* at 1337.
92 *Id.* at 1338.
93 *Id.* at 1339.
94 *Id.*
95 230 F.3d 1313 (11th Cir. 2000).

96 *Id.* at 1315.
97 *Id.* at 1316.
98 70 F.3d 402 (5th Cir.1995).
99 *Id.* at 406 (referencing Bishop v. Aronov, 926 F.2d 1066, 1073 (11th Cir. 1991) ("a teacher's [religious] speech can be taken as directly and deliberately representative of the school")).
100 *See also* Borden v. Sch. Dist. of Twp. Of E. Brunswick, 523 F.3d 153, 165-68, 174 (3d Cir. 2008) (holding constitutional public school policy prohibiting faculty from participating in student-initiated prayer and holding that football coach violated the Establishment Clause when he bowed his head and took a knee when his team prayed); Jager v. Douglas County Sch. Dist., 862 F.2d 824, 828-33 (11th Cir. 1989) (holding unconstitutional the practice of having pre-game religious invocations); Doe v. Aldine Indep. Sch. Dist., 563 F. Supp. 883, 885-88 (S.D. Tx. 1982) (holding unconstitutional pre-event singing of public school song that called upon God's blessing).
101 Phillip C. Kissam, *Let's Bring Religion Into the Public Schools and Respect the Religion Clauses*, 49 U. Kan. L. Rev. 593, 627-28 (2001) (internal footnotes omitted). *See also* Gil Fried & Lisa Bradley, *Applying the First Amendment to Prayer in a Public University Locker Room: An Athlete's and Coach's Perspective*, 4 Marq. Sports L. J. 301 (1994).
102 20 U.S.C. § 4071(a) (2009). For an in-depth discussion of the Equal Access Act, see Chapter 3.
103 *See, e.g.*, Chatin v. New York, 1998 WL 196195, *2 (S.D.N.Y. Apr. 22, 1998) (explicating Salat).
104 472 U.S. 38 (1985). *See* discussion *supra*.
105 Sherman v. Twp. High Sch. Dist. 594 F. Supp. 2d 981, 990 (N.D. Ill. Jan. 21, 2009). Also in line with *Wallace v. Jaffree*, reviewing courts would likely find unconstitutional moment-of-silence rules implemented in a manner that favored Christians but did not allow Muslims students to pray in their normal manner. *See, e.g.*, Walter v. West Virginia Bd. of Educ., 610 F. Supp. 1169, 1170-73, 1175-77 (S.D. W.Va. 1985) (concluding that as-applied moment-of-silence law violated the First Amendment in part because it favored Christian students and singled-out Jewish student for retaliation by his peers).
106 For more discussion of permanent space issues, see Chapter 6.