PRAYING FOR TOUCHDOWNS: CONTEMPORARY LAW AND LEGISLATION FOR PRAYER IN PUBLIC SCHOOL ATHLETICS

Brett A. Geier* & Annie Blankenship**

INTRODUCTION

A. The Ethical Conundrum of Supporting Jurisprudence That Runs Contrary to Personal Beliefs

"It's un-American,"[1] exclaimed Florida's Speaker of the House, Will Weatherford, in reaction to the memo from the Pasco County Schools' (Florida) superintendent reminding coaches that they may not lead or participate in prayer while working in their official roles.[2] In response to the directive, a Pasco County School staff member exclaimed, "[i]f you had told anybody 30 to 40 years ago . . . that a coach wouldn't be allowed to legally lead a prayer with his players, I don't think anyone would have believed you."[3]

The act of public schools leading prayer in an official capacity was deemed unconstitutional over fifty years ago,[4] yet a renaissance of sorts is occurring among the Religious Right to permeate the theoretical barrier separating church and state,

---

* Brett A. Geier, Ed.D. is an Assistant Professor at Western Michigan University.
** Ann E. Blankenship-Knox, J.D., Ph.D. is an Assistant Professor at University of Southern Mississippi.

[1] Jeffrey S. Solochek, *House Speaker Says Coaches Should Be Able to Pray with Players*, TAMPA BAY TIMES (Sept. 30, 2013), http://www.tampabay.com/news/education/k12/house-speaker-says-coaches-should-be-able-to-pray-with-players/2144714.

[2] Memorandum from Kurt Browning to Pasco County Schools Staff (Sept. 26, 2013) (on file with Pasco County Schools).

[3] Solochek, *supra* note 1.

[4] Engel v. Vitale, 370 U.S. 421 (1962) (holding that the First Amendment protects religious liberty by keeping government from determining when and how people should pray or worship, and that school officials may not require devotional religious exercises during the school day, as this practice unconstitutionally entangles the state in religious activities and establishes religion); *see also* Herdahl v. Pontotoc Cty. Sch. Dist., 933 F. Supp. 582, 585–86 (N.D. Miss. 1996) ("[T]he Bill of Rights was created to protect the minority from tyranny by the majority. Indeed, without the benefit of such a document, women in this country have been burned because the majority of their townspeople believed their religious practices were contrary to the tenets of fundamentalist Christianity.").

specifically in public schools.[5] In 1989, Eugene Bjorklun noted, "[n]umerous efforts have been made by state legislatures to evade the ban on organized, devotional prayer in public schools through 'voluntary' prayer and/or moment-of-silence statutes."[6] The quest to allow Christian prayer in schools has increased dramatically since Mr. Bjorklun's statement. Arguing that religious freedoms are being chilled, state legislatures have taken different approaches to infuse religion (particularly Christianity) into schools. Generally, legislation enacted at the state level seeks to reinforce religious freedoms already provided to public school students,[7] and to circumvent well-established case law on the First Amendment's Establishment Clause.[8]

In this context of pro-Christian prayer legislation, we look beyond the classroom to consider the role of prayer in public school athletics. Spectators, coaches, and athletes often seek divine guidance for protection and excellence on the field or

---

[5] KATHERINE STEWART, THE GOOD NEWS CLUB: THE CHRISTIAN RIGHT'S STEALTH ASSAULT ON AMERICA'S CHILDREN 3 (2012) (providing an analysis of the rise of fundamentalist Christians reacting to the massive social transformation taking place in America).

[6] Eugene C. Bjorklun, *Prayers and Extracurricular Activities in Public Schools*, 16 RELIGION & PUB. EDUC. 459, 461 (1989).

[7] *See* FLA. STAT. § 1001.432 (2016) (enacted) (authorizing, but not requiring, a district school board to adopt a policy allowing an inspirational message to be delivered by students at a student assembly. The policy provides that students who are responsible for organizing any student-led portion of a student assembly must have sole discretion in determining whether an inspirational message is to be delivered. If the policy is adopted, school district personnel may not monitor or otherwise review the content of a student volunteer's inspirational message); N.C. GEN. TAT. §115C-407.30 (2015) (affording students the right to pray, either silently or audibly and alone or with other students, to attempt to share religious viewpoints with other students, and to possess or distribute religious literature, provided that any activity is done in an orderly fashion. It also provides protection for student-led religious groups, and states that, "a student shall not be penalized or rewarded based on the religious content of the student's work").

[8] *See* H.R. 45, 2013-2014 Leg., Reg. Sess. (Ala. 2014) (couched in historical, secular significance, this bill would allow public buildings and schools to erect the Ten Commandments as long as they were part of other historical documents);Stone v. Graham, 449 U.S. 39 (1980) (insisting that the statute in question serves a secular legislative purpose, the Court found that the display had no educational function but that the preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature; the Ten Commandments are undeniably a sacred text in Jewish and Christian faiths and no legislative recitation of a supposed secular purpose can bind us to that fact); ACLU v. McCreary Cty., 354 F.3d 438 (6th Cir. 2003) (holding that framed copies of the Ten Commandments in two Kentucky courthouses amounted to an accommodation of Christianity and a violation of church and state separation). *But see* Van Orden v. Perry, 545 U.S. 677 (2005) (stating in its plurality opinion that a monument displaying the Ten Commandments did not violate the Establishment Clause, as it held historical and political significance rather than a solely religious purpose).

court at athletic events. However, if the contests are sponsored by a public school, then employees must be cognizant of the fact that open displays of prayer or other religious rituals may violate the Establishment Clause. This can be an unpopular posture, particularly in communities dominated by groups with strong religiosity. Representative Gene Green from Texas embodied much of the consternation by religious groups seeking influence at athletic events by asking, "[h]ow does a prayer before a football game act to establish a religion?"[9] Supporters of prayer in public schools expound upon the notion that athletic events are analogous to other co-curricular activities in that a group's right to use facilities outside school hours for religious purposes is protected.[10] However, organized prayer at athletic contests raises constitutional concerns related to religious content, free speech and public fora doctrine, and school coercion. While arduous, the public schools must maintain viewpoint neutrality and navigate these factions, ensuring individual religious expression and minimizing school coercion.

In this Article, we consider the history of prayer in K-12 public school classrooms and on the sports field. Next, we discuss the foundational case law on the First Amendment's separation of church and state. We then consider how that separation has played out in public school prayer cases, and then more specifically, in public school sports cases. In this section, we discuss the rules of law developed by the Supreme Court to determine if alleged school prayer constitutes a violation of the Establishment Clause. We next consider contemporary manifestations of prayer in athletics, particularly the trend of prayer at the fifty-yard line. Finally, we discuss the tension between federal case law and state legislative efforts regarding

[9] 145 CONG. REC. H11325 (daily ed. Nov. 2, 1999) (statement of Rep. Green) (speaking about a resolution he cosponsored in reaction to the Fifth Circuit Court of Appeals ruling in *Doe v. Santa Fe Independent School District* that amplified his concern and perplexity as to how a prayer for the safety of the athletes before a sporting event could be held as unconstitutional).

[10] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that a school district may not engage in viewpoint discrimination by denying religious community groups access to the use of school facilities after hours on the same basis as other groups).

prayer in public schools and the implications for educational and legal practice.

B. The Tradition of Prayer in Public Schools

Those who argue the religious rights of public school students have been chilled fail to acknowledge that state and federal courts have repeatedly ruled that the First Amendment's Free Exercise Clause "explicitly *protects* the rights of children to pray in schools in a nondisruptive, noncoercive fashion."[11] As long as the act of praying does not impede the educational process, students are free to engage in prayer. As individuals, students have "the right to freely articulate [their] religious beliefs in a public setting [which] is fundamental to American constitutional entitlements."[12] There is a "wall" separating church and state. As conceived by Thomas Jefferson, this "wall" is a theoretical barrier, which seeks to protect individual rights and prohibit government intrusion into religious matters.[13] In 1952, the Court determined that it was constitutional for students to engage in voluntary religious education off school premises.[14]

---

[11] ROBERT BOSTON, WHY THE RELIGIOUS RIGHT IS WRONG ABOUT SEPARATION OF CHURCH AND STATE 111 (2003).

[12] Brett A. Geier, *Texas Cheerleaders and the First Amendment: Can You Cheer for God at a Football Game?*, 33 MISS. C. L. REV. 65, 66 (2014). *Cf.* S.D. v. St. Johns Cty. Sch. Dist., 632 F.Supp. 2d 1085, 1091 (M.D. Fla. 2009) (noting that "there exists a tension between the doctrines, when applied: the government action to facilitate free exercise might be challenged as impermissible establishment, and government efforts to refrain from establishing religion might be objected to as denying the free-exercise of religion.").

[13] Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), *available at* https://www.loc.gov/loc/lcib/9806/danpre.html (last visited Feb. 8, 2017). Writing to President Thomas Jefferson, the Danbury Baptist Association wanted to congratulate him on his election to the presidency and to seek his approval of religious freedom. With the Bill of Rights not pertaining to the states during this time, many states still had officially established religions, and Connecticut was one of those states. The Danbury Baptists knew of Jefferson's leading role in the struggle to end state-established religion in Virginia and felt Jefferson would lend a sympathetic ear. However, in his response, Jefferson stated, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church [and] State."

[14] Zorach v. Clausen, 343 U.S. 306, 313–14 (1952) (writing for the majority, Justice Douglas stated, "We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and

Further, in 1962, *Engel v. Vitale*, saw the parents of ten students challenge a New York state law requiring public schools to begin each day with a prayer drafted by the State Board of Regents.[15] Supporting the *Engel* decision, a year later, the Court held that a Pennsylvania state law requiring "at least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day"[16] violated the Establishment Clause of the First Amendment.[17] "Public school children . . . have been, in effect, required by law to pray and have been regimented in their prayers. To establish such a religious exercise upon these citizens is an unconstitutional use of governmental authority."[18] In 1971, the Supreme Court constructed a three-pronged analysis, known as the *Lemon* test, which provided a model to measure the constitutionality of religious challenges in public schools.[19] In sum, the Court firmly

---

the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions.").

[15] Engel v. Vitale, 370 U.S. 421, 425 (1962) ("[W]e think that the 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 part of a religious program carried on by government.").

[16] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963).

[17] *Id.* at 225 ("[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. 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. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.").

[18] Boston, *supra* note 11, at 122 (quoting an undated press release from Americans United for Separation of Church and State).

[19] Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that government actions or practices violate the Establishment Clause if they do not have a valid non-sectarian purpose , advance or impede religion, or create excessive government entanglement with religion). Two other tests have been created since the *Lemon* test: the Endorsement Test and the Coercion Test. The Endorsement Test finds an Establishment Clause violation if the act or practice has a purpose or effect of endorsing or disapproving religion. The Coercion Test holds an act unconstitutional if it places direct or indirect government coercion on individuals to profess a faith. Lee v. Weisman, 505 U.S. 577 (1992). A crafty maneuver by state legislatures to amend these decisions can be seen in the attempt to couch prayer in silent meditation legislation. *See* Wallace v. Jaffree, 472 U.S. 38, 59 (1985) (The Court distinguished between implicitly allowing students an opportunity for voluntary prayer during "an appropriate moment of silence during the school day," and a moment of silence designed explicitly to favor prayer or other religious practices. The Court noted that a 1978 Alabama statute already protected students' rights to pray during the moment of silence and the only purpose for changing the statute was to highlight, endorse and

established a line between government intrusion and the freedoms of the individual—a concept which had lacked clarity.

I. FOUNDATIONAL ESTABLISHMENT CLAUSE CASE LAW

A. The First Amendment

Traditionally, the United States has promoted the ideal of individuals being able to express their beliefs in public fora.[20] Public schools are a prime setting for the expression of beliefs of students and, indirectly, parents. Public schools must balance students' rights to express individual beliefs with the perception or reality that the school is endorsing a particular religious message.[21] School administrators must be cognizant of church and state tension and ensure the school maintains a constitutional, viewpoint-neutral position.[22] This can be an arduous task. When an individual is prohibited from expressing his or her religious faith, it may cause conflict between public school stakeholders. Public school administrators are required to conciliate these conflicts, which may run contrary to the administrator's own personal beliefs and/or convictions. Having religious convictions that are contrary to jurisprudence can pose significant ethical dilemmas for leaders.

---

prefer prayer.); *see also* Brown v. Gilmore, 258 F.3d. 265, 270, 276 (4th Cir. 2001) (holding that a Virginia silent prayer statute authorizing a "daily observance of one minute of silence" in all classrooms so that pupils may "meditate, pray, or engage in any other silent activity" was neutral toward religion). *Compare* MICH. COMP. LAWS SERV. § 380.1565 (LexisNexis 2016) ("The board of education of a school district may by resolution provide the opportunity during each school day to allow students who wish to do so, the opportunity to observe time in silent meditation."), *with* FLA. STAT. § 1003.45(2) (2012) ("The district school board may provide that a brief period, not to exceed 2 minutes, for the purpose of silent prayer or meditation be set aside at the start of each school day or each school week in the public schools in the district.").

[20] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939). *See also* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate.").

[21] JEROME A. BARRON, C. THOMAS DIENES, WAYNE MCCORMACK & MARTIN H. REDISH. CONSTITUTIONAL LAW: PRINCIPLES AND POLICY, CASES AND MATERIALS 1431–32 (8th ed. 2012).

[22] *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that if secular community groups are allowed to use the public school after school hours to address particular topics, a sectarian group desiring to show a film series from a religious perspective cannot be denied public school access).

The First Amendment to the Constitution includes a simple, yet nebulous clause: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."[23] It restrains government intervention while protecting individual expressions of faith. Supporters who encourage religious practices in public schools have advocated a strict interpretation of the Establishment Clause, contending that states and public schools, as agents of the state, are not bound by this clause.[24] The suggestion that states are exempt from the Bill of Rights, or at least the First Amendment, had some plausibility early in American jurisprudential history. In *Barron v. Baltimore*,[25] the Court held that no part of the Bill of Rights, including the First Amendment, applied to the States.[26] Speaking for the majority, Chief Justice John Marshall said:

> These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them . . . [T]he fifth amendment . . . is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.[27]

Further, in *Permoli v. First Municipality of New Orleans*,[28] the Court held that "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."[29] Despite these rulings, all the states assumed the dual obligation of supporting the free exercise of religion and maintaining religious neutrality in their respective constitutions.[30] Every state that entered the union after the

---

[23] U.S. CONST. amend. I.
[24] Heritage Guide to the Constitution, *Establishment of Religion,* THE HERITAGE FOUND., http://www.heritage.org/constitution#!/amendments/1/essays/138/establishment-of-religion (last visited Apr. 8, 2017).
[25] 32 U.S. 243 (1833).
[26] *Id.*
[27] *Id.* at 250.
[28] 44 U.S. 589 (1845).
[29] *Id.* at 609.
[30] LEO PFEFFER, CHURCH, STATE, AND FREEDOM 140 (1953).

Constitution was ratified included a basic law or prohibition in its constitution regarding religion.[31] No state attempted "to establish any denomination or religion; on the contrary, in varying language but with a single spirit, all states expressly forbade such attempt."[32] "The decision was in all cases voluntary; and it was made because the unitary principle of separation and freedom was as integral a part of American democracy as republicanism, representative government, and freedom of expression."[33] The principle of separation of church and state was embedded in standard colonial thought and practice.

B. In God We Trust

In God We Trust—the national motto that adorns many government buildings and icons throughout the nation—has a compelling history. In fact, it was institutionalized by an act of Congress.[34] It is now used in conjunction with, or in some cases replaces altogether, the more traditional motto, *e pluribus unum* (out of many, one), used since the colonial era.[35] *E pluribus unum* captured the formation of the United States by defining it as a collection of many religions, cultures, factions, colonies, etc., that joined to become one nation.[36] The phrase, "In God We Trust" has its roots in the Civil War period when the motto was added to coins.[37] In 1956, the Nation was just over a decade removed from World War II, the Korean Conflict had just concluded, and the United States was on the brink of a nuclear

---

[31] *Id.* at 142.
[32] *Id.*
[33] *Id.*
[34] Patriotic Societies and Observances Act, 36 U.S.C. § 302 (1956).
[35] *See* Candida Moss, *"In God We Trust" Doesn't Mean What You Think It Does*, THE DAILY BEAST (Jan. 24, 2016), http://www.thedailybeast.com/articles/2016/01/24/dear-atheists-don-t-fear-in-god-we-trust.html. *See also*, Monroe E. Deutsch, *E Pluribus Unum*, 18 THE CLASSICAL JOURNAL, 387, 392 (1923).
[36] *See* Deutsch, *supra* note 35 at 393.
[37] Moss, *supra* note 35 ("The use of the phrase "In God We Trust" in U.S. currency first appeared in 1864. Salmon P. Chase, Lincoln's Secretary of the Treasury in the middle of the Civil War, received a letter from a Pennsylvanian minister requesting some recognition of God in a national motto.").

war with Russia.[38] The threat of imminent annihilation was reported in newspapers and the Emergency Broadcast System's off-putting siren permeated from the television set announcing civilian alert protocols.[39] Many people in America sought a belief in a Christian God for guidance and protection in a modern and frightening period.[40] This fear opened the door for leaders of the Religious Right to push for greater expressions of the Christian faith in the public arena.[41] To combat Godless communism, Congress enacted legislation which placed the motto "In God We Trust" on paper currency ("under God" was added to the Pledge of Allegiance around the same time).[42] Those that supported Christianity in the public sector also sought the adoption of more religious (Christian) rhetoric in public schools.[43]

Paradoxically, Christian sectarians consistently argue that the framers of the Constitution intended for Christianity to be the foundation on which all public governance would rely.[44] They have described the founders of the United States as men of intense Christian faith.[45] These advocates claim the founders

---

[38] *The United States and Soviet Union Step Back from the Brink of Nuclear War,* HISTORY CHANNEL, http://www.history.com/this-day-in-history/the-united-states-and-soviet-union-step-back-from-brink-of-nuclear-war (last visited Apr. 20, 2017).

[39] Dennis Mersereau, *There's a Meaning to the Horrible Noise the Emergency Alert System Makes,* THE VANE (May 18, 2015), http://thevane.gawker.com/theres-a-meaning-to-the-horrible-noise-the-emergency-al-1705168960.

[40] Interview by Terry Gross with Kevin Kruse, Professor of History, Princeton University, NPR (Mar. 18, 2015), http://www.npr.org/2015/03/30/396365659/how-one-nation-didnt-become-under-god-until-the-50s-religious-revival.

[41] *See id.*

[42] Act of July 11, 1955, Pub. L. No. 84-140, 69 Stat. 290; *see also* Interview by Terry Gross with Kevin Kruse, Professor of History, Princeton University, NPR (Mar. 18, 2015), http://www.npr.org/2015/03/30/396365659/how-one-nation-didnt-become-under-god-until-the-50s-religious-revival.

[43] *See* Geier, *supra* note 12, at 66.

[44] *See, e.g.*, Mark David Hall, *Did America Have a Christian Founding?*, THE HERITAGE FOUND. (June 7, 2011), http://www.heritage.org/research/lecture/2011/06/did-america-have-a-christian-founding; Michael Medved, *The Founders Intended a Christian, Not Secular, Society*, TOWNHALL (Oct. 3, 2007), http://townhall.com/columnists/michaelmedved/2007/10/03/the_founders_intended_a_christian,_not_secular,_society; Dave Miller, *Christianity is in the Constitution*, APOLOGETIC PRESS, https://apologeticspress.org/apcontent.aspx?category=7&article=2556 (last visited Dec. 14, 2016).

[45] Steven K. Green, *God is Not on Our Side: The Religious Right's Big Lie About the Founding of America,* SALON (June 28, 2015), http://www.salon.com/2015/06/28/god_is_not_on_our_side_the_religious_rights_

were descendants of those who fled the European continent in search of religious liberties—the freedom to practice the purist of Christian doctrines.[46] They have imbued our founders, such as Jefferson, Adams, and Franklin, with the presumed Christian piety of their forefathers.[47] This natural transfer of Christian belief would most assuredly be their foundation for the creation of the Nation. However, this historical notion is in error.[48]

Absent in the Constitution is specific language that describes a specific deity which must be worshipped for effective governance of the Nation. The Declaration of Independence stopped short of divinization of a specific deity. Founding father Thomas Jefferson may have referred to "God" but not the "God" traditionally recognized by Judeo-Christian faiths:

> By invoking 'the Laws of Nature and of Nature's God' rather than the Judeo-Christian God, it made clear that it was not a Christian document, that it did not reflect uniquely Christian or Judeo-Christian beliefs, and that it was not 'a bridge between the Bible and the Constitution.' To the contrary, it rejected Christianity, along with other organized religions, as a basis for governance, and it built a wall – rather than a bridge – between the Bible and the Constitution.[49]

By penning the Declaration of Independence, Jefferson sought to attack "two claims of absolute authority – that of any

---

big_lie_about_the_founding_of_america/?utm_source=facebook&utm_medium=socialflow.

[46] *Id.*

[47] Bill Flax, *Was America Founded as a Christian Nation?,* FORBES (Sept. 25, 2012), http://www.forbes.com/sites/billflax/2012/09/25/was-america-founded-as-a-christian-nation/#20b13c3f4cd9.

[48] *See, e.g.*, PFEFFER, *supra* note 30 (throughout this work, Pfeffer lists George Washington, Patrick Henry, George Mason, James Madison, Benjamin Franklin, Thomas Paine, John Adams and Thomas Jefferson as the most prominent leaders of the time who were influenced by deism or Unitarianism. Jefferson, Adams, and Franklin were three leaders of the aforementioned group who sat on the committee to draft the Declaration of Independence).

[49] ALAN DERSHOWITZ, BLASPHEMY: HOW THE RELIGIOUS RIGHT IS HIJACKING OUR DECLARATION OF INDEPENDENCE 53 (2007) (affirming the notion that a major founding father did not espouse the tenet that the Nation was uniquely created by a Judeo-Christian god, which is anathema to the present Conservative philosophy that the Nation was founded as strictly a Christian nation).

government over its subjects and that of any religion over the minds of men."[50] However, the fact that God was included in this non-sectarian document provides some confusion as to why Thomas Jefferson, a religious skeptic, would include the reference at all.

The inclusion of the Judeo-Christian God, or even the idea of a God of nature, which Jefferson conjectured to be the bona fide deity of the universe, may give the impression that he was religious and/or supported the inclusion of religious thought in the public sector. An acute study of Jefferson's time, in contrast with today's society, provides some resolution to this query. A modern reading might support the conclusion that the reference to God in the Declaration of Independence meant Jefferson and the founders intended to create a Christian nation. However, for those that were reading the document in the late eighteenth century, their paradigm for analysis was much different, and Jefferson's rejection of clericalism was unambiguous.[51] "The Declaration of Independence was a resounding defeat for organized religion in general and traditional Christianity in particular."[52]

If the framers had intended to create a Christian nation with no ambiguities, dogmatic terms such as "God," "Lord God," "Almighty God," or "Jesus Christ," would have been incorporated into the Nation's foundational documents.[53] Further evidence of the framer's intent is found in a treaty signed with the Barbary Coast signed by John Adams,[54] which was subsequently approved by the Senate, included the clause, "the government of the United States is not in any sense founded on the Christian religion."[55] This is noteworthy since John Adams also served on the drafting committee for the Declaration of

---

[50] ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY, AND THEOLOGY 174 (1998).
[51] DERSHOWITZ, *supra* note 49, at 56.
[52] *Id.*
[53] *Id.*
[54] EDMOND S. MORGAN, BENJAMIN FRANKLIN 29 (Yale Univ. Press 2002); *see also* John Fea, *Religion in Early Politics: Benjamin Franklin and his Religious Beliefs*, PENNSYLVANIA HERITAGE (2011) (Benjamin Franklin was another distinguished father of the United States who proffered his belief of being "a thorough deist" who "[re]jected his Christian upbringing").
[55] Treaty of Peace and Friendship between the United States of America and the Bey and Subjects of Tripoli of Barbary, art. 11, November 4, 1796, 8 Stat, 154.

Independence.[56] The absence of recognition of a formal deity in the Declaration of Independence and the fact that President John Adams declared the United States is not founded on the Christian religion as detailed in the Treaty is not mere happenstance.[57] It demonstrates a theoretical principle of separation of church and state in the creation of national documents practically applied in foreign affairs of the Nation. In support of the bifurcation of religion and state matters, other scholars contend that the authors of the Constitution intended for the Nation to be constructed as a secular state. For example, Frank Lambert concluded:

> By their actions, the Founding Fathers made clear that their primary concern was religious freedom, not the advancement of a state religion. Individuals, not the government, would define religious faith and practice in the United States. Thus the Founders ensured that in no official sense would America be a Christian Republic. Ten years after the Constitutional Convention ended its work, the country assured the world that the United States was a secular state, and that its negotiations would adhere to the rule of law, not the dictates of the Christian faith. The assurances were contained in the Treaty of Tripoli of 1797 and were intended to allay the fears of the Muslim state by insisting that religion would not govern how the treaty was interpreted and enforced. John Adams and the Senate made clear that the pact was between two sovereign states, not between two religious powers.[58]

The spirit of dogmatism and bigotry Adams saw in clergy and laity alike repelled him.[59] Adams concurred with Jefferson's rejection of the Holy Trinity in favor of the "God of nature," as evidenced by the following missive to Jefferson:

---

[56] *See* FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 11 (Princeton Univ. Press 2006).
[57] *See id.*
[58] *See id.*
[59] DAVID MCCULLOUGH, JOHN ADAMS 37 (Simon & Schuster 2001).

> The question before the human race is whether the God of nature shall govern the world by His own laws, or whether priests and kings shall rule it by fictitious miracles? Or, in other words, whether authority is originally in the people? Or whether it has descended for 1800 years in a succession of popes and bishops, or brought down from heaven by the Holy Ghost in the form of a dove in a phial of holy oil.[60]

The spirit of Jefferson and Adams is reflected in the careful choice of language used in the Constitution and Bill of Rights.

II. A COMPENDIUM OF RELIGION IN PUBLIC SCHOOLS

Public schools are the epicenter of activity for many local communities. For most students and parents, they will attend a public school at some point in their educational career.[61] Because all students are eligible and entitled to a public education, by nature of their attendance they are bringing their religiosity into this cauldron of culture. If world history has been any guide to the passion and ire that religion can raise among individuals, it is no surprise that religion has also caused titanic conflicts in public schools.

A review of the history of religion in American public schools reveals limited judicial interventions prior to 1945[62] and jurisprudential confusion between 1945 and 1971.[63] Until about 1940, daily prayer, recitation of religious materials, and the recitation of the Pledge of Allegiance,[64] were widely accepted—

---

[60] Letter from John Adams to Thomas Jefferson (June 20, 1815), *in* CORRESPONDENCE OF JOHN ADAMS AND THOMAS JEFFERSON: 1812-1826 112 (1925).
[61] Jack Jennings, *Proportion of U.S Students in Private Schools is 10 Percent and Declining*, HUFF. POST (Mar. 28, 2013), http://www.huffingtonpost.com/jack-jennings/proportion-of-us-students_b_2950948.html.
[62] John M. Flynn, *Constitutional Law – Accommodation of Religion – The Answer to the Invocation Dilemma* – Jager v. Douglas County School District, 24 WAKE FOREST L. REV. 1045, 1050 (1989).
[63] *Id.* at 1052.
[64] *See* West Virginia State Bd. of Educ. v. Barmette, 319 U.S. 624 (1943) (stating the Pledge of Allegiance has its own separate and distinct history of controversy. Because of Supreme Court contests including Jehovahs' Witnesses families who requested their students not say the Pledge in violation of the Bible's First Commandment, "Thou shall have no other gods before me," public schools were forbidden to require students to honor the nation by reciting the Pledge of Allegiance. When the Supreme Court held that a school district could not force

even expected in public schools. It was not until the 1960s that the Court built a foundation of case law upholding the proverbial "wall separating church and state."[65]

To maintain separation of church and state, the Supreme Court has provided guidance as to the constitutionality of various religious expressions. This, of course, requires a balance of the prohibitions of the Establishment Clause with the rights of the Free Exercise Clause, which affords significant protection to students practicing their religion at school.[66]

A. Pre-1945 Case Law

An analysis of the Establishment Clause in the First Amendment can be conveniently categorized into two segments leading up to 1971.[67] The two categories are from the First Amendment's passage in 1791[68] to 1945 and from 1945 until the *Lemon v. Kurzman*[69] decision in 1971. For nearly a century after "the adoption of the First Amendment, no petitioner argued before the Court that a law violated the Establishment Clause."[70] During this period there were two cases that implicitly dealt with the Establishment Clause.

In the first case, *Terret v. Taylor,*[71] the Supreme Court assessed laws passed by the Virginia legislature, which would have divested the Episcopal Church of lands it had acquired before the American Revolution.[72] The Court found against the statues giving tremendous deference for religion and a willingness for religion to prosper at state expense.[73] In *Vidal v.*

---

someone to say something he or she did not believe, a new era in religious jurisprudence began that provided verve for the authority of the Establishment Clause).

[65] Flynn, *supra* note 62, at 1056–57.

[66] U.S. CONST. amend. I.

[67] Flynn, *supra* note 62, at 1050.

[68] *Id.* (citing GERALD GUNTHER, CONSTITUTIONAL LAW (11th ed. 1985)).

[69] 403 U.S. 602 (1971).

[70] Henry T. Miller, *Constitutional Fiction: An Analysis of the Supreme Court's Interpretation of the Religion Clauses,* 47 LA. L. REV. 169, 187 (1986).

[71] 13 U.S. 43 (1815).

[72] *Id.* at 51.

[73] *Id.* at 52 (basing its holding on "the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals . . .").

Gerard's Executors,[74] the Court held that money left by Gerard to establish a school for boys with the caveat that "no ecclesiastic, missionary, or minister . . . shall ever hold or exercise any station or duty"[75] in the school was not incompatible with Pennsylvania common law because the testator's will would allow the teaching of Christianity, simply not by clergy, thus a complaint could not be legally supported.[76] These cases demonstrate the Court's generally neutral position towards education.

The Supreme Court's first Establishment Clause case came in 1899. In *Bradfield v. Roberts*,[77] the appellant argued that a congressional act giving money to a Roman Catholic hospital for maintenance constituted the establishment of religion.[78] The Court disagreed with this argument declaring that the money was appropriated for a secular purpose of maintaining a hospital and not advancing religion.[79] Nearly twenty years later, in *Arver v. United States*,[80] the Court summarily rejected as unsound an Establishment Clause challenge to a federal statute requiring conscientious objectors to perform noncombatant military service.[81] Finally, in 1930, a Louisiana statute allowing the distribution of books at state expense to children attending private schools was attacked as violative of the Establishment Clause.[82] The Court rejected the argument, claiming the secular purpose of education did not interfere with religion.[83] To sum, during this pre-1945 period, the Court was most concerned with protecting religion from state intrusion. As described, laws were made allowing religion to flourish.[84] It would not be until the post–1945 period that the principle concern of the Court would

---

[74] 43 U.S. 127 (1844).
[75] *Id.* at 133.
[76] *Id.* at 199–200.
[77] 175 U.S. 291 (1899).
[78] *Id.* at 295.
[79] *Id.* at 299–300 (holding that the hospital was incorporated under an act of Congress and its property was acquired in its own name for its own purpose and it was not under supervision or control by any ecclesiastical authority).
[80] 245 U.S. 366 (1917).
[81] *Id.* at 390.
[82] Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930).
[83] *Id.* at 375 (declaring that "[t]he legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded").
[84] *See id.*; *see also* Vidal v. Phila, 43 U.S. 127 (1844).

shift and it would seek to protect the state from religious influence.

B. Post-1945 Case Law

The imbroglio that occurred during the period of 1945 to 1971 regarding religion and public schools is due in large part to different standards that were applied by the Supreme Court to similar cases.[85] The most intelligible method by which to analyze Establishment Clause jurisprudence during this period is to divide the cases into two categories: those that violated the Establishment Clause and those that did not.

During this period, the Court began shifting its focus in safeguarding religion in the public realm to removing religion from the public sphere. The concept of neutrality became the general philosophy of the Court in some Establishment Clause decisions.[86] In 1948, the Champaign Council on Religious Education, a voluntary association, obtained permission to give religious instruction in public schools in Illinois.[87] The Court determined that the State's tax-supported public schools were being used for a religious purpose and that the State was helping to provide an audience for the instruction by allowing the schools to be used in that manner.[88] A seminal case that is frequently cited regarding public schools and religion, *Engle v. Vitale*,[89] struck down a mandate by the New York Regents (a government agency overseeing public education), which required the recitation of a daily prayer in public school classrooms.[90] In *School District of Abington Township v. Schempp*,[91] the Court held unconstitutional a Pennsylvania statue, which required prayer and Bible reading in the public schools.[92] More significant than the actual holding was the Court's method of analysis.[93] Justice

[85] *Compare* Zorach v. Clauson, 343 U.S. 306 (1952), *with* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (involving release time programs for public schools but resulted in different holdings by the Supreme Court).
[86] *See* Epperson v. Arkansas, 393 U.S. 97 (1968).
[87] Illinois *ex rel.* McCollum, 333 U.S. at 203 (1948).
[88] *Id.* at 212.
[89] 370 U.S. 421 (1962).
[90] *Id.*
[91] 374 U.S. 203 (1963).
[92] *Id.*
[93] Flynn, *supra* note 62, at 1053.

Clark established for the Court a two-prong test that looked first for a secular purpose and second for the effect of the challenged law.[94] Finding no secular purpose for the prayer or Bible reading, the Court declared the statute unconstitutional.[95]

However, during the same period, the court also supported the continued relationship between the state and religion in schools. In 1947, a New Jersey law allowed public funds to be spent on the transportation of students to parochial schools.[96] By not reviewing the motive of the legislature or effect of the statute, the Court held that the transportation of all students, irrespective of whether they attend a parochial or public school, should receive equal treatment, and may, thus, be transported to school supported by public funds.[97] In *Zorach v. Clauson*,[98] the Court recognized a new trend, "release time," as constitutional. The New York law allowed students to leave school grounds to receive religious instruction and participate in devotional exercises.[99] The "release time" program involved neither religious instruction in public school classrooms nor the expenditure of public funds.[100] Students whose families chose not to participate in the release program stayed at school.[101] These holdings show a trend during this period to accommodate religion in the public sphere, reminiscent of its position during its first 150 years.[102]

This period of judicial analysis amplifies the Court's use of an *ad hoc* formula to make judgments regarding religion in public schools.[103] The Court's uncertainty in the post–1945 period provided the setting for some statutes to be found unconstitutional, while others passed constitutional muster. The modification in judicial approach can be characterized thusly:

---

[94] Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 222 (1963).
[95] *Id.* at 224–225.
[96] Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947).
[97] *Id.*
[98] 343 U.S. 306 (1952).
[99] *Id.* at 308.
[100] *Id.* at 308–09.
[101] *Id.* at 308.
[102] Flynn, *supra* note 62, at 1054–56.
[103] *Id.* at 1056.

> The Court's shift in interpretation corresponds with a change in the American philosophy of law. Since the late nineteenth century the Court has rejected the natural law theory in favor of theories which associate laws with utility or policy, and general morality with religion. The Court now follows a legal theory which is generally hostile to aid, encouragement, or support of religion, because under the utility or policy theory of law, any statute which encourages and affects religion is viewed as the union of church and state.[104]

The decisions finding violations between 1945 and 1971 demonstrate an increased reticence toward religion during the twentieth century.[105] Several cases during this period provide foundational elements for the next wave of Establishment Clause cases.[106]

C. The Lemon Test

In 1971, the Supreme Court was called upon to rule on the constitutionality of two state acts, one from Pennsylvania and one from Rhode Island.[107] Each State took advantage of the vagueness of the holding in *Board of Education of Central School District No. 1 v. Allen*,[108] in which States attempted to give public funds to parochial schools.[109] In Pennsylvania, the state legislature enacted a law, which provided reimbursement to nonpublic schools for costs of teachers' salaries (so long as they did not teach religion), textbooks, and instructional materials.[110] In Rhode Island, teachers in nonpublic elementary schools were paid a 15% supplement to their annual salaries.[111] The Supreme

---

[104] Miller, *supra* note 70, at 190.
[105] Flynn, *supra* note 62, at 1057.
[106] *Id.*
[107] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[108] 392 U.S. 236 (1968) (the holding created many questions on the part of both public and parochial schools. The language was unclear, failing to delineate First Amendment restrictions in providing state aid to parochial schools. The public purpose theory was applied so that the state could give assistance to religious schools so long as the aid was provided for only secular services).
[109] *Id.*
[110] *See Lemon*, 403 U.S. at 607.
[111] *Id.*

Court struck down the statutes of both States and provided its now famous three-prong test to determine constitutionality.[112]

Lemon gave direction to whether a state statute or other state action is constitutional under the Establishment Clause of the First Amendment with three tests:

(1) The statute must have a secular legislative purpose;
(2) Its principal or primary effect must be one that neither advances nor inhibits religion;
(3) It must not foster excessive government entanglement with religion.[113]

In regards to the specific state statutes at issue in *Lemon*, the Court found no basis in the legislative history of either statute by which to conclude that either legislature intended anything other than a secular purpose.[114] The Court also concluded that there was clearly excessive entanglement between government and religion in both states and an analysis of the primary effect was not warranted.[115] As for Rhode Island, the Court held that the statute would allow for the presence of teachers of religion in public schools.[116] The Court further noted, "[w]e cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education."[117] Thus, the mere potential for conflict was enough to violate the entanglement prong.[118] The Pennsylvania statue had a similar infirmity.[119] The Court noted, "the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state."[120] The Supreme Court developed a new formula by which challenges to the separation of church and state would be evaluated, and while alternative legal theories have developed, the *Lemon* test remains foundational in Establishment Clause challenges.

---

[112] *Id.* at 613–14.
[113] *Id.*
[114] *Id.* at 613; *see* Flynn, *supra* note 62, at 1058.
[115] Flynn, *supra* note 62, at 1058.
[116] *See* Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970).
[117] *Lemon*, 403 U.S. at 617.
[118] Flynn, *supra* note 62, at 1058.
[119] *Id.*
[120] *Lemon*, 403 U.S. at 620–21.

III. MODERN CASE LAW

Despite the seemingly well-settled principals set forth in *Lemon v. Kurtzman*[121] regarding the Establishment Clause and prayer in public schools, teachers, administrators, and coaches continued to engage in religious activities with students for decades. Cases in the First, Second, Third, Fourth, Fifth, and Eleventh Circuits help expand on the rules established in *Lemon* and possible outcomes in other circumstances.

A. Other Tests

In addition to the three-pronged test used in *Lemon v. Kurtzman*,[122] the Supreme Court and lower federal courts have used two additional tests, creating a "trilogy of tests"[123] used in determining whether a state agent's actions violated the Establishment Clause: the endorsement test and the coercion test.

1. The Endorsement Test

As noted in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter et al.*,[124] in cases following *Lemon*, courts considered whether the state action or practice "has the purpose or effect of 'endorsing' religion."[125] The Court noted, "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[126] The Court's prohibition of government "endorsement" or

---

[121] *Id.* at 602.
[122] *Id.*
[123] *See* Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989).
[124] *Id.*
[125] *Id.* at 592; *see also* Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. Of Grand Rapids v. Ball, 473 U.S. 373 (1985); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (holding that Alabama's moment-of-silence statute was unconstitutional because it was enacted "for the sole purpose of expressing the State's endorsement of prayer activities."); Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (holding Louisiana's "Creationism Act" unconstitutional because its purpose was to endorse religion); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) (limiting tax exemptions to religious periodicals "effectively endorses religious belief").
[126] *Allegheny*, 492 U.S. at 593–94 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

"promotion"[127] of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*."[128] The Court warned that such state actions can have the effect of making non-adherents feel like outsiders, ostracized from the community, and adherents feel like favored members.[129]

Whether a state action constitutes an endorsement of religion is not a matter of subjectivity; the endorsement test requires the court to take the viewpoint of an "objective observer, acquainted with the [context], legislative history, and implementation of the statute."[130] Context can be particularly important in how a state action is perceived.[131] This is evident in two Supreme Court cases that both addressed the display of crèches at Christmas, a symbol, which by itself is religious in nature. In *Lynch v. Donnelly*,[132] the Court concluded that a crèche displayed as part of a larger holiday display that included other non-religious symbols depicting the origins of the Christmas holiday did not constitute an endorsement of religion.[133] However, in *County of Allegheny*, the Court determined that a crèche, standing alone as a single element of display including an angel saying "[g]lory to God in the Highest!" was an endorsement of Christian religious belief.[134] Therefore, in determining the constitutionality of the actions of public school coaches, coaching staff, band directors, and other state actors, courts must look not only at the action itself, but if the action

---

[127] Courts use both terms to describe the same government actions. *See Allegheny*, 492 U.S. at 593 (noting that "whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same."); *Wallace*, 472 U.S. at 59–60.
[128] *Allegheny*, 492 U.S. at 593 (quoting *Wallace*, 472 U.S. at 70).
[129] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000).
[130] *Wallace*, 472 U.S. at 76. In *S.D. v. St. Johns Cty. Sch. Dist.*, the court noted, "The question as to whether certain conduct violates the Establishment or Free Exercise Clause is objective and based on a First Amendment analysis that is largely independent from individual feelings of indignity or personal affront." 632 F.Supp.2d 1085, 1092 (M.D. Fla. 2009).
[131] Freedom from Religion Found. v. Hanover Sch. Dist., 626 F.3d 1, 12 (5th Cir. 2010).
[132] 465 U.S. 668 (1984).
[133] *Id.* at 669.
[134] *Allegheny*, 492 U.S. at 598–600 (noting that the crèche was the setting for the county's annual Christmas-carol program and that it bore a sign disclosing ownership by a Roman Catholic organization; the Court determined that both of these facts further supported the conclusion that the crèche constituted an endorsement of religion).

would be perceived by an objective observer in context as an endorsement of religion.

2. The Coercion Test

In *Lee v. Weisman*,[135] pursuant to district policy for middle and high schools, a public school principal invited a local religious leader to give an invocation and benediction prayer at the middle-school graduation ceremony.[136] The rabbi gave a nonsectarian prayer, as he was instructed, just following the Pledge of Allegiance.[137] Based on these facts, the Court found the district policy allowing such religious demonstrations at middle and high school graduation ceremonies to be so blatantly unconstitutional that it did not deem it necessary to discuss complicated issues of religious accommodation or controlling precedent for religious exercise in primary and secondary public schools.[138] Writing for the majority, Justice Kennedy wrote,

> The 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.[139]

Justice Kennedy went on to write that any attempt to accommodate the free exercise of religion cannot supersede the limitations imposed by the Establishment Clause.[140] He stated, "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ."[141]

While the Court did note that participation in graduation ceremonies was voluntary, it found that students were subject to

---

[135] 505 U.S. 577 (1992).
[136] *Id.*
[137] *Id.* at 581–86.
[138] *Id.* at 586–87; *see also* S.D. v. St. Johns Cty. Sch. Dist., 632 F. Supp. 2d 1085, 1092 (M.D. Fla. 2009) (noting, "the analysis is not effected by whether the student was or was not offended by the school district's conduct").
[139] *Weisman*, 505 U.S. at 587.
[140] *Id.* at 587–99.
[141] *Id.* at 587.

peer-pressure to attend the graduation and to participate, even if tacitly, in the religious exercises by standing and remaining silent.[142] The coercion "need not be direct to violate the Establishment Clause, but rather can take the form of 'subtle coercive pressure' that interferes with an individual's 'real choice' about whether to participate in the activity at issue."[143]

B. Contemporary Prayer Cases

In reviewing actions of state actors that may constitute religious exercise, particularly when conducted in front of or with primary or secondary school students, courts may use one or all of the aforementioned tests. In extreme cases, like the one described in *Lee*, a court may not find it necessary to use all three tests. However, in less clear cut cases, the use of multiple tests may provide courts with more nuanced analyses. In this section, we will discuss how these tests have been applied to more contemporary cases involving K-12 public school students and sports (sporting events, interactions with coaches, etc.).

1. Student-Initiated Prayer

In 2000, the Supreme Court took on the issue of student-led prayer at high school football games. In *Santa Fe Independent School District v. Doe*,[144] students filed suit against the school

---

[142] *Id.* at 593; *see also*, Freedom from Religion Found. v. Hanover Sch. Dist., 626 F.3d 1, 12 (5th Cir. 2010).

[143] *Freedom from Religion Found.*, 626 F.3d at 12 (quoting *Lee*, 505 U.S. at 592). Federal courts have considered prayer at different ceremonies and meetings associated with public schools and the primary factor in determining whether the Establishment Clause applies is whether children are present as part of the formal school day or at a school event. The same rules may not apply for a school board meeting. In *Doe v. Tangipahoa Parish School Board*, the court considered whether an opening prayer given by a member of the clergy at a school board meeting violated the Establishment Clause. 631 F.Supp.2d 823 (E.D. La. 2009). The United States District Court for the Eastern District of Louisiana concluded that a school board was a governing body and thus more like a legislature than a school. They applied the holding in *Marsh v. Chambers*, 463 U.S. 783 (1983), "because the opening of legislative sessions with the recitation of prayer is deeply embedded in the 'unique history' and tradition of this country, the Supreme Court upheld as constitutionally permissible the Nebraska state legislature's practice of beginning each session with a prayer from a chaplain, even one paid by the state." *Id.* at 835 (summarizing *Marsh*, 463 U.S. at 790–93). However, Marsh stipulated that "[t]he content of the prayer is not a concern to judges [when] there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794–95.

[144] 530 U.S. 290 (2000).

district for permitting, and perhaps endorsing, prayer before the football games.[145] The school district argued that because the prayers were student-initiated and student-led they were private speech protected by the Free Exercise Clause.[146] The Court did not agree.[147] Justice Stevens, writing for the majority, argued a number of the school district's actions raised alarm, clearly endorsing religion.[148] First, he noted that the pre-football invocations were given by a student who held the school-elected position of student council chaplain.[149] The district argued that the invocation constituted a free exercise of religion by a student elected by his or her peers.[150] However, the Court concluded that any attempts by the district to disentangle itself from religious speech through the two-step student election process were futile; the election itself was conducted because the board chose to permit a student-led prayer.[151] Second, Justice Stevens noted that the invocations were authorized by the school and took place on government property at a government-sponsored school-related event.[152] Therefore, while the speech was delivered by a student, the school's endorsement of the speech made it government speech for purposes of the Establishment Clause.[153]

The Court acknowledged that not all speech given in government forums constitutes government-sponsored speech, particularly when the government has created an open forum or limited public forum for individual free speech.[154] However, by limiting the pre-game ceremony to one prayer given by a single student, the school had not created an open forum, open to other individual expressions of free speech.[155] Furthermore, the school limited the student's prayer to messages that were nonsectarian and non-proselytizing, thus precluding the creation of a limited

---

[145] *Id.* at 294–95.
[146] *Id.* at 302.
[147] *Id.* at 309–10.
[148] *Id.* at 308–10.
[149] *Id.* at 309.
[150] *Id.* at 301–304.
[151] *Id.* at 305–06.
[152] *Id.* at 303.
[153] *Id.*
[154] *Id.* For example, sharing one's opinion at a government-sponsored public debate would not constitute government sponsored speech. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 894–95 (1995).
[155] *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 304.

public forum because the speech itself was state controlled.[156] Thus, the Court concluded that school district's policy allowing the student council chaplain to give an invocation at the beginning of each home football was "invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events."[157]

In a recent conflict at Kountze High School, the football cheerleaders created a traditional run-through banner in which football players tore through in the pregame ceremony encouraging school spirit.[158] Typically, these banners provide encouragement to the team by giving support or even messages wishing for the defeat of the opposition. The Kountze cheerleaders exceeded this tacit canon by placing religious missives on the banner.[159] Recognizing this act had the potential of positioning the District in violation of the Establishment Clause, school administrators requested the cheerleaders no longer include religious messages on the run-through banners.[160] The cheerleaders, supported by their parents, immediately sought an injunction against the school district allowing them to continue with their practice.[161] The district court concurred with the cheerleaders allowing them to continue with their practice.[162] In May 2013, the district court, in a very succinct decision, held that the cheerleaders were employing their free speech rights and their activities did not require the school district to violate the Establishment Clause.[163] The school district permitted the

[156] *Id.*
[157] *Id.* at 317.
[158] Kountze Indep. Sch. Dist. v. Matthews, 482 S.W.3d 120, 124–126 (Tex. App. 2016).
[159] Order on Plaintiff's Application for Temporary Injunction at 4, Matthews v. Kountze Indep. Sch. Dist. No. 53526 (Dist. Ct. Tex. Oct. 18, 2012) (No. 53526). *See* Brett A. Geier, *supra* note 12, at 70.
[160] Order on Plaintiff's Application for Temporary Injunction at 4, Matthews v. Kountze Indep. Sch. Dist. (Dist. Ct. Tex. Oct. 18, 2012) (No. 53526). *See* Brett A. Geier, *supra* note 12, at 70.
[161] Order on Plaintiff's Application for Temporary Injunction at 4, Matthews v. Kountze Indep. Sch. Dist. (Dist. Ct. Tex. Oct. 18, 2012) (No. 53526). *See* Brett A. Geier, *supra* note 12, at 70.
[162] Order on Plaintiff's Application for Temporary Injunction at 4-22, Kountze Indep. Sch. Dist. (Dist. Ct. Tex. Oct. 18, 2012) (No. 53526).
[163] Summary Judgment Order at 2, Kountze Indep. Sch. Dist. (Dist. Ct. Tex. May 8, 2013) (No. 53526).

banners with Bible verses to be raised at sporting events and filed an appeal.[164] The Texas Court of Appeals noted that since the school district was permitting the banners the case was moot.[165] The plaintiff cheerleaders challenged that the school district's voluntary cessation prohibiting the banners did not render their claim for prospective relief moot.[166] The Texas Supreme Court accepted the interlocutory appeal and reversed the court of appeals judgement stating that the "[d]istrict's voluntary abandonment here provides no assurance that the District will not prohibit the cheerleaders from displaying banners with religious signs or messages at school-sponsored events in the future."[167] In our opinion, the district and state supreme courts failed to accurately employ previous case law and Establishment Clause intent by permitting religious missives by students participating on school-sponsored teams at co-curricular activities managed by the public school.[168]

A final recent example comes from New York where a student wanted to end her graduation speech at a public middle school by stating, "may the LORD bless you and keep you; make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace."[169] The school district believed the student's message was too religious and a reasonable observer would perceive the student's speech as being endorsed by the middle school.[170] The student argued the remarks were her private free speech and the school censored them as a result of viewpoint discrimination.[171] Losing in the Second Circuit, the student applied for *writ of certiorari* with the Supreme Court, which was denied.[172]

2. Coach-Initiated/Led Prayer

---

[164] Kountze Indep. Sch. Dist. v. Matthews, 482 S.W.3d 120, 123 (Tex. App. 2014).
[165] *Id.* at 124.
[166] Mathews, on behalf of M.M. v. Kountze Indep. Sch. Dist., 484 S.W.3d 416, 417 (Tex. 2016).
[167] *Id.* at 420.
[168] Geier, *supra* note 12, at 84–88.
[169] A.M. *ex rel.* McKay v. Taconic Hills Cent. Sch. Dist., No. 12-753-cv, 2013 WL 342680, at *5 (2d Cir. Jan. 2013), *cert denied,* 134 S.Ct. 196 (2013).
[170] *Id.* at *8.
[171] *Id.*
[172] *Id.*

The Court considered the constitutional limits of coach led prayer in public school athletics in *Doe v. Duncanville Independent School District*.[173] In 1988, Jane Doe enrolled as a seventh grade student in Duncanville Independent School District (DISD).[174] After qualifying for the girls' basketball team, she was enrolled in a special athletics class specially designed for the team held during the last period of the school day.[175] Doe received academic credit for the class and for her participation on the basketball team.[176] During her first class, Doe learned the following:

> [T]he girls' basketball coach, Coach Smith, included the Lord's Prayer in each basketball practice. The basketball team also said prayers in the locker rooms before games began, after games in the center of the basketball court in front of spectators, and on the school bus travelling to and from basketball games. Coach Smith initiated or participated in these prayers. These prayers had been a tradition for almost twenty years.[177]

At first, Doe participated in the prayers so she would fit in with her teammates.[178] However, when she told her father that she preferred not to participate, he encouraged her to discontinue her participation.[179] Her lack of participation immediately attracted attention from her teammates, spectators, and teachers.[180] Doe's history teacher reportedly referred to Doe as a "little atheist."[181] Doe's father complained to the superintendent, who stopped the prayers at the pep rallies but said there was nothing he could do about the post-game prayers.[182]

Doe also participated in choir from seventh to twelfth grade, for which she received academic credit.[183] The theme song

---

[173] 70 F.3d 402 (5th Cir. 1995).
[174] *Id.* at 404.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*

identified for the seventh and eighth grade choruses was "Go Ye Now in Peace," based on Christian text.[184] In high school choir, she was required to sing another Christian theme song, "The Lord Bless You and Keep You," which had reportedly been the choir's theme song for over twenty years.[185] They would sing the theme songs at the end of class each Friday, at some concerts, and in competitions.[186]

Doe filed an application for a restraining order and a preliminary injunction forbidding DISD from allowing its employees from leading, encouraging, promoting, or participating in "prayer with or among students during curricular or extra-curricular activities, including sporting events."[187] The court used the "triad of tests" to identify violations of the Establishment Clause, breaking the case up into analyses of prayer at curricular and extra-curricular activities, the choirs' theme songs, and the distribution of the Gideon Bible to fifth grade students.[188] For the first part, the court considered DISD's prohibitions on employee participation of prayer.[189] With regards to employee participation in prayer, the court upheld the district's prohibition.[190] It noted, "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."[191] They found this "particularly true in the . . . context of basketball practices and games."[192] The prayers took place during instructional time or school-controlled time during school-sponsored, extra-curricular activities that team members were required to attend as members of the team.[193] As representatives of their school district, the coach's prayers

---

[184] *Id.*
[185] *Id.*
[186] *Id.* at 404–05. DISD also engaged in other religious activities or customs, "such as holding prayers and distributing pamphlets containing religious songs at awards ceremonies, allowing student-initiated prayers before football games, allowing Gideon Bibles to be distributed to fifth grade classes, and until 1990, including prayers during school pep rallies."
[187] *Id.* at 405.
[188] *Id.*
[189] *Id.* at 406.
[190] *Id.*
[191] *Id.* (quoting Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 165 (5th Cir. 1993)).
[192] *Id.*
[193] *Id.*

"improperly entangle[ed] [the district] in religion and signal[ed] an unconstitutional endorsement of religion."[194]

However, the court did not come to the same conclusion in its analysis of the choir theme songs. The parties acknowledged that religious music can be and often is used by public school choirs and choruses for secular purposes.[195] In this case, Doe argued that by identifying the songs as theme songs and singing them at every practice and many performances year after year, the songs were given a greater significance, rising to an endorsement of religion.[196] The court disagreed, concluding that given the dominance of religious music in this field, the selection of a religious theme song in and of itself does not constitute an endorsement of religion.[197] In fact, the court noted, "to forbid DISD from having a theme song that is religious would force DISD to disqualify the majority of appropriate choral music simply because it was religious. Within the world of choral music, such a restriction would require hostility, not neutrality, toward religion."[198] For the last part, the court determined that neither Doe nor her father had standing regarding this claim because the Gideon Bibles were distributed to fifth grade students and Doe did not enter the district until the seventh grade.[199]

The issue of coach led prayer was further troubled the in *Borden v. School District of the Township of East Brunswick.*[200] In 2008, the Third Circuit considered an action brought by a football coach against a school district, claiming that the district's prohibition of faculty and coaches participating in prayer violated his rights to free speech, academic freedom, freedom of association, and due process.[201] The Petitioner, Marcus Borden, was the head football coach at East Brunswick High School

---

[194] *Id.*
[195] *Id.* at 407–08.
[196] *Id.* at 407.
[197] *Id.* at 407–08.
[198] *Id.* In Lynch v. Donnelly, 465 U.S. 669, 678 (1984), the Court stated, "[i]n our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court."
[199] *Id.* at 408–09.
[200] 523 F.3d 153 (3d Cir. 2008).
[201] *Id.* at 158-59.

(EBHS).[202] During his tenure at EBHS, he made a habit of leading the team in prayer before games and at the weekly team dinner (with players, parents, and cheerleaders).[203] Before Borden's arrival, the prayers at the team dinners were led by a local minister.[204] From 2003–2005, Borden led the prayer at the first team dinner of every season and then selected a senior player to lead prayer in the subsequent weeks.[205] Additionally, after discussing strategy before each game, Borden would ask the assistant coaches and players to take a knee as he led them in prayer.[206]

In 2005, three sets of parents complained to the District Superintendent about the prayer at the team dinner.[207] One player indicated that he was uncomfortable and was afraid that the coach would call on him to lead the prayer.[208] In the weeks following the complaints, the attorney for the school district stated that Borden "could not lead, encourage, or participate" in prayer with his players at team dinners or before games.[209] In a memo to Borden and all faculty members, the Superintendent reminded all faculty and staff that students have a constitutionally protected right to pray at school so long as it did not interfere with the "normal operations of the school or district."[210] However, she noted, representatives of the school or school district (teachers, coaches, administrators, board members, etc.) "were prohibited from encourag[ing,] lead[ing,] initiat[ing,] mandat[ing,] or otherwise coercing student prayer, either directly or indirectly," during school time or at any school sponsored event.[211] She advised that failure to comply with these

---

[202] *Id.* at 159.
[203] *Id.*
[204] *Borden*, 523 F.3d at 159. In 1997, the athletic director told Borden that the minister could no longer read the prayer. From 1997 to 2003, when the minister retired, the minister wrote a prayer that students took turns reading each week.
[205] *Id.*
[206] *Id.*
[207] *Id.* at 160.
[208] *Id.*
[209] *Id.*
[210] *Id.*.
[211] *Id.* at 160–61. Note that while in *Borden*, the Third Circuit found the superintendent's memo seeking to avoid future Establishment Clause violations was not unconstitutional, *id.* at 179, courts may not always come to that conclusion. In considering pre-emptive regulations, the Supreme Court has said that the state must have a "plausible fear" of being associated with religion or a particular religion, and there must be a "likelihood that the speech in question is being either endorsed or

guidelines would be considered insubordination.[212] Borden resigned the evening he received the memo but returned to his position ten days later, agreeing to comply with the specified terms.[213] He filed suit against the district five weeks after returning to his position.[214]

Prior to the commencement of the 2006 football season, Borden asked his team captains to talk to all of the members of the team to determine if they wanted to continue prayer before team dinners and games.[215] The captains indicated to him that the team voted to continue the pre-meal and pre-game prayers.[216] Accordingly, while Borden no longer led his players in prayer, he continued to bow his head before team meals and take a knee before each game.[217]

In considering the limitations of the First Amendment for Borden and other public school employees, the Third Circuit Court of Appeals reminded, "the day has long since passed when individuals surrendered their right to freedom of speech by accepting public employment."[218] However, their rights are not unlimited.

Borden argued that his speech (bowing his head and taking a knee) was protected by the First Amendment's freedom of speech, academic freedom, freedom of association, and due process.[219] The court quickly concluded that Borden's speech was not a matter of public concern and thus not protected First Amendment speech.[220] The court next concluded that Borden's

---

coerced by the State." Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 841–42 (1995); *see also*, Tucker v. Cal. Dept. of Educ., 97 F.3d 1204, 1213 (9th Cir. 1996) (holding that a blanket ban on all employee religious speech or expression went beyond what was necessary to protect the State from Establishment Clause violations. The court stated, "The challenged regulation here prohibits all sorts of employee speech that could in no way create the impression that the state has taken a position in support of a religious sect or of religion generally.").

[212] *Borden,* 523 F.3d at 160.

[213] *Id.* at 161.

[214] *Id.* at 162.

[215] *Id.*

[216] *Id.*

[217] *Id.* at 162. Note that because Borden discontinued other acts of religious expression with players, the court in this case considered only Borden's acts of bowing his head and taking a knee. *See id.* at 162–163.

[218] *Id.* at 168, (quoting Sanguini v. Pittsburgh Bd. of Pub. Educ., 968 F.2d 393, 396 (3d Cir. 1992)).

[219] *Id.* at 163 nn. 4–5.

[220] *Id.* at 171. The court used the two-pronged test from *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Under the *Pickering* test, the court must first

speech was not protected under academic freedom because his speech was intended to be a pedagogic method, rendering him a "proxy" for the school district.[221] In considering Borden's freedom of association claim,[222] the court noted that the relationship that Borden shared with his players was not sufficiently close to warrant constitutional protection.[223] Finally, the court dismissed Borden's due process claims because he could not identify a fundamental right that was infringed upon by the district prayer policy.[224]

The court next considered whether the school district had the right to adopt the prayer policies in an effort to avoid

---

determine if the public employee is speaking on a matter of public concern. *Id.* If the speech relates to matters of public concern, then the court must consider the second prong of the test, which requires a balancing of the interests of the public employee, commenting as a citizen and someone who may have special knowledge on a subject of public concern, with the interests of the employer in efficient operations. *Id.* In considering the nature of Borden's speech, the court notes that Borden's speech was not, in fact, public in nature. *Id.* at 169. His speech only occurred in private settings, at the invitation-only dinner and in the locker room before games. *Id.* at 171. The court concluded that the speech was intended for the football players (and their parents) only. *Id.*

[221] In *Bradley v. Pittsburgh Board of Education*, the Third Circuit determined that in-class conduct did not constitute protected speech. 910 F.2d 1172, 1176 (3rd Cir. 1990) ("Although a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected . . . her in-class conduct is not."). In *Borden,* the Third Circuit noted that when a teacher engages in "in-class conduct," he or she is acting as the educational institution's proxy, and the institution, not the teacher, has the right to direct how and what students are taught. *Borden*, 523 F.3d at 172. *See also* Brown v. Armenti 247 F.3d 69, 74–75 (3d Cir. 2001). But note that courts distinguish between religious activities conducted in a teacher or coach's own school from those conducted in other schools. See, for example, *Wigg v. Sioux Falls School Dist.*, in which the court reviewed a district policy prohibiting teachers from participating in after-school, religiously-based, non-school related activities in all schools in their district. 382 F.3d 807, 815–16 (8th Cir. 2004). The court noted that this restriction was overly restrictive and violated the mandate of religious neutrality. *Id.* To avoid possible Establishment Clause violations, the district could prohibit the teacher from engaging in religiously-based after-school activities at her own school but not the other schools in the district. *Id.* at 815–16.

[222] Borden alleged that the school district's guidelines separated Borden from his players, both physically and emotionally, during times of prayer. *Borden*, 523 F.3d at 173.

[223] *Id.* The Supreme Court has ruled that certain close relationships require protection, such as "marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives." *Id.* (citing Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545 (1987)). While the court conceded that football coaches can have a very special relationship with their players, those relationships are not sufficiently close to require constitutional protections. *Id.* (citing *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 545).

[224] *Id.* at 173–74.

violating the Establishment Clause. The prayer policy was not unconstitutional on its face and, as stated above, did not violate Borden's constitutional rights.[225] Therefore, the court focused on whether the policy was "reasonably related to a legitimate educational interest."[226] As noted in *Capitol Square Review and Advisory Board v. Pinette*,[227] "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."[228]

The court concluded that Borden's conduct violated the Establishment Clause using the Endorsement Test.[229] The court looked to how "a reasonable observer familiar with the history and context of the display"[230] would perceive Borden's actions. Contextually, the court considered not just Borden bowing his head before pre-game meals and taking a knee in the locker room, but also looked at Borden's history with the team and the fact that he engaged in religious activities with players for an extended period.[231] The court concluded that his involvement as "an organizer, participant, and a leader . . . would lead a reasonable observer to conclude that he was endorsing religion."[232] However, the court noted that "[w]ithout Borden's twenty-three years of organizing, participating in, and leading prayer with his team, this conclusion would not be so clear as it presently is."[233] The Court went on to state:

> [I]f a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment

---

[225] *Id.* at 165–66.
[226] *Id.* at 174 (citing Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998)). Note that the court actually determined that this analysis was unnecessary since the policy was not unconstitutional on its face and did not violate Borden's fundamental rights. *Id.* However, it opted to go through the analysis to make clear that the school district has a legitimate educational interest if avoiding Establishment Clause violations and that the prayer policy guidelines were reasonably related to that interest. *See generally Borden*, 523 F.3d. at 174.
[227] 515 U.S. 753 (1995).
[228] *Id.* at 761–62.
[229] *Borden*, 523 F.3d at 175. The court found it unnecessary to analyze Borden's actions using the coercion test or the *Lemon* test because his conduct so obviously violated the Establishment Clause using the endorsement test. *Id.*
[230] *Id.* (citing Modrovich v. Allegheny Cty., Pa., 385 F.3d 397, 401 (3d Cir. 2004)).
[231] *Id.* at 176–77.
[232] *Id.* at 176.
[233] *Id.* at 178.

> of reflection or prayer, we would likely reach a different conclusion because the same history and context of endorsing religion would not be present.[234]

Despite ruling against Borden, this Third Circuit opinion contemplates a circumstance in which a coach bowing his head or taking a knee out of respect during a time of student-initiated prayer may not violate the Establishment Clause.

IV. MODERN TRENDS AND CASES OF RELIGIOUS EXPRESSION IN PUBLIC SCHOOL SPORTS

In the early 2000s, there was a renewed movement to embrace Christian tenets in public school settings, in direct contradiction to the Supreme Court's ruling protecting the "wall of separation between Church and State."[235] Katherine Stewart, author of *The Good News Club: The Christian Right's Stealth Assault on America's Children*, identified proponents of this movement as the "Christian Nationalists," those intent upon assuming a cultural control of the public schools.[236] Stewart frames her philosophy on the work of Jerry Falwell. Falwell stated, "I hope to see the day when, as in the early days of our country, we don't have public schools . . . . The churches will have taken them over again and Christians will be running them."[237] This doctrine has been advanced by several justices of the Supreme Court, namely Justices Scalia and Thomas. Justice Scalia argued that the founding fathers never intended to keep religion and state separate.[238] The Free Exercise Clause and the Establishment Clause, "applies only to the words and acts of government. It was never meant and has never been read by the court to serve as an impediment to purely private religious speech."[239] The

---

[234] *Id.* at 178–79.
[235] Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 512 (1947).
[236] KATHERINE STEWART, THE GOOD NEWS CLUB: THE CHRISTIAN RIGHT'S STEALTH ASSAULT ON AMERICA'S CHILDREN 85 (1st ed. 2012).
[237] JERRY FALWELL, AMERICA CAN BE SAVED 52–53 (1979).
[238] Debra Cassens Weiss, *Scalia Compares Himself to Frodo in Originalism Battle*, ABA JOURNAL (Oct. 2, 2014), http://www.abajournal.com/news/article/scalia_compares_himself_to_frodo_in_originalism_battle.
[239] STEWART, *supra* note 236, at 85 (citing JEFFERY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 114 (2007)).

axiom created is that religion, in and of itself, is speech and should be protected under the free speech doctrine. This represents a substantial potential doctrinal shift that actually marginalizes the Free Exercise and Establishment Clauses of the First Amendment.

This doctrinal shift can be seen on the sports fields nationwide. For example, in Bremerton, Washington, former assistant football coach Joe Kennedy has received a great deal of attention for his religious demonstrations following Bremerton High School (BHS) football games. Beginning in 2008, Kennedy went to the fifty-yard line directly following the conclusion of each football game, took a knee, bowed his head, and quietly prayed a "prayer of thanksgiving for player safety and sportsmanship that lasts approximately 15-30 seconds."[240] He claimed that he was first inspired to engage is this kind of post-game prayer after watching the Christian football film *Facing the Giants*.[241] Kennedy noted that other BHS coaches often joined him in this prayer ritual.[242] Over time, players began to join Kennedy in prayer following the game.[243] Kennedy claims that he did not direct or coerce players to join him and did not direct their prayer once on the field.[244] By the 2009 season, a majority of the BHS players and some players from opposing teams joined him on the field for post-game prayer.[245] Kennedy explains, "[a]t some point during the 2009 season, I started giving a short motivational speech prior to some of my post-game prayers. Around the same time, some of my prayers began to be audible."[246]

---

[240] Addendum to EEOC Intake Questionnaire – Joseph A. Kennedy, EEOC Intake Questionnaire, at 1, https://www.scribd.com/document/293388712/Kennedy-EEOC- Intake-Questionnaire-and- Supporting-Materials- Redacted (last visited Feb. 17, 2017). Note that we rely heavily on Kennedy's own EEOC Complaint so as to present the facts most favorable to Kennedy and thus avoid any appearance of bias. Note that for purposes of this article, we give deference to the facts as presented by Coach Kennedy and his legal team, in part because they have made their official record of events available to the public; additionally, given the nature of this study, we want to present facts and legal arguments as neutrally as possible.

[241] Lindsay McCane, *Bremerton Football Coach Joe Kennedy Defies Orders, Prays on Field*, INQUISITOR (Oct. 20, 2015), http://www.inquisitr.com/2508188/bremerton-football-coach-joe-kennedy-defies-orders-prays-on-field/.

[242] Addendum to EEOC Intake Questionnaire, *supra* note 240, at 1.

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *Id.*

On September 17, 2015 the Bremerton School District (BSD) superintendent sent a letter to BHS parents and staff providing information on prayer at athletic events.[247] The superintendent noted that the athletic staff could give motivational talks focusing on "appropriate themes such as unity, teamwork, responsibility, safety, and endeavor,"[248] but should not engage in religious expression, including prayer with or in front of students.[249] He reminded the Bremerton community that the students retained their right to free expression so long as it did not interfere with the athletic event and was "entirely and genuinely student-initiated."[250] He concluded by reminding the community that "[t]he District is bound by . . . federal precedents[,]" and he provided a copy of the school board policy and legal references on faculty and staff prayer.[251]

After receiving this letter, Mr. Kennedy temporarily (from September 17 until October 16, 2015) stopped praying after BHS football games.[252] On October 14, 2015 Mr. Kennedy's attorneys sent a letter to BSD informing the district that Mr. Kennedy would resume his practice of praying on the fifty-yard line following the October 16 game and demanding the district rescind its September 17 directive.[253] BSD did not respond to Mr. Kennedy's October 14 demand and he did engage in prayer on the fifty-yard line following the October 16 homecoming football game, in violation of district policy.[254] In a letter dated October 23, 2015 the BSD superintendent specifically noted, "I wish to make it clear that religious exercise that would not be perceived as District endorsement, and which does not otherwise interfere with the performance of job duties, can and will be accommodated."[255] The letter also included the following

---

[247] *Id.* at Exhibit B.
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.* at Exhibit B.
[252] Addendum to EEOC Intake Questionnaire, *supra* note 240.
[253] *Id.* at Exhibit C, 6.
[254] *Id.* at Exhibit D, 1. Pursuant to the response letter sent to Mr. Kennedy on October 23, 2015, Mr. Kennedy went to great effort to publicize his intention to pray on the field following the October 16th football game. *Id.*
[255] *Id.* at Exhibit D, 2. The superintendent further suggested that Mr. Kennedy could be accommodated by permitting him a brief period for prayer before or after games in the "school building, athletic facility, or press box". *Id.* at Exhibit D, 3. There

directive: "While on duty for the District as an assistant coach, you may not engage in demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public."[256] Despite this directive, Mr. Kennedy engaged in public prayer following the varsity football game on October 23 and the junior varsity game on October 26 while on duty as a district employee.[257] Consequently, on October 28, 2015 Mr. Kennedy was placed on paid administrative leave. [258] Subsequently, Mr. Kennedy's contract was not renewed after he received an unsatisfactory performance review, citing his failure "to follow district policy and his actions [that] demonstrated a lack of cooperation with administration."[259]

After consulting with attorneys at the Liberty Institute, Mr. Kennedy filed a complaint with the Equal Employment Opportunity Commission (EEOC), claiming BSD's actions violated his First Amendment right to free exercise of religion.[260] To date, there has been no resolution to the EEOC complaint and Kennedy filed suit against the Bremerton School District on August 9, 2016 claiming that the school district violated his First Amendment rights to free speech and free exercise of religion.[261] Specifically, the complaint alleges that the Bremerton employee directive, instructing employees to abstain from "demonstrative religious activity," is "baldly unconstitutional."[262] It goes on to claim:

---

appears to be a discrepancy in the timeline between the statement of fact written by Mr. Kennedy's attorneys for the EEOC complaint and the letters provided as exhibits. In points, the timeline hinges on what time particular letters were sent and received. We have closely read the entire EEOC complaint and all supporting documents. The facts in this section take into account Mr. Kennedy's timeline of events and conflicting correspondence provided as exhibits to the EEOC complaint. Specifically, Mr. Kennedy claims in his timeline that he requested religious accommodation to engage in prayer before or after the football games sometime between October 16 and 23. In his timeline, he further claims that BSD denied his request for religious accommodation on October 23. However, the letter attached as Exhibit D to his EEOC complaint does not support this series of events, as BSD's October 23rd letter clearly offers Mr. Kennedy a religious accommodation.

[256] *Id.* at Exhibit D, 3.

[257] *Id.* at Exhibit E.

[258] *Id.* at Exhibit E, 1.

[259] *Id.* at Exhibit H, 1-2.

[260] Addendum to EEOC Intake Questionnaire, *supra* note 240.

[261] Complaint at 3, Kennedy v. Bremerton Sch. Dist., No. 3:16-cv-05694 (W.D. Wash. 2016).

[262] *Id.* (internal quotation marks omitted).

> On its face, BSD's policy would prohibit all on-duty school employees, while in view of any student or member of the community, from making the sign of the cross, praying towards Mecca, or wearing a yarmulke, headscarf, or a cross. After all, each of those actions is "demonstrative" religious expression and would be interpreted as such.[263]

Finally, Kennedy notes that he brought the "[c]omplaint to vindicate his constitutional and civil rights to act in accordance with his sincerely held religious beliefs by offering a brief, private prayer of thanksgiving at the conclusion of BHS football games."[264] U.S. District Court Judge Ronald Leighton has already declined Kennedy's request for a preliminary injunction which would have required the school district to immediately re-hire Kennedy as an assistant football coach.[265]

Coach Kennedy's case is not an isolated event. For example, in July 2015, the Hall County School District in Gainesville, Georgia settled a lawsuit brought by the American Humanist Association alleging Establishment Clause violations.[266] In part, the complaint alleged that "the School District [had] an ongoing policy, practice, and custom of allowing its faculty, including coaches, to lead and participate in prayers with students during school-sponsored activities."[267] It further alleged that coaches led and participated in prayers with student players at practices and games and integrated Bible verses into team documents and workout logs.[268] While the exact terms of the settlement remain confidential, both the American Humanist Society and Hall County officials indicated that the

---

[263] *Id.* Note that lower courts have upheld state statutes prohibiting teachers' religious expression, including religious dress, while teaching. *See* United States v. Bd. of Educ. for the Sch. Dist. of Philadelphia, 911 F.2d 882, 894 (3d Cir. 1990); Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298, 313 (Or. 1986).

[264] Complaint, Kennedy v. Bremerton Sch. Dist., *supra* note 261, at 3.

[265] *Judge Won't Issue Injunction in Postgame Prayer Lawsuit*, WASH. TIMES (Sept. 19, 2016), http://www.washingtontimes.com/news/2016/sep/19/judge-wont- issue-injunction- in-postgame- prayer-law/.

[266] Tyler Estep, *Lawsuit Challenging Hall County School Prayer Dismissed*, ATLANTA-J. CONST. (July 20, 2015), http://www.ajc.com/news/news/local/lawsuit-challenging-hall-county-school-prayer-dism/nm3h3/.

[267] Complaint at 4, Am. Humanist Ass'n. v. Hall Cty. Sch. Dist., No. 2:14-cv-288-WCO (N.D.Ga., 2014).

[268] *Id.* at 5-6.

Hall County School District would issue a memorandum outlining "the standards for religious neutrality" and hold professional development sessions for faculty and staff (including coaches) on their constitutional duties with regards to prayer.[269] Similar cases have arisen across the country in public elementary and secondary schools, and even in some public universities.[270] While the school or school district in each case has been responsive and made efforts to more closely comply with the prayer guidelines set forth in case law (either voluntarily or with some legal pressure), in many cases they have faced pushback from Christian community members, organizations, and in some cases, political figures. As communities are pushed to consider other divisive issues considered by some to be religious or moral in nature, such as the rights of persons identifying as LGBTQ, women's health care rights, and sex education, the question of prayer in schools continues to be a challenge despite well settled case law. In fact, in some states, legislators have made attempts to circumvent Supreme Court case law by passing pro-prayer legislation. In the next section, we will consider legislative machinations to circumvent legal precedent.

---

[269] Press Release, American Humanist Association, Georgia District Settles Football Prayer Lawsuit with Humanist Group (July 20, 2015), https://americanhumanist.org/news/2015-07- georgia-school- district-settles-football-prayer-laws/. *See also* Estep, *supra* note 266, at para. 4.

[270] *See*, Heather Clark, *Illinois High School Football Team Stands by Coach Told to Stop Leading Prayers*, CHRISTIAN NEWS (Dec. 12, 2015), http://christiannews.net/2015/12/12/illinois-high-school-football-team-stands-by-coach-told-to-stop-leading-prayers; Emma Ginader, *Facebook Post Prompts Ban on Pregame Religious Traditions at Pa. School*, TRAVERSE CITY RECORD EAGLE (Dec. 1, 2016), http://www.record-eagle.com/cnhi_network/facebook-post-prompts-ban-on-pregame-religious-traditions-at-pa/article_3f4007d0-1cb2-59a3-b087-5895bda8c108.html; Richard Orbert, *Tempe Prep Football Coach Suspended for Praying with his Team*, THE ARIZONA REPUBLIC (Sept. 19, 2014), http://www.azcentral.com/story/sports/high-school/2014/09/19/tempe-prep-football-coach-suspended-for-praying-with-team/15907411/; Samuel Smith, *Ohio Community Defies Atheist Group's Threat with Public Prayer at High School Football Game*, CHRISTIAN POST (Oct. 11, 2014), http://www.christianpost.com/news/ohio-community-defies-atheist-groups-threat-with-public-prayer-at-high-school-football-game-127882/.; Press Release, American Civil Liberties Union, ACLU Declares Victory in Ohio School where Football Coach Led Prayers, Read Scripture (Oct. 19, 1999), https://www.aclu.org/news/aclu-declares-victory-ohio-school-where-football-coach-led-prayers-read-scripture; Press Release, American Civil Liberties Union, ACLU Will Defend Five Sued for Libel by Football Coach in Ohio School Prayer Case (July 6, 1999), https://www.aclu.org/news/aclu-will-defend-five-sued-libel-football-coach-ohio-school-prayer-case.

V. LEGISLATION: GOVERNMENT'S METHOD TO CIRCUMVENT ESTABLISHED CASE LAW

In spite of the fact that officially sanctioned prayer in public schools was held unconstitutional in 1962,[271] controversy regarding this decision has not waned and efforts by state legislators to mitigate the impact of *Engel* continue. The *Engel* decision proscribed public entities from leading prayer, but did not prohibit individuals from praying silently. Consternation for this decision was swift and resistant. Former Democratic Senator from West Virginia, Robert C. Byrd commented, "[c]an it be that we, too, are ready to embrace the foul concept of atheism? . . . Somebody is tampering with America's soul. I leave it to you who that somebody is."[272] Senator Byrd's comment was Cold War hyperbole as it attempted to link separation of church and state to Soviet hostility toward religion.[273] In actuality, the *Engel* decision increased religious freedom by providing parents complete control over what prayers their children would say and to what religious texts they would be exposed.[274] Nonetheless, legal attempts have been made by state legislatures throughout the Nation to support some form of state-sponsored voluntary prayer or meditation in public schools; these attempts have been largely unsuccessful.[275]

The Supreme Court responded to the prayer and silent meditation issue in 1985. In *Wallace v. Jaffree*,[276] a father of three elementary students challenged the validity of two Alabama statutes: a 1981 statute that allowed a period of silence for "meditation or voluntary prayer," and a 1982 statute authorizing teachers to lead willing students in a nonsectarian prayer composed by the state legislature.[277] After a lower court found both statutes unconstitutional, the Supreme Court agreed to review only the portion that allowed meditation or voluntary prayer.[278] The Court concluded that the intent of the Alabama

---

[271] Engel v. Vitale, 370 U.S. 421, 430 (1962).
[272] PFEFFER, *supra* note 30, at 466.
[273] Boston, *supra* note 11, at 121.
[274] *Id.*
[275] *Id.*
[276] 472 U.S. 38 (1985).
[277] *Id.* at 40.
[278] *Id.* at 41.

legislature was to affirmatively reestablish prayer in the public schools.[279] Inclusion of the words "or voluntary prayer" in the statute indicated that it had been enacted to convey state approval of a religious activity and violated the First Amendment's Establishment Clause.[280] However, as Essex noted, "student-initiated meditation that is not endorsed by school officials will not likely violate the Establishment Clause so long as the school does not set aside moments or prescribe that students should do so and no disruption to the educational process occurs."[281]

Even though the *Engel* Court was clear in its prohibition of government-sanctioned prayer, and *Wallace* clarified the limitations for state legislation endorsing officially sanctioned prayer, there remains motivation on the part of many government officials to enact legislation that endorses government-sponsored prayer. As highlighted by Table 1, thirty-eight states have enacted legislation that addresses prayer or silent meditation in public schools.[282] For thirteen states and the District of Columbia, no statute is in effect and the state relies upon federal jurisprudence for guidance.[283] Some of the enacted state legislation needs to be carefully scrutinized because components of the language (or, in many circumstances, the legislative intent) is to promote school-sponsored prayer.

In 2012, Governor Rick Scott of Florida signed Florida Senate Bill 98, which permitted a district school board to adopt a policy allowing an inspirational, religious message to be delivered by students at a student assembly.[284] To date, no school

---

[279] *Id.* at 58.
[280] *Id.* at 59–60.
[281] NATHAN L. ESSEX, SCHOOL LAW AND THE PUBLIC SCHOOLS: A PRACTICAL GUIDE FOR EDUCATIONAL LEADERS 124 (6th ed. 2016).
[282] *See infra* Appendix A.
[283] *Id.*
[284] S 98, 2012 Leg., Reg. Sess. (Fla. 2012) (allowing the use of a prayer of invocation or benediction at the discretion of the student government as long as students will deliver all prayers, all prayers will be nonsectarian and nonproselytizing in nature, and school personnel will not participate in, or otherwise influence any student in determining whether to use prayers); *see also* Adler v. State, 250 F.3d 1330, 1352 (11th Cir. 2001) (permitting a graduating student, elected by her class, to give a message unrestricted by the school). *But see* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding that pregame prayer given by a student at high school football games communicates a government religious endorsement and, as such, violates the Establishment Clause).

boards in Florida have established such a policy. However, SB 98 and other Florida laws make it clear that the Florida legislature supports a religious presence in public schools.[285]

In June 2014, North Carolina enacted Senate Bill 370 commonly known as *Student Prayer and Religious Activity*.[286] The law begins by noting that the U.S. Constitution is its guiding principal and that it does not promote religion or one religion over another.[287] While the law purports to do nothing more than merely clarify what types of behaviors are allowed under the U.S. Constitution, federal law, and state law, it does augment religious activities for students and employees. Most importantly is what Senate Bill 370 identifies as acceptable employee behavior. Whereas, prior legal history restricts attendance at and participation in student-led religious activities, SB 370 states that employees may not only attend student-led prayer activities, but if present, "shall not be disrespectful of the student exercise of such rights and may adopt a respectful posture."[288] This section of the statute comes precariously close to crossing the Establishment Clause line, and as is noted in *Wallace v. Jaffee*, a court will consider the objective context of alleged Establishment Clause violations.[289] The federal Equal Access Act,[290] recognizes this thin boundary, and states that if a student group is meeting for any religious purpose, the role of the faculty present must be a non-participatory role only, to prevent the perception of

---

[285] FLA. STAT. §1003.45 (2017) ("The district school board may install in the public schools in the district a secular program of education including, but not limited to, an objective study of the Bible and of religion . . . [and] may provide that a brief period, not to exceed 2 minutes, for the purpose of silent prayer or meditation be set aside at the start of each school day or each school week in the public schools in the district.").

[286] N.C. GEN. STAT. §§ 115C-407.30, 407.33 (2015).

[287] *Id.* § 115C-407.32(a).

[288] *Id.* § 115-407.32(c).

[289] *See* Jager v. Douglas Cty. Sch. Dist., 862 F.2d 824 (11th Cir. 1989) (banning the practice of coaches leading their players in prayer before an athletic event); *see also* SEE YOU AT THE POLE, http://www.syatp.com (last visited Aug. 17, 2016) (students all over the world are encouraged to meet at the flagpole on school campuses prior to classes commencing on the fourth Wednesday in September for a general session of prayer. This activity is specifically student-organized and student-led and is outside of regular school hours. Adult participation is specifically prohibited in its guidelines and adult participation is specifically prohibited. Adults are informed they should not be present.).

[290] 20 U.S.C. § 4071 (2012) (providing that if a school district receives federal money and allows noncurricular activities and club meetings, then it is unlawful to deny students the right to meet for religious activities).

government endorsement of the practice.[291] Under SB 370, state employees must be particularly careful in how their actions could be perceived by an objective observer.

In 1975, Alabama enacted legislation which established a period of quiet reflection in which students may pray or meditate silently.[292] The statute allows public school teachers to lead their class in prayer to "the Lord God."[293] The constitutionality of this clause is highly suspect. Yet, the concept of praying or meditating silently is similar to language in many other states.[294] Like Alabama, there are states that have enacted laws, which not only permit Christian prayer—they promote it.[295]

In contrast, some states and governmental bodies within the states (such as local boards of education), have begun to retreat from language that permits and promotes prayer in public schools, instead seeking to comply with judicial holdings, by securing individual rights to pray and limiting governmental coercion.[296] For example, the Berkeley County School Board in

---

[291] Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 240–41 (1990) (citing 20 U.S.C. § 4071(f)).

[292] ALA. CODE § 16-1-20.4 (2016).

[293] *Id.* § 16-1-20.2.

[294] *See, e.g.*, DEL. CODE ANN. tit. 14 § 4101A (2016) (granting "a brief period of silence, not to exceed 2 minutes in duration, to be used according to the dictates of the individual conscience of each student" during the beginning of the school day); FLA. STAT. ANN § 1003.45(2) (West 2016) ("The district school board may provide that a brief period, not to exceed 2 minutes, for the purpose of silent prayer or meditation be set aside at the start of each school day or each school week in the public schools in the district"); GA. CODE ANN. § 20-2-1050 (2016) (at the start of each school day, the teacher shall hold a brief period of quiet reflection up to 60 seconds for all students in the classroom); 105 IL. COMP. STAT. 20/1 (2016) (a brief period of silence which "shall not be conducted as a religious exercise but shall be an opportunity for silent prayer or for silent reflection"); IND. CODE § 20-30-5-4.5 (2016) ("[T]he governing body of each school corporation shall establish the daily observance of a moment of silence in each classroom or on school grounds); KAN. STAT. ANN. § 72-5308a (2016) ("In each public school classroom the teacher in charge may observe a brief period of silence with the participation of all the pupils therein assembled at the opening of every school day").

[295] *See, e.g.*, KY. REV. STAT. ANN. § 158.175 (West 2016) ("As a continuation of the policy of teaching our country's history and as an affirmation of the freedom of religion of this country, the board of education of a local school district may authorize the recitation of the Lord's [P]rayer . . . .").

[296] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305 (2000) (holding that the Establishment Clause prohibits governmental bodies from taking any action that communicates "endorsement of religion"); Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987) (students are impressionable, and because their attendance at school is involuntary, courts are "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools"); *see also* Lee v. Weisman, 505 U.S. 577, 592 (1992) (stating that in the public school context, there are "heightened concerns with protecting freedom of conscience from subtle coercive

South Carolina recently revisited the issue of praying (reciting the Lord's Prayer) before each school board meeting.[297] The Board recognized that reciting the Lord's Prayer prior to a public school board meeting could be deemed unconstitutional.[298] In fact, the chair of the Board, highlighting its options, stated that the Board can continue to recite the Lord's Prayer and "face a long, expensive lawsuit that many others have already fought and lost."[299] However, as in this case, such decisions are not made without considerable push back.[300]

With the support of fifty state legislators, South Carolina Senator Larry Grooms, composed a letter supporting the Berkeley County School Board in opening their meetings with prayer.[301] Employing an untenable position, the legislators cite *Green v. Galloway*[302] and the *Public Prayer and Invocation Act of South Carolina*[303] as evidence that jurisprudence recognizes that prayer before public meetings has been part of the nation's history.[304] This is a deficient summary on the part of advocates

---

pressure"); Engel v. Vitale, 370 U.S. 421, 425 (1962) (finding that public schools may not require recitation of prayers at beginning of the school day because "it is no part of the business of government to compose official prayers").

[297] Deanna Pan, *Berkley Board No Longer Reciting Lord's Prayer*, THE POST & COURIER (June 28, 2016), http://www.postandcourier.com/20160628/160629397/berkeley-county-school-board-no-longer-reciting-lords-prayer.

[298] *Id.*

[299] *Id. Compare* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 385–86 (6th Cir. 1999) (holding that school board meetings were held on school property, were regularly attended by students, and did not resemble legislative sessions. The court further emphasized that board meetings had a function that was uniquely directed toward students and school matters, making it necessary for students to attend such meetings on many occasions. The court stated that prayer at school board meetings was potentially coercive to students in attendance – prayer has the tendency to endorse Christianity through excessively entangling the board in religious matters), *with* Greece v. Galloway, 134 S.Ct. 1811 (2014) (holding the town's practice of opening its town board meetings with a prayer offered by members of the clergy does not violate the Establishment Clause when the practice is consistent with the tradition long followed by Congress and state legislatures, the town does not discriminate against minority faiths in determining who may offer a prayer, and the prayer does not coerce participation from non-adherents).

[300] Pan, *supra* note 297.

[301] Herb Silverman, *Letter: Matter of Prayer*, THE POST & COURIER (July 15, 2016), http://www.postandcourier.com/opinion/letter-matter-of-prayer/article_77d6e246-5d15-53ae-9c87-e2c65da4bd36.html.

[302] 134 S. Ct. 1811 (2014).

[303] S.C. CODE ANN. § 6-1-160 (2016) (allowing invocations to open meetings of deliberative bodies, so as to provide that public prayer means a prayer or invocation; to provide that deliberative public body includes a school district board; to provide that public invocations may not proselytize or and advance any one faith or belief, or coerce participation by observers).

[304] Silverman, *supra* note 301.

of prayer prior to public board meetings. *Marsh v. Chambers*[305] found government funding of chaplains to provide an invocation opening legislative session constitutional because of the unique history of the United States.[306] School board meetings are not congruous to other public board meetings. As the Sixth Circuit Court noted, school board meetings are held on school property, are regularly attended by students, and do not resemble legislative sessions.[307]

VI. DISCUSSION FOR PRACTICE

Throughout the nation, public school officials are challenged with constitutional law and policy which may be contrary to their personal religious philosophies. In many communities, it is expected that religious doctrine (often Christianity) will be strictly adhered to in public schools despite decades of case law requiring a separation of church and state in public schools. The notion that many of these school officials ignore the legal proscriptions and permit certain activities to occur is concerning. Many school officials face compelling pressure from religious groups who can influence their employment in the district.

In school districts across the county, school officials have ignored constitutional precedent to permit religious activities to occur to conform to the religious beliefs of the majority and local community pressures. Individual school officials can be conflicted between their personal faith and legal precedent; but they must be able to navigate between them to be an effective administrator. Unfortunately, for school officials, either decision meets disapproval from one group or another, which can cause large religious schisms in the community. The discord that develops can permeate the school community causing poor learning environments and potentially impact student achievement.

---

[305] 463 U.S. 783 (1983).
[306] *Id.* at 787 (three days before the ratification of the First Amendment in 1791, containing the Establishment Clause, the U.S. Congress authorized the hiring of a chaplain to open the session with prayer).
[307] Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 381 (6th Cir. 1999).

A primary objective for courts is to protect minority viewpoints. The right to individual religious belief is a fundamental concept in constitutional law. The freedom to worship or not worship as one chooses is an inherent right of all citizens in the nation. Yet, as important, is the ability to ensure that minority viewpoints on not trampled, causing religious discrimination in public spaces, including schools. Public schools are representative of the nation's many cultures and religions. Young children and adolescents are impressionable and vulnerable, and the courts, through their rulings, have tried to protect them from being influenced by religious activities in public school. Students, on the whole, want to participate in school activities and want to be accepted in the macro- and micro-communities within the school. Employees acting as agents of the public school bear the imprimatur of the school, and must realize that they directly and/or indirectly influence students.

Restricting religious expression of public school employees includes curricular activities and co-curricular activities. Central to this article is the issue of athletic coaches engaging in religious activities in the presence of student-athletes. Jurisprudence has been established that chills the right of coaches to engage in prayer with student-athletes before or after a contest. In addition, coaches who wish to express religious moments prior to, during, or after athletic contests need to engage in these activities whereby they do not, in perception or reality, bear the imprimatur of the school. Kneeling to pray on the field or court immediately following an athletic contest should be perceived as the school endorsing the activity, which is in violation of the Establishment Clause.

APPENDIX 1

INDIVIDUAL STATE LEGISLATION PERTAINING TO PRAYER IN PUBLIC SCHOOL

State	Applicable State Code	What is Allowed?
Alabama	ALA. CODE § 16-1-20 & 16-1-20.3	1.) Period of silence not to exceed one minute in duration, shall be observed for mediation or voluntary prayer, and during any such period no other activities shall be engaged in 2.) Alabama statute says public school teachers may lead their class in prayer to the "Lord God" but at this time its constitutionality is questionable.
Arkansas	No Statutory Provision	Silent and voluntary prayer (in accordance with federal constitutional law).
California	No Statutory Provision	While many state laws mandate a period of silence in which students and faculty may pray or meditate silently, California schools may honor this custom voluntarily.
Colorado	No Statutory Provision	No Statutory Provision
Connecticut	CONN. GEN. STAT. § 10-16(a)	Silent meditation.
Delaware	DEL. CODE ANN. tit. 14 § 4101, 4101A(b)	A brief period of silence not to exceed two minutes to be used according to

		dictates of individual student's conscience. First Amendment read to students on first day.
District of Columbia	No Statutory Provision	Federal law holds that school staff may not lead students in prayer or in any way "establish" or promote any religion in a public school. Although many schools have implemented a minute of silence at the start of each school day.
Florida	FLA. STAT. ANN § 1003.45(2)	Individual school districts may decide whether to allow brief periods not to exceed two minutes, for the purpose of silent prayer or meditation.
Georgia	GA. CODE ANN. § 20-2-1050	At the start of each school day, the teacher shall hold a brief period of quiet reflection (up to 60 seconds) for all students in the classroom.
Hawaii	No Statutory Provision	Hawaii's religion in public school policy seems clear. The policy prohibits any employee of the Department of Education from giving any religious instruction shall in any public school during the regular school day, and states, "Prayer and other religious observances shall not be organized or

		sponsored by schools and the administrative support units of the public school system, especially where students are in attendance.
Idaho	No Statutory Provision	Many school districts in Idaho mandate a regular minute of silence each morning. The Idaho Constitution echoes the religious protections provided by federal law.
Illinois	105 ILL. COMP. STAT. 20/1	Brief period of silence, which shall not be conducted as a religious exercise but shall be an opportunity for silent prayer or for silent reflection.
Indiana	IND. CODE § 20-30-5-4.5	Brief period of silent prayer or meditation. Schools and employees may not cause or encourage attendance or attach opprobrium to these observances
Iowa	No Statutory Provision	Schools must provide religious accommodations for students upon request.
Kansas	KAN. STAT. ANN. § 72-5308a	Schools must provide religious accommodations for students upon request.
Kentucky	KY. REV. STAT. ANN. § 158.175	1.) Recitation of Lord's Prayer to teach our country's history and as an affirmation of the freedom of religion in this country, if authorized by local

		school district; pupil's participation is voluntary. 2.) At the commencement of the first class of each day in all public schools, the teacher in charge of the room may announce that a moment of silence or reflection not to exceed one (1) minute in duration shall be observed.
Louisiana	LA. STAT. ANN. § 17:2115 to 2115.11	Each parish or city public school board must allow (but not force) schools to start the school day with a brief time of silent meditation or prayer. The law explicitly proclaims this "shall not be intended nor interpreted as state support of or interference with religion, nor shall such time allowance be promoted as a religious exercise and the implementation of this Section shall remain neutral toward religion."
Maine	ME. STAT. tit. 20-A, § 4805	Period of silence shall be observed for reflection or meditation.
Maryland	MD. CODE ANN. EDUC. §7-104	Meditate silently for approximately one minute; student or teacher may read the holy scriptures or pray.

Massachusetts	MASS. GEN. LAWS ch. 71 § 1(A)(B)	1.) Provides for a period of silence not exceed on minute. The moment of reflection occurs at the start of each school day for every grade of all public schools. During the period of silence the classroom cannot engage in other activities. 2.) Permits the school committee of any city or town to allow any student attending its public schools to voluntarily pray if the child's parent has given permission. If allowed, the praying must occur before the start of the daily school session.
Michigan	MICH. COMP. LAWS § 380.1565	Opportunity to observe time in silent meditation.
Minnesota	No Statutory Provision	Silent and voluntary prayer (in accordance with federal constitutional law).
Mississippi	MISS. CODE ANN. § 37-13-4.1	Student-initiated voluntary prayer permitted on school property.
Missouri	MO. CONST. art. 1 § 5	Voluntary, private, and non-disruptive prayer.
Montana	MONT. CODE ANN. § 20-7-112	A publication of a sectarian or denominational character may not be distributed in any school. Instruction may not be given advocating sectarian or

		denominational doctrines. Any teacher, principal, or superintendent may open the school day with a prayer.
Nebraska	NEB. CONST. art. 1, § 4	Silent and voluntary prayer (in accordance with federal constitutional law). Reading in public schools of passages from the Bible, singing of hymns, and offering prayer, in accordance with the doctrines of sectarian churches, is forbidden by the Constitution.
Nevada	NEV. REV. STAT. § 388.075	Silent period for voluntary individual meditation, prayer, or reflection.
New Hampshire	N.H. REV. STAT. ANN. § 189:1-b	On each school day, before classes of instruction officially convene in the public schools of this sovereign state, a period of not more than five minutes shall be available to those who wish to exercise their right to freedom of assembly and participate voluntarily in the free exercise of religion. There shall be no teacher supervision of this free exercise of religion, nor shall there be any prescribed or proscribed form or content of prayer.

New Jersey	No statutory provision	Silent and voluntary prayer (in accordance with federal constitutional law).
New Mexico	N.M. CONST. art. 2, § 11	Public schools in New Mexico must comply with federal laws and cases that provide religious accommodations for students.
New York	N.Y. EDUC. LAW § 3029-a	Brief period of silent meditation which may be opportunity for silent meditation on a religious theme or silent reflection.
North Carolina	N.C. GEN. STAT. § 115C-47(29)	Period of silence not to exceed one minute in duration shall be observed and silence maintained; prayer by individuals on a voluntary basis allowed.
North Dakota	N.D. CENT. CODE § 15.1-19-03.1	1.) A student may voluntarily pray aloud or participate in religious speech at any time before, during, or after the school day to the same extent a student may voluntarily speak or participate in secular speech. 2.) A school board, school administrator, or teacher may not impose any restriction on the time, place, manner, or location of any student-initiated religious speech or prayer which exceeds the

		restriction imposed on students' secular speech. 3.) A school board may, by resolution, allow a classroom teacher to impose up to one minute of silence for meditation, reflection or prayer at the beginning of each school day.
Ohio	OHIO REV. CODE ANN. § 3313.601	Reasonable periods of time for programs or meditation upon a moral, philosophical or patriotic, or patriotic theme.
Oklahoma	OKLA. STAT. tit. 70, § 11-101.1	Oklahoma public schools must permit those students and teachers who wish to participate in voluntary prayer to do so.
Oregon	No Statutory Provision	The state relies on guidance from federal law. Students who wish to pray may do so, in accordance with their constitutional rights, but only if it does not disrupt class or the learning process. Also, teacher may include religion in their curriculum as long as its sole purpose is for education.
Pennsylvania	24 PA. STAT. AND CONS. STAT. ANN. § 15-1516.1	Brief period of silent prayer or meditation, which is not a religious exercise but an opportunity for prayer or

		reflection as child is disposed.
Rhode Island	16 R.I. GEN. LAWS § 16-12-3.1	At opening of every school day in all grades in all public schools the teacher in charge of the room in which each class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation, and during this period silence shall be maintained and no activities engaged in.
South Carolina	S.C. CODE ANN. § 59-1-443	All schools shall provide for a minute of mandatory silence at the beginning of each school day.
South Dakota	No Statutory Provision	Silent and voluntary prayer (in accordance with federal constitutional law).
Tennessee	TENN. CODE ANN. § 49-6-1005	Mandatory period of silence of approximately one minute; voluntary student participation or initiation of prayer permitted.
Texas	TEX. EDUC. CODE ANN. § 25.901	Student has absolute right to individually, voluntarily, and silently pray or meditate in a non-disruptive manner.
Utah	UTAH CODE ANN. § 53A-11-901.5	Teacher may provide for the observance of a period of silence

Vermont	No Statutory Provision	Silent and voluntary prayer (in accordance with federal constitutional law).
Virginia	VA. CODE ANN. § 22.1-203	School may establish the daily observance of one minute of silence; students may engage in voluntary student-initiated prayer.
Washington	No Statutory Provision	Silent and voluntary prayer (in accordance with federal constitutional law).
West Virginia	WEST. VA. CONST. art III, §15(a)	The West Virginia Constitution requires public schools to provide a designated brief time at the beginning of the school day for students to exercise their right to personal and private contemplation, meditation, or prayer. Students can neither be denied the right to voluntarily prayer, nor be required or encouraged to participate in any type of meditation or prayer as part of the school curriculum.
Wisconsin	No Statutory Provision	Silent and voluntary prayer (in accordance with federal constitutional law).
Wyoming	No Statutory Provision	Student-led prayers, religious student groups, and religious exercise absent school-direction.