

Public-School Prayer Appellate Case Summary

By State

Updated February 20, 2009

Americans United for Separation of Church and State

ALABAMA

- ***Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004).**

Holding: A public-school teacher’s practice of opening her class with a request for student devotions and a moment of silence — which she began with “let us pray,” and concluded with “amen” — lacked a genuine secular purpose and conveyed a message of governmental endorsement of religion, in violation of the Establishment Clause.

The Facts: A public-school teacher typically began her class each day by eliciting prayer requests from her students, then stating, “Let us pray,” before holding a moment of silence that she concluded by saying, “Amen.” The school’s principal had personally observed this practice. A student challenged the practice under the Establishment Clause. The district court dismissed his Establishment Clause claim on qualified immunity grounds, but the Eleventh Circuit reversed, concluding that then-existing law clearly established a constitutional violation.

Establishment Clause: The court applied the three-part *Lemon* test to the teacher’s prayer practice. First, the teacher’s solicitation of “prayer requests” and her use of the phrases “let us pray” and “amen” made clear that her intent in holding a moment of silence was to foster prayer. While her supposed purpose was to teach students compassion, she had chosen a quintessentially religious means of doing so, contrary to *Lemon*’s purpose prong. Second, given that the effect of the teacher’s behavior was to promote prayer, an inherently religious activity, her conduct constituted an impermissible governmental endorsement of religion. This was true regardless of whether students had asked the teacher to undertake the presentations, whether they were nonsectarian, and whether students were free to not participate or even leave the room. An objective observer would still view the teacher’s actions as an official endorsement of prayer. Hence, the teacher’s practice failed the *Lemon* test on two separate bases. Finding the circumstances in this case virtually “indistinguishable” from those in the Supreme Court’s 1985 *Jaffree* decision, the court concluded the constitutional violation was clearly established, and the teacher was not entitled to qualified immunity. And because her prayer practice was regular and longstanding enough to qualify as a policy, the school board could be held vicariously liable for her conduct.

- ***Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), vacated, 530 U.S. 1256 (2000), reinstated, 230 F.3d 1313 (11th Cir. 2000).**

Holding: A school district policy permitting nonsectarian, non-proselytizing, student-initiated prayer at any school-related event did not violate the Establishment Clause because when no indicia of school sponsorship are present, such prayer is private speech protected by the Free Speech and Free Exercise Clauses.

The Facts: Plaintiffs challenged the DeKalb County school district’s application of an Alabama statute permitting nonsectarian, non-proselytizing, student-initiated prayer during compulsory or non-compulsory school-related events, as well as the statute, itself.

The district court found the statute, both facially and as applied by DeKalb County, violated the Establishment Clause, and it issued a permanent injunction. The Eleventh Circuit Court of Appeals vacated the injunction to the extent it required school officials to prohibit prayer in purely private situations.

Free Exercise and Free Speech Clauses: The court first noted that public schools may not require students to pray; nor delegate this function to community members; nor establish a policy which “permits” students or others to speak strictly on religious subjects; nor actively endorse, encourage, or participate in religious speech. But conversely, schools may not limit truly student-initiated religious speech to any greater extent than they can regulate student-initiated secular speech, lest they demonstrate hostility toward religious speech in violation of the Free Exercise and Free Speech Clauses. Thus, a school must apply the same reasonable time, place, and manner restrictions to both religious and secular speech, except that schools can forbid religious speech that is “proselytizing,” because such speech is “inherently coercive.” In a footnote, the court noted that the same restrictions must apply to religious and secular speech with respect to the school’s commencement programs, the distribution of religious literature, and speech by “all non-government, private parties.”

The U.S. Supreme Court vacated the decision in light of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), but on remand, the Eleventh Circuit concluded its previous opinion aligned with *Santa Fe*. The Supreme Court, it reasoned, had not prohibited *all* prayer at school events. Rather, it had proscribed prayer which, from all the circumstances, an objective observer would consider school-sponsored. In contrast, when “the prayer is genuinely student-initiated, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private[,] and it is protected [by the Constitution].”

- ***Wallace v. Jaffree*, 472 U.S. 38 (1985).**

Holding: A moment-of-silence statute authorizing public-school students to engage in a one-minute period of “meditation or voluntary prayer” at the beginning of each school day was unconstitutional because it lacked any secular purpose and suggested prayer was a favored activity.

The Facts: The Alabama legislature amended a statute that originally authorized a one-minute period of silence for “meditation” at the opening of the school day in public-school classrooms. As amended, the statute authorized a one-minute period of “meditation or voluntary prayer,” and the amendment’s principal sponsor explained its sole purpose was to “return voluntary prayer to our public schools.” Plaintiff parents challenged both the original and amended statutes, as well as a subsequent amendment permitting public-school teachers to “lead ‘willing students’ in a prescribed prayer to ‘Almighty God . . . the Creator and Supreme Judge of the World.’” The U.S. Supreme Court unanimously affirmed the Court of Appeals’ ruling that the final amendment was unconstitutional, *see Wallace v. Jaffree*, 466 U.S. 924 (1984), and the plaintiffs ultimately abandoned their challenge to the original statute. Thus, the Court was left to

consider only the first amendment, which authorized a moment of “meditation or voluntary prayer.”

Establishment Clause: As an initial matter, because the district court had erroneously concluded that nothing prevented Alabama from establishing a state religion if it so desired, the Supreme Court reaffirmed that the Fourteenth Amendment applied the Establishment Clause to the States, noting that the “individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.”

Turning to the merits, the Court applied the *Lemon* test. It saw no need to proceed beyond the purpose prong, however, because it was “unambiguous” that the legislative measure in question “had *no* secular purpose.” The bill’s sponsor testified that its intent was to return prayer to public schools, a clearly religious purpose. He had also inserted a statement to this effect into the legislative record, without any apparent dissent from his colleagues. The State had presented *no* evidence of *any* secular purpose. Examining the statutory language, the Court noted that the bill effected only one substantive change — that is, it added the phrase “or voluntary prayer.” “[O]nly two conclusions [we]re consistent with” this text: “(1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose.” Absent any suggestion that the bill “was nothing but a meaningless or irrational act,” the Court concluded “that the State intended to characterize prayer as a favored practice.” Such a message was inconsistent with the principle that the State must maintain neutrality with respect to religion.

In concurrence, Justice Powell indicated he would have upheld the statute — apparently despite its singling out of “voluntary prayer” as a favored activity — had it had any secular purpose. Justice O’Connor concurred in the judgment and made clear that in her eyes, the statute’s endorsement of “voluntary prayer” rendered it unconstitutional, but that other, neutral “moment-of-silence” statutes were permissible.

- ***Hall v. Bd. of Sch. Comm’rs of Conecuh County*, 656 F.2d 999 (5th Cir. 1981).**

Holding: A public high-school’s practice of allowing students to give daily religious readings over the school’s public-address system, and the fundamentalist Christian curriculum of its Bible Literature course, had the primary effect of advancing religion, in violation of the Establishment Clause.

The Facts: Plaintiffs challenged an Alabama public high-school’s practice of permitting students to read “morning devotionals” over the school’s intercom system, and they claimed a Bible Literature course offered at the school was taught in a manner that advanced religion. Because the school district discontinued the morning devotionals, and the Bible Literature course was not then being taught, the district court dismissed the case as moot. The Fifth Circuit held the case was not moot, and that both practices had violated the Establishment Clause.

Establishment Clause: First, all parties agreed that under established law, including *Sch. Dist. of Abington Twp. v. Schempp*, the morning devotionals were unconstitutional, and the plaintiffs were entitled to a permanent injunction that would ensure the school district did not resume its longstanding practice after the litigation concluded. Second, the district court had found that the Bible Literature course “consisted entirely of a Christian religious perspective and within that a fundamentalist and/or evangelical doctrine.” The only text used in the course other than the Bible revealed a clearly fundamentalist Christian approach to studying the Bible, and expert witnesses testified that the primary effect of a course based on these materials would be to advance religion. Examinations given in the course required rote memorization of the Bible, and other aspects of the curriculum were inconsistent with a secular methodology. Consequently, the Fifth Circuit found that the course’s primary effect was to advance fundamentalist Christianity, in violation of the Establishment Clause, and it ordered the district court on remand to fashion an injunction that would prohibit use of the offending text and ensure that any future course was taught within a secular framework.

ARIZONA

- *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981).

Holding: A school district policy permitting student council members to open student-run assemblies with prayer violated the Establishment Clause because it lacked a secular purpose and advanced religion through implicit coercion of dissenting students.

The Facts: The Chandler school board approved the student council's request to open the voluntary assemblies it ran for fellow students with prayer. At each assembly, the council allotted time for a prayer and selected a student to deliver it, leaving him/her free to choose its content. A parent sued, contending the prayers violated the Establishment Clause. The district court agreed and permanently enjoined the school from permitting or condoning verbal prayers at student assemblies. The Ninth Circuit affirmed.

Establishment Clause: The court applied *Lemon* and found the prayer practice failed all three prongs. First, the court could conceive of no secular purpose for opening assemblies with prayer, and the school district offered none. Second, the primary effect of the prayers was to advance religion, since students must either listen to a prayer chosen by a select group of students or forego the opportunity to attend a major school function. Third, because the assemblies required supervision by school personnel, prayer during these events engendered excessive entanglement between government and religion. More broadly, the court found "no meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting' students to direct the exercises."

Free Speech and Free Exercise Clauses: The court rejected the school district's claim that denying students the ability to open assemblies with prayer would violate their free-speech and free-exercise rights because in the public-school context, the Establishment Clause trumped the students' free-speech rights, and students remained free to pray together outside the school day.

ARKANSAS

- ***Warnock v. Archer*, 380 F.3d 1076 (8th Cir. 2004).**

Holding: Prayers delivered by a public-school principal at mandatory faculty meetings violate the Establishment Clause, but the principal had a Free Exercise right to display religious items in his office.

The Facts: A local public-school district required teachers to attend in-service training meetings that were held at a religious college and that included prayers. Additionally, the superintendent delivered prayers at mandatory teacher training meetings and displayed a personal Bible and framed scriptural quotation in his office. After initially complaining to the EEOC, one teacher filed suit. The district court concluded that the prayers at compulsory events violated the Establishment Clause, but that the superintendent's expressions of his religious beliefs were protected by the Free Exercise Clause. The Eighth Circuit affirmed, but it clarified that the prayers were impermissible not because the plaintiff was required to hear them but because they endorsed religion.

Establishment Clause: First, the court rejected the notion, championed by the district court, that the district's prayer practices were unconstitutional because they offended the plaintiff. Indeed, "government can permissibly engage in any number of activities that its citizens find deeply offensive without violating the Constitution." Instead, the problem with the prayers lay in their "decisive endorsement" of a particular religious position. Given that the prayers were "offered in mandatory teachers' meetings by the official conducting the meetings," an objective observer would conclude that "the government was explicitly endorsing the religious content of the prayers offered."

Free Exercise Clause: The court had previously held that religious items in the office of a county supervisor were protected by the Free Exercise Clause, and it extended that protection to the Bible and scriptural quotation at issue here.

- ***Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492 (8th Cir. 1988).**

Holding: A school district could be held liable for an employee's leading the school band in prayer at mandatory events, in violation of the Establishment Clause, where the school board was aware of and implicitly condoned the prayer practice.

The Facts: A band member's parent challenged a public-school-band teacher's practice of leading the band in prayer at mandatory rehearsals and performances. The district court found this practice, undertaken with the school board's knowledge and implicit approval, violated the Establishment Clause. The Court of Appeals affirmed, addressing only the district's contentions that the case had been mooted by the student's graduation, and that it was not responsible for the band leader's actions.

Due Process Clause: Because the school-sponsored prayers had injured the parent's interest in having her children educated in a public school free from religious activities, and the parent's other children attended schools in the district, the case was not moot.

Municipal Liability: Evidence demonstrated that the school board knew of the prayers and of the parent's concerns but took no action, and that individual members expressed support for the prayers. Further, the superintendent, with the board's authorization, had informed the band leader that the board would support his decision to continue the prayers. These facts demonstrated that the board had adopted the prayers as a custom or policy — for which it could face municipal liability.

CALIFORNIA

- *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003).

Holding: The Establishment Clause required a public-school district to censor proselytizing comments in a high-school student's proposed commencement speech because such comments would create the appearance of government sponsorship of religion and would have an impermissibly coercive effect on dissenting listeners.

The Facts: A co-salutatorian selected to speak at his high-school-graduation ceremony due to his academic standing sued the district after it censored proselytizing statements in his proposed speech. The principal, who maintained control over all aspects of the graduation ceremony, permitted the student to retain references to God as they related to his own religious beliefs, but he instructed the student to refrain from making proselytizing comments. Though it denied the student's request to insert a disclaimer in the graduation programs rather than censor the speech, the district did permit him to distribute copies of the uncensored speech just outside the graduation site. The district court rejected the student's free exercise, free speech, and equal protection claims, holding that the school district's actions were necessary to avoid an Establishment Clause violation. The Court of Appeals affirmed, relying primarily on its decision in *Cole*.

Establishment Clause: As in *Cole*, the Establishment Clause compelled the school district's actions for two reasons: first, censoring the speech was the only means of avoiding the appearance of government sponsorship of religion; and second, allowing the speech would have had an impermissibly coercive effect on dissenting listeners forced to participate through their silence. Here, as in *Cole*, the school district exercised plenary control over the graduation ceremony and the speeches given during it. Notwithstanding *Cole*, the plaintiff argued that the district should have chosen a less restrictive alternative to censoring the speech. But *Cole* made clear that censorship was necessary. The student's proposed disclaimer would only have addressed the first of the two Establishment Clause problems created by the proselytizing speech, and in any event, the district *had* offered a less restrictive alternative by permitting the student to distribute copies of his uncensored speech outside the graduation venue.

- *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000).

Holding: The Establishment Clause required a public-school district to censor prayer and sectarian references in a high-school student's proposed commencement speech because such comments would create the appearance of government sponsorship of religion and would have an impermissibly coercive effect on dissenting listeners.

The Facts: Oroville High School graduation ceremonies were held on school-district property, paid for by district funds, and planned and run by school personnel. The principal holds supervisory authority over all aspects of the ceremony, and though attendance is non-mandatory, those students who choose to attend must sign a contract pledging to act and dress in accordance with school directions. Under a school policy,

graduation ceremonies featured two speakers: the valedictorian, and a student selected by his/her classmates to deliver a non-denominational spiritual invocation. The policy further provided that the principal would review both speeches in advance. In 1998, both student speakers submitted explicitly sectarian presentations, and when the principal prohibited them from delivering the sectarian portions of their speeches, the students sued, alleging a free-speech violation. The district court denied their motion for a preliminary injunction and granted judgment for the school district. The Court of Appeals affirmed.

Free Speech Clause: Even assuming the graduation ceremony was a public or limited public forum, in which the Free Speech Clause prohibits viewpoint discrimination, the Establishment Clause required that the district refuse to allow students to deliver sectarian speeches or prayers during the ceremony. The proposed addresses would not have been private speech because the school district had authorized them as part of a district-sponsored and district-run ceremony held on district property, and because the students would deliver these comments only through operation of the district's policies and using the district's public-address system.

Establishment Clause: Relying primarily on *Santa Fe Indep. Sch. Dist. v. Doe*, the court reasoned that in light of the school district's plenary control over the graduation ceremony, an objective observer would associate the students' sectarian comments with the school district and would perceive them as governmental endorsement of religion. Further, the court explained, had the district permitted these students to deliver proselytizing comments, it would have coerced attendees to participate in a religious practice, which the Supreme Court prohibited in *Lee v. Weisman*. Consequently, the Establishment Clause compelled the district to prohibit the students from making these remarks.

- *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809 (Cal. 1991).

Holding: Prayer at public-school graduations violated the federal Establishment Clause because it sent a message of governmental endorsement of religion and excessively entangled government and religion, and it was likewise inconsistent with the religion clauses of the California Constitution.

The Facts: Taxpayer plaintiffs challenged the district's policy of allowing local public-school officials to select clergy or faculty members to deliver invocations and benedictions at high-school graduation ceremonies. With the exception of one teacher-delivered benediction, the prayers had consistently included explicitly religious content. The trial court enjoined the practice, but the court of appeal reversed, creating a split among California's intermediate appellate courts on the issue of graduation prayer. The California Supreme Court held that both the Establishment Clause and the California Constitution prohibited the prayer practice.

Establishment Clause: The court first concluded that because prayer is an inherently religious activity, the graduation prayers' "primary effect" was to advance religion. The

graduation ceremonies — organized and controlled by school officials, held on government property, and funded with public money — bore all the hallmarks of governmental sponsorship. Thus, including prayer in the ceremonies “inevitably create[s] a strong appearance of government endorsement . . . of the prayer[s]’ religious content.” That the prayers were allegedly nonsectarian was irrelevant, for the Supreme Court had made clear that “the [E]stablishment [C]lause prohibits not only explicit denominational preferences, but also governmental favoritism of religion in general.” Nor could the prayers be justified as an accommodation of religion, because “[t]here is no free exercise right for government officials to include prayers in a public school ceremony.” Finally, that the ceremonies were nominally mandatory was also irrelevant because the absence of outright coercion did not mitigate the prayers’ message that the district “favor[ed] or prefer[red] the religious beliefs expressed by the invocation and benediction speakers.”

Next, the court applied *Lemon*’s excessive-entanglement prong, concluding that including prayers at public high-school-graduation ceremonies “impermissibly entangles government in religious matters in two ways: It involves governmental selection or approval of religious speakers and governmental approval of the content of public prayer.”

Lastly, the court rejected *Marsh v. Chambers*, which approved legislative prayers based on their unique history dating back to the Bill of Rights’ passage, as a precedent for approving graduation prayers. The Supreme Court, it explained, had made clear that *Marsh* was inapplicable in the public-school context.

State Constitution: The graduation prayers likewise violated several California constitutional provisions, including its establishment clause, its no-preference clause (which is more protective than the federal Establishment Clause), and its no-aid clause (which applied to intangible aid as well as material aid).

DISTRICT OF COLUMBIA

- *Comm. for Voluntary Prayer v. Wimberley*, 704 A.2d 1199 (D.C. 1997).

Holding: A proposed ballot initiative that would permit nonsectarian, non-proselytizing, student-initiated prayer at school-related events was not a proper subject for initiative because it served the religious purpose of promoting prayer in public schools, and its primary effect would be the advancement of prayer-givers' religious views.

The Facts: The DC Board of Elections approved for inclusion on the November 1995 ballot an initiative that would have authorized "nonsectarian, non-proselytizing student-initiated voluntary prayer . . . during compulsory or non-compulsory school-related" events. Plaintiffs challenged the Board's decision, contending this was not a proper subject for initiative because the practice would violate the DC Human Rights Act and the federal Establishment Clause. Concluding that the proposed prayer initiative was "patently, obviously, and unquestionably unconstitutional," the trial court enjoined the Board from placing it on the ballot. The Court of Appeals affirmed.

Establishment Clause: Like the trial court, the Court of Appeals concluded that at least as applied to graduation ceremonies, the prayer initiative was clearly unconstitutional under *Lee v. Weisman*. Moreover, allowing prayer at compulsory school events would result in overt coercion, and more subtle coercion would still be present even at non-compulsory events — and *Lee* held that both types of coercion were inconsistent with the Establishment Clause. Further, the court explained, the proposed initiative bore the clear, non-secular purpose of "fostering prayer in the public schools," its "principal and primary effect" would be the advancement of "the religious views of those students who lead school prayers. Thus, it failed the *Lemon* test's first two prongs. Furthermore, the court saw "no distinction between the teacher-led voluntary prayer struck down in [*Wallace v. Jaffree*] and the student-led prayer envisioned by the proposed prayer initiative" because both involved a departure from the "fundamental principle of neutrality required by the [E]stablishment [C]lause." The court expressly declined to follow *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), which it characterized as clearly inconsistent with *Lee*.

DC Human Rights Act: In light of its Establishment Clause conclusion, the court found it unnecessary to determine whether the initiative would result in unlawful religious discrimination in the public schools.

GEORGIA

- ***Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997).**

Holding: Where its legislative history revealed a clear secular intent — that is, reducing violence among youths — a statute mandating “a brief period of quiet reflection” for public-school students at the beginning of each school day was constitutional.

The Facts: Georgia enacted a statute under which public-school teachers were required to “conduct a brief period of quiet reflection for not more than 60 seconds with the participation of all the pupils therein assembled” at the beginning of each school day. Its legislative sponsor included it in a legislation package aimed at reducing violence among youths after he observed the calming effect of quiet reflection on students who had survived campus tragedies. The statute’s legislative history indicated some legislators believed the statute would institute school prayer, and an amendment added a provision clarifying that the statute would have no impact on students’ ability to initiate voluntary, nonsectarian, non-proselytizing prayer at school events. In Gwinnett County, the superintendent issued a bulletin to principals directing teachers not to suggest or imply that students should or should not use the moment of reflection for prayer. If a student asked, however, a teacher could inform him he was permitted to pray silently if he so desired. Bown, a Gwinnett County teacher, refused to enforce the statute and was ultimately fired. He sued, claiming the statute violated the Establishment Clause.

Establishment Clause: Applying *Lemon*, the Court of Appeals first concluded the statute had a secular purpose — namely, providing students with an opportunity for quiet reflection as a respite from “today’s hectic society.” Moreover, it explicitly stated that the silent period was “not intended to be and shall not be conducted as a religious service or exercise but shall be considered as an opportunity for a moment of silent reflection on the anticipated activities of the day.” The amendment referring to prayer was intended simply to clarify that the moment-of-silence provisions did not affect what the legislature believed was constitutionally protected activity, and it affirmatively authorized nothing. Because the statute’s legislative history was so different from that in *Wallace v. Jaffree*, the court concluded the statute passed *Lemon*’s purpose prong.

Next, the court found that the statute neither advanced nor inhibited religion because it was neutral with regard to religion — students could do as they liked, so long as they were silent. Students could pray, but need not, nor listen to others’ prayers. For this same reason, the court observed, students experienced no coercion or peer pressure to engage in religious activity.

Finally, the court found no excessive entanglement because teachers were required only to advise their students to remain silent and to do the same, themselves. While a teacher would be expected to quiet a student who began praying audibly, teachers are regularly expected to quiet students at various times during the day when audible activity is not permitted.

- ***Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989).**

Holding: A school district’s “equal access plan” designed to permit continued delivery of sectarian invocations at its high-school-football games was unconstitutional because it lacked a secular purpose, and because religious messages delivered at a school-sponsored event on school property via a sound system controlled by the school would be stamped with the school’s imprimatur.

The Facts: After some negotiation with the plaintiffs, who had complained about the public high-school’s traditional, pre-game invocation practice, the school adopted an “equal access plan” permitting designated members of all school clubs and organizations or willing students, parents, or staff members to volunteer to deliver the pre-game invocations. Speakers would be selected at random from among the volunteers, and the school would not monitor the invocations’ content. The plaintiffs sued, contending the “equal access plan” was unconstitutional on its face, but the district court disagreed. The Eleventh Circuit reversed.

Establishment Clause: Initially, the court rejected the school district’s invitation to approve the prayers under *Marsh v. Chambers*, noting that “the present case does not lend itself to *Marsh*’s historical approach because invocations at school-sponsored football games were nonexistent when the Constitution was adopted.” Under *Lemon*, the court found the equal access plan lacked a secular purpose. The district had expressly rejected an alternative plan permitting only secular invocations, which clearly demonstrated its religious purpose. Moreover, “the state cannot employ a religious means to serve otherwise legitimate secular interests,” and in the instant case, “the pre-eminent purpose behind having invocations was to endorse Protestant Christianity.” Further, invocations delivered pursuant to the plan would convey an “inescapable” message of governmental endorsement of religion because the invocations were “given via a sound system controlled by school principals . . . at a school-sponsored event at a school-owned facility.”

FLORIDA

- *Adler v. Duval County School Board*, 206 F.3d 1070 (11th Cir. 2000) (*en banc*) (“Adler II”), *vacated*, 531 U.S. 801 (2002), *reinstated*, 250 F.3d 1330 (11th Cir. 2001) (“Adler III”).

Holding: A school board policy allowing graduating high-school students to vote on whether to have a student volunteer present at commencement a two-minute opening and/or closing “message,” unedited and uninfluenced by school employees, did not violate the Establishment Clause.

The Facts: A Duval County School Board policy allowed the graduating high-school class to vote on whether to have a student volunteer present a two-minute opening and/or closing “message.” The policy placed no restrictions on the message’s content and provided that the student volunteer would prepare his/her message without input from school employees.

Establishment Clause: In *Adler II*, the Eleventh Circuit upheld this policy against an Establishment Clause challenge, reasoning that the “absence of state involvement in each of the central decisions -- whether a graduation message will be delivered, who may speak, and what the content of the speech may be -- insulates the School Board’s policy from constitutional infirmity on its face.” First, the court applied *Lee v. Weisman*, 505 U.S. 577 (1992). It reasoned that the Supreme Court struck down high-school commencement prayer in *Lee* because the State had ordained, directed, endorsed, and sponsored a religious message. Here, the Board’s policy created a forum for private expression, whether secular or religious, so the governmental “coercion” that concerned the Court in *Lee* was not present. Moreover, however this forum was characterized, the State could not, having created it, exclude expression of religious viewpoints. According to the Eleventh Circuit, the school’s provision of a platform for speech was not enough to demonstrate state sponsorship: first, an objective observer would not view politicians and others who speak at graduations as speaking for the State; and second, the Supreme Court’s forum cases had made clear that private speech can occur within government facilities. Further, the court reasoned, the school’s creation and administration of the student vote did not endow the student “message” with a governmental imprimatur — rather, an objective observer would view the graduation speaker much like a homecoming queen, as a representative of the student body, not of school officials. Absent evidence that policy had coerced elected speakers into delivering sectarian messages to satisfy majority desires, the court found no violation under *Lee*.

Next, the court applied the tripartite *Lemon* test. First, it found that the policy served the secular purposes of affording graduates an opportunity to direct their own ceremony, allowing students to solemnize graduation as a seminal educational experience, and permitting student freedom of expression. Second, the court concluded the policy’s primary effect did not advance religion because it was facially neutral with respect to the student message’s content, leaving this choice to the student. Finally, the policy did not

entangle the state with religion because it forbade school employees from influencing the message's contents.

In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the Supreme Court struck down prayers at high-school football games that were delivered by an elected student, based on a separate student vote as to whether to have the prayers at all. Following this decision, the Court vacated *Adler II* and remanded the case to the Eleventh Circuit for reconsideration. But the Eleventh Circuit, sitting *en banc*, reached the same conclusion. It reasoned that Duval County's policy lacked two characteristics that had proven fatal to the policy at issue in *Santa Fe*: (1) the student message's content was *not* subject to review and modification by school officials; and 2) the policy's terms did *not* invite a religious message. Consequently, *Santa Fe* was distinguishable and did not compel a different outcome.

- **Meltzer v. Bd. of Pub. Instruction, 548 F.2d 559 (5th Cir. 1977), *aff'd in part and rev'd in part en banc*, 577 F.2d 311 (5th Cir. 1978).**

Holding: A school district's practice of allowing students to deliver daily "morning devotionals" consisting of prayer and Bible-readings over its public-address system violated the Establishment Clause.

The Facts: Plaintiffs challenged two Orange County public-school district practices and one Florida statute: (1) the district's practice of holding daily, five to seven-minute "morning devotionals" consisting of prayer and Bible-reading over the schools' public address systems; (2) the district's guidelines — adopted after the plaintiffs complained about the district's allowing the Gideons to distributed Bibles to students in classrooms — allowing distribution of literature by all religious groups on an equal footing, but not permitting distribution of secular literature; and (3) a statute requiring public-school teachers to "inculcate, by precept and example, . . . the practice of every Christian virtue" in their students. The district court denied relief on all three grounds, but a Court of Appeals panel reversed, finding *all three* practices unconstitutional under the Establishment Clause. The *en banc* court adopted the panel's opinion as to part (1), but it affirmed by an equally divided vote the district court's holding that (2) and (3) were constitutional.

Establishment Clause: In striking down the morning devotionals, the panel explained that because the prayers and Bible-readings occurred over schools' public address systems, they were "near[ly] compulsory" for the "captive audience." This practice, it held, clearly fell within the scope of the Supreme Court's ruling in *Schempp*.

The *en banc* court's opinion did not address the substance of issues (2) and (3).

IDAHO

- ***Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998), vacated as moot, 177 F.3d 789 (9th Cir. 1999) (en banc).**

Holding: A school district’s policy permitting four graduates, selected according to class standing, to deliver brief, personally-composed comments at their commencement ceremony, without school review or censorship, did not violate the Establishment Clause.

The Facts: A high-school student and her parent challenged a school-district policy under which four graduates, selected according to class standing, would each deliver at their commencement ceremony “an address, poem, reading, song, musical presentation, prayer, or any other pronouncement.” The school could neither require specific content nor censor any presentation, but could merely advise the student “about the appropriate language for the audience and occasion.” Further, the district included a disclaimer in its graduation programs stating that the school district did not endorse the students’ speeches. The district court *sua sponte* granted summary judgment for the school district. A three-judge panel of the Ninth Circuit affirmed, after which the student graduated. When the full court later granted rehearing *en banc*, it vacated the district court and panel decisions and ordered the case dismissed as moot.

Establishment Clause: The panel first considered and rejected the plaintiffs’ argument that the district’s prayer practice was unconstitutional under *Lee v. Weisman*’s no-coercion test. In contrast to the situation in *Lee*, Madison’s policy provided for students, rather than clergy, to deliver presentations and neither stipulated nor encouraged those presentations to include prayer or other religious content. Further, the student speakers were selected according to a neutral, secular criterion, academic performance.

The panel likewise found the policy constitutional under *Lemon*: it served a secular purpose — namely, granting top students the autonomy to deliver an uncensored speech; an objective observer, aware that only the students controlled the speeches’ content, would not perceive any governmental endorsement of religion; and on its face, the policy evinced no entanglement between government and religion.

- ***Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), vacated as moot, 515 U.S. 1154 (1995).**

Holding: A school board policy under which students voted on whether to have a prayer at commencement, and on who should deliver it, violated the Establishment Clause because it violated the no-coercion principle.

The Facts: A school district policy allowed graduating students to vote on whether to have an invocation and benediction at graduation, and if so, whether a minister or a student (and in either case, who) would deliver them. The policy suggested, but did not require, that a student with the third or fourth highest grade-point-average in the class be chosen. Students were not required to attend graduation, and during the prayers, neither

students nor other attendees were required to stand, bow, or otherwise “participate.” Moreover, the commencement programs included a disclaimer related to the prayers, and school officials did not review the prayers’ contents in advance. Some form of religious exercise had been included in the district’s graduation ceremonies since 1981.

Establishment Clause: Because graduation is ultimately a school-controlled, school-sponsored event, the district could not circumvent the Establishment Clause by delegating the decision to include a prayer and the selection of the speaker to the student body. “Elected officials cannot avoid constitutional mandates by putting them to a majority vote” and cannot absolve themselves of a constitutional duty by delegating their responsibilities to students. The court concluded that the policy was coercive for the same reasons as those found in *Lee v. Weisman*, 505 U.S. 577 (1992), and that the policy further violated the *Lemon* test. It also noted its disagreement with the Fifth Circuit’s holding in *Jones v. Clear Creek*, 977 F.2d 963 (5th Cir. 1992).

Free Speech and Free Exercise Clauses: The court rejected intervenor-students’ argument that eliminating the prayers would violate their free speech and free exercise rights. The graduation ceremony was not a public forum, and the challenged policy did not provide broadly for the expression of all viewpoints on a particular topic. Rather, because the ceremony bore the hallmarks of governmental control, the student speakers were state actors subject to the Establishment Clause.

LOUISIANA

- ***Doe v. Sch. Bd. of Ouachita Parish*, 274 F.3d 289 (5th Cir. 2001).**

Holding: A proposed statutory amendment that would have allowed verbal prayer in public schools was motivated entirely by a religious purpose and thus violated the Establishment Clause.

The Facts: A Louisiana statute required school boards to permit schools “to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in silent prayer or meditation.” A proposed amendment would have deleted the word “silent.”

Establishment Clause: Applying *Lemon*, the court found the amendment “was motivated by a wholly religious purpose.” As in *Jaffree v. Wallace*, 472 U.S. 38 (1985), the amendment’s nature and plain language, as well as legislators’ contemporaneous statements, demonstrated that its sole purpose was to authorize verbal prayer in schools, which the Supreme Court had declared impermissible.

- ***Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff’d without op.*, 455 U.S. 913 (1982).**

Holding: A statute and associated policy authorizing daily, student or teacher-led prayer in public-school classrooms were inconsistent with the Establishment Clause because they employed an inherently religious means to accomplish their avowed secular purpose, their primary effect was to promote a quintessentially religious activity, and their implementation would inevitably engender excessive entanglement between government officials and religious practices.

The Facts: A Louisiana statute enabled public-school boards to authorize classroom prayers. Teachers would ask whether any student wished to offer a prayer, and if none did, could offer the prayer themselves. Under the Jefferson Parish School Board’s policy, a minute of silent meditation would immediately follow any prayer, and if neither the teacher nor any student chose to offer a prayer, the class would proceed to the minute of meditation. No prayer could exceed one minute in duration, and no student or teacher could be compelled to pray. Written parental permission and a verbal request from the student were required for participation in the prayers. All other students could either sit quietly in the classroom or remain outside during the prayer, returning for the meditation period. Several parents challenged the statute and policy under the Establishment Clause. The district court ruled for the State, but the Fifth Circuit Court of Appeals reversed.

Establishment Clause: Applying *Lemon*, the court first found that the statute lacked a legitimate secular purpose. Although two legislators averred its intent was to increase religious tolerance by exposing students to beliefs different from their own, the court

brushed this explanation aside. “Prayer is perhaps the quintessential religious practice for many of the world’s faiths, and it plays a significant role in the devotional lives of most religious people.” If nothing else, the State had employed a religious means to serve its secular purpose, and the Supreme Court had held this was impermissible. Second, the court concluded that because the statute and policy promoted an inherently religious practice — regardless of whether participation was voluntary, and regardless of the prayers’ ultimate content, whether sectarian or not — they violated *Lemon*’s effect prong. Finally, though the statute and policy had not yet gone into effect, the court found it “inevitable” that they would lead to “inappropriate governmental involvement in religious affairs” because the prayers would take place on school property during regular school hours, with teacher organization or leadership, and under the supervision of school authorities.

MISSISSIPPI

- ***Ingrebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996).**

Holding: A Mississippi statute permitting student-initiated prayers at compulsory and noncompulsory public school events violated the Establishment Clause because it was intended to promote prayer in public schools, conferred a special benefit to religion, entangled school officials in delivering and evaluating prayers, coerced dissenting students' participation, and communicated a message of endorsement of religion.

The Facts: A newly-enacted Mississippi statute permitted "invocations, benedictions, or nonsectarian, non-proselytizing, student-initiated, voluntary prayer . . . during compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies and other school-related student events." A group of parents, students, and taxpayers sought to enjoin its operation based on the Establishment Clause. The district court issued a preliminary injunction halting implementation of the statute in its entirety, except to the extent it authorized prayers at graduation ceremonies in accordance with *Jones v. Clear Creek*, 977 F.2d 963 (5th Cir. 1992). The Fifth Circuit affirmed.

Establishment Clause: The court concluded the statute failed all three prongs of the *Lemon* test. First, it lacked a secular purpose because its "clear intent [was] to inform students, teachers and school administrators that they can pray at any school event so long as a student 'initiates' the prayer . . ." Returning prayer to public schools, it warned, was not a secular purpose. Second, it advanced religion by conferring a "preferential, exceptional benefit to religion that it does not extend to anything else." Third, it excessively entangled government and religion by allowing government employees to conduct prayers (at students' "initiation"); to punish dissenting students who chose to absent themselves under compulsory attendance laws; and to determine whether prayers were "nonsectarian and non-proselytizing." Moreover, the statute likewise failed *Lee*'s no-coercion test because it allowed any person (including teachers and administrators) to conduct prayers at events that students were required by law to attend. Finally, the statute failed the endorsement test because it allowed school officials to lead students in prayer and set aside special time for them to do so.

NEBRASKA

- ***Doe v. Sch. Dist. of the City of Norfolk*, 340 F.3d 605 (8th Cir. 2003).**

Holding: Absent any indicia of affirmative school sponsorship, an impromptu prayer delivered by a parent-speaker at a public-high-school graduation did not violate the Establishment Clause.

The Facts: After the ACLU threatened legal action, the school district decided to omit the traditional, student-delivered invocation and benediction from its 2000 graduation ceremony. Nonetheless, as it had in the past, the district permitted a school-board member whose child was graduating to deliver brief remarks during the ceremony. The board-member-parent used this opportunity to recite the Lord's Prayer, and though no district officials interrupted him, nothing suggested that any of them had been aware of his intentions in advance. Parents of a graduating student then sued the district, alleging the prayer's delivery violated the Establishment Clause. The district court granted summary judgment to the school district, and the Court of Appeals affirmed.

Establishment Clause: Because the court concluded the board-member-parent's comments were purely private speech, not endorsed by the school district, it found no Establishment Clause violation.

Free Exercise and Free Speech Clauses: Although the parent was also a board member, the court concluded that the informal policy which allowed him to address the audience, the impromptu nature of his recitation, and his couching the prayer as a personal request for guidance all "indicate[d] sufficient separation" between his roles as a parent and board member. Citing the Eleventh Circuit's decision in *Adler II*, the court explained that "[t]he complete absence of any involvement by the School District in determining whether [the parent] would deliver a speech as well as the complete autonomy afforded [him] in determining the content of his remarks indicates a lack of state-sponsorship of his recitation." Consequently, the prayer constituted private religious expression protected by the Free Exercise and Free Speech Clauses.

NEW JERSEY

- ***Borden v. Sch. Dist. of the Twp. of East Brunswick*, 523 F.3d 153 (3d Cir. 2008).**

Holding: Where a high-school football coach has historically organized and even led his team in prayer, his bowing his head or “taking a knee” during player-initiated team prayers sent an unconstitutional message of governmental endorsement of religion.

The Facts: A high school football coach sued the school district after it prohibited him from continuing his longstanding practice of praying with his team. In the past, the coach had actively organized and even led the prayers, but even if he could no longer do so, he sought to bow his head during student-initiated prayers at pre-game meals and to “take a knee” while his players prayed just prior to games. The district court found the school district’s restrictions infringed on the coach’s rights to free speech, academic freedom, free association, and due process, but the Third Circuit reversed, holding the restrictions were necessary to prevent continued Establishment Clause violations.

First Amendment: The court first considered Borden’s allegations that the district’s prohibition was overbroad and vague. The district prohibited school officials from encouraging, leading, initiating, mandating, or otherwise coercing students into prayer, and from participating in student-initiated prayer. While the court acknowledged the latter prohibition could be slightly overbroad — extending to circumstances where a reasonable observer, in light of history and context, might not construe a school official’s mere participation in student-initiated prayer as a governmental endorsement thereof — this overbreadth could be cured through case-by-case application. Further, contrary to Borden’s allegations, the term “participate” was not vague, as the district’s guidelines proceeded to define the term using language from a Fifth Circuit Court of Appeals decision.

Free Speech Clause: Because Borden’s censored “speech” was not on a matter of public concern, Borden lacked a free speech right to trigger the *Pickering* balancing test. The interests his silent acts would serve were personal to him and to his team — namely, raising the team’s morale and sense of unity, and respecting the players’ prayers — and the “speech” did not occur in any type of official proceeding or public forum. Hence, the school was free to prohibit it. The court also addressed Borden’s allegation that the guidelines interfered with his right to academic freedom: educational institutions, not individuals, were endowed with this right, and nothing entitled Borden to contravene his employer’s policy.

Free Association: Borden further argued that by barring him from “taking a knee,” the district had interfered with his right to associate with his players by physically and mentally segregating him. Free Association did not protect Borden’s relationship with his students because this relationship was insufficiently close, and his football team was not an expressive association.

Due Process Clause: In a few brief paragraphs, the court dismissed Borden's vague references to privacy rights as lacking any basis in law.

Establishment Clause: Relying on the endorsement test used in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the court held that a reasonable observer familiar with the context and history of Borden's behavior would perceive his conduct as governmental endorsement of religion. An objective observer would know that he had previously led and organized prayers with his players and would thus interpret his silent actions not as respect for religion, but as endorsement of it. The court confined its holding to the facts before it, noting that "if 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 of reflection or prayer, we would likely reach a different conclusion because the same history and context of endorsing religion would not be present."

- *ACLU of N.J. v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (*en banc*).

Holding: A school board policy under which students voted on whether to have a prayer delivered by a student volunteer, a moment of silence, or neither, at their graduation ceremony violated the Establishment Clause because it communicated a message of governmental endorsement of religion, lacked a secular purpose, subjected religious views to majority rule, and impermissibly coerced dissenting students.

The Facts: After the Supreme Court's ruling in *Lee v. Weisman*, a local school board adopted a new policy on graduation prayers. Rather than invite a local clergy member to deliver an invocation and benediction, the school would allow the graduates to vote on whether to have a prayer, a moment of reflection, or neither, and to organize and administer the vote themselves. A disclaimer would also be inserted in the graduation programs. The next year, a slim plurality of graduates voted for a prayer, and the senior class officers then selected a volunteer to deliver it. The ACLU and one graduating student sued, contending the prayer would violate the Establishment Clause and the New Jersey Constitution. The district court granted a preliminary injunction, which the Third Circuit affirmed on emergency appeal, noting that the graduation ceremony was a school-sponsored event not materially distinguishable from that in *Lee*. The district court ultimately entered judgment for the plaintiffs, and the Third Circuit affirmed.

Establishment Clause: As an initial matter, the court rejected the Board's proffered justification for the prayer policy — namely, the students' free speech rights. The Free Speech Clause, it explained, does not create a right in a plurality to impose its religious views on others. "Although it is necessary to reconcile one's own preferences to the results of a referendum when choosing one's representatives," the court observed, "the First Amendment does not allow one's religious preferences to be compromised in this manner." Moreover, given that the policy permitted only one speaker, it did not transform the graduation ceremony into a public forum for the expression of private religious views.

Analyzing the policy in light of *Lee v. Weisman*, 505 U.S. 577 (1992), the court acknowledged that the school in this case was less involved, but that its involvement remained significant. School officials controlled the order of speakers, the ceremonies were held on school property, the ceremonies were undeniably school-sponsored events, and only through the Board's delegation were students able to speak at all. And as in *Lee*, dissenting students were left to either participate in a group prayer or forgo attendance at an event of seminal importance. Noting its disagreement with the Fifth Circuit's decision in *Jones v. Clear Creek*, 977 F.2d 963 (5th Cir. 1992), the court found the policy unconstitutional under *Lee*.

Finally, the court applied the *Lemon* test and concluded that the policy flunked two of its three prongs. First, to the extent that solemnizing the graduation ceremony was a legitimate secular purpose, the policy accomplished it in a constitutionally impermissible manner. Second, the policy's text and history would convince a reasonable observer that the Board favored inclusion of a prayer, and the principal effect of prayer offered in any given year would be to advance religion. Because the policy sought "to accommodate the preference of some at the expense of others and thereby crosses the required line of neutrality," it could not be justified as an accommodation of religion. `

- ***May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985).**

Holding: A facially neutral moment-of-silence statute enacted to accommodate those students who wished to pray was unconstitutional because it lacked a secular purpose.

The Facts: The New Jersey legislature enacted a statute permitting public-school students to observe a "1-minute period of silence to be used solely at the discretion of the individual student . . . for quiet and private contemplation or introspection" at the beginning of each school day. Several parents and students and one teacher filed suit and obtained a temporary restraining order. The state attorney general refused to defend the statute's constitutionality, so the New Jersey legislature intervened to do so.

Establishment Clause: Under *Lemon*'s purpose prong, the court adopted the district court's factual finding that the statute lacked a secular purpose. The lower court had concluded that the moment-of-silence lacked any pedagogical value, and hence, that the legislature's proffered secular purpose was mere pretext. In light of the evidence, this finding was not clearly erroneous. Instead, the Court of Appeals concluded, the legislature's purpose was to accommodate those students who wished to pray. It deemed this a religious purpose and struck down the statute as unconstitutional.

NEW YORK

- ***Stein v. Oshinsky*, 348 F.2d 999 (2d Cir. 1965).**

Holding: Neither the Free Exercise Clause nor the Free Speech Clause required a public school to allow students to offer daily verbal prayers in the classroom.

The Facts: After the Supreme Court issued its decision in *Engel v. Vitale*, a public-school principal ordered his kindergarten teachers to prohibit children from reciting a prayer before eating cookies and milk during class. The students' parents sued, arguing that the prohibition on voluntary prayer violated the students' free speech and free exercise rights.

Establishment Clause: Though it declined to reach the question, the court opined that because "student-initiated prayers are an illusion in the context of closely organized schooling of young children," permitting verbal classroom prayer among kindergartners would almost certainly violate the Establishment Clause.

Free Exercise and Free Speech Clauses: Neither clause, the court explained, required the State to permit individuals to engage in public prayer on any public property at any time. The parents had not alleged that prayers before milk and cookies were mandated by their children's deeply held religious beliefs, so strict scrutiny did not apply. The school was entitled to weigh the plaintiff parents' desire to have their children acknowledge God aloud in their classrooms with other parents' desire not to have their children present for such prayers. The court concluded: "The authorities acted well within their powers in concluding that plaintiffs must content themselves with having their children say these prayers before nine or after three."

- ***Engel v. Vitale*, 370 U.S. 421 (1962).**

Holding: The Establishment Clause prohibited government from composing or sponsoring the recitation of a prayer, including a nondenominational one.

The Facts: The New York State Board of Regents crafted a 22-word, nondenominational prayer and recommended that public-school districts adopt it for daily recitation by students in the classroom. When a local school board followed this recommendation, several parents sued, contending the prayers violated the Establishment Clause. The trial court and the New York Court of Appeals both deemed the prayers permissible because students were not compelled to participate, and would be excused from the classroom at their parents' request. The U.S. Supreme Court reversed.

Establishment Clause: First, the Court observed that prayer was, and always had been, an inherently religious activity. At the very least, the Court declared, the Establishment Clause means that "[i]t is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government." Indeed, "this very practice of establishing

governmentally-composed prayers” motivated the first American colonists to leave England. “These people knew, some of them from bitterest personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government’s placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services.” That the prayer was nondenominational and nominally voluntary was irrelevant. Two aspects of the prayer demonstrated that it nonetheless transgressed the Establishment Clause: first, it had been composed by government officials, and second, the State had effectively sponsored the prayer and the religious viewpoint it expressed.

PENNSYLVANIA

- *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

Holding: Statutes calling for daily recitation of Bible verses or of the Lord's Prayer over a public-school intercom system violated the U.S. Constitution's Establishment Clause.

The Facts: The Court examined consolidated cases in which the Pennsylvania and Baltimore City legislatures had adopted statutes calling for public-school students to read from the Bible or to recite the Lord's Prayer over their schools' intercom systems at the opening of each school day. In one case, students recited the prayers under a teacher's supervision, and in both cases, students could be excused from the exercise upon request.

Establishment Clause: For the first time, the Court explicitly employed the now-familiar purpose-effect test to determine whether the statutes complied with the Establishment Clause. The Court explained that the Clause required governmental actions to have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." Because the Bible verses and prayers were inherently religious, the Court found the statutes did not meet these requirements. Prayer and Bible readings almost certainly had a religious purpose, and even if the State could articulate a plausible secular purpose, it had chosen inherently religious means for accomplishing it — the principal effect of which was to promote religion. The Court deemed irrelevant that students could absent themselves upon parental request, and that the practice might be a "relatively minor encroachment[]" on the First Amendment, and it rejected the argument that the elimination of voluntary prayers would amount to government sponsorship of an anti-religious position. Nonetheless, the Court noted that the Bible could constitutionally be studied for "its literary and historic qualities," "when presented objectively as part of a secular program of education."

RHODE ISLAND

- *Lee v. Weisman*, 505 U.S. 577 (1992).

Holding: Inviting local clergy to deliver nonsectarian prayers at public middle- and high-school graduations violated the Establishment Clause because it subtly coerced high-school students to participate in a government-sponsored religious exercise.

The Facts: A Rhode Island school board policy authorized school principals to invite local clergy members to offer prayers at middle and high-school graduations. The principals typically provided the invited prayer-givers with a pamphlet instructing them to compose nonsectarian prayers with “inclusiveness and sensitivity.” Attendance at graduation ceremonies was voluntary. A middle-school student and her parents sued, claiming the prayers violated the Establishment Clause.

Establishment Clause: Writing for the majority, Justice Kennedy identified the “dominant facts” that “control[led] the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.”

The Court then proceeded to outline his no-coercion principle. At a minimum, it explained, the Constitution guarantees that government may not coerce anyone to support or participate in a religious exercise. Here, a principal’s choice to have an invocation and benediction, and his choice of a religious officiant, were choices attributable to the State. Further, by distributing the pamphlets, the principal controlled the prayers’ content. Thus, the prayers bore the hallmarks of state sponsorship. And critically, the Court noted that “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.” Participation in the prayer was not “voluntary” in the true sense of the word because students face peer and school pressure to stand or remain silent throughout, like their fellow students. Indeed, “a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.” A student’s only other options — vocal protest or non-attendance — were not real alternatives, given the students’ age and the paramount importance of the high-school graduation ceremony in their young lives. “The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation.” That the prayers were nonsectarian did not ameliorate the violation, for “our precedents do not permit school officials to assist in composing prayers” — even nonsectarian ones — “as an incident to a formal exercise for their students.”

In a concurrence joined by Justices O’Connor and Stevens, Justice Blackmun emphasized his view that the relevant question was not whether coercion was present, but whether the

state had placed its official stamp of approval on the prayer — which he concluded had occurred.

In a separate concurrence, likewise joined by Justices O'Connor and Stevens, Justice Souter explained that the Establishment Clause applies to governmental acts favoring religion *generally*, not just to acts favoring one religion over others, and that a showing of coercion is unnecessary to make out an Establishment Clause claim. While government may “accommodate” the free exercise of religion by relieving people from generally applicable rules that interfere with their religion, omitting prayers from a graduation ceremony does not “burden” religion.

In a dissent joined by then-Chief Justice Rehnquist and Justices White and Thomas, Justice Scalia indicted the majority for having laid “waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.” In his view, the Establishment Clause prohibits only governmental coercion that is “backed by threat of penalty.”

TEXAS

- *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

Holding: Student-delivered invocations at high-school football games violated the Establishment Clause, where pursuant to a school district policy, students voted on whether to have a “statement or invocation” at the games and elected a single fellow student to deliver them.

The Facts: For several years, the school district had allowed students to read overtly Christian prayers from the stage over the public address system at home football games. No written policy governed the prayers. After the plaintiffs filed suit, the district adopted a policy under which students would vote on whether a student would give an invocation during pre-game ceremonies and, if so, would elect a speaker from a list of student volunteers. Under the policy, the selected student had complete autonomy over the invocations’ content, so long as it was consistent with the goals and purposes of the policy, which were “to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.” Students voted to have an invocation and elected a student to deliver them. The District subsequently amended the policy to refer to a “statement or invocation” rather than an “invocation” alone, but it did not hold another election. The Fifth Circuit struck down the amended policy as unconstitutional. It reasoned that the rationale of *Jones v. Clear Creek*, 977 F.2d 963 (5th Cir. 1992), in which the court had upheld non-denominational prayers at graduation ceremonies, did not extend to football games because graduations, unlike football games are unique and “sober” events that are “appropriately solemnized with prayer.”

Establishment Clause: The U.S. Supreme Court agreed with the Fifth Circuit’s conclusion but not with its reasoning. The Court held that the invocations were not simply the “private speech” of elected students but instead had been endorsed by the school district. Indeed, the invocations bore numerous hallmarks of government control and approval: they occurred pursuant to a school policy, on public property, at a school-sponsored, school-related event, and were delivered via the school’s public address system. These factors confirmed the invocations did not occur in a public forum, for the district had not opened the pre-game stage for “indiscriminate use” and placed restrictions on the contents of the few messages it allowed. Rather, the messages were the government’s, and the invocations comprised an unconstitutional governmental endorsement of religion. That speakers were chosen by majoritarian vote exacerbated the violation because the voting system — engineered and operated by the school district — ensured that minority views would never be heard.

Applying *Lemon*’s purpose prong, the Court noted that the policy invited religious messages by specifically referring to “invocations” and stating that the invocations’ must serve to “solemnize” the games. Hence, the Court found the purpose set forth in the policy — fostering free expression — was a sham because restricting messages’ content and permitting only a single student to speak did not rationally serve this end. Moreover,

the policy's history demonstrated that its adoption was intended to preserve the pre-game prayer practice.

Next, the Court addressed the no-coercion principle and found that the pre-game prayer practice was indistinguishable from the graduation prayers in *Lee* in that some students were required to attend games, while others faced social pressure to do so. Even if all students' attendance were "purely voluntary," the policy would still violate the no-coercion principle because the Constitution forbids the State to exact religious conformity from a student as the price of attending a football game.

Finally, the Court held that a facial challenge was proper even though the policy had yet to be implemented because the history of its enactment sufficiently demonstrated its religious purpose, and because by its terms, the policy subjected the issue of prayer to a majoritarian vote and favored religious messages over secular ones. Thus, it would violate the *Lemon* test even if no student were ever to offer a religious message.

Justices Rehnquist, Scalia and Thomas dissented. They opined that the *Lemon* test should be jettisoned, and that a policy should be upheld against a facial challenge unless there was no conceivable set of circumstances under which it would be constitutional. Here, they explained, it was conceivable that no religious speech would result from the policy, and in any event, they deemed the invocations private speech. They also posited conformity to constitutional law as the policy's purpose, which would satisfy *Lemon*'s purpose prong.

- ***Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999), *aff'd in part*, 530 U.S. 290 (2000).**

Note: The Fifth Circuit considered the constitutionality of two prayer practices in this case. The Supreme Court granted *certiorari* as to only one of these, and the Fifth Circuit's reasoning on that issue is discussed along with the Supreme Court's decision, above.

Holding: A school board policy providing for graduating students to vote on whether an invocation and benediction would be delivered at their commencement ceremony, and if so, by whom, was unconstitutional because it failed to prohibit sectarian and proselytizing prayers.

The Facts: A school board policy authorized "the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver invocations and benedictions for the purpose of solemnizing their graduation ceremonies."

Establishment Clause: The court read its earlier decision in *Jones v. Clear Creek* narrowly, emphasizing that the nonsectarian and non-proselytizing nature of the prayers

at issue there were crucial to their constitutionality. Absent such a limitation, it concluded, the policy would fail the *Lemon* test, the endorsement test, and the no-coercion test. That prayers are student-led, student-initiated, or both, will not automatically insulate them from the Establishment Clause — content still matters because it contributes to the prayers’ coercive effect and to how an objective observer would perceive them. Because the graduation podium was not a public forum of any kind, the Free Speech Clause did not preclude the district from discriminating against these religious viewpoints.

- ***Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).**

Holding: A school district’s practice of permitting its employees to lead, encourage, promote, and participate in prayers with students during various curricular and extracurricular events unconstitutionally endorsed religion in violation of the Establishment Clause, but because most choral music includes religious content, the district’s choirs’ adoption of religious theme songs was permissible.

The Facts: A public-middle-school basketball player and her parents sued to stop the basketball coach’s longstanding practice of initiating and participating in recitation of the Lord’s Prayer at each team practice, pre-game prayers in locker rooms, post-game prayers at center court, and prayers on the bus to and from games. They also challenged various other religious practices in the school district, including holding prayers and distributing pamphlets containing religious songs at awards ceremonies, allowing student-initiated prayers before football games, allowing classroom Gideon Bible distributions, and including prayers at pep rallies. The district court entered a preliminary injunction, which was upheld on appeal. In its final ruling, the district court concluded the school district had violated the Establishment Clause by “(1) permitting its employees to lead, encourage, promote or participate in prayers with students during curricular or extracurricular events; (2) permitting its employees to initiate, lead, authorize, encourage or condone the recitation or singing of religious songs as the theme songs of the schools’ choirs; and (3) authorizing, permitting, or condoning the distribution . . . of Gideon Bibles” in classrooms. The Fifth Circuit Court of Appeals concluded the plaintiffs lacked standing to challenge the Bible distributions, affirmed the district court as to part (1), and reversed as to part (2).

Establishment Clause: The school district contended the trial court had erred in prohibiting it from allowing its employees to participate in or supervise student prayers. The Court of Appeals explained that during school-controlled, curriculum-related activities, school employees are present as school representatives, and their actions are those of the school. Hence, in these situations, the Establishment Clause forbade their participation in student prayers, and the Free Exercise Clause did not confer an overweening right to participate. Although school employees were entitled to participate in or supervise non-curricular student-prayer groups, this entitlement did not apply at official school functions or during the school day. Further, *Jones v. Clear Creek*, which permitted nonsectarian, non-proselytizing, student-led graduation prayer, did not apply to

“a quintessentially Christian prayer” in this less “solemn and extraordinary” context involving much younger students.

Though it invalidated the district’s prayer practices, the court applied the *Lemon* test and reached a different conclusion as to the choirs’ religious theme songs. First, a choir director had testified one particular song was useful in teaching students to sight read and to sing *a capella*, supplying a genuine secular purpose for singing it frequently and retaining it year to year. Second, based on testimony that the vast majority of choral music included religious content, the court found restricting the choirs to secular theme songs, as the plaintiffs desired, would actually evince impermissible hostility to religion.

- ***Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992) (“Jones II”), reinstating decision in, 930 F.2d 416 (5th Cir. 1991) (“Jones I”).**

Holding: Delivery of a nonsectarian, non-proselytizing invocation at a public high-school graduation did not violate the Establishment Clause where the prayer was approved by a majority vote of the student graduates, a student selected in the same fashion delivered the prayer, and school officials reviewed the invocation in advance.

The Facts: In *Jones I*, the court upheld a school district resolution permitting high-school seniors to choose student volunteers to deliver nonsectarian, non-proselytizing invocations at their graduation ceremonies. The senior class would first decide by majority vote whether to have an invocation, and then select the student speaker. The school would review a draft of the invocation before commencement to ensure that it was nonsectarian and non-proselytizing. In 1992, the Supreme Court vacated *Jones I* and remanded the case to the Fifth Circuit for reconsideration in light of *Lee v. Weisman*, 505 U.S. 577 (1992). On reconsideration, the court reached the same conclusion.

Establishment Clause: On remand, the Fifth Circuit analyzed the commencement prayer under five separate tests articulated over the years by the Supreme Court. First, it explained that the prayer served the secular purpose of solemnizing the graduation ceremony and recognizing its meaning and importance to students and their families. Second, it reasoned that the prayer policy could “only advance religion by increasing religious conviction among graduation attendees,” and that the requirement that invocations be nonsectarian and non-proselytizing “minimize[d]” this effect. Third, because the district officials merely reviewed a student speaker’s proposed prayer, they did not interact with religious officials or parse religious doctrine — hence, the court found no excessive entanglement between government and religion. Fourth, because students selected and delivered the prayers, no reasonable observer would perceive that the school, itself, was endorsing religion. Fifth, and finally, the court found no coercion because the prayer was not government-directed, was nonsectarian and non-proselytizing, and was delivered by a student rather than an authority figure.

Note: This decision’s continued vitality is in substantial doubt after the U.S. Supreme Court’s decision in *Santa Fe v. Doe*, 530 U.S. 290 (2000). In *Does 1-7 v. Round Rock Independent School District*, 540 F. Supp. 2d 735 (W.D. Tex. 2007), a district court

“recognize[d] that *Santa Fe* overruled *Clear Creek* to the extent *Clear Creek* approves a majoritarian election on religion.” 540 F. Supp. 2d at 750.

VIRGINIA

- ***Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001).**

Holding: A moment-of-silence statute authorizing public-school students to engage in a one-minute period of meditation, prayer, or any other silent activity which does not interfere with their classmates was constitutional because it served the secular purposes of encouraging student civility, decorum, and reflection and accommodating religion, and because it treated silent religious and secular activities neutrally.

The Facts: In 2000, the Virginia legislature made mandatory a previously authorized “minute of silence” in public-school classrooms, during which “each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, restrict, or impede other pupils in the like exercise of individual choice.” Before this new statute became effective, plaintiffs lodged a facial challenge, contending the statute’s purpose was to advance prayer in public schools.

Establishment Clause: The Court of Appeals applied *Lemon*. To ascertain whether the statute had a secular purpose, the court first examined its text. Because the statute explicitly noted pupils’ right to be free from “pressure from the Commonwealth” to engage or not engage in religious activity, expressly stated that the minute-of-silence would be offered for *any* non-distracting use, and treated religious and non-religious activity neutrally, the court found the statute’s text supported at least two purposes. First, to the extent the statute was designed to permit non-religious meditation, it had a secular purpose. And second, to the extent it was designed to permit prayer, it simply accommodated students’ religious beliefs. The statute’s legislative history confirmed these two purposes, which the court characterized as secular. The court distinguished *Wallace v. Jaffree* by observing that here, the legislature had debated the statute’s secular merits rather than expressly conceding its intent was to advance prayer in the public schools.

Next, the court found *Lemon*’s second prong “clearly satisfied . . . given the statute’s facial neutrality between religious and nonreligious modes of introspection and other silent activity.”

Finally, the State had “undoubtedly” “not become excessively entangled with religion” because its “only involvement in religion” would consist of teachers’ “informing students that one of the permissible options during the moment of silence is prayer.”

WISCONSIN

- *Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097 (7th Cir. 2007).

Holding: Public-school employees did not have a right to make promotion of religion a part of their jobs, lest they precipitate an Establishment Clause violation.

The Facts: A public-school district declined to renew a contract for one of its guidance counselors after she replaced literature on contraception with pamphlets on abstinence and twice urged students to pray with her. The counselor sued, alleging she had been fired due to her religious beliefs in violation of both Title VII and the Free Exercise Clause.

Free Exercise Clause: As Judge Posner, writing for the Seventh Circuit panel, explained, the counselor “was let go not because of her beliefs but because of her conduct.” Citing *Edwards v. Aguillard*, 482 U.S. 578 (1987), the court stressed that “[t]eachers and other public school employees have no right to make the promotion of religion a part of their job description and by doing so precipitate a possible violation of the First Amendment’s establishment clause.”