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Separation of Church and State: Are Invocations and Team Prayers Legal?

An Update

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I. Background

Before beginning a high school football game in a small Northern Georgia town, a Protestant Christian clergyman selected by the local ministerial association gives an invocation over the public address system. The invocation is addressed to God, asks for safety for the players and good sportsmanship from all present, and closes with a reference to Jesus Christ.

In a St. Petersburg, Florida high school locker room, members of the varsity basketball team stand in a circle and hold hands. The coach begins to recite the words of the Lord's prayer ..."Our Father, who art in Heaven ...", and with heads bowed, the team members join in.

Principals of public schools in Providence, Rhode Island, are permitted to invite members of the clergy to give invocations and benedictions at their schools' graduation ceremonies. A Rabbi was invited to offer such prayers at a graduation ceremony. The Rabbi was given a pamphlet containing guidelines for the composition of public prayers at civic ceremonies, and was advised that the prayers should be nonsectarian. Shortly before the ceremony, the district court denied a motion for a temporary restraining order to prohibit school officials from including the prayer ceremony. The prayers were recited. Subsequently, a permanent injunction was sought barring school officials from inviting clergy to deliver invocations and benedictions.

Do invocations delivered before high school games violate the Establishment Clause and the three-part *Lemon* test (i.e. "This test consists of ensuring neutrality, the government would have to control the sectarian school programs. State action passes the *Lemon* tests if it has a secular legislative purpose. In other words, the principal or primary effect of the law must neither advance nor inhibit religion. Additionally, the law must not foster excessive government entanglement with religion.)? In 1995 the answer was yes, even though the United States Supreme Court is narrowly divided on the issue evidenced by the 1992, 5-4 decision rendered in *Lee v. Wiseman* and a string of other 5-4 decisions in religion cases.

The United States District Court for the Northern District of Georgia found, in the *Jager and Jager v. Douglas County School District and Douglas County School Board*, that invocations given only by Protestant Christian clergy before football games are unconstitutional; however, the court held the door open for invocations, provided that a system be employed to randomly select students, parents, or staff from the school district to deliver messages before the games. Yet, the *Jager* court found that the practice of delivering invocations violated the Establishment Clause of the First Amendment.

II. Pre-game Team Prayers and Invocations: Are They Constitutional or Unconstitutional?

A. *Introduction*

Most athletes are familiar with the traditional pre-game prayers or invocations undertaken prior to athletic contests. Most athletes participate in these rituals without any thought as to the consequences or potential impact of the prayers on their teammates. Athletes often participate in these pre-game rituals out of habit or a sense of team unity. This was true at Douglas County High School, except for Doug Jager

who alleged that this practice was a violation of the Religion Clauses of the First Amendment.

B. *Jager v. Douglas County School Board*

In 1987 Doug Jager, a junior at Douglas County High School, and his father, William Jager sued the Douglas County School District and Board of Education to stop the practice of offering invocations before Douglas County High School football games. The practice of offering invocations before games in Douglas County was initiated about 1947. The invocations invited the audience to bow their heads and pray. A prayer was then announced which frequently invoked the name of Jesus Christ and often closed, noting in Jesus' we pray. These prayers conflicted with Jager's Native American beliefs. Jager contacted the principal of the school. The principal talked to the band director, who then lectured Jager on Christianity.

The Jager family met to discuss alternatives with the school officials. One proposed alternative was to begin athletic events with an inspirational secular speech. The other alternative was to create an equal access plan that would retain religious content and allow different local ministers to present the invocation. The Jagers initially rejected the equal access plan, but later indicated that they would reconsider this plan if, in the meantime, the school voluntarily discontinued Christian prayers on the loudspeakers before games.

The federal district court found that invocations before football games are unconstitutional. Two years later, in 1989, the Eleventh Circuit Court of Appeals ruled the pre- game invocations violate the First Amendment, the district failed two prongs of the Lemon tests. The court first found the secular purposes proposed by the school district could, in fact, be served by wholly inspirational, nonreligious speeches on fair play, teamwork, and competition, and the equal access plan adopted by the school board had an actual purpose of endorsing and perpetuating religion. Second, the court found when a religious invocation is given a sound system controlled by the school principals and occurs at school-sponsored events at a school-owned facility, the message is that the school endorses the religious invocation. The only prong which this court felt the school district could meet was, since the school did not pick the speakers or monitor the selection, the school was not unnecessarily administratively entangled. In May 1989, the Supreme Court denied certiorari, thereby implicitly affirming the above-noted analysis of the appellate court.

Since 1989 numerous school districts have probably complied with the *Jager* decision. However, a few districts notably have not. The Suwanee County, Florida, school board voted to continue pre-game invocations because they didn't believe they needed to change it unless somebody complained. During the 1989 football season, *USA Today* reported that "dozens of school systems are disregarding ..." the *Jager* decision and that "defiance is getting enthusiastic support". *Time* reported that a variety of strategies to evade the decision have been used, such as ministers using bullhorns led the crowd in a prayer at the beginning of the annual football jamboree in Escambia County, Florida , or ministers in Sylacauga, Alabama, who sat at various locations in the stands, and cued the fans who chanted the Lord's prayer, and fans in Chatsworth, Georgia, who were encouraged to take radios to the game and turn up the volume when a local radio station broadcasted a prayer.

On November 7, 1989, voters in Palatka, Florida voted to disapprove (seventy-eight percent) of the *Jager* decision. Despite large public support, efforts to evade the *Jager* decision are unlikely to be successful in view of the line of court decisions on organized, devotional prayer in public school settings over the past quarter of a Century.

C. *The Jager Case and Its Impact on High School Athletics*

The Jagers argued that the practice of delivering invocations before football games violated all three prongs of the *Lemon* test. They alleged first that no secular purpose existed for the practice of delivering the invocations. Citing *Doe v Aldine*, in which a federal court found unconstitutional the practice of delivering prayers before high school graduation exercises, the plaintiffs said that "as a matter of law ... prayer recitation lacked a secular purpose." Further, if government purpose can be achieved through nonreligious means, the state may not employ religious ones."

With respect to the 2-prong, primary effect the Jagers stated that ..."whether the defendants intended to or not, they created the impression that the Douglas County public school sanctioned the tradition of a school-sponsored forum for religious invocations by Protestant clergymen. Therefore, the primary effect of the practice was to maintain a school-sponsored forum for the expression of the religious views held by the majority in Douglas County and to inhibit and divide those with nonconforming beliefs on religious matters."

Finally, the defendants failed the entanglement

test because the school district could not supervise the equal access plan without becoming closely involved in determining what messages would be presented at the games. If the school district did not "encourage a more diverse presentation of views," the invocations were likely to sound much like the previous prayers, and if the school took action to promote diverse views, the district would "become entangled in a costly, divisive program to identify and favor religious and nonreligious minorities."

The court held that the custom and practice of invocations before Douglas County High School football games violated the Establishment Clause of the First Amendment to the United States Constitution. The court found since the pregame prayers violated the first prong of the *Lemon* test, it was unnecessary to consider whether the second and third parts of the test had been violated.

The effect of this decision was immediate in Florida. The Berlin family had constitutionally attacked a similar 'prayer on the loudspeaker' policy. When the Supreme Court denied certiorari and refused to review the *Jager* opinion, the Okaloosa County School District settled on a nonreligious invocation which does not mention one religion or any particular religious prophet. The most recent nonsport case, *Lee v. Weisman*, indirectly affirms the 3- prong analysis found in *Jager* as applied to a public high school graduation.

D. *Pre-game Invocations and Locker Room Prayers Violate the First Amendment of the Constitution*

The *Jager* decision, which bans pre-game invocations, may increase the use of team prayers conducted by a team member, coach, or another school official in a locker room before or after the game. Team prayers are much less visible than an invocation given over the public address system at the site of the athletic contest, but does not this become constitutional. They, like invocations, are in violation of the First Amendment in most cases.

E. *What about 'Silent' Prayer?*

Silent prayers prepared by the students themselves or instituted by the state for purely secular reasons, can provide the environment where individual reflection or prayer can thrive in the locker room or playing area without implicating the state or the coach in religious activities. However, if these prayers are sponsored by the school district they can still violate the Establishment Clause. In *Wallace v. Jaffe,* the Supreme Court held an Alabama Statute which authorized a one minute period of silence in all public schools "for meditation or voluntary prayer" was a law endorsing the establishment of religion. In order for the practice to be valid it must be adopted with purely secular intentions.

F. *What about Casual Communication?*

Coaches have the right to gather their athletes into a huddle and ask them to think about what it means to be playing in this contest. However, the coach should be very careful to not use the word 'God' (e.g., through the grace of God no one will get injured). Even if the word 'God 'is not used, the statement still could be considered a religious prayer. because the idea or intention of the statement may be the controlling factor. While technically there might not be a First Amendment violation from casually mentioning the word 'God,' if a mere mention starts sounding like a prayer, the school district entanglement in having to monitor the speech could violate the Establishment Clause.

III. The Limitations of the First Amendment

The First Amendment guarantees basic freedoms of speech, religion, press, and assembly, and the right to petition the government for redress of grievances. It encompasses two distinct guarantees: (1) the government shall make no law respecting an establishment of religion nor (2) prohibit the free exercise thereof. Both guarantees have the common purpose of securing religious liberty. Through vigorous enforcement of both clauses by the courts, religious liberty and tolerance is promoted for all individuals. Further, enforcement cultivates the conditions which secure that end.

"The First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." The First Amendment protects speech and religion by different mechanisms. Speech is protected by insuring its full expression even when the government is a participant. The very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of belief and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment contrary to the freedom of all individuals. The Free Exercise Clause embraces a freedom to practice his or her religion, whereas the Establishment Clause protects the individual's freedom of belief, and requires

the state to be neutral in its relations with groups of religious believers and non-believers. The constitution states that religious liberties are values that deserve a high degree of protection. Under the Free Exercise Clause students must be given the option of what religious message they want to be exposed to without coercive pressure being subtly applied. The Establishment Clause further prohibits government from promoting or affiliating itself with any religious doctrine or organization. The lesson of history is that in the hands of government, what might begin as a tolerant expression of religious views, may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience are the sole assurance that religious faith is real, not imposed.

The lessons of the First Amendment are as important in the modern world as in the 18th Century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable belief and conscience which is the mark of a free people. The various freedoms and rights protected by the First Amendment are applicable to the states through the due process clause of the Fourteenth Amendment.

In *Engel v. Vitale,* the Supreme Court held that organized, devotional prayers (invocations or benedictions) in public schools are unconstitutional even if participation is voluntary. The court said,"... it is no part of the business of government to compose official prayers for any group of American people to recite ...".

A year later, in 1963, the Court extended this principle in *School District of Abington Township v. Schempp,* by holding the student recitation of a non-government composed prayer, Lord's Prayer, violated the Establishment Clause. Additionally, the court ruled that governmental bodies cannot advance secular goals through religious means even if those secular goals are commendable. Therefore, while achieving team unity might be a commendable secular goal, it cannot be promoted by prayer, which is a religious activity. Finally, the court rejected the voluntary nature of participation as valid justification for devotional prayers. It stated voluntary participation in religious activities "furnishes no defense to a claim of unconstitutionality under the Establishment Clause."

Eugene Bjorlun found that devotional team prayers led by a team member, a coach, or another school or non-school person are in violation of the Establishment Clause. Further, he stated this would also apply to periods of silence held before or after games if they are designated by the coach for meditation or prayer. In *Wallace v. Jaffe,* the Supreme Court ruled that an Alabama statute that authorized schools to begin the day with a moment of silence for meditation or voluntary prayer violated the Establishment Clause because it gave students a clear signal that prayer was a favored way of using the period of silence.

However, the *Wallace* court also indicated that a statute permitting a moment of silence would be constitutional if it met a genuine secular purpose, and was worded so as not to favor prayer. "Thus, a coach could set aside a `quiet' time before and/or after the game for reflection by the players. They could then choose to pray or think about any other matter they wished. Such a practice would probably not violate the Establishment Clause."

A. *Free Exercise (of Religious Belief or Conscience) Clause*

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Free Exercise Clause of the First Amendment provides for freedom of individuals to practice or exercise one's belief. The First Amendment protection embraces the concepts of freedom to believe and to act, the first is absolute but the second remains subject to regulation for the protection of society. Such freedom means not only that civil authorities may not intervene in affairs of church but also prevents the church from exercising its authority through the state.

The *Lee* majority declared that "if citizens are subjected to state-sponsored (e.g. invocation prior to an athletic event or invocation before and a benediction after a graduation ceremony) religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable belief and conscience which is the mark of a free people." If this equation expressed by the Court is followed, judicial protection of an individual's beliefs and conscience should be in direct proportion to the judicial exclusion of religious activities from the public sector. However, the evidence is to the contrary; while the Court may assert the protection of the conscience of dissenters under the Establishment Clause where religion and the public sector are concerned, it has not demonstrated the same intensity in protecting individual beliefs and conscience under the Free Exercise Clause.

Justice Souter's concurring opinion in *Lee* underscores the dilemma regarding the disparity between the two religion clauses. Justice Souter disavows that the state has a legitimate function in promoting a diversity of religious views. Such a function, he observed, "would necessarily compel the

government and, inevitably, the courts to make wholly inappropriate judgements about the number of religions the State should sponsor and the relative frequency with which it should sponsor each." However sound such reasoning regarding diversity of views may seem under the aegis of the Establishment Clause, the application of such reasoning to the Free Exercise Clause is catastrophic.

B. *Establishment Clause*

During the eighties the United States Supreme Court has been called on in a number of cases to resolve questions involving religion and government on a variety of issues. The overwhelming majority of Supreme Court decisions addressing religion clauses of the First Amendment have dealt with issues regarding the Establishment Clause rather than the Free Exercise Clause.

The Establishment Clause prohibits public school students from being exposed to religion in form of "nonsectarian" prayer even when students are subjected to variety of ideas in courses and the freedom to communicate is protected by the First Amendment. Further, under the free speech portion of the First Amendment, it was contemplated that government would be a participant in expression of ideas, while under the Establishment Clause it was provided that government would remain separate from religious affairs.

The United States Supreme Court first reviewed a challenge to state law under the Establishment Clause in *Everson v. Board of Education*. Relying on the history of the clause, and the Court's prior analysis, Justice Black outlined the considerations that have become the touchstone of Establishment Clause jurisprudence: "Neither a state nor the Federal Government can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither a State nor the Federal Government, openly or secretly, can participate in the affairs of any religious organization and vice versa". "In Jefferson's words, the clause against the establishment of religion by law was intended to erect 'a wall of separation between church and state.'"

In *Engel*, the Court considered for the first time the constitutionality of prayer in a public school setting. Students said aloud a short prayer selected by the State Board of Regents: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country." Justice Black, writing for the Court, again made clear that the First Amendment forbids the use of power or prestige of the government to control, support, or influence the religious beliefs and practices of the American people. Even though the prayer was "denominationally neutral" and "its observance on the part of the students [was] voluntary," the Court found that it violated this essential precept of the Establishment Clause.

In 1963, the Court again invalidated government-sponsored prayer in public schools in *School District of Abington Township v. Schempp*. After a thorough review of the court's prior Establishment Clause cases, the Court concluded if "the purpose and the primary effect of the enactment is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."

Because the schools' opening exercises were government-sponsored religious ceremonies (e.g. reading from the Bible, and recitation of the Lord's Prayer), the Court found that the primary effect was the advancement of religion and held, therefore, that the activity violated the Establishment Clause.

In 1968, the Court reiterated the principle that government "may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite."

In *Allegheny County v. Greater Pittsburgh ACLU,* Justice Scalia joined an opinion recognizing that the Establishment Clause must be construed in light of the "government policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage." That opinion affirmed that "the meaning of the Clause is to be determined by reference to historical practices and understandings." Finally, Scalia concluded: " ... to deprive our society of that important unifying mechanism [religion], in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law."

IV. Conclusion

There are three types of prayer practices common in public schools: (1) pre-game invocations involving not only team members and spectators; (2) team prayers or moments of silence involving only team members; and (3) invocations and benedictions at graduation ceremonies. Recent decisions have held that pre-game invocations, and invocations before and benedictions after graduation ceremonies are in violation of the First Amendment. Further, while less visible than invocations, team prayers are also in violation of the First Amendment because they are devotional activities organized by agents of government (coaches).

V. Implications

Today public schools are faced with considerable support for pre-game prayers and prayers at graduation ceremonies even though they violate the First Amendment's Establishment Clause and their use can lead to liability problems for coaches, principals, superintendents, and school boards. Coaches who lead team prayers, moments of silence or permit others to lead them could be liable for damages for violation of the Constitution. If coaches are liable, so are principals, superintendents, and school board members if they know or knew about the team prayers and took no action to stop them. The school district could be liable for such actions by its personnel. The school board does not need a policy permitting or condoning team prayers in order to be liable for their occurrence. An unwritten policy or custom that encourages or condones such prayers at pre-game or graduation ceremonies can be the basis for an award of damages against the district.

Further, if the Court adopts a modification of *Lemon* similar to those suggested by Justice O'Connor (the Endorsement test), the Court, in the future, is likely to permit prayer at Douglas County football games and Rhode Island public school graduation ceremonies because participation was voluntary and no attempt was made to proselytize or coerce members of the audience. The test that emerges from *Lee* "... may well revise and revive the interaction between religion and the government for the next several decades."

Educators and attorneys need to be able to explain the historic and contemporary reasons for government neutrality concerning religion and how separation of church and state in the public schools can protect religious as well as nonreligious students.

It is unclear what the precise future of prayer at public school athletic events will be. It is apparent that this is an issue which will continue to be raised and which should be addressed in both the legal and public school forums. Persons responsible for the administration of athletic programs in public schools (K-12) must be sensitive to the religious diversity of their students. The specific questions which should be asked whether or not an invocation or prayer is: (1) secular or religious in nature, (2) secular or religious in effect, and (3) entangled or detangled with school officials. These questions should be discussed by the administrator with coaches, parents, and the school attorney before prayers occur.

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