ARTICLES

Balancing the First Amendment's Establishment and Free Exercise Clauses: A Rebuttal to Alexander & Alexander

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"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

United States Constitution, Amendment I

"[T]he Supreme Court has slammed the door on religion in the public schools . . ."

Alexander & Alexander, 2000

I. INTRODUCTION

In a recent article published in this journal, the authors reviewed the historical origins of the First Amendment and several United States Supreme Court cases interpreting the Amendment, and then included in their conclusion their opinion that the Supreme Court has "slammed the door on religion in the public schools."[1] I contend that this opinion by Alexander & Alexander is not supported by case law, and, accordingly, I dissent and present this rebuttal.

Arguing to the contrary, I maintain that the Supreme Court and other federal courts have reaffirmed that the First Amendment authorizes and protects students' freedom to engage in religious activities in the public schools, so long as those activities do not constitute "school sponsorship of a religious message."[2]

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1. F. King Alexander, & Ruth H. Alexander, *From the Gridiron to the United States Supreme Court: Defining the Boundaries of the First Amendment's Establishment Clause*, 10 J. LEGAL ASPECTS OF SPORT 129, 136 (2000).

2. Santa Fe Indep. Sch. Dist. v. Doe, et. al., 530 U.S. 290, 309 (2000).

A. Historical and Philosophical Perspectives

The primary purpose of this article is to analyze Supreme Court opinions to determine the Court's interpretation of the First Amendment, and its effect on religious activities in public schools. However, since Alexander & Alexander have taken a different approach, i.e., primarily a historical and philosophical perspective on the First Amendment, it is necessary to reconsider the precedents they have cited.

They include a history of the origins of the First Amendment, citing writers such as Thomas Jefferson, James Madison, John Locke and others, then argue that the Supreme Court's "capricious treatment of the separation principle. . .has cast an ominous cloud over the principle of separation of church and state that Jefferson, Madison and the founding fathers once envisaged for this nation."[3] They also state that many citizens question "the Supreme Court's objectives in reinterpreting the intentions of the framers . . . to establish[] new boundaries between church and state."[4]

From their writings cited by Alexander & Alexander, it is apparent that both Jefferson and Madison believed that government should be neutral in matters of religion. The articles quoted affirm Jefferson's and Madison's opinions that the state should neither interfere with a citizen's free exercise of his religious beliefs, nor compel a citizen to support a particular religious practice. While many writers use Jefferson's metaphorical "wall of separation" to support an opinion that religion has no place in state-run public schools, they overlook the other side of the wall that prohibits any intrusion (including in public schools) on the free exercise of religious beliefs. As Jefferson wrote in his *Bill for Establishing Religious Freedom*, adopted in Virginia on January 16, 1786:

> [N]o man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that *all men shall be free to profess, and by argument to maintain, their opinions in matters of religion* . . .[5]

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3. Alexander, *supra* note 1, at 130.

4. *Id.* at 136.

5. *Id.* at 131 (emphasis added). The text of the entire *Bill for Establishing Religious Freedom* can be found at *Thomas Jefferson on Religious Freedom: Jefferson's Bill for Establishing Religious Freedom in the State of Virginia, available at* http://www.geocities.com/Athens/7842/rfindex.htm.

In addition to Madison's argument "that a true religion did not need the support of law or tax payer money, and that cruel persecutions were the inevitable result of government-established religion",[6] he continued to write in his *Memorial and Remonstrance Against Religious Assessments*, that

> The Religion then of every man must be left to the conviction and conscience of every man; and *it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.*[7]

Clearly, the founders drew a distinction between government sponsored or endorsed religious activity, and private exercise of religious beliefs. These and other commentaries have created widely divergent philosophical viewpoints on the boundaries that should be placed on religious activities in public schools, and Alexander & Alexander have presented their opinion. However, the purpose of this rebuttal is not to present a philosophical argument whether or not the Supreme Court is following the framers' intent in First Amendment jurisprudence. Rather, the purpose is to highlight actual legal precedents announced in specific court decisions to determine the constitutionality of religious activities taking place in public schools.

B. Supreme Court Opinions

The Supreme Court recently said that the First Amendment does not "impose a prohibition on all religious activity in our public schools."[8] Indeed, as Justice Brennan said in his concurring opinion in *McDaniel v. Paty*,[9] "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."[10]

Due to the importance that Americans place on religion and education, it is inevitable that social conflict would appear "where the state and religion

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6. Alexander, *supra* note 1, at 132.

7. James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* JAMES MADISON: WRITINGS (Jack N. Rakove ed., 1999) (emphasis added). The text of the entire remonstrance can also be found on the internet at The Religious Freedom Page, *James Madison: Memorial and Remonstrance Against Religious Assessments, at* http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html.

8. *Santa Fe*, 530 U.S. at 313.

9. 435 U.S. 618 (1978).

10. *Id.* at 641.

brushed against one another."[11] Many "religious people today feel that government is hostile to their religion, especially in the public schools,"[12] while others believe that "secular institutions like the public schools should not be a forum for religious ritual or indoctrination."[13] Much of this social conflict originates in the "playing fields and classrooms of public education,"[14] and concludes in the courts. As Justice Brennan has said:

> The Court's historic duty to expound the meaning of the Constitution has encountered few issues more intricate or more demanding than that of the relationship between religion and the public schools . . . Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom.[15]

Therefore, the question remains, has the Supreme Court "slammed the door on religion in the public schools?" This article will discuss the relationship of the Establishment and Free Exercise clauses, and summarize areas where the courts allow religious activities in public schools.

II. RELIGION AND THE FIRST AMENDMENT

As Alexander & Alexander have noted in their article, the adoption of the First Amendment was a culminating event in American Constitutional history.[16] The founding fathers demonstrated the significance they attached to religious tolerance by placing the religious freedom clauses at the beginning of our Bill of Rights, before freedoms of speech, press, or assembly in the First Amendment. This is especially noteworthy since at the time of the Revolutionary War, there were established churches in at least eight of the

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11. Kenneth J. Brown, *Establishing a Buffer Zone: The Proper Balance Between the First Amendment Religion Clauses in the Context of Neutral Zoning Regulations*, 149 U. PA. L. REV. 1507, 1540-1 (2001).

12. George W. Dent, Jr., *Religion and the Public Schools After Lee v. Weisman: Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. 707 (1993).

13. American Atheists, *FAQ's About Prayer in Schools: What's Wrong with Prayer in Class?*, *available at* http://www.atheists.org/schoolhouse/faqs.prayer.html.

14. Alexander, *supra* note 1, at 130.

15. Sch. Dist. of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963).

16. Alexander, *supra* note 1, at 132.

thirteen former colonies and established religions in at least four of the other five.[17]

The founding fathers might be surprised that so many of the cases involving religious freedoms arise out of public school settings because

> free public education was virtually nonexistent in the late 18th century . . . Since there then existed few government-run schools, it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools.[18]

On the other hand, it should not be surprising that the playing fields and classrooms of public education have been the focus of many of the cases dealing with the religious freedoms guaranteed by the First Amendment since "[t]he history of man is inseparable from the history of religion."[19]

The First Amendment contains two distinct provisions relating to religion. The first phrase is known as the Establishment Clause – "Congress shall make no law respecting an establishment of religion . . ." The second phrase is known as the Free Exercise Clause – "or prohibiting the free exercise thereof." The Courts frequently refer to them jointly as the "Religion Clauses."

In scrutinizing religious activities to determine their constitutionality, most cases involve examining the effect of both clauses on the disputed activities. Specific activities that suggest governmental establishment of religion to some are believed by others to be individual free exercise and speech. While the two clauses might overlap in certain circumstances, "they forbid two quite different kinds of governmental encroachment upon religious freedom."[20] As the Supreme Court has said, "[t]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[21]

One author has described the religion clauses as defining "only the outer boundaries of appropriate government action respecting religion, that government may not prescribe ('establish') religion nor proscribe ('prohibit') its exercise."[22]

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17. Engel v. Vitale, 370 U.S. 421, 427-8 (1962).

18. Wallace v. Jaffree, 472 U.S. 38, 80 (1985).

19. *Engel*, 370 U.S. at 434.

20. *Id.* at 430.

21. Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 250 (1990).

22. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 372, 376-7 (1996).

Another author has characterized the two clauses as "two sides of the same coin – a single constitutional restriction on the power of government to interfere with the religious liberty of its citizens," creating "a particularly important manifestation of the basic constitutional premise that the individual is to be left alone by government unless the government can show a sufficient reason to justify interfering with the individual's liberty."[23]

Finally, a third author asserts that "[t]he principle function, then, of the two religion clauses is the same – to eliminate or minimize government offense to citizens' religious beliefs."[24] Perhaps, however, the Supreme Court has provided the most succinct description that "the common purpose of the Religion Clauses is to secure religious liberty."[25] Therefore, how does the Court balance the conflicting Clauses to secure religious liberty?

III. BALANCING THE CONFLICTING RELIGION CLAUSES IN THE FIRST AMENDMENT

The conflict between the two Clauses occurs because there is an "intersection of two First Amendment guarantees,"[26] and "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[27] While the Court has established some principles that govern Religion Clause jurisprudence, it has been "far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application."[28]

In attempting to define such a standard, the Court has applied three different, but similar, tests to decide whether any particular government activity constitutes an establishment of religion. The original Establishment Clause test was a three-prong test set forth in *Lemon v. Kurtzman*:[29]

> In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship,

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23. Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1337 (1995).

24. Dent, *supra* note 8, at 707.

25. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313.

26. *Mergens*, 496 U.S. at 263.

27. Walz v. Tax Comm'r of the City Of New York, 397 U.S. 664, 668-69 (1970).

28. *Id.* at 694 (Harlan, J., concurring).

29. 403 U.S. 602 (1971).

> financial support, and active involvement of the sovereign in religious activity.'. . .Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . .; finally, the statute must not foster 'an excessive government entanglement with religion.'[30]

Although this criterion (called the "*Lemon* test") has been "oft-criticized"[31] and "has had a checkered career in the decisional law of this Court,"[32] the *Lemon* test "remains binding precedent."[33] Unfortunately, to underscore the Court's struggle to produce a standard to identify impermissible government establishment, it has diluted the authority of *Lemon* by "repeatedly emphasiz[ing] our unwillingness to be confined to any single test or criterion."[34]

The second test is the "coercion test" set forth in *Lee v. Weisman*,[35] which scrutinizes school-sponsored religious activity to determine the coercive effect that the activity may have on students. The Court held that "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[36]

Finally, the Court has also used the "endorsement test" established in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*,[37] and summarized by the Fifth Circuit as follows:

> Government unconstitutionally endorses religion whenever it appears to "take a position on questions of religious belief, ' " "or makes" "adherence to a religion relevant in any way to a person's standing in the political community, ' " . . .The government creates this appearance when it conveys a message that religion is "favored," "preferred," or "promoted" over other beliefs.[38]

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30. *Id.* at 612-3 (citations omitted).
31. *Santa Fe*, 530 U.S. at 319 (Rehnquist, CJ, dissenting).
32. *Id.*
33. Brown v. Gilmore, 258 F.3d 265, 275 (4th Cir. 2001).
34. Lynch, Mayor of Pawtucket v. Donnelly, 465 U.S 668, 679 (1984).
35. 505 U.S. 577 (1992).
36. *Id.* at 587.
37. 492 U.S. 573 (1989).
38. Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996).

Therefore, while the *Lemon* test continues to be the benchmark in religion cases, the essence of resolving conflicts between the Religion Clauses has become an exercise in balancing the competing interests protected by the Clauses. This task has not been easy for the Supreme Court. As Justice O'Connor has said:

> When two bedrock principles so conflict, understandably neither can provide the definitive answer . . . Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.[39]

Those who support or oppose religion in the public schools invariably argue over where the lines should be drawn. Because the Religion Clauses "are not the most precisely drawn portions of the Constitution,"[40] the meaning of those provisions in the First Amendment has been subject to as many philosophical perspectives and opinions as there are writers.

However, while the Court has admitted there is "considerable internal inconsistency"[41] in its decisions, the Supreme Court has spoken authoritatively in allowing religious activities in public schools in several areas. The focus of this article will not be on the philosophical argument where the line should be drawn, but, instead, the focus is where the actual line has been drawn in previous Supreme Court opinions.

IV. RELIGIOUS ACTIVITIES PERMITTED IN PUBLIC SCHOOLS

In *Santa Fe Independent School District v. Doe*,[42] a recent case in which the Supreme Court held unconstitutional a policy promoting school sponsored prayer at high school football games, the Court left no doubt that it has not slammed the door on religion in public schools. The Court reiterated its position on religion in public schools, affirming that "[t]he Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools."[43]

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39. Rosenberger v. Rectors & Visitors of the Univ. of Virginia, 515 U.S. 819, 847 (1995).
40. *Walz*, 397 U.S. at 668.
41. *Id.*
42. 530 U.S. 290.
43. *Id.* at 313.

Based on the Court's ruling in *Santa Fe*, I submit that religion has not been removed from the public schools. Indeed, to remove these activities from the public schools would exclude free exercise of religion, thereby allowing the civil authority (government) to infringe upon students' constitutional rights. If the Court allowed school administrators to completely remove religion from public schools, it would abridge Thomas Jefferson's metaphorical wall of separation between church and state. To support this position, the following cases demonstrate that exercise of certain religious practices, under some circumstances, is constitutionally acceptable in public schools.

A. Prayer

It has been facetiously said that as long as exams are given in schools, there will always be prayer in schools. However, probably the most contentious issue in the debate over religion in public schools is that of prayer. While advocates from both sides of the issue have legitimate constitutional concerns, the Supreme Court has clearly delineated the rule in *Santa Fe*: "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."[44]

Therefore, the determining factor appears to be whether the prayer is "voluntary" or is state "sponsored." While the distinction between voluntary and state-sponsored appears to be clear and apparent, when applied to various fact situations the distinction may become blurred. Justice O'Connor's description of the fine line is particularly appropriate in these cases.

1. Voluntary Prayer

The Supreme Court has consistently held that religious worship and discussion constitute speech protected by the First Amendment.[45] The Court has gone further by characterizing such speech as among a citizen's "fundamental personal rights and liberties."[46] These First Amendment rights apply in public schools since neither students nor teachers "shed their

44. *Id.*

45. Widmar v. Vincent, 454 U.S. 263 (1981); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Niemotko v. Maryland, 340 U.S. 268 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940).

46. Schneider v. State, 308 U.S. 147, 161 (1939).

constitutional rights to freedom of speech or expression at the schoolhouse gate."[47]

The Court has held that schools must allow religious speech on the same terms as other speech,[48] and that such protected speech can be prohibited only when it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."[49] Clearly, individual students and faculty are allowed to engage in voluntary prayer on public school property.

Alexander and Alexander cite *Ingebretsen v. Jackson Public School District*,[50] as support for their opinion that "*all* student initiated prayer, including prayer at extracurricular events, was unconstitutional unless it is conducted at graduation ceremonies."[51] This case involved an appeal of a preliminary injunction issued by the District Court enjoining enforcement of a Mississippi statute named the "School Prayer Statute."[52] The statute authorized "nonsectarian, nonproselytizing 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"[53] in Mississippi public schools. The Fifth Circuit found that the District Court had not abused its discretion in issuing the preliminary injunction, that the School Prayer Statute violated the First Amendment, and that it was unconstitutional.[54]

In *Ingebretsen*, however, after affirming the preliminary injunction in question, the Fifth Circuit explicitly reaffirmed the constitutionality of certain types of student prayer, holding

> the court correctly held that the injunction affected only the School Prayer Statute and would not affect students' existing rights to the free exercise of religion and free speech. Therefore, students continue to have exactly the same constitutional right to pray as they had before the [Mississippi] statute was enjoined. They can pray silently or in a non-disruptive manner whenever and wherever they want. . .in groups

47. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

48. *Widmar*, 454 U.S. at 277.

49. *Tinker*, 393 U.S. at 513, (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

50. 88 F.3d 274.

51. Alexander, *supra* note 1, at 134 (emphasis added).

52. 1994 Miss. Laws ch. 609, § 1(2).

53. *Ingebretsen*, 88 F.3d at 277.

54. *Id.* at 278.

before or after school or in any limited open forum created by the school.[55]

Alexander & Alexander also cite the case of *Jager v. Douglas County School District*,[56] in which the Eleventh Circuit held that invocations at public high school football games, delivered by ministers using school public address systems, were unconstitutional. While they correctly summarize the holding, Alexander & Alexander then present examples of religious activities that they assert "creatively ignored"[57] the *Jager* ruling. They cite instances where "ministers used 'bull horns' to lead the crowd in prayer," "ministers sat throughout the grandstands of local football games and led spectators in the Lord's Prayer," and "fans used personal radios to broadcast a local radio station's pre-game invocation."[58]

Clearly, those individuals did not "creatively ignore" court rulings since they were acting as individual citizens (they were not sponsored or endorsed by the school), were legally exercising their First Amendment rights of free speech and religious expression, and were not under the prohibitions established by the Court. If the Court would have enjoined these private citizens from exercising this form of free speech, it is obvious that their First Amendment rights would have been violated. While the decorum of performing these acts is open to debate, I submit these acts are undoubtedly constitutionally protected activities, and are not prohibited by the Eleventh Circuit's opinion in *Jager*.

2. School Sponsored Prayer

Religious activities become more constitutionally questionable when the school, or its administrators or employees, become involved in the activities. In the landmark case of *Engel v. Vitale*,[59] the Court held that a prayer composed by state officials, and required to be offered aloud in a classroom in the presence of the students and a teacher, violated the Establishment Clause. In *Lee v. Weisman*,[60] the Court also invalidated a school's practice of inviting members of the clergy to give invocations and benedictions at the school's formal graduation ceremonies.

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55. *Id.* at 280.
56. 862 F.2d 824 (11th Cir. 1989).
57. Alexander, *supra* note 1, at 135.
58. *Id.*
59. 370 U.S. 421.
60. 505 U.S. 577.

Undeterred by these cases, the Santa Fe ISD adopted a policy allowing the students to vote whether a "statement or invocation" should be given at football games, and if so, then to vote again to select the student to deliver the statement or invocation.[61] The Supreme Court was "not persuaded that the pregame invocations should be regarded as 'private speech'" because "[t]hese invocations are authorized by a government policy and take place on government property at government-sponsored school-related events."[62] Accordingly, the Supreme Court held that the policy permitting pregame prayers was unconstitutional because "the 'degree of school involvement' makes it clear that the pregame prayers bear 'the imprint of the State,'"[63] thus violating the Establishment Clause.[64] When the state becomes involved in sponsoring or advancing the religious speech as the school's own speech, the Court is likely to find a violation of the Establishment Clause.

3. Student-Led Prayer at Graduation

Although the Court barred graduation prayers delivered by clergy in *Lee*, the Supreme Court has not resolved the issue of student-led religious speech (primarily prayer) at graduation ceremonies. Although the Court in *Santa Fe* held that the pregame invocations were authorized by government policy, on government property, at government-sponsored school-related events, it held that "not every message delivered under such circumstances is the government's own."[65] The Court chose not to settle the issue even though the Circuit Courts have reached different conclusions.[66]

In *Jones v. Clear Creek Independent School District*,[67] the Fifth Circuit approved a school policy allowing graduating seniors to determine whether a student volunteer should give a nonsectarian and nonproselytizing invocation and/or benediction at graduation. In allowing the student prayer, the Court came down on the side of Free Exercise, saying "[t]he practical result of our

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61. *Santa Fe*, 530 U.S. at 298.

62. *Id.* at 302.

63. *Id.* at 305.

64. The degree of school involvement was not limited to the pregame prayers "sponsored" by the school. The District Court entered an interim order prohibiting the district from allowing "overt or covert sectarian and proselytizing religious teaching, such as the use of blatantly denominational religious terms in spelling lessons, denominational religious songs and poems in English or choir classes, denominational religious stories and parables in grammar lessons and the like." *Id.* at 296 n.3.

65. *Id.* at 302.

66. Howard M. Baik, *Note: Chandler v. James: A Student's Right of Prayer in Public Schools*, 15 BYU J. PUB. L. 243, 246-248 (2001).

67. 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

decision, viewed in light of *Lee,* is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies."[68]

Conversely, in *ACLU v. Black Horse Pike Regional Board of Education,*[69] the Third Circuit was faced with a school board policy drafted with the express purpose of conforming to the policy approved in *Clear Creek.* The Third Circuit refused to follow *Clear Creek,* and held that "the challenged practice violated the Establishment Clause even though any graduation prayer would have to be initiated, selected, and delivered by students."[70]

The Eleventh Circuit has aligned with the Fifth Circuit on the issue of student-led graduation prayers. In *Adler v. Duval County School Board,*[71] the school's Superintendent instituted a policy allowing a student, chosen by the senior class, to deliver an unrestricted message of his or her choice at the beginning or end of the graduation ceremony. The Eleventh Circuit held that the school's policy "permitting graduating students to decide through a vote whether to have an unrestricted student graduation message at the beginning and/or closing of graduation ceremonies"[72] does not facially violate the Establishment Clause.

An appeal was taken to the Supreme Court, but *Santa Fe* was decided before the Court considered *Adler.* Thereafter, on October 2, 2000, the court granted the petition for a writ of certiorari in *Adler,* vacated the judgment, and remanded the case to the Eleventh Circuit "for further consideration in light of *Santa Fe.*"[73]

The Eleventh Circuit reconsidered the case, and reached the conclusion "that *Santa Fe* does not alter our previous en banc decision, and accordingly, we reinstate that decision and the judgment in favor of Duval County."[74] The Court discussed the *Santa Fe* holding, reviewed the facts of both cases, and found that "the differences between this case and *Santa Fe* are substantial and material."[75] The Court distinguished the facts in *Adler* and *Santa Fe,* finding that the speech in the latter was state sponsored due to the involvement of the school authorities, while in the former the speech was not state sponsored

68. *Id.* at 972.

69. 84 F.3d 1471 (3rd Cir. 1996).

70. *Id.* at 1483.

71. 206 F.3d 1070 (11th Cir. 2000), *vacated & remanded,* 531 U.S. 801 (2000).

72. *Id.* at 1091.

73. 531 U.S. 801.

74. 250 F.3d 1330, 1333 (11th Cir. 1999), *cert. denied,* 505 U.S. 577 (2001).

75. *Id.* at 1340.

because the "student speaker's complete autonomy over the content of the message means that the message delivered, be it secular or sectarian or both, is not state-sponsored."[76]

Although the Circuit Courts have a difference of opinion on the issue, as recently as December 10, 2001, the Supreme Court denied certiorari in *Adler*,[77] thereby leaving the issue unresolved. As the Third Circuit said in *Adler*, "[t]he Court in *Santa Fe* had every opportunity to declare that all religious expression permitted at a public school graduation ceremony violated the Establishment Clause; it did not do so."[78] Until the Supreme Court speaks, the issue of prayer at graduation will remain unresolved.

B. Access to Facilities

I disagree with Alexander & Alexander that "the federal courts have prohibited state and *student sponsored* prayer . . . from virtually all public school . . .extracurricular activities."[79] While state sponsored prayer violates the Establishment Clause, it is clear that students in public schools have a right to engage in and sponsor prayer or other religious activities in public school facilities. This right in public universities was confirmed by the Supreme Court in 1981,[80] and has been extended to the public secondary schools by Congressional action in 1984.[81]

The 1981 Supreme Court decision in *Widmar v. Vincent*[82] applied to public universities, but has since been used to argue that public secondary school facilities are available for use by religious groups. In *Widmar*, the University of Missouri at Kansas City formally recognized more than 100 student groups and provided access to University facilities for meetings of these recognized organizations. Between 1973 and 1977, a recognized religious group regularly requested and received permission to convene its meetings in University facilities.[83] However, in 1977, the University notified the students that they could no longer meet in University buildings because of a regulation adopted in 1972 by the University Board of Curators that

76. *Id.* at 1342.
77. 505 U.S. 577.
78. *Adler*, 250 F.3d at 1342.
79. Alexander, *supra* note 1, at 136 (emphasis added).
80. *Widmar*, 454 U.S. 263 (1981).
81. Equal Access Act, 20 U.S.C. §§ 4071-4074 (2002).
82. 454 U.S. 263.
83. *Id.* at 265.

prohibited use of University buildings or grounds "for purposes of religious worship or religious teaching."[84]

Based on the denial of access to University facilities, members of the student group brought suit alleging that the University discriminated against them based on their religious viewpoint and thereby violated the Free Exercise Clause, as well as their Constitutional rights to equal protection and freedom of speech.[85] The University argued that allowing religious groups to use its facilities would violate the Establishment Clause.[86] In an 8-1 decision, the Supreme Court held that the University had created an "open" forum, and that the University "has discriminated against student groups and speakers based on their desire . . .to engage in religious worship and discussion."[87] Accordingly, the court held that the University's policy excluding student religious groups from campus facilities, based on the religious viewpoint and content of their speech, was an unconstitutional prohibition on the students' First Amendment rights to free exercise of religion and free speech.

In the aftermath of *Widmar*, students in public secondary schools brought similar challenges. However, some federal courts refused to apply the *Widmar* holding to public secondary schools since it was decided strictly within a university setting.[88] The resultant failure of some lower courts to so apply *Widmar* prompted Congress to pass a statute[89] recognizing the rights of students to meet for religious purposes in public schools. In addition, the Supreme Court decided a case[90] involving the use of public school facilities by community religious organizations.

1. Use by Student Organizations

Congress' "reaction to the confusion created by the federal courts' failure to extend Widmar to secondary public schools"[91] led to passage of the Equal Access Act[92] on August 11, 1984. According to the legislative history, the Act was "intended to address perceived widespread discrimination against

84. *Id.*

85. *Id.* at 266.

86. *Id.* at 270-1.

87. *Id.* at 269.

88. Dena S. Davis, *Religious Clubs in the Public Schools: What Happened After Mergens?*, 64 ALB. L. REV. 225, 227 (2000).

89. Equal Access Act, 20 U.S.C. §§ 4071-4074.

90. *Mergens*, 496 U.S. at 226 (1990).

91. Davis, *supra* note 88, at 228.

92. 20 U.S.C. § 4071-4.

religious speech in public schools."[93] The Act provided access to groups of students seeking to use school facilities for religious purposes. The statutory provision that prohibits denial of equal access states:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[94]

In order to ensure absolute clarity, Congress was very specific in describing the attributes of a "limited open forum" and a "fair opportunity." A "limited open forum" exists when the "school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[95] The statute also ensures that the student group has been provided a "fair opportunity" when:

> (1) the meeting is voluntary and student-initiated;
>
> (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
>
> (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
>
> (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
>
> (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.[96]

Acknowledging the prohibitions contained in the First Amendment, Congress included a provision to ensure that the Act would not violate the Establishment Clause, stating that:

> Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof
>
> (1) to influence the form or content of any prayer or other religious activity;

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93. *Mergens*, 496 U.S. at 239.

94. 20 U.S.C. § 4071 (a).

95. *Id.*.§ 4071 (b).

96. *Id.* § 4071 (c).

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.[97]

Not surprisingly, it did not take long for the constitutional validity of the Equal Access Act to be challenged. In *Board of Education of the Westside Community Schools v. Mergens*,[98] public school students in Omaha, Nebraska, were permitted to join any of approximately 30 recognized secular school groups that met on campus after school. The School Board had passed a policy recognizing student clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills."[99]

Bridget Mergens sought permission to establish a "Christian Club" that would "permit the students to read and discuss the Bible, to have fellowship, and to pray together," with membership being voluntary and open to "all students regardless of religious affiliation."[100] The administration and School Board denied the requested recognition of the Club because a "religious club at the school would violate the Establishment Clause."[101] Mergens filed suit alleging that the school's refusal to recognize the Club and allow use of school facilities violated the Equal Access Act, and further violated the "First and Fourteenth Amendment rights to freedom of speech, association, and the free exercise of religion."[102] Among other contentions, Westside responded that the

97. *Id.* § 4071 (d).
98. 496 U.S. 226.
99. *Id.* at 231.
100. *Id.* at 232-3.
101. *Id.* at 233.
102. *Id.*

Equal Access Act "violated the Establishment Clause of the First Amendment and was therefore unconstitutional."[103]

The Supreme Court reiterated the Congressional intent of the Equal Access Act to "address perceived widespread discrimination against religious speech in public schools" and to respond to "two federal appellate court decisions holding that student religious groups could not, consistent with the Establishment Clause, meet on school premises during noninstructional time."[104] The Court held that Westside created a limited open forum as defined in the Act, and, therefore, "Westside's denial of respondents' request to form a Christian club denies them 'equal access' under the Act."[105]

With regard to the Establishment Clause issue, Westside argued that student clubs were an integral part of its educational mission and that "official recognition of respondents' proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students,"[106] thereby having the "primary effect of advancing religion."[107] In a plurality opinion written by Justice O'Connor, joined by Chief Justice Rehnquist, and Justices White and Blackmun, the Court examined the Act using the *Lemon* test, and held that "the Equal Access Act does not on its face contravene the Establishment Clause."[108]

Justice Kennedy, joined by Justice Scalia, concurred that "the Act does not violate the Establishment Clause", but they would use a different "analytic premise" to resolve the Establishment question.[109] Rather than using the *Lemon* test as the criterion, they would decide the case using the "coercion" and "endorsement" tests. Specifically, they would hold that the governmental benefits provided to the religious club were "incidental" rather than "direct",[110] and that government did not "coerce any student to participate in a religious activity . . ."[111]

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103. *Id.*

104. *Id.* at 239.

105. *Id.* at 247.

106. *Id.* at 247-8.

107. *Id.* at 249.

108. *Id.* at 253.

109. *Id.* at 258.

110. *Id.* at 260 ("[T]he government cannot 'give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so" '. . .Any incidental benefits that accompany official recognition of a religious club under the criteria [of the Act] do not lead to the establishment of religion. . .")

111. *Id.* at 260-2.

Justice Marshall, joined by Justice Brennan, "agree[d] with the plurality that the Act as applied to Westside could withstand Establishment Clause scrutiny."[112] However, they would have expanded the holding to require Westside to take steps "to avoid appearing to endorse the Christian Club's goals."[113]

Although the Court did not produce a majority opinion, eight of the justices agreed that the Equal Access Act does not violate the Establishment Clause of the Constitution.

After the decision, one researcher asked the question "[h]ow will Mergens affect the community in which the school is embedded?," and initiated a research project to discover the answer by surveying all 241 public high school districts in the State of Ohio.[114] In 1995, more than 10 years after passage of the Equal Access Act, religion-based clubs met on school premises at 93, or 38.6%, of the schools, while the remainder of the schools (148/61.4%) reported that no religion based clubs existed.[115] Only 11 schools (4.6%) reported controversy surrounding the clubs.[116]

The author was especially interested in how the religion-based clubs began because, as she accurately characterized the conflicting viewpoints on these

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(The second principle controlling the case now before us, in my view, is that the government cannot coerce any student to participate in a religious activity . . . I should think it inevitable that a public high school 'endorses' a religious club, in a common-sense use of the term, if the club happens to be one of many activities that the school permits students to choose in order to further the development of their intellect and character in an extracurricular setting. But no constitutional violation occurs if the school's action is based upon a recognition of the fact that membership in a religious club is one of many permissible ways for a student to further his or her own personal enrichment. The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity. This inquiry, of course, must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw. No such coercion, however, has been shown to exist as a necessary result of this statute, either on its face or as respondents seek to invoke it on the facts of this case.)

112. *Id.* at 263. ("[T]he Act as construed by the majority simply codifies in statute what is already constitutionally mandated: schools may not discriminate among student-initiated groups that seek access to school facilities for expressive purposes not directly related to the school's curriculum.")

113. *Id.* at 269-70.

(Westside must redefine its relationship to its club program . . . It must fully disassociate itself from the Club's religious speech and avoid appearing to sponsor or endorse the Club's goals . . . [and] effectively disassociate themselves from the religious speech that now may become commonplace in their facilities.)

114. Davis, *supra* note 88, at 234.

115. *Id.* at 236.

116. *Id.* at 238.

clubs, "[p]eople who applaud the Equal Access Act tend to characterize the clubs as the spontaneous result of student interest. Those who oppose it often see it as a plot by outside evangelical ministries to establish beachheads in public schools."[117] She reported that 32 of the schools did not know how the groups were formed, 30 were formed by students, 16 by faculty members, 7 by ministers, 4 by athletic coaches, and 1 by a Parent Teachers Organization.[118]

2. Use by Community Religious Organizations

While the Equal Access Act applies to groups of students, other groups of community members have sought access to public school facilities for various religious activities. Typically, these groups ask to use facilities that have been made available to the public for a wide variety of purposes. When religious groups seeking to use the facilities are denied access, while other groups are accommodated, the Religion Clauses again intersect. Litigation over the availability of school premises has produced a definitive answer that schools may not discriminate against religious groups, but they must be accommodated in the same manner as non-religious groups.

On June 11, 2001, in *Good News Club v. Milford Central School*,[119] the Supreme Court, in a 6-3 decision, held that a public school violated the Free Exercise Clause when it denied a Christian children's club after-school access to public school facilities. A New York statute allows school boards to "permit the use of the schoolhouse . . .for any of the following purposes: . . . instruction in any branch of education, learning or the arts" or for "social, civic and recreational meetings. . .and other uses pertaining to the welfare of the community" conditioned on the activities being "non-exclusive" and "open to the general public."[120] Pursuant to that state statute, the Milford school district enacted a policy allowing those uses, but also included an additional condition that "school premises shall not be used by any individual or organization for religious purposes."[121]

The sponsor of the Good News Club, who was a private citizen not associated with the school, sought permission to hold weekly after-school meetings in the school cafeteria, but was denied access to the school premises. The Board of Education adopted a resolution denying the club's requested use

117. *Id.* at 237.

118. *Id.*

119. 533 U.S. 98 (2001).

120. Use of schoolhouse and grounds, N.Y. EDUC. LAW § 414 (McKinney 2000).

121. Brief on the Merits for Petitioners at 4, Good News Club v. Milford Central School, 2000 WL 1793046 (S.C. 2000) (No. 99-2036).

"for the purpose of conducting religious instruction and Bible study."[122] The Club's sponsors filed suit alleging that the denial violated its free speech rights under the First Amendment.

The Supreme Court found it clear that "the Club teaches morals and character development to children,"[123] which was permissible under Milford's approved policy. Accordingly, the Court found that denying use of the facilities to the Club "because Milford found the Club's activities to be religious in nature"[124] made it "quite clear that Milford engaged in viewpoint discrimination when it excluded the club from the afterschool forum,"[125] and therefore constituted "unconstitutional viewpoint discrimination."[126]

In rejecting Milford's argument that allowing the Club to meet on its premises would violate the Establishment Clause, the court held that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."[127] Even the dissent acknowledged this principle, as Justice Stevens recognized that, "[a] public entity may not generally exclude even religious worship from an open public forum. Similarly, a public entity that creates a limited public forum for the discussion of certain specified topics may not exclude a speaker simply because she approaches those topics from a religious point of view."[128]

The Court did acknowledge that there are limitations on the right to access, e.g. that the state may establish a "limited" public forum allowing access to "certain groups or for the discussion of certain topics."[129] However, the limitation must be based on the topics to be discussed, rather than the viewpoint of the speaker.

C. Moments of Silence

I also disagree with the assertion by Alexander & Alexander that "the federal courts have prohibited . . . moments of silence from virtually all public school curricular and extracurricular activities."[130]

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122. *Good News Club*, 533 U.S. at 104.
123. *Id.* at 108.
124. *Id.*
125. *Id.* at 109.
126. *Id.*
127. *Id.* at 112.
128. *Id.* at 130 (citation omitted).
129. *Id.* at 106, citing *Rosenberger*, 515 U.S. at 829.
130. Alexander, *supra* note 1, at 136.

It is true that in *Wallace v. Jaffree*,[131] the Supreme Court invalidated an Alabama Statute seeking to authorize a moment of silence at the beginning of the school day for "meditation or voluntary prayer." In *Wallace*, the Court was faced with a statute that was enacted by the Alabama Legislature in an "effort to return voluntary prayer to our public schools" with "no other purpose in mind."[132] The Court found that "the statute had *no* secular purpose,"[133] thereby failing the first prong of the *Lemon* test and, accordingly, violated the Establishment Clause.

However, the Court noted that the issue in the case was a "narrow question"[134] involving only the Alabama statute. The court did not hold all moment of silence statutes unconstitutional, but stated that "[t]he legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday,"[135] indicating that some moment of silence statutes might pass constitutional muster.

Indeed, in her concurring opinion, Justice O'Connor notes that "twenty five states permit or require public school teachers to have students observe a moment of silence in their classrooms,"[136] and that "[a] state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading"[137] and may be constitutional. She wrote her concurring opinion to "identify the peculiar features of the Alabama law that render it invalid, and to explain why moment of silence laws in other States do not necessarily manifest the same infirmity."[138] She further wrote:

> the moment of silence statutes of many States should satisfy the Establishment Clause standard we have here applied. The Court holds only that Alabama has intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer.[139]

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131. 472 U.S. 38.
132. *Id.* at 43.
133. *Id.* at 56.
134. *Id.* at 41.
135. *Id.* at 59.
136. *Id.* at 70. See n.1 therein for a list of the respective state statutes.
137. *Id.* at 72.
138. *Id.* at 67.
139. *Id.* at 84.

She then acknowledges that "the federal trial courts have divided on the constitutionality of these moment of silence laws,"[140] thus leaving an opportunity for the Supreme Court to decide the issue by addressing statutes that, unlike the Alabama statute, do not have the sole intent to return prayer to public schools.

Although presented the opportunity to decide that issue in a recent case, on October 29, 2001, the Supreme Court denied certiorari[141] in the Fourth Circuit case of *Brown v. Gilmore.*[142] In 2000, the legislature of the Commonwealth of Virginia amended a statute requiring each school in the state to establish a moment of silence so that "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, distract, or impede other pupils in the like exercise of individual choice."[143] Prior to the statute's effective date, parents of Virginia public school students filed suit alleging that the statute violated the Establishment Clause because its purpose was to advance prayer in public schools, and arguing that the statute is "in all relevant respects" the same as the one held unconstitutional in Wallace.[144]

The Fourth Circuit distinguished the Virginia statute from the Alabama statute scrutinized in *Wallace* based on the "unique facts" of *Wallace*, i.e., Alabama's attempt to "return voluntary prayer to our public schools", the sole purpose of Alabama's statute being to encourage religious activity, and that its' teachers "had already begun leading their students in collective prayers."[145] The Court found that the "factual record of the [*Brown*] case stands in stark contrast to the one presented to the Supreme Court in *Wallace,*"[146] and that the Virginia statute did not on its face violate the Establishment Clause because "the statute provides a neutral medium—silence—during which the student may, without the knowledge of other students, engage in religious or nonreligious activity."[147] Accordingly, the court held that "by providing this moment of silence, the state makes no endorsement of religion."[148] As the Court said:

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140. *Id.* at 71.

141. 122 S. Ct. 465.

142. 258 F.3d 265.

143. Daily observance of one minute of silence,VA. CODE ANN. § 22.1-203 (Michie 2001).

144. *Brown*, 258 F.3d at 273.

145. *Id.* at 279.

146. *Id.* at 280.

147. *Id.* at 276.

148. *Id.* at 278.

> Establishing a short period of mandatory silence does not ipso facto amount to the establishment of anything but silence. The minute of silence established in Virginia . . . is designed to provide each student at the beginning of each day an opportunity to think, to meditate, to quiet emotions, to clear the mind, to focus on the day, to relax, to doze, or to pray – in short, to provide the student with a minute of silence to do with what the student chooses. And just as this short period of quiet serves the religious interests of those students who wish to pray silently, it serves the secular interests of those who do not wish to do so. Because the state imposes no substantive requirement during the silence, it is not religiously coercive.[149]

While the Supreme Court has not spoken, based on the dicta in *Wallace*, it is conceivable, if not probable, that the Court will agree with the Fourth Circuit, and hold that a moment of silence statute such as Virginia's, which is neutral and not coercive, does not violate the Establishment Clause. As Justice O'Connor said in her concurrence in *Wallace*, "[i]t is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren."[150]

V. ESTABLISHMENT OR FREE EXERCISE? OPINIONS ON PUBLIC SCHOOL SCENARIOS

Having reviewed the preceding cases involving the Religion Clauses, the practitioner may benefit from examining factual situations requiring Courts to balance the Religion Clauses. In their article, Alexander & Alexander list several incidents that they contend "creatively ignored"[151] court decisions, with participants seeking to perform religious activities on public school property. The activities listed by Alexander & Alexander, as well as other common public school occurrences discerned by the author, together with the opinion of the author, include the following:

1. Prayers in "a team huddle prior to the game in the locker room or on the playing field."[152] If it is student initiated and led, this is clearly free exercise; however, if a coach or school employee initiates or leads the prayer, or encourages or requires team members to join in the prayer, then it is school sponsored and impermissible.

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149. *Id.* at 281.

150. *Wallace*, 472 U.S. at 73.

151. Alexander, *supra* note 1, at 135.

152. *Id.* at 134.

2. "[P]rayers conducted over the loud speakers with spectators and players being asked to pray together."[153] This is the *Santa Fe* fact situation and is unconstitutional school sponsorship of religion.

3. "[M]inisters use 'bull horns' to lead the crowd in prayer prior to athletic events."[154] This is free exercise by private individuals and allowed, unless the school promotes, sponsors or endorses such activity.

4. "[M]inisters sat throughout the grandstands of local football games and led spectators in the Lord's Prayer."[155] This is permissible as free exercise by private individuals, unless endorsed, sponsored or promoted by school officials.

5. "[F]ans used personal radios to broadcast a local radio station's pre-game invocation."[156] Again, this is free exercise by private individuals, unless endorsed, sponsored or promoted by school officials.

6. "[P]rayers led by students at football games", and "student-led prayer at school sponsored athletic events."[157] The decisive factor will be the source of the student-led prayer. If it is sponsored, endorsed, or promoted by the school, and broadcast over the school public address system, then it is not lawful. If it is initiated by the students, without intervention of the school authorities, then it is free expression and lawful.

7. Athletes from the competing schools voluntarily meeting at center court for prayer after the game is free exercise, unless endorsed, sponsored or promoted by school officials.

8. A football player kneeling to pray after scoring a touchdown is free exercise.

9. An individual athlete voluntarily silently reading a religious book in the locker room before the game is free exercise.

10. An individual athlete voluntarily reading aloud from the same source is also free exercise.

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153. *Id.*
154. *Id.* at 135.
155. *Id.*
156. *Id.*
157. *Id.* at 136.

11. A fan praying loudly in the stands during an athletic contest is free exercise.

12. A public school team involved in an athletic contest with a private school, on the campus of the private school, cannot require the host school to forego its pre-game invocation.

13. A pastor begins reciting "The Lord's Prayer" at five minutes before game time, pursuant to an advertisement in the local newspaper inviting fans to join in the prayer. This is free exercise, unless endorsed, sponsored or promoted by school officials.

14. A coach calls a team meeting and begins with a moment of silence. The Supreme Court has not decisively answered this question, until the court renders an opinion clarifying the application of *Wallace*. Although this may pass constitutional scrutiny, it will probably be unlawful if the coach encourages or expects prayer.

15. A public school on-campus Fellowship of Christian Athletes ("FCA") huddle group, sponsored by a coach who actively participates, is not allowed under the Equal Access Act, and constitutes unlawful Establishment. Conversely, an off-campus voluntary FCA huddle group sponsored by parents of players, or a community religious group led by a private citizen, is free exercise. However, if a coach attends and participates in the off-campus FCA activities, the situation becomes more complicated. If attending athletes receive any benefit from the coach for attending, or non-attending athletes receive any detriment, then it is arguably coercive and probably unlawful. However, if the coach merely attends and is not in a leadership or sponsoring position, it is probably free exercise and association. The determining factor will likely be whether each athlete participates voluntarily and without actual or perceived coercion.

VI. CONCLUSION

Since the Supreme Court's 1962 decision in *Engel* prohibited mandatory prayer in the public schools, the Court has had many opportunities to interpret the Religion Clauses of the First Amendment as they affect religious activities in public schools. In addressing the prohibitions in the Religion Clauses, the Supreme Court has attempted to balance the competing provisions. The cases cited above establish that the Supreme Court continues to affirm that various religious activities are constitutional under the First Amendment, and,

therefore, are legally permissible in public schools. While the Court's opinions have been self-admittedly inconsistent, the Court clearly affirms the right of each individual to voluntarily exercise his or her personal religious convictions in public schools.

Even though Alexander & Alexander argue that the Supreme Court has "chipped away"[158] at Jefferson's wall of separation, has given it "capricious treatment"[159] and has "cast an ominous cloud over the principle of separation",[160] they concede that the Court has "consistently held to the notion of governmental neutrality concerning prayer in schools."[161] In dealing with the Religion Clauses, neutrality is what is required of the government.[162] As Justice Douglas said in his concurring opinion in *Engel*, "a government neutral in the field of religion better serves all religious interests."[163] Removing all religious activities from the public schools would violate the concept of government neutrality.

Further, prohibiting students from expressing their religious convictions would be incompatible with the fundamental right to free exercise. As the Supreme Court has confirmed, "[t]he general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion."[164]

Consistent with the Free Exercise Clause, the Supreme Court continues to allow students to voluntarily exercise their right to religious expression and association in public school settings. While the Court maintains the prohibition of school-sponsored prayer, an objective legal analysis of the cases previously cited does not substantiate the contention that "the Supreme Court has slammed the door on religion in the public schools."

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158. *Id.* at 130.

159. *Id.*

160. *Id.*

161. *Id.* at 133.

162. *Abington Township*, 374 U.S. at 226. ("In the relationship between man and religion, the State is firmly committed to a position of neutrality.")

163. *Engel*, 370 U.S. at 443.

164. *Walz*, 397 U.S. at 669.

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