

BASKETBALL PRAYER TRADITION UNCONSTITUTIONAL

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Several years ago, I spoke to a county recreation director who expressed some concern about one of the county's volunteer sports coaches. This particular baseball coach apparently required his young players to kneel down and recite the "Lord's Prayer" before taking the field. As illustrated by the *Duncanville* decision described below, such religious practices, in which public entities or their agents initiate or participate, may violate the Establishment Clause of the United States Constitution.

While initiation or participation in pre- and post-game prayers may be unconstitutional, this same decision would indicate that religious songs are not necessarily religious exercises. Specifically, the *Duncanville* court found that the repeated singing of a particular religious songs in a school choir did not amount to an endorsement of religion in violation of the Establishment Clause. On the contrary, the *Duncanville* decision found that "[a] position of neutrality towards religion must allow choir directors to recognize the fact that most choral music is religious." In fact, the court stated: "Limiting the number of times a religious piece of music can be sung is tantamount to censorship and does not send students a message of neutrality."

In so doing, this "choral music" aspect of the *Duncanville* opinion provides some insight into another constitutional law issue posed several years ago by a director of a governmental health facility. In this particular instance, the facility allowed community volunteer groups to perform for patients during the holiday season. This administrator expressed some concern about the predominance of religious songs in the repertoire of a particular church choir when performing at the facility. As indicated in *Duncanville*, such performances would probably lack the degree of governmental compulsion and entanglement necessary to violate the Establishment Clause.

HOOP PRAYERS

In the case of *Doe v. Duncanville Independent School District*, No. 94-10416, United States Court of Appeals, Fifth Circuit (1995), plaintiff alleged that "certain religious practices in curricular and extracurricular activities at their schools" violated "the Establishment Clause of the First Amendment of the United States Constitution." The facts of the case were as follows:

Plaintiffs in this case are Jane Doe, a student in the Duncanville Independent School District (DISD), and John Doe, her father. Jane Doe first enrolled in the DISD in 1988, when she entered the seventh grade at the age of twelve. Doe qualified to play on the

girls' basketball team and was placed in an athletic class specially designated for team members. This class was held during the last class period of the day and extended into after-school practice. Students received academic credit for this class and for their participation in the sport. During her first class, Doe learned that the girls' basketball coach, Coach Smith, included the Lord's Prayer in each basketball practice. The basketball team also said prayers in the locker rooms before games began, after games in the center of the basketball court in front of spectators, and on the school bus traveling to and from basketball games. Coach Smith initiated or participated in these prayers. These prayers had been a tradition for almost twenty years.

When she first became a team member, Doe participated in these prayers because she did not wish to single herself out. After Doe's father attended a game and saw his daughter joining in the center court prayer, he asked her how she felt about participating. When told that she preferred not to participate, John Doe told his daughter that she did not have to take part in the prayers.

Thereafter, Jane Doe no longer participated. At games away from home and at least one home game, Doe was required to stand by while the team prayed. Her non-participation drew attention from her fellow students, who asked her "Aren't you a Christian?" and from one spectator, who called out "Well, why isn't she praying? Isn't she a Christian?" At one point during her history class, Doe's history teacher referred to her as a "little atheist."

John Doe complained about the prayers to the assistant superintendent of schools, Ed Parker, and his successor, Marvin Utecht. Utecht halted the prayers at pep rallies, although he insisted there was nothing he could do about the post-game prayers.

Jane Doe also joined the choir program at DISD. Students in this program also receive academic credit for their participation. In the seventh and eighth grade choruses, Doe was required to sing the choir theme song "Go Ye Now in Peace," which is based on Christian text. Upon progressing to the high school choirs, Doe was required to sing another Christian theme song, "The Lord Bless You and Keep You." David McCullar, the director for the ninth through twelfth grade choirs, testified that "The Lord Bless You and Keep You" had been the choirs' theme song for at least 20 years; he did not know how it had originally been chosen. The choirs learn this song as part of their overall repertoire, sing it at the end of class on Fridays, at the end of some performances and during choral competitions. They also sing this song on the bus on the way home from performances. The parties stipulated that the choir's theme song is a "Christian religious

song."

The federal district court entered a preliminary injunction forbidding DISD from "permitting its employees to lead, encourage, promote or participate in prayer with or among students during curricular or extra-curricular activities, including sporting events." The federal appeals court affirmed the preliminary injunction against DISD.

At the permanent injunction hearing, the parties stipulated (i.e., agreed) that "since May 1991, DISD stopped all prayers during class-time. Students are still allowed to initiate prayers during athletic events, but the coaches no longer do so." After the hearing, the federal district court found that DISD 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...

Accordingly, the federal district court enjoined DISD from continuing these practices. Specifically, the permanent injunction issued by the district court prohibited the following conduct:

DISD, its employees and its agents [were barred] from "leading, encouraging, promoting, or participating in prayers with or among students during curricular or extracurricular activities, including before, during, or after school-related sporting events." The federal district court, however, did not prohibit students from "praying, either individually or in groups." On the contrary, the federal district court held that "Students may voluntarily pray together, provided such prayer is not done with school participation or supervision."

DISD appealed. As characterized by the federal appeals court, "modern Establishment Clause jurisprudence is rife with confusion." Accordingly, in an attempt "to bring some order to the organization and application of the existing precedents" to the Establishment Clause, the federal appeals court identified the following "three tests that the Supreme Court has used to determine whether a government action or policy constitutes an establishment of religion."

First, we identified the Establishment Clause test of longest lineage: the *Lemon* test. *Lemon v. Kurtzmann*, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111-12, 29 L.Ed.2d 745 (1971). Under *Lemon*, a government practice is constitutional if (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not

excessively entangle government with religion.

We then recognized that the Court has also analyzed school-sponsored religious activity in terms of the coercive effect that the activity has on students. *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). Lastly, we found that the Court has disapproved of governmental practices that appear to endorse religion.

On appeal, DISD argued that the district court erred by “forbidding DISD employees from participating in or supervising student-initiated prayers.” Specifically, DISD contended that “it cannot prevent its employees from participating in student prayers without violating their employees' rights to the free exercise of religion, to association, and to free speech and academic freedom.” The federal appeals court rejected this argument.

[T]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. This is particularly true in the instant context of basketball practices and games. The challenged prayers take place during school-controlled, curriculum-related activities that members of the basketball team are required to attend. During these activities DISD coaches and other school employees are present as representatives of the school and their actions are representative of DISD policies. DISD representatives' participation in these prayers improperly entangles it in religion and signals an unconstitutional endorsement of religion.

In so doing, the federal appeals court acknowledged that “a non-curricular student prayer group [must] be given the same access to school facilities as other student groups.” Further, the court found that “school employees can be present at these religious meetings for custodial purposes.” However, under the circumstances of this case, the appeals court found the type of activities at issue involved participation and supervision by the school.

Membership on the basketball team is at least extra-curricular: [I]t is directly related to the school's physical education classes and students receive academic credit for their participation. The games are school-sponsored and - controlled events that do not provide any sort of open forum for student expression and DISD makes no claim that it has created such a forum for its basketball team or any other athletic group.

Accordingly, the federal appeals court found that “the district court did not err in enjoining DISD employees and agents from participating in student-initiated prayers.”

RELIGIOUS THEME SONG

The federal appeals court then considered whether “the district court erred by enjoining DISD from permitting DISD choirs to sing songs with religious content as their theme songs.” As noted above, the federal district court had prohibited DISD from “initiating, leading, authorizing, encouraging, or condoning the recitation or singing of religious songs as a theme song of the Duncanville school choirs.”

According to the federal appeals court, “[r]eligious songs may be sung for their artistic and historic qualities if presented objectively as part of a secular program of education.” In this particular instance, the appeals court noted that the district court made only two findings specific to this issue:

(1) that "Jane Doe is a member of the DISD choir and receives academic credit for her participation in the choir"; and (2) that "[a]s a DISD choir member, Jane Doe was required to sing a religious Christian song entitled, "The Lord Bless You and Keep You." This song is sung at each DISD choir performance and has been adopted by school personnel and students as the choir's theme song."

Further, the court found that both Doe and DISD recognized that “the Establishment Clause does not prohibit DISD choirs from singing religious songs as part of a secular music program.” As characterized by the appeals court, Doe contended on appeal that “the act of treating ‘The Lord Bless You and Keep You’ as the theme song, rather than as simply one song in the repertoire, transforms the permissible practice of singing this song into an endorsement of religion.”

The record reveals that two practical effects flow from designating this as the theme song: it is sung often and it is carried over from year to year. Legitimate secular reasons exist for maintaining "The Lord Bless You and Keep You" as the theme song. As the choir director, David McCullar, testified, this song is particularly useful to teach students to sight read and to sing "a capella." In Mr. McCullar's words, it is also "a good piece of music ... by a reputable composer."

In the opinion of the appeals court, utilizing "The Lord Bless You and Keep You" as a theme song did not “advance or endorse religion.”

The Does do not argue that the choir sings the theme song as a religious exercise *per se* [i.e., in and of itself]... [W]e do not accept the notion that repeated singing of a particular religious song amounts to an endorsement of religion...

At trial, Mr. McCullar estimated that 60-75 percent of serious choral music is based on

sacred themes or text. Given the dominance of religious music in this field, DISD can hardly be presumed to be advancing or endorsing religion by allowing its choirs to sing a religious theme song. As a matter of statistical probability, the song best suited to be the theme is more likely to be religious than not. Indeed, to forbid DISD from having a theme song that is religious would force DISD to disqualify the majority of appropriate choral music simply because it is religious. Within the world of choral music, such a restriction would require hostility, not neutrality, toward religion.

A position of neutrality towards religion must allow choir directors to recognize the fact that most choral music is religious. Limiting the number of times a religious piece of music can be sung is tantamount to censorship and does not send students a message of neutrality. Where, as here, singing the theme song is not a religious exercise, we will not find an endorsement of religion exists merely because a religious song with widely recognized musical value is sung more often than other songs. Such animosity towards religion is not required or condoned by the Constitution.

The federal appeals court, therefore, concluded that “the district court erred by enjoining DISD from using songs with religious content as theme songs for its choirs.” As a result, the appeals court affirmed the injunction of the district court only in so far as it prohibited DISD employees and agents from participating in student-initiated prayers.