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CREIGHTON UNIVERSITY LAW SCHOOL

THE SCHOOL PRAYER CONTROVERSY

PRESENTED BY:

RICHARD COLLIN MANGRUM

CREIGHTON UNIVERSITY LAW SCHOOL

SCHOOL PRAYER CONTROVERSY

The United States Supreme Court in 1962 in the case of Engel v. Vitale,[1] ignited a controversy over the propriety of religious words and acts in the public forum, especially the public schools, that has burned ever since. Occasionally the fire smolders, with little attention paid to the disaster it threatens; other times the controversy bursts forth into a conflagration that makes it obvious to everyone that something critical is at risk. What makes this fire especially difficult to extinguish is the fact that advocates on both side of the issue bring the combustibles and fan the very flames that the opposition are trying to extinguish. Consequently, the school-prayer controversy rages on with little hope of a short-term resolution in sight. All that is possible is an outline of the central themes arising from the cases decided to date.

THE ORIGINAL SCHOOL-PRAYER CASE: ENGEL V. VITALE

Justice Black ignited the flames of the school-prayer controversy in Engel v. Vitale.[2] The facts were simple. The New York State Board of Regents, a governmental body, recommended that the School District's principal cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[3]

The prayer was published as part of the moral and spiritual training of the students and justified as part of our spiritual heritage.

Justice Black, speaking for a six-person majority, held the practice violative of the establishment clause.[4] The Court explained:

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[1]370 U.S. 421 (1962).

[2] 370 U.S. 421 (1962).

[3]370 U.S. at 422.

[4]370 U.S. at 424.

> we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.[5]

In dissent, Justice Stewart noted that the practice did not interfere with the free exercise rights of any of the students because they were permitted an exemption from the exercise. Moreover, prohibiting the exercise denied those interested any opportunity to share in the spiritual heritage of our Nation.[6] Justice Stewart also pointed out the fact that the Supreme Court opens each session with a Crier declaring: "God save the United States and this Honorable Court," both houses of Congress open daily sessions with prayer, each of the presidencies upon assuming office have asked for the protection and help of God.[7] Justice Stewart also noted that the National Anthem references God and our National motto "In God is our Trust," school children since 1954 have pledged allegiance to the flag invoking the words "one Nation under God," and our coins since 1865 have contained the National Motto: "IN GOD WE TRUST."[8] Finally, he referenced dictum in Zorach v. Clauson,[9] "We are a religious people whose institutions presuppose a Supreme Being." All of these examples suggest that by writing a voluntary nondenominational school prayer the state had not "established" religion.

In review of Engels, the case establishes that the state, at least in a public school setting, cannot write prayers and require that all recite them as a religious activity. This case proscribes "state" religious speech, but does not answer the legitimacy of state religious speech outside the public school setting.

SCHOOL PRAYER REVISITED IN BIBLE PASSAGES AND/OR PRAYERS: ABINGTON SCHOOL DIST. V. SCHEMPP

The year following Engels the Court in Abington School Dist. v. Schempp,[10] addressed the issue of whether school boards may

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[5]370 U.S. at 425.

[6]370 U.S. at 444-445 (J. Stewart, dissent).

[7]370 U.S. at 446.

[8]370 U.S. at 449 (J. Stewart, dissent).

[9]343 U.S. 306, 313.

[10]374 U.S. 203 (1963).

require student selected passages from various versions of the Bible[11] be read or that the Lord's Prayer be recited at the beginning of each school day. Although students were given the option of being excused from the exercise, the Schempps refused this option because of the adverse connotation such exclusion would presumably have on the teachers and fellows students. The Court held that because the scripture reading and recitation of the Lord's Prayer was intended as a religious exercise, it violated the establishment clause. The Court found that the school's insistence that the exercise was merely an exercise in moral value and literature was disingenuous. The Bible could be read in school if it is studied comparatively as part of literature or history, but it cannot be used as a source of religious training. A preference given to biblical training would interfere with the neutrality toward religion that the establishment clause requires.

Engels and Schempp read together teach us that the state can neither compose prayers or subscribe to sectarian versions of prayers or religious training if undertaken for religious, as compared with secular, purposes.

SCHOOL PRAYER REVISITED IN THE FORM OF A MOMENT OF SILENCE: WALLACE V. JAFFREE

Several decades later the school prayer issue emerged again in the context of a legislatively-mandated moment of silence. The issue presented in Wallace v. Jaffree,[12] was whether an Alabama statute that authorized a 1-minute period of silence in all public schools "for meditation or voluntary prayer," could pass constitutional muster. Reviewing the legislative history behind the statute, Justice Stevens for a five vote majority held the statute violative of the establishment clause because it was an "'effort to return voluntary prayer to our public schools....'"[13]

Chief Justice Burger, in dissent, warned that if the government may not accommodate the religious needs of its people then the search for benevolent neutrality "will quickly translate into 'callous indifference.'"[14] Justice Rehnquist also wrote a scathing dissent criticizing the majority for misreading history which forbade only the establishment of a national religion.

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[11]Although the only copies furnished by the school are the King James version, students have also read from the Douay and the Revised Standard versions of the Bible as well as the Jewish Holy Scriptures. 374 U.S. at 207.

[12]472 U.S. 38 (1985).

[13]472 U.S. at 43, quoting he intent of the "prime sponsor."

[14]472 U.S. at 90 (J. White, dissent).

Rehnquist condemned on historical grounds the use of the wall of separation metaphor as well as the derivative Lemon test which the majority relied upon in deciding the case. He specifically concluded that nothing in the establishment clause, "prohibits any such generalized 'endorsement' of prayer."[15]

More recently, a federal district judge in Brown v. Gwinnett County School Dist.,[16] held that a moment of silence act in Georgia did not violate the establishment clause because (1) the act had an express purpose of allowing the students a calm moment of reflection at the beginning of the day (rather than an apparent religious prayer purpose); (2) the exercise did not advance religion, because it was not a religious exercise; and (3) and no entanglement would arise from monitoring the moment of silence (what the student did reflective upon silently during this period was up to the individual student). This result was clearly anticipated with the holding of Wallace v. Jaffree.

In comparison, a federal district judge in Herdahl v. Ponotoc County School Dist.,[17] granted a preliminary injunction against the principal allowing the members of a religious club to broadcast a devotional and a prayer over the school's intercom system. The court, however, noted that the disputants had arrived at a settlement that would permit the students to hold voluntary devotionals before school hours in the school gymnasium.

SCHOOL-PRAYER REVISITED IN THE CONTEXT OF EXTRA-CURRICULAR ACTIVITIES: MERGENS V. WESTSIDE

The issue of school prayer reemerged in the 1990s in the context of an extracurricular activity in Westside Community Bd. of Ed. v. Mergens.[18] Unlike Engel or Schempp, the prayer in Westside did not occur as part of school activities, nor did it involve the direct participation of school personnel. Rather, the "prayer" group involved a student group which met after school on school premises. The group wanted to read and discuss the Bible, to have fellowship and to pray together. Membership was voluntary and the group did not condition membership on the basis of religious affiliation. Nonetheless the school administrators barred the club from meeting on the grounds that such religious activities violated the establishment clause by permitting school prayer and school Bible reading.

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[15]472 U.S. at 113-114 (J. Rehnquist, dissent).

[16]___F.Supp. ___, 1995 U.S. Dist. LEXIS 10766 (N.D. Ga. 1995).

[17]___F.Supp.___, 1995 WL 312013 (N.D. Miss. 1995).

[18]496 U.S. 225 (1990).

The students filed a civil rights suit, claiming that the school administrators violated the Equal Access Act, 20 U.S.C § § 4071-4074, which prohibits federally funded secondary schools from denying "equal access" to students if the school maintains a "limited open forum."

Justice O'Connor, writing for the majority in an eight to one decision, held that Westside had created a limited open forum by opening up extracurricular activities to non-curriculum-related activities.[19] If the school permitted such diverse groups as chess clubs, service clubs, scuba-diving clubs to use school premises during noninstructional times then it could not discriminate against religious speech. The Court also held that the school could not broadly defined curriculum related to include nearly everything except religion to avoid a "limited open forum" classification.[20]

The Court noted, however, that under the Equal Access Act, faculty members could monitor the activities for custodial purposes, but school officials could not participate in any of the religious activities; nor could any nonschool persons direct, control or regularly attend the activities of the student groups.

Finally, the Court held that the Equal Access Act, which required nondiscriminatory treatment be given religious speech and activities during noninstructional time, did not violate the establishment clause by permitting student-sponsored prayer and religious activities on school premises.

Only Justice Stevens dissented, arguing that under the facts of the case that school had not created a limited open forum triggering the Equal Access Act. No one discussed the free exercise implications of the case or suggested that the free exercise rights of the students could provide an alternative basis for legitimating the student extracurricular activity.

More recently, the Ninth Circuit Court of Appeals in Ceniceros v. Board of Trustees of San Diego School District,[21] held that religious groups under the Equal Access Act could meet during the lunch period on school premises consistent with the Act's requirement that the activities be during "non instructional" times.

SCHOOL PRAYER REVISITED IN THE CONTEXT OF GRADUATION CEREMONIES: LEE V. WEISMAN

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[19]496 U.S. at 246

[20]496 at 239-246.

[21]___ F.3d ___, 1995 U.S. App. Lexis 27566 (9th Cir. 1995).

The United States Supreme Court in Lee v. Weisman,[22] addressed the issue of whether prayers may be part of a public school graduation ceremony. Under the facts of the case, the principals in Providence, Rhode Island were permitted to invite members of the clergy to give invocations and benedictions at their school's graduation ceremonies. Under this authority Principal Lee, a middle school principal, invited a Rabbi to offer a graduation prayer. The rabbi was informed that the prayer should be nonsectarian. Also the rabbi was given a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews. The pamphlet recommended that such civic prayers by composed with "inclusiveness and sensitivity."

In a six to three opinion, the Court held that such a practice violated the establishment clause because it was a state sponsored and state-directed religious activity.[23] The sponsorship and direction came from the following: (1) the school's principal decided that an invocation and benediction should be given; (2) the principal chose the religious participant; and (3) the principal supplied the religious participant with a copy of civic prayer guidelines, including the requirement that the prayer be nonsectarian. Consequently, the facts were deemed indistinguishable from Engel. Specifically, the Court held: "our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students."[24] Essentially the Court invalidated the prayer practice because in "bore the imprint of the State."[25]

The Court's most significant concern was that the dissenters present, who may have been compelled to be there, were forced by the exercise to become either unwilling participants in a religious exercise or embarrassed objectors.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that the history and tradition of this country "are replete with public ceremonies featuring prayers of thanksgiving and petition."[26] Scalia gave as examples the Declaration of Independence's appeal to "the Supreme Judge of the world," for rectitude; President George Washington made a prayer a part of his first official act as president; succeeding presidents have

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[22]112 S.Ct. 2649 (1992).

[23]2649 S.Ct. at 2655.

[24]112 S.Ct. at 2657.

[25]Id.

[26]112 S.Ct. at 2679.

regularly included prayers as part of the inaugural addresses; national Thanksgiving Day celebrations proclaim the day to be a day of thanksgiving and prayer; Congress opens each day with legislative prayer; the United States Supreme Court opens their own sessions with the invocation "God save the United States and this Honorable Court"; and high schools for generations have continued this tradition of prayers at graduation ceremonies.[27]

Finally, Justice Scalia discounted the so-called coercion associated with either sitting or standing with respectful silence during the prayers: "We indeed live in a vulgar age. But surely 'our social conventions,' have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence."[28] Justice Scalia explained that the coercion the establishment clause was intended to prohibit "was coercion of religious orthodoxy and of financial support by force of law and threat of penalty."[29]

In comparison, several lower federal courts have permitted student-initiated graduation prayers. In Jones v. Clear Creek Indep. Sch. Dist.,[30] the United States Fifth Circuit Court of Appeals permitted a student initiated graduation prayer for the primary purpose of solemnizing the occasion. Similarly, a federal district court in Harris v. Joint School Dist. No.241,[31] permitted a graduation prayer where it was student initiated, participation was voluntary and the school remained neutral regarding the content of the prayer.

SCHOOL PRAYER DURING NON-SCHOOL HOURS BY NON-STUDENTS: LAMB'S CHAPEL

The United States Supreme Court applied a Mergen's like analysis to the issue of use of school facilities for religious speech by noninstructional times in Lamb's Chapel v. Center Moriches Union Free School Dist.[32] In Lamb's Chapel a church requested use of the school facilities during non-school hours for the purposes of showing a religious oriented film series on family

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[27]112 S.Ct. at 2679-80 (J. Scalia, dissent).

[28]112 S.Ct. at 2681.

[29]112 S.Ct. at 2683.

[30]977 F.2d 963 (5th Cir. 1992), cert. denied, 113 S.Ct. 2950 (1993).

[31]821 F.Supp.638 (D.Idaho 1993).

[32]113 S.Ct. 2141.

values and child-rearing. Although the New York school district involved authorized local school boards to permit after-hours use of school property for a wide variety of purposes, religious purposes were specifically excluded as a legitimate use. Lamb's Chapel, an evangelical church, challenged this exclusion on the basis of a violation of free speech, free exercise, equal protection and establishment.

In an unanimous decision, the Court held that the school had created a "limited public forum" by permitting a wide range of use of the school premises during non-school hours. Accordingly, under the free speech clause the school had to remain viewpoint neutral as to the content of the speech, including religious speech. the establishment clause justification for excluding the class of religious speech was not persuasive because the activity was (1) during after school hours, (2) the activity was not sponsored by the school, (3) the activity was open to the public, rather than simply church members, and (4) the school permitted similar use of the premises by a wide variety of other private groups. Accordingly, the activity could not reasonably be viewed as an endorsement of religion in violation of the establishment clause.[33]

SCHOOL PRAYER BY STUDENTS PUBLISHED IN SCHOOL-FUNDING PUBLICATIONS: ROSENBERGER V. RECTOR & VISITORS OF UNIV. OF VA.

Rosenberger presents the novel issue of whether a state university can indirectly fund the publication of a sectarian (Christian) student newspaper. In a 5-4 opinion, the majority held that the state not only may, but must subsidize what amounts to religious speech if the university funds other "like" speech. Because the University authorized the payment of outside contractors for the printing costs of a variety of student publications, it could not withhold publication-cost payments for a student Christian organization entitled Wide Awake Productions. The majority pointed out that the University did disclaim any responsibility for the content of any of the publications. The court noted that the purpose of the paper was to "challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." (115 S.Ct. at 2515). Furthermore, each page of Wide Awake and the end of each article or review was marked by a cross.

The student council had denied Wide Awake their request on the basis that it was a religious activity within the meaning of their exclusionary provisions for funding. The Supreme Court, however, held that such discrimination constituted view point discrimination of free speech because the University had created a limited public forum by permitting funding of a wide variety of organizations. It

[33]113 S.Ct. at 2148.

could not, therefore, try to limit funding to "religious" and "political" organizations on the authority of Lamb's Chapel. Further, such viewpoint discrimination would violate the establishment clause, if the organization's speech was excluded solely on the basis of its religious viewpoint.

The majority responded to the concerns of the four dissenters by arguing that the fact that money was directly aiding a religiously-motivated magazine was no different than similar use of state university facilities for religious discussions (Widmar v. Vincent, 454 U.S. 263 (1981)), use of public high school facilities for religious extracurricular activities (Board of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226 (1990)), use of public school facilities during non-school hours (Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. ___ (1993)).

Moreover, the Court held that the "'Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion.'" (115 S.Ct. at 2525, quoting Kiras Joel Village School Dist. v. Grumet, 512 U.S. ___, ___ (1994)(O'Connor, J.).

Finally, the Court noticed that the payments did not go to a church or a religious organization, but a student group with a religious purpose.

Justices Souter, joined by Stevens, Ginsburg and Breyer, filed a vigorous dissent on the basis the majority for the first time approved direct funding of core religious activities by an arm of the state.

The most critical fact distinguishing Rosenberger from Engel is the source of the religious speech or activity. In Engel the religious speech (prayer) came from the state; in Rosenberger the religious speech came from the students and a disclaimer emphasized this fact. Rosenberger simply holds that you cannot discriminate against religious speech if you allow a wide variety of speech to take place even in a school forum.

SCHOOL PRAYER IN THE CONTEXT OF RELIGIOUS MUSIC: BAUCHMAN V. WEST HIGH SCHOOL (PENDING)

In Bauchman v. West High School,[34] Thomas Greene, District Judge for the United States District Court of Utah addressed the issue of whether songs sung by an a'cappella choir during graduation ceremony which contained references to God violated the establishment clause. The two songs in dispute were "The Lord Bless You and Keep You," and "Friends," a song that referenced God. The petitioner claimed that the songs were the equivalent of school

[34]900 F.Supp. 248 (1995).

prayer because the lyrics are "'invocation[s] of God's blessings.'"[35] Also the petitioner claimed that because the songs were overtly Christian, the graduation ceremony had been rendered a Christian service.

Rejecting this argument, the district court found:

> (1) that singing the songs in question was reflective of a clearly secular purpose, i.e., a traditional graduation ceremony including promotion of friendship, sentimentality, memories and encouragement of tradition and music appreciation; (2) that singing the songs in question would have a primary effect that neither advances nor inhibits religion in that the dominant purpose was to convey feelings of friendship and good wishes for the future among friends who were graduating; and (3) that singing the songs did not constitute an excessive entanglement with religion in that the religious content is not excessive, and is not clearly Christian or sectarian. Also, both songs had been expressly approved as part of the curriculum for the A'Cappella class.[36]

Also, several federal circuit courts have held that religious music sung in schools does not violate the establishment clause. The United States Fifth Circuit Court of Appeals in Doe v. Duncanville Independent School Dist.,[37] held that because an estimated 60 to 75% of choral music is religious, excluding it entirely from the music repertoire would evidence hostility toward religion. Including it furthers the secular purposes of teaching about history, culture and advancing music skills.[38] The court also held that use of "The Lord Bless You and Keep You" as a theme song did not violate the establishment clause. The Fifth Circuit in Florey v. Sioux Falls School Dist.,[39] also upheld religious choral music during the Christmas holiday season as part of our cultural history.

However, the issue is not entirely settled. The district court in Doe v. Aldine Indep. School Dist.,[40] held that the students could not sing a prayer at school sponsored activities

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[35]900 F. Supp at 252.

[36]900 F. Supp at 252-253, n. 9.

[37]70 F.2d 402 (5th Cir. 1995).

[38]70 F.3d. at 407.

[39]619 F.2d 1311 (8th Cir. 1980).

[40]563 F.Supp. 883 (S.D. Tex. 1982).

where attendance was required.

Consequently, the issue may turn on whether a reasonably observer would view the religious music as an expression of prayer or an artistic or cultural express. Many of the Court's school prayer cases distinguish permissible religious music from impermissible school prayer. Thus in McCullom v. Board of Education,[41] Justice Jackson distinguished prayer from cultural religious experiences: "Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view." Similarly, in Engel v. Vitale,[42] noted that the prohibition of school prayer did not mean that the students could not sing "officially espoused anthems which include the composer's professions of faith in a Supreme Being.... Such ... ceremonial occasions bear no true resemblance to the unquestioned religious exercise" as organized school prayer. Also, the Court in Abington v. Schempp,[43] observed that the religion can be included as part of the curriculum "when presented objectively as part of a secular program of education." Finally in permitting the display of a Christmas nativity scene along with non-religious Christmas displays, the Court in Lynch v. Donnelly,[44] justified the display in part because banning it "at the very time people are taking note of the season with Christmas hymns and carols in public schools ... would be a stilted overreaction to our history and holdings."

SCHOOL PRAYER IN THE CONTEXT OF SCHOOL ATHLETIC EVENTS

The Fifth Circuit Court of Appeals in Doe v. Ducanville Indep. School Dist.,[45] upheld the district court's injunction against a junior high school coach leading his team in prayer before basketball games. The court held that the teacher's active participation and supervision of the team prayer improperly constituted state endorsement of prayer.

Similarly, the United States Eleventh Circuit Court of Appeals in Jager v. Douglas County School Dist.,[46] prohibited a student initiated invocation over the school's intercom system before high

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[41]333 U.S. 203, 235-36 (Jackson, J., concurring).

[42]370 U.S.421, 435 n.21 (1961).

[43]372 U.S. 203, 225 (1962).

[44]465 U.S.668, 686 (1983).

[45]70 F.3d 402 (5th Cir. 1995).

[46]862 F.2d 824 (11th Cir. 1989), cert. denied, 490 U.S. 1090 (1989).

school football games. The use of the school's announcement system gave the imprimatur of school endorsement.

CONCLUSION:

The controversy surrounding school prayer has yielded tentative answers only on the margins. What is clearly prohibited is state directed, state endorsed, state compelled prayers within the public school forum. What is clearly permitted is student initiated, personal or independently organized group prayers, especially if they are outside the instructional structure of the school. In between these two extremes there are grey areas of controversy with few definitive answers.

Currently there is a proposed initiative in Congress which would authorize student-initiated, voluntary, nonsectarian, nonproselytizing prayer at student events, including compulsory activities. If the purpose of the proposal is to reinstitute state-directed prayer in the schools, then the proposal, unless in the form of a constitutional amendment, challenges the principle explained in Engle and Wallace. In comparison, the more the prayer can be explained as a measured response to student-initiated requests for voluntary religious activities within the school day, the more likely it will be deemed within the protection of free speech and free exercise clauses.

While the proposal's goal of ensuring that the student-initiated prayer not become too sectarian or proselytizing in nature is an understandable effort to avoid the appearance of endorsing a particular religion in violation of the establishment clause, requiring state imposed restrictive guidelines creates separate problems. As the state meddles with the content of the prayer, even if the meddling is for the purpose of ensuring that the prayer is tolerant of religious pluralism, then the state becomes more "entangled" with religion and the endorsement label threatens the entire enterprise as the Court held in Lee v. Weisman.

Accordingly, my suggestion would favor authorizing student initiated prayer during the regular school hours, with the school staying out of the business of dictating prayer guidelines. The school's involvement could be limited to (1) ensuring that various voices are heard over time; (2) ensuring that appropriate disclaimers are issued making it clear that the state neither endorses nor disapproves of the content of the particular prayer, but rather is celebrating the diversity and sincerity of the different beliefs of the participating students; and (3) ensuring that attendance exemptions of dissenting students, teachers and administrators are honored. If the school remains neutral as to content then it will comply with free speech guidelines. If the state disclaims any endorsement, then the threat of establishment is minimized.

Outside the regular school hours, whether the activity fits within the definition of extracurricular activities (Westside) or belongs to nonstudent activities conducted on school premises (Lamb's Chapel), then the state on free speech and free exercise grounds must not prohibit the activity solely because it is religious in nature. Schools do not violate the establishment clause simply by avoiding discriminatory treatment against religious speech, even prayer.