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DO STUDENTS HAVE A PRAYER AFTER *LEE V. WEISMAN*?

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The CLC is the public policy and religious liberty agency for the Southern Baptist Convention, America's largest non-catholic denomination, with over 15.4 million members in over 38,200 local churches. Southern Baptists have a significant interest in the issues presented in *Lee v. Weisman*, and thus filed an *amicus curiae* brief in support of permitting the prayers. Baptists have always been deeply involved in promoting and protecting the principle of religious liberty, including the separation of church and state. Indeed, the *Lee* case arose in Rhode Island, which was founded by Baptist Roger Williams in his search for religious liberty. Southern Baptists also have a longstanding commitment to local public schools. Many Southern Baptist parents have served on local school boards. Many of these parents have worked as teachers and administrators in public schools. Most Southern Baptist parents have chosen to educate their elementary and secondary school children in their local public schools. Many pastors are invited regularly to speak and to pray at public ceremonies, such as graduation ceremonies. The Southern Baptist Convention, meeting in Houston, Texas, June 15-17, 1993 adopted a resolution affirming accommodation of student-led, student-initiated prayers at graduations and other school-related events.

I. HAS GOD BEEN RULED OUT OF PUBLIC EDUCATION?

The School Committee of Providence, Rhode Island, had for many years chosen to include an invocation and a benediction by local clergy in the annual graduation ceremony for its junior high and high schools. School principals performed the administrative task of rotating the invitation to clergymen of various faiths. The principals then provided the clergy with guidelines for the ceremonies prepared by the National Conference of Christians and Jews, which stressed inclusiveness and sensitivity in authoring prayers for civic ceremonies. In 1989, at a middle school commencement, Rabbi Leslie Gutterman gave the invocation and benediction, which were described later by a district court judge as "examples of elegant simplicity, thoughtful content and sincere citizenship."[1]

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1. Brief of the Southern Baptist Convention Christian Life Commission as Amicus Curiae Supporting Petitioners, Lee v. Weisman, 112 S. Ct. 2649 (1992) [hereinafter Pet. Brief].

> Invocation: God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it. For the liberty of America, we thank You. May these

The American Civil Liberties Union (ACLU) sued to enjoin the practice of commencement prayers. The organization argued that the Establishment Clause prohibited the graduation prayers under the three-part test formulated in *Lemon v. Kurtzman*.[2] In announcing that graduation prayer inherently advances religion, the district judge used some chilling words:

> Since the landmark 1962 decision of *Engel v. Vitale*[3] . . . God has been ruled out of public education as an instrument of inspiration or consolation[4]. . . .[I]f Rabbi Gutterman had given the exact same invocation . . . with one change—God would be left out—the Establishment Clause would not be implicated. The plaintiff here is contesting only an invocation or benediction which invokes a deity or praise of a God.[5]
>
> The fact is that an unacceptably high number of citizens who are undergoing difficult times in this country are children and young people. School-sponsored prayer might provide hope to sustain them, and principles to guide them in the difficult choices they confront today. But the Constitution as the Supreme Court views it does not permit it. . . . Those who are anti-prayer thus have been deemed the victors. That is the difficult but obligatory choice this Court makes today.[6]

The decision of the district court said bluntly that current Establishment

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> new graduates grow up to guard it. For the political process of America in which all its citizens may participate, for its court system where all can seek justice, we thank You. May those we honor this morning always turn to it in trust. For the destiny of America, we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it. May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled. Amen.

Id.

> Benediction: O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepared them. The graduates now need strength and guidance for the future. Help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. Amen.

Id.

2. 403 U.S. 602, 612 (1971). Chief Justice Burger wrote for the majority: "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." *Id.*

3. 370 U.S. 421 (1962).

4. Pet. Brief, *supra* note 1, at 3.

5. *Id.* at 3 n.1.

6. *Id.* at 4.

Clause doctrine prohibits the word "God" from being uttered in a graduation invocation or benediction, because "God has been ruled out of public education . . . " and "(t)hose who are anti-prayer have thus been deemed the victors."[7]

The district judge's opinion virtually cried out for reversal so that public schools might be spared from the "obligatory choice" made by the trial court.[8] Compelled to apply the tripartite test to its logical conclusion, the court felt it was forced to hold that a commencement must be absolutely secular—without a prayer, and without one unutterable word—"God."[9]

The First Circuit Court of Appeals adopted the opinion of the district judge. The Supreme Court granted review. The petitioner and numerous *amici curiae*, including the Southern Baptist Christian Life Commission, urged the Court to use this case as an opportunity to abandon or ameliorate the *Lemon* test in a manner that would not seem to require such hostility by school officials toward religious expression.

On June 24, 1992, the United States Supreme Court announced its decision in *Lee v. Weisman*.[10] By a 5-4 vote, the Court majority held that *school-initiated, school-sponsored* prayers by a local minister at a public school commencement ceremony violated the Establishment Clause of the First Amendment to the United States Constitution. The Court did not apply the *Lemon* test, but neither did it abandon it. Instead, the Court found the circumstances surrounding this commencement prayer to be coercive on the students who attended, regardless of whether attendance is voluntary.[11]

By the fall of 1992, school boards, school officials, their lawyers and their insurers quickly huddled to review and revise their school policies to comply with *Lee* and thus prevent lawsuits. More often than not, the new policies went much further than simply restricting school-directed prayers at commencements. Religious expression even by students was prohibited at any school-related event.

Not since the 1962-63 prayer and Bible reading cases had the Supreme Court touched such a raw nerve among public school patrons.[12] School board meetings drew large crowds of pastors and parents and students who were shocked and angered by the apparent loss of yet another religious tradition in their communities.

This article reviews the history and holding of the *Lee* case, and provides a rationale for interpreting *Lee* in a manner which maximizes religious liberty

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7. *Id.* at 4-5.
8. *Id.* at 6.
9. *Id.*
10. 112 S. Ct. 2649 (1992).
11. *Id.* at 2658-59.
12. Michael W. McConnell, *Accommodation of Religion* 1985 SUP. CT. REV. 1, 35-9. *See generally* Engel v. Vitale, 370 U.S. 421 (1962); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

for students while minimizing the risks of "establishment clause" challenges. This article posits that *Lee* did not abolish all student-initiated, student-led religious expression at public school-related events.

A. *The Majority Opinion*

Justice Kennedy began the majority opinion by citing certain facts and framing the central issue:[13]

> School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment. . . .[14]

The Court began its description of the facts by criticizing the school's involvement, calling it pervasive, and saying it created a "state-sponsored and state-directed" religious exercise that "conflicts with settled rules pertaining to prayer exercises for students."[15] More importantly, the Court noted that the school's principal, Robert E. Lee, provided Rabbi Gutterman with written guidelines to follow and advise him that his prayers should be non-sectarian.[16] Thus, Mr. Lee had "directed and controlled the prayer. . . ."[17]

The majority then emphasized those facts which created the appearance of "state endorsement" of the prayer, and which created state "coercion" or pressure upon students to participate in a "state-sponsored" religious exercise:

> The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position.
>
> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invo-

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13. Justice Anthony Kennedy authored the majority opinion, joined by Justices Souter, O'Connor, Blackmun and Stevens. Justice Souter wrote a concurring opinion, and Justice Blackmun wrote a separate concurring opinion, joined by Justices Stevens and O'Connor. Justice Antonin Scalia authored the dissenting opinion, joined by Chief Justice Rehnquist, and Justices White and Thomas.

14. *Lee*, 112 S. Ct. at 2652.

15. *Id.*

16. *Id.*

17. *Id.*

> cation and Benediction. . . . But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real.[18]

B. *The Holding in* Lee*: Limited to Its Facts*

The majority opinion held that the above factual circumstances violated the Establishment Clause of the First Amendment. Justice Kennedy expressly limited the *Lee* holding to the following facts:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.[19]

II. ACCOMMODATION OF RELIGIOUS LIBERTY IS A PUBLIC VALUE WHICH SHOULD BE TAUGHT IN PUBLIC EDUCATION

A. *The Values—Inculcation Mission of Public Schools*

The public schools are supposed to be our nation's training ground for the knowledge and values which will produce good citizenship and character.[20] In *McCollum v. Board of Education*,[21] the Court said: "The public school is at once the symbol of our democracy and the most persuasive means for promoting our common destiny." In other cases, the Court has affirmed the role of public schools as "a principal instrument in awakening the child to cultural values";[22] of "inculcating fundamental values necessary to the maintenance of a democratic political system";[23] and as a tool for

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18. *Id.* at 2657-58.

19. *Id.* at 2655.

20. JOHN WHITEHEAD, RIGHTS OF RELIGIOUS PERSONS IN PUBLIC EDUCATION 209-10 (1991); *see also* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). "The classroom is peculiarly 'the marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' (rather) than through any kind of authoritative selection." *Id.*

21. 333 U.S. 203, 231 (1948).

22. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

23. Ambach v. Norwich, 441 U.S. 68, 77 (1979).

developing "community values."[24]

As we approach the twenty-first century, the crisis in American public education is both academic and moral. Literacy and aptitude scores decline while drug abuse, sexually-transmitted disease, teenage pregnancy, and violence increase. School officials struggle desperately to teach academics and values, while also striving to keep schools relentlessly secular, as the *Lemon* test seems to require. But relentless secularism also violates the Establishment Clause. In a 1981 report concerning lawlessness in American culture, former Chief Justice Warren Burger opined: "Possibly some of our problem of behavior stems from the fact that we have virtually eliminated from public schools and higher education any effort to teach values of integrity, truth, personal accountability and respect for other's rights."[25]

B. *Public Schools—Training Americans to Be Tolerant Citizens*

Professor Michael McConnell has observed that "individual choice in religion is a public value; the state itself is religiously pluralistic—not secular."[26] One of the values which public schools should transmit is respect and tolerance for the religious choices of others. Religious liberty is promoted by exposing children and adults to differing religious beliefs and practices in a community, in a respectful, accommodating way. When school officials show respect and tolerance for the religious diversity of the community, they promote this public value. This enriches the educational experience and builds understanding and respect. Just as racial harmony cannot grow in the soil of racial segregation, neither can religious harmony spring up in a system of "religious apartheid."[27]

The lower courts, applying *Lemon*, held that the public institution, whose goal is to teach good citizenship and tolerance, cannot itself tolerate prayers at public meetings because this might have the "primary effect" of advancing or endorsing religion. Many parents and teachers have retreated from public schools, in part because they refuse to accept the "absolutely secular" model. They perceive a "brooding and pervasive devotion to the secular, and a passive, and even active, hostility to the religious."[28] If the trend of strict separationism continues, many more Americans may seek greater "educational choice" to find a more tolerant alternative, and public school enrollment will continue to decline.

By giving all religious views represented in the community and its student population an equal opportunity to participate in invocations and bene-

24. Board of Educ. v. Pico, 457 U.S. 853, 864 (1982).
25. *Annual Report to the A.B.A. by the Chief Justice of the United States*, 67 A.B.A. J. 291 (1981).
26. McConnell, *supra* note 12, at 35-41.
27. WHITEHEAD, *supra* note 20, at 33.
28. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

dictions, the public school system encourages freedom of religious choice. Parents and students are less likely to feel compelled to seek alternative education systems in order to find religious liberty, if they find accommodation and respect in public education.

Many parents and students believe that all knowledge has a unifying source in a personal God; that all truth is God's truth; and that the ultimate aim of education is to know God personally. For these Americans, there is no such thing as "secular" knowledge or "value-neutral education." To have mandatory school attendance laws, but to make no accommodation for this viewpoint, amounts to a denial of equal protection of the laws for these parents and their children.

C. *Religious Speech Is Still Protected Speech*

Another serious public value at risk in such cases is freedom of speech. Note that the district judge's opinion says that the rabbi's speech would have been lawful, but for a certain word, "God." Presumably if the word had been uttered as a curse or in vain, there would have been no Establishment Clause issue. However, since the rabbi was obviously sincere in believing he was addressing a personal God, the words have become a prayer that is inherently "religious," and therefore impermissible. It is as though religious speech at a public function is a sort of "super-obscenity," which is unprotected by the Free Speech Clause.

It is intolerable to Baptists and others that the Court would deny to the word "God" the normal protections of free speech, just because it is religious speech. If God's name used in a profanity is protected free speech, even if offensive to some, then God's name invoked in a prayer by a non-official is protected free speech, even if offensive to non-believers. The Constitution does not create a right not to be offended.

The Supreme Court seemed ready to reverse the trend, to uphold choices developed by families, working through their local school boards, for non-coercive ways to accommodate the religious and moral needs of public school students. *Mergens v. Westside Community Schools*[29] clearly established the principle of equal access to facilities for student-led, student-initiated religious expression during a limited open forum in a public high school. Upholding graduation prayer in *Lee* would have been another step in the right direction, to correct the mistaken perception that public schools must always discriminate against religious expression, even by private citizens in after-hours voluntary programs.

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29. 496 U.S. 266 (1990).

III. ACCOMMODATION WITHOUT COERCION IS THE GOAL OF RELIGION CLAUSES

There is widespread agreement that the Establishment Clause and the Free Exercise Clause have as their common ultimate goal the protection of religious liberty.[30] Professor McConnell's article, *Coercion: The Lost Element of Establishment*,[31] notes that the primary good of the Religion Clauses is freedom of religious choice, with the primary evil being government coercion. Religious liberty should therefore include both individual choice of religious belief and practice, and autonomy of religious organizations from government interference.

Accommodation of religious liberty by public school officials helps fulfill the values-inculcation mission. As the Court stated in *Zorach v. Clauson*: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."[32]

A. *Establishment Clause Protects Religious Choice from Official Coercion*

The Establishment Clause protects religious liberty by preserving religious pluralism, free from government interference which might distort religious choice. Prior to 1962, it was generally agreed that a major aim of the Establishment Clause, as stated in *Cantwell v. Connecticut*,[33] was to "forestall compulsion by law of the acceptance of any creed or the practice of any form of worship."[34]

In *Engel v. Vitale*,[35] the Court struck down a school board rule requiring the New York Board of Regents prayer[36] to be repeated daily aloud by each class. For the first time, the Court said that freedom from coercion of conscience was not the primary interest being served: "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct government compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate to coerce nonobserving individuals or not."[37]

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30. McConnell, *supra* note 12, at 1.

31. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

32. 343 U.S. 306, 313-14 (1952).

33. 310 U.S. 296 (1940).

34. *Id.* at 303.

35. 370 U.S. 421, 440 (1962).

36. *Id.* at 422. "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." *Id.*

37. *Id.* at 430.

B. *The* Lemon *Test Ignores the Element of Coercion*

The *Lemon* test does not consider the element of official coercion which would interfere with religious pluralism. It does not provide clear guidance to officials and courts who must draw lines between permissible accommodations of religion and impermissible benefits to religion.

Consistency has not been a hallmark of the *Lemon* test. It has been used to prohibit the display of a poster listing the Ten Commandments in Kentucky classrooms.[38] Yet, in *Lynch v. Donnelly*, Chief Justice Burger observed that "The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with the Ten Commandments."[39] School children who regularly tour and observe the chambers of our highest court should learn, as educated citizens, that the Ten Commandments provide the foundation for the legal and moral code for Western Civilization, and that they are rooted in Judeo-Christian history. The fact of religious origin and the presence of religious words should not have voided the Kentucky law. In *Lynch*, the Court side-stepped *Lemon* and upheld a nativity scene display by the city of Pawtucket, Rhode Island.[40] But in *County of Allegheny v. ACLU*,[41] the Court upheld a government display including a menorah, while prohibiting a government display of a creche, citing *Lemon* as the basis for both holdings.

C. *The* Lemon *Test Promotes Secularism, Not Religious Pluralism*

The very formulation of the *Lemon* test seems to obscure the value of religious liberty. The legislative purpose must be secular. The primary effect must be secular, neither advancing nor inhibiting religion. Insisting on a secularizing purpose, and permitting only secular effects makes the test inherently hostile to religious liberty.

The Establishment Clause separates the institutions of church and state, but it does not separate the influence of religion and morality from government. If the Establishment Clause prohibited government from expressing benevolent regard for religion, then the Free Exercise Clause would have been the first violation of the Establishment Clause. The Free Exercise Clause is clearly official action affirming the inherent value and good of religious liberty, so that its free exercise is to be among the first freedoms to be protected in our Bill of Rights.

Lemon seeks to create a vacuum in the public square by excluding everything that is religious. But nature abhors a vacuum, and emptying the public

38. Stone v. Graham, 449 U.S. 39 (1980).
39. 465 U.S. 668, 677 (1984).
40. *Id.* at 668.
41. 492 U.S. 573 (1989).

square of religious content does not create a neutral zone. Instead, the secularism which fills the public square brings its own non-theistic values which are antithetical to religion and intolerant of religious pluralism.

D. *Accommodating Religion Includes Religious Speech*

An Establishment Clause test should be reformulated to allow official accommodations, but not official endorsement, of religious speech. Unlike *Lemon*, *Lee* did not involve direct government financial aid. The Court may save for another day the reformulation of the special aspects of the test which pertain to financial benefits. But in any event, the Establishment Clause test should have as its goal the promotion of religious liberty as a public value, with religious pluralism as a means to that end. This includes the protection of individual choice and institutional autonomy from government coercion and interference.

A test based on these principles, would include the following:[42]

I. Does the government action accommodate independent religious choice? Religious choice is independent if:

   A. The religious practice or belief pre-existed the government action, or
   B. The religious practice is adopted through private, family, church or community influences, and
   C. The government action does not provide preferential treatment for a particular practice or belief, which has the demonstrable effect of inducing, coercing or distorting religious choice.

II. Does the government action interfere with the religious liberty of non-adherents by inducing or coercing them to alter their religious practice?

III. Does the government action use the taxing and spending power of government to provide some financial incentive, benefit or penalty to a particular religious practice or belief which is not given to other religious or non-religious alternatives?[43]

   A. Is the demonstrable effect to induce, coerce, or distort:
      a) religious choice by individuals, or
      b) the religious autonomy of a religious institution?

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42. McConnell, *supra* note 12, at 35-9.
43. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

B. Is the demonstrable effect to directly subsidize religious worship, teaching, and indoctrination?

E. *Graduation Prayers May Be Non-coercive*

The Supreme Court found a coercive atmosphere in *Lee*, but such may not be the case in all graduation services. Graduation prayers generally facilitate the exercise of longstanding, traditional practice by religious groups in the community. It is not necessary that a public official pray or prescribe the content of any prayer.[44] No public funds are paid for the prayer. The mandatory attendance laws, which compelled the *Engel* students to be a captive audience during the school day, do not require attendance at a voluntary, after-hours, civic program, where family and friends are present. No one is by law pressured to participate. No reasonable person should feel like an "outsider" or a "second class citizen" just because he does not believe or participate in the brief prayers in the program. Any person who does not wish to participate is free to remain silent, think about other things, or even excuse himself from the room for the 30-45 seconds the prayer may last. The prayers are a minuscule portion of an otherwise wholly secular program. Any appearance of endorsement by officials is offset by the non-preferential nature of the forum. In his *amicus* brief, the Solicitor General correctly observed: "In short, whatever special concerns about subtle coercion may be present in the classroom setting—where inculcation is the name of the game—they do not carry over into the commencement setting, which is more properly understood as a civic ceremony than part of the educational mission."[45] Finally, the school principal did not discriminate against certain religions in his rotation of invitations to various religious leaders in the community. Nonetheless, the Supreme Court found that the "pervasive involvement" by public officials had combined with the "peer pressure" and other psychological pressures causing students to feel coerced by the state to stand and participate in the prayer.

In a decision that pre-dated *Lee*, the Sixth Circuit Court of Appeals avoided finding "coercion" in *Stein v. Plainwell Community Schools*,[46] a decision that upheld historic, traditional invocations and benedictions at public school graduation ceremonies. The *Stein* court noted that the tradition of including an invocation and benediction to solemnize this rite of passage predates the founding of the American republic.[47] The court compared these

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44. Pet. Brief, *supra* note 1, at 4. The district court judge described this as "school-sponsored prayer" which might help students. Weisman v. Lee, 728 F. Supp. 68, 74 (D.R.I. 1990). While we agree with his assessment of the value of prayer, we disagree that this private prayer is "school-sponsored." Instead, it is school-accommodated.

45. Pet. Brief, *supra* note 1, at 18.

46. 822 F.2d 1406 (6th Cir. 1987).

47. *Id.* at 1409; *see also* WHITEHEAD, *supra* note 20, at 209-10:

facts to *Marsh v. Chambers*,[48] and *Lynch v. Donnelly*,[49] in which the Supreme Court found historical tradition and practice to be relevant to Establishment Clause analysis. Traditional religious expressions or symbols in civic ceremonies, especially those which are similar to practices in the era of the Founding Fathers, should not be held to violate the Establishment Clause apart from a finding of some government coercion.

F. *Fifth Circuit Decision After* Lee

In *Jones v. Clear Creek Independent School District*,[50] the Fifth Circuit of the United States Court of Appeals interpreted *Lee* as prohibiting school-led prayer, but allowing student-led prayer. The Court upheld a south Texas high school policy which stated:

> (1) The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal; (2) the invocation and benediction, if used, shall be given by a student volunteer; and (3) consistent with the principle of equal liberty of conscience, the invocation and benediction shall be non-sectarian and non-proselytizing in nature.[51]

Commencement prayers occurring under such guidelines were held to be lawful because they were not coercive. Officials did not "sponsor" a prayer, but accommodated the expression of the students. Sponsoring the commencement program does not make the school the sponsor and endorser of everything that is said by every private individual who speaks on the program.

The ACLU mass mailings in the spring of 1993 warned school attorneys that the *Jones* decision was clearly erroneous, and that school officials who permitted even student-led commencement prayer would be personally liable for punitive damages for intentionally doing a clearly unlawful act. In June 1993, the United States Supreme Court declined to review the Fifth Circuit decision in *Jones*. Surely if the *Jones* decision was so clearly erroneous, the

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> The first graduation services began in Oxford, England, as early as the twelfth century. In America, the tradition began at Harvard in 1642. The program consisted of a prayer by the president of the institution and addresses by members of the graduating class. Commencement exercises in public high schools were not started until 1842. The high schools primarily copied the university format.

See also the discussion that Thomas Jefferson saw no Establishment Clause violation by the traditional practice of commencement prayer at public schools. *Id.*

48. 463 U.S. 783 (1983).
49. 465 U.S. 668 (1984).
50. 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).
51. *Id.* at 965 n.1.

Court could have granted certiorari and summarily reversed the Fifth Circuit holding. While the Supreme Court's silence is always ambiguous, this denial of certiorari should give some solace to school officials who choose to adopt a policy like that approved in *Jones*. The *Jones* decision is binding only in the Fifth Circuit, including the federal districts in Texas, Louisiana, and Mississippi. Nevertheless, it is persuasive authority in other circuits, and has been cited by other district courts with approval.[52]

G. *Free Speech and Equal Protection*

The Religion Clauses should protect freedom of choice, including those who choose unbelief. Persons who disagree with the content of the prayer have a right to their opinion, but they should not have the right to force their opinion on others by asking government to censor all public religious expression which they claim offends them. In the Free Speech arena, even the most hateful speech must be tolerated, even though a listener may claim to be offended.[53] Surely, religious speech cannot be relegated to some lower standard, to some super-obscene standard, so that "religious words" in a prayer must be prohibited if anyone claims "offense." This hardly promotes religious liberty, tolerance and respect for others with different religious beliefs, or the common good.

In *Widmar v. Vincent*,[54] Justice White based his dissent in part on a distinction between religious speech, which he said was protected in school buildings, and religious worship, which he said was not protected.[55] The majority disagreed, noting that this distinction would entangle officials and courts in the scrutiny of words, motives and religious significance by religious groups, to discern what words were mere speech, and what words were religious worship.[56]

Suppose, for example, that the minister in *Lee* had read during the invocation from the presidential proclamation, calling for prayers of thanksgiving for the success of Operation Desert Storm in the Persian Gulf.[57] Would references to the "Heavenly Father" and the "Lord" in the proclamation, and quotations from the Old Testament, be impermissible as "prayer," or as "sectarian" religious words?

It should be noted that, according to the lower court record, the rabbi in *Lee* was invited without any direct instruction from the school to pray, or

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52. Harris v. Joint Sch. Dist. No. 241, Case No. 91-0166-N-HLR, U.S. Dist. Ct., Idaho, Ryan, J., unpublished opinion dated May 20, 1993.

53. *See generally* Cantwell v. Connecticut, 310 U.S. 296, 308-10 (1940); Cohen v. California, 403 U.S. 15 (1971).

54. 454 U.S. 263 (1981).

55. *Id.* at 283-86 (White, J., dissenting).

56. *Id.* at 269-70 n.6 & 272 n.11.

57. Presidential Proclamation No. 6257, Mar. 7, 1991.

how to pray.[58] The private speaker controlled the content of the speech. This is as it should be. The school board certainly should not involve itself, in the name of avoiding establishment problems, in policing the content of the speech or prayer.[59] It should be left to the manners of the private speaker to be gracious and sensitive to the pluralistic nature of his audience.

The CLC urged the Supreme Court not to adopt that part of the *Stein* holding which protected the prayer only so long as the words were "non-denominational" or "non-sectarian." It does not promote religious liberty for government to permit speech only about a generic "brand-X" God. If a Baptist student or minister is prohibited from praying "in the name of Jesus Christ," or a rabbi prohibited from praying to "Jehovah," the state has gone too far, and now truly infringes on religious conscience. The price for participation in community life would be too high if it requires a legal gag on the religious language of the speaker. The value of religious liberty, and the vehicle of religious pluralism, must neither be sacrificed on the altar of merely civil religion nor abandoned in the arid, hostile desert of stifling secularism.

IV. SUMMARY

A. *What* Lee *Does and Does Not Prohibit*

Lee expressly prohibited commencement prayers by a minister because the Court found pervasive State involvement and coercion. The majority said State officials were involved in deciding to have prayer, in selecting the clergy, in directing and controlling the content of the prayer, and in appearing to endorse the prayer, or to pressure students to participate.

Lee impliedly prohibits all prayers which are initiated or directed by school officials, and which occur at after-school events similar to commencements in significance, i.e., "once-in-a-lifetime" events. In trying to apply the reasoning of *Lee* to later cases, courts should also consider facts indicating whether school officials have coerced students, by public or peer pressure, to attend and participate in school events which include prayer.

Lee does not expressly prohibit student-initiated or student-led religious expression at public school-related events. Under a student-initiated plan, clergy might be permitted to pray, or students might select other students to pray, so as to avoid the indications of "pervasive school official involvement" to which the *Lee* majority objected.

Lee does not prohibit religious speech by private citizens at public school-related meetings if State "sponsorship" or "endorsement" of the prayer

58. Pet. Brief, *supra* note 1, at 19a.

59. Marsh v. Chambers, 463 U.S. 783, 794 (1983). "The content of the prayer is not of concern to judges." *Id.*

can be avoided, if officials work with students and parents to dispel the appearance of state "coercion" to attend an event, and if the public or peer pressure to participate in the religious activity is eliminated.[60]

1. Excusal from Objectionable Practice

Parents and school officials should not forget that excusal has been acknowledged by the court to be either permitted or required for students who claim an offense to some practice or matter of curriculum.

Consider, for example, a flag-salute case in which the Supreme Court held that education officials cannot compel objecting Jehovah's Witnesses students to violate their religious beliefs by saluting the American flag as a regular public school activity.[61] The Court did not say that, because the minority group was offended, the majority must be silenced from the flag-salute ceremony. It was enough to excuse the dissenting students. Note that the program in *Lee* included a pledge of allegiance, which includes an acknowledgement of God. If a student objected to the pledge, the remedy would be excusal, not a ban on the pledge for the whole group.

Excusal has been held as an insufficient remedy when state law compels classroom prayer or Bible reading. Courts have focused on the impressionability of elementary children as effectively precluding genuine choice in the face of state coercion or peer pressure to remain in the room and participate rather than feel ostracized. These cases, however, do not say that excusal is always inadequate, or that it never should be considered as a solution to the dissenter's objections.

Excusal is a common place and common sense remedy to accommodating the occasional objection of parents to curriculum or practices which offend family religious values. School officials should consider including excusal as a part of their policy to reduce offense for individual dissenters.[62]

2. Baccalaureate Services

Lee did not directly deal with baccalaureate services, but Justice Souter's concurring opinion observed that students and community leaders are still free to "organize a privately sponsored baccalaureate service," at which stu-

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60. Justice Souter commented in his concurring opinion, "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State." *Lee*, 112 S. Ct. at 2678 n.8 (Souter, J., concurring). Justice Souter gives just one example of how students, parents or school officials could change the facts slightly so as to make the religious expression non-official and non-coercive. This should encourage citizens to explore creative alternatives which comply with *Lee* but still accommodate religious freedom by private citizens. *Id.* at 2674, 2677-78 (Souter, J., concurring).

61. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

62. WHITEHEAD, *supra* note 20.

dents or clergy pray, sing and speak about God.[63] The safer approach is for school officials not to participate in the program, but to remain in a cooperative and accommodating mode, perhaps granting or renting school premises (auditorium or gymnasium) for the event, on the same terms as other groups. Schools may permit students to announce the time and place of the event in the same manner that other meetings are announced, whether by word of mouth, flyers, bulletin boards, or a public address system.[64] Similarly, a school could rent an auditorium from a church for a commencement if the school auditorium is inadequate, provided a disclaimer of state endorsement of the church is made at the program.

3. Prayer of Thanks for Food

Student-initiated or student-led prayers of thanks for food at a senior banquet or similar after-school banquet is not prohibited by *Lee*. A student program committee might make decisions about the speakers, and hence avoid state involvement. School officials may disclaim school endorsement of the speaker by an announcement or a printed program note, and disclaim any pressure on students to participate by noting that they may politely excuse themselves during the prayer and that their presence during the prayer does not imply approval or disapproval.

4. Pre-Game Prayers at Football Games and Other Events

At an after-school sports event, an invocation prayer which is initiated and led by a non-official, such as a student, is not expressly prohibited by *Lee* or any prior Supreme Court case.[65]

Students may urge school authorities to permit student-led prayer before games. Or they may initiate, with faculty oversight, creative new approaches to the pre-game activities. A program might include a student or adult speaker who gives a brief message which may include religious content. If this program is planned solely by students and non-officials, state involvement will not be "pervasive." A disclaimer in the printed program may remedy any apparent endorsement or coercion.[66]

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63. *Lee*, 112 S. Ct. at 2677 (Souter, J., concurring).

64. As a guide to developing a policy on private baccalaureates, consider Verbena United Methodist Church v. Chilton City Bd. of Educ., 765 F. Supp. 704 (M.D. Ala. 1991). The court held that the churches were allowed to rent the school auditorium for the private service. The Supreme Court's decision in Lamb's Chapel v. Center Moriches Sch. Dist., 113 S. Ct. 2141 (1993) is instructive on the issue of the right to rent school facilities for meetings, including those involving religious speech.

65. The Eleventh Circuit held a school policy unconstitutional which permitted pre-game prayers by ministers selected by the principal or the local ministers' alliance. Jager v. Douglas City Sch. Dist., 862 F.2d 824 (11th Cir. 1989). Presumably, after *Lee* lower courts will examine pre-game prayer cases in terms of "pervasive state involvement" or "state coercion."

66. For example, a disclaimer may say that:

Some may argue that football games are like commencements with respect to peer pressure to attend, but the language of the majority opinion in *Lee* does not seem to support this view. Yes, there is peer pressure to go to school sports events, but the Court does not say that the slightest degree of peer pressure will be enough to support a coercion claim. The majority opinion stresses the uniqueness of the graduation event, the "once-in-a-lifetime" aspect which creates unusual pressure on students to attend and participate in the ceremony, even the prayers. By developing policies which try to avoid the problems of state involvement and coercion mentioned in *Lee*, while using creative alternatives not prohibited by *Lee*, invocation prayers can remain a part of school athletic events.[67]

5. Student Bible Clubs—Equal Access

In 1984, the federal Equal Access Act became law.[68] Congress's primary purpose in passing the act was to end "perceived widespread discrimination" against religious speech in public schools.

According to the Guidelines on the Equal Access Act:[69]

> If a public secondary school permits student groups to meet for student-initiated activities not directly related to the school curriculum, [during non-instructional time] it is required to treat all such student groups equally (without discrimination) . . . on the basis of the religious, political, philosophical or other content of the speech at such meetings.

Statements made by students or other non-officials during the pre-game activities are not approved or endorsed by school officials, but are a means of accommodating the First Amendment liberties of all citizens. Persons who do not wish to participate are free to step outside the field area, or remain in their seats and not participate, as they wish. We do not wish to pressure or coerce anyone to participate in any part of the program, and you will not be deemed to have approved of the content of the program merely by your presence or your silence. Thank you for your courtesy to others as they express their personal ideas and opinions at this community event.

67. If statements or announcements by other civic groups are permitted at sports events, an "equal access" policy might be developed to include a student-led invocation. Another alternative might be for students and civic leaders to arrange a "private prayer" gathering somewhere on the premises before the game, and seek to announce or publicize the place and time of the regular pre-game prayer. School cooperation in announcing or accommodating such a private meeting need not appear to endorse religion. Disclaimers may be used to neutralize any such appearance.

68. 20 U.S.C. §§ 4071-4074 (1984).

69. Guidelines on Equal Access are available from the Christian Life Commission. This booklet contains the statutory language, and questions and answers about compliance. Sponsoring organizations include Christian Legal Society, American Association of School Administrators, National Education Association, and National School Boards Association.

In the 1990 *Mergens* case,[70] the Supreme Court held that the Equal Access Act was constitutional. The religious speech rights of student groups under Equal Access were not limited by *Lee*.[71]

6. "See You at the Pole"

During the second week in September each year, a national student-initiated event called "See You at the Pole" occurs, in which interested students assemble at the flag pole in front of their school buildings for brief, voluntary prayer before school one morning. An occasional complaint has caused some school officials to worry that, by permitting this event, they may risk violating the "school prayer" cases by the Supreme Court. These fears are unfounded.

Some schools begin incorrectly to analyze this event by looking at the federal Equal Access Act and the *Mergens* decision. In fact, this event has little to do with equal access laws, but has more to do with the landmark case of *Tinker v. Des Moines Independent School District*.[72] In *Tinker*, the Supreme Court said, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[73] Whether or not the school has non-curricular clubs or a limited open forum for group meetings, students have the right to freedom of speech without content-based censorship, subject to reasonable regulations on time, place, and manner of speech.[74] Officials may restrict speech only if it "materially or substantially interferes with the requirements of appropriate discipline in the operation of the school."[75]

Students who gather at the pole to talk to each other or talk to God need not seek recognition as an official group in order to have freedom of speech. If the school permits other speech "around the pole," it should not try to censor the content of this prayer event. The school does not sponsor or endorse the event merely by accommodating it. The event should be student-initiated and student-led. The school may even permit routine notices or announcements of the event, without "endorsing" the content.[76]

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70. Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226 (1990).

71. *See generally id.* at 236.

72. 393 U.S. 503 (1969).

73. *Id.* at 509.

74. *Id.* at 512-13. "When [a student] is in the cafeteria, or on the playing field, or on the campus during authorized hours, he may express his opinions. . . ." *Id.*

75. *Id.* at 509.

76. For more information, address your letter to "See You at the Pole" and mail either to P.O. Box 60134, Ft. Worth, TX 76115 or P.O. Box 552, Little Rock, AR 72203.

7. Released Time Programs

Released Time may be the best kept secret about the rights of religious persons in America's public schools today. If students and parents believe that accommodation for a thirty-second prayer at an occasional school-related event is not enough religious freedom in a child's education, they should investigate the possibilities of starting a "released time program" in the local school district.

In *Zorach v. Clauson*,[77] the Supreme Court held that public schools may cooperate with parents and churches in developing a program of weekday religious instruction for public-school students who are "released" to go off the school premises to attend classes taught by non-public teachers.[78]

Religious parents have often been disturbed by public school textbooks on subjects like sex education or evolution, which do not accommodate their religious point of view. In addition to efforts to improve these texts, perhaps parents should consider starting a released time program. A parent who chooses to send his child to a release-time class can have confidence that any subject can be freely presented from a solidly, unapologetically Biblical and moral perspective which reinforces rather than undermines the family's religious faith and values.

Some will angrily "curse the darkness" about the moral vacuum which Supreme Court decisions have created in the public schools. Others will seek to "light a candle." Options like released time are good candles to light. Such options offer the potential of being far more substantive and effective in terms of religious impact than an annual prayer at commencement or a football game. Even as we assert and defend our constitutional rights to prayers at school-related events, we dare not become so preoccupied with "closed doors" that we overlook an even better door that is legally "wide open." Nothing in the *Lee* decision limits the validity or effectiveness of released time programs.[79]

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77. 343 U.S. 306 (1952).

78. The Court has approved programs in which schools release students to be picked up from school and transported to a church or other non-school building where a pastor or lay teacher conducts the class. The classes may occur one hour each week, or more often. The classes may include prayer, Bible study, and worship. Parental consent avoids "state involvement" or "coercion." Any church which wishes to participate may sponsor a class. There is no State pressure on students to participate. The program is set up in a manner such that students who do not attend a program are not penalized, and do other productive work during the "released time" period.

79. "Release time" programs still operate in many school districts around the country. Most school districts, however, do not have programs, perhaps because so few parents and churches know that the programs are available and lawful. For more information, contact National Association of Released Time Christian Education, P.O. Box K, Ellijay, GA 30540, Phone (706) 276-7900.

B. *Remedies*

1. Using Disclaimers to Avoid Endorsement

Using disclaimers may remedy the appearance of State endorsement or coercion. Justice Scalia, in the dissenting opinion in *Lee*, observes:

> [I]nvocations and benedictions will be able to be given at public school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation Program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their country.[80]

In numerous prior cases where there was concern about apparent endorsement of religion by government, the Court has held that the solution was not to silence the religious person, but to have a government official make an announcement disclaiming endorsement. For example, airport officials often post signs or play recorded announcements in a terminal area, disclaiming state endorsement of religious or political leafleteers. In *Widmar v. Vincent*,[81] the Court cited the use of a disclaimer in the university student handbook to dispel the appearance of state endorsement of the student groups which used the student union.[82] Disclaimers should be tailored for the particular event, and should make clear that the school does not endorse the content of the speech by any private person or non-official on the program. They should also make clear that participation is voluntary, and that approval or non-approval will not be presumed by one's participation or non-participation in the event.

2. Risks and Costs of Litigation

Court decisions in this highly controversial area seem to have placed school boards in a difficult dilemma. If the school permits prayer at a school-related event, the ACLU may file a lawsuit. If the school forbids all religious expression at any school-related event, religious liberty groups or individuals

80. *Lee*, 112 S. Ct. at 2685 (Scalia, J., dissenting).
81. 454 U.S. 263 (1981).
82. *Id.* at 276 n.15.

may file suit demanding accommodation or equal protection for religious speech. The school may face substantial legal fees either way, whether it wins or loses.

School boards will, of course, want to practice "preventive law," but that no longer means capitulating to the strict separationists if they threaten suit. Preventive law means taking the principled course of action and applying the principles of *Lee* when the facts are substantially similar. But if the material facts are different, both principle and prudence should cause school officials to give the benefit of the doubt to freedom rather than to restriction on religious expression by non-officials.[83]

V. CONCLUSION

The State is to be religiously pluralistic—not secular. The Court can advance this value by restoring freedom of religious choice as the touchstone of the Religion Clauses, and by protecting religious expression in civic ceremonies so long as official coercion is absent.

Truly, public schools in America "do not have a prayer," if the one unmentionable word at public school functions is "God." The *Lee* case provided the Court with an excellent example of the sour fruit which the *Lemon* tree has borne. The Court side-stepped *Lemon* once again, and pursued perhaps an even more confusing course of psycho-babble about "peer pressure"-as-legal-coercion. The Christian Life Commission urges public officials to apply *Lee* narrowly, limiting it to its facts, as Justice Kennedy said the Court did. Meanwhile, the Christian Life Commission will continue to look for future opportunities to urge the Supreme Court, not to just revise and sweeten *Lemon*, but to uproot and replace it with an Establishment Clause doctrine which will promote religious liberty rather than obliterate it.

83. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992) (holding that it is reasonable to interpret *Lee* to permit student-led prayers.).