Rabbi Myer and Dorothy
KRIPKE CENTER
for the Study of Religion & Society

Omaha, Nebraska | Fall 1993 | Volume 5, Number 1

The Constitutional Implications of Public School Graduation Prayers

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Controversy surrounding the constitutionality and propriety of public school graduation prayers has subsided once again for the wintry moment. However, with the coming of Spring, graduation prayer controversies will undoubtedly be upon us again as a fresh batch of public high school and state college graduates face the rites of passage. Each of us directly or indirectly will again have the opportunity to decide how we ought to behave, where should our religious, moral and legal sympathies lie when school administrators give the go ahead for a graduation prayer, or more likely where students on secret cue rise in defiance of an administrative directive banning any graduation prayer and recite some form of prayer during the graduation ceremony. Such questions are particularly difficult as evidenced by the confusion and split amongst the Supreme Court justices on the constitutionality of graduation prayers.

The Supreme Court's 1992 decision in **Lee v. Weisman**,[1] invalidating on establishment grounds by a 5 to 4 vote Providence, Rhode Island's practice of directing a school-initiated and school monitored graduation prayer, obliquely answers the constitutionality of a school directed graduation prayer. In deciding **Lee v. Weisman**, the Supreme Court justices relied on conflicting establishment paradigms, suggesting that the constitutionality of any graduation prayer scheme may turn on the particular facts of the case.

Justice Blackmun in his concurring opinion in **Lee v. Weisman** expressed obeisance to the "wall of separation between church and State" metaphor used almost canonically by strict separationists in their quest for removing religion entirely from the public forum.[2] Justice Kennedy, writing for the Court, specifically declined either reliance upon or reconsideration of the limited separationist test contained in **Lemon v. Kuutzman's** secular purpose, secular effect and nonentanglement test.[3] Justice Scalia, writing in dissent in **Lee v. Weisman**,[4] joined by Chief Justice Rehnquist and Justices White and Thomas, recommended the theory of accommodationism as an alternative to strict separationism in general and the **Lemon** test in particular. In brief, Justice Scalia opined that "the Establishment Clause must be construed in light of the 'government policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.'"[5] From a traditionalist perspective, accommodationism makes sense in the context of high school graduation prayers because "[f]rom our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations."[6] Justice Souter wrote a concurring opinion in **Lee v. Weisman**, joined by Justices Stevens and O'Connor, which stressed a broader neutrality or nonendorsement

justification for prohibiting school graduation prayers.[7]

Justice Kennedy, writing for the Court in **Lee v. Weisman**,[8] announced a newly minted combined endorsement and coercion test. The endorsement of religion came as a result of the school's participation in (1) deciding that an invocation and benediction be given; (2) choosing the religious participant, here a rabbi; and (3) giving the rabbi directions and guidelines that the prayer should be nonsectarian. Based upon these active steps to promote graduation prayers, "[t]he 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."[9]

Further, the graduation-prayer experience entailed "subtle coercive pressure" to participate or give the appearance of participating in state-directed prayer.[10]

The confusing and conflicting nature of these paradigms provide a powerful argument for their rejection, but more importantly their total disregard of free speech and free exercise rights calls for further reflection and reformulation.

Strict separationism, despite the advantage of offering clean and precise lines, contradicts our cultural roots and privatizes religion in an unnatural way. Limited separationism, captured in both the **Lemon** test and the paradigm of neutralism or non-endorsement, stands as a reasoned alternative to strict separationism, but each of the limited separationist formulas have a tendency of collapsing back into strict separationism whenever they are taken seriously. The difficulty of drawing the type of lines required by separationist-inspired models has encouraged most Supreme Court justices to look to various forms of accommodationism. The varied explanations of the basis and limits of accommodationism, however, have left the theory open to coherency criticism from the separationists and the neutralists. Although religion cannot coherently be walled off from the public forum in every respect, it seems probable that the establishment clause provides some principled restriction on the permissible scope of religious activities within the public forum.

It is suggested that the fatal flaw of all existing establishment tests is that they do not properly reconcile the twin religion clauses: free exercise and establishment. Present establishment paradigms either ignore free exercise principles or embrace them in an ad hoc manner, thus contributing to the appearance of random results legitimized . through historical continuity or vague notions of accommodationism. It is suggested that a revised model of "reconciliationism" would resolve much of the confusion of establishment cases by highlighting free exercise justifications for many of the religious activities tolerated in the public forum.

Reconciliationism begins with the simple insight that the establishment clause cannot coherently prohibit religious incursions in the public realm demanded by

the free exercise clause. In this sense religion is entitled to more than neutrality: the free exercise of religion sometimes mandates and in other instances permits granting religious beliefs and practices an exempted status from the state's otherwise legitimate purposes.[11]

Applied to the issue of graduation prayers, reconciliationism would examine the impetus behind the religious incursions into the public forum, label them as such, and then determine their appropriateness in light of the circumstances presented. Permitting a student-initiated prayer or group of prayers, unsupervised by the school administrators, accompanied by appropriate disclaimers that the opinions and beliefs expressed by the persons delivering the prayer carry no school endorsement, would reconcile those free exercise rights of the people who cherish communal sharing of the rites of passage, without coercing the active participation of dissenters.

Justice Scalia, in his **Lee** dissent, in effect recommends this result under accommodationist reasoning without adopting in any way the free exercise justification. Thus he suggests that notwithstanding the Court's ruling invalidating Providence, Rhode Island's graduation prayer scheme, graduation prayers will still be permissible in other instances "so long as school authorities make clear that anyone who abstains from screaming protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written assertion 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."[12]

Interestingly enough the Fifth Circuit Court of Appeals for the United States, notwithstanding **Lee v. Weisman**, recently permitted a student-initiated graduation prayer under a rationale compatible with reconciliationism in **Jones v. Clear Creek Indep. Sch. Dist**.[13] In **Jones II** the Fifth Circuit carefully distinguished Providence's practice of soliciting ministers for prayers and then controlling the content of the prayer from Clear Creek's practice of permitting, but not soliciting, graduating seniors, not ministers, from giving any prayer they wanted with the only prohibition being against sectarian or proselytizing prayers.[14]

The court explained in **Clear Creek**: [t]he practical result of our decision, viewed in light of **Lee**, is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies."

As applied to school graduation ceremonies, it is suggested that the Fifth Circuit's analysis in **Clear Creek** most closely corresponds to the model of reconciliationism and ought to become the standard for future references. School graduation prayers should be permissible if they honestly reflect the religiosity

of the students and if steps are taken to explain to everyone that the students, not the state, are the motivational source behind the prayers. In this way the courts respect the free speech and free exercise rights of the students, without unconstitutionally endorsing religion. Otherwise the Court will have to revise its dicta in **Tinker v. Des Moines Independent School District**[15] that students and children do not abandon their basic rights at the schoolhouse gate.

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[1] 112 S. Ct. 2619 (1992).

[2] 112 S. Ct. 2649, 2662 n.1 (J. Blackmun, concurring, 1992). The "wall of separation" metaphor can be traced to dictum in Reynolds v. United States, 98 U.S. 145 (1879). In Reynolds the Court accepted Thomas Jefferson's explanation, penned in a letter to the Danbury Baptist Association, that the establishment clause erected "a wall of separation between church and State." 98 U.S. 145, 164 (1879). The Court incorporated this wall metaphor as the touchstone of modern establishment jurisprudence in Everson v. Board of Education 330 U.S.1 (1947).

[3] 112 S. Ct. at 2655

[4] 1992 U.S. Lexis 4364 at 34-43.

[5] Id. at 34, quoting Allegheny County v. Greater Pittsburgh ACLU 492 U.S. 573, 657, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

[6] Id. at 35.

[7] 112 S. Ct. 2671.

[8] 1192 U.S. Lexis 4361.

[9] Id. at 10.

[10] Id. at 11.

[11] For an argument that they should not, see, Marshall, "The Case Against the Constitutionally Compelled Free Exercise Exemption," 40 Case W. Res. 357 (1990).

[12] 112 S. Ct. at 2685.

[13] 977 F. 2d 971 (5th Cir. 1992).

[14] 977 F. 2d at 971.

[15] 393 U.S. 503, 506 (1969).