DOES PRAYER HAVE A PLACE AT PUBLIC COLLEGE AND UNIVERSITY OFFICIAL FUNCTIONS?

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The issue of prayer in the educational system has gained prominence as the public mourns the perceived decline of society's moral fiber. Traditionally, the aim of education has been to prepare students for their future roles in shaping society. The limited inclusion of prayer may have surfaced as a means to give students exposure to moral values at institutions of learning, which lack specific moral direction. Private institutions of higher learning are relatively free to institute policies, often drawn from religious principles, that cultivate moral development. This freedom does not exist for publicly-supported colleges and universities, which must be cognizant of state and federal constitutional restrictions because their administrators are not private individuals but agents of the state whose activity constitutes state action. Specifically, such institutions must be wary of two constitutional limitations. The Establishment Clause contained in the First Amendment to the United States Constitution, as interpreted by the courts, guarantees the separation of church and state, and this federal mandate has been applied to the states through the Fourteenth Amendment.[1] The Free Exercise Clause, yet another Constitutional guarantee of church and state separation, has also been applied to the states through the Fourteenth Amendment. The two clauses pertaining to religion raise controversial issues when attempts to promote religious toleration may be viewed, instead, as the establishment of religion.[2]

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[1] ***See* Everson v. Board of Education, 330 U.S. 1 (1946).**

[2] **Amy L. Weinhaus, *The Fate of Graduation Prayers in Public Schools After Lee v. Weisman,* 71** WASH. **U. L.Q. 957, 958-959 (1993).**

I. SEPARATION OF CHURCH AND STATE

The Constitution does not require or expect total separation of church and state. In its historical context, the Establishment Clause served to preclude the coerciveness incident to the establishment of an official state sponsored church as in eighteenth century England. In applying the law, the Supreme Court explained in *Engel v. Vitale*,[3] that the Clause does not "depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion, whether those laws operate directly to coerce non-observing individuals or not."[4] The Free Exercise Clause was meant to insure the protection of a person's individual values, which may differ from those held by the majority To effect a balance, the constitutional right to religious freedom may be constrained when its expression impermissibly harms society.

A. EMERGING CAMPUS ISSUE

The scope of religious expression at official functions is now an active campus issue. A faculty member at publicly funded Dixie College in Utah objected to prayer at graduation stating that it should be a secular event.[5] But student pressure in support of prayer has left this tradition intact.[6] Even though a campus committee recommended otherwise, the University of Tennessee at Chattanooga, prompted by numerous complaints, restored prayer at its commencements.[7] The constitutionality of prayer in the context of state supported schools needs to be carefully studied, because the issue is currently being raised. On advice from the Texas Attorney General's Office, Texas Southern University, a public institution, is scrutinizing its policy that allows prayer at university functions, since its constitutionality depends on the nature of the practice.[8]

[3] **370 U.S. 421 (1962).**

[4] ***Id.* at 430.**

[5] ***Dixie College Will Keep Prayers,*** CHRON. OF HIGHER EDUC., **May** 18,1994, **at** 6(A).

6 ***Id.***

7. Mike Smith, *Commencement Prayer to be Revived,* ATLANTA CONST., **Sept.** 6, 1994, **at** 3(A).

8. Charles Ornstein, ***Texas Southern U. Told to 'Scrutinize' Its Use of Prayers,*** CHRON. or HIGHER EDUC., Aug. 17,1994, at 18(A).

B. Case Analysis

In its recent decisions on church-state relations, the Supreme Court appears unwilling to allow greater government accommodation of religion or to follow a single test to determine constitutionality. Court observers speculate that the justices, in their failure to apply precedent strictly, may soon overrule *Lemon v. Kurtzman*,[9] the decision which sets the standard by which church-state cases are judged.[10] Under *Lemon,* the test for a statute's constitutionality requires that the practice meet three prongs. First, the statute must have a secular purpose.[11] Specifically, the Court considers a statute's dominant purpose. "A statute or practice with mixed secular and religious purposes will not violate the first prong of the test if the predominant purpose of the statute or practice is not religiously motivated."[12] The test's second prong involves effect. The court determines whether or not the primary or principal effect of the statute is to advance or inhibit religion.[13] Finally, the statute must not result in excessive government entanglement with religion.[14]

C. Coercion as Defined by the Court

At this time, no Supreme Court decision deals specifically with prayer at a public college or university. However, in *Lee v. Weisman*[15] the Supreme Court, in a five to four decision, ruled that a member of the clergy, at the invitation of the school's administration, may not deliver nondenominational prayers at public high school graduation ceremonies. Instead of applying the *Lemon* analysis, the Court focused on the coercive nature of the prayer on impressionable young minds at the junior high school function.[16]

Even though the role of coercion is not limited to the context of schools, it is most pronounced there. What to most believers may seem nothing more than a reasonable request that nonbelievers

[9] **403 U.S. 602(1971).**

[10] **Henry J. Reske,** ***Court Maintains Its Church-State Course,*** **80 A.B.A. J. 26 (1994).**

[11] ***See*** **Susan E. Kennedy,** ***Lee v. Weisman: A Missed Opportunity for Clarity in Establishment Clause Jurisprudence,*** **23** CUMB. **L.** Rev. **445, 447 (1993).**

[12] ***Id.*** **at 447-48 (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 296-303 (1963) (Brennan, J., concurring)).**

[13] ***Id.*** **at 448 (quoting School Dist. v. Ball, 473 U.S. 373, 383 (1985)).**

[14] ***Id.***

[15] **505 U.S. 577 (1992),** ***aff'g*** **908 F.2d 1090 (1st Cir. 1990),** ***aff'g*** **728 F. Supp. 68 (D.R.I. 1990).**

[16] **Weinhaus,** ***supra*** **note 2, at 970.**

respect their religious practices, in a school context, actually may appear to nonbelievers or dissenters to be an attempt to use the State to enforce a particular religious orthodoxy.[17] In his majority opinion in *Weisman,* Justice Kennedy stated that something less than the traditional, direct legal coercion may be sufficient to trigger an Establishment Clause violation.[18] The school district's control of a high school graduation ceremony places pressure on attending students to stand or to maintain respectful silence during the Invocation and Benediction. "This pressure, though subtle and indirect, can be as real as any overt compulsion."[19] The Court's decision in *Committee for Public Education and Religious Liberty v. Nyquist*[20] supports Kennedy's position that a lack of traditional coercion does not make a practice valid under the Establishment Clause. Under the Clause, proof of coercion is not a necessary element of any claim.[21]

Scalia's dissent in *Weisman,* however, contested the position of Kennedy and his supporters. Simply stated, Scalia's view was that there exists "no support for the proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman—with no one legally coerced to recite them—violated the Constitution . . . ."[22] Justice Scalia astutely observed that even the Declaration of Independence explicitly states that the Founders "appeal(ed) to the Supreme Judge of the world," and relied upon "the protection of divine Providence."[23]

Justice Blackmun, however, concluded that the administration's invitation to the clergyman, by itself, was constitutionally impermissible action resulting in the government's endorsement of religious practice.[24] "Government pressure to participate in a religious activity," Blackmun stated, "is an obvious indication that the government is endorsing or promoting religion."[25]

Notably, the state-sponsored prayer played no part in a daily ritual of religious expression, nor was it offered in a classroom where the teacher-student relationship aroused fear of inculcation. Therefore,

[17] ***Weisman,* 505 U.S. at 592.**

[18] ***See generally* Weinhaus, *supra* note 2, at 971-72.**

[19] ***Weisman,* 505 U.S. at 593.**

[20] **413 U.S. 756 (1973) (holding, in pertinent part, that states must maintain an attitude of neutrality, neither advancing nor inhibiting religion, and that they cannot, by designing programs to promote the free exercise of religion, erode the limitations of the Establishment Clause).**

[21] ***Id.* at 786.**

[22] ***Weisman,* 505 U.S. at 641.**

[23] ***Id.* at 633.**

[24] ***See* Weinhaus, *supra* note 2, at 974.**

[25] ***Weisman,* 505 U.S. at 604.**

the decision is inconsistent with school prayer precedent.[26] "The Court failed to recognize that graduating seniors are not young impressionable children susceptible to peer pressure."[27] These students are able to distinguish between religious customs, teachings and principles.[28] The majority decision apparently ignored the longstanding history and tradition of graduation prayers.[29] The Court's refusal to apply or to overrule the Lemon test will force lower courts to choose between *Lemon* and *Weisman.*[30]

II. ASPECTS OF PRAYER

A. A SPIRITUAL HERITAGE

History and tradition have long played a role in sustaining prayer with governmental activity. Despite the *Weisman* ruling, the United States is not a godless country. Even the Supreme Court begins each session with the invocation, "God save the United States and this Honorable Court". In *Marsh v. Chambers,*[31] the Supreme Court applied an historical analysis in upholding the constitutionality of prayer by a government-employed chaplain at the opening of state legislative sessions.[32] Federally supported chaplains, who are given commissioned officer status in the military, provide for the spiritual needs of service members. George Washington began the longstanding practice of opening presidential inaugural ceremonies with prayer.[33] The nation's motto remains "In God we Trust," and the pledge of allegiance explicitly makes reference to the deity. None of the preceding examples of tradition, illustrative of our nation's spiritual heritage, serves as a proselytizing vehicle. But tradition should not be observed for its own sake if it is wrong. The foregoing instances certainly illustrate the singularity of the *Weisman* decision, which could be limited to the facts of the case, instead of outlawing

[26] **Will K. Wright, *Back to the Future with Establishment Clause Jurisprudence: Analysis and Application of Lee v. Weisman,* 28** TULSA **L.J. 297, 298 (1992).**

[27] ***Id.***

[28] ***Id.* at 304. *Cf.* School District of Grand Rapids v. Ball, 473 U.S. 373 (1985) (finding it highly likely that indoctrination will occur when primary school students are concerned).**

[29] **Weinhaus, *supra* note 2, at 970.**

30. Wright, *supra* note 27, at 308.

[31] **463 U.S. 783 (1983).**

[32] ***Id.* at 792-94.**

[33] **Weinhaus, *supra* note 2, at 977 n.134.**

all prayer in all situations.[34] If the decision were otherwise, strong public sentiment, in support of our nation's spiritual heritage, might press for a constitutional amendment allowing prayer.

B. Legal Scenarios: Subtle or Explicit Coercion

Alternative settings that include prayer in the context of public education may be constitutionally defensible depending on the right combination of facts. The *Weisman* decision concerned a junior high school graduation ceremony. Adolescents are most impressionable. This impressionability places them at particular risk to indirect coercion. Arguably, occasional prayers given at public state college and university functions are constitutional since the audience, unlike junior high school, does not consist of impressionable students, susceptible to peer pressure.[35] In this situation, members at the gathering, mostly legal adults, may choose to leave, not participate or otherwise filter out any aspect of the invocation deemed objectionable. As an example, Jehovah's Witnesses do not recite or stand during the pledge of allegiance because of the phrase "one nation under God." Simply stated, if coercion exists, then the practice is unconstitutional. However, determining the presence of coercion is no simple matter. To minimize this concern, anyone experiencing subjective coercion should be given an easy opportunity to forego the prayer exercise.

III. First Amendment Right

Students, pursuant to the free exercise clause, have the constitutionally protected right of religious practice. An important question that comes up is how this protected right of religious practice holds up against the Establishment Clause. In *Collins v. Chandler Unified School District,*[36] *a* high school principal granted permission to the school's student council to open student assemblies with prayer.[37] The court, citing the three-part *Lemon* test, held that such prayers violated the Establishment Clause.[38] In the court's words, there was "no meaningful distinction between school authorities actually orga

[34] **Kennedy, *supra* note 11, at 460.**

[35] **Wright, *supra* note 27, at 305. *See also* Tanford v. Brand, 883 F. Supp. 1231, 1241 (S.D. Ind. 1995).**

[36] **644 F.2d 759 (9th Cir. 1981).**

[37] ***Id.* at 760.**

38. *Id.* at 762.

nizing the religious activity and officials merely 'permitting' students to direct the exercises."[39]

The *Weisman* decision does not address student selection of a graduation speaker, either clergy or non-religious, to deliver prayer.[40] Notably, in *Jones v. Clear Creek Independent School District*,[41] the procedure of allowing student-initiated, nonsectarian prayer was permitted.[42] The contaminating factor of unconstitutional state action was eliminated when the issue was placed to a student vote and the selection process taken away from school administrators. However, the Ninth Circuit's ruling in a more recent case, Harris v. Joint School District No. 241,[43] was that school prayers, which were initiated by a majority vote of the student body, violated the Establishment Clause.[44] In *Harris* a senior high school class voted to have an invocation and benediction during graduation exercises.[45] The court found that the high degree of control which high school officials retained over graduation ceremonies was sufficient to constitute state involvement.[46] The court also found coercion to be a factor in the school's practice.[47] At the simplest level, these conflicting decisions demonstrate a split in the courts. However, the decisions are also indicative of a prevailing high sense of caution in drawing the line between actions attributable to the state through school officials and to individual students, legitimately acting on their own.

A. Student Involvement

The Supreme Court has not evaluated the permissibility of student- voted religious speakers or prayers at school functions. Whether such student selection, by vote or other means, is permissible constitutionally remains open, to a certain extent.[48] Also open is the issue of whether or not, in the free exercise of religion, non-clergy, student volunteers could present a nondenominational prayer at a graduation ceremony.[49] Both of these scenarios are distinguishable from

[39] ***Id.*** **at 761.**

[40] **Weinhaus,** ***supra*** **note 2, at 979.**

[41] **977 F.2d 963 (5th Cir. 1992),** ***cert. denied,*** **113 S. Ct. 2950 (1993).**

[42] ***Id.*** **at 969.**

[43] **41 F.3d 447 (9th Cir. 1994). The facts in** ***Harris*** **virtually mimic those of** ***Jones.***

[44] ***Id.*** **at 458.**

[45] ***Id.*** **at 452.**

[46] ***Id.*** **at 454.**

[47] ***Id.*** **at 457.**

[48] **Weinhaus,** ***supra*** **note 2, at 979.**

[49] ***Id.*** **at 979-80.**

Weisman in that in neither one is there direct involvement on the part of school officials.[50] State action no longer exists once school officials relinquish control. Loss of such oversight authority could result in unpleasant consequences for those who believe that students are incapable of mature decision. Conceivably, a demonic ceremony, initiated by students or their chosen speaker, could become a protected activity under both the First Amendment and the recently enacted Religious Freedom Restoration Act of 1993.[51] An announcement may appear in the program that the speaker's views do not constitute a public endorsement.

B. CHOICE OF WORDS

Unlike the invocation in *Weisman,* the graduation prayer should not include the word God, or mention a higher being. But Justice Souter cautioned in *Weisman* that "state-sponsored prayers . . . [risk constitutional infirmity] no matter how nondenominational the prayers may be."[52] A truly non-sectarian prayer might not exist because it fails to include the atheist's right to non-belief. In *Wallace v. Jaffree*,[53] for example, a moment-of-silence statute, enacted to return voluntary prayer to public schools,[54] was struck down as an Establishment Clause violation because the Court concluded that "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."[55]

C. AVAILABLE OPTIONS

The simplistic solution of eliminating prayer at graduation could be viewed as an infringement of the Free Exercise clause, if that right were denied to a student. The resulting lawsuit would not just be limited to the Free Exercise clause but would attack all aspects of the prohibition. If a ban policy were implemented, the rule must be applied consistently to all official school functions to avoid fundamen

[50] ***Id.* at 980.**

[51] **Pub. L.** NO. **103-141, 107 Stat. 1488 (codified at 42 U.S.C.S. § 2000bb (1989 & Supp. 1995) (creating a statutory right requiring application of a compelling state interest test to governmental burdens on religion).** ***See also*** **Peter Steinfels,** ***Clinton Signs Law Protecting Religious Practices,*** N.Y. TIMES, NOV. **17,1993, at 18A.**

[52] ***Weisman,* 505 U.S. at 610.**

[53] **472 U.S. 38 (1985).**

54. ***Id.* at 57.**

[55] ***Id.* at 53.**

tal unfairness or, otherwise, be struck down as unconstitutionally arbitrary in violation of due process.

Alternatively, student supporters of prayer may organize a voluntary, off-campus commencement service just before or after the established graduation ceremony. This approach recognizes that everyone can exercise religious belief at the proper place and time.

Another option is silent meditation. Graduation is one of life's most significant events and its commemoration should possess individual meaning in a collective setting. The least intrusive means may be an optional, student-initiated moment of silence for reflection, observation, tribute or personal prayer. People, in a multi-valued assembly, have different ways of thinking, worthy of respect. Silent individual reflection may be the best legally defensible way for ensuring liberty to all present.

IV. CONCLUSION

In religious freedom cases, any attempt to build a constitutionally acceptable formula is a formidable task because no answer can be derived with clarity and predictability.[56] The law is presently uncertain, but prayer, in some form, at post-secondary school ceremonial functions will be allowed. The courts will find it difficult, if not impossible, to apply clear-cut rules to settle any disputes between matters of individual liberty and impermissible government intervention. Effectuating the proper balance between the Free Exercise and Establishment Clauses should not become an exercise in futility. For the Constitution to remain vibrant, this framework for our laws and ethical principles must support a pluralistic society in its diversity of religious beliefs or non-belief without excising moral values. Society benefits from the exercise of free speech in the exchange of ideas, including religious speech. Common sense should prevail. Prayer, in some form, as a constitutionally protected tradition, should be perceived as voluntary and non-coercive. When initiated by students, pursuant to the Free Exercise Clause, prayer can claim rightfully its place at publicly supported academic ceremonies without the possible taint of state action. In the exercise of abundant caution, silent reflection in that context may be the most appropriate solution.

56. Kennedy, *supra* note 11, at 445.