

Winter 3-2-1999

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### Recommended Citation

Charles J. Russo, *Prayer at Public School Graduation Ceremonies: An Exercise in Futility or a Teachable Moment?*, 1999 BYU Educ. & L.J. 1 (1999).

Available at: <https://digitalcommons.law.byu.edu/elj/vol1999/iss2/2>

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# PRAYER AT PUBLIC SCHOOL GRADUATION CEREMONIES: AN EXERCISE IN FUTILITY OR A TEACHABLE MOMENT?

*Charles J. Russo\*\**

## INTRODUCTION

One has only to look at the strife in Bosnia and Herzegovina, Northern Ireland, and the Middle East to recognize how volatile and violent religious differences within a society can become.<sup>1</sup> As litigious as the United States has become over religion in the marketplace of ideas, particularly in public schools, the Nation is indeed fortunate that disputes have managed to remain non-violent.

A major impetus for the founding of the American colonies was the desire of many to escape the tyranny of state-sponsored religions in Western Europe during the upheaval of the post-Reformation era, so it is ironic that many of the practices they sought to avoid were transplanted into the New World. Consequently, the sense of frustration experienced by many of those who helped create the new American Republic gave birth to the religion clauses of the First Amendment. The Framers of the Bill of Rights were concerned with prohibiting the establishment of a state-sponsored religion. At the same time, the Framers did not wish to inhibit the free exercise of religion; hence the poten-

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\* Although not attributed to a particular author, the "teachable moment" is a term of art that refers to a time when "conditions for learning are optimum." CARTER V. GOOD (Ed.), *DICTIONARY OF EDUCATION* 586 (3d ed. 1973).

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1. For a first hand account of the author's experiences in, and reflections on, post-war Sarajevo, Bosnia and Herzegovina, see Charles J. Russo, *At the Table in Sarajevo: Reflections on Ethnic Segregation in Bosnia*, 38 CATH. LAW. 211 (1998).

tial for antagonism between the two religion clauses in the First Amendment.<sup>2</sup>

The United States Supreme Court is heir to this historic frustration. As the final arbiter in the conflict between values in a First Amendment dispute, the United States Supreme Court is often in a "catch 22" situation. That is, while the Court seeks to adhere to religious neutrality, its rulings are often perceived by critics at both ends of the spectrum as anything but neutral.<sup>3</sup>

Appeals to history as to the meaning of the religion clauses as intended by the Founding Fathers fail to provide clear answers. This lack of clarity stems largely from the fact that close ties between religion and government continued in several states even after the adoption of the Bill of Rights.<sup>4</sup> As a result of the paradox created by the mandated separation of a symbiotic relationship, the natural tension between the religion clauses generates a similar rivalry between supporters of the two distinct approaches to the First Amendment's religion clauses.<sup>5</sup> On the one hand are supporters of the Jeffersonian

2. For background information, see generally LEO PFEFFER, CHURCH STATE AND FREEDOM (revised edition 1967); RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER (James L. Wood, Jr., ed. 1985); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988); RELIGION AND POLITICS: FROM THE COLONIAL PERIOD TO THE 1980S (Mark A. Noll, ed. 1990).

3. The Court is ordinarily the final arbiter of such disagreements. However, tension continues to surround disagreements between the Court and other branches of the government. Perhaps the best recent example of this tension began in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U. S. 872 (1990), wherein the Court upheld the dismissal of two Native American drug counselors for ingesting peyote, a sacrament in the Native American Church. For a discussion of this case, see David L. Gregory & Charles J. Russo, *Let Us Pray (but not them!): The Troubled Jurisprudence of Religious Liberty*, 65 ST. JOHN'S L. REV. 273 (1991). Subsequently, Congress essentially overruled *Smith* by passing the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-(4) (1993) while restoring greater protection for religious liberty. However, the Court struck the Act down in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997). For a discussion of *Boerne*, see Ralph D. Mawdsley, *Invalidating the Religious Freedom Restoration Act: Implications for Religious Liberty*, 123 EDUC. L. REP. 431 (1998).

4. Up until at least until the time of the Revolutionary War, "[T]here . . . were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five." *Engle v. Vitale*, 370 U.S. 421, 428 n. 5 (1962). For a review of the background, see generally Richard Hoskins, *The Original Separation of Church and State in America*, 2 J.L. & RELIGION 221 (1984); Kent Greenwalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985).

5. For discussions of these tensions, see, e.g., 4 Rotunda & Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, 446 (2d ed. 1992; pocket parts 1998) 446; Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146 (1986); Mark V. Tushnet, *Religion and Theories of Constitutional Interpretation*,

metaphor of maintaining a “wall of separation” between church and state.<sup>6</sup> This wall of separation is most often associated with the Supreme Court over the past thirty-five years.<sup>7</sup> On the other hand are those, including the Christian Right, who favor accommodation to religion as long as no one religion is supported or favored to the exclusion of others.<sup>8</sup>

Public education presents today’s Court with one of its greatest challenges as it interprets the religion clauses.<sup>9</sup> Although the

33 LOY. L. REV. 221 (1987); John H. Garvey, *The Architecture of the Establishment Clause*, 43 WAYNE L. REV. 1451 (1997).

6. The metaphor of the “wall of separation” comes from Thomas Jefferson’s letter of January 1, 1802 to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association. 16 WRITINGS OF THOMAS JEFFERSON 281 (Andrew A. Lipscomb, ed., 1903). Jefferson wrote:

Believing with you that religion is a matter which lies solely between man and his God . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between church and state.

The term was first used by the Supreme Court in *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (a case involving a Mormon’s Free Exercise Clause challenge to a federal polygamy statute)).

7. Members of the Court have had widely different perspectives on the “wall.” For example, Chief Justice Rehnquist’s dissent in *Wallace v. Jaffree* 472 U.S. 38, 107 (1985), soundly criticized the wall. He wrote that the wall “[i]s . . . a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.” For a review of *Wallace*, see discussion at note 40 and accompanying text. *But see* Justice Brennan’s concurrence in which Justice Blackmun joins in *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (upholding the display of a creche among secular symbols) at 673: “The concept of a ‘wall’ of separation is a useful figure of speech . . . .” “The viability of the wall continues to be debated. *See, e.g.,* Martha M. McCarthy, *Is the Wall of Separation Still Standing*, 77 EDUC. L. REP. 1 (1992).

8. For representative commentaries on this issue, see Michael W. McConnell, *Accommodation of Religion*, 1985 SUPREME COURT REV. 1; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685 (1992); Ralph D. Mawdsley, *The Advancement-Accommodation of Religion Continuum: Searching for the Mythical Midpoint*, 117 EDUC. L. REP. 21 (1997); Richard S. Vacca, et H.C. al. Hudgins, & Louis M. Millhouse, *Accommodation of Religion Without Establishment of Religion*, 115 EDUC. L. REP. 9 (1997).

9. The Court is certainly more overtly polarized over abortion. *See, e.g.,* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (reaffirming a woman’s ability to chose to have an abortion prior to fetal viability); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (holding that a statute barring the use of public funds for the performance or assistance of non-therapeutic abortions did not contravene the Constitution); *Roe v. Wade*, 410 U.S. 113 (1973) (striking down a Texas criminal statute that prohibited abortion at any time other than to save the life of the mother and defining a woman’s “right” to have an abortion). However, when turning to education, the Court has, over the past twenty years, addressed more school cases on religion than any other topic, even desegregation.

earliest European settlers traveled to America in search of religious freedom, their understanding of the relationship among religion, government, and education was unlike our contemporary perspective. The notion of public education divorced from denominational control was foreign to the colonial mind. The lack of a clear distinction between church and state sowed the seeds for contemporary debates—especially as church and state intersected in the schools. The absence of a definitive interpretation of the First Amendment makes it difficult to find the balance that allows the religion clauses and public education to maintain their integrity.

Due to conflicting lower court judgments on the propriety of prayer at public school graduation ceremonies, this question will return to the Supreme Court.<sup>10</sup> This article is divided into three major sections. Part I briefly recites the history of the Establishment Clause and education. Part II examines case law relevant to prayer at public school graduation ceremonies. This section begins with a brief examination of the cases prior to *Lee*.<sup>11</sup> It next reviews the majority and dissenting opinions in *Lee* in some detail to show how the diametrically opposed views of Justices Kennedy of the majority and Scalia of the dissent have helped to shape the parameters of post-*Lee* debate. Part II also discusses the tests employed by the Supreme Court and lower courts in evaluating school-sponsored prayer or religious activity. This section ends with a brief review of post-*Lee* lower court cases. Part III discusses questions related to how prayer at public school graduation ceremonies can be transformed into a teachable moment that allows all those gathered to develop a new sense of respect for an opinion other than their own. Part IV concludes that by permitting prayer at public school graduation ceremonies, the Supreme Court does not run the risk of establishing a state-sponsored religion; instead it leads the way in fostering a climate wherein divergent opinions are appreciated and even celebrated.

## I. HISTORY OF THE ESTABLISHMENT CLAUSE AND EDUCATION

Judicial interpretation of the Establishment Clause, especially with regard to religion and education, has a short history.

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10. See *infra*, note 71 and accompanying text.

11. *Lee v. Weisman*, 505 U.S. 577 (1992).

Prior to the Court's 1947 ruling in *Everson v. Board of Education*,<sup>12</sup> the few cases involving religion, however broadly construed, and public education were decided on grounds other than the Establishment Clause.<sup>13</sup> From *Everson* through the early 1990s, the Court's interpretations of both federal and state actions have generally maintained that the Establishment Clause prohibits governmental sponsorship of or aid to any religion.<sup>14</sup> Yet, given the conservative coalition that emerges when the swing Justices, Kennedy and O'Connor,<sup>15</sup> join the conservative core of Chief Justice Rehnquist and Justices Scalia and Thomas, the Court's attitude on aid has been altered dramatically.<sup>16</sup>

Notwithstanding the shift in the Court's stance with regard to aid, there has been little change in its attitude toward prayer in the schools. The Court's intransigence is highlighted in *Lee v. Weisman*,<sup>17</sup> where the majority held that school-sponsored prayer at public high school graduation ceremonies violates the Establishment Clause.<sup>18</sup>

12. 330 U.S. 1 (1947) (upholding the constitutionality of a state law from New Jersey that reimbursed the transportation costs of parents who sent their children to non-public schools).

13. The leading cases are *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that Oregon's compulsory attendance law, which required all students to attend public schools, violated the Fourteenth Amendment's Due Process Clause), and *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930) (holding that a state law providing textbooks to students in non-public schools did not violate the Due Process Clause of the Fourteenth Amendment).

14. The Child Benefit test, which traces its origins to *Everson*, *supra* note 10, is based on the premise that under certain circumstances, aid is provided primarily to students and not the religiously affiliated schools that they attend. After being largely ignored during the *Lemon* era, the Court reinvigorated the Child Benefit test in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (permitting a sign language interpreter to provide services on site in a religiously affiliated high school on the ground that since the student was the primary beneficiary, any aid that the school received was incidental), and *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 997 (1997) (holding that employees in a Title I program that provided remedial services on site in religiously-affiliated non-public schools to students who were educationally and economically disadvantaged is barred by the Establishment Clause).

15. Justice Kennedy who wrote, and Justice O'Connor, who joined, the majority opinion in *Lee* are still considered moderates, at least in religion cases, in light of their stance in aid cases.

16. The two most notable cases here are *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) and *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 997 (1997), *supra*, note 14.

17. 505 U.S. 577 (1992).

18. For a case from higher education, see *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 60 (1997) (permitting an invocation and benediction at

## II. SCHOOL SPONSORED PRAYER OR RELATED ACTIVITY

A. SUPREME COURT CASES PRIOR TO *LEE*

Shortly after the New York State Board of Regents recommended and composed a prayer to be used at the start of the day in public schools, the parents of ten students filed suit in state court arguing that the use of official prayer was contrary to their own religious beliefs and those of their children. In *Engel v. Vitale*, the first case in which the Supreme Court considered the propriety of prayers in schools, the Court agreed that the Board of Regents violated the Establishment Clause even though students could have been excused from participation.<sup>19</sup> The Court found that governmental involvement in creating the prayer was dangerously close to the official establishment of religion that many of the Framers sought to avoid—especially since the prayer was recited in schools.<sup>20</sup>

Faced with a growing controversy over its ruling in *Engel*, the Court again found itself in the eye of a storm regarding the companion cases of *School District of Abington Township v. Schempp* and *Murray v. Curlett*.<sup>21</sup> Here the Court was asked to address the constitutionality of a Pennsylvania statute and a Maryland rule adopted pursuant to a state law that required Bible reading and/or the use of the Lord's Prayer at the start of the day in public schools.<sup>22</sup> More specifically, in *Schempp* a state law required a student to read at least ten verses from the Bible over the school intercom, without comment, followed by the

a university commencement on the grounds that college students were less impressionable than students in K-12 settings and that the 155-year practice of having a nonsectarian invocation and benediction at commencement did not violate the Establishment Clause). For a discussion of prayer at commencement exercises in higher education, see W. Bradley Colwell & Paul W. Thurston, *Prayer and University Commencement: Application of Lee v. Weisman*, 94 EDUC. L. REP. 1 (1994).

19. 370 U.S. 421 (1962).

20. Shortly after classes completed the Pledge of Allegiance, each teacher chose a student to recite the following prayer "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

21. 374 U.S. 203 (1963).

22. Although the question has apparently not been raised previously, it is worth noting that while most Christians who belong to Protestant Church's use this title for the words of Jesus, Roman Catholics refer to this same prayer as the "Our Father." It would have been interesting to see what would have happened if Catholics raised this objection.

recitation of the Lord's prayer at the opening of each public school day.<sup>23</sup> In *Murray*, the Board of School Commissioners in the City of Baltimore adopted a rule pursuant to state law that called for the daily reading of a chapter from the Bible without comment and recitation of the Lord's Prayer. In both cases, children could be excused from taking part in these activities upon the written requests of their parents or guardians.

*Schempp* introduced a new era in the relationship between religion and government. The Court enunciated a two-part test to invalidate both practices and, in so doing, vitiated both practices. Even though neither state was directly involved in the composition of the prayers, students participated voluntarily, and no one religion was favored. Justice Clark's majority opinion maintained that "The test may be stated as follows: what are the purpose and the primary effect of the [legislative] enactment? . . . [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."<sup>24</sup> The Court quickly added that nothing in its decision excluded the secular study of the Bible in public schools when in connection with topics such as comparative religion, literature, or history.

The Court was soon faced with yet another dispute involving the Establishment Clause.<sup>25</sup> In *Lemon v. Kurtzman*, the Court considered the constitutionality of programs from Rhode Island and Pennsylvania that aided religiously affiliated non-public schools.<sup>26</sup> The case from Rhode Island centered on a state statute that paid salary supplements to certified teachers in non-public schools who taught only subjects that were offered in the public schools. Similarly, the action from Pennsylvania involved a state law that provided reimbursements for teachers' salaries, textbooks, and instructional materials for courses as long as they

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23. The school provided only copies of the King James Bible. Even so, students used the Douay and Standard versions as well as Jewish Scriptures. 374 U.S. 203, 207 (1963).

24. *Id.* at 222.

25. In the interim, the Court applied the Purpose and Effects test in *Board of Educ. v. Allen*, 392 U.S. 236 (1968). The Court's upholding a New York State law that required school boards to loan textbooks for secular subjects to all students regardless of whether they attended public or non-public schools, is generally accepted as representing the outer limit of permissible aid to religiously affiliated non-public schools.

26. 403 U.S. 602 (1971).



did not contain "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."<sup>27</sup>

Invalidating both programs, the Court subsequently added a third element, from *Walz v. Tax Commission of New York City*,<sup>28</sup> to create the tripartite test that it has since relied upon in virtually all cases involving the Establishment Clause.<sup>29</sup> Chief Justice Burger's majority opinion in *Lemon* stated that:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. 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"<sup>30</sup> with religion."<sup>31</sup>

Even though the first two parts of the seemingly ubiquitous and increasingly unworkable *Lemon* test<sup>32</sup> were developed in the context of prayer cases, it continues to be applied just as widely in disputes involving aid to non-public schools.<sup>33</sup>

27. *Id.* at 610.

28. 397 U.S. 664 (1970) (upholding New York State's practice of providing state property tax exemptions for church property that is used in worship services).

29. As central as *Lemon* has been, it was conspicuous by its absence in Justice Kennedy's opinion in *Lee*.

30. When addressing entanglement and state aid to institutions that are religiously affiliated, Chief Justice Burger noted that the Court took three additional factors into consideration: "we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

31. *Id.* at 612-613 (internal citations omitted). (Citations omitted).

32. The *Lemon* test continues to generate grist for the academic mill. See, e.g., Carl H. Esbeck, *The Lemon Test: Should it be Retained, Reformulated or Rejected?* 4 NOTRE DAME J. L. ETHICS & PUB. POLY 513 (1990); Timothy V. Franklin, *Squeezing the Juice Out of the Lemon Test*, 72 EDUC. L. REP. 1 (1992); Michael S. Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795 (1993); Daniel O. Conkle, *Discussion of Lemon is Dead*, 43 CASE W. RES. L. REV. 865 (1993); Julie K. Underwood & Julie F. Mead, *Establishment of Religion Analysis: The Lemon Test or Just Lemonade?* 25 J.L. & EDUC. 55 (1996).

33. In addition to other cases cited in the footnotes, see, e.g., *Meek v. Pittenger*, 421 U.S. 349 (1975) (upholding text book loans; striking down the loan of instructional equipment such as laboratory materials and maps); *Wolman v. Walter*, 433 U.S. 229 (1977) (upholding text book loans, the delivery of diagnostic services, and the off-site deliver of etherapeutic services; striking down loans of instructional materials and the use of buses for field trips for students in religiously-affiliated non public schools).

As the Court has grown increasingly dissatisfied with *Lemon*, Justices O'Connor and Kennedy have offered their own alternatives. In *Lynch v. Donnelly*,<sup>34</sup> a non-school case in which the Court upheld the display of a creche among secular symbols, Justice O'Connor's concurrence sought to modify *Lemon* by creating a two-part test:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines (internal citations omitted). The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.<sup>35</sup>

In further explaining her stance on the governmental endorsement of religion, Justice O'Connor called for modifications to both the purpose and effect tests in *Lemon*:

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.<sup>36</sup>

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34. 465 U.S. 668 (1984).

35. *Id.* at 687-688. (O'Connor concurring).

36. *Id.* at 690.

Even though Justice O'Connor's endorsement test<sup>37</sup> has been used frequently,<sup>38</sup> it has yet to replace *Lemon*.<sup>39</sup>

As state legislatures sought to circumvent the Court's ban on school-sponsored prayer and religious activity,<sup>40</sup> laws mandating or permitting moments of silence emerged.<sup>41</sup> *Wallace v. Jaffree*<sup>42</sup> was the first such case to make its way to the Supreme Court. Here an Alabama statute originally providing for a moment of silent meditation was amended to include voluntary prayer. In the only case where the Court found it unnecessary to proceed beyond *Lemon*'s first prong, the Court decided that the law violated the Establishment Clause because the legislature was motivated solely by the religious purpose of returning organized

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37. For a more complete discussion of this test, see Julie K. Underwood, *Establishment of Religion in Primary and Secondary Schools*, 55 EDUC. L. REP. 807 (1989).

38. Even though *Lynch* was formulated in a context other than education, the Court applied it in the next four cases involving the Establishment Clause in disputes surrounding K-12 education. See *Edwards v. Aguillard*, 482 U.S. 578 (1982) (striking down a state law requiring balanced treatment of creation science and evolution as violating the Establishment Clause); *Aguilar v. Felton*, 473 U.S. 402 (1985) (striking down the on-site delivery of Title I services in religiously affiliated non-public schools); *Grand Rapids v. Ball*, 473 U.S. 373 (1985) (striking down a program that provided publicly-funded education for students in religiously affiliated non public schools); *Wallace v. Jaffree*, 472 U.S. 38 (1985) see discussion at, *infra*, note 43 and accompanying text. Surprisingly, the test was ignored in subsequent cases not involving education. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding the Adolescent Family Life Act even though it aided public and non-public organizations that provided services related to the care of pregnant adolescents and the prevention of sexual relationships in this age group); *Corporation of Presiding Bishop of Church v. Amos*, 483 U.S. 327 (1987) (upholding a statutory amendment for religious organizations from the prohibition against discrimination in employment on the basis of religion); *Witters v. Washington Servs. for the Blind*, 474 U.S. 481 (1986) (holding that a vocational rehabilitation program that provided assistance to a blind student as he studies for the religious ministry did not violate the Establishment Clause since he, not his college, was the primary beneficiary).

39. For a more complete discussion of Justice Kennedy's (psychological) coercion test from *Lee v. Weisman*, 505 U.S. 577 (1992), see *infra* discussion at, *infra*, note 56 and accompanying text.

40. In *Stone v. Graham*, 449 U.S. 39 (1980), *reh'g denied*, 449 U.S. 1104 (1981), *remanded*, 612 S.W.2d 133 (Ky. 1981), the Supreme Court struck down, without the benefit of oral argument, a statute from Kentucky that required the posting of the Ten Commandments on a wall of each public classroom in the Commonwealth on the ground that it violated the Establishment Clause.

41. The Court has held firm against prayer in the schools but not other arenas. Perhaps the most notable case in this regard is *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding the Nebraska legislature's practice of hiring a religious chaplain to open each legislative day with a prayer).

42. 472 U.S. 38 (1985).

prayer to the public schools.<sup>43</sup> As such, the Court struck the law down since it clearly intended to characterize prayer as a favored practice.

In *Karcher v. May*,<sup>44</sup> the only other case involving a moment of silence to reach the Supreme Court,<sup>45</sup> the Justices avoided reaching a judgment on the merits.<sup>46</sup> The Court ruled that the appellants, former leaders of the New Jersey State Assembly and Senate who lost their leadership positions, lacked standing to appeal the Third Circuit's decision upholding a ruling that the statute permitting a moment of silence was unconstitutional.

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43. If ever there was a smoking gun, State Senator Donald G. Holmes, prime sponsor of the bill provided one. He testified that the law "was an 'effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction.' Apart from the purpose to return voluntary prayer to public school, [he] unequivocally testified that he had 'no other purpose in mind'" when he introduced the bill. *Id.* at 43.

44. 484 U.S. 72 (1987). For a discussion of this case, see Steven S. Goldberg, *The Supreme Court Remains Silent on Moments of Silence: Karcher v. May*, 43 EDUC. L. REP. 849 (1988).

45. More recently, a teacher in Georgia unsuccessfully challenged a state law that permits a moment of quiet reflection in public schools. The Eleventh Circuit affirmed that the law satisfied the *Lemon* test. *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997). See also *Coles v. Cleveland Bd. of Educ.*, 950 F. Supp. 1337 (N.D. Ohio 1996) (upholding a board's practice of opening its meetings with a prayer or a moment of silence on the ground that since the board meeting was fundamentally an adult atmosphere, prayer did not violate the Establishment Clause).

46. Five courts, in six different cases, had earlier held that religious activities in the morning did not violate state constitutions. *Donahoe v. Richards*, 38 Me. 379 (Me. 1854); *McCormick v. Burt*, 95 Ill. 263 (Ill. 1880); *Moore v. Monroe*, 20 N.W. 475 (Iowa 1884); *Billard v. Board of Educ. of Topeka*, 76 P. 422 (Kan. 1904); *Hackett v. Brooksville Graded Sch. Dist.*, 87 S.W. 792 (Ky. 1905); *Knowlton v. Baumhover*, 166 N.W. 202 (Iowa 1918). However, at least five courts, including Illinois, which had previously decided to the contrary, held that religious exercise violated their constitutions. See *State ex rel. Weiss v. District Bd.*, 44 N.W. 967 (Wis. 1890); *Freeman v. Scheve*, 91 N.W. 846 (Neb. 1902); *People ex rel. Ring v. Board of Educ. of Dist. 24*, 92 N.E. 251 (Ill. 1910); *Herold v. Parish Bd. of Sch. Directors*, 68 So. 116 (La. 1915); *State ex rel. Finger v. Weedman*, 226 N.W. 348 (S.D. 1929).

B. *LEE V. WEISMAN*

The Court<sup>47</sup> finally agreed to hear a case on the merits of graduation prayer<sup>48</sup> in *Lee v. Wiesman*.<sup>49</sup> Based on the school system's policy of inviting religious leaders to pray at graduation ceremonies, administrators in Providence, Rhode Island, asked a rabbi to offer non-sectarian prayers which followed the guidelines prepared by the National Conference of Christians and Jews. Even so, a student and her father unsuccessfully sought to prevent the rabbi from offering the prayers.<sup>50</sup> Subse-

47. Prior to *Lee*, other courts during the *Lemon* era had already prohibited prayer at graduation ceremonies. *Graham v. Central Community Sch. Dist. of Decatur County*, 608 F. Supp. 531 (D. Ia. 1985); *Kay v. David Douglas Sch. Dist. No. 40*, 719 P.2d 875 (Or. Ct. App. 1986); *Bennett v. Livermore Unified Sch. Dist.*, 238 Cal. Rptr. 819 (Cal. Ct. App. 1987); *Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989); *Sands v. Morongo Unified Sch. Dist.*, 281 Cal. Rptr. 34 (Cal. 1991).

48. Earlier, the Eleventh Circuit banned prayer prior to the start of public school football games, *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989). *See also Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492 (8th Cir. 1988) (prohibiting a high school band teacher from leading the band in prayer at mandatory rehearsals and performances); *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Sup. 883 (S.D. Tex. 1982) (holding that recitation of an expressly Christian prayer initiated by the principal or other school employee at athletic contests and pep rallies violated the Establishment Clause).

49. 505 U.S. 577 (1992).

50. Rabbi Guterman's prayers were:

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 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 may 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."

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 prepare 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." *Lee* at 581-582. "God" appears twice and "lord" once in the 252 words of prayer. However, Justice Blackmun's concurrence noted that the phrase in the Benediction, "We must each strive to fulfill what you require of us all, to do justly, to love mercy,

quently, the federal trial court permanently enjoined the district from permitting prayer at graduation ceremonies on the grounds that doing so violated the effect prong of *Lemon* by creating a symbolic union between religion and the government.<sup>51</sup> The First Circuit affirmed even though the judge who wrote the majority opinion thought it unnecessary to expand on the trial court's analysis.<sup>52</sup>

The Supreme Court's willingness to hear the appeal in *Lee* was greeted with great anticipation for two reasons.<sup>53</sup> First, it was the first time that the Court would directly address the issue of graduation prayer. Second, since a majority of the justices sitting in the *Lee* decision had expressed their dissatisfaction with the *Lemon* test, there was the sense that *Lee* might result in an alternative test.<sup>54</sup>

Justice Kennedy's majority opinion striking down school-sponsored prayer in the Court's bitterly divided 5-4 ruling<sup>55</sup> surprised most observers since it virtually ignored *Lemon*.<sup>56</sup> Kennedy found it unnecessary "to revisit the difficult . . . questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens."<sup>57</sup> His opinion,

to walk humbly" conveys a Judeo-Christian message that was clearly borrowed from the Prophet Micah at Chapter 6, verse 8. (Blackmun, J., concurring), at 604 note 604 n. 5. Similarly, Justice Souter's concurrence feared that the reference from Micah "embodies a straightforwardly theistic premise" (Souter, J., concurring), at 617617.

51. *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990).

52. *Weisman v. Lee*, 908 F.2d 1090 1090 (1st Cir. 1990).

53. *Cert. granted*, 499 U.S. 918 (1991).

54. Prior to *Lee*, a majority of the Court was on record as being less than pleased with *Lemon*. Chief Justice Rehnquist and Justices Kennedy and Scalia favored rejecting *Lemon*; Justices Kennedy, O'Connor, and Blackmun favored modifying the test. Only Justices Marshall and Stevens were willing to retain *Lemon* without any modifications. For a full discussion of the Justices' perspectives at that time, see Ralph D. Mawdsley & Charles J. Russo, *High School Prayers at Graduation: Will The Supreme Court Pronounce the Benediction?* 69 EDUC. L. REP. 26 (1991).

55. Justice Kennedy's majority opinion was joined by Justices Blackmun, Stevens, O'Connor, and Souter. Justices Blackmun and Souter filed concurring opinions. Justice Souter's opinion was joined by Justices Stevens and O'Connor. Justice Scalia's dissent was joined by Chief Justice Rehnquist and Justices White and Thomas.

56. For a full discussion of the case, see Ralph D. Mawdsley & Charles J. Russo, *Lee v. Weisman: The Supreme Court Pronounces the Benediction on Public School Graduation Prayers*. 77 EDUC. L. REP. 1071 (1992). For a different interpretation, see David Schimmel, *Graduation Prayers Flunk Coercion Test: An Analysis of Lee v. Weisman*. 76 EDUC. L. REP. 913 (1992).

57. *Lee v. Weisman*, *supra*, note 49, at 586.

which was not organized around clearly identified concepts, focused on two constitutional points. Namely, he examined the relationships between the Free Exercise and Establishment Clauses on the one hand, and the Free Speech and Establishment Clauses on the other.

Justice Kennedy's view of the relationship between the Free Exercise and Establishment Clauses is reflected in his statement that "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."<sup>58</sup> He found that there were three key factors in this regard: coerciveness, potential for divisiveness, and the place of civic religion.

Kennedy offered two arguments to support his contention that school officials violated the concept of neutrality because "[t]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise. . . ."<sup>59</sup> First, he pointed to the pervasive role that school officials played in deciding to have prayer, inviting religious leaders to pray, and offering guidelines under which the prayer was composed. The second factor that Kennedy identified as contributing to coerciveness was that students were truly not free to absent themselves from their graduations.<sup>60</sup>

After voicing an apparently unfounded concern over the potential divisiveness of prayer in the community, Kennedy reflected on the role of civic religion. He initially seemed to suggest the need for a civic religion founded in a "common ground . . . express[ing] the shared conviction that there is an ethic and a morality which transcend[s] human invention, the sense of community and purpose sought by all decent societies."<sup>61</sup> Even so, he quickly concluded that "[t]he suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with a more specific creed strikes us as a contradiction that cannot be accepted."<sup>62</sup>

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58. *Id.* at 577.

59. *Id.*

60. Later in his opinion Kennedy discussed what he perceived as the psychological and social pressures that students faced by having to maintain a respectful silence during an invocation or benediction that they may not have agreed with. *Id.* at 593-594.

61. *Id.* at 589.

62. *Id.* at 590.

Turning to the relationship between the Free Speech and Establishment Clauses, Kennedy focused on what he perceived as the “different mechanisms”<sup>63</sup> by which these rights are protected. He probably would have been better served by using an expression such as “different emphases” because free speech “is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own.”<sup>64</sup> Yet, when dealing with religious expression, the government is not supposed to be a prime participant. The government oversteps its bounds when it “disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.”<sup>65</sup> The key factors, then, that Kennedy went on to consider in placing different emphases between free speech and establishment clauses were psychology and peer pressure of social conformity, the *de minimis* character of graduation prayers, and the potential forfeiture of the benefit of attending graduation that students would suffer if they chose not to attend the ceremony.<sup>66</sup>

Justice Scalia’s scathing dissent disagreed with Justice Kennedy in four major ways. First, he stridently asserted that the Court went “beyond the realm where judges know what they are doing. The Court’s argument that state officials have ‘coerced’ students to take part in the invocation and benediction ceremonies is, not to put too fine a point on it, incoherent.”<sup>67</sup> Scalia further reasoned that the silence on the part of students did not have to be interpreted as their assent to the prayer. In fact, his eloquent comment “that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate”<sup>68</sup>

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63. *Id.* at 591.

64. *Id.*

65. *Id.* at 592.

66. *Id.* at 593 *passim*.

67. *Id.* at 636. Justice Scalia issued what has to be one of the more blistering dissents in recent memory. Just prior to this remark he wrote that “I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays, has come to ‘require scrutiny more commonly associated with interior decorators than the judiciary.’ But interior decorating is a rock-hard science compared to psychology practiced by amateurs.” (Internal citations omitted).

68. *Id.* at 638.



offered an unanswered challenge to the Court to consider how people must come together in a pluralistic society.

Scalia's second point of disagreement was based on his position that the acts of school officials in inviting clergy to pray did not amount to state endorsement. Third, he criticized the historical analyses of Justice Kennedy's majority and Justice Souter's concurrence. Scalia pointed out that unlike the time when the Establishment Clause was adopted, and civil penalties could be imposed for failing to comply with state-sanctioned religious requirements, no such penalties were at issue. Finally, Scalia distinguished *Engel*<sup>69</sup> and *Schempp*<sup>70</sup> on the basis that attendance in class, unlike at a public graduation ceremony, is compulsory, rather than optional, and parents are excluded from the former but invited to the latter.

### C. POST-*LEE* LITIGATION

On the same day that the Court struck down *Lee*, it vacated, and remanded without comment, *Jones v. Clear Creek Independent School District*,<sup>71</sup> a case from Texas with a similar set of facts. The major difference between the suits was that in *Jones*, members of a high school's senior class chose volunteers to deliver nonsectarian, nonproselytizing prayers at their graduation.

On remand to the Fifth Circuit,<sup>72</sup> that court placed greater reliance on Justice Scalia's dissent than the majority opinion in *Lee*. More specifically, the Fifth Circuit narrowly interpreted *Lee* as precluding only those prayers that were school-sponsored. As such, the Fifth Circuit declared that since the students, not the school officials, invited individuals to lead the prayers, they were constitutional. Subsequently, the Supreme Court refused to hear an appeal in *Jones*.<sup>73</sup> Even though the Court's denial of *certiorari* in *Jones* is of no precedential value, educators in the Fifth Circuit<sup>74</sup> may permit student-initiated prayer at public

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69. *Engle v. Vitale*, 370 U.S. 421 (1962).

70. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

71. 930 F.2d 416 (5th Cir. 1991), *cert. granted, vacated, and remanded*, 505 U.S. 1215 (1992).

72. 977 F.2d 963 (5th Cir. 1992), *reh'g denied*, 983 F.2d 234 (5th Cir. 1992).

73. *Cert. denied*, 508 U.S. 967 (1993).

74. *But see* *Ingbretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996), *cert. denied sub nom. Moore v. Ingebretsen*, \_\_U.S.\_\_, 117 S. Ct. 388 (1996) (invalidating a law in Mississippi that allowed "students to initiate nonsectarian, nonproselytizing prayer at various compulsory and noncompulsory school events"). *See also* *Herdahl v.*

graduation ceremonies. In the interim, four other Circuits<sup>75</sup> have, with mixed results, addressed prayer at graduations.<sup>76</sup>

At issue in *Harris v. Joint School District No. 241*, a dispute from Idaho, was whether administrators could permit high school students to choose, by a majority vote, whether to have prayer at a nonmandatory graduation ceremony.<sup>77</sup> After a federal trial court ruled that prayer did not violate the Establishment Clause, the Ninth Circuit reversed on the basis that since school officials still ultimately controlled the ceremony, they could not permit students to decide whether to have public prayer at graduation.<sup>78</sup> The Supreme Court sidestepped the controversy by vacating the judgment as moot and remanding with instructions to dismiss, apparently since the students had graduated.<sup>79</sup>

In *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education*,<sup>80</sup> an en banc panel of the Third Circuit followed the lead of *Harris* and affirmed that a board policy of permitting student-led prayer at a public high school graduation ceremony violated the Establishment Clause.

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Pontotoc County Sch. Dist., 933 F. Supp. 582 (N.D. Miss. 1996) (prohibiting a religious club from making announcements including prayers and Bible readings over a school wide intercom system; however, the court did permit student-initiated prayer before school to continue).

75. In addition, a federal trial court in Virginia, in a case that was not appealed to the Fourth Circuit, ruled that allowing high school students to decide whether to include prayer in a graduation ceremony violated the Establishment Clause since state sponsorship was inherent in the activity. *Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993).

76. At least two lower courts have recently examined the propriety of student-initiated prayer at school activities other than graduations. See *Chandler v. James*, 958 F. Supp. 1550 (M.D. Ala. 1997), 998 F. Supp. 1255 (M.D. Ala. 1997) (permanently enjoining a state law that allowed student-initiated, nonsectarian voluntary prayer as school-related events); *Committee for Voluntary Prayer v. Wimberly*, 704 A.2d 1199 (D.C. 1997) (holding that a proposed initiative on non-sectarian, non-proselytizing, student initiated prayer at school related activities was not a proper subject within the meaning of voter-initiated measures); For an earlier post-Lee case involving school-sponsored prayer, see *Doe v. Duncanville Indep. Sch. Dist.*, 986 F.2d 953 (5th Cir. 1993), opinion withdrawn and superseded, 994 F.2d 160 (5th Cir. 1993) (prohibiting school employees from initiating and leading students in prayer before and after athletic practices and competitions).

77. 41 F.3d 447 (9th Cir. 1994).

78. *Harris v. Joint Sch. Dist. No. 241*, 821 F. Supp. 638 (D. Idaho 1993).

79. *Cert. granted*, and judgment vacated with directions to dismiss as moot, 515 U.S. 1154 (1995).

80. 84 F.3d 1471 (3rd Cir. 1996); (the court reached its decision by a nine-to-four margin.)

The majority held that since the board retained significant authority over the ceremony, prayer could not be upheld as promoting the free speech rights of students.

When graduating students and their parents in Florida challenged a board's policy of permitting prayer at a commencement ceremony, the Eleventh Circuit, in *Adler v. Duval County School Board*,<sup>81</sup> affirmed a grant of summary judgment in favor of the board. In not reviewing the merits of the trial judge's constitutional analysis, the court, in a manner not unlike *Jones*, was satisfied that the students' claims for relief were moot because they had already graduated.

The most recent disagreement over graduation prayer arose in Idaho. In *Doe v. Madison School District No. 321*,<sup>82</sup> the Ninth Circuit upheld a board policy of allowing each of a minimum of four graduating students to offer "an address, poem, reading, song, musical presentation, prayer, or any other presentation" at their commencement.<sup>83</sup> The court reasoned that the policy was acceptable because the students and not the clergy delivered the prayer; the speakers were selected on the basis of their academic standing; and school officials did not "'[c]ensor any presentation or require any content.' At most, [they] 'advise[d] the participants about the appropriate language for the audience and occasion.'"<sup>84</sup> The court drew a clear line between *Madison* and *Lee*, finding that the policy was acceptable because it easily satisfied all three prongs of the *Lemon* test. Based on the Ninth Circuit's careful distinction, it appears that *Madison* is not the case that will make its way to the Supreme Court to resolve the split over prayer.

#### IV. DISCUSSION

When considering the parameters under which prayer at public school graduation ceremonies may be constitutionally permissible,<sup>85</sup> there are two larger, more important issues that

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81. 112 F.3d 1475 (11th Cir. 1997).

82. 147 F.3d 832 (9th Cir. 1998).

83. *Id.* at 834.

84. *Id.*

85. For apparently the only recorded post-*Lee* case involving the frequently related matter of baccalaureate services, see *Shumway v. Albany County Sch. Dist. No. 11*, 826

may transform prayer from a potentially contentious exercise in futility to a teachable moment that can unite communities. The way in which the Court clarifies the constitutional place of prayer, if any, at public school graduation ceremonies will have a major impact on the United States as the nation heads into the new millennium. The resolution of the place of prayer at graduation ceremonies is important because the way in which this debate is played out will reveal whether the nation still cherishes the underlying values of freedom of religion and speech that contributed so greatly to its foundation.

The first question concerns the paradox of how a democratic society that was founded on religious principles but continues to preserve the Jeffersonian metaphor by maintaining "a wall of separation" between church and state with regard to prayer at public school graduations, can respect the rights of both the majority and minority. In other words, while a majority of Americans seems to favor prayer at school graduations, it is important to safeguard the rights of the minority.<sup>86</sup> At the same time, in protecting the rights of the minority by banning prayer, it

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F. Supp. 1320 (D. Wyo.) (holding that a school board violated the First Amendment rights of a group of students and parents when it refused to rent them a school gymnasium to conduct a privately sponsored baccalaureate service that would have been open to the public and all students who wished to participate). For the two pre-*Lee* cases, see *Verbenia United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991) (ordering a board to rent an auditorium to a local church that sought to conduct a baccalaureate service); *Randall v. Pagan*, 765 F. Supp. 793 (W.D.N.Y. 1991) (denying a preliminary injunction to a graduating senior and a parent that would have prevented a district from leasing a high school auditorium to a nondenominational student group that wished to conduct a baccalaureate ceremony).

86. In the most recent edition of the Phi Delta Kappa/Gallup Poll assessing attitudes toward public school, the majority favored prayer. The same question, which had been posed previously in 1995 and 1985, reads: "An amendment to the U.S. Constitution has been proposed that would permit prayers to be spoken in public schools. Do you favor or oppose this amendment?" 67% of respondents answered yes (down from 71% in 1995 and up from 69% in 1985); 28% (up from 25% and 24% respectively) answered no; 5% answered don't know (up from 4% and down from 7%). More specifically, 73% of parents with children in public schools responded affirmatively (down from 75% and no change from 73%); 22% (up from 20% and 21% respectively) answered that they opposed the amendment; 5% (the same as last time and down from 6% respectively) answered don't know. Lowell C. Rose & Alec M. Gallup, *The 30th Annual Phi Delta Kappa/ Gallup Poll Of the Public's Attitudes Toward the Public Schools*, 80 PHI DELTA KAPPAN 41, 50 (1998). Even in the face of such strong support, the House of Representatives recently passed, by a 224-203 vote, a bill that sought to enact an amendment supporting school prayer. However, the bill fell 61 votes short of the two-thirds necessary to pass a constitutional amendment. Katherine Q. Seelye, *House Rejects School Prayer Amendment to Constitution*, N.Y. TIMES, June 5, 1998 at A 13.

remains to be seen how the courts can avoid the tyranny of the minority.<sup>87</sup> Therefore, finding an acceptable middle ground is essential.

If Justice Kennedy's concern about "mutuality of obligation"<sup>88</sup> in *Lee* is to have any genuine meaning, then the State, *qua* public schools, must find a way to accommodate the viewpoints of all, rather than stifle the religious expression of believers. To this end, Justice Scalia's insight "that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate"<sup>89</sup> is crucial.

One can only wonder how educators can expect to foster an appreciation of diversity in all of its manifestations if we cannot tolerate expressions of religious or other beliefs that may not be shared by all members of an audience or community. It is ironic that in a nation that values freedom of religion, the courts have been unable to reach a consensus on the appropriateness of prayer at graduations. The judicial inability to formulate a measure that respects the rights of diverse groups is frustrating where educators have, as in *Lee*, included well-reasoned safeguards such as selecting a religious leader from a different faith each year and providing broad-based guidelines under which prayers may be offered. The *Lee* Court's failure to respond adequately to Justice Scalia's salient observation that silence does not necessarily mean assent has further exacerbated the situation. By silently listening to and reflecting upon whatever prayer is being offered, members of an audience can develop a deeper respect for perspectives other than their own. Moreover, if the United States is to continue to grow as a nation, it is not only unnecessary but is potentially very dangerous to limit the parameters of civil discourse on controversial issues such as prayer.

A second and closely related question arises in light of the effect prong in *Lemon*. More specifically, if the Nation is to continue to foster on-going dialogue about diversity of perspectives,

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87. For an interesting case, see *Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997), *cert. denied*, \_\_U.S.\_\_, 118 S. Ct. 2370 (1998) (affirming that a student failed to state a claim for a violation of the Establishment Clause where a music director used explicitly Christian music at a public school graduation ceremony).

88. *Lee v. Weisman*, *supra*, note 49, at 591.

89. *Id.* at 638.

it is imperative that the Court provide guidance for the remainder of the federal judiciary to avoid the appearance of inhibiting religion, especially in the aftermath of recent cases that have been less than favorable to expressions of religious belief.<sup>90</sup>

Lip service over the importance of respect for differences of opinion aside, the courts must allow the schools to practice what they preach and do more than talk about inculcating different values. At a time when morals and values are center stage in public debate, one can only wonder what message school children receive when the courts have ensured that their educations are virtually sanitized of references to prayer and religion<sup>91</sup> other than "appropriate" discussions in history or English classes.<sup>92</sup> By imposing a wall of silence that prevents believers from exercising their constitutional rights, schools and the

90. See, e.g., *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992) (preventing a teacher from reading the Bible during class time and requiring them to remove *The Bible in Pictures* and *The Story of Jesus* from his classroom library, while books on Greek gods and goddesses and American Indian religions remained on the shelves); *Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679 (6th Cir. 1994), *cert. denied*, 514 U.S. 1095 (1995) (upholding the removal of a portrait of Christ, painted by a graduate of the school, that had been posted on the wall of a public high school for thirty years); and *C.H. v. Oliva*, 990 F. Supp. 341 (D.N.J. 1997) (holding that a board of education did not violate the First Amendment rights of a first grade student when school officials changed the location of his poster of Jesus and prevented him from reading Bible stories to his classmates).

91. In a controversy from New York City that received national attention, a substitute teacher in a public school lost her job when she asked sixth graders if they were willing to accept Jesus as their personal Savior and wanted to pray as the class discussed the recent drowning death of one of their classmates. Jacques Steinberg & Macarena Hernandez, *Teacher is Now Political Cause After Dismissal for Class Prayer*, N.Y. TIMES, June 26, 1998 at B 1. In an interesting twist, even while the teacher's wrongful termination suit was pending against the school board, it awarded her two weeks of back pay. *New York Teacher Who Led Students in Prayer Awarded Back Pay*, MANAGING SCHOOL BUSINESS In an interesting twist, even while the teacher's wrongful termination suit was pending against the school board, it awarded her two weeks of back pay. *New York Teacher Who Led Students in Prayer Awarded Back Pay*, MANAGING SCHOOL BUSINESS, Vol. 3, Issue 14, September 24, 1998, at 9., Vol. 3, Issue 14, September 24, 1998, at 9.

92. See *Engel v. Vitale*, 370 U.S. 421, 435, n. 21 (1962). The Court wrote: There is, of course, nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God.

courts risk sending out the unmistakable message to children that freedom of religion is little more than a pious platitude.<sup>93</sup>

The third not entirely unrelated question relates to the nature of the prayers themselves. Does the nation risk trivializing the profound relationship between believers and their God about the nature of the "prayers" at graduations? Could it be that these "prayers" run the risk of being reduced to mere formalities, words uttered to bring a gathering to order? If this is the case, then could a selection from a book of poetry, or even the phone book, have the same effect if we fear "coercing" listeners by "forcing" them to maintain silence?

In other words, if one views prayer as being, in some way, shape, or form, a type of communication with, or, a lifting of the heart and mind to God, then are not these discussions on prayer at graduations a variation on the theme of reduction to the absurd? Is it fair to say that a few brief words from scriptures, whether Jewish, Christian, Islamic, or Buddhist, among many others, run the risk of "establishing" a state religion? Or does the erection of a wall of separation almost run the risk of mocking believers while turning them into second class citizens? By relegating prayer to a kind of afterthought, the courts and schools may be setting a precedent that undermines the very foundation upon which the nation was established.

#### IV. CONCLUSION

As controversy over the constitutionality of prayer lingers on, a line of Supreme Court precedent from *Engel v. Vitale* to *Lee v. Weisman* clearly prohibits officials in the public schools from sponsoring prayer or other religious activities at school sponsored graduation ceremonies (or other activities such as athletic contests). Yet, the place, if any, of prayer at graduation ceremonies remains unsettled in light of the Court's action, or lack thereof, subsequent to its initial ruling in *Jones v. Clear Creek Independent School District*. The Fifth Circuit's decision to adopt the reasoning in Justice Scalia's dissent and permit student-initiated prayer at graduations, followed by the High Court's

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93. This is not to suggest that the schools should replace parents in teaching values to children. Rather, the purpose of this discussion is to raise the question of the confusion that undoubtedly exists in the minds of children whose parents value religion and who then enter a school system that transmits an almost antithetical perspective.

denial of *certiorari*, although of no precedential value outside of the Fifth Circuit, meant that the question remained alive. In fact, the ensuing split between the circuits over the constitutionality of prayer at public school graduation ceremonies virtually ensures that this highly contentious question will eventually find its way back to the Court.

If anything, the ongoing public discourse over the place of prayer and other forms of religious expression in American public schools generally, or at graduation ceremonies in particular, let alone other dimensions of public life,<sup>94</sup> is a revealing barometer of how deeply conflicted American attitudes are in this regard. As the Nation grows increasingly pluralistic and multicultural groups that have previously been marginalized move into the mainstream, new and novel issues involving the place of religion in the schools will arise.<sup>95</sup> Perhaps a case raised by one of these groups that formerly have been disenfranchised will serve as the spur that energizes the Court to reevaluate its stance. At the same time, it is important to recognize that the Court does not run the risk of establishing a state-sponsored religion by permitting prayer at public school graduation ceremonies. Rather, by acknowledging the legitimate place of prayer at graduation ceremonies in the public schools, the Court can assume a leadership role in truly fostering a climate wherein diversity of opinions and beliefs are not only appreciated but are also celebrated by all Americans.

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94. For a recent non-school case involving religion, see *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (upholding the right of the Ohio Knights of the Ku Klux Klan to erect a large cross on the square in front of the state capitol). For a discussion of this case in the broader context, see David L. Gregory & Charles J. Russo, *The Supreme Court's Jurisprudence of Religious Symbol and Substance*, 28 LOY. U. CHI. L. J. 419 (1997).

95. For a case involving a new group, see *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995) (affirming that a district's total ban on weapons violated the religious rights of Khalsa Sikh students who wished to wear their kirpans, or ceremonial daggers, to school).