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The Ironic State of Religious Liberty in America

Frederick Mark Gedicks*

The constitutionality of organized graduation or classroom prayer in public schools is an issue of continuing controversy in the United States. There are, of course, numerous policy arguments for and against allowing prayer in public schools, but I will be focusing on the constitutional issues and consequently will have rather less to say about policy. (I will disclose, however, that as a matter of policy, I think there are problems with public schools' organizing and sponsoring group prayer as part of graduation ceremonies or classroom activities; it would seem that Mr. Peck, Mr. Sekulow, and I all agree on that, if nothing else.) What perplexes me about this issue is why it continues to be an issue at all. When I think about prayer in public schools, I have a difficult time escaping the conclusion that there is really not very much at stake in the constitutional controversy over this practice. There are no constitutional obstacles to individual prayer in public schools,¹ and the effect of the Equal Access Act is to allow student-initiated group prayer on most public school campuses. In addition, it is rare that prayers given in the classroom or other official public school contexts have significant theological content. Consider, for example, one of the graduation prayers at issue in *Lee v. Weisman*,² the Supreme Court's latest decision in this area:

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

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1. See Frederick Mark Gedicks, *Motivation, Rationality, and Secular Purpose in Establishment Clause Review*, 1985 ARIZ. ST. L.J. 677, 720-22.

2. 112 S. Ct. 2649 (1992).

thank you. May these young men and women grow up to enrich it. For liberty of America, we thank you. 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.³

It's hard to find anything to disagree with in this prayer. Although the words are undeniably eloquent, the sentiments expressed are nonetheless so innocuous, and are phrased so generally, that the prayer is virtually without content. As such, it is a perfect example of the American civil religion—"faintly Protestant platitudes which reaffirm . . . the religious base of American culture despite being largely void of theological significance."⁴

On the one hand, given the theologically vacuous nature of most organized public school prayers, it ought not to be that large of an imposition to ask that nonbelievers sit quietly through thirty or forty seconds of vaguely religious platitudes. In fact, when compared to the free exercise cases in which the Supreme Court has found that constitutionally significant coercion of religious belief does not exist, the argument that such coercion exists in graduation or classroom prayer situations like *Weisman* is ludicrous. In *Lyng v. Northwest Indian Cemetery Ass'n*,⁵ for example, the Supreme Court found that government action which threatened outright destruction of native American religion did not trigger the protections of the Free Exercise Clause.⁶

Compared to the coercion suffered by native American believers in *Lyng*, the offense experienced by nonbelievers who heard the *Weisman* prayer is pretty small constitutional potatoes. But this would seem to cut against public school prayer as much as it does in favor of it. Given that individual and student-led prayer is already permitted in public schools, and that graduation and classroom prayers are usually theologically inconsequential in the way I have described, very little is

3. *Id.* at 2652-53.

4. Frederick Mark Gedicks, *The Religious, the Secular, and the Antithetical*, 20 CAP. U. L. REV. 113, 122 (1991). See also *Engel v. Vitale*, 370 U.S. 421, 422 (1962) (reviewing constitutionality of recitation of the following prayer in state public schools: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country"). *Id.*

5. 485 U.S. 439 (1988).

6. *Id.* at 451-52.

lost when such prayers are constitutionally prohibited or otherwise eliminated from public education. Even for those (like me) who believe that religion has been wrongfully excluded from American public life, and religious people unfairly treated by secular public institutions, public school prayer seems an issue that should not stir up passion against these wrongs.

But make no mistake, passions continue to be aroused by the constitutional prohibition of graduation and classroom prayer. Why do so many people seem to care whether public schools may sponsor or otherwise encourage prayer? While nothing very important seems to be at stake in an examination of the merits of public school prayer by itself, whether or not prayer is allowed in public schools has become a symbol of what has become known as the "culture war."⁷ For religious conservatives, the Supreme Court's prohibition of organized prayer in public schools encapsulates the moral decline of the last several decades. For civil libertarians, the return of organized prayer to public schools is reason to man the ramparts and drive the religious barbarians back from the gates that protect the rational peace created by post-Enlightenment liberalism. It remains important to discuss classroom prayer because the fault lines dividing opponents in this particular conflict are mirrored in many other conflicts about church and state, conflicts in which more significant religious liberty issues are at stake.⁸

Although I believe classroom prayer to be ill-advised, I do not believe that it is unconstitutional for any of the reasons advanced by Mr. Peck.⁹ At the same time, I believe that the strategy of using existing free speech doctrine to argue for individual and voluntary group prayer, exemplified by Mr. Sekulow, does not succeed in constitutional terms, and threatens authentic religious faith and worship as well.¹⁰ I will conclude by noting a political aspect to this controversy that I find troubling: Given that so little ought to be at stake in the controversy over public school prayer, the continued pursuit of satisfaction on this issue by some religious conservatives suggests the troubling possibility that they are seeking less to restore free exercise denied than to signal who is in charge of American politics and culture.

7. See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

8. Cf. James R. Stoner, Jr., *Amending the School Prayer Amendment*, *FIRST THINGS*, May 1995, at 16 (arguing that the reintroduction of classroom prayer would symbolize society's opposition to the modern trend of secularization in public life).

9. See *infra* Part I.

10. See *infra* Part II.

I.

Mr. Peck argues that the effort to pass a school prayer amendment rejects the American idea of religious liberty that confines government to public life and religion to private life.¹¹ He further contends that the effort to frame school prayer as primarily a matter of individual expression, as Mr. Sekulow does, ignores that the Establishment Clause imposes limitations on religious speech in public schools that do not restrict other kinds of expression. There are problems with both arguments.

With respect to the first argument, I am skeptical that there is anything like "the American idea of religious liberty"; if there is such an animal, my reading of American history suggests that until recently, it looked a lot more like Mr. Sekulow's idea than Mr. Peck's. Jefferson and Madison may well support Mr. Peck's reading of the American tradition of church-state relations, but it is far from clear that their views on the proper relationship of church and state coincided with the majority sentiment in the early American states. For example, the Virginia bill providing for tax assessment for the support of ministers and churches, so vigorously opposed by Jefferson and Madison, was supported by George Washington and Patrick Henry.¹² Similarly, John Adams was a proponent of the tax-supported Congregationalist establishment in Massachusetts.¹³

If we move forward into American history from the founding period of the late eighteenth century, things get worse for Mr. Peck's argument. From the early nineteenth century until well into the twentieth century, the United States was governed by what Mark De Wolfe Howe called the "de facto Protestant establishment" under which Protestant Christianity was a major, uncontroversial, and coercive participant in American public life.¹⁴ Although state-supported religious establishments had disappeared by the 1830s, Protestants remained in control of virtually all of the major organizations and institutions in American public life,

11. Robert S. Peck, *The Threat to the American Idea of Religious Liberty*, 46 *MERCER L. REV.* 1023 (1995).

12. Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim about Original Intent, 27 *WM. & MARY L. REV.* 875, 896 & n.101. Laycock notes that Washington later withdrew his support because the issue had become too divisive. *Id.*

13. ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 27 (1990).

14. MARK DE WOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 11-15, 31, 98 (1965).

including public education.¹⁵ Non-Protestants were tolerated in the classic sense. That is, they were allowed to believe and to act in their non-Protestant ways as long as they knew their place and kept to it. However, when non-Protestant religion challenged fundamental Protestant values which were thought to lie at the foundation of civilized society in the United States, as Mormon polygamy did in the late nineteenth century, classic toleration turned quickly into classic persecution.¹⁶

The "tradition" of prohibiting government encouragement of religious belief and practice that Mr. Peck attributes to the United States did not appear in Supreme Court opinions until the 1940s,¹⁷ did not become the doctrine of the Court until the 1960s,¹⁸ and has never commanded the support of more than a small minority of Americans.¹⁹ In sum, there simply isn't much history in support of the position that the American tradition of church and state precludes graduation or classroom prayer; to the contrary, there's quite a bit of history in favor of such prayer.

Mr. Peck's second point is a variation of the separationist argument that generally confines religion to private life and imposes unique disabilities on religious speech in public life. Separationism purports to achieve government neutrality between religion and nonreligion by having government withdraw from religious matters, and by keeping religion out of public life, effectively confining it to private life. But if religion is private, and thus out of place in public life, then religious organizations and individuals are penalized whenever they enter public life, because their most authentic motivations for political action are immediately ruled procedurally out of order. This is a rather odd notion of "neutrality." One could argue that the result is neutral because it

15. For summaries of the mutual reinforcement and extensive interactions of government authority and Protestant religion during this period, see HAROLD S. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 211-14, 225-30 (1993); Laycock, *supra* note 12, at 914-18; David M. Smolin, *The Judeo-Christian Tradition and Self-Censorship in Legal Discourse*, 13 U. DAYTON L. REV. 345, 380-85 (1988); John Witte, Jr., *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489, 497-99 (1991).

16. See, e.g., *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Reynolds v. United States*, 98 U.S. 145 (1878).

17. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

18. See *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engle v. Vitale*, 370 U.S. 421 (1962); *McGowan v. Maryland*, 366 U.S. 420 (1961).

19. See, e.g., HERBERT MCCLOSKEY & AIDA BRILL, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS THINK ABOUT CIVIL LIBERTIES* 133-35 (1983); Ronald Brownstein, *Dissatisfied Americans May Spell Democrat Losses*, L.A. TIMES, July 28, 1994, at A1 & A19 (Orange County ed.).

treats religion the same as all activities that should be confined to private life, penalizing them all when they enter public life.²⁰ Regardless of whether this argument might succeed academically, it is clearly insufficient to persuade most believers that they are being treated fairly.

This suggests an important, practical point (law professors occasionally think of them). Not to put too fine a point on the situation, separationism has been a decisive failure as a foundation for religion clause doctrine. The doctrine is both incoherent and without significant public support. That is, the doctrine cannot give a rational account of Supreme Court decisions under either religion clause, and it is highly unpopular. There cannot be two worse conditions for a doctrine to overcome. Constitutional doctrine can succeed—that is, it can endure and have significant effect in American life—if it has either coherence or popular support. Ideally a doctrine should have both, but one or the other will do.

For example, the pre-*Roe* privacy cases, *Griswold v. Connecticut*²¹ and *Eisenstadt v. Baird*,²² lack a persuasive and coherent legal rationale. But neither decision ran significantly against popular morality; there wasn't ever much popular sentiment in favor of restricting married adult access to condoms, and even at the time *Eisenstadt* was decided in the early 1970s, most Americans were simply not outraged at a constitutional result that guaranteed such access even to unmarried adults. As a result, the incoherence of the cases didn't (and still doesn't) matter all that much.

On the other hand, consider the *Flagburning Cases*.²³ These are extremely unpopular. (In fact, the number of people in favor of punishing people who desecrate the flag may be as great as those who are in favor of organized public school prayer.) But the *Flagburning Cases* have a coherent, rational justification: Burning the American flag communicates dramatic criticism of the United States and its government. As such, it is political speech, the protection of which goes to the very heart of the First Amendment.²⁴ The Supreme Court has been rather consistent in holding government to a generally high level of justification when it tries to punish critical political speech with

20. I criticized this argument in Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992).

21. 381 U.S. 479 (1965).

22. 405 U.S. 438 (1972).

23. *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

24. See, e.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

punishment, because punishment in these circumstances looks suspiciously like an effort to silence the critics.²⁵ The existence of an explainable rationale for the decisions makes the lack of popular support for their result relatively unimportant.

Unfortunately, current religion clause doctrine is neither coherent nor popular. The Court's decisions in this area have been variously described as "ad hoc,"²⁶ "eccentric,"²⁷ "misleading and distorting,"²⁸ "historically unjustified and textually incoherent,"²⁹ and "riven by contradiction."³⁰ Steven Smith has observed that "people who disagree about nearly everything else in the law agree that establishment clause doctrine is seriously, perhaps distinctively, defective."³¹

Moreover, changes that would make the doctrine cohere with the separationist ideology that underlies it—for example, abandonment of the ideal of neutrality in favor of outright preference of secularism and discouragement of religion—would be uniquely unpopular. One would hope that installation of a sort of nineteenth century Christian majoritarianism is equally unthinkable. Certainly both options would threaten religious liberty. Lacking popular support, and unable to give any coherent account of itself, religion clause doctrine has become like economic due process in the 1930s—a failed doctrine ripe for dismantling.

25. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (statutory limitations on political contributions and expenditures subject to close scrutiny by a reviewing court); *United States v. O'Brien*, 391 U.S. 367 (1968) (government action that burdens communicative conduct may be upheld if it is within the government's power and furthers an important government interest unrelated to suppression of free expression in the least restrictive manner). See also *Spence v. Washington*, 418 U.S. 405 (1974) (affixing peace symbol to flag in protest of then-current foreign and domestic policies of United States held protected expression under the First Amendment); *Street v. New York*, 394 U.S. 576 (1969) (state statute permitting punishment for speaking contemptuous words about the flag held unconstitutional).

26. Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680 (1980).

27. Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 817 (1984).

28. HOWE, *supra* note 14, at 156.

29. Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 (1986).

30. Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 1 (1989).

31. Steven D. Smith, *Separation and the 'Secular': Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 956 (1989).

II.

Mr. Sekulow and his associates argue that Supreme Court decisions under the Speech Clause—not the Free Exercise or Establishment Clauses—require that public, ceremonial prayer be permitted in public schools as private individual expression.³² This argument is incorrect. Perhaps more important, defending religious worship with this kind of argument, even assuming it were legally supportable, is ill-advised for people who care about authentic expressions of religious faith.

First, this argument fails on its own terms—it supports the conclusion that individual prayer is constitutionally protected, but not the conclusion that prayer that is institutionally organized or encouraged by public school action is protected. As I indicated, there is currently no impediment to individual student prayer—silent or spoken—and voluntary student-initiated prayer on most public school campuses, so Mr. Sekulow's argument that *Tinker*³³ ought to protect individual expressions of religious faith like voluntary prayer is correct, but beside the point. What is clearly prohibited by current constitutional law is group prayer that is officially sanctioned and monitored by teachers or other school officials as part of the normal school day or a graduation ceremony.³⁴ *Tinker* has nothing to say about the constitutionality of government sponsorship or endorsement of religious expression.

Mr. Sekulow's public forum analysis is unavailing. Current public forum doctrine holds that if a forum is truly a public one, the government may not use the content or viewpoint of a proposed speaker's speech as a basis for determining whether the speaker may use the forum.³⁵ In other words, any person who can satisfy reasonable eligibility criteria unrelated to content or viewpoint is entitled to use a public forum for communicative purposes. While certain portions of a public school, or even a public school day, may be considered public forums (at least for certain limited purposes),³⁶ it is doubtful that either classrooms or graduation ceremonies may be so construed. Indeed, one would think that content and viewpoint based regulation of speech is

32. Jay Sekulow, James Henderson & John Tuskey, *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017 (1995).

33. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

34. *Lee v. Weisman*, 112 S. Ct. 2469 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engle v. Vitale*, 370 U.S. 421 (1962).

35. *E.g.*, *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

36. *Cf. Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (finding high school activity period is limited public forum for purposes of Equal Access Act).

precisely what one needs to plan and implement effective public school curricula and activities.

If the Establishment Clause means anything, it ought to mean that public schools cannot sponsor and incorporate a religious worship service into the school day. If such sponsorship and incorporation is really the aim of Mr. Sekulow's argument, then perhaps "barbarians-at-the-gates, sky-is-falling" secular liberals, with whom I am not normally in sympathy, have a point.

Attempting to protect religious worship and expression exclusively through the Speech Clause also demonstrates the folly of fighting battles on your opponent's field using his or her weapons. Current Establishment Clause doctrine prohibits inclusion of religion in public life *as religion*. Religion is only properly present in public life as a subgroup of some secular category.

Three cases make this clear. In *McGowan v. Maryland*, the Supreme Court held that Sunday closing laws did not violate the Establishment Clause because secular rationales for the laws—encouraging family togetherness through a uniform day of rest and recreation—had displaced the laws' original religious purpose.³⁷ In *Lynch v. Donnelly*³⁸ and *County of Allegheny v. ACLU*,³⁹ the Supreme Court upheld local government displays of Christian and Jewish religious symbols, on the ground that the secular context in which the symbols appeared neutralized their religious content.⁴⁰ In *Lynch*, for example, the majority found it important that the display of the Christian nativity at issue in that case was set up in close proximity to a display of Santa and his reindeer.⁴¹

Likewise in *Allegheny*, Justices Blackmun and O'Connor argued that display of a menorah in proximity to a Christmas tree and a sign "saluting liberty" obscured and overshadowed the religious significance of the menorah, and merely suggested that Chanukah and Christmas were different cultural manifestations of the same "winter holiday season."⁴² In each case, practices or symbols that aided or endorsed a particular religious viewpoint were permitted because the Court managed to convince itself—and perhaps nobody else—that the disputed practices and symbols had no significant religious effect. It seems to me

37. 366 U.S. 420, 445, 449, 452 (1961).

38. 465 U.S. 665 (1984).

39. 492 U.S. 581 (1989).

40. 465 U.S. at 671; 492 U.S. at 613, 615-18.

41. 465 U.S. at 671.

42. 492 U.S. at 613, 615-18 (opinion of Blackmun, J.); *id.* at 633-35 (O'Connor, J., concurring in part and concurring in the judgment).

a rather Pyrrhic victory to have repulsed a constitutional challenge to government sponsored religious activity by successfully arguing that Jesus Christ and Santa Clause, or Chanukah and Frosty the Snowman, are conceptually indistinguishable.

The same danger exists in the argument that public school prayer is constitutionally protected by general Speech Clause principles. In other words, prayer is protected by the same rationale that extends constitutional protection to non-obscene pornography, nude-dancing, protest rallies, and political commercials. Yet prayer is a form of worship; if it is expression at all, it is a unique kind of expression. Forcing prayer into secular categories for the expedient of gaining entry to public schools runs the risk that prayer will be stripped of its uniqueness in the effort to make it look like secular communication protected by the Speech Clause.

III.

Although students can pray in public schools at any time as individuals, and although under the Equal Access Act most students may engage in voluntary group prayers right before or right after school, or during their free time during the school day, it seems that for many religious conservatives this is not enough. As a member of the Mormon church, a minority faith that is usually relegated by orthodox Protestants to the periphery of the Christian tradition (if not beyond), this makes me nervous. I wonder, "Why isn't it enough to be able to pray by oneself, or to pray voluntarily with other like-minded students as an extra-curricular activity? Why is it so important to make prayer an official school-sponsored part of graduation ceremonies or classroom activities?"

Perhaps the answer is that some religious conservatives believe that orthodox Christianity should be the preferred religious faith in the United States, with all others merely to be tolerated as minorities. Mormons are particularly well situated to worry about this possibility because their religion was nearly destroyed by a regime of Christian tolerance in the late nineteenth century. The ideology of separatism and the religion clause doctrine that is built upon this ideology would presumably protect religious minorities like Mormons from this possibility, but as I have indicated, separationism and its doctrine have failed. That the doctrine that might protect religious minorities from persecution is rationally bankrupt and widely rejected only suggests the seriousness of the crisis that religious liberty now confronts in the United States.