

Public School Prayers and the Constitution: What are the Implications for Team Prayers and Pre-game Invocations?

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■ INTRODUCTION

Before beginning a high school football game in a small northern Georgia town, a Protestant Christian clergyman selected by the local ministerial association gives an invocation over the public address system. The invocation is addressed to God, asks for safety for the players and good sportsmanship from all present, and closes with a reference to Jesus Christ (Walden, 1987).

In a St. Petersburg, Florida high school locker room, members of the varsity basketball team stand in a circle and hold hands. The coach begins to recite the words of the Lord's prayer ... "Our Father, who art in Heaven ...", and with heads bowed, the team members join in (Gordon, 1981).

Principals of public schools in Providence, Rhode Island, are permitted to invite members of the clergy to give invocations and benedictions at their schools' graduation ceremonies. A Rabbi was invited to offer such prayers at a graduation ceremony. The Rabbi was given a pamphlet containing guidelines for the composition of public prayers at civic ceremonies, and was advised that the prayers should be nonsectarian. Shortly before the ceremony, the district court denied a motion for a temporary restraining order to prohibit school officials from including the prayer ceremony. The prayers were recited. Subsequently, a permanent injunction was sought barring school officials from inviting clergy to deliver invocations and benedictions (*Lee v. Weisman*, 1992).

The preceding scenarios are examples of three types of rather common practices involving prayers at athletic contests and graduation ceremonies. In regard to invocations, Walden states that "... pre-game prayers are offered at virtually all high school football games in Georgia" (Walden, 1987, p.493).

Gordon reports that team prayer, in which coaches lead student-athletes before, during, and after competition, is steeped in tradition and occurs regularly throughout Florida (1981). A newspaper survey, reported by Bjorklun (1990), found that 70 percent of the high school football coaches in the San Fernando Valley of California had team prayers and moments of silence before games.

Graduation prayers have been custom in Providence, Rhode Island (*Lee v. Weisman*, 1992) and many other schools districts as well as colleges and universi-

ties throughout the United States. It is likely that similar practices occur in most states.

Do invocations delivered before high school games or invocations and benedictions before and after high school graduation ceremonies violate the Establishment Clause and the three-part *Lemon* test? In 1993 the answer is yes, even though the United States Supreme Court is narrowly divided on the issue evidenced by the 1992, 5-4 decision rendered in *Lee v. Weisman* (1992).

The United States District Court for the Northern District of Georgia found that invocations given only by Protestant Christian clergy before football games are unconstitutional; however, the court held open the door for invocations provided that a system be employed to randomly select students, parents, or staff from the school district to deliver messages before the games (*Jager v. Douglas County School District and School Board*, 1987). But, the court did find that the practice of delivering invocations violated the Establishment Clause of the First Amendment.

■ THE LIMITATIONS OF THE FIRST AMENDMENT

The First Amendment guarantees basic freedoms of speech, religion, press, and assembly, and the right to petition the government for redress of grievances. The various freedoms and rights are protected by the First Amendment have been held applicable to the states through the due process clause of the Fourteenth Amendment. Further, it encompasses two distinct guarantees: (1) the government shall make no law respecting an establishment of religion or (2) prohibiting the free exercise thereof. Both have the common purpose of securing religious liberty. Through vigorous enforcement of both clauses by the courts, religious liberty and tolerance is promoted for all. Further, the conditions which secure the best hope of attainment of that end are nurtured (*Lee v. Weisman*, 1992).

The First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere (*McCullum v. Board of Education*, 1948). The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring 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 (*Abood v. Detroit Board of Education*, 1977; *Meese v. Keene*, 1987; and *Keller v. State Bar of California*, 1990). The method for protecting freedom of belief and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment contrary to the freedom of all. The Free Exercise Clause embraces a freedom of belief and conscience that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience are the sole assurance that religious faith is real, not imposed (*Buckley v. Valeo*, 1976).

The lessons of the First Amendment are as urgent in the modern world as in the 18th Century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable belief and conscience which is the mark of a free people (*Buckley v. Valeo*, 1976).

In *Engel v. Vitale* the Supreme Court held that organized, devotional prayers (invocations and/or benedictions) in public schools are unconstitutional even if participation is voluntary. The court said, "...it is no part of the business of government to compose official prayers for any group of American people to recite..." (*Engel v. Vitale*, 1962, p.423).

In 1963, a year later, the court extended this principle by holding the student recitation of a non-government composed prayer, Lord's Prayer, violated the Establishment Clause (*School District of Abington Township v. Schempp and Murray v. Curlett* (1963). Further, the court ruled that governmental bodies cannot advance secular goals through religious means even if those secular goals are commendable. Therefore, while achieving team unity might be a commendable secular goal, it cannot be promoted by prayer, which is a religious activity. Finally, the court rejected the voluntary nature of participation as valid justification for devotional prayers when it stated voluntary participation in religious activities "furnishes no defense to a claim of unconstitutionality under the Establishment Clause" (Bjorlun, 1990, p.10).

Bjorlun (1990) found that devotional team prayers led by a team member, a coach, or another school or non-school person are in violation of the Establishment Clause. Further he stated this would also apply to periods of silence held before and/or after games if they are designated by the coach for meditation or prayer. In *Wallace v. Jaffree* (1985), the Supreme Court ruled that an Alabama statute that authorized schools to begin the day with a moment of silence for meditation or voluntary prayer violated the Establishment Clause because it gave students a clear signal that prayer was a favored way of using the period of silence (*May v. Cooperman*, 1985).

However, the court also indicated in *Wallace* (1985) that a moment of silence statute could be adopted to meet a genuine secular purpose, and if it was worded so as not to favor prayer, it would be constitutional. "Thus, a coach could set aside a 'quiet' time before and/or after the game for reflection by the players. They could then choose to pray or think about any other matter they wished. Such a practice would probably not violate the Establishment Clause" (Bjorlun, 1990, p.10).

Free Exercise (of Religious Belief or Conscience) Clause

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (Black, 1990, p.635). Further, free exercise provides for freedom to individually believe and to practice or exercise one's belief (*RE Elwell*, 1967). This First Amendment protection embraces the concept of freedom to believe and freedom to act, the first of which is absolute, but the second of which remains subject to regulation for protection of society (*Oney v. Oklahoma City*, C.C.A. Okl., 1941). Such freedom means not only that civil authorities may not intervene in affairs of church; it also

prevents church from exercising its authority through state (*Eastern Conference of Original Free Will Baptists of N.C. v. Piner*, 1966).

The *Lee* (1992) majority declared vigorously that “if citizens are subjected to state-sponsored (e.g., invocation prior to an athletic event or invocation before and a benediction after a graduation ceremony) religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable belief and conscience which is the mark of a free people” (*Lee v. Weisman*, 1992, p.2654). If this equation expressed by the Court is followed, the affirmative intensity of judicial protection of an individual’s beliefs and conscience should be in direct proportion to the negative intensity of judicial exclusion of religious activities from the public sector. However, the evidence is to the contrary; while the Court may vigorously assert the protection of the conscience of dissenters under the establishment clause where religion and the public sector are concerned, it has not demonstrated the same vigorous intensity in protecting individual beliefs and conscience under the Free Exercise Clause (Mawdsley & Russo, 1992).

Judge Souter’s concurring opinion in *Lee* (1992) underscores the dilemma regarding the disparity between the two religion clauses - (1) Establishment, and (2) Free Exercise. Souter disavows that the state has a legitimate function in promoting a diversity of religious views. Such a function, he observed, “would necessarily compel the government and, inevitably, the courts to make wholly inappropriate judgements about the number of religions the State should sponsor and the relative frequency with which it should sponsor each” (*Lee v. Weisman*, 1992, p. 2671). However sound such reasoning regarding diversity of views may seem under the aegis of the Establishment Clause, the application of such reasoning to the Free Exercise Clause is catastrophic (Bjorlun, 1990)

Establishment Clause

During the eighties the United States Supreme Court was called on in a number of cases to resolve questions involving religion and government on a variety of issues. The overwhelming majority of Supreme Court decisions addressing religion clauses of the First Amendment have dealt with issues regarding Establishment rather than Free Exercise (Mawdsley, 1992).

The Establishment Clause prohibits public school students from being exposed to religion in form of “nonsectarian” prayer given by school-selected clergymen at athletic events or graduation ceremonies, even though students were subjected to a variety of ideas in courses, with freedom of communication being protected by the First Amendment (*U.S.C.A. Const. Amends. 1, 14*). Further, under the free speech portion of the First Amendment it was contemplated that government would be a participant in expression of ideas, while under the Establishment Clause it was provided that government would remain separate from religious affairs.

The United States Supreme Court first reviewed a challenge to state law under the Establishment Clause in *Everson v. Board of Education* (1947). Relying on the history of the clause, and the Court’s prior analysis, Justice Black outlined the considerations that have become the touchstone of Establishment Clause jurisprudence: “Neither a state nor the Federal Government can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither a State nor the

Federal Government, openly or secretly, can participate in the affairs of any religious organization and vice versa" (*Lee v. Weisman*, 1992, p.2662). In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state' (*Reynolds v. United States*, 1879).

In *Engel* (1962) the Court considered for the first time the constitutionality of prayer in a public school setting. Students said aloud a short prayer selected by the State Board of Regents: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country" (*Engel v. Vitale*, 1962, p.422). Justice Black, writing for the Court, again made clear that the First Amendment forbids the use of power or prestige of the government to control, support, or influence the religious beliefs and practices of the American people. Even though the prayer was "denominationally neutral" and "its observance on the part of the students [was] voluntary," (*Engel v. Vitale*, 1962, p.430) the court found that it violated this essential precept of the Establishment Clause.

In 1963, a year later, the Court again invalidated government-sponsored prayer in public schools in *Schempp* (1963). After a thorough review of the court's prior Establishment Clause cases, the Court concluded:

"The Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief of the expression thereof. The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution" (*School District of Abington Township v. Schempp*, 1963, p.223-24).

Because the schools' opening exercises were government-sponsored religious ceremonies (e.g., reading from the Bible, and recitation of the Lord's prayer), the Court found that the primary effect was the advancement of religion and held, therefore, that the activity violated the Establishment Clause.

In 1968, five years later, the Court reiterated the principle that government "may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite" (*Epperson v. Arkansas*, 1968).

Justice Scalia, in 1989, joined an opinion recognizing that the Establishment Clause must be construed in light of the "government policies of accommodation, acknowledgement, and support for religion [that] are an accepted part of our political and cultural heritage" (*Allegheny County v. Greater Pittsburgh ACLU*, 1989, p.657). That opinion affirmed that "the meaning of the Clause is to be determined by reference to historical practices and understandings" (*Allegheny County v. Greater Pittsburgh ACLU*, 1989, p.670). Finally, Scalia concludes: "... to deprive our society of that important unifying mechanism (religion), in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law" (*Lee v. Weisman*, 1992, p.2686).

In *Lee* (1992) Justice Scalia, the Chief Justice, and Justices White and Thomas dissented. Justice Scalia did not join in the opinion because the majority

opinion was conspicuously bereft of any reference to history. Thus in holding that the Establishment Clause prohibits invocations and benedictions at public-school graduation ceremonies, the court lays waste a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.

■ THE LEMON TEST (THE "EFFECTS" TEST)

In 1971 the United States Supreme Court enunciated the *Lemon* test, (*Lemon v. Kurtzman*, 1971). The Court has yet to interpret the test in a clear and consistent manner. In the wake of *Lemon*, no fewer than twenty-eight Supreme Court cases, generating more than one-hundred opinions, have addressed the establishment of religion both in education and noneducation settings (Underwood, 1989). The *Lemon* test is a three-part test. To avoid violating the Establishment Clause, a governmental act must: (1) have a secular purpose; (2) be (its principal and primary effect) one that neither advances or inhibits religion; and (3) not foster excessive government entanglement with religion (*Lee v. Weisman*, 1992). Should the governmental action violate any one of the three parts of the test, then the action must be struck down as unconstitutional.

The United States Supreme Court of the early nineties can be tentatively divided into four broad groupings in relation to the *Lemon* test. Those that favor retention are Justices Marshall and Stevens; against retention Chief Justice Rehnquist, and Justices Scalia and White; in the middle of the spectrum Justices Kennedy, O'Connor, and Blackmun; and the wild cards in this issue seem to be Justices Souter and Thomas (Mawdsley, 1992).

The Retention of *Lemon*

Justice Marshall was, along with Stevens, of the opinion that *Lemon* should be enforceable in its original tripartite version. In *Mueller* (1983), in his dissent, Justice Marshall found that the Minnesota tax deductions had the "primary effect" (the second prong of the test) of advancing religion since they covered books chosen by the parochial schools themselves. While Justice Stevens has been particularly adamant regarding the first, or "purpose," of the *Lemon* test. He recognized in *Wallace* (1985) the validity of all three *Lemon* tests, but had to go no further than the "purpose" test to find that the moment of silence statute "had no secular purpose" (*Wallace v. Jaffree*, 1985, p.2489-90). Further Justice Stevens has written ... "to survive scrutiny under the *Lemon* test, it is not enough that a statute's sponsors identify some secular goals allegedly by the [Equal Access] Act. We have held that a statute is unconstitutional if it 'does not have a clearly secular purpose,'" or if its "primary purpose was to ... provide persuasive advantage to a particular religious doctrine" (*Board of Education of Westside Community Schools v. Mergens*, 1990). There is no reason to believe that Justice Stevens would relax his adherence to the tradition *Lemon* tests in analyzing a case involving graduation or athletic event prayers.

The Rejection of *Lemon*

Chief Justice Rehnquist, in his dissent in *Wallace*, (1985) took direct aim at the *Lemon* tripartite test declaring that “the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be sound as the doctrine it attempts to service. The three-part test has simply not provided adequate standards for deciding Establishment Clause case, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions ... depending how each of the three factors applies to a certain state action. The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results” (1992). Similarly, in his dissent in *Ball* (*Grand Rapids School District v. Ball*, 1985), Justice White has also expressed his strong dislike for the *Lemon* test. Justice White ... “is firmly of the belief that decisions like *Lemon* and *Nyquist* (1973), are not required by the First Amendment and [are] contrary to the long range interest of the country” (Mawdsley, 1992, p.199).

Justice Scalia, in his dissent in *Edwards* (1987), pointedly declared that “I doubt whether the ‘purpose’ requirement of *Lemon* is a proper interpretation of the Constitution” It appears the Chief Justice Rehnquist, and Justices Scalia and White are in agreement that a statute with a secular purpose is constitutional, regardless of other religious motivations that may have influenced the legislative process.

A Modification of *Lemon*

The middle group, Justices Kennedy, O’Connor, and Blackmun, have suggested modifications to the *Lemon* test. These modifications include: (1) having a common denominator that espouses the general concept of “endorsement or disapproval of religion” as first explicated by Justice O’Connor in *Lynch* (1984); (2) having a limited the definition of endorsement (Justice Kennedy) to “whether the government imposes pressure upon a student to participate in a religious activity” (*Mueller v. Allen*, 1983, p.2388); (3) “being absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal” (Kennedy) (*Lee v. Weisman*, 1992, p.672); and (4) establishing “the Establishment Clause, at very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community’” (Justice Blackmun) (*Lynch v. Donnelly*, 1984, p.687).

The Future of *Lemon*

Justice Souter and Thomas are key components in the future definition and application of the *Lemon* test. It is not clear what their views are at the present time. Although Justice Souter’s exact sentiments concerning *Lemon* are yet to be expressed in a judicial opinion, during his confirmation hearings Souter expressed an awareness of “the difficulty of applying the three-part *Lemon v. Kurtzman* test.... The concerns that have been raised about [the *Lemon* test] naturally provoke

a search, not only perhaps for a different test of the standard which we think we are applying today, but a deeper re-examination about the very concept behind the Establishment Clause.” However, Justice Souter, in *Lee* concludes: “When public officials ... convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. However ‘ceremonial’ their message may be, they are flatly unconstitutional” (*Lee v. Weisman*, 1992, p.923). According to Souter the Establishment Clause forbids government aid to religion, it prohibits all state-sponsored prayers in public schools. Since the invocation of God’s blessing is a religious activity supervised by school officials, it violates the Establishment Clause even if there is no coercion. Finally, he argues that the principle of neutrality, which prohibits government favoritism or endorsement of some religions or all, is the core of the Establishment Clause.

Justice Marshall’s replacement Justice Thomas has not expressed a judicial opinion either relating to the *Lemon* test. Because Justice Thomas’s confirmation hearings centered on sexual harassment, little attention was devoted to important Establishment Clause concerns. This oversight was unfortunate, for the decisions of the present Court will determine the scope and vitality of First Amendment religion clause jurisprudence well into the twenty-first century (*Lee*, 1992).

Lee neither overrules the *Lemon* test nor endorses it. The consideration of the *Lemon* test has merely been postponed. Since a majority of the Justices have criticized *Lemon*, it remains a critically weak precedent that is likely to be replaced or substantially revised in the next few years.

“Perhaps O’Connor’s endorsement test will replace *Lemon* with the support of Souter, Blackmun, Stevens, and a “converted” Kennedy. However, since a majority of the Justices have indicated a preference for the coercion test, it is more likely that the dominant debate in the coming years will be between those justices who only oppose direct or overt coercion and those who oppose subtle and indirect coercion in the public schools” (*Lee v. Weisman*, 1992, p.928).

■ GRANT RULE

In the *United States v. W.T. Grant Co.*, the court said that voluntarily stopping allegedly illegal conduct does not make a case moot unless the defendant can demonstrate that “there is no reasonable expectation that the wrong will be repeated” (*United States v. W.T. Grant Co.*, 1953, p.897). The Eighth Circuit Court of Appeals, in 1988, applied the Grant rule in the *Steele v. Van Buren Public School District* (1988). The case centered around prehearsal or preperformance prayers required of all band members. The plaintiff, Jennifer Steele and her mother Nancy, complained that the tradition violated the Constitution. This was taken under consideration by the Van Buren Board of Education but no resolution was reached. However, in November the Band Director voluntarily stopped the prayers because “... Steele had caused such dissension among band members that the prayers were ‘counter-productive’” (*Steele v. Van Buren Public School District*, 1988, p.1493-94). Later the superintendent of schools told the band director that the board would support him if he chose to continue the prayers.

The court found that the district had not shown that it would not permit prayer

at school functions in the future. The court said that the band director or another teacher "... could conduct religious activities and we have no indication that the district would disallow them" (*Steele v. Van Buren Public School District*, 1988, p.1495). Therefore, the case was not moot based on the voluntary cessation of the band prayers. This could affect pre-game invocations if they were voluntarily stopped by the principal or athletic director after receiving complaints. Then later the superintendent of schools informed the principal and/or athletic director the board would support him if he chose to continue the prayers. Based on previous courts decisions this would not make the case moot.

■ COERCION TEST

In *Lee v. Wiseman* the Court was especially concerned with "protecting freedom of conscience from subtle coercive pressure" in the public schools where "prayer exercises ... carry a particular risk of indirect coercion." In this case, the school's supervision of the graduation "places public pressure as well as peer pressure" on students to stand during the invocation and benediction. Although this pressure is subtle and indirect, Kennedy writes that it "can be as real as any overt compulsion." Moreover, for many of the students, "the act of standing or remaining silent was an expression of participation in the Rabbi's prayer." To find no constitutional violation under these circumstances, "would place objectors in the dilemma of participating ... or protesting." The Court rules that the state may not place students in this position because "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." The fact the prayers sought to be nonsectarian "does not lessen the offense or isolation" for those who object. "At best, it narrows their numbers, at worst increases their sense of isolation and affront." Nor does the fact that many people feel graduation prayers are important allow the state "to exact religious conformity from a student as the price of attending her own graduation" (Schimmel, 1992, p.917).

The implication for pre-game invocations are obvious. The student-athlete must attend the game, stand for the invocation, and remain silent during the invocation. All three are expressions of participation in the prayer. The student-athlete is faced with public pressure, peer pressure, and social pressure during the pregame invocation. Is this "peer-pressure" or "psychological" coercion?

Justice Scalia, in this case, attacked the notion that graduation prayers are different from prayers at other public ceremonies on the ground that they involve "psychological coercion" (Schimmel, 1992, p.919). Scalia wrote: "Since the Court does not dispute that students exposed to prayer at graduation ceremonies retain (despite 'subtle coercive pressures') the free will to sit, there is absolutely no basis for the Court's decision." He further argues that "peer-pressure" or "psychological" coercion is not the kind of coercion the Establishment Clause was intended to prohibit. Rather, it is "coercion of religious orthodoxy and of financial support by force of law and threat of penalty. However, Scalia concedes that constitutional tradition also prohibits government endorsement of "sectarian" religion "in the sense of specifying details" upon which believers differ. But the nondenominational prayers of a rabbi, "with no one legally coerced to recite them", are not violations.

■ ENDORSEMENT TEST

Over the years, the Supreme Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement. In *Allegheny County*, the Court "... forbade the prominent display of a nativity scene on public property; without contesting the dissent's observation that crèche coerced no one into accepting or supporting whatever message it proclaimed, five Members of the Court found its display unconstitutional as a state endorsement of Christianity" (*Allegheny County v. Greater Pittsburgh ACLU*, 1989, p.589-602). Likewise, in *Wallace* (1985), the Court struck down a state law requiring a moment of silence in public classrooms not because the statute coerced students to participate in prayer (for it did not), but because the manner of its enactment ... "convey[ed] a message of state approval of prayer activities in the public schools" (*Wallace v. Jaffree*, 1985, p.7684). Further, Justice O'Connor, in *Lynch*, declared that the government can run afoul of the Establishment Clause in two ways: (1) excessive entanglement with religious institutions, and (2) government endorsement or approval of religion (the latter being a more direct infringement). Moreover this "endorsement" concept has both an objective component (the message intended by the government based on the words themselves) and a subjective component (the message actually communicated to the audience or some portion of the audience) (*Lee v. Weisman*, 1992).

■ YODER (COMPELLING INTEREST) TEST

For nearly twenty years, the compelling interest test of *Wisconsin v. Yoder* (1972), (as supplemented by the "least restrictive means test" of *Thomas v. Review Board of Indiana Security Division*) was the singular most important mechanism to protect diverse religious groups from government restrictions that adversely impacted their religious beliefs. Although frequently not successful, the Yoder test nonetheless reinforced the principle that religious beliefs were among the most fundamental rights within the pantheon of constitutional rights. Yoder was a high benchmark, for free exercise rights, to protect religious beliefs against intrusion by all but the most compelling state interests. In 1990, in *Employment Division v. Smith* (1990), the Supreme Court disregarded the Yoder compelling interest test in favor of a simple rule that upheld "an across-the-board criminal prohibition of a particular form of conduct" (*Employment Division v. Smith*, 1990, p.1603). Justice Scalia's "declared that an individual's right to obey a law contingent upon his religious beliefs contradict[ed] both constitutional tradition and common sense ... [and such] a private right to ignore generally applicable laws is a constitutional anomaly" (*Employment Division v. Smith*, 1990, p.1604). Further he observed that requiring a state to justify all of its laws under a compelling interest test would be "courting anarchy" (*Employment Division v. Smith*, 1990, p.1605).

■ CIVIC RELIGION

The Court in *Lee* explained why the government cannot be involved with prayers. Justice Kennedy writes "... in the Religion Clauses (Establishment and Free Expression) which mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State" (*Lee v. Weisman*, 1992,

p.2672). Therefore, the Constitution is designed to guarantee that the “transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.” However, the Religion Clauses are not just designed to protect the nonbeliever but equally important “to protect religion from government interference.” These concerns, writes Kennedy, “have particular application in the case of school officials, whose effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject.”

“The Court rejects the argument that nonsectarian prayers at public ceremonies should be recognized as part of this country’s ‘civic religion’ and should be tolerated when sectarian prayers are not. This proposal, writes Kennedy, conflicts with the ‘central meaning of the Religion Clauses ... which is that all creeds must be tolerated and none favored.’ The idea that government may establish a civic religion ‘as a means of avoiding the establishment of a religion’ is an unacceptable contradiction” (*Smith* in Schimmel, 1992, p.916).

■ PRE-GAME TEAM PRAYERS AND INVOCATIONS: ARE THEY CONSTITUTIONAL OR UNCONSTITUTIONAL?

In 1987, Doug Jager, a junior at Douglas County High School, and his father, William Jager, sued the Douglas County School District and Board of Education to stop the practice of offering invocations before Douglas County High School football games (*Jager v. Douglas County School District and School Board*, 1989). The practice of offering invocations before games in Douglas County was initiated about 1947 (*Douglas County School District v. Doug Jager*, 1989). The federal district court found that invocations before football games are unconstitutional. Two years later, in 1989, the Eleventh Circuit Court of Appeals ruled the pre-game invocations violate the First Amendment. In May 1989, the Supreme Court refused to review the *Jager* decision.

Since 1989 numerous school districts have probably complied with the *Jager* decision. However, a few notably have not, namely: (1) the Suwanee County, Florida, school board voted to continue pre-game invocations. “We just felt like we didn’t need to change it unless somebody complained” (Education Week, 1989); (2) during the 1989 football season *USA Today* reported that “dozens of school systems are disregarding ...” the *Jager* decision and that “defiance is getting enthusiastic support” (Mayfield & Rota, 1989); (3) *Time* reported that a variety of strategies to evade the decision have been used, such as ministers using bullhorns led the crowd in a prayer at the beginning of the annual football jamboree in Escambia County, Florida, or ministers in Sylacauga, Alabama, who sat at various locations in the stands, and cued the fans who chanted the Lord’s prayer, and fans in Chatsworth, Georgia, who were encouraged to take radios to the game and turn up the volume when a local radio station broadcasted a prayer (Trippett, 1989).

On November 7, 1989, voters in Palatka, Florida voted to disapprove (seventy-eight percent) of the *Jager* decision (*USA Today*, 1989). Despite large public support, efforts to evade the *Jager* decision are unlikely to be successful in view of the line of court decisions on organized, devotional prayer in public school settings over the past quarter of a Century (Bjorlun, 1990).

The *Jager* decision, which bans pre-game invocations, may increase the use of team prayers conducted by a team member, coach, or another school official in a locker room before or after the game. Team prayers are much less visible than an invocation given over the public address system at the site of the athletic contest. They may be less visible but they are not constitutional. They, like invocations, are in violation of the First Amendment in most cases (Bjorlun, 1990).

The Jager Case and Its Impact on High School Athletics

The *Jagers* argued that the practice of delivering invocations before football games violated all three prongs of the *Lemon* test. They alleged first that no secular purpose existed for the practice of delivering the invocations. Citing *Doe v. Aldine* (1982), in which a federal court found unconstitutional the practice of delivering prayers before high school graduation exercises, the plaintiffs said that "as a matter of law ... prayer recitation lacked a secular purpose" (*Doe v. Aldine*, 1982, p.883). Further, "if government purpose can be achieved through nonreligious means, the state may not employ religious ones" (*Doe v. Aldine*, 1982, p.886).

With respect to the second prong, primary effect, the *Jagers* stated that... "whether the defendants intended to or not, they created the impression that the Douglas County public school sanctioned the tradition of a school-sponsored forum for religious invocations by Protestant clergymen. Therefore, the primary effect of the practice was to maintain a school-sponsored forum for the expression of the religious views held by the majority in Douglas County and to inhibit and divide those with nonconforming beliefs on religious matters" (*Doe v. Aldine*, 1982, p.891).

Finally the defendants failed the entanglement test because the school district could not supervise the equal access plan without becoming closely involved in determining what messages would be presented at the games. "If the school district did not encourage a more diverse presentation of views, the invocations were likely to sound much like the previous prayers, and if the school took action to promote diverse views, the district would become entangled in a costly, divisive program to identify and favor religious and nonreligious minorities" (*Smith* in Schimmel, 1992, p.918).

The court held that the custom and practice of invocations before Douglas County High School football games violated the Establishment Clause of the First Amendment to the United States Constitution. The court found that the pregame prayers violated the first prong of the *Lemon* test and thus that it was unnecessary to consider whether the second and third parts of the test had been violated.

■ SUMMARY

There are three types of prayer practices common in public schools: (1) pre-game invocations involving not only team members, but spectators as well; (2) team prayers or moments of silence involving only team members; and (3) invocations and benedictions at graduation ceremonies. Recent decisions have held that pre-game invocations, and invocations before and benedictions after graduation ceremonies are in violation of the First Amendment. Further, while less visible than

invocations, team prayers are also in violation of the First Amendment because they are devotional activities organized by agents of government (coaches).

In summary, the following points can be drawn relating to the Establishment and Free Exercise Clauses jurisprudence:

- (1) Since 1962 over thirty cases have established the principle against favoritism and endorsement which has become the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community.
- (2) The Establishment Clause prohibits establishment of religion at the federal level and to protect state establishments of religion from federal interference.
- (3) There is a common thread running through the majority of cases decided under *Lemon* (1971): a common-sense balancing of the danger of government establishment of religion with the recognition that religious traditions are a part of our nation's fabric.
- (4) Based on the early 1993 composition of the Supreme Court it is unlikely that *Lemon* (1971) will be overruled; however, it is likely it will be reformulated.
- (5) In *Douglas* (1989), the court's focus was the invocation and it held that a prayer was inherently religious, thus, a violation of the Establishment Clause.
- (6) What emerges from the diverse opinions in *Weisman* (1992) is a 4-4-1 split. Four Justices - Blackmun, Souter, O'Connor, and Stevens support the neutrality approach incorporated in the endorsement test. Four other Justices - Rehnquist, Scalia, Thomas, and White support the coercion test. And Kennedy is in the middle. This leaves the *Lemon* Test (1971) in an interesting position, neither overruled nor reformulated.
- (7) The larger question raised by *Wiseman* (1992) is whether the 5-4 decision will be a narrow precedent largely limited to the facts of this case or will it have broader impact on other issues concerning religion and public education. It is unclear whether the court's decision will significantly influence future Establishment Clause cases that come before the court.
- (8) However, a different question arises if a public school official has knowledge that a student speaker (team member) plans to offer a prayer at graduation (in the locker room or team huddle) without the encouragement of the coach, teacher or administrator. It is unclear under *Weisman* (1992) whether this knowledge imposes an obligation on the school official (coach, teacher, or administrator) responsible for the graduation (athletic event or team) to ask (or order) the student not to offer the prayer at graduation (athletic event).
- (9) Further, voluntarily stopping the practice of pre-game prayers or prayers at graduation ceremonies at some point after it has occurred is insufficient to avoid liability based on mootness.
- (10) However the court also indicated in *Wallace* (1985) that a moment of silence statute could be adopted to meet a genuine secular purpose, and if it was worded so as not to favor prayer, it would be constitutional. "Thus, a coach could set aside a 'quiet' time before and/or after the game for reflection by the players. They could then choose to pray or think about any other matter they wished. Such a practice would probably not violate the Establishment Clause" (*Wallace v. Jaffree*, 1985, p.2492).

- (11) Finally, team prayers are much less visible than an invocation given over the public address system at the site of the athletic contest. They may be less visible but they are not constitutional. They like invocations are in violation of the First Amendment in most cases. Therefore leaving the coach in a very interesting position in regard to team prayers.

■ IMPLICATIONS

The Court, in *Everson*, articulated six examples of paradigmatic practices that the Establishment Clause prohibits "... (1) neither a state nor the Federal Government can set up church; (2) neither can pass laws which aid one religion, aid all religions, or prefer one religion over another; (3) neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion; (4) no person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance; (5) no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion; and (6) neither a state nor the Federal Government can openly or secretly, participate in the affairs of any religious organizations or groups" (*Everson v. Board of Education*, 1947, p.15). These articulated examples are still used in Establishment Clause jurisprudence. The second example has the greatest effect on public schools relating to pre-game invocations, and invocations and benedictions delivered at graduation ceremonies, even today 45 years later as evidenced in the *Lee* case.

Today public schools are faced with considerable support for pre-game prayers, and prayers at graduation ceremonies even though they violate the First Amendment's Establishment Clause and their use can lead to liability problems for coaches, principals, superintendents, and school boards. Coaches who lead team prayers or moments of silence or permit others to lead them could be liable for damages for violation of the Constitution. If coaches are liable, so are principals, superintendents, and school board members if they know or knew about the team prayers and took no action to stop them. Further the school district could be liable for such actions by its personnel. The school board need not have a policy permitting or condoning team prayers in order to be liable for their occurrence. An unwritten policy or custom that encourages or condones such prayers at pre-game or graduation ceremonies can be the basis for an award of damages against the district.

Bjorklun suggests that "voluntary cessation of an unconstitutional practice," such as pre-game prayers or prayers at graduation ceremonies, "does not moot the issue unless it can be shown that the practice is not likely to be resumed" (Bjorklun, 1990, p.14). The burden of proving that resumption will not occur is on the school board and it is a high standard to meet. Parents are regarded as having an interest their children's religious education which includes an interest in having their children educated in public schools that do not permit or impose religious practices. "Thus, as long as any parents, party to the suit, have children in the schools, the issue cannot be moot" (Bjorklun, 1990, p.14).

Finally, if the Court adopts a modification of *Lemon* similar to those suggested by Justice O'Connor (the Endorsement test), the Court, in the future, is likely to

permit prayer at Douglas County football games and Rhode Island public school graduation ceremonies since participation was voluntary and no attempt was made to proselytize or coerce members of the audience. The test that emerges from *Lee* "... may well revise and revive the interaction between religion and the government for the next several decades" (Mawdsley, 1992, p.202).

Educators and attorneys need to be able to explain the historic and contemporary reasons for government neutrality concerning religion and how separation of church and state in the public schools can protect religious as well as nonreligious students (*Wisconsin v. Yoder*, 1972, p.929).

As Justice Blackmun observed:

"The Establishment Clause protects religious liberty on a grand scale; it is a social compact that guarantees for generations a democracy and a strong religious community - both essential to safeguarding religious liberty. 'Our fathers [believed] that the members of the Church would be more patriotic, and the citizens of the state more religious, by keeping their respective functions entirely separate'" (*Lee v. Weisman*, 1992, p.2664-66).

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