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The Death of Graduation Prayer: The Parrot Sketch Redux

J. ALEXANDER TANFORD *

John Cleese: "I wish to complain about this parrot . . ."
Michael Palin: "Oh yes, the Norwegian Blue. What's wrong with it?"
John Cleese: "I'll tell you what's wrong with it - it's dead, that's what's wrong with it."
Michael Palin: "No, no, it's resting."
John Cleese: "Look, my lad, I know a dead parrot when I see one, and I'm looking at one right now."
Michael Palin: "No, it's resting. Remarkable bird, the Norwegian Blue - beautiful plumage."
John Cleese: "The beautiful plumage doesn't enter into it. It's still dead . . ."
Michael Palin: "Look! There, it moved."
John Cleese: "He did not. That was you, pushing the cage. [Cleese takes parrot out of cage, hits it on counter and drops it on the floor]. Now that's what I call a dead parrot."
Michael Palin: "No, no, it's stunned."
John Cleese: "Look my lad, I've had just about enough of this. That parrot is definitely deceased . . ."
Michael Palin: "It's probably pining for the fjords. . . ."
John Cleese: "It's not pining. It's passed on. This parrot is no more. It has ceased to be. It's expired and gone to meet its maker. This is a late parrot. It's a stiff. In the restive night, it rests in peace. . . . It's drawn down the curtain and joined the choir invisible. This is an ex-parrot."

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A. Introduction

In 1992, the Supreme Court ruled, in Lee v. Weisman, that it was unconstitutional to “offer prayers as part of the official school graduation ceremony.” The Court held, as it has always held, that the Establishment Clause prohibits religious activity at official school functions. Graduation prayer was dead. However, in the two years since its demise, modern-day Michael Palins stubbornly insist that prayer is only resting. If we just prop them up or give them a slightly different look, graduation invocations will live in our schools once again.

This article critically examines and responds to the remarkably persistent argument by religionists that high school graduation prayer is somehow constitutional despite Lee v. Weisman—not that it should be constitutional, but that it is. This position has been aggressively advanced by Pat Robertson’s American Center for Law and Justice and supported by several recent law review articles. To justify it, they read Weisman narrowly, 6

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3. Several perfectly good theoretical arguments can be made that prayer at high school graduations should be constitutional. One could argue that the courts should recognize a broad free speech right for student religious speech (see Bell v. Little Axe Indep. Sch. Dist., 766 F.2d 1391, 1400-02 (10th Cir. 1985)); predict that a conservative Supreme Court might in the near future abandon existing Establishment Clause jurisprudence in favor of a new rule that permits religion in the schools, a development suggested by Justice Scalia’s dissent in Weisman; or suggest that the Constitution should be amended to permit school prayer. See Douglas Jehl, Clinton Reaches Out to G.O.P. on School Prayer Amendment, N.Y. TIMES, Nov. 16, 1994, at 1.
4. See undated “Bulletin” on high school graduation prayer distributed in February 1993, to school boards throughout the United States by the American Center for Law and Justice (copy on file with author).
6. See Weinhaus, supra note 5, at 957 (“Weisman answers the narrow question whether a member of the clergy may deliver [a prayer] but leaves open the question whether other nondenominational type prayers are proscribed”). See also Phillips, supra note 5, at 502-03 (claiming that the Supreme Court, in Weisman, did not ban all graduation prayers but was narrowly focused on the facts of the case and only banned clergy-led prayers). Whether the case is to be read narrowly or broadly is open to dispute. At one point, Justice Kennedy suggests that the case is confined to situations in which “State officials direct” the prayer, 112 S. Ct. at 2655, which would be more narrow than the usual state action standard of significant official involvement. At other places, however, Kennedy makes it reasonably clear that the Court is banning all prayer for which the school is ultimately responsible under the traditional state action doctrine. Id. at 2660, 2661.
distort the Court’s holding, find ambiguity where none exists, and act as if Weisman were the only case addressing religious activity in public schools. They pretend that the court’s “wall of separation” metaphor is a recent invention or ignore it completely. Religionists also tend to ignore the Lemon test and the “endorsement” doctrine—both of which

7. See Phillips, supra note 5, at 512 (suggesting that high school seniors might be allowed to pray at graduation because “Weisman involved a middle school, not a high school”). In fact, Justice Kennedy states the issue in the first paragraph of Weisman as follows: “School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses. . . .” 112 S. Ct. at 2652 (emphasis added).

8. See Broyles, supra note 5, at 285 (Weisman holding uncertain, “eulogy for school prayer premature”); Phillips, supra note 5 at 509-10 (“Do student prayers count as a ‘formal religious exercise’? Would student invocations count if they were nonsectarian and non-proselyting? There is no case law to support an argument either way. . . . [A]nalyzing whether prayer constitutes a “formal religious exercise” creates . . . a quagmire”). No such ambiguity appears in Weisman, which held without hesitation that prayer was a “formal religious exercise,” even when nonsectarian and non-proselyting. 112 S. Ct. at 2655 (calling it a “state-sponsored . . . religious exercise”). See also Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989) (nonsectarian student invocation given over the sound system at a school-sponsored football game violated the Establishment Clause).

9. See Phillips, supra note 5 at 502 (“Given the opportunity to ban all graduation prayers, the court decline[d]. With this open door . . . in mind, it is important to review what arguments Weisman eliminated, since those not eliminated may still be valid”). Phillips writes as if a dozen other Supreme Court cases banning religion in the schools did not exist and had not already rejected many of those arguments.


11. The phrase does not appear anywhere in the Phillips article, supra note 5.

12. See Phillips, supra note 5, at 501 (Weisman replaced the Lemon test with a “new Establishment Clause test,” the “coercion” test). To the contrary, despite vigorous argument by the Bush administration in favor of a coercion test, the court rejected it, applying instead “the controlling precedents,” and stating explicitly “we do not accept the invitation of petitioner and amicus the United States to reconsider our decision in Lemon v. Kurtzman.” 112 S. Ct. at 2655. See also Michael S. Paulsen, Lemon Is Dead, 43 Case W. Res. L. Rev. 795, 799 (1993) (suggesting that Lemon has been replaced by a coercion test that would allow religion into the schools). Paulsen has a degree from Yale Divinity School and is staff counsel for the Christian Legal Society’s Center for Law and Religious Freedom. See also El-Sayed, supra note 5, at 465-66 (distorting secular-purpose part of test to argue that religious activities pass constitutional muster if any secular purpose can be found).

13. See Phillips, supra note 5, at 506 n.112 (refusing to discuss the endorsement test because it “has never been accepted by a majority of the Court”). The claim is bizarre. In County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 592 (1989), Justice Blackmun, writing for a majority of the Court, states that the endorsement test “has long had a place in our Establishment Clause jurisprudence,” citing a half dozen cases.
appear frequently in the religion cases—and rely on Justice Scalia’s “coercion” test which has never been adopted by the Court but which would tend to allow many religious activities in the schools.\textsuperscript{14} They argue that anything other than significant direct official action is beyond the reach of the First Amendment, ignoring traditional state action doctrine that also prohibits officials from facilitating religious activity.\textsuperscript{15} Religionists promote a single aberrational case—\textit{Jones v. Clear Creek Independent School District}\textsuperscript{16}—that permitted graduation prayer, without analyzing whether it is good law, and arguing somewhat paradoxically that this lower court case should be read more broadly than \textit{Weisman}.\textsuperscript{17}

This article will address each of the loopholes advocated by the religionists—student-initiated prayer, prayer approved by a majority vote of the student body, disclaimers by “neutral” school administrators, nonsectarian prayer, voluntary prayer, using prayer for the secular purpose of solemnizing graduation, or allowing prayer because it is a historical tradition. The article concludes that the courts have clearly rejected each of these supposed loopholes. Graduation prayer is a dead issue, and no amount of denial will change that fact.

\section*{B. The Courts Have Consistently Ruled That Religious Activity at Official School Functions Violates the Establishment Clause}

In interpreting the Establishment Clause, the Supreme Court has never once permitted prayer or religious activity at any official school function, no matter what the guise, no matter whose idea it was, and no matter what the

\textsuperscript{14} See Phillips, supra note 5, at 507 (“the coercion test in \textit{Weisman} requires three prongs to establish coercion: (1) the government directs (2) a formal religious exercise (3) in such a way as to obligate the objector to participate”). Phillips cites \textit{Weisman} at page 2656, although no such language appears on that page. Similar language appears on page 2655, as a description of the facts in the Providence case, but not as a legal standard for evaluating future cases.

\textsuperscript{15} See Mangrun, supra note 5, at 1049; Weinhaus, supra note 5, at 979-80; and Phillips, supra note 6, at 508-09 (prayer permissible as long as school officials do not “direct” it). \textit{Compare} County of Allegheny v. ACLU, 492 U.S. 573, 594 (“The Establishment Clause, at the very least, prohibits government from \textit{appearing} to take a position on questions of religious belief”) (emphasis added) and Mangold v. Albert Gallatin Area Sch. Dist., 438 F.2d 1194 (3rd Cir. 1971) (prayers given by students facilitated by school officials were still “clearly state action”) with Paulsen, supra note 12, at 799 (prayer unconstitutional only when school officials “compelled, induced, or strongly encouraged attendance at a religious worship ceremony”).

\textsuperscript{16} 977 F.2d 963 (5th Cir. 1992).

\textsuperscript{17} See, e.g., El-Sayed, supra note 5 at 468-70; Phillips, supra note 5, at 497; Mangrun, supra note 5, at 1049-50. \textit{Jones} is discussed in subsection F.4., infra.
"secular" explanation. In *Engel v. Vitale* the Court ruled that nonsectarian prayer in school classrooms was "wholly inconsistent with the Establishment Clause." In *School District of Abington Township v. Schemp*, the Court ruled that it was a violation of the Establishment Clause for a teacher to read Bible verses and for students to recite the Lord's Prayer. In *Stone v. Graham*, the Court ruled that posting privately-funded copies of the Ten Commandments on school walls was unconstitutional. In *Wallace v. Jaffree*, the Court held that voluntary nondenominational prayer in school was unconstitutional even when brought in under the guise of a "moment of silence."

The federal circuit courts also have consistently ruled that religious activity in public schools violates the Establishment Clause if it is approved, endorsed, or facilitated by school officials. The First Circuit prohibited prayer at public school graduation in *Weisman v. Lee*, the case underlying the Supreme Court's *Lee v. Weisman* decision. The Second Circuit held that the Establishment Clause would be violated if a school authorized, supervised, or took any action to facilitate student-initiated voluntary prayer.

The Third Circuit ruled in *Marigold v. Albert Gallatin Area School District* that Bible readings and nondenominational group prayers were unconstitutional. It rejected the argument that the prayers were the "voluntary actions of students," pointing out that there was sufficient school involvement to constitute state action. The same court also struck down a New Jersey statute requiring a moment of silence at the beginning of each school day in *May v. Cooperman*. It found that the passage of the statute was religiously motivated, was understood as such, and lacked a legitimate secular purpose.

The Fifth Circuit (en banc) unanimously ruled, in *Meltzer v. Board of Public Instruction*, that daily Bible reading and prayer in classrooms were unconstitutional. In *Hall v. Board of School Commissioners*, the court ruled that it was equally unconstitutional to permit students to give the daily prayers.

22. There are apparently no cases on the subject of religion in the schools in the D.C. Circuit or the Fourth Circuit, although the Fourth Circuit suggests in dictum in *Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975), that it would strike down any religious activity taking place in the schools.
25. 438 F.2d 1194 (3d Cir. 1971).
26. 780 F.2d 240 (3d Cir. 1985).
27. 577 F.2d 311 (5th Cir. 1978).
28. 656 F.2d 999 (5th Cir. 1981).
even if they were nonsectarian "devotionals." The court also prohibited a Bible literature class which was taught entirely from a fundamentalist Christian perspective, 29 struck down a school policy permitting student volunteers to offer daily classroom prayers, 30 prohibited after-school voluntary religious meetings that were supervised by teachers, 31 and enjoined a basketball coach from sponsoring prayers before games and practices. 32

The Sixth Circuit prohibited graduation prayers in Stein v. Plainwell Community Schools. 33 The Court ruled that even prayers given by student volunteers and voted upon by the students violate the Establishment Clause. The judges stated that such a prayer "says to some parents and students: we do not recognize your religious beliefs, our beliefs are superior to yours."

The Seventh Circuit in two cases ruled that religious activity in the public schools violates the Establishment Clause. In DeSpain v. DeKalb County Community School District 428, 34 students in kindergarten were asked to say in unison, "We thank you for the flowers so sweet, we thank you for the food we eat, we thank you for the birds that sing, we thank you for everything." The court ruled that this devotional violated the Establishment Clause, even though it did not mention God. In Berger v. Rensselaer Central School Corporation, 35 the court ruled that it was unconstitutional for an elementary school to permit the Gideons to hand out Bibles on school property, because such permission would create the impression that the school was endorsing religion.

The Eighth Circuit struck down Bible classes offered in public schools during regular school hours. Despite the fact that the classes were nondenominational, voluntary, and taught by lay people rather than ministers, the court held that they impermissibly advanced religion. 36 In another case, the Eighth Circuit suggested that a band teacher's prayers before rehearsals and concerts violated the Establishment Clause. 37

29. Id. at 1001-03.
31. Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038, 1044-45 (5th Cir. 1982).
33. 822 F.2d 1406 (6th Cir. 1987).
34. 384 F.2d 836 (7th Cir. 1967).
35. 982 F.2d 1160 (7th Cir. 1993).
The Ninth Circuit ruled, in *Collins v. Chandler Unified School District*, 38 that prayers and Bible readings at school assemblies were unconstitutional even when they were student-led and attendance was voluntary. In the course of the opinion, the court explicitly rejected the argument that the students had a free speech right to lead such prayers. 39 In *Grove v. Mead School District No. 354*, 40 the court stated that several other kinds of religious activities are also prohibited in the public schools: daily readings from the Bible, recitation of the Lord’s Prayer, posting of the Ten Commandments, and requiring students to participate in a religious ceremony as part of a class.

The Tenth Circuit ruled, in *Lanner v. Wimmer*, 41 that a released-time program permitting students to attend religious classes held off school grounds was unconstitutional if school officials facilitated or lent any administrative support to it. The court stated broadly that the Establishment Clause prohibits public schools from “engaging in [any] activities which are essentially religious, religiously ceremonial, or worship-like, such as the recitation of prayer or scripture, and the posting of the Ten Commandments on classroom walls.” 42 In other cases, the Tenth Circuit approved a school regulation prohibiting teachers from reading the Bible or making Christian books available to students during silent reading periods, 43 and struck down a school policy that permitted religious groups to meet on school grounds during the day. 44

The Eleventh Circuit ruled, in *Jager v. Douglas County School District*, 45 that an invocation given over the public address system before a high school football game violated the Establishment Clause. The invocations had been given for at least forty years by Christian ministers. The court noted that these pre-game prayers were given at a school-owned stadium, over a sound system controlled by the school, at a school-sponsored football game in which the equipment and facilities were paid for by the taxpayers. The court rejected the claim of secular tradition and held that the inescapable conclusion was that the school endorsed the religious aspect of the invocation. In another

38. 644 F.2d 759, 761-63 (9th Cir. 1981).
39. Id. at 762-63.
40. 753 F.2d 1528, 1534 (9th Cir. 1985).
41. 662 F.2d 1349, 1358-59 (10th Cir. 1990).
42. Id. at 1354 (citations omitted).
43. Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990).
44. Bell v. Little Axe Indep. County Sch. Dist., 766 F.2d 1391, 1402-03 (10th Cir. 1985).
45. 862 F.2d 824 (11th Cir. 1989).
In fact, among all the more than one hundred federal appellate cases on the application of the Establishment Clause to public schools decided in the last fifty years, only one permitted a religious exercise in connection with an official school activity. Every other appellate case has declared religious activity at official school functions unconstitutional.

The central reason for this uniformity of outcome is probably the principle of "endorsement." The Supreme Court's Establishment Clause jurisprudence requires that the government must be neutral on the very subject of religion. It may not advance religion as opposed to nonreligion or support a generic "civil religion." It may not demonstrate a preference for Christianity (or the so-called Judeo-Christian tradition) over other religions. If, under all the circumstances, it appears that the government is endorsing religion, the Court has held that this endorsement, even if passive, constitutes unconstitutional advancement of those beliefs.

In *County of Allegheny v. American Civil Liberties Union*, the Supreme Court summarized the endorsement issue as follows:

47. Id. at 649.
49. The case is, of course, *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), in which a defiant panel of the Fifth Circuit ruled that prayer at graduation was constitutional. The case is discussed in part F.4., infra.
50. There are a number of district court cases in which individual judges, perhaps for personal religious reasons, have refused to enjoin school-sponsored prayer. The essence of many of these opinions is that the judge sees no harm (and perhaps some good) in a little religion in the schools. Every such case that reaches the court of appeals has been reversed. Some cases have not been appealed.
51. Epperson v. Arkansas, 393 U.S. 97 (1968); Gillette v. United States, 401 U.S. 437, 450 (1971). Despite the general acceptance of this principle, the argument is occasionally made that the Establishment Clause should be read as narrowly as only forbidding the creation of a state church. This argument has always been rejected by the Supreme Court. Of the thirty-two Supreme Court Justices who have participated in Establishment Clause cases, only Justice Rehnquist has advanced the argument, supporting it with selected historical fragments taken out of context. Wallace v. Jaffree, 472 U.S. 38, 91-105 (1985) (Rehnquist, J., dissenting). The leading treatise on constitutional law dismisses the argument: "There is a seemingly irresistible impulse to appeal to history when analyzing issues under the religion clauses. This tendency is unfortunate because there is no clear history as to the meaning of the clauses." *RONALD ROTUNDA & JOHN NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 21.2 (2d ed. 1992).
In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion, a concern that has long had a place in our Establishment Clause jurisprudence. Thus, in Wallace v. Jaffree, the Court held unconstitutional Alabama's moment-of-silence statute because it was "enacted . . . for the sole purpose of expressing the State's endorsement of prayer activities." The Court similarly invalidated Louisiana's "Creationism Act" because it "endorses religion" in its purpose. And the educational program in School Dist. of Grand Rapids v. Ball, was held to violate the Establishment Clause because of its "endorsement" effect.

Of course, the word "endorsement" is not self-defining. Rather, it derives its meaning from other words that this Court has found useful over the years in interpreting the Establishment Clause. Thus, it has been noted that the prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." Moreover, the term "endorsement" is closely linked to the term "promotion," and this Court long since has held that government "may not . . . promote one religion or religious theory against another or even against the militant opposite."

Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the 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."

In Allegheny, the Court applied the endorsement test to a creche erected in the county courthouse by the Catholic Church, and found that it violated the Establishment Clause. The Court determined that the erection of a religious display in the heart of government would inevitably be viewed as approving or promoting that particular religion, regardless of who actually paid for it.

Lower courts also have widely used the idea of endorsement to analyze Establishment Clause issues, especially in those cases where the religious activity was privately initiated or funded. In American Jewish Congress v. City of Chicago, the Seventh Circuit ruled that a privately initiated nativity scene on public property violated the Establishment Clause despite several signs posted by the city denying that it endorsed the display. The Fourth Circuit has ruled that a nativity scene erected on government property violated
the Establishment Clause, even though it had been initiated and planned by private citizens, because its location in front of a governmental building suggested government endorsement. The Second Circuit ruled, in *Kaplan v. City of Burlington*, that a menorah erected by a Jewish group in a two-and-a-half-acre public park adjacent to city hall violated the Establishment Clause. Despite the fact that the park was a traditional public forum, the court decided that because the menorah would be unattended and would remain in place for several days, it would appear to a reasonable observer to have the approval of the city.

Federal courts have found the endorsement principle useful in analyzing the constitutionality of private religious activity in the public schools. In *Berger v. Rensselaer Central School Corp.*, a private group initiated, paid for, and conducted the distribution of Gideon Bibles in an elementary school while school officials remained passive. School policy neither favored nor opposed Bible distribution; if no private group had taken the initiative, no distribution would have taken place. The Seventh Circuit rejected the argument that the Bible distribution was permissible under the Establishment Clause. It ruled that because the event took place on school grounds, in the presence of school officials, and with the acquiescence of teachers and other school officials, it appeared to be an official school activity and thus constituted an implicit endorsement of religion.

It seems inescapable that prayer at an official school function such as graduation, conducted on school property with school officials standing by, will be viewed by members of the audience as an official endorsement of religion. Indeed, one of the reasons religionists are fighting so hard for prayer in the schools is just that: they want the schools to endorse religion and the important values that it represents. But this very appearance of approval would violate the Establishment Clause. The juxtaposition of a religious exercise with a highly visible public event such as graduation is similar to a religious display on the lawn of the courthouse. It does not matter who initiated it, paid for it, planned it, or installed it. Time in a graduation program, like space on a courthouse lawn, is scarce. The government both controls who has access to it and is aware of its visibility. If a private group were to erect

56. 891 F.2d 1024 (2nd Cir. 1989).
57. But see *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (similar facts, different result).
58. 982 F.2d 1160 (7th Cir. 1993).
on the courthouse grounds a pink statue of two gay men holding hands, the city would immediately remove it, not put up small notices disclaiming support for it. To leave the statue in place, the angry letters to the editor would say, would be to condone the gay lifestyle. So too, when public school officials permit a religious event to occur at a school event on school grounds, they endorse the particular message.

C. Graduation Prayer Violates the Lemon Test

In Lemon v. Kurtzman, the Supreme Court announced what has become the dominant framework for analyzing whether the Establishment Clause has been violated. State action that advances, endorses or facilitates religion is presumptively unconstitutional unless it can satisfy three criteria:

1) The action must have a clearly secular purpose;
2) Its primary effect must be secular, neither advancing nor inhibiting specific religions or religion in general; and
3) The act must avoid excessive government entanglement with religion.

Despite some premature obituaries and Justice Scalia’s vituperative attack, the Lemon test has not been repudiated by the Supreme Court. Indeed, its continuing vitality as one of several ways of analyzing church/state issues has been reaffirmed twice by the Court in the last five years. In American County of Allegheny v. Civil Liberties Union, the Court stated that Lemon’s three-pronged analysis “has been applied regularly in the Court’s later Establishment Clause cases.” And in Lee v. Weisman, despite pressure from religious conservatives and the Bush administration, the Court decided “we do not accept the invitation of petitioners and amicus the United States to reconsider our decision in Lemon v. Kurtzman.”

The kind of graduation prayer involved in Lee v. Weisman, in which the school planned the prayer, selected the clergyman, and gave the clergyman guidelines to follow, clearly violated all three parts of the Lemon test. The

60. See Rotunda & Nowak supra note 57, at § 21.3.
61. See, e.g., Paulsen, supra note 12.
62. See, e.g., Lee v. Weisman, 112 S. Ct. At 2685 (“the interment of [Lemon] may be the one happy byproduct of the Court’s otherwise lamentable decision”).
64. 492 U.S. 573, 592 (1989).
65. 112 S. Ct. at 2655.
religionists’ argument that some kind of prayer should be on the graduation program has therefore shifted to “student-initiated” prayer. Perhaps if students decide whether to have group prayer, vote in favor of it, and select a student volunteer to lead it, the *Lemon* test will permit it.

Student-initiated prayer may solve the “excessive entanglement” problem, but it still runs afoul of the first two parts of the *Lemon* test: 1) The purpose of prayer at graduation is still religious, not secular; and 2) the primary effect is still to advance or endorse religion in general. The fact that prayer was voted on by students does not change the fact that “the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.” 66 The *Weisman* opinion held that this constituted a religious purpose and religious effect that could not withstand constitutional analysis.

**D. The Establishment Clause Erects a Wall of Separation Between Church and State**

Under the rubric of the *Lemon* test and otherwise, the Supreme Court has been consistent in its view that the central purpose of the Establishment Clause is to ensure government neutrality in matters of religion. The Constitution mandates that government remain secular rather than affiliate itself with religious beliefs or institutions. 67 The Establishment Clause prohibits both direct support for particular religious beliefs and “subtle departures from neutrality” 68 because its “first and most immediate purpose rest[s] on the belief that a union of government and religion tends to destroy government and degrade religion.” 69 The purpose of neutrality is not just to prevent government from interfering with the free exercise of religious beliefs, but to guard against the political tyranny and subversion of civil authority which might result from the establishment of one dominant religion in a land of many different faiths. 70 The purpose of the Bill of Rights was to withdraw certain subjects, including religion, from the vicissitudes of public controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. 71

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In short, the Establishment Clause was intended to erect a wall of separation between church and state. In *Everson v. Board of Education of Ewing Township*, the Supreme Court stated: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." 72 The Court has for more than one hundred years consistently held fast to the concept of separation, first announcing it in 1879 in *Reynold v. United States*, 73 and repeating it in numerous cases since then. 74

In recent cases, the wall has been threatened but has not cracked. The last eight Supreme Court religion cases have, remarkably, thirty-one different opinions. This makes generalizations about "the Court's view" of the wall-of-separation metaphor impossible. Justices Kennedy, Rehnquist and Scalia criticize the metaphor when it is used to keep religion out of government 75 but rely on it when it is used to keep government out of religion. 76 Justices Brennan, Marshall and Stevens have written opinions reaffirming the separation principle 77 and they were joined, in *Lee v. Weisman*, by Justices Blackmun and O'Connor. 78 Justice Souter's opinion in *Weisman* takes a strong separationist position but does not explicitly refer to the wall metaphor. 79 Not one of the three opinions in *Zobrest v. Catalina Foothills School District* 80 or the six opinions in *Board of Education of Kiryas Joel Village School District v. Grumet* mentions the wall at all. 81 With the addition of two avowed traditionalists, Justices Ginsberg and Breyer, there does not appear to be a majority of the current Court willing to abandon the separationist principle.

72. 330 U.S. 1, 18 (1947).
73. 98 U.S. 145, 164 (1879) (citing Jefferson's letter to the Danbury Baptist Association that the religion clauses built a wall of separation between church and state, and stating: "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment").
77. County of Allegheny v. American Civil Liberties Union, 492 U.S. at 637 (Brennan, J., concurring); id. at 651 n.7 (Stevens, J., concurring).
78. 112 S. Ct. at 2662, 2665 (Blackmun, J., concurring).
79. Id. at 2670 ("the Establishment Clause forbids support for religion in general no less than support for one religion or some."). Justice Souter expresses support for prior decisions invalidating state actions that created a "symbolic union" of church and state. Id. at 2672.
80. 113 S. Ct. 2462 (1993).
E. There Are No Loopholes in the Wall of Separation

The Supreme Court has said that the wall of separation which keeps all religious activity out of the public schools is absolute, complete, and unequivocal.\(^2\) Separation is especially important in the public schools because "adolescents are often susceptible to pressure from their peers towards conformity, and . . . the influence is strongest in matters of social convention."\(^4\) The nature of group prayer in a school setting leaves "the student [with] no real alternative which would [allow him or] her to avoid the fact or appearance of participation."\(^8\) Therefore, the Court has frequently "observed [that] there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"\(^8\) where "prayer exercises . . . carry a particular risk of indirect coercion. . . . What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."\(^8\) 8

Despite such clear and forceful language, religionists continue to argue that there are, or should be, loopholes in the wall of separation. Thus far, they have not been successful in the public school context.

1. There Is No Loophole Permitting "Student-Initiated" Prayer

Graduation prayer does not suddenly become constitutional because crowds of students demand it. School officials who let the students decide can no more wash their hands of responsibility for the result than could Pontius Pilate relieve himself of the fate of Jesus when he put the question to the crowd.\(^8\) A student-initiated prayer simply replaces official pressure to participate in a religious exercise with peer pressure to so participate.\(^9\) If the setting is the same—the official graduation ceremony—this option has been foreclosed

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83. See *Lee v. Weisman*, 112 S. Ct. at 2658 ("The concern may not be limited to the context of schools, but it is most pronounced there.").
84. Id. at 2659.
85. Id. at 2656.
86. Id. at 2658.
87. Id. (citation omitted).
88. *Matthew* 27:24 (New Revised Standard Version). It is ironic to hear the argument advanced in the name of Christianity.
89. Indeed, peer pressure may have an even greater tendency to compel conformity than pressure from teachers. If the most popular kids in school advocate prayer, it may be almost impossible for any student to resist.
by the Supreme Court. In *Lee v. Weisman* the Court stated that "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." 90

One part of the "let-the-students-decide" argument is that student-initiated prayer would be private, not state, action. This is not a new argument; religionists have urged in numerous cases that privately sponsored religious activity in public schools should be allowed as long as the school does not actively endorse it. The argument has been rejected in every federal circuit that has decided the issue.

The Seventh Circuit faced the issue directly in *Berger v. Rensselaer Central School Corp.* 91 A private group initiated and conducted the distribution of Gideon Bibles in the classrooms of a public school, while school officials stood by passively. Pat Robertson’s American Center for Law and Justice argued that this was private action beyond the reach of the Establishment Clause. The Court rejected this argument, ruling that because the event took place on school grounds, in the presence of school officials, and with the acquiescence of teachers and school administrators, it was an official school activity subject to Establishment Clause analysis.

Other circuits are in agreement. The Second Circuit has held that student-initiated prayer violates the Establishment Clause and is not protected as free exercise when it imposes on others. 92 Several circuits have ruled that privately initiated nativity scenes on government property, erected under the eyes of government officials, violate the Establishment Clause just as if they had been planned by government officials. 93 The Ninth Circuit ruled that it was unconstitutional to give students permission to conduct (or not conduct) prayers of their own choosing at school assemblies. 94 The Tenth Circuit stated that if students, parents, and the public might reasonably perceive privately initiated religious activity to bear the imprimatur of the school, the activity violates the Establishment Clause whether or not the school actually has anything to do with it. 95 The Eleventh Circuit held that invocations at high school football games organized by a private group (the county ministers association) violated the Establishment Clause because of the appearance of

90. 112 S. Ct. at 2659.
91. 982 F.2d 1160 (7th Cir. 1993).
92. Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965).
95. Roberts v. Madigan, 921 F.2d 1047, 1057 (10th Cir. 1990).
school endorsement. Only the Fifth Circuit has been inconsistent, ruling first that student-initiated prayer at official school functions violated the Establishment Clause, then ruling that it did not, and, most recently, ruling that it does.

The second part of the "let-the-students-decide" argument is the assertion that school prayer is constitutional if a majority of students vote for it. The Supreme Court has addressed the tension between majority vote and minority rights many times and has never suggested there was a loophole allowing prayer upon a majority vote by anyone. Indeed, the Court has always held to the contrary. In School District of Abington Township v. Schempp, the Court stated that "the concept of neutrality does not permit a State to require a religious exercise even with the consent of the majority. . . . [I]t has never meant that a majority could use the machinery of the State to practice its beliefs." In West Virginia State Board of Education v. Barnette, the Court stated that a person's rights to religious freedom "may not be submitted to vote; they depend on the outcome of no election." In Lee v. Weisman, the Court reiterated this point: "While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects [it]. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own graduation."

2. There Is No Loophole If School Officials Include a Disclaimer in the Program

If school officials delegate graduation prayer to students, can the school circumvent the "implied endorsement" problem by including a disclaimer on the program? The answer is unclear. In theory, private religious activity on state property is beyond the reach of the Establishment Clause as long as the government makes it clear—through disclaimers or otherwise—that the

102. 112 S. Ct. at 2660.
government does not endorse the religious message. In practice, however, the courts have rarely found disclaimers to be effective. In *American Jewish Congress v. City of Chicago*, the Seventh Circuit ruled that a privately sponsored nativity scene on public property with six disclaimers still violated the Establishment Clause. Neither did disclaimers save the constitutionality of the privately financed creche in the courthouse in *County of Allegheny v. ACLU*, or of the copies of the Ten Commandments in schools in *Stone v. Graham*.

Apparently the notion that a disclaimer in the graduation program might be effective is derived from Justice Scalia’s dissenting opinion in *Lee v. Weisman*.

Another happy aspect of the case is that it is only a jurisprudential disaster and not a practical one. Given the odd basis for the Court’s decision, invocations and benedictions will be able to be given at public-school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstinates from screaming in protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their country.

However, there are two problems with using this text as authority for a disclaimer argument: It is not clear whether Justice Scalia was being serious or sarcastic; and, in either event, his views were rejected by a majority of the Supreme Court.

Disclaimers have been used successfully in only one context: when religious symbols are included in a predominantly secular Christmas display. The idea would be difficult to extend to school prayer cases, because courts have generally ruled that disclaimers are ineffective if any public official is involved.

103. 827 F.2d 120 (7th Cir. 1987).
106. 112 S. Ct. at 2685.
in the general organization of an event, 108 and only apply if the event occurs in a public forum. 109 Public school officials—from the custodians who set up the room, to the principal and teachers who sit on stage—are almost always involved in graduation; and the typical graduation, where the number of speakers is limited, is not a public forum.

Endorsement is a question of fact, not formality. The federal courts are not as easily fooled as the religionists seem to think. High school prayer cannot magically appear on the program without school officials encouraging, facilitating, or participating in it. The school board may pass a resolution leaving the prayer issue to the students. The principal may call an assembly to let the students debate and vote on the issue. The senior class advisor may help the student council organize a vote. The school may encourage the very idea of a vote on whether to have prayer by printing, distributing, and counting the ballots. The principal, superintendent, and members of the school board may occupy the platform from which the prayer is given. In all such cases, school officials are involved and are acting with unconstitutional religious purpose. A formal disclaimer is unlikely to convince a judge that school officials really had nothing to do with it, had no control over their rascally students, and had no religious purpose in facilitating the vote. States have tried these charades before; the Supreme Court has seen through them. 110

3. There Is No Loophole for “Voluntary” Religious Exercises

If the school makes prayer “voluntary” (participation not required), does it become constitutional? Despite Justice Scalia’s claim to the contrary, 111 the Supreme Court has clearly held that it does not. In Lee v. Weisman it was stipulated that attendance at the graduation and participation in the prayer were technically voluntary. The Court held that the reality was far different: students were under tremendous social and peer pressure to conform. In other words, the question of voluntariness and coercion, to the extent that it may be relevant in Establishment Clause jurisprudence, 112 is one of fact. Announc-

111. Lee v. Weisman, 112 S. Ct. at 2685 (Scalia, J., dissenting) (as long as students are told it is voluntary, graduation prayer is permitted).
112. The claim has sometimes been made that a majority of Supreme Court Justices favor the use of a “coercion” test in lieu of the Lemon test. See, e.g., Paulsen, supra note 12, at 797. Petitioners and the Bush administration argued in their briefs in Lee v. Weisman that the Court should replace Lemon with a “coercion” test that would permit voluntary prayer in schools as long
ing that a prayer is voluntary does not make it voluntary in fact. In \textit{Weisman},
the Court has already decided that "voluntary" prayer in the high school
context is not really voluntary. This is consistent with earlier cases involving
"voluntary" religious activity in the public schools, in all of which the Court
has ruled that the challenged activity violated the Establishment Clause despite
its being putatively voluntary.\textsuperscript{113}

This reality of the coercive effect of school-sponsored prayer has also been
recognized in the circuit courts. For example, the Seventh Circuit has stated
that it is unrealistic to expect a lone dissenting student to object to religious
activity in a public school classroom.\textsuperscript{114} The Eleventh Circuit similarly re-
jected a claim that invocations at a high school athletic event were sufficiently
"voluntary" to escape Establishment Clause problems.\textsuperscript{115}

4. There Is No Loophole for Nonsectarian Prayer

The Supreme Court has never permitted prayer in the schools when it is
diluted and made nonsectarian. Indeed, the graduation prayer found constitu-
tionally offensive in \textit{Lee v. Weisman} was nonsectarian. The majority of the
Supreme Court rejected Justice Scalia’s assertion that a nonsectarian "civic"
religion exists in this country that is outside the prohibition in the Establish-
ment Clause. The Court observed: "The suggestion that the government may
establish an official or civic religion as a means of avoiding the establishment
of a religion with more specific creeds strikes us as a contradiction that
cannot be accepted."\textsuperscript{116} The Supreme Court has repeatedly held that the
nondenominational character of a prayer does not remove it from strict Estab-
lishment Clause scrutiny.\textsuperscript{117}

5. There Is No Loophole If Prayer Is a School Tradition

Whether a school system has had a long tradition of graduation prayer is
irrelevant. Many school systems had long traditions of segregation, too. The

\begin{itemize}
  \item as no student was coerced into participating. See \textit{Lee v. Weisman}, 112 S. Ct. at 2681-82 (Scalia,
        J., dissenting). However, the argument was rejected by the majority of Justices.
        that individual students could absent themselves from religious exercises is no defense); Wallace v.
        Jaffree, 472 U.S. 38 (1985) (making school religious exercises voluntary was no defense); Engel v.
        Vitale, 370 U.S. 421, 430 (1962) (the fact that prayer is voluntary is irrelevant and does not save
        school prayer from violating Establishment Clause).
  \item 114. Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir. 1993).
  \item 115. Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989).
  \item 116. 112 S. Ct. at 2657.
\end{itemize}
fact that a school has been unintentionally violating the Establishment Clause for years does not give it the right to continue to do so. The "tradition" argument was rejected by the Supreme Court in *Lee v. Weisman*. It has also fared badly in the circuit courts. In *Harris v. City of Zion*, the court declared that the inclusion of religious symbols on the city seal violated the Establishment Clause despite the fact that the seal was a historical tradition. In *Jager v. Douglas County School District*, invocations at football games were defended on the basis that they were simply a tradition going back more than fifty years. The argument was rejected out of hand.

6. There Is No Loophole Permitting Prayer for the Secular Purpose of Solemnizing an Event

The courts have consistently held that school prayer may not be justified by claims that it serves the secular purpose of solemnizing an event. In the first place, judges are unlikely to believe assertions of secular purpose. In *Wallace v. Jaffree*, the Supreme Court held that a moment of silence for meditation or prayer was clearly an endorsement of religion and served no secular purpose, despite the state’s assertions to the contrary. In *Stone v. Graham*, the school asserted that posting the Ten Commandments served the secular purpose of expressing a universal set of values the school was trying to teach. The Court was not impressed. It held that the Ten Commandments are undeniably religious, and "no recitation of secular purpose can blind us to that fact." In *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce*, the county asserted that erecting a large cross on a hill served the secular purpose of attracting tourists. The Eleventh Circuit rejected the argument.

Even if there is *some* secular purpose, religious activity may nevertheless violate the Establishment Clause. The courts have held that the government may not employ religious means to reach a secular goal unless secular means are wholly unavailing. For example, the Supreme Court held that a creche may not be used for the secular purpose of acknowledging the Christmas

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118. 927 F.2d 1401 (7th Cir. 1991).
119. 862 F.2d 824, 828 (11th Cir. 1989).
122. 698 F.2d 1098 (11th Cir. 1983).
123. American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, 698 F.2d 1098 (11th Cir. 1983).
holiday because many nonreligious symbols are available (e.g., Christmas trees, Santa Claus); but a menorah may be used to acknowledge Hanukkah because no other symbol is available. 124 With respect to graduation, there are numerous secular ways to solemnize it: the school band may play “Pomp and Circumstance,” the faculty may march in wearing academic robes, the mayor may read a proclamation honoring graduating seniors, or the school song may be sung. Because the school could accomplish its secular goal of solemnization without prayer, the inclusion of prayer would be an unnecessary endorsement of religion. 125

F. Other Arguments for Allowing Graduation Prayer Also Fail

In addition to arguing for loopholes in the wall of separation, religionists have asserted other arguments in favor of graduation prayer—free speech rights for the person who wants to give the prayer, free exercise rights for students who want to hear it, the Marsh v. Chambers exception for a legislative invocation—and have touted the lone aberrational case, Jones v. Clear Creek. None of these arguments withstands scrutiny.

1. Free Speech for Students

Religionists often argue that a student “volunteer” has a Free Speech right to present prayer at graduation. 126 There are a number of serious flaws to this argument.

If the free speech argument is invoked on behalf of the students as a group, it is problematic. Free Speech is predominantly an individual, not a collective, right. The “students” as a group cannot claim a right to free speech when some students disagree with the position of the majority. To do so is to force dissenters to advocate a position with which they disagree. This violates the free speech rights of the dissenters. The Supreme Court has addressed this issue in the context of speech by labor unions. It held in two cases that the

125. See Jager v. Douglas County Sch. Dist., 862 F.2d 824, 829-30 (11th Cir. 1989) (pre-game invocation alleged to serve secular purpose of solemnization; school district could serve that purpose with nonreligious inspirational speeches about sportsmanship and fair play, so prayer could not be used).
126. See undated “Bulletin” on high school graduation prayer distributed in February 1993, to school boards throughout the United States by American Center for Law and Justice (on file with author).
dissenters have the right to veto group expression. The Court has similarly held that a state bar association has no right to finance political or ideological causes with which some members disagree.

A free speech claim on behalf of an individual student is also problematic. The Court has not given high school students the same degree of freedom that it has given adults. In *Hazelwood School District v. Kuhlmeier*, the court upheld a school's decision to censor "inappropriate" student-written articles in a school publication. The Court stated that the school, as a forum, was different from the public park, and the students did not have broad free speech rights. The school was acting within its power to control the school newspaper, and had a duty to exercise that power in an educationally responsible manner. Similarly, in *Bethel School District No. 403 v. Fraser* the Court upheld the power of school officials to censor a lewd, sexually suggestive student speech given as part of a school assembly.

The primary reason that students have only a limited right of free speech is that a school is not a public forum. Public schools do not permit anyone to wander in at any time and start addressing students on any topic. Indeed, even when schools try to create a public forum, they rarely succeed. In *Berger v. Rensselaer Central School Corp.*, an elementary school district had a policy allowing the superintendent to permit outside groups to distribute literature during school hours. The superintendent admitted she would not permit satanists to distribute literature, and Seventh Circuit held that the school was not a public forum. The reasoning seems to extend easily to graduation, which is also not a true public forum. School officials determine who may speak and do not permit any student who wants to grab the microphone and talk about sex, drugs or other controversial topics.

Even if a high school graduation ceremony were a limited public forum in which individual students had free speech rights, religious speech would not necessarily be permitted. Some courts have held that religious speech may be regulated if it would tend to dominate other kinds of speech and turn a limited public forum into a religion program. In such cases, the Establishment Clause and the Free Speech Clause conflict. When they

131. 982 F.2d 1160 (7th Cir. 1993).
conflict, the courts have without exception given priority to the Establishment Clause on the grounds that there are other avenues for exercising free speech. 132

2. The Free Exercise Clause

The assertion is sometimes made that prohibiting prayer denies to Christian teachers, families, or students their First Amendment right to the free exercise of their religion. The argument is based on a misunderstanding of the scope of the Free Exercise Clause.

When religionists ask to be allowed to “exercise” their religion through public prayer at graduation, they are asking to engage in a religious activity. The Supreme Court has drawn a distinction between religious activity and religious belief. It has held that the Free Exercise Clause encompasses the right to believe and to be left alone to engage in whatever private religious worship one wishes. The state may not unnecessarily burden that right. However, the Court distinguishes belief from activity and gives the state power to ban public religious activity when to do so is necessary in furthering an important state interest. 133 Since the ban on school-sponsored prayer is necessary in furthering an important interest—the separation of religion and government—and does not impose a significant burden on the exercise of religion, the free exercise claim cannot succeed.

The free exercise argument fails for a second reason: mere failure to support religion does not constitute suppression of it. Religionists argue that if you’re not for them, you’re against them and thus deny that a neutral position is possible. The law, however, requires that schools strive for just such a neutral position, neither favoring nor disfavoring religion. 134 This principle of neutrality means that the school cannot permit one religious group to practice its religion in the name of the school. It also means that although the school cannot try to regulate private, nondisruptive religious activity occurring outside the regular school activities, the religionists cannot ask that the school “accommodate” religion by bringing it into the official part of the school program.

132. See Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir. 1993); Bender v. Williamsport Area Sch. Dist., 741 F.2d 538 (3d Cir. 1984).

133. The leading free exercise cases are Employment Div. v. Smith, 494 U.S. 872 (1990) (opinion written by Justice Scalia, usually one of the most vocal proponents of religion); and Wisconsin v. Yoder, 406 U.S. 205 (1972).

Even if the mere absence of graduation prayer infringes to some degree on the right of evangelical Christians to exercise their religion, it is hard to turn that into a legal argument that prayer should be allowed. Free exercise rights in a public context must be balanced against the Establishment Clause’s mandate that public school officials maintain a wall of separation between religion and school. If in order to maintain this wall school officials must tell principals, teachers, teachers’ aides, and student leaders that they may not lead prayers at graduation, that raises (at best) the question of which clause—Establishment or Free Exercise—should prevail. The courts have uniformly held that the restrictions of the Establishment Clause have priority over a free exercise demand to engage in a religious practice, especially in the school setting. Any other rule would reduce the Establishment Clause to an unenforceable exhortation. In *Lee v. Weisman*, for example, the Court stated that “[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”

3. The Exception for Prayer by Legislative Bodies

In *Marsh v. Chambers*, the Supreme Court permitted the Nebraska legislature to hire a chaplain to give opening prayers. It held that this particular instance of state-sponsored religion did not violate the Establishment Clause. Other courts have similarly permitted religious invocations at meetings of legislative bodies, such as borough councils, county boards, and town meetings.

The *Marsh* exception has not been extended beyond the legislative setting, however. Indeed, it would be particularly inappropriate to apply it to public school graduations. At legislative meetings, no member of the audience is

135. This point is conceded. It is part of the dogma of many evangelical Christians that their religion is a full-time matter, that actions such as proselytizing and praying are integral to belief, and that education is a gift from God so that a graduation ceremony must acknowledge His role. They would deny that it is possible to separate church and state, religion and education.

136. See *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir. 1993) (the prohibition against the establishment of religion is more important than the right of free exercise in the public school context); *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105 (7th Cir. 1986) (approving the prohibition against teachers gathering before school and praying; the teachers could practice their religion elsewhere, and there was a danger that their conduct would violate the Establishment Clause).

137. 112 S. Ct. at 2655.


139. See *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145 (4th Cir. 1991) (judge opening court with prayer was unconstitutional).
compelled be there, few children are present, and no one is subtly coerced into participation. Attendance is truly voluntary, and there is no sanction for refusing to participate.

In any event, the issue seems foreclosed by *Lee v. Weisman*, in which the Court ruled explicitly that *Marsh* would not be extended to the public school setting. Graduations differ from legislative sessions because of the youthfulness of the audience, the degree of control over the program exerted by the school, the societal and peer pressure to attend and conform, and the omnipresent power of school officials to punish miscreants and trouble-makers. 140

4. *Jones v. Clear Creek*: The One Aberrational Case

Among all the federal appellate Establishment Clause cases, there is only one—a Fifth Circuit case—that purports to allow prayer in the public schools at an official occasion: *Jones v. Clear Creek Independent School District*. 141 Despite all the legal precedent discussed in this Article, the *Jones* court interpreted *Lee v. Weisman* as allowing student-sponsored, nonsectarian, non-proselytizing prayer. Needless to say, this single case is heavily relied upon by religionists as the linchpin of argument that student-initiated prayer should be permitted at official graduation ceremonies.

Despite the hoopla, *Jones* cannot reasonably be considered good law. One could make the argument that *Jones* represents what the law should be: a retreat from strict separation and the beginning of a new First Amendment jurisprudence that permits religion to play a broader role in the schools. But the law is not yet there. As things currently stand, *Jones* is an aberration—an opinion that appears to be deliberately trying to circumvent the Supreme Court’s Establishment Clause cases. It contradicts language in *Lee v. Weisman* and precedent from every other circuit. Subsequent Fifth Circuit cases have ignored it in embarrassed silence. *Jones* is simply bad law.

*Jones* appears to be an attempt by a religious judge to circumvent *Lee v. Weisman*, rather than interpret and apply it. The opinion opens by sounding a pro-religion refrain, suggesting that religion in the schools is a good idea:

> [P]ublic schools [have a] responsibility to develop pupils’ character and decisionmaking skills, a responsibility more important in a society suffering from parental failure. If religion be the foundation, or at least relevant

140. 112 S. Ct. at 2660.
141. 977 F.2d 963 (5th Cir. 1992).
to these functions [developing character] and to the education of the young, as is widely believed, it follows that religious thought should not be excluded as irrelevant to public education. 142

The opinion concludes with a section entitled, "From Sea to Shining Sea, Great God Our King." 143 Along the way the judge expresses his view that we, as Americans, are "subjugat[ed] to a deity." 144 The opinion of a federal judge who believes religion is the foundation of education and that all Americans are subjugated to God, who is our King, cannot be taken seriously as a reasonable interpretation of the Establishment Clause.

Moreover, Jones distorts and misstates Lee v. Weisman, contradicts other Supreme Court religion cases, makes assertions about Establishment Clause doctrine that are either false or misleading, and confuses Establishment Clause and Free Exercise Clause cases. The opinion begins by distorting the holding in Lee v. Weisman, creating the appearance that Weisman is limited to the narrow situation in which school officials directly and extensively control the prayer:

The [Weisman] Court summarized its entire analysis of the constitutionality of the school policy at issue in Lee as follows:

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory. . . . 145

The Jones court selected this passage from the middle of the Weisman opinion, not from the beginning or end where the Court usually summarizes the issue. Indeed, when one turns to the first and last sections of Weisman, one finds a broader statement of the issue that does not suggest this narrow "direct-control" limitation:

142. Id. at 965.
143. Id. at 972.
144. Id. at 972 n.13 ("the Pledge of Allegiance, . . . of course recounts our subjugation to a deity").
145. Id. at 969-70. However, in context the Supreme Court's statement about "confining" its opinion appears to be addressed to its refusal to reconsider Lemon, not to mean that Lee is itself to be read narrowly: "These dominant facts mark and control the confines of our decision . . . . This case does not require us to revisit the difficult question [of Lemon]." Lee v. Weisman, 112 S. Ct. at 2655.
The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment. 146

* * *

The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. 147

Next, after concluding that Weisman does not apply to student-voted graduation prayer, the Jones court bypasses all other Establishment Clause cases. Instead, it "applies" Board of Education of Westside Community Schools v. Mergens, 148 citing it for the principle that Christianity cannot be unfairly excluded from schools. Mergens is an equal access case involving unofficial, extracurricular religious activities at which only a handful of students and no school officials were in attendance. It does not state an Establishment Clause principle that religion must be accommodated. As the Weisman Court pointed out, Mergens has nothing to do with an official school-wide activity, such as graduation where "the State has in every practical sense compelled attendance and participation in an explicit religious exercise." 149 The Weisman Court said that the issues raised in Mergens, "often questions of accommodation of religion, are not before us." 150

Jones then contradicts a number of specific statements in Weisman, simply ignoring them and asserting that the opposite is true.

First, Jones asserts that a majority vote by students makes a difference. The opinion states that a school "does not constitutionally endorse religion if it submits the decision . . . to the majority vote of the senior class," 151 because "a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies." 152 The Supreme Court said otherwise:

While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids

146. Lee v. Weisman, 112 S. Ct. at 2652 (first paragraph of opinion).
147. Id. at 2661 (final paragraph of opinion).
149. 112 S. Ct. at 2661.
150. Id.
151. 977 F.2d at 969.
152. Id. at 972.
the State to exact religious conformity from a student as the price of attending her own high school graduation. . . . It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high. 153

Second, Jones asserts that the nonsectarian, nonproselytizing nature of the prayer makes a difference. The opinion states that the "requirement that any invocation be nonsectarian and nonproselytizing minimizes any such advancement of religion." 154 The Supreme Court said otherwise:

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. . . . [T]he First Amendment does not . . . permit [it]. 155 That [a prayer] sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. 156

Third, Jones says that age matters. It asserts that high school students are mature enough not to be coerced: "We also consider the age of the graduating seniors relevant to the determination of whether prayers [at graduation] can coerce these young people into participating in a religious exercise. . . . [G]raduating seniors 'are less impressionable than younger students.'" 157 The Supreme Court said otherwise:

[F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer. . . . We do not address whether that choice is acceptable if the affected citizens are mature, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. 158

153. 112 S. Ct. at 2660.
154. 977 F.2d at 969.
155. 112 S. Ct. at 2656.
156. Id. at 2659.
157. 977 F.2d at 971, citing Mergens, 496 U.S. at 235-37, a free exercise plurality opinion.
158. 112 S. Ct. at 2658-59.
Fourth, Jones asserts that the school may enforce content restrictions on prayer so that the prayer will not offend anyone. The Supreme Court said otherwise:

Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. Through these means the principal [unconstitutionally] directed and controlled the content of the prayer.

The Jones opinion also contains a number of assertions that conflict with other Supreme Court Establishment Clause cases. Jones asserts that graduation prayer is permissible because it serves the secular purpose of solemnizing graduation. The Supreme Court has held to the contrary that a religious symbol may generally not be used to solemnize an event if nonreligious alternatives are available. For example, in County of Allegheny v. American Civil Liberties Union, the Supreme Court stated that the availability or "unavailability of secular alternatives is an obvious factor to be considered in deciding whether the government's use of a religious symbol amounts to an endorsement of religious faith." It ruled that a creche could not be used to commemorate the secular aspects of the Christmas season because other, nonreligious, symbols (e.g., Santa Claus, Christmas trees) were available. On the other hand, a menorah could be used to commemorate Hanukkah, because no generally recognized secular symbol existed.

Jones states that the only way prayer unconstitutionally advances religion is if it "attract[s] new believers or increas[es] the faith of the faithful." This bizarre definition of advancement bears little relation to the Supreme Court's:

Our . . . decisions . . . have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion, a concern that has long had a place in our Establishment Clause jurisprudence. Thus, [we] held unconstitutional Alabama's moment-of-silence statute because it

159. 977 F.2d at 971 (constitutionality of prayer is saved if a school "imposes two one-word restrictions, 'nonsectarian and nonproselytizing,'").
160. 112 S. Ct. at 2656. The "Guidelines" advised that the prayer should be nonsectarian and inclusive. Id. at 2652.
161. 977 F.2d at 966-67.
163. Id. at 613 n.68.
164. 977 F.2d at 967.
was "enacted . . . for the sole purpose of expressing the State's endorsement of prayer activities." The Court similarly invalidated Louisiana's "Creationism Act" because it "endorses religion" in its purpose. . .

[T]he prohibition against governmental endorsement of religion preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Moreover, the term "endorsement" is closely linked to the term "promotion," and this Court long since has held that government "may not . . . promote one religion or religious theory against another or even against the militant opposite." Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the 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." 165

*Jones* also states an unusually narrow definition of the endorsement test, suggesting that only direct action, and not passive acquiescence, can constitute endorsement: "[W]e understand government to unconstitutionally endorse religion [only] when a reasonable person would view the challenged government action as a disapproval of her contrary religious choices." 166 The Supreme Court has given a broader definition. In *Texas Monthly v. Bullock*, the Court stated:

The core notion animating the requirement that a statute . . . "neither advances nor inhibits religion" is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community. 167

Similarly, in *County of Allegheny v. American Civil Liberties Union*, 168 the court held that a Roman Catholic creche was endorsed by the county government merely by allowing it to be erected in the courthouse:

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No viewer could reasonably think that [the creche] occupies this location without the support and approval of the government. Thus, by permitting the "display of the creche in this particular physical setting," the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message. 169

*Jones* then suggests that unconstitutional state action takes place only when the government "coerces" students to pray, and that this coercion occurs only when "the government directs" a religious exercise. 170 It states that only "government-mandated prayer at graduation places a constitutionally impermissible amount of psychological pressure upon students to participate in religious exercises." The implication is that student-initiated prayer, placed on the graduation program with the acquiescence of school officials, does not qualify as state action. 171 This is a far cry from the usual understanding of the term. State action is not limited to situations involving direct, coercive government action. The Supreme Court has found state action advancing religion when the state did nothing affirmative, but merely allowed the Roman Catholic church to erect a creche in a courthouse. 172 Such acquiescence could hardly be termed "direct, coercive, government action."

Perhaps most tellingly, Judge Reavley's *Jones* opinion simply disagrees with the mildly separationist sentiments expressed by the Supreme Court in *Weisman* and other recent cases. He states that the majority of the community has the right to set its own constitutional standards:

In *Lee*, the Court forbade schools from exacting participation in a religious exercise as the price for attending what many consider to be one of life's most important events. This case requires us to consider why so many people attach importance to graduation ceremonies. If they only seek government's recognition of student achievement, diplomas suffice. If they only seek God's recognition, a privately-sponsored baccalaureate will do. But to experience the community's recognition of student achievement, they must attend the public ceremony that other interested community members also hold so dear. By attending graduation to experience and participate in the community's display of support for the graduates, people should not be surprised to find the event affected by community standards. The Constitution requires nothing different. 173

169. *Id.* at 599-600 (citation omitted).
170. *977 F.2d* at 970.
171. *Id.* at 971.
173. *977 F.2d* at 972.
To the contrary, the Constitution explicitly requires that states and school officials protect the rights of those who want religion kept out of the hands of government institutions—whether it is the school board or the student council.

The *Jones* case thus stands completely outside the Supreme Court’s Establishment Clause jurisprudence. Perhaps for that reason, it has not been accepted or followed outside the Fifth Circuit. In the most recent graduation prayer case, *Harris v. Joint School District No. 241*, the judges stated they were “not persuaded by the reasoning in *Jones*” and found it “flawed.”

*Jones* may not even be good law in its own circuit. In the spring of 1993, the Fifth Circuit decided a new religion-in-the-schools case, *Doe v. Duncanville Independent School District*. A student sued her public high school over prayer at basketball games and practices. The district court enjoined the school from permitting its employees to lead such prayers, or to “encourage, promote, or participate in prayer with or among students [at] school related events.” The Fifth Circuit upheld the order. In doing so, it recognized only “two different lines of precedent: a restrictive one of considerable parentage that prohibits prayer in the school . . . and a recently carved-out exception permitting equal access to school facilities.” This equal access exception, the court held, was limited to extracurricular student groups. The court ignored *Jones*. It neither cited it nor suggested that it created a precedent for student-initiated prayer at official school functions. Instead, the Fifth Circuit returned to traditional Establishment Clause cases and declared that a “per se rule [exists] prohibiting public-school-related . . . expression” of religion.

**F. Conclusion**

The high school graduation prayer issue seems like it should be trivial. A two-minute nonsectarian prayer is not inherently a meaningful religious exercise. Indeed, the demand for watered-down public group prayer would seem

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174. 41 F.3d 447 (9th Cir. 1994).
175. *Id.* at 454.
176. *Id.* at 457.
177. 994 F.2d 160 (5th Cir. 1993).
178. *Id.* at 164.
179. *Id.*
180. *Id.*
181. *Id.* at 165.
to contradict the basic religious tenets of the very group most stridently demanding it—the evangelical Christians. Following the Sermon on the Mount, Jesus taught:

Beware of practicing your piety before others in order to be seen by them; for then you have no reward from your Father in heaven. . . . Whenever you pray, do not be like the hypocrites; for they love to stand and pray in the synagogues and at the street corners, so that they may be seen by others. Truly I tell you, they have received their reward. But whenever you pray, go into your room and shut the door and pray to your Father who is in secret; and your Father who sees in secret will reward you. 182

Despite its religious unimportance, the graduation prayer issue has become a politically important battle in the latest round of Antidisestablishmentarianism wars. 183

The assault on traditional Establishment Clause jurisprudence continues apace. The Lemon test has been attacked. The wall of separation is under siege. The calls for a new jurisprudence of accommodation and appeasement of religious fundamentalists can be heard everywhere—even among a minority of the Supreme Court. The religionist may yet win the battle but, as of today, the wall holds. Graduation prayer is unconstitutional.

182. Matthew 6:1-6 (New Revised Standard Version). See also Catechism of the Catholic Church 2696 (1994) (“The most appropriate places for prayer are personal or family oratories, monasteries, places of pilgrimage, and above all the church, which is the proper place for liturgical prayer for the parish community”).

183. Ever since I was a child, I have promised myself I would one day use this word in a sentence.