

GRADUATION PRAYER
First Amendment Center
Interview Hotsheet

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OVERVIEW

Inconsistencies in lower court rulings around the country attest to the fact that graduation prayer is an ongoing controversial issue today. After the U.S. Supreme Court ruled in the 1992 case of [Lee v. Weisman](#) that state-sponsored graduation prayer violates the Establishment Clause of the First Amendment, the courts have been torn over whether or not student-led prayer at graduation violates the Establishment Clause. Circuit courts have been split when ruling on such cases.

The following analysis will examine the various legal tests the courts use in analyzing whether or not a religious act violates the Establishment Clause, important U.S. Supreme Court cases involving prayer in school, various cases from U.S. circuit courts proving inconsistent rulings, proposed legislation, U.S. Department of Education guidelines, proponents and opponents views on graduation prayer, current news stories, Gallup poll results and a recommendation to school districts proposed by First Amendment senior scholar, [Charles C. Haynes](#).

LEGAL TESTS FOR ANALYZING THE ESTABLISHMENT CLAUSE

The Lemon Test

Articulated in [Lemon v. Kurtzman](#), 403 U.S. 602 (1971)

In 1971, the U.S. Supreme Court developed a 3-prong test, known as the *Lemon* test, which is commonly used as a guide in helping the courts to determine if the government's involvement in religion is constitutional.

The three prongs of the *Lemon* test are:

1. The government's action must have a legitimate secular purpose;
2. The government's action must not have the primary effect of either advancing or inhibiting religion;
3. The government's action must not result in an "excessive entanglement" with religion

In the 1997 U.S. Supreme Court case of [Agostini v. Felton](#), 521 U.S. 203 (1997), the Court modified the *Lemon* test by combining the 2nd and 3rd prongs into one prong, known as the "effects" prong. The first prong became known as the "purpose" prong. If

any of the prongs is violated, the government's (public school's) action is deemed to be unconstitutional under the Establishment Clause of the First Amendment.

Endorsement Test

Articulated in [Lynch v. Donnelly](#), 465 U.S. 668 (1984)

The endorsement test essentially contains two prongs that must be examined:

1. Was the practice intended to endorse or disapprove of religion?
2. Did the practice actually convey the message that religion was being endorsed or disapproved?

In articulating what would become known as the endorsement test, Justice Sandra Day O'Connor wrote:

“The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition...[by] endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. The proper inquiry under the purpose prong of Lemon, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.”

Coercion Test

Articulated in [County of Allegheny v ACLU](#), 492 U.S. 573 (1989)

Further expanded upon in [Lee v. Weisman](#), 505 U.S. 557 (1992)

The coercion test forbids the government from coercing religious practice. Under this test, the government does not violate the Establishment Clause *unless* it:

1. provides direct aid to religion in a way that would tend to establish a state church
2. coerces people to support or participate in a religion against their will (this can include coercion by peer pressure)

LEGAL HISTORY

U.S. SUPREME COURT CASES

Note: In holding that state-sponsored graduation prayer violates the Establishment Clause of the First Amendment, [Lee v. Weisman](#) has been the only U.S. Supreme Court decision to rule directly on graduation prayer. However, there are cases of significant importance regarding school prayer in general that the U.S. Supreme Court has ruled on and these cases provide a fundamental understanding of the current state of prayer in schools.

[Engel v. Vitale](#)

370 U.S. 421 (1962)

- The Board of Regents for the state of New York composed and authorized the daily recitation of a prayer at the start of each school day in public schools throughout the state. The prayer read, “Almighty God, we acknowledge our dependence upon Thee, and beg Thy blessings upon us, our teachers, and our country.” The issue before the U.S. Supreme Court was whether the recitation of a nondenominational prayer each school day violates the Establishment Clause of the First Amendment? In a 6-1 opinion, the High Court held that by providing the prayer to public schools, the state of New York approved religion, therefore violating the Establishment Clause. In delivering the opinion of the court, Justice Hugo Black wrote that:

“...the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government....When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing official approved religion is plain.”

[Abington School District v. Schempp](#)

374 U.S. 203 (1963)

- Students who attended public schools in the state of Pennsylvania were required to read at least 10 Bible verses each morning, as well as to recite the Lord’s prayer. Students could elect not to participate in the exercises. A family of Unitarian faith challenged this law on First Amendment grounds. The Court held 8-1 that the law violated the Establishment Clause of the First Amendment. In delivering the opinion of the court, Justice Tom Clark wrote that:

“To withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.” (These requirements essentially became the *Lemon* test)

The Court noted that just because the students could elect not to participate doesn’t change the fundamental fact that the underlying law authorizing the prayer in school was unconstitutional in that it violated the Establishment Clause.

Wallace v. Jaffree

472 U.S. 38 (1985)

- In question in this case was a statute in Alabama that authorized each public school to begin its day with a moment of “silent meditation or voluntary prayer.” The U.S. Supreme Court believed that the Alabama Legislature authorized this statute in an effort to return to government endorsement of prayer in school, and the Court struck the statute down. The Court explained that a general moment of silence in the schools is constitutional, but only when the legislation endorsing such prayer is initiated with a secular purpose. The legislation, according to the Court in this case, was passed with the intention of promoting prayer in the classroom, clearly in violation of the Establishment Clause.

Lee v. Weisman

505 U.S. 557 (1992)

- A principal at a Rhode Island middle school invited a rabbi to speak at the school’s graduation ceremony. Deborah Weisman was among the graduates at the school, and her father sought a temporary restraining order to stop the rabbi from speaking at the graduation. The order was denied, and prayers were recited at the graduation. After the ceremony, Weisman sought a permanent injunction barring public school officials from inviting individuals from the community to deliver benedictions at graduations. The Court held that school-sponsored prayer at a graduation ceremony is unconstitutional because it violates the Establishment Clause. Part of the school district’s defense was that the prayer was nonsectarian in nature, but the Court rejected that notion by explaining that the Establishment Clause forbids any prayer, not just prayer geared toward a religious belief. This decision forbade public school officials from inviting individuals from the community to lead in prayer at graduation ceremonies. In delivering the opinion of the Court, Justice Anthony Kennedy wrote:

“The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitation imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”

In his majority opinion, Justice Kennedy discussed how prayer in the school setting can have a coercive effect on students to engage in religious practices. This has become known as the coercion test. Justice Kennedy stated:

“As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions in [Engel] and [Abington] recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion.”

Note: The [Blackmun Papers](#) reveal that Justice Kennedy switched his vote during the deliberations with the other justices. Justice Kennedy admitted that his draft of the original majority opinion, in which he sided with the school district, “looked quite wrong.” He then authored the published majority opinion that ruled against the school district’s policy.

[Santa Fe v. Doe](#)

530 U.S. 290 (2000)

- Every year a student elected by the Sante Fe High School student body would lead prayer over the public-address system before each home football game. The school district required the pre-game prayer to be “non-sectarian, non-proselytizing.” However, the U.S. Supreme Court found this practice to be unconstitutional and held that it was designed by officials to result in pre-game prayer, thus favoring religious expression over secular expression. The Court concluded that it is unconstitutional for students to lead prayer over the public-address systems at public schools before a football game.

U.S. CIRCUIT COURT OF APPEALS DECISIONS

Note: The conflicting views of what is and what is not constitutional under the Establishment Clause in regard to graduation prayer is evidenced in some of the following cases from the various circuit courts around the country. [Lee v. Weisman](#) made it clear that the state cannot sponsor graduation prayer by inviting someone from outside the school to lead the prayer. Since the [Weisman](#) decision, the more controversial issue has become whether students can elect to have student-led prayer at commencement ceremonies.

3rd Circuit

[ACLU of New Jersey v. Black Horse Pike Regional Board of Education](#)

84 F.3d 1471 (3rd Cir. 1996)

- The facts of this case are very similar to those of *Jones v. Clear Creek Independent School District* (see 5th Circuit). However, the ruling is different. The 3rd U.S. Circuit Court of Appeals struck down the board of education’s policy that graduating students could decide whether or not to include prayer at graduation, and if they decided to include prayer, they could decide on its content as well. The court ruled that graduation prayer violates the Establishment Clause because no matter how you look at it, graduation is still a government-sponsored event. The court explained that school officials cannot circumvent the requirements of the Establishment Clause by giving students full control over graduation prayer. The court stated that:

“Delegation of one aspect of the ceremony to a plurality of students does not constitute the absence of school officials’ control over the graduation. Students decided the question of prayer at graduation only because school officials agreed to let them decide that one question. Although the

delegation here may appear to many to be no more than a neutral means of deciding whether prayer should be included in the graduation, it does not insulate the School Board from the reach of the First Amendment.”

5th Circuit

Jones v. Clear Creek Independent School District

977 F.2d 963 (5th Cir. 1992)

The Clear Creek Independent School District in Texas had a policy that allowed for student-led invocation at graduation if the majority of the senior class voted to do so. If the senior class voted to include an invocation, the district's policy required that it be nonsectarian and nonproselytizing and conducted only by a student volunteer. The 5th Circuit Court of Appeals reasoned that school officials merely permitted the prayers if the seniors wanted to have the prayers. The court also reasoned that the district's policy in no way coerced students to participate in prayer because opposing students realized that the decision to include prayer had not been made by the school, but by the students. The court also applied the *Lemon* test, articulated by Justice Kennedy in [Lemon v. Kurtzman](#) 403 U.S. 602 (1971), and found that the school board's policy passed constitutional muster because the policy is secular, it neither advances nor inhibits religion, and there is no excessive entanglement between the government and religion.

8th Circuit

[Doe. v. School District of the City of Norfolk](#)

340 F.3d 605 (8th Cir. 2003)

- The school district had a policy of allowing a school board member who was a parent of a graduating senior to make a speech at their child's graduation ceremony. Without the prior knowledge of the school district officials, a board member making a speech recited a prayer at the ceremony. The 8th U.S. Circuit Court of Appeals held that there was no constitutional violation of the Establishment Clause because in reciting the prayer, the school board member acted as a private citizen- causing the speech to be constitutionally protected. The court emphasized the oft-cited phrase articulated by former U.S. Supreme Court Justice Sandra Day O'Connor in [Board of Education of Westside Community Schools v. Mergens](#), 496 U.S. 226 (1990):

“There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”

9th Circuit

[Cole v. Oroville Union High School](#)

228 F.3d 1092 (9th Cir. 2000)

- Two students at Oroville High School in California were selected to give the invocation and valedictorian speech at their high school graduation. The school district had a policy of reviewing the speeches beforehand. After review, the school informed the students that their speeches were too sectarian and proselytizing and they were to be modified. The students refused to modify the speeches and they challenged the school on First Amendment free speech grounds. The 9th U.S. Circuit Court of Appeals determined that the school district officials reasonably prevented the religious speech of the students in order to avoid violating the Establishment Clause. The court held that:

“[even] if the graduation ceremony was a public or limited public forum, the District’s refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was necessary to avoid violating the Establishment Clause.”

11th Circuit

[Adler v. Duval County School Board](#)

250 F.3d 1330 (11th Cir. 2001)

Note: This case originally reached the U.S. Supreme Court the same year as [Sante Fe v. Doe](#). The Court sent this case back down to be reviewed in light of its decision in [Santa Fe](#). The 11th Circuit reinstated its original decision.

- Duval County, Florida, authorized a public school policy that allowed senior students to vote on whether two-minute messages (prayers) were to be given at the beginning and end of graduation ceremonies. The policy also allowed for the students to vote on a student to deliver such messages. The purpose of this policy was to allow students to control their own graduation ceremony without the “monitoring or review by school officials.” Several students brought suit claiming that this policy violated the Establishment Clause. The 11th U.S. Circuit Court of Appeals held that the Duval County policy was constitutional because it found that the prayers are a result of a neutral process and therefore did not amount to an establishment or endorsement of religion.
 - The court applied the *Lemon* test in this case and determined that the policy had a secular “purpose” because the district’s policy had an actual purpose in permitting prayer at graduation ceremonies and the policy had the “effect” of advancing or inhibiting religion because a reasonable observer at the graduation ceremony would believe that the prayer conveys an endorsement of religion. The Court did not examine the 3rd (“entanglement”) prong of the *Lemon* test because the policy clearly failed the first two prongs.

CURRENT PROPOSED LEGISLATION

[S.J. Res. 11](#)

2007 S.J. Res. 11

- Introduced by U.S. Sen. Robert C. Byrd, D- W. Va., in March 2007 and co-sponsored by 1 Democrat and 6 Republicans, this joint resolution proposes an amendment to the United States Constitution stating:

“Nothing in this Constitution, including any amendment to this Constitution, shall be construed to prohibit voluntary prayer or require prayer in a public school, or to prohibit voluntary prayer or require prayer at a public school extracurricular activity.”

At the end of March 2007, the bill was referred to the Senate Committee on the Judiciary, where it currently sits today.

U.S. DEPARTMENT OF EDUCATION GUIDELINES

Rules and regulations issued by a government agency typically attempt to clarify confusing issues. In the case of graduation prayer, however, the guidelines provided by the Department of Education are not very clear as evidenced by the continued controversies in schools across the country. The DOE clearly states in its guidelines for graduation prayer that “school officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer.” This guideline is essentially what [Lee v. Weisman](#) provides.

However, the DOE guidelines get a little more confusing going forward. If a student speaker, or other private graduation speaker, is selected on the basis of “genuinely neutral, evenhanded criteria and [the speaker] retains primary control over the content of their expression,” then the expression is not associated with the school and the speaker is free to include religious expressions. The guidelines point out that “school officials may make appropriate, neutral disclaimers, to clarify that such speech (whether religious or nonreligious) is the speaker’s and not the school’s.”

Charles Haynes, a First Amendment scholar, explains in his article, “[Graduation Prayer a Tricky Issue, but Consider This Approach](#),” that the effect of the DOE guidelines “means creating what might be called a free-speech forum at graduation, during which time students are free to express themselves religiously or otherwise. This takes school officials out of the picture--no editing or reviewing the speech for religious or anti-religious conduct.” Haynes explains that this could be “risky business” because the forum would have to be open to all types of speech, and while the school could prohibit profanity, sexual, or defamatory speech, it would not be able to censor political or religious speech-- even though it may offend many people.

PROPONENTS' AND OPPONENTS' VIEWS OF GRADUATION PRAYER

Proponents of graduation prayer argue that student-led prayers are not state-sponsored speech but rather the exercise of free speech and religion in schools by students.

Opponents of graduation prayer argue that it is school-sponsored, thereby sending a message of the school's endorsement of religion through prayer. The conflicting views between the American Civil Liberties Union (ACLU) and the American Center for Law and Justice (ACLJ) provide a perfect portrayal of both sides of this very controversial issue.

The ACLU is an organization that prides itself on defending the constitutional rights of individuals. ACLU attorneys offer free legal advice to those who feel that their civil liberties have been violated. They have defended individuals and groups alleging that various school districts have violated the Establishment Clause by allowing prayer at graduation ceremonies ([See this document](#) for many examples of religious-freedom cases that the ACLU has undertaken; for a specific example of a graduation prayer case, see the 5th Circuit above.)

The ACLJ directly opposes the efforts of the ACLU and other similar groups. In a [statement of their position](#), the ACLJ states that:

“This Nation’s founding fathers never contemplated a society in which any public prayer was viewed as anathema under the Constitution. From the inception of our country, American Presidents have issued Thanksgiving Proclamations establishing a national day of celebration and prayer....Similarly, our Presidential inaugurations have traditionally opened and closed with prayers....The Judiciary has also historically invoked divine protection over its proceedings. All federal courts open sessions with the ‘prayer’ that ‘God save the United States and this honorable Court.’”

The ACLJ sums up its main purpose as it relates to prayer as follows:

“It is thus clear that public prayer is a vital part of our nation’s heritage and our founding fathers would undoubtedly have been shocked at the notion that the Establishment Clause of the First Amendment forbids such public prayers. The ACLJ is committed to restoring a proper understanding of the role public prayers play in the life of our nation.”

CURRENT NEWS STORIES

Note: As suggested by the split in circuit court decisions, the most recent graduation prayer controversies have dealt with student-voted and student-led prayer at graduation ceremonies. Below are a few of the most recent graduation prayer controversies.

Ouachita Parish High School (Louisiana- May 2007)

- The ACLU warned officials at Ouachita Parish High School that if they did not “keep graduation...inclusive, tolerant and welcoming to believers and nonbelievers alike,” then they would entertain any complaint regarding the constitutionality of the prayer. Despite the strong message from the ACLU, the school principal and the 237-member senior class voted unanimously to recite prayer at the commencement ceremony, and they chose two students to deliver the prayers.
 - The valedictorian of the school declared “the Lord, my God” as her most influential person in her life and ended her speech with a quote from the Bible.
 - Another senior led the graduates in a recitation of the Lord’s Prayer.
 - Both members of the audience and some graduates wore T-shirts supporting the student-led prayer.

Round Rock School District (Texas- May 2007)

- The Round Rock School District follows a statewide policy written by the Texas Association of School Boards that prohibits school officials from ordering an invocation at graduation. The policy, however, allows students to request an invocation if they want one. The guidelines state that the invocation must be “nonsectarian” and “nonproselytizing.”
 - There were mixed results among schools in the Round Rock School District. Some schools voted in favor of an invocation, while others voted against an invocation at graduation.
 - A student within the district who voted in favor of graduation prayer stated, “After Virginia Tech and Columbine, we don’t have to wait for another tragedy to invoke the name of God.”
 - A spokesman for a school where an invocation was voted down stated that, “We are a diverse community, and not having an invocation acknowledges that diversity.”

GALLUP POLLS

Since the early 1980s, support for voluntary prayer in public schools has been strongly favored by the public. In a Gallup poll conducted in August 2005, 76% of Americans polled favored a constitutional amendment that would allow voluntary prayer in schools. Only 23% of those polled oppose such an amendment. Gallup mentions that a similar poll conducted in 1983 yielded very similar results, and polls conducted over the past decade show that about three-quarters of Americans consistently support such an amendment.

Of the 76% polled who favored voluntary prayer, only 23% favor spoken prayer while 69% silent prayer, or a moment of silence. Gallup also claims that these results are similar to those expressed in a comparable poll a decade ago.

RECOMMENDATIONS

FINDING COMMON GROUND: A GUIDE TO RELIGIOUS LIBERTY IN PUBLIC SCHOOLS

Charles Haynes, in his publication *Finding Common Ground*, provides an approach that he believes provides a constitutionally accepted way for school districts to include prayer at graduation. Haynes writes:

“A far better approach to the graduation-prayer dilemma would seem to be a privately sponsored, voluntarily attended baccalaureate services held after school hours, perhaps at a local church. The school could announce the event and even allow it to be held on campus if other community groups were given similar privileges. In fact, schools are prohibited from discriminating against religious groups in the after-hours use of their facilities. Schools may not, however, sponsor such religious exercises. If school officials still see the need to accommodate religion at the graduation exercise, a neutral moment of silence might be considered.”

Haynes followed up on this approach in his article “[Graduation Prayer a Tricky Issue, but Consider This Approach](#).” He recognizes that moving prayers to baccalaureate services probably “won’t satisfy the diehards on this issue, but it’s a good way to allow for authentic religious practice at graduation time without violating anyone’s freedom of conscience.”