Graduation Prayer After *Lee v. Weisman*: A Cautionary Tale

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Loudoun County, Virginia, is a lush expanse of fields and rolling hills at the edge of the burgeoning Washington metropolis. Its growing population\(^1\) is heavily white,\(^2\) affluent,\(^3\) and Christian.\(^4\) In 1993, a year after the Supreme Court’s decision in *Lee v. Weisman*,\(^5\) the county not surprisingly became an arena for the resurgence of a familiar


\(^2\) The county’s 1990 population was 86,129. Of that number, 77,095, or 89.5%, were white. *United States Department of Commerce, Bureau of the Census, 1990 Census of Population and Housing* (1991).

\(^3\) With a per capita personal income of $26,398 in 1991, Loudoun ranked fourth among the state’s 100-plus counties and cities, behind only Alexandria, Arlington County, and the combination of Fairfax County and the cities of Fairfax and Falls Church. *VSA 1994, supra* note 1, at 414-15. The county had Virginia’s second lowest proportion of persons living below the poverty line at 3.1%. *VSA 1994, supra* note 1, at 435-36.

\(^4\) The county “has numerous Christian churches, but no known synagogues, mosques, Buddhist meditation centers, or other minority religious institutions except for a Christian Science Reading Room and a New Age Meditation Center.” *Joint Stipulation of Facts, Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993)* [hereinafter “*Gearon Joint Stipulation*”], at 8. As of 1993 all but one member of the local school board, as well as all of the high school principals, the school superintendent, and the student speakers in the case were Christian. *Id.* at 7.

majoritarian dispute: the legality and propriety of officially sponsored prayer in America's public schools.

This Article tells the story of the Loudoun County graduation prayer litigation, and tries to set the case in context. It ponders doctrinal questions from an unabashedly separationist perspective, but it offers words of caution for both sides in the debate. For while the notion of officially promoted group prayer for public school students raises Establishment Clause alarms that are as urgent today as they were a generation ago in Engel v. Vitale, the current wave of school prayer controversy also involves questions of individual free speech that are only now receiving fuller treatment in the courts and the academic literature.

The latest school prayer furor was predictable from the well-known antagonism of some, though by no means all, devout religionists to court decisions of the past generation that have restricted public school prayer in one way or another. The latest chapter of the dispute opened when the United States Supreme Court held, in Weisman, that a public school system could not constitutionally arrange for a member of the clergy to deliver a prayer at a middle school graduation ceremony in Providence, Rhode Island. Though the Court's pronouncements in Weisman were ringing and unequivocal, observers critical of the result in the case

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6. 370 U.S. 421 (1962) (striking down school requirement that students, at discretion of school officials, recite a prayer composed by the state) ("It is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government"). Id.


8. 112 S. Ct. at 2649.

9. "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, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" Weisman, 112 S. Ct. at 2655 (citations omitted). "The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position." Id. at 2657. "One timeless lesson [of the Establishment Clause] is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." Id. at 2658. "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." Id.
followed in their forbears' footsteps\textsuperscript{10} and chose to search for gaps or limitations in the decisional language that could leave room for an argument that some organized prayer was still permitted in the nation's public schools.

The \textit{Weisman} critics' search was eased and encouraged by an anomalous federal appeals court decision, \textit{Jones v. Clear Creek Independent School District},\textsuperscript{11} which addressed the particular question whether a public school graduation prayer was permissible where it resulted from school implementation of a majority vote of the graduating class.\textsuperscript{12} The Fifth Circuit had held, after \textit{Weisman} had been appealed to the Supreme Court but before certiorari was granted,\textsuperscript{13} that such a prayer did not violate the Establishment Clause. At the time the Supreme Court decided \textit{Weisman}, a petition for certiorari was pending in \textit{Jones}.\textsuperscript{14} The Court granted the petition, vacated the Fifth Circuit's decision and remanded the case "for further consideration in light of \textit{Lee v. Weismman}."\textsuperscript{15} The Fifth Circuit's opinion on remand essentially warmed over its previous holding, but cloaked it in \textit{Weisman} garb, saying that the

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\item 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. No holding by this Court suggest that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.
\item See ROBERT ALLEY, \textit{SCHOOL PRAYER: THE COURT, THE CONGRESS, AND THE FIRST AMENDMENT} 107-13 ("firestorm of protest across the nation" followed the ruling in \textit{Engel} in June 1962, followed by attempts to enact a federal constitutional amendment to override the decision). Professor Alley gives detailed accounts of the political battles that ensued after each of the Court's major school prayer decisions. See, e.g., id. at 107-26 (aftermath of \textit{Engel} and \textit{Schempp}); id. at 95-98 (fallout from \textit{Everson}); id. at 169-80 (1970s attempts at amending the religion clauses).
\item 930 F.2d 416 (5th Cir. 1991) ("\textit{Jones I}"), vacated and remanded, 112 S. Ct. 3020 (1992), on remand, 977 F.2d 983 (5th Cir. 1992) ("\textit{Jones II}"), cert. denied, 113 S. Ct. 2950 (1993).
\item 977 F.2d at 964-65. The court in \textit{Jones} was not presented with actual prayers or student votes to have prayers, but rather only with a dispute over the facial validity of a school board resolution expressly permitting students to choose by ballot whether to have prayers at graduation. \textit{Id.}
\item The petition in \textit{Jones} was filed August 20, 1991, as No. 91-310. 60 U.S.L.W. 3161 (1991).
\item 60 U.S.L.W. 3878 (June 29, 1992).
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student-led prayer passed muster under each of several available Establishment Clause tests.\textsuperscript{16} By early 1993 the American Center for Law and Justice ("ACLJ"), affiliated with the Reverend Edmund G. "Pat" Robertson's Christian Broadcasting Network and the Regent (formerly CBN) Law School,\textsuperscript{17} had drafted and circulated a "bulletin"\textsuperscript{18} to every school superintendent in the nation\textsuperscript{19} which, in the name of providing "helpful . . . information,"\textsuperscript{20} proclaimed in a shameless distortion of the caselaw that Jones \textit{II} was now controlling: "Students have the right to include an invocation and benediction in their graduation exercises."\textsuperscript{21} The bulletin explained,

In [\textit{Weisman}], the Supreme Court held only that it violates the Establishment Clause for school officials to invite clergy to give prayers at commencement . . . . Indeed, following [\textit{Weisman}], at least one [federal] appeals court has ruled that "a majority of students can do

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  \item \textsuperscript{16} See discussion infra at 1107-12.
  \item \textsuperscript{17} The ACLJ was incorporated as a Virginia not-for-profit corporation under the name of its corporate parent, the Christian Broadcasting Network. CBN's president and chief executive officer is the Rev. Edmund G. "Pat" Robertson. ACLJ chief counsel is Jay A. Sekulow, Esq., whose article on student religious speech in public schools appears elsewhere in this issue. Jay Alan Sekulow, James Henderson & John Tuskey, \textit{Proposed Guidelines for Student Religious Speech and Observance in Public Schools}, 46 \textit{Mercer L. Rev.} 1016 (1995).
  \item \textsuperscript{18} American Center for Law and Justice, untitled document dated "School Year 1992-93," on file at Mercer Law Review and with the author [hereinafter "ACLJ Bulletin"], at 2 ("The purpose of this bulletin . . ."). The document was first seen by the American Civil Liberties Union of Virginia on April 4, 1993.
  \item \textsuperscript{19} "This bulletin has been sent for educational purposes to each of the 14,658 public school superintendents in the United States." \textit{ACLJ Bulletin}, supra note 18, at 2.
  \item \textsuperscript{20} \textit{ACLJ Bulletin}, supra note 18, at 1. The ACLJ renewed its endeavor more recently with a mass-mailing letter to school superintendents dated March 21, 1994, that said it was intended "to address the questions and concerns of school officials regarding the issues of prayer at graduation ceremonies . . . ." American Center for Law and Justice, open letter to school superintendents from Jay A. Sekulow, Chief Counsel, March 21, 1994 [hereinafter "1994 ACLJ Letter"]. The letter claimed, without mention of \textit{Gearon} and with only perfunctory citation of ACLU of New Jersey v. Blackhorse Pike Regional Bd. of Educ., No. 93-5368, slip op. at 1 (3d Cir. June 25, 1993) (unpublished), that "a public school district can allow student-led, student-initiated prayer at graduation ceremonies without an Establishment Clause problem." \textit{1994 ACLJ Letter} at 4. The letter was apparently distributed before the ringing repudiation of majority-vote student prayer in Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994). Given the present state of the law, the usefulness of the ACLJ's advice is debatable.
  \item \textsuperscript{21} \textit{1994 ACLJ Letter} at 4.
what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies.\textsuperscript{22}

The bulletin also advised that “within the context of a valedictorian, salutatorian, or other address, students may initiate prayers, Christian testimonies or other religious speech,”\textsuperscript{23} and indicated that “[s]tudents, community groups and area churches are entitled to sponsor events, such as baccalaureate ceremonies . . . . Thus, avenues still exist after [Weisman] for voluntary yearly baccalaureate ceremonies [at school].”\textsuperscript{24}

On February 5, 1993, the Loudoun County school superintendent, in consultation with the local school board, distributed to principals of the county’s four public high schools a memorandum he had written, based on the ACLJ Bulletin, which purported to set out “guidelines . . . with regard to baccalaureate [services and] prayer at graduation . . . .”\textsuperscript{25}

Though the superintendent later testified that the central school administration left decisions about graduation ceremonies to “the individual schools,”\textsuperscript{26} he also stated that his own “personal position” was that “having prayer at school graduation is an appropriate vehicle for solemnization” because it “acknowledg[es] a power beyond ourselves.”\textsuperscript{27} Accordingly he devised a simple scheme parallel to the one at issue in Jones, i.e., official implementation of the results of a simple majority vote of members of the senior class on whether to have a prayer.

\textsuperscript{22} ACLJ Bulletin, supra note 18, at 2 (emphasis in original), quoting Jones II, 977 F.2d at 972.

\textsuperscript{23} Id. ACLJ Bulletin, supra note 18, at 3.

\textsuperscript{24} Id. Baccalaureate services, which typically are prayer services in advance of formal commencement exercises, present official involvement problems somewhat similar to those familiar to readers of Weisman. These ceremonies, where privately held, are less likely to pose Establishment Clause problems than are prayers offered at official graduation ceremonies. See, e.g., Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (public school had no Establishment Clause basis for refusing, and violated free speech guarantee by declining, to rent facilities to religious group for private after-school use on same terms as were available to other users). Indeed, where the facts permit no inference of official sponsorship or promotion of the event, a baccalaureate or other private prayer service is as noncontroversial absent Lamb’s Chapel as it is after that decision. Because the ACLJ Bulletin, and the local school board action at issue in Gearon, attempted first and foremost to set forth circumstances when prayers could and should be permitted at official graduation ceremonies, the discussion in this article focuses on graduation prayer itself.

\textsuperscript{25} Gearon Joint Stipulation, supra note 4, at 1-2. Prayer, delivered by a member of the clergy, was historically a staple at graduation ceremonies in Loudoun County’s schools. Id. at 3.

\textsuperscript{26} Id. at 1.

\textsuperscript{27} Deposition of Edgar B. Hatrick, III, at 15, cited in Gearon, Plaintiff’s Counter-Statement of Material Facts at 1.
at graduation. Meanwhile, also in February 1993, two members of the county school board drafted a resolution to “express support for prayer at graduation,” a statement that they “figured ... would be picked up by the media” and that “most of the community would see ...” The unusual resolution ultimately passed the full board that April, to the wide publicity its patrons had expressly intended.

 Principals at the county’s high schools proceeded to hold student assemblies for their senior classes at which the superintendent’s memorandum was read aloud and the voting arrangement presented. From there school officials proceeded to orchestrate the vote. The procedure was repeated with minor variations at each school, e.g., as to who called the meetings, or whether a teacher was the only speaker at the meeting where the plan was presented. Some might think it significant, for instance, that senior class officers at one high school asked their principal, rather than the other way around, for a meeting on the prayer issue, or that senior class officers, acting with apparent unanimity, put the matter to a class vote themselves.

 The ensuing votes at all four high schools were lopsided in support of prayer. At Loudoun County High School, the vote was 125 in favor, 46 opposed and 4 recorded as “other.” At Loudoun Valley High School, the vote was 133 in favor and 33 opposed. At Broad Run the vote was 145 to 46, and at Park View the vote was 171 to 33. After the votes, school administrators guided students as to choice of text and reviewed the proposed prayers in advance, in particular to observe the superintendent’s admonition that any prayer was to be “non-

29. Id. at 4.
30. A school board member testified that the board’s typical fare of resolutions was “national teachers’ week ... principals’ week ... vocational education week. That’s it .... In the seven years I’ve been on the board we have never passed a resolution of that nature (indicating).” Id. at 7.
31. Id. at 4.
32. Id. at 30 (Loudoun County High School); Gearon Joint Stipulation, supra note 4, at 14-15 (Broad Run High School); Id. at 22-23 (Park View High School); Id. at 38 (Loudoun Valley High School).
34. The evidence by and large was, and this Article assumes, that school officials did not directly attempt to control the outcome of the vote. However, as should be clear from the discussion which follows, control of the election results is beside the point.
35. Gearon Joint Stipulation, supra note 4, at 32.
36. Id. at 39.
37. Id. at 15.
38. Id. at 26.
sectarian and non-proselytizing"; even in one instance changing the text at the last minute following the onset of litigation. At Loudoun County High School, the county's oldest and largest, school officials handed out and collected ballots for the prayer vote, and afterwards made most if not all of the decisions about the prayer itself: who would recite it, when in the graduation ceremony it would be given, and even what it would and would not say. The Loudoun Valley High School principal testified that if he had had doubts about whether the prayer to be offered was "non-sectarian" and "non-proselytizing," he would have sent the student who posed the question to a pastor and would have "taken the pastor's word" for the answer.

As soon as plaintiffs could be found from the affected community, a preliminary injunction was sought and obtained in federal district court. The county appealed immediately to the Fourth Circuit and was granted a stay of the injunction almost without a word. Graduation ceremonies in the Loudoun County high schools then took place.

39. Gearon Joint Stipulation, supra note 4, at 36. The phrases "non-sectarian" and "non-proselytizing" were first used in Marsh v. Chambers, 463 U.S. 783, 793 n.14 (1983) (prayer at state legislative sessions), further discussed at infra note 63 and accompanying text.

The record in Gearon reflected a peculiar if predictable breakdown in the official consensus when it came to just what was "non-sectarian" and "non-proselytizing." The factual stipulations in the case tell the story:

The [county high school principals] have varying determinations as to whether certain portions of the statements delivered at the 1993 Loudoun County [public high school] graduation ceremonies were in fact non-sectarian and non-proselytizing. Mr. Starzenski [of Loudoun County High School] believes that use of the phrase "now let us bow our heads and give thanks" has relevance to prayer, and would question whether or not this would be allowed . . . . Four of his professional colleagues do not view this quote as being proselytizing or sectarian . . . . Mr. Starzenski would not question "Almighty" as non-sectarian and non-proselytizing, . . . but [the other principals] would . . . . [All] would question "Dear Heavenly Father" . . . which [a graduation speaker] used . . . . [Two officials] would question the use of "Amen" [and three] would not . . . .

Gearon Joint Stipulation, supra note 4, at 44.

40. Gearon Joint Stipulation, supra note 4, at 36 (Loudoun County High School). That school's principal also instructed the student giving the prayer to have the commencement audience stand during the recitation. Id.

41. Id. at 42.


43. Order on Motion for Stay Pending Appeal, Gearon v. Loudoun County Sch. Bd., Docket No. 93-1770 (4th Cir. June 23, 1993) (Widener, J.). ("We are of opinion the motion is well taken . . . . With the concurrence of Judge Hamilton, Judge Phillips dissenting"). Id.
with varying degrees of religiosity. The interlocutory appeal was dismissed by stipulation, and the case proceeded through discovery and summary judgment in the district court. It was submitted to Judge Bryan in late 1993 by agreement of the parties for a paper “trial” on the ultimate issues, i.e., for findings and conclusions on stipulated facts and documentary evidence without an oral hearing.

Defendants contended, in the district court’s words, that “the remarks delivered were student-initiated, student-written and student-delivered, and, therefore, lacked the pervasive government involvement condemned in [Weisman] and [Lemon]. They relied heavily on [Jones II]. They also asserted that the students’ purpose in the remarks was to ‘solemnize’ the graduation ceremonies, and that such a purpose does not run afoul of the Establishment Clause; and that the prayer at issue neither advances nor inhibits religion.” Plaintiffs’ arguments were essentially that Weisman applied; that Jones was wrongly decided; and that “student-initiated” and “student-led” prayers at Loudoun County’s graduations were no less violative of the separation command than the prayers given by clergy in Weisman. As the district court put it, the heart of the plaintiffs’ case was that “state sponsorship of a graduation ceremony cannot be insulated from government entanglement [with religion] by delegating to a majority of the members of the graduating class the decision whether prayers are to be included.”

Plaintiffs used three local expert witnesses: a school psychologist, a college professor of religion, and a Conservative Jewish rabbi. The expert testimony was to the effect that the prayers actually given at the graduation ceremonies were essentially Christian, regardless of their

44. At Loudoun County High School’s 1993 graduation, the prayer began, “Almighty, Please watch over the future of these young men and women . . . .” Gearon, 844 F. Supp. at 1101. At Park View High School, the prayer began, “Dear Heavenly Father, [w]e thank you for the blessings you have bestowed upon us which have brought us together to celebrate this wonderful occasion . . . .” Id. At Loudoun Valley High School, the ceremony’s opening message—whether it was immediately recognizable as a prayer is difficult to say—ended with, “Let us reflect in our special ways upon the memories . . . . Now let us bow our heads and give thanks to all those who have guided, supported and [led] us to the point [at] which we are today.” There followed a period of silence, after which the opening remarks concluded, “Best of luck . . . .” The closing remarks at the same school included the exhortation, “Let our faith guide us through these lessons of life . . . . May the class of 1993 be blessed with a prosperous and successful future.” Id. at 1101-02.

45. Gearon, 844 F. Supp. at 1098. “Although the matters initially giving rise to the action concerned the 1993 spring graduation, which obviously has passed, the defendants seek to follow and the plaintiffs resist following the same procedures in the future. No party suggests the controversy is moot.” Id.

46. Id.

47. Id. at 1099.
supposed “non-sectarian” cast; that for non-Christians “participation in even ‘non-denominational’ and ‘non-proselytizing’ prayer would be violative of specific [commands] of their faiths”\textsuperscript{48} that “the effect of the [prayers actually given] is to advance the religion of those who believe in a [Christian] deity at the expense of non-believers, Jews, or other non-Christians”\textsuperscript{49} that there exist religious traditions, in particular Eastern ones like Buddhism, in which “prayer” in the sense of the Loudoun County student votes is simply not possible\textsuperscript{50} and that acute peer

\textsuperscript{48} Gearon, Plaintiffs’ Proposed Findings and Conclusions on the Unconstitutionality of Graduation Prayer Per Se, at 9.

\textsuperscript{49} 844 F. Supp. at 1102. The article by Sekulow, et al., supra note 17, at 333, makes much of the failure of the opinion to include the bracketed word “Christian” here. Courts make slips like this often, and the Gearon opinion as a whole fails to support an argument that this elision betrays a motive to destroy or disrespect religious belief in the name of upholding a constitutional guarantee of religious freedom. 844 F. Supp. at 1102 (“in any event, even if defendants could persuade the court that the graduation prayer [in this case] had a clearly secular purpose and [in its effect] neither advanced nor inhibited religion, they would not prevail here. As noted above, the extent of state entanglement with religion on these facts requires the court to find an Establishment Clause violation.”). \textit{Id.}

\textsuperscript{50} See Declaration of Francisca Cho Bantly, \textit{Gearon}, 844 F. Supp. at 1102. The particulars of the declaration are instructive. An assistant professor of Buddhist studies in the Georgetown University theology department, Bantly attested that

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[i]n the United States, which is predominantly Protestant in religious culture, the call for “non-denominational” devotion taxes non-Protestant, and particularly non-Christian, faiths far more than Protestantism. Many American Protestants do not have far to go, in form or nature of devotion, to reach the “non-denominational” mode. The same cannot be said of a Muslim, a Jew, a Sikh, or even a Catholic, for whom the “non-denominational” requirement serves as a prohibition on actions or words at the heart of their religious observance (e.g., praying in a foreign tongue, or taking prescribed actions) .... For some non-western faiths, the concept of “non-denominational prayer” is an oxymoron. Thus, for example, the closest things that appear in certain non-theistic traditions, e.g., Theravāda Buddhism, are certain speech acts such as meditational recitations, mantras, and bodhisattva vows, none of which can possibly be stripped of their “Buddhist” nature. An adherent of this faith can no more give a “non-denominational prayer” having any meaning within his or her own faith, than one can invoke Buddha by making the sign of the cross .... \[A Buddhist statement of position at a world religious parliament\] objected to the fact that western or Christian speakers “define[d] all religions as religions of God .... The founder of Buddhism was not God or a god, \[but\] a human being who attained full Enlightenment through meditation .... Unlike those who believe in God who is separate from us, [Buddhists believe that salvation and enlightenment] is available to all through the removal of defilements and delusion and a life of meditation ....”. I, like many of my colleagues, .... view with concern official public forays into the religious arena .... When unschooled public officials get involved in the determination of what should or should not take place by way of religious worship at public events, the result is almost invariably exclusionary \textit{via-d-via} members of minority faiths .... [The “Dear Heavenly Father” and “Almighty” prayers given
pressure among adolescents, coupled with the universal awareness among students of the importance of high school graduation as an event in their lives, makes dissent from the majority's will difficult at best. Plaintiffs maintained that for a student who did not share the prevailing religious view that by definition was embodied in the vote to have a prayer, there were no satisfactory alternatives. “Opting out” of participation in the group prayer, i.e., by not attending the ceremony at all, was a wholly unpalatable choice. So was disrupting the proceeding in some way “so as to give witness to [the student's] objections and principles, and to avoid compelled speech,” or “standing mutely in violation of [his or her] principles and beliefs, being coerced to participate in prayer.” Plaintiffs argued further that the very importance of the occasion compounded the problem for dissenting or non-religionists, including those in the audience and those who might otherwise choose or be chosen to fill roles of leadership in the proceedings.

at Loudoun County high school graduations] reflect a theistic faith. They are thus inaccessible to a member of a non-theistic faith such as Buddhism . . . . The problem is not solved by manipulating language (e.g., dropping the words “God” or “in your name we pray . . .”), since the religious content and reference remain unchanged.

Id. 51. The district court chose to strike the school psychologist’s declaration from the record, on the ground that “[a]n expert's testimony is not needed to establish the effects of peer pressure on adolescents, or the importance, symbolically or otherwise, of the graduation ceremony.” Gearon, 844 F. Supp. at 1102. On the psychological dimensions of the problem, see generally Ted W. Harrison, Note, The Establishment Clause and Developmental Psychology: An Analysis of Public School Graduation Prayer, 4 CORNELL J.L. & PUB. POL’Y 333 (1994).

52. Gearon, Plaintiffs’ Counter-Statement of Material Facts at 28-29.

53. See Weisman, 112 S. Ct. at 2659 (“[t]he importance of the event is the point the school district . . . relies upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail.”).

54. “Undeniably it is an honor for a student to be chosen to make a presentation at graduation. Were merely ‘secular inspirational remarks’ at issue, all articulate students would be on an equal footing to volunteer or be chosen to present such remarks. But if what is at issue is prayer in one form or another, it is only students who see fit to pray, at all or in this secular context, who will be so honored . . . . This is not only grossly unfair to secular students, but unconstitutional under settled law. The government cannot ‘make[] adherence to religion relevant to a person’s standing in the . . . community.’” Gearon, Plaintiffs’ Opposition to Motion for Summary Judgment, at 17-18 (quoting Weisman, 112 S. Ct. at 2665 n.9 (Blackmun, J., concurring)).
I. WEISMAN AND JONES II

The district court's opinion in Gearon followed Weisman to the letter, faithfully adhering in particular to several points of the Supreme Court's reasoning that some commentators have overlooked. First, as the Weisman majority understood, a prayer formally offered as part of a graduation ceremony cannot simultaneously be "an essential and profound recognition of divine authority" for the majority of the graduation audience on the one hand, and on the other a de minimis intrusion on the freedom of conscience of a dissenter.55 Second, as Justice Blackmun's concurrence (for himself, Justice Stevens, and Justice O'Connor) added, while coercion of individual religious belief is sufficient to prove an Establishment Clause violation, it is not a necessary condition.56 And third, as pointed out in Justice Souter's concurrence (which Justices Stevens and O'Connor, though not Justice Blackmun, joined), a claim that the prayer at issue is non-sectarian should be of no consequence to the decision. Justice Souter investigated the legislative history of the Establishment Clause and concluded that it was intended to prohibit more than just preferential treatment of one sect over another, and indeed was created as a bar to government actions that "aid all religions."57

Measured against these principles of Jones II, decided after the Weisman Court vacated the Fifth Circuit's own previous ruling that a majority-vote prayer was permissible, is disingenuous in several respects. It claims to recognize the importance and the state sponsorship of graduation,58 and then centrally holds that a majority of students can, without violating the Constitution, manipulate this state-sponsored event to coerce their fellows into participation in their religious exercise.59 The decision turns a blind eye to the government's sponsorship of the graduation ceremony, a fact it earlier acknowledged, and instead pretends that the event is a "community" experience that "people should not be surprised [is] affected by community standards."60

55. Weisman, 112 S. Ct. at 2659 (opinion of the Court).
56. Id. at 2664 (citing Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 786 (1973)) ("proof of coercion ... [is] not a necessary element of any claim under the Establishment Clause."). Id.
57. Id. at 2667 (Souter, J., concurring) (quoting Everson v. Board of Educ. of Ewing, 330 U.S. 1, 15 (1947)).
58. Jones II, 977 F.2d at 966 ("the Resolution represents Clear Creek's judgment that society benefits if people attach importance to graduation."). Id.
59. Id. at 971.
60. Id. at 972, comparing Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (criminal laws of general application reflect "community standards" and
The nub of the Jones II distortion of Weisman is its insistence on limiting and then breaking down the Supreme Court's parameters for the constitutionality of "a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend." The Jones II opinion first reduces the Weisman principles to an inventory of separate indicia of state involvement, e.g., a state decision that an invocation should be given; a state choice of prayer giver; and a degree of state control over prayer content. This unbundling is unobjectionable in itself, but the opinion then strains to distinguish between the Weisman and Jones fact patterns along each of these axes, as follows:

first, the resolution in Jones "does not necessarily charge government with the decision of whether to include invocations"; second, the resolution precludes anyone but a student volunteer from delivering the invocations and "says nothing of government involvement in the selection"; and third, the school district exercises less control over the text than the Providence school system did in Weisman—it "does not solicit invocations . . . [it] only forbids [its] schools from accepting sectarian or proselytizing invocations;" and it uses the terms "non-sectarian" and "non-proselytizing," which, unlike the "pamphlet full of invocation suggestions" said to be at issue in Weisman, "enhance solemnization and minimize advancement of religion"—almost as though the two were mutually exclusive.

This rationale presents three immediate problems. One is the implication that "non-sectarian" and "non-proselytizing" prayer is the same as no prayer. This tendency to exacerbate the mischief of Marsh v. Chambers is lamentable and as difficult to defend as the Marsh need not yield to individual behavior preferences even where those preferences are based on religious conviction) Id. (later overridden in part by Religious Freedom Restoration Act of 1993, Pub. L. 103-141, 107 Stat. 1488 (1993) ("RFRA"), codified at 42 U.S.C. § 2000b. See S. Rep. No. 111, 103d Cong., 1st Sess. 2, reprinted in 1993 U.S. CODE CONG. & ADMIN. NEWS 1893 (RFRA was expressly designed to restore the "compelling interest" test Smith had abrogated with regard to government justifications of any substantial burdens on individual free exercise of religion).

61. Id. at 970.
62. Id. at 971.
63. 463 U.S. 783 (1983) (Establishment Clause did not prohibit hiring of state-paid chaplains by the Nebraska state legislature or the delivery of prayers by clergy at state legislative sessions). The Court in Marsh did not discuss the Lemon test or, for that matter, engage in extended analysis of any of its other precedents. Instead, the Court reasoned solely from the duration of the practice that it was to be deemed permissible. The decision has been roundly criticized, not least for its convenient suggestion that there was such a thing as "civil religion," or a civil religion, the practices of which were constitutionally permissible and to be differentiated from others, presumably vested with truer or greater religious significance, that the Establishment Clause did not permit to be observed,
decision itself has been. Moreover, Jones turned a blind eye, after Weisman as much as before, to the existence of religious traditions other than the one preferred in the prayers at issue—even though proof of the existence of other religious paths ought not to be needed to show that prayer is inconsistent with the Constitution’s mandate of religious neutrality. The Gearon plaintiffs, conscious of this difficulty in Jones, presented undisputed evidence that some religions consider prayer, as conventionally understood or practiced by Jews, Christians, and Muslims, to be incompatible with their own beliefs and practices.64

A second defect of Jones II is that it misconstrues and misapplies the Supreme Court’s religious purpose test.65 The Jones II opinion cites Lynch v. Donnelly66 for the “acknowledgement” that “solemnization is a legitimate secular purpose of ceremonial prayer,”67 and then assumes—and ascribes the assumption to the Court—that any such purpose completely excludes or neutralizes a religious purpose that may also be present, and thus satisfies the religious purpose inquiry of Lemon.

The assumption does not necessarily hold true. The state statute analyzed in Lemon satisfied the Court’s religious purpose test because the Justices found “no basis for a conclusion that the legislative intent was to advance religion,”68 and “nothing here that undermines the stated legislative intent” to advance only a secular interest.69 The

64. See Bantly Declaration, supra note 50.
65. 977 F.2d at 967.
67. 977 F.2d at 966-67 (citing Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 630 (1989)) (O’Connor, J., concurring). Certainly Allegheny County does not stand for this proposition, or claim that Lynch or Marsh stands for it. The most that Justice O’Connor’s concurring opinion in Allegheny County did was to say that her Lynch concurrence had harmonized the result in Marsh with the endorsement principle by saying the legislative prayer in Marsh “serve[s], in the only way reasonably possible in our culture, the legitimate secular purpose[] of solemnizing public occasions . . . .” Allegheny County, 492 U.S. at 630 (O’Connor, J., concurring) (citing Lynch, 465 U.S. at 693 (O’Connor, J., concurring)). Whatever we may think of this reasoning, it does not equate to the proposition pretended for it in Jones II, i.e., that the articulation of any secular purpose for state action suffices to negate or neutralize any religious purpose that may also be evident. See discussion infra. Indeed, even the Jones court was forced to acknowledge that “a law may pass Lemon’s secular-purpose test . . . yet still be stricken as an unconstitutional establishment under another test mandated by the Court.” 977 F.2d at 967.
68. 403 U.S. at 613 (emphasis added).
69. Id.
"moment of silence" statute challenged in Wallace v. Jaffree was held to have "no secular purpose" and to be "entirely motivated by a purpose to advance religion," and therefore the Jaffree Court had no occasion to gauge what level of secular purpose would suffice to withstand the religious purpose test. The Court held that "even though [state action] that is motivated in part by a religious purpose may satisfy the first criterion" of the Lemon test, such action must have a "clearly secular purpose." This reasoning simply does not equate to the broadly stated proposition of Jones II that the presence, proved or attributed, of any secular purpose for the contested state action automatically precludes further inquiry.

However, even assuming "solemnization" to be an adequate secular purpose, and assuming a court reviewing a graduation prayer for constitutionally could impute such purpose to a school board without evidence that the board had articulated such a purpose, the facts in Gearon show that a court may still be presented with a religious purpose problem. The Loudoun County School Board passed a resolution which

71. Id. at 56 (emphasis in original).
72. Id. Note the language in Jaffree that [the addition of "or voluntary prayer" to the statutory text during the amend-ment process under challenge] indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.

Id. at 60.

In Mueller v. Allen, 463 U.S. 388 (1983) (upholding state subsidy, through tax deductions, of certain expenses of education, including private and parochial schooling), the Court was bolder in saying that a secular purpose the state "could conclude" exists would be sufficient to satisfy the Lemon religious purpose test. But even Mueller did not limit the Lemon purpose prong to situations where no secular legislative purpose was discernible even in the abstract. See also Lynch, 465 U.S. at 680 ("The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations"); Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987) (invalidating state statutory mandate that "creation science" be taught in any public school where evolutionary theory was taught) ("it is required that the statement of (secular) purpose be sincere and not a sham"); North Carolina Civil Liberties Union Legal Foundation v. Constangy, 947 F.2d 1145, 1150 (4th Cir. 1991) (invalidating judge's practice of opening sessions of court with prayer) ("it is not required that the primary purpose of the action be secular," but "controlling caselaw suggests that an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the Lemon test").
expressly recognized "the deeply held religious beliefs of many of the students of Loudoun County Public Schools and those many citizens of Loudoun County," and resolved "to encourage the continuation of the traditions" of baccalaureate services and graduation prayer. The resolution, however it may have sought to enrich, ennoble, or "solemnize" local graduation ceremonies, amounted to an express preference for religious observance, and a particular one, at a state function. It would be worthy of the proverbial ostrich for a court to retreat from the school board's plain language, in a case like this, into a surmise that a secular "solemnization" purpose, alone or in the main, animated the board's vote, or that such a purpose neutralized or cancelled out whatever impermissible motive the board also had to advance or promote the inculcation of religious dogma in its students. This, it is thankfully observed, the Gearon court did not do.

A third and especially obvious intellectual deficiency of Jones is that the decision pretends that group prayer at official school functions is acceptable, under any and all Establishment Clause standards or theories, so long as it is "initiated" and "led" by students. Two flaws require mention here. First, the term "student-initiated" is a pretense, since on the facts of Jones school officials decide that there should be a vote in the first place, and since the voting process itself is suspect ab initio as a presumptive abrogation of the individual liberties of religion, expression and association of any dissenters, visible or not. Second,


74. See Jaeger v. Douglas County Sch. Dist., 862 F.2d 824, 831 (11th Cir. 1989) (prayers at public high school football games violate the Establishment Clause under an endorsement test, not merely a coercion theory, even though student clubs designated the person to give the prayer, and even though the prayer was extracurricular and "outside the classroom," because the "extracurricular activities were school[-]sponsored and so closely identified with the school program"). Id.

Even the Fifth Circuit has treated the matter differently in cases decided before Jones. See Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981) (invalidating Louisiana state statute authorizing public school teachers to ask for student volunteers to offer prayers and to recite prayers themselves if no student volunteered), and after it as well. See Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160 (5th Cir. 1993) (disallowing team prayer recitations led by high school coach before student basketball games; strictly applying test of Mergens as to whether official supervision of student-initiated prayer was merely "custodial").

75. Indeed, the degree of visibility of dissent in peer-pressure situations like this one, see Weisman, 112 S. Ct. at 2659 (effects of peer pressure on adolescents), may well be a function of the sheer effectiveness of the suppression rather than an indicium of non-coercion. See Harrison, supra note 17.

For that matter, a ruling based on proof that not a single student body member felt "coerced," assuming persuasive proof to this effect could ever be offered, would only
the term "student-led" forgets what is right under its nose, i.e., that an audience, gathered by authority of the school for a state purpose, is being asked or expected to participate in the religious exercise. This is what Weisman at its core recognizes as prohibited official coercion of private religious belief.\textsuperscript{6}

II. S\textit{PEECH AND RELIGION: THE ANTI-SEPARATIONIST CRITIQUE OF WEISMAN}

The best that can be said of the post-Weisman wave of pro-prayer criticism, including Mr. Sekulow's article elsewhere in this issue, is that it is highly alert—perhaps more alert than was the Weisman Court—to the free speech ramifications of the separation command when the context is student religious speech in the public schools. The immediate question this critique raises, however, is relevancy, i.e., whether the objections or fears are colorable given the Court's commands. In his article Mr. Sekulow makes a number of basically non-controversial proposals about public school students' personal expression, e.g., that students must not be prevented from saying prayers to themselves in the cafeteria,\textsuperscript{77} that student religious groups must not be prevented from meeting in school facilities outside the instructional day,\textsuperscript{78} that students must not be prevented from proselytizing to their fellow students absent proof of disruption actually present or fairly to be anticipated under \textit{Tinker v. Des Moines Independent Community School District},\textsuperscript{79} and that students must not be subject to teacher bias against

\textit{illuminate a problem inherent in the coercion test. It would be dangerous indeed for a court to hold that insulation from coercive effects was the only protection the state was required to extend in order to satisfy the separation command. Surely settled Establishment Clause doctrine would not permit us to suppose that government, if it wishes to make officially sponsored religious observances permissible, would need only to impose complete and permanent religious segregation on its citizens. The insuperable definitional difficulties, and the specter of societal degradation, that such a supposition presents, ought to sound their own alarms against too permissive a test for government interference in private religious affairs.}

\textsuperscript{76} 112 S. Ct. at 1261.


\textsuperscript{79} 393 U.S. 503 (1969). \textit{Tinker} is discussed in Sekulow et al., supra note 17.
their religious beliefs if they happen to express those beliefs, say, in a writing assignment or an examination answer.  

Mr. Sekulow's complaint with regard to the decision in Gearon, beyond a general dissatisfaction with judicial enforcements of Weisman, makes one fair observation: the breadth of the Gearon court's pronouncement that "permitting prayer" is to be universally forbidden. The matter calls for some discussion.

The district court adopted the plaintiffs' proposed findings of fact. The court held simply, "[A] constitutional violation inherently occurs when, in a secondary school graduation setting, a prayer is offered regardless of who makes the decision that the prayer will be given and who authorizes the actual wording of the remarks." Relying on Weisman, in which in turn rested on cases from Everson v. Board of Education of Ewing Township to Engel v. Vitale, School District of Abington Township v. Schempp, Wallace v. Jaffree, and Edwards v. Aquillard, the Gearon court felt quite comfortable saying that [t]o involuntarily subject a [public school] student at such an event [as his or her high school graduation] to a display of religion that is
The court continued into a second phase of reasoning: "Nor can the state simply delegate the decision as to a prayer component of that ceremony to the graduating class."

The notion that a person's constitutional rights may be subject to a majority vote is itself anathema. The graduating classes in Loudoun County certainly could not have voted to exclude from the ceremonies persons of a certain race. To be constructively excluded... because of one's religion or lack of religion is not a great deal different. To the extent that [Jones] permits such a delegation, this court respectfully rejects its reasoning.

The court in Gearon understood the plaintiffs to have two distinct arguments, one a *per se* claim that a formal group prayer as part of a public school graduation ceremony was coercive of individual religious belief no matter who gave the prayer, and the other that the extent of state involvement here—a matter of degree under the third prong of *Lemon*—was greater than the Establishment Clause permitted. Accordingly, as to relief, the court's order stated that the defendants "and those in privity with them are permanently enjoined from permitting prayer in high school graduations in Loudoun County, Virginia." The court specifically explained that its ruling that "permitting prayer at high school graduations... is a violation" was "predicated on the acceptance of the plaintiffs' primary argument. If only the alternative argument were accepted, obviously a more narrow injunction would be issued."

The Gearon court granted precisely the sort of relief required for the violation complained of, *i.e.*, the state's consignment of a core freedom of individual belief to the whims of a plebiscite that scarcely deserves the name. School officials indeed must not be about the business of

88. 844 F. Supp. at 1100.
89. Id. At the outset the Gearon court cited the Third Circuit's opinion in Blackhorse Pike, supra note 20, for its use of the term "delegate." The principle has since been resoundingly affirmed in Harris v. Joint Sch. Dist., 41 F.3d 477 (9th Cir. 1994).
90. 844 F. Supp. at 1100.
91. Id.
92. Id. at 1103 (order of the court).
93. Id. at 1102 (emphasis supplied).
"permitting" the students in their care to abrogate the rights of their fellows whenever in the exercise of some group mentality they see fit to do so. Where the wrong complained of is the official sanction of a religious caste system in a public school, the fact that the castes are created by majority vote of the student populace in no way justifies their existence, or excuses from constitutional liability the public officials who oversaw and implemented the scheme.

Nevertheless, the *Gearon* court's holding goes too far if it means that "permitting prayer" is unconstitutional in literally all circumstances, from affirmative advance grants of official permission for student prayer at graduation all the way to failure to stop a spontaneous prayer or other religious utterance by students if or while it occurs at the event. If it is true for all cases that "a constitutional violation inherently occurs when ... a prayer is offered," one may wonder whether the pronouncement is to mean, e.g., that if a student speaker at graduation—whose speech is entirely unreviewed and free of conditions imposed by school officials in advance—engages in a personal, though publicly displayed, religious activity or expression, the school is obliged to make an interruption in mid-sentence or terminate the display forcibly no matter what the resulting disruption and embarrassment. The question may be an idle one, for it is difficult to imagine a court decision holding school officials to such a duty under the Establishment Clause. On the other hand, the scenario points up the larger problem of what individual student speech is protected in a public school, and what is the scope of school prerogatives to control or censor that speech whether or not its content happens to be religious.

For at least some public school contexts outside the majority-vote group prayer cases, the state's Establishment Clause duty to avoid the endorsement or coercion of student religious belief should probably not be formulated quite as it was in *Gearon*. As noted, the *Gearon* "no permitting prayer" formulation could theoretically be construed to require school systems to bar a student speaker—assuming he or she is selected without regard to his or her religion and assuming his or her speech is unreviewed in advance—from saying a prayer or otherwise

94. *Id.* at 1099.

95. It is devoutly to be wished that the same courts might invalidate official censorship of this kind under the speech clause where the speech was "controversial" for reasons other than its religious bent. See, e.g., Broussard v. School Bd. of Norfolk, 801 F. Supp. 1526 (E.D. Va. 1991) (upholding school decision to suspend seventh-grader for indecency for wearing to school a rock concert souvenir T-shirt which read "Drugs Suck").

96. The nature, scope and degree of advance review of student speech by school officials is an important variable here: the equation will change upon proof, for instance, that school officials have insisted on review for content in other respects. See *Gearon* Joint
engaging in religious speech as part of the personal utterance the school has given him or her discretion to compose. Indeed, the "no permitting" language could, if strained sufficiently, make it impermissible to allow individual prayer that is not meant to lead or be shared by the group. There is little doubt even among strict separationists, and the proposition seems noncontroversial, that such suppressions would achieve nothing for the Establishment Clause and would violate free speech and free exercise in the bargain.

Some of the opinion's arguable overreaching may be traced to the plaintiffs' submissions in the rough and tumble of litigation. They put forward their cause in passages like these: "Plaintiffs respectfully, but urgently, request the court to adjudicate [the question] whether prayer can be presented at public school graduations, regardless of by whom or by whose ostensible authority . . . ;97 "the offering of prayer as part of public high school graduations violates the [F]irst [A]mendment";98 and the pertinent constitutional considerations render irrelevant: (1) the status or identity of the person by whom the prayer is given, (2) the authority pursuant to which it is ostensibly given, (3) the decision-making procedure whereby it is determined that prayer shall be given or who shall give the prayer, (4) the content of the prayer, and (5) the extent to which school authorities are actually involved in determining the content of the prayer;99 and "[s]tudent-initiated" graduation prayer is unconstitutional under Lee v. Weisman, . . . graduation prayer offered by authority of majority student vote "runs head-on into the mandate of [Weisman]," . . . and is impermissible.100 Some of the plaintiffs' suggested injunction language asked the court to bar "defendants . . . permanently from causing, permitting, or facilitating the presentation of prayer at public school graduations."101

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Stipulation, supra note 4, at 20, 28, 36, 40 (principals' statements that they reviewed speeches in advance and directed changes in content). The same would be true of proof that the school reviewed a student's proposed remarks in advance and censored his or her ideas in other respects while affirmatively approving or encouraging the prayer material; or that the school selected or caused the selection of a student as graduation speaker with an eye on the likelihood that the result would be an attempt to present a religious spectacle or lead the commencement audience in a religious observance.

98. Id. at 11.
99. Id.
100. Id. at 11-12 (citing Friedmann v. Sheldon Community Sch. Dist., No. C93-4052 (N.D. Iowa 1993)) (unpublished order).
101. Id. at 14.
The *Gearon* plaintiffs did not intend for their church-state separation advocacy to result in a restraint of otherwise protected speech, and the decision that resulted, properly construed, worked no such hardship. For the ruling in *Gearon* to work satisfactorily, it should be understood to mean, more or less, a ban on the knowing grant of official permission for group prayer as a part of the ceremonial design. This amounts to an exception, not difficult to make, for individual student speech that is truly free of the taint of official sanction or promotion. Tempered by this limitation, the core prohibition of *Gearon*—and now of the other decisions that have repudiated *Jones, American Civil Liberties Union of New Jersey v. Blackhorse Pike Regional School District*102 and *Harris v. Joint School District No. 241*103—will operate, at the least, against official permission to any public school student or students to order or direct the religious belief or practice of others at an event that is sponsored by, or in a manner implemented or approved in advance by, school officials.

Nevertheless, even under a rule thus described, there are situations where school officials’ special acknowledgment or encouragement of students’ freedom to “initiate” prayer at graduation, without more, may raise a prima facie suggestion that the encouragement is religiously motivated under the first prong of *Lemon*, or amounts to an endorsement under *Allegheny County*, an entanglement under *Lemon* or a coercion à la *Weisman*, to whatever extent any of those standards applies. An instance in point is the heavily attended press conference given by members of the governing body and the school board of Henrico County, Virginia, at the start of the graduation planning season after *Gearon* was decided, in which the officials railed en masse against the ruling and made special efforts to let the county’s public school students know they had the “right” to initiate prayers at their graduation ceremonies.104 Courts presented with such evidence should hold school systems to a burden to produce at least some proof of legitimate non-religious motivation in order to satisfy the secular purpose command of *Lemon, Stone, Jaffree*, and *Aguillard*.

102. No. 93-5368, slip op. at 1 (3d Cir. June 25, 1993) (unpublished); see also supra note 20.
103. 41 F.3d 447 (9th Cir. 1994).
104. See *Supervisors OK Henrico Prayers*, RICHMOND TIMES-DISPATCH, May 24, 1994, at A-1 (quoting county school board chairman James B. Donati, Jr., as saying, “We want to let the students know that it is their constitutional right that they can have a spontaneous prayer at any time they choose,” and attributing to him the additional comment that “spontaneous” means “however they are led”). Id.
Moreover, the student speech rationale has limits necessarily set by the Establishment Clause, and in this regard the Sekulow approach tends toward some overreaching of its own. Several examples arise from the rhetoric itself. First, the desideratum "allowing private religious speech at public schools" covers a multitude of potential sins. The speech protection available to purely private, individual religious expression and observance should be beyond question. But the phrase just quoted is so lacking in particulars for the terms "private" and "allow" that adoption of the dictum as a per se rule could lead to absurd results, e.g., a decision requiring schools to let student missionary groups take over student assemblies, without limiting school discretion to disallow "private" student speech of the kind found objectionable in *Bethel School District No. 403 v. Fraser.*

If pro-prayer critics of *Weisman* complain that school authorities "over-separate," invading the purely private sphere in the name of Establishment Clause compliance, separationists are just as concerned lest public schools overreact to talk of "allowing" group prayer at official functions and thereby violate their duty as stewards and transmitters of America's religious pluralism.

Much is made of the danger believed to flow to private religious activity from misperceptions of endorsement, i.e., mistaken public impressions that government is promoting or favoring otherwise non-governmental religious speech. The anxiety is misplaced, since the endorsement test in effect calls for a reviewing court to inspect for the reasonableness of the perception. Mistaken perceptions of government endorsement will not automatically result in decisions requiring censorship of private religious speech, since only if a court determines the perception was reasonable will it require the state to do anything to prevent or counteract the appearance. If the inference of endorsement is found to be reasonable, it will have been because of facts which

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105. See Sekulow et al., supra note 17.
106. See Wallace v. Jaffree, 472 U.S. 38 (1985) (O'Connor, J., concurring) ("[n]othing in the United States Constitution as interpreted by this Court . . . prohibits public school students from voluntarily praying at any time before, during, or after the school day"). *Id.*
107. 478 U.S. 675 (1986) (school had power, as inculcator of "civility," to discipline student for sexually suggestive speech during student government nominating assembly).
108. See, e.g., Thomas F. LaMacchia, *Reverse Accommodation of Religion,* 81 GEO. L.J. 112, 118 (1992) (giving as examples of "over-separation" in public schools a ban on traditional Muslim teacher attire, discipline of a teacher for reading the Bible during a silent reading period and then leaving it out on his desk, and discipline of a physical education teacher for explaining in class his belief that a "divine force" was behind the complexity of the human physique).
permitted the court to conclude that government had acted so as to foster the inference.\footnote{110}

With regard specifically to prayers at public school graduations, where the religionist critique of \textit{Weisman} goes wrong is that it either evades or begs the central question posed in the graduation prayer cases: the constitutionality of granting official permission to \textit{group} prayer or religious observances—student-led, student-initiated, or otherwise—at official school functions. The plaintiffs in \textit{Gearon} argued, and the court agreed, that officially-sponsored student prayer at such functions was just as corrosive of religious freedom as was the graduation prayer enjoined in \textit{Weisman}. Perhaps the fact that most securely bound \textit{Gearon} to \textit{Weisman} was that the prayer in both cases was, for the moment of its duration, \textit{the} group activity to which the ceremony was devoted. The audience was expected to participate, and not just by listening.\footnote{111} For the same reason there would have been a key constitutional difference between a monologue at graduation by an individual student, religious in its content or not, and a religious call-and-response oration by the same student in which the audience was asked to join. Even if neither speech were reviewed in advance by school officials, the latter expression would present more delicate problems than the former to the extent that the state sponsor expected \textit{group} participation\footnote{112} in the religious activity as a part of the occasion's state purpose.

At a minimum, the grant of authority for public prayer as a group activity, as part of the program at a state-sponsored gathering whose function is an expression of a common bond or purpose, is a government establishment of religion. The court in \textit{Gearon} grasped that \textit{Weisman} necessarily extended to public school graduation cases of this type even where the prayer was student-initiated or student-delivered. In holding fast to \textit{Weisman}'s principles for the majority-vote graduation prayer case, \textit{Gearon} not only preserved the individual right at stake but reinforced

\footnote{110. One interesting question is whether, under the endorsement test of \textit{Allegheny County}, a court may infer endorsement more readily where the religious practice or expression said to be endorsed is popular or favored by a political majority. It may be that a sliding scale of this sort for endorsements based on the popularity of the religious expression at issue is a workable refinement of endorsement theory, but that discussion is beyond the scope of this Article.}

\footnote{111. \textit{See Weisman}, 112 S. Ct. 2659 ("the State, in a school setting, in effect required participation in a religious exercise"). \textit{Id.}}

\footnote{112. \textit{Id.} By noting the state's expectancy of "group participation," I do not mean to suggest that in \textit{Gearon}, for instance, or even in \textit{Jones}, the school system intended for no one to be able to "opt out." But, as \textit{Weisman} explicitly held, the "opt" of non-participating by non-attendance or "let[ting one's] mind wander" is no option at all. \textit{Id.}}
the emerging consensus of the courts that a student head count is no substitute for the Constitution's guarantees.

III. CONCLUSION

Put in the bluntest terms, the tug-of-war over applying the Establishment Clause to public education continues chiefly because some people cannot accept the norms of a pluralistic American social order that is designed to preserve their freedom to practice their religion as they choose—but also designed to keep them from imposing their personal religious preferences on a larger community which may contain people of differing belief or interest. This rather radical brand of religious toleration is the great experiment of our republic, and may be what most readily distinguishes us from our sister nations in Europe or elsewhere that otherwise have similar political orders.\textsuperscript{113}

The United States Supreme Court's decisions against organized, officially sponsored prayer in public schools keep faith with this founding principle. They do not stop anyone from praying, any more than do Court decisions invalidating "moment of silence" laws.\textsuperscript{114} Prayer is a private act that the government can neither compel nor prevent. It is not prayer, but the government's involvement in prayer, that offends the Constitution.

Freedom of religion in this country means we have decided to treat questions of theology as questions of personal religious belief, not as questions of fact. To a believer in the literal truth of the existence of God, that truth may be as real and reliable as the ground beneath one's feet. But to someone who does not hold the same belief, the two "truths" are different—one a matter of faith, the other of fact. The political principle of religious freedom in a diverse community is necessarily based on the idea that even disputes over the distinction between facts and beliefs are issues of belief, not fact. The order of our democracy assumes, and the assumption is essential and salutary, that each of us shares the polity with persons who beliefs about these basic questions differ from our own.

\textsuperscript{113} See ALEXIS DE TOQUEVILLE, 1 DEMOCRACY IN AMERICA 319-20 (1831) (Vintage ed. 1945) for the famous observation that members of all the different [religious] sects ... all attributed the peaceful dominion of religion in their country mainly to the separation of church and state ... during my stay in America I did not meet a single individual, of the clergy or the laity, who was not of the same opinion on this point.

\textsuperscript{114} See Jaffree, 472 U.S. at 67 (O'Connor, J., concurring) ("[n]othing in [the] Constitution ... prohibits public school students from voluntarily praying at any time before, during, or after the schoolday"). Id.
This ideal of tolerance is the basis of the argument that governments are not to confuse religious and secular matters. It is the reason we do not preach in the schools, for there are many forms of religious belief—including the absence of such belief—and no one of us is supremely qualified to decide whose belief we should inculcate in everyone, or how. In the inevitable situations where conflict arises between public education and personal religious conviction, our Constitution commands that we learn and teach religion in the personal sphere, not impose it on one another through the nation's institutions. Public education's very purpose is to preserve and protect this tradition, both to keep order in the classrooms of today and to make the schools of tomorrow worth funding, attending, and laboring to perfect.

Above all, if we hope to live out the meaning of religious freedom as the framers of the Constitution conceived it, we must not fall into the trap of inferring hostility to our religious beliefs or interests from society's or government's failure to prefer them affirmatively over the beliefs or interests of others. A multi-religious society whose members infer disapproval of their beliefs from government neutrality in matters of belief, or who require affirmative preferences in the name of that neutrality, does not deserve to be called a tolerant, an egalitarian or a truly free society. We have all had to play in the same sandbox for two centuries of America's great religious experiment. We might as well get used to it.