SHALL WE PRAY? GRADUATION PRAYERS AND ESTABLISHMENT PARADIGMS

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I. INTRODUCTION

The United States Supreme Court's decision in Lee v. Weisman, invalidating on Establishment Clause grounds a Providence, Rhode Island, practice of having clergy present nonsectarian prayers at the graduation ceremonies for both the public middle and high schools, represents yet one more skirmish in the ongoing battle delineating the constitutional boundaries of religious references in the public forum. The debate over the propriety of public prayer has animated much of the evolving Establishment Clause jurisprudence. Indeed, much of our modern understanding of Establishment Clause principles can be traced directly to public prayer cases. Unfortunately, the cases and interpretivist paradigms cannot be easily reconciled.

On the one hand, many courts have emphatically prohibited for various reasons prayer in the public forum, especially the public schools. In Engel v. Vitale, for example, in invalidating for the first time state-directed prayer in the public school, Justice Hugo Black explained that the Establishment Clause forbids the use of the power or prestige of the state to control, support, or influence religious beliefs or practices. Again, in Abington School District v. Schempp, the Court, in proscribing daily reading from the Bible and the recitation of the Lord’s Prayer, adopted as Establishment Clause guidelines the secular purpose and effect tests later incorporated into the Lemon v. Kurtzman three-part test. In Wallace v. Jaffree, the

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5. 403 U.S. 602 (1971). Chief Justice Warren Burger announced the test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster "an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
6. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963) (stating that "[t]he test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment ex-
Court, in invalidating a moment of silence as the intended equivalency of organized school prayer, stressed the importance of avoiding even the appearance of state endorsement of religion. Each of these important Establishment Clause decisions lends support to the argument that prayer in the public forum conflicts directly with basic Establishment Clause principles, however defined.

However, the Court in *Marsh v. Chambers*, in validating prayer in the Nebraska Unicameral, ignored such doctrinal tests as secular purpose and effect or apparent endorsement of religion in favor of the authoritative effect of historical continuity. The Court reasoned that because the practice of invoking the will of God as part of the legislative process has enjoyed a long-standing tradition, a tradition dating back at least as early as the constitutional framing period, the Establishment Clause doctrine must accommodate these practices.

On separate reasoning grounds, the Court in *Board of Education v. Mergens* rejected an Establishment Clause challenge to the Equal Access Act and permitted student participation in voluntary prayer groups as a recognized extracurricular activity. In this case, the Court opined that the free speech and equal protection aspects of student-initiated, voluntary, but group oriented, prayer insulated otherwise objectionable conduct from the strictures of the Establishment Clause.

Each of these public-prayer cases has provided grist for the mill of Establishment Clause jurisprudence. However, the varied responses and explanations given evidence confusion and discord regarding the appropriate interpretation of the brief admonition: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Consequently, many Court observers expected that the Court would unveil, in *Lee*, an articulate and manageable test, formula, or interpretivist paradigm for resolving Establishment Clause issues. Unfortunately, the disparate
opinions in Lee demonstrate the lack of a consensus or even majoritarian view explanatory of Establishment Clause principles. The Court's decision in Lee, in effect, exemplifies the Court's recent micro-management of controversial Establishment Clause issues on a case-by-case basis, in place of a principled analysis.\(^\text{16}\)

The discussion of Lee in this Article will (1) identify the conflicting approaches adopted by the lower courts prompting the Court to grant certiorari, (2) provide an overview of the respective opinions constituting the five to four vote invalidating public school graduation prayers under the facts given, (3) analyze the respective opinions in terms of the Establishment Clause paradigms expressed by the various Justices, and (4) offer an alternative interpretivist model for resolving Establishment Clause cases.

II. SPLIT OF AUTHORITY

Justice Anthony Kennedy, writing for the United States Supreme Court in Lee v. Weisman,\(^\text{17}\) acknowledged the prior split of authority at the federal circuit court level concerning the constitutionality of public school graduation prayers.\(^\text{18}\) In Stein v. Plainwell Community Schools,\(^\text{19}\) the United States Court of Appeals for the Sixth Circuit previously held that Marsh v. Chambers,\(^\text{20}\) not Engle v. Vitale,\(^\text{21}\) controlled the school graduation prayer issue. The Sixth Circuit explained that graduation prayers are more analogous to judicial and legislative prayers than the day-to-day prayers banned in Engle.\(^\text{22}\) However, because the specific prayers involved in Stein invoked Christian terminology, and thereby "symbolically place[d] the government's seal of approval on one religious view — the Christian view," the Sixth Circuit struck down the challenged invocations as beyond the protection of nonsectarian ceremonial prayers previously established in Marsh.\(^\text{23}\)

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16. The most obvious example of the Court's micro-management of Establishment Clause cases appears in the creche cases. In Lynch v. Donnelly, 465 U.S. 668 (1984), the Court permitted a creche to be displayed in a public park, whereas the Court banned a creche in County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989). The distinction between the two cases has euphemistically become known as the plastic reindeer distinction. In Lynch, the creche display was part of a Christmas display including nonreligious items such as plastic reindeers, whereas the creche in Allegheny was more obviously religious because of the absence of reindeers.


19. 822 F.2d 1406 (6th Cir. 1987).


23. Id. at 1410.
Justice Kennedy noted, however, that the United States Court of Appeals for the First Circuit in *Lee* had rejected *Marsh* as inapplicable to public school prayer cases. According to the First Circuit in *Lee*, the *Lemon* test, not *Marsh*, controls graduation prayer cases and justifies permanent injunctions against such practices on the reasoning that they clearly violate the "effects" test of *Lemon*.

The split of authority, of course, runs much deeper than that acknowledged by Justice Kennedy. For example, in *Sands v. Morongo Unified School District*, the California Supreme Court held that despite the brevity of the graduation invocation, the secular nature of the ceremony, and the fact that the ceremony occurred once a year, the prayers were prohibited by the Establishment Clause because of the apparent endorsement of the religious message conveyed. In comparison, the United States Court of Appeals for the Fifth Circuit in *Jones v. Clear Creek Independent School District* and the United States District Court for the District of Utah in *Albright v. Board of Education* both held that graduation prayers were permissible on the authority of the *Marsh* ceremonial prayer precedent. To the same effect, the United States Court of Appeals for the Second Circuit, in dictum in *Brandon v. Board of Education*, stated that a brief appearance by a clergyman at graduation ceremonies did not effect such an endorsement of religion so as to violate the Establishment Clause. Because of the split of lower court authority on the proper line of reasoning applicable to school graduation cases, the Supreme Court granted certiorari in *Lee*.

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29. 930 F.2d 416 (5th Cir. 1991). In *Jones*, upon remand after *Lee*, the Fifth Circuit explained that where a high school permits seniors to choose student volunteers to deliver nonsectarian, non-proselytizing invocations at graduation ceremonies, the coercive elements present in *Lee* have been overcome, and the prayer is constitutionally permissible. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 971 (5th Cir. 1992).
31. 635 F.2d 971 (2d Cir. 1980).
III. AN OVERVIEW OF THE VARIANT OPINIONS IN LEE V. WEISMAN

The United States Supreme Court in Lee v. Weisman, by a five to four vote, held that a Providence, Rhode Island practice of directing a school-initiated and school-monitored graduation prayer violated the Establishment Clause. The petitioner, Daniel Weisman, acting for himself and his daughter Deborah, had long disputed the Providence public school practice of inviting members of various clergy to offer invocation and benediction prayers at the formal graduation ceremonies for middle and high schools. As a member of the Jewish faith offended by the nondenominational prayers, Weisman had unsuccessfully sought a temporary restraining order against a nonsectarian prayer being offered at his daughter Deborah's middle school graduation by Rabbi Leslie Gutterman. Weisman retained standing because of the likelihood of prayers being offered at Deborah's future high school graduation.

Justice Anthony Kennedy, writing for the Court, affirmed the lower courts' holdings that graduation prayers given at the public middle and high schools in Providence violated the Establishment Clause. However, rather than adopting the United States Court of Appeals for the First Circuit's reading of Lemon v. Kurtzman, that graduation prayers have the unconstitutional effect of endorsing religion, Justice Kennedy held that Providence's graduation prayer tradition violated the Establishment Clause by coercing participation in a religious practice within the public school setting. In response to the argument that the graduation prayers did not violate Establishment Clause principles because the schools had taken steps to ensure the nondenominational character of the prayers, Justice Kennedy explained that the schools' initiation and monitoring of the prayers exacerbated an Establishment Clause violation by furthering a "civic religion." Justice Kennedy further observed that prayer in the public school setting raises "heightened concerns with protecting freedom of conscience from subtle coercive pressure." He also rejected any suggestion that the fact that attendance at the graduation ceremonies is voluntary negates the coercive nature of the exercise:

35. Id. at 2653-54.
36. Id. at 2654.
37. Id. at 2655-56.
38. 403 U.S. 602 (1971).
40. Id. at 2656-57.
41. Id. at 2756-59.
"[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation."42

Justice Harry Blackmun, joined by Justices John Paul Stevens and Sandra Day O'Connor, wrote a concurring opinion invalidating the practice of graduation prayers as a violation of Establishment Clause principles mandated either by strict or qualified separationism.43 Justice David Souter, joined by Justices Stevens and O'Connor, wrote an additional concurring opinion concluding that school graduation prayers violate the Establishment Clause by unconstitutionally endorsing religion.44

In dissent, Justice Antonin Scalia, joined by Chief Justice William Rehnquist and Justices Byron White and Clarence Thomas, espoused a Marsh-premised accommodationist interpretation of the Establishment Clause.45 In support of accommodationism, Justice Scalia argued that the Court's long-standing tradition of allowing public ceremonial prayers weighs against Establishment Clause challenges to graduation prayers.46 According to Justice Scalia, Justice Kennedy's coerced participation in religious exercises argument is "ludicrous": "[w]e indeed live in a vulgar age. But surely 'our social conventions,' . . . have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence."47 Justice Scalia added, almost parenthetically, that even against the majority ruling invalidating the graduation-prayer practices followed in Providence, Rhode Island, graduation prayers in other contexts would be permissible if the school provided an adequate disclaimer that "while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so."48

Thus, the respective opinions in Lee present the spectre of a multiplicity of Establishment Clause paradigms each unsuccessfully competing for interpretivist hegemony. In invalidating the graduation prayers given in the Providence public schools by a plurality vote, but without a consensus or majoritarian explanation of the supporting rationale, the Court has perpetuated its recent practice of micro-managing Establishment Clause cases on a case-by-case basis. An
understanding of these paradigms and their limits is necessary for anyone who would enter the debate over the present meaning of the Establishment Clause or the significance of Lee.

IV. ANALYSIS OF LEE V. WEISMAN AND ESTABLISHMENT CLAUSE PARADIGMS

In deciding Lee, the Court relied on at least five different Establishment Clause paradigms: (1) strict separationism, (2) Lemon-qualified separationism, (3) accommodationism or historicism, (4) nonendorsement or neutral principlism, and (5) noncoercion. Each of these models has historical, judicial, and scholarly support, but none presently enjoy majoritarian support among the Supreme Court Justices.

A. STRICT SEPARATIONISM

At the outset of his concurring opinion, Justice Blackmun expressed obeisance to the “wall of separation between church and State” metaphor used almost canonically by strict separationists. The “wall of separation” metaphor can be traced to dictum in Reynolds v. United States. In Reynolds, the Court accepted Thomas Jefferson’s explanation, written in a letter to the Danbury Baptist Association, that the Establishment Clause erected “a wall of separation between church and State.” The Court incorporated this wall metaphor in Everson v. Board of Education as the touchstone of modern Establishment Clause jurisprudence. Justice Harry Blackmun’s adoption in Lee of the “wall of separation” historical references makes his conclusion inevitable: public school graduation prayers clearly violate the Establishment Clause because they represent a breach in the “wall of separation” in the sensitive arena of the public school.

B. LEMON-QUALIFIED SEPARATIONISM

Although the rhetoric of strict separationism has pervaded modern Establishment Clause cases since Everson, the reality of a more complex relationship has generated formulaic alternatives to strict separationism. Chief Justice Warren Burger articulated the most persistent of these formulas in Lemon. Encroachments of the wall

49. Id. at 2662 n.1 (Blackmun, J., concurring).
50. 98 U.S. 145 (1879).
52. 330 U.S. 1 (1947).
53. Lee, 112 S. Ct. at 2662 (Blackmun, J., concurring).
54. See Lemon, 403 U.S. at 612.
of separation between church and state are permissible if they sur-
vive a three-part test: "First, the statute must have a secular legisla-
tive purpose; second, its principal or primary effect must be one that
neither advances nor inhibits religion; finally the statute must not
foster 'an excessive government entanglement with religion.'"55

The Lemon test has since become the norm for Establishment
Clause analysis. Widespread dissatisfaction with the Lemon doctrine
by the current Justices, however, prompted many Court observers to
predict that the Court would abandon the Lemon test in Lee. How-
ever, Justice Anthony Kennedy, writing for the Court, specifically
deprecated either reliance upon or reconsideration of the Lemon test:
"we do not accept the invitation of petitioners and amicus the United
States to reconsider our decision in Lemon v. Kurtzman."56

In dissent, Justice Antonin Scalia observed that the fact that the
Court declined to rely on Lemon suggests that the decision in Lee
may represent a death knell for the Lemon test:

Our religion-clause jurisprudence has become bedeviled (so
to speak) by reliance on formulaic abstractions that are not
derived from, but positively conflict with, our long-accepted
constitutio nal traditions. Foremost among these has been
the so-called Lemon test which has received well-earned
criticism from many members of this Court. The Court to-
day demonstrates the irrelevance of Lemon by essentially ig-
noring it, and the interment of that case may be the one
happy byproduct of the Court's otherwise lamentable
decision.57

Justice Blackmun's concurring opinion in Lee, aware of the di-
rect assault on Lemon and therefore the indirect attack of both strict
and qualified separationism, indignantly outlined the consistency
with which the Court has followed the Lemon test, perhaps in hope
of resuscitating the embattled doctrine.58 For Justice Blackmun, a
rejection of the Lemon test cannot be squared with stare decisis prin-
ciples. Under the Lemon analysis, graduation prayers violate the Es-
tabl ishment Clause because they give the imprimatur of state support
of religion.

55. Id. at 612-13 (citations omitted).
56. Lee, 112 S. Ct. at 2655 (citation omitted).
57. Id. at 2685 (Scalia, J., dissenting) (citations omitted).
58. Id. at 2663 n.4 (Blackmun, J., concurring). Justice Blackmun observed that
since 1971 the Court has decided 31 Establishment Clause cases, and in only one in-
anse, Marsh v. Chambers, 463 U.S. 783 (1983), has the Court not rested its decision on
the "basic principles described in Lemon." Lee, 112 S. Ct. at 2663 n.4 (Blackmun, J,
concurring).
C. ACCOMMODATIONISM

In Justice Scalia’s dissenting opinion in *Lee*, in which Chief Justice William Rehnquist and Justices Byron White and Clarence Thomas joined, Justice Scalia recommended the theory of accommodation as an alternative to strict separationism in general and to the *Lemon* test in particular.59 In brief, Justice Scalia reasoned that “the Establishment Clause must be construed in light of the ‘government policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.’”60 From a traditionalist perspective, accommodationism makes sense in the context of high school graduation prayers because “[f]rom our Nation’s origin, prayer has been a prominent part of governmental ceremonies and proclamations.”61 In support of this historical justification for permitting graduation prayers to continue, Justice Scalia quoted Justice Kennedy’s previous opinion in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, wherein Justice Kennedy affirmed that “the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings,” and added that “[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.”63

In addition to this historical argument supporting accommodation of religious activities within the public forum, Justice Scalia also offered a sociological justification for accommodation of public prayer at civic ceremonial functions, including school graduations. Justice Scalia stated that the founders were well aware that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration — no, an affection — for one another than voluntarily joining together in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what

59. *Id.* at 2678-86 (Scalia, J., dissenting).
60. *Id.* at 2678 (Scalia, J., dissenting) (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 637, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)).
61. *Id.*
63. *Lee*, 112 S. Ct. at 2678 (Scalia, J., dissenting) (quoting *County of Allegheny*, 492 U.S. at 657, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)).
seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.64

Justice Scalia’s theory of accommodationism rejects the radical restructuring of American society that strict separationism would entail. Borrowing from Justice William O. Douglas’s insight expressed in his concurring opinion in Engel v. Vitale,65 “Our system at the federal and state levels is presently honeycombed” with governmental support of religion.66 To take “separationism” seriously, the state would have to eradicate every last vestige of governmental support of religion from “In God We Trust” on coinage, to the words of the Pledge of Allegiance, to ceremonial prayers opening legislative, judicial, and executive sessions, and to the discriminatory preference implied by the words of the Free Exercise Clause itself. From a strict separationist perspective, every such vestige of religion in the public forum constitutes a breach in the wall; any particular breach threatens the continued viability of the wall and represents an unconstitutional accommodation to religious forces.

Contrary to strict separationists, accommodationists see the pervasive and continuous vestiges of religion in the public realm as a Burkean justification for their continuance. The argument is that our long-standing tradition of making religion part of the warp and the woof of society’s fabric favors its continuance. Moreover, the fact that the framers participated in coincidental accommodation of religion in a myriad of ways effectively refutes any original intent argument offered by strict separationists. Thus, the tradition of military and legislative chaplaincies, repeated Thanksgiving Day proclamations, the Northwest Ordinance’s preservation of public lands for religious purposes, sectarian missionary work among the Indians, and religiously based exemptions from state obligations, including draft laws and taxes, all provide historical ammunition favoring the accommodationist model over strict separationism.

The Court’s decision in Marsh v. Chambers,67 permitting legislative prayer in the Nebraska Unicameral, and its decision in Lynch v. Donnelly,68 permitting the display of a nativity scene in a public park, express the view that the Constitution “mandates accommodation, not merely tolerance, of all religions.”69 This same accommodationist perspective explains the Court’s validation of religiously based

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64. Id. at 2682 (Scalia, J., dissenting).
exemptions from state unemployment compensation rules. For example, the Court in *Sherbert v. Verner*\(^7^0\) first acknowledged the necessity of recognizing a judicial exemption from a state's unemployment compensation rules because of the impact of a facially neutral rule on a person's free exercise rights. In *Sherbert*, a Sabbatarian lost her job when she refused for religious reasons to work on Saturdays and then was refused unemployment benefits because her refusing to work on Saturdays justified her discharge for cause.\(^7^1\) The Court justified a judicially created exemption because the disqualification could not be justified on the basis of a compelling state interest.\(^7^2\) The Court explained that the disqualification had impermissibly

force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.\(^7^3\)

The Court, adopting the same strict scrutiny test and compelling state interest analysis as used in *Sherbert*, accommodated Eddie Thomas's religious beliefs in *Thomas v. Review Board*.\(^7^4\) In *Thomas*, a Jehovah's Witness adherent refused work when his department closed and he was transferred to a division that produced tank turrets.\(^7^5\) Thomas's religious beliefs forbade his participation in the production of armaments.\(^7^6\) On the authority of *Sherbert*, the Court in *Thomas* again required an exemption from Indiana's unemployment compensation rules.\(^7^7\) The Court in *Thomas* stated the rule as follows:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.\(^7^8\)

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72. *Id.* at 408-09.
73. *Id.* at 404.
76. *Id.* at 717-18.
77. *Id.* at 719-20.
78. *Id.*
The Court also accommodated a person's religious beliefs with state unemployment policies in *Hobbie v. Unemployment Appeals Commission*. In *Hobbie*, Justice William Brennan, writing for the Court, rejected the argument that recognizing a free exercise exemption to unemployment benefit rules would constitute an establishment of religion. In response, Justice Brennan observed that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." As applied to the denial of unemployment benefits to a Seventh-day Adventist convert, the believer's free exercise rights prevented the State from classifying Paula Hobbie's refusal to work on Saturdays as "misconduct connected with [her] work."

In each of the above cases, the Court held that the petitioners' free exercise rights mandated a judicially recognized exemption from facially neutral laws. Justice Scalia, in comparison, writing for the majority in *Employment Division, Department of Human Resources v. Smith*, suggested that judicially recognized exemptions have been limited to the unemployment compensation cases. Consequently, he refused to grant the Indian petitioner an exemption from Oregon's drug laws making the consumption of peyote a crime. Under those circumstances, Justice Scalia wrote disparagingly regarding judicially imposed exemptions from general laws on free exercise grounds alone. He acknowledged, however, a different result where free exercise claims are coupled with free speech or family rights. Additionally, he noted that religious-practice exemptions legislatively enacted are a permissible accommodation to free exercise claims. The constitutionality of such legislative exemptions enacted for accommodationist reasons has been previously validated.

Justice White, for example, writing for the Court in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, upheld a legislative exemption for religious entities from Title VII's anti-discrimination provisions despite the arguably nonreligious nature of the activity involved. Directly at issue in *Presiding Bishop* was whether a legislative exemption enacted for the very purpose of accommodating religion necessarily violated the secular pur-
pose and effect tests of Lemon. In *Presiding Bishop*, the Court held that "[u]nder the Lemon analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Again, the Court explained that purposeful accommodation of religion, by itself, is not enough: "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence.

Although the cases discussed previously are supportive of the accommodationist perspective, the trend has not been without opposition. For example, Justice Brennan's opinion, joined by Justices Thurgood Marshall and John Paul Stevens, in *Texas Monthly, Inc. v. Bullock*, substantially undermines, without totally repudiating, the accommodationist theory's justification of legislative exemptions aimed exclusively at religion. Essentially, Justice Brennan held that a legislative exemption, though prompted by an accommodationist purpose, cannot amount to an endorsement of one or another set of religious beliefs or of religion generally. Because the Texas Legislature had singled out religious literature for a tax exemption, presumably to accommodate the free exercise rights of the readers of religious literature, the exemption constituted an impermissible endorsement.

Dissenting in *Texas Monthly*, Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, attempted to salvage the accom-
modationist perspective from the "demolition project" undertaken by
the majority.\textsuperscript{95} The dissenting Justices insisted that one might "sim-
ply describe the protection of free exercise concerns, and the mainte-
nance of the necessary neutrality, as 'secular purpose and effect,'
since they are a purpose and effect approved, and to some degree
mandated by the Constitution."\textsuperscript{96} Indeed, Justice Scalia character-
ized Justice Brennan's opinion as premised on the
bold but unsupportable assertion (given such realities as the
text of the Declaration of Independence, the national
Thanksgiving Day proclaimed by every President since Lin-
coln, the inscriptions on our coins, the words of our Pledge
of Allegiance, the invocation with which sessions of our
Court are opened and, come to think of it, the discriminatory
protection of freedom of religion in the Constitution) that
government may not "convey a message of endorsement of
religion.\textsuperscript{97}

The accommodationist theory advanced by Justice Scalia in his
dissent in \emph{Lee} has received both scholarly and judicial support. For
example, University of Chicago Law Professor Michael W. McCon-
nell characterized accomodationism as consistent with both the fram-
ers' intent and liberal political theory:

Liberal political theory thus favored religion, but it did not
favor any one religion. It guaranteed religious freedom in
the hope and expectation that religious observance would
flourish, and with it morality and self-restraint among the
people. But it feared monopoly in religion, especially at the
national level.\textsuperscript{98}

Although some form of accommodationism has received schol-
arly as well as judicial support, the underlying rationale varies sig-
ificantly among the proponents. Accommodationism can be analyzed
on at least three separate bases: (1) religious beliefs and practices
fulfill important sociological functions in pluralistic America (Mc-
Connell's justification), (2) American institutions and traditions have
been replete with examples of church and state interaction which
justifies their continuance (historical justification), or (3) the core
values of respect for individuality and autonomy demand that the

\textsuperscript{95} Id. at 29 (Scalia, J., dissenting).
\textsuperscript{96} Id. at 40 (Scalia, J., dissenting).
\textsuperscript{97} Id. at 30-31 (Scalia, J., dissenting).
\textsuperscript{98} Michael W. McConnell, \textit{Accommodation of Religion}, 1985 \textit{SUP. CT. REV.} 1, 19-
20. Georgetown University Law Professor Mark Tushnet has repudiated McConnell's
accommodationist explanation of Republican virtue arising out of religious beliefs as
empirically unproven since secularists can be virtuous in a republican sense without
religion. See Mark Tushnet, \textit{The Emerging Principle of Accommodation of Religion
(Dubitante)}, 76 \textit{GEO. L.J.} 1691 (1988).
state accommodate certain public aspects of private religion (entitlement view). Adding to the confusion, accommodationists often fail to articulate the specific justification for the accommodation view they would advance. Moreover, accommodationist theory faces serious challenge from yet another nonseparationist theory, neutrality or nonendorsement, which at times appears accommodationist and at other times appears separationist.

D. THE NEUTRALITY OR NONENDORSEMENT TEST

Although Justice David Souter agreed with Justice Kennedy that the presence of religious coercion is sufficient to constitute an Establishment Clause infringement, he wrote a concurring opinion in Lee, joined by Justices Stevens and Sandra Day O'Connor, stressing a broader neutrality or nonendorsement justification for prohibiting school graduation prayers. Justice Souter explained that “over the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement.” According to Justice Souter, “While the Establishment Clause’s concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the state may not favor or endorse either religion generally over nonreligion or one religion over others.” Justice Souter quickly added that the neutrality principle “does not foreclose it from ever taking religion into account. The State may ‘accommodate’ the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings.”

Justice Souter’s adoption of the neutrality or nonendorsement interpretivist view of the Establishment Clause follows a long line of neutralist writings and precedent. University of Chicago Law Professor Philip Kurland first argued that the Establishment Clause requires a neutral approach to the issue of religion in the public forum. In brief, if a statute or state policy is facially neutral, it is constitutional even though the effect is to either burden or benefit religion. Professor Donald Beschle of the John Marshall Law School, who adopts this approach, would go beyond the text or expressed policy to see whether a message of approval or disapproval is

100. Id. at 2671 (Souter, J., concurring).
101. Id. at 2676 (Souter, J., concurring).
102. Id.
104. Id. at 96.
being conveyed.\textsuperscript{105} He explained that "[w]hen neutrality among and legal equality of value systems becomes the goal of the inquiry, we can abandon the foundation of separationism, that all contact between church and state is suspect and to be only reluctantly tolerated when absolutely unavoidable."\textsuperscript{106}

The neutrality paradigm asks simply whether the policy constitutes an endorsement of religion. Justice O'Connor has been the most consistent advocate for substituting a neutralist paradigm as an alternative to the \textit{Lemon} test.\textsuperscript{107} The modification would focus on the perception of endorsement rather than the purpose, effect, and entanglement tests characteristic of a \textit{Lemon} analysis. Justice O'Connor first observed the inherent tension between the \textit{Lemon} test and the persistent effort of states to accommodate the free exercise of religion in another school-prayer case, \textit{Wallace v. Jaffree}.\textsuperscript{108} In \textit{Wallace}, Justice O'Connor stated:

On the one hand, a rigid application of the \textit{Lemon} test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an "accommodation" of free exercise rights.\textsuperscript{109}

In response to the conflict, Justice O'Connor has repeatedly proposed an alternative endorsement test. For Justice O'Connor, "The relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute."\textsuperscript{110} Thus, the neutralist or nonendorsement inquiry should be "whether government’s purpose is to endorse religion and whether the statute actually conveys a message of endorsement."\textsuperscript{111}

\textsuperscript{106} \textit{Id.} at 175-76.
\textsuperscript{107} See \textit{Wallace v. Jaffree}, 472 U.S. 38, 70, 73-74 (1985) (O'Connor, J., concurring) (identifying the key issue as to whether the government was "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred"). Justice O'Connor, in \textit{Board of Educ. v. Mergens}, 492 U.S. 226 (1990), opined that the Equal Access Act conveyed a message of "neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others it would demonstrate not neutrality but hostility toward religion." \textit{Id.} at 247.
\textsuperscript{109} \textit{Wallace}, 472 U.S. at 82.
\textsuperscript{110} \textit{Presiding Bishop}, 483 U.S. at 348 (citing \textit{Wallace}, 472 U.S. at 76).
\textsuperscript{111} \textit{Wallace}, 472 U.S. at 69; see \textit{Presiding Bishop}, 483 U.S. at 348 (O'Connor, J., concurring); \textit{Lynch}, 465 U.S. at 693-94 (O'Connor, J., concurring).
Justice O'Connor, in her concurring opinion in
Lynch, noted that the endorsement issue “is not a question of simple historical fact” but in-
stead is “a legal question to be answered on the basis of judicial inter-
pretation of social facts.”112

In Texas Monthly, the Court invalidated on Establishment
Clause grounds a legislative exemption for sales tax aimed exclu-
sively at religious periodicals.113 Justice O'Connor joined Justice
Blackmun's concurring opinion in which he stated that Justice Bren-
nan's majority opinion would subordinate free exercise to establish-
ment values even at the expense of long-standing precedent, and
Justice Scalia's accommodationist opinion would subordinate estab-
ishment values to free exercise claims.114 As a compromise theory,
Justice Blackmun stated that the Texas exemption offended the Es-
tablishment Clause because it preferred the dissemination of reli-
gious ideas.115 If, alternatively, the exemption applied to atheistic
literature as well, Justice Blackmun stated that it may well have sur-
vived Establishment Clause scrutiny.116

Again, in County of Allegheny, the Court relied on Justice
O'Connor's "endorsement" test as the basis of the decision:

Of course, the word "endorsement" is not self-defining.
Rather it derives meaning from the other words that this
Court has found useful over the years in interpreting the Es-
tablishment Clause. Thus, it has been noted that the prohi-
bition against governmental endorsement of religion
"preclude[s] government from conveying or attempting to
convey a message that religion or a particular religious belief
is favored or preferred."

Whether the key word is "endorsement," "favoritism,"
or "promotion," the essential principle remains the same.
The Establishment Clause, at the very least, prohibits gov-
ernment from appearing to take a position on questions of
religious belief or from "making adherence to a religion rele-
vant in any way to a person's standing in the political
community."117

Justice Scalia, in his dissenting opinion in Texas Monthly, repudi-
ated Justice O'Connor's "bold but unsupported assertion . . .
that government may not 'convey a message of endorsement of reli-

113. Texas Monthly, 489 U.S. at 5 (Blackmun, J., concurring).
114. Id. at 26-29 (Blackmun, J., concurring).
115. Id. at 27 (Blackmun, J., concurring).
116. Id. at 28-29 (Blackmun, J., concurring).
117. County of Allegheny, 492 U.S. at 593-94 (quoting Lynch, 465 U.S. at 687)
(O'Connor, J., concurring)).
Indeed, he pointed out that the majority opinions are aimed at "a revolution in our Establishment Clause jurisprudence" which otherwise would be supportive of the "accommodation of religion" rationale. Justice Souter's concession to the accommodationists that nonendorsement does not preclude Free Exercise Clause exemptions from neutral legislation is apparently responsive to this criticism of abstract nonendorsement theory taken to its logical extreme.

E. NONCOERCION

Justice Kennedy, in his dissent in County of Allegheny, found the Lemon test unusable and recommended some form of accommodationism based on historical experience. However, writing for the Court in Lee, Justice Kennedy rejected the accommodationist views of Justice Scalia's dissent in favor of a newly minted coercion test. Justice Kennedy stated that the Providence, Rhode Island, graduation prayer practices violated Establishment Clause principles by both endorsing religion and coercing participation in a civic religious exercise. The endorsement of religion came as a result of the school's participation in (1) deciding that an invocation and benediction be given; (2) choosing the religious participant, here a rabbi; and (3) giving the rabbi directions and guidelines that the prayer should be nonsectarian. Based on these active steps to promote graduation prayers, "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."

Furthermore, the graduation prayer experience entailed "subtle coercive pressure" to participate or give the appearance of participating in state-directed prayer. Justice Kennedy explained that "[t]he undeniable fact is that the school district's supervision and control of the high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction." Thus, even though attendance at the ceremony as well as participation in the prayer were voluntary, the school's choice to have the prayers constituted illegitimate "social pressure to enforce

118. Texas Monthly, 489 U.S. at 29 (Scalia, J., dissenting).
119. Id. at 38 (Scalia, J, dissenting).
120. Lee, 112 S. Ct. at 2657-59.
121. Id. at 2657.
122. Id.
123. Id. at 2658.
124. Id.
orthodoxy." Coercion, in this sense, arises from peer pressure inviting conformity in a religious exercise.

Justice Kennedy in *Lee* thus adopted an alternative establishment paradigm, premised on coercion, thereby frustrating any effort to achieve a majoritarian theory of establishment principles premised on accommodationism.

V. CRITIQUE OF ESTABLISHMENT PARADIGMS RELIED UPON IN *LEE V. WEISMAN*: FREE EXERCISE RECONCILIATIONISM AS AN ALTERNATIVE

The United States Supreme Court in *Lee v. Weisman* resolved very little, conceptually, regarding Establishment Clause jurisprudence. The Court, of course, decided the case on the facts presented, but nothing more. None of the Establishment Clause views presented are compelling; indeed, a majority could not agree on any single perspective. The weaknesses of the Establishment Clause perspectives presented demand further investigation into meaningful alternatives.

Strict separationism, despite the advantage of offering clean and precise lines, contradicts our cultural roots and privatizes religion in an unnatural way. Does the Establishment Clause really require the eradication of "In God We Trust" on coinage, references to God contained in the Pledge of Allegiance, and traditional patriotic songs that are not sanitized against notions of providential history or indebtedness to God? Does the Establishment Clause really demand the complete privatization of religious impulses? For example, a religiously motivated conscientious objector will refuse military service despite the nation's compelling need for his or her military assistance. Our intuition tells us that the Free Exercise Clause should afford conscientious objectors some type of exemption from otherwise general obligations. Yet, such exemptions necessarily entail an encroachment in any separationist wall. A strict separationist view, simply stated, allows religion a narrower scope than that experienced by many religious adherents, eviscerates the Free Exercise Clause, and contradicts our intuitive judgment regarding the range of tolerance we ought to endure. The religiosity of individuals and groups cannot always be as easily segregated from their cultural and personal identities as the strict separationist model would demand. Indeed, the Free Exercise Clause seemingly protects individuals against this very demand. Accordingly, strict separationism must be rejected as inconsis-

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125. *Id.*
126. *Id.*
tent with the competing demands of free exercise, free association, free speech, and claims of equal protection, as well as our personal and cultural histories.

Limited separationism, captured in the *Lemon v. Kurtzman*\textsuperscript{128} test, and neutral principilism or nonendorsement stand as reasoned alternatives to strict separationism, but their formulas have a tendency to collapse into strict separationism whenever they are taken seriously. Whether articulated under the rubric of secular purpose and effect or nonendorsement, the models threaten the very tolerance of religious activity that free exercise would seemingly require. For example, the granting, on grounds of religious tolerance, of either judicial or legislative exemptions from generally applicable laws has a purpose and effect of endorsing religion at some level. Although a question may remain whether we are comfortable with the level the exemption tolerates, the threat to a state's neutrality in religious matters persists. Indeed, the reality of this threat quite often leads directly to a split of authority among the lower courts and plurality opinions by the United States Supreme Court.

The difficulty of drawing the types of lines required by these separationist-inspired models has encouraged most of the current Supreme Court Justices to look to various forms of accommodationism. The varied explanations of the basis and limits of accommodationism, however, have left the theory open to criticism from the separationists and the neutralists. Although religion cannot coherently be walled off from the public forum in every respect, it seems probable that the Establishment Clause provides some meaningful restriction on the permissible scope of religious activities within the public forum. Too often the accommodationist resolution of church and state relations is dependent upon historical continuity or policy constraints rather than defensible as a matter of legal or moral principle. As a result, the accommodationist cases appear ad hoc, unpredictable, and unprincipled.

At the risk of adding to the confusion by proliferating yet another Establishment Clause paradigm, the author would suggest that the fatal flaw of all existing Establishment Clause tests is that they do not properly reconcile the twin religion clauses: free exercise and nonestablishment. Present Establishment Clause paradigms either ignore free exercise principles or embrace them in an ad hoc manner, thereby contributing to the appearance of random results legitimzed through historical continuity or vague notions of accommodationism. It is suggested that a revised model, "reconciliationism," would resolve much of the confusion of Establishment Clause cases by high-

\textsuperscript{128} 403 U.S. 602 (1971).
lighting free exercise justifications for many of the religious activities tolerated in the public forum.

Reconciliationism begins with the simple insight that there are two interrelated religion clauses that must be reconciled for interpretivist coherency. The Establishment Clause cannot coherently prohibit religious incursions in the public realm demanded by the Free Exercise Clause. In this sense, religion is entitled to more than neutrality; the free exercise of religion sometimes mandates and, in other instances, permits granting religious beliefs and practices a preferred status even if in conflict with otherwise legitimate state purposes.129

In the effort to reconcile the seemingly contradictory demands of the separate religion clauses, reconciliationism recommends evaluating the core unifying values of respect for individual autonomy and tolerance for variant religious perspectives that the religion clauses were intended and reasonably should preserve. Preserving the sanctity of each individual's search for self- and communal-identity, expression, and realization should animate the religion clauses controversy. The reconciliationist would reject the alternative establishment models for their failure to preserve these core values.

The principle of reconciliationism offers reasoned support for many of the controversial accommodationist cases. For example, the decisions in Sherbert v. Verner,130 Thomas v. Review Board,131 Hobbie v. Unemployment Appeals Commission,132 and Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,133 are all compatible with reconciliationism because although they either create judicially compelled exemptions or validate legislatively exemptions from otherwise applicable unemployment benefit laws, contrary to strict separationism, limited separationism, and neutral principlism, they manifest respect for the free exercise rights of those who are faced with the untenable alternative of violating either religious principles or civic obligations. Indeed, reconciliationism would even go further in validating legislatively determined tax exemptions contrary to Texas Monthly, Inc. v. Bullock,134 on the theory that the Free Exercise Clause legitimates a legislature's policy favor-

ing the granting of a preferential tax exemption for religious literature.

Aside from religious exemption cases, reconciliationism explains, in a way other Establishment Clause models cannot, cases such as *Widmar v. Vincent* and *Board of Education v. Mergens*. The Court, at the university level and under free speech principles in *Widmar*, and at the high school level and under the Equal Access Act in *Mergens*, rejected Establishment Clause challenges to student religious groups enjoying equal access to privileges enjoyed by other student groups. Strict separationism, the *Lemon* secular effect test, and the nonendorsement views of the Establishment Clause all weighed in favor prohibiting the granting of equal access in both cases. Although the Court accommodated the equal access claims of the religious students, the rationale supplied in both instances relied more on free speech and equal protection arguments than the free exercise claims. Reconciliationism would avoid the necessity of religious claimants coupling free exercise claims with other less objectionable entitlements such as free speech, free association, family rights, or equal protection.

Perhaps the noncoercion perspective of Justice Kennedy in *Lee* rationally seeks resolution of the conflict between the religion clauses consistent with reconciliationism. However, the vague standard of "indirect coercion" arising out of subtle peer pressure threatens to collapse Justice Kennedy's noncoercion theory into strict separationism. Thus, although Justice Kennedy observed in *Lee* that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution," the difficulty in drawing lines regarding permissible religious activities or expressions which do not foster an appearance of endorsement and thereby subtle pressure to conform remains problematic.

Reconciliationism recommends respect for the variant religious views and traditions of our people even as they have participated and continue to participate in public life, while at the same time it requires that no religious view or activity be legitimized or coerced as authoritative. Reconciliationism recommends personalizing encroachment issues to the free exercise claims of the individuals involved, either contemporaneously or historically, rather than illegitimately ascribing them to the state. In many instances, a public

disclaimer that state tolerance of the variant religious traditions of our people is not intended to constitute any preferential endorsement would assist in highlighting the difference between compelled orthodoxy and tolerant respect for religious traditions and present day activities.

Applied to the issue of graduation prayers, reconciliationism would examine the impetus behind the religious incursions into the public forum, label them as such, and then determine their appropriateness in light of the circumstances presented. For example, the most objectionable form of graduation prayer would be a sectarian prayer ordered given by school administrators on a year-to-year basis for the purpose of communicating to the students the preferred status of a given belief. In a sense, a state's intentional exclusion of any form of graduation prayer constitutes a form of endorsement of secular rationalism as the preferred belief system appropriate in the public forum. A "no prayer strict separationist" view thus would contradict the principle of toleration upon which it is based. In comparison, permitting a student-initiated prayer or group of prayers, unsupervised by the school administrators, accompanied by appropriate disclaimers that the opinions and beliefs expressed by the persons delivering the prayer carry no school endorsement, would reconcile those free exercise rights of the people involved who cherish communal sharing of the rites of passage, without coercing the active participation of dissenters, except for their passive tolerance. The lack of symmetry with respect to the demands of tolerance in this instance, in comparison to the strict separationist view of tolerance in excluding all prayers, is that it is more consistent with the special demands of free exercise. It simply respects the impetus of those who, as a matter of religious compulsion, feel a need to acclaim publicly their indebtedness to or ask the blessings of sources of inspiration that cannot be rationally explained.

Justice Scalia, in his dissent in *Lee*, in effect recommends this result under accommodationist reasoning without adopting in any way the free exercise justification for this apparent incursion of religion into the public forum. Thus, he suggests that notwithstanding the Court's ruling invalidating the Providence, Rhode Island, graduation prayer scheme, graduation prayers will still be permissible in other instances so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation Program, to the effect that, while all are asked to rise for the invocation and benediction, none is
compelled to join in them, nor will be assumed, by rising, to have done so. 139

This type of public disclaimer explained under the principle of reconciliationism would enhance the reconciliation of free exercise and Establishment Clause values by accommodating religious expression within the public sphere.

This result also would be compatible with the Court’s equal access approach adopted in Widmar and Mergens. Thus, if the graduation prayers more obviously arose from the students and were voluntary and personal, the majority’s concern in Lee that steps be taken to avoid the impression that a state by its conduct has unconstitutionally endorsed religion would reasonably be alleviated in a manner consistent with the student-initiated prayer groups in Mergens.

Interestingly enough, the United States Court of Appeals for the Fifth Circuit adopted a Mergens approach and permitted a high school graduation prayer upon remand after Lee in Jones v. Clear Creek Independent School District. 140 In Jones, the Fifth Circuit carefully distinguished, on grounds similar to the proposed model of reconciliationism, a school district resolution in Clear Creek, Texas, permitting graduation prayers. The Fifth Circuit in Jones distinguished the two prayer schemes as follows:

In three respects, Clear Creek exercises significantly less control over the content of invocations at its schools. Clear Creek does not solicit invocations; the Resolution only forbids Clear Creek schools from accepting sectarian or proselytizing invocations. Moreover, because a graduating senior drafts proposed invocations each year under the Resolution, the same person will never repeatedly propose an invocation. Finally, the Resolution imposes two one-word restrictions “nonsectarian and nonproselytizing” which enhance solemnization and minimize advancement of religion, instead of a pamphlet full of invocation suggestions.

We conclude that Clear Creek does not direct prayer presentations at its graduation ceremonies. 141

Thus, the court in Jones concluded, “The practical result of our decision, viewed in light of Lee, is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies.” 142 This result follows the proposed model of reconciliationism and is consistent with Mergens. School graduation prayers should be permissible if they honestly re-

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139. *Id.* at 2685 (Scalia, J., dissenting).
140. 977 F.2d 963 (5th Cir. 1992).
142. *Id.* at 972.
reflect the religiosity of the students and if steps are taken to explain
to everyone that the students, not the state, are the motivational
source behind the prayers. In this way, the courts respect the free
speech and free exercise rights of the students, without unconstitu-
tionally endorsing religion.

VI. CONCLUSION

The resolution of public school graduation prayers requires the
reconciliation of the seemingly contradictory Free Exercise and Es-
tablissement Clauses. The United States Supreme Court’s efforts in
this regard have fostered competing interpretivist models reflected in
the multiplicity of opinions in Lee v. Weisman.143 “Strict separation-
ism” favored by Justice Harry Blackmun, although popular as rhetor-
ical flourish, has never captured the Court’s attention. The modified
separationist paradigm contained in Lemon v. Kurtzman144 appears
on the wane because of its likelihood to exclude more than history or
free exercise would allow. Some form of accommodationist, neutral
principlist, or reconciliationist theory will likely provide the basis of
Establishment Clause reasoning in the future. Accommodationist
cases often appear ad hoc or random to the Justices deciding the case
because they are unprincipled in most respects. A practice is permit-
ted on the basis of historical continuity or because it furthers the
public interest. Neutral principlism’s persuasive force loses convic-
tion in those very cases where it is most needed — in religious ex-
emption cases where free exercise claims demand some concession to
religious beliefs. Accordingly, it is suggested that some form of
reconciliationism should inform the courts in the future on issues
where Free Exercise Clause and Establishment Clause rights conflict.
States must scrupulously avoid establishing an orthodox creed of offi-
cial belief, even the belief of secular humanism, that religious beliefs
have no place in the public forum; at the same time, a state must tol-
erate religious speech and conduct in the public forum. In so doing,
the courts reconcile the twin religion clauses of the First
Amendment.

As applied to school graduation ceremonies, it is suggested that
the United States Court of Appeals for the Fifth Circuit’s analysis in
Jones v. Clear Creek Independent School District145 most closely cor-
responds to the model of reconciliationism and ought to become the
standard for future references. Otherwise, the Court will have to re-
vise its dicta in Tinker v. Des Moines Independent Community

144. 403 U.S. 602 (1971).
145. 977 F.2d 963 (5th Cir. 1992).
School District\textsuperscript{146} that students and children do not abandon their basic rights at the schoolhouse gate.\textsuperscript{147}

\textsuperscript{146} 393 U.S. 503 (1969).