

Finalist of the Second Annual DCBA Writing Contest: Collegiate Team Prayer and the First Amendment

By Diane E. Elliott

As announced in the April issue, the Selection Committee for the Second Annual DCBA Writing Contest has selected three finalists. The first place winner and recipient of the \$2,500 award was announced at the DuPage County Bar Association's annual Law Day luncheon at Klein Creek Country Club on April 28, 2005, and will be listed in the June issue of the Brief. Each of the three finalists were personally invited to attend the luncheon, and were all acknowledged for their success. Many quality articles were submitted to the Selection Committee, and it is truly a credit to the three finalists efforts and abilities that they were selected. One of the three finalist's articles is set forth below.

A football team at a state university holds a team prayer service before the game. The prayer service is organized by the coaching staff and lead by a local religious leader at the school's request. The team coaches are in attendance. A team member objects to participating in the prayer service, either because he is atheist or practices a non-Christian faith. This memorandum examines school prayer at the college or university level, and suggests issues a court might consider in deciding such a claim.

The Religion Clauses of the First Amendment – the Establishment Clause and the Free Exercise Clause – state that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”² The Fourteenth Amendment incorporates the First Amendment against the states and their political subdivisions.³ In interpreting the Establishment Clause, the Court has been clear in determining that states are prohibited from sponsoring prayer in the elementary and secondary schools. The Court has never specifically addressed whether or not the Establishment Clause prohibits state-sponsored prayer at a public college or university.

However, a review of school prayer cases, both at the elementary, middle/high school and college levels, provides some guidance regarding the potential constitutional issues involved in athletic team prayer at the collegiate level. Finally, an Appellate Court case from the Fourth Circuit involving supertime prayer at Virginia Military Institute is discussed and analogized to athletic team prayer.

A. An Overview of the Tests Used by the Supreme Court in School Prayer Cases

I. The “Lemon” Test

In *Lemon v. Kurtzman*, the Supreme Court articulated a three-prong test to determine if a government sponsored activity offends the Establishment Clause.⁴ Under *Lemon*, a government sponsored activity will not violate the Establishment Clause if: (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not excessively entangle government with religion.⁵ If the challenged practice fails any one of the three *Lemon* prongs, the action is in violation of the Establishment Clause and unconstitutional.⁶

1. Secular Purpose

The secular purpose prong has the lowest burden. Generally, courts defer to what the government says is the stated secular purpose of the prayer as long as the reason given is sincere and not a sham.⁷ The focus of inquiry is on the government's intentions. If the government attempts to communicate a message of endorsement or disapproval of religion, the message will not meet this prong of the test. The purpose of the state action does not need to be exclusively secular; but if the practice is solely motivated by the desire of advancing religion, it will violate the Establishment Clause.⁸

2. Primary Effect

The second prong of the *Lemon* test asks if the primary effect, regardless of the government's stated purpose, conveys a message of “endorsement or disapproval of religion.”⁹ “If a reasonable observer would conclude that the message communicated is one of either endorsement or disapproval of religion, then the challenged practice is unlawful.”¹⁰ In *Chaudhuri*, the prayer in question was sustained because it was nonsectarian, the university had no control over the contents of the prayer, beyond requesting there be no references to Jesus Christ, and the setting was a college graduation, a setting involving adults, rather than a school function involving minors.¹¹ “It is well established that state sponsored school prayer has the impermissible effect of advancing religion.”¹² The Establishment Clause requires that the state remain neutral; taking no position on questions of religious belief or seeming to favor one religion over another.¹³ If the questioned action is likely to be perceived by those who adhere to the controlling denominations as an endorsement of their faith, and by nonadherents as disapproval of their individual religious choices, the action is a violation of the Establishment Clause.¹⁴

3. Entanglement

The final prong of the *Lemon* test requires that the challenged practice avoid excessive entanglement of government with religion.¹⁵ This does not mean an absolute separation is required. The Court recognizes that it is inevitable there will be interaction between church and state and that some tolerance of this intersection is required.¹⁶ If school officials decide the prayer will be offered, select the clergyperson to give the prayer, and determine the content of the prayer through offering guidelines for what is said, these features are seen as bearing the imprint of the State and, thus excessive entanglement.¹⁷

II. Coercion

The dominant test for unconstitutional coercion identifies (1) when the government directs (2) a formal religious exercise (3) in such way as to oblige the participation of objectors.¹⁸ The critical issue in determining coercion is whether the government is imposing pressure on students to participate in the religious activity in question.¹⁹

In *Lee*, the Court stressed the governments' direct and absolute control over the graduation prayer as evidence of an Establishment Clause violation.²⁰ School officials decided that during a high school graduation ceremony, an invocation and benediction would be offered; the Court saw this as if a state law had decreed the prayer occur.²¹ Additionally, the school officials in *Lee* provided the clergyperson selected to lead the prayer with a copy of "Guidelines for Civic Occasions" as well as advised the rabbi that his prayer should be nonsectarian.²² This was seen as too much government involvement, and thus evidence of the state controlling the prayer.

A school policy of allowing graduating seniors to determine whether or not an invocation will be given at the graduation ceremony where school official's role is merely advisory, no Establishment Clause violation occurs because government is not seen as making the decision whether or not to include prayer in the ceremony.²³ In *Jones v. Clear Creek Independent School District*, the students decided whether there would be a prayer at the graduation ceremony. They wrote the prayer used and the extent of the school district's direction was to impose two restrictions – the prayer be nonsectarian and nonproselytizing, both of which serve to enhance solemnization. The court determined there was no violation of the Establishment Clause.²⁴

III. Endorsement

Under the endorsement test, the government may not engage in a practice that would lead a reasonable, informed observer to conclude that endorsement of religion is taking place.²⁵ A government practice should not have the effect of communicating a message of government endorsement or disapproval of religion. In *Lynch v. Donnelly*, the Court found that a community display of a crèche, positioned with other symbols of the holiday season, did not violate the Establishment Clause because there was not government

endorsement of religion, but acknowledgement that the crèche is one of several symbols of the season.²⁶

IV. Legislative Exception Test

A fourth test is used in highly fact specific situations involving forms of prayer that can be historically tied to being in existence when the Bill of Rights was established. Sometimes referred to as the "legislative-exception", this test is also called the "history and traditions" test.²⁷ In *Marsh*, a challenge was made to opening the Nebraska state legislature with prayers lead by a chaplain paid by the state. Because it was shown that prayer opening legislative sessions was in existence at the time the First Amendment was passed, the Court approved the constitutionality of this form of prayer, indicating that "in the same week Congress passed the First Amendment, it authorize payment of chaplains for the sole purpose of leading prayer at the opening sessions of Congress", thus creating a conundrum.²⁸ The Supreme Court concluded that it was unlikely that when the First Congress voted to appoint and pay a chaplain for each House, and to approve the First Amendment for submission to the states, they intended the Establishment Clause to prohibit what they had just authorized.²⁹ *Marsh* is the only case where the Supreme Court has dealt with the issue of government sponsored prayer outside the context of the public schools, upholding such prayer.

A successful history and traditions argument would likely require a plaintiff showing the prayer in question or a form of said prayer was deeply embedded in the history and traditions of the United States, not simply the university.³⁰ Additionally, the prayer would have to take place in a deliberative public body, such as a legislative session. The tradition of athletic team prayer likely cannot be shown to meet this test.

V. Application of the Tests to Public College and University Institutions

Examination of prayer in the college setting has involved two forms of prayer – graduation prayer³¹ (which has been found constitutional) and supper time prayers offered at a military academy.³² Pre-supper prayer offered to cadets at the Virginia Military Institute (VMI) was determined unconstitutional violation of the

Establishment Clause.³³ In *Mellon*, the court applied coercion test principles first, then the *Lemon* criteria, treating the endorsement test as a refinement of *Lemon's* second prong³⁴. The prevailing consideration in school prayer context is coercion.³⁵

VMI is a state-operated military college, funded by the Commonwealth of Virginia and "subject to the control of the Virginia General Assembly."³⁶ Its mission is to educate and prepare its cadets for military service.³⁷ To accomplish this goal, VMI uses an adversarial method of educational instruction with its primary aim being to "instill mental and physical discipline in its cadets".³⁸ This methodology contains a "rigorous and punishing system of indoctrination" in which first year cadets are subjected to a series of hazing rituals, which include group punishment and group rewards.³⁹ Conformity and submission are the hallmarks of the educational program at VMI, with the sole purpose of developing a group mindset.⁴⁰

Amidst this environment, VMI also was sponsoring a meal-time prayer, in which cadets were required to participate if they wanted to eat during the first seating for supper.⁴¹ This included all first year cadets, who could not opt out of first supper seating for various reasons.⁴² Cadets were required to stand at attention while the daily announcements were given, and the Cadet Chaplain read a supper prayer to the assembled Corps.⁴³ Supper prayer had been conducted at VMI, discontinued in 1990 and reinstated in 1995 in an effort to bring a stronger sense of unity to the Corps.⁴⁴ The prayer would begin with the words "Almighty God," "O God," "Father God," or "Sovereign God," and was "dedicated to giving thanks or asking for God's blessing."⁴⁵ Cadets had to remain standing and silent while the prayer was said, but did not have to recite the prayer, bow their heads or close their eyes.⁴⁶ When asked if they could continue in the mess hall without standing at attention during the prayer, the plaintiffs request was denied, so they filed a lawsuit challenging the constitutionality of the supper prayer.⁴⁷

The Court has determined that school officials may not compel students to participate in religious activity.⁴⁸ Under the structure of VMI's aversive educational system, with detailed regulation of the cadets conduct, and strict moral code, indoctrination is such a key component of

the educational system that VMI's cadets, even though not children, are "uniquely susceptible" to coercion.⁴⁹ The communal dining experience at VMI was likely not something a cadet could opt out of, without consequences.⁵⁰ The supper prayer placed an unconstitutional burden on cadets who might have objected to the prayer.⁵¹ The court determined that while voluntary prayer among cadets is acceptable; prayer like this one, sponsored by VMI was determined an unconstitutional violation of the Establishment Clause because of its coercive nature.⁵²

Next the court applied the three pronged *Lemon* test to the facts in this case, again determining the supper prayer was unconstitutional. Under *Lemon*, the prayer must have a secular purpose; the primary effect of the prayer must be one that neither advances nor inhibits religion; and the prayer must not foster an excessive government entanglement with religion.⁵³ Failure to satisfy any one of the three prongs results in the questioned action being found unconstitutional.⁵⁴ The court questioned but ultimately accepted as having a secular purpose VMI's stated reasons for the supper prayer – its purpose was to assist in developing leadership, promote religious tolerance and encourage cadets to reflect on their own spirituality.⁵⁵

However, the supper prayer failed the second and third prongs of the *Lemon* test. The court concluded that the supper prayer had the primary effect of promoting religion, sending a clear message that VMI, as an institution, endorsed the religious expressions contained in the prayer.⁵⁶ Here the prayer in question was "monotheistic, patriarchal and indebted to Judeo-Christian values and traditions of worship."⁵⁷ Such an endorsement is inconsistent with the concept that government should be neutral toward religion. An individual cadet can say a prayer before his supper; the Establishment Clause prohibits VMI from sponsoring this practice.⁵⁸

Under *Lemon*'s third prong, excessive entanglement with religion, the supper prayer violated the Establishment Clause because VMI wrote, mandated and monitored the daily prayer for its cadets.⁵⁹ The court determined that VMI had "taken a position on what constitutes appropriate religious worship – an entanglement with religious activity that violates the Establishment Clause."⁶⁰

VI. Conclusion

The Court has never specifically addressed whether or not the Establishment Clause prohibits state-sponsored prayer at a public college or university. Analysis of prayer at a public college or university requires discussion of the primary tests established for use in Establishment Clause challenges. Under the three part test set forth in *Lemon v. Kurtzman*,⁶¹ a government practice is constitutional if (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not excessively entangle government with religion. A second test the Court uses analyzes the coercive effect the activity has on the students.⁶² A third test used, the Endorsement test, states the Court disapproves of state practices giving the appearance of endorsing religion.⁶³ The "legislative exception test" is used in fact specific situations involving forms of prayer that can be tied to existing when the Bill of Rights was established.⁶⁴

The court mixes these tests, depending on the facts presented. *Lemon* is the dominant test used in Establishment Clause cases, with special consideration given in school prayer situations to the coercion analysis.⁶⁵

Courts have approved graduation prayers at university commencement exercises and recognizes that young adults (post-high school age) operate at a different level, than individuals high school age or younger.⁶⁶ Questioning, exploring new ideas and having ones beliefs challenged are part of the college experience.⁶⁷ Coercive effects would be more prevalent in a high school setting than in a college setting. It is not likely that the audience gathered for a college commencement ceremony would conclude the state is endorsing any one form of religion when an invocation is given.⁶⁸ The audience can likely conclude that the state is merely respecting religion in general, rather than endorsing any one religion in particular. However, once the court examines the facts in a given instance and discovers that because of the uniquely coercive elements of a situation, even school prayer at the college level might be found unconstitutional.

Because of the unique educational environment the court found supper prayer at VMI an unconstitutional violation of Establishment Clause. The prayer was considered too coercive, given the

"adversative method of education" at VMI "which emphasizes the detailed regulation of conduct and the indoctrination of a strict moral code."⁶⁹

In the fact pattern presented involving athletic team prayer at a college or university setting, relevant questions for the court to analyze include an assessment of what the university's role in the development of the prayer is. If the university has actively selected the speaker and provided specific guidelines for the content of the prayer, likely the courts would find such action violates the Establishment Clause. Another line of inquiry would likely explore whether or not there was an official university action involved in instituting the prayer. The fact finder would likely look to see if anyone associated with the university has stated that the purpose of the prayer was to put 'religion back in the sport.' The language used in the prayer is of concern – if the prayer uses 'Jesus' or 'God', the court might view such a prayer as having a religious purpose, rather than a legitimate secular purpose. If the purpose is to solemnize the occasion and inspire, might words by other inspirational leaders such as Abraham Lincoln or Martin Luther King Jr. serve the same motivational purpose, yet avoid the imprimatur of religion. The university setting is significant in distinguishing the instant facts from school prayer cases involving elementary, middle or high school students. University students are considered less easily influenced because of their status as young adults.⁷⁰ Yet, the team mentality required to participate in athletics, especially at the college level, may make these students particularly vulnerable to any coercive elements related to the prayer.

² U.S. Const. amend I.

³ See *Everson v. Bd. of Educ.* 330 U.S. 1, 8(1947) (applying Establishment Clause to states); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

⁴ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁵ *Id.* at 612-13.

⁶ See *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

⁷ *Edwards v. Anguillard*, 482 U.S. 578, 585, (1987).

⁸ *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

⁹ *Id.* at 56 n. 42, (quoting *Lynch v. Donnelly*, 465 U.S. at 690, (O'Connor, J., concurring)).

¹⁰ *Chaudhuri v. Tennessee*, 130 F. 3d 232, 237 (6th Cir. 1997) (holding that the particular nonsectarian prayer given at a public university's graduation ceremony did not violate the Establishment Clause.)

¹¹ *Id.* at 238-29

¹² *Yacovelli v. Moser*, 2004 WL 1144183 (M.D.N.C.) citing *Mellon v. Bunting*, 327 F. 3d 355, 366-64 (4th Cir. 2003).

¹³ *County of Allegheny v. ACLU*, 492 U.S. 573, 592-94 (1989).

¹⁴ *Id.* at 597.

¹⁵ *See Lemon*, 403 U.S. at 613.

¹⁶ *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997) (quoting *Lemon*, 403 U.S. at 615).

¹⁷ *Lee v. Weisman*, 550 U.S. 577, 588(1992).

¹⁸ *Id.*

¹⁹ *Bd. of Educa. of Westside Cmty. Schl. v. Mergens*, 496 U.S. 226, 261, (1990) (Kennedy, J., concurring).

²⁰ *Lee* at 2655.

²¹ *Id.*

²² *Id.* at 2656.

²³ *Jones v. Clear Creek Independent School District*, 977 F.2d 963, 971 1992 U.S. App. LEXIS 30795.

²⁴ *Id.*

²⁵ *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984).

²⁶ *Id.*

²⁷ *Marsh v. Chambers*, 463 U.S. 783 (1983).

²⁸ *Id.* at 791.

²⁹ *Id.* at 790.

³⁰ *Id.*

³¹ *Tanford v. Brand*, 883 F. Supp. 1231 (S.D. Ind. 1995) (invocation at university commencement not coercive; determination made by using *Lemon* test and coercion test.); *Chaudhuri v Tennessee*, 886 F. Supp. 1374 (M.D. Tenn. 1995). (state university could include prayer in graduation ceremonies; determination made by using *Lemon* test and coercion test.)

³² *Mellen v. Bunting*, 327 F. 3d 355 (4th Cir. 2003).

³³ *Id.*

³⁴ *Id.* at 371.

³⁵ *Id.* at 370.

³⁶ *Id.* at 361

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 362.

⁴³ *Id.*

⁴⁴ *Mellen v. Bunting*, 327 F. 3d 355, 362 (4th Cir. 2003).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 371.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 372.

⁵³ *Lemon*, 403 U.S. at 612-13, 91 S. Ct. 2105. (19—).

⁵⁴ *See Stone v. Graham*, 449 U.S. 39, 40-41(1980).

⁵⁵ *Mellen v. Bunting*, 327 F. 3d 35, 373 (4th Cir. 2003).

⁵⁶ *Id.* at 374.

⁵⁷ *Id.*

⁵⁸ *Id.* at 375.

⁵⁹ *Id.*

⁶⁰ *Id.* at 375.

⁶¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

⁶² *Lee v. Weisman*, 550 U.S. 577 (1992).

⁶³ *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

⁶⁴ *Marsh v. Chambers*, 463 U.S. 783 (1983).

⁶⁵ *Mellon* at 370.

⁶⁶ *See Bd. of Educa. of Westside Cmty. Schl. v. Mergens*, 496 U.S. 226, 235-37 (1990).

⁶⁷ *Tanford v. Brand*, 883 F. Supp. 1231, 1241 (S.D. Ind. 1995).

⁶⁸ *Chaudhuri v. Tennessee*, 886 F. Supp. 1374, 1387-88 (N.D. Tenn. 1995).

⁶⁹ *Mellon v. Bunting*, 327 F. 3d 355, 372 (4th Cir. 2003).

⁷⁰ *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990).

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