Lee v. Weisman

505 U.S. 577, 112 S.Ct. 2649 (1992)

Daniel Weisman, who is Jewish and the father of two school students in Providence, Rhode Island, initially objected to the middle and high schools' allowing prayers during their commencement ceremonies when his first daughter graduated. He renewed his complaints when his second daughter graduated. At that graduation ceremony, Rabbi Leslie Gutterman offered an invocation thanking God "for the legacy of America where diversity is celebrated" and a benediction in which he observed, "O God, we are grateful for the learning which we have celebrated on this joyous commencement. . . . We give thanks to you, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion." Subsequently, Weisman sued school officials, and federal district and appellate courts ruled that mentioning God during public-school graduation ceremonies violates the First Amendment establishment clause. In appealing that decision, attorneys for the school board countered that such prayers do not constitute governmental endorsement or promotion of religion. Moreover, in a brief supporting the school board, the Bush administration asked the justices to abandon the three-prong test established in *Lemon v. Kurtzman*. Under that test, laws and government practices run afoul of the establishment clause if they (1) fail to have a secular purpose or (2) have the primary effect of advancing religion or (3) promote "an excessive government entanglement with religion." The district and appellate courts concluded that the graduation prayers constituted an "advancement of religion." And the George H. W. Bush administration urged the Court to "jettison the framework erected by *Lemon* in circumstances where, as here, the practice under assault is a non-coercive, ceremonial acknowledgement of the heritage of a deeply religious people."

The Court's decision was five to four. The majority's opinion was announced by Justice Kennedy. Justices Blackmun and Souter's concurrences were joined by Justices Stevens and O'Connor. Justice Scalia's dissent was joined by Chief Justice Rehnquist and Justices White and Thomas.

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□ *Justice KENNEDY delivered the opinion of the court.*

This case does not require us to revisit the difficult questions dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens. See *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989); *Wallace v. Jaffree*, 472 U.S. 38

(1985); *Lynch v. Donnelly*, 465 U.S. 668 (1984). For without reference to those principles in other contexts, the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation of petitioners and *amicus* of the United States to reconsider our decision in *Lemon v. Kurtzman*, [403 U.S. 602 (1971)]. The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us.

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so." *Lynch*. The State's involvement in the school prayers challenged today violates these central principles. . . .

We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district's supervision and control of a 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. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it. . . .

The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a de minimis character. To do so would be an affront to the Rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same

reason, we think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. . . .

Inherent differences between the public school system and a session of a State Legislature distinguish this case from *Marsh v. Chambers*, 463 U.S. 783 (1983). The considerations we have raised in objection to the invocation and benediction are in many respects similar to the arguments we considered in *Marsh*. But there are also obvious differences. The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*. The *Marsh* majority in fact gave specific recognition to this distinction and placed particular reliance on it in upholding the prayers at issue there. Today's case is different. At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students. In this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit. . . .

For the reasons we have stated, the judgment of the Court of Appeals is Affirmed.

□ *Justice SOUTER, with whom Justice STEVENS and Justice O'CONNOR join, concurring.*

That government must remain neutral in matters of religion 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. See, e.g., *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); see also *Sherbert v. Verner*, 374 U.S. 398 (1963). Contrary to the views of some, such accommodation does not necessarily signify an official endorsement of religious observance over disbelief. . . .

Whatever else may define the scope of accommodation permissible under the Establishment Clause, one requirement is clear: accommodation must lift a discernible burden on the free exercise of religion. Concern for the position of religious individuals in the modern regulatory state cannot justify official solicitude for a religious practice unburdened by general rules; such gratuitous largesse would effectively favor religion over disbelief. By these lights one easily sees that, in sponsoring the graduation prayers at issue here, the State has crossed the line from permissible accommodation to unconstitutional establishment.

□ *Justice SCALIA, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join, dissenting.*

From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations. The Declaration of Independence, the document marking our birth as a separate people, "appealed to the

Supreme Judge of the world for the rectitude of our intentions" and avowed "a firm reliance on the protection of divine Providence." In his first inaugural address, after swearing his oath of office on a *Bible*, George Washington deliberately made a prayer a part of his first official act as President. . . . Such supplications have been a characteristic feature of inaugural addresses ever since. . . .

[A] tradition of Thanksgiving Proclamations—with their religious theme of prayerful gratitude to God—has been adhered to by almost every President. . . .

The Court presumably would separate graduation invocations and benedictions from other instances of public "preservation and transmission of religious beliefs" on the ground that they involve "psychological coercion." I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays, has come to "require scrutiny more commonly associated with interior decorators than with the judiciary." *American Jewish Congress v. Chicago*, 827 F. 2d 120 (Easterbrook, J., dissenting). But interior decorating is a rock-hard science compared to psychology practiced by amateurs. A few citations of "research in psychology" that have no particular bearing upon the precise issue here, cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing. The Court's argument that state officials have "coerced" students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.

The Court identifies two "dominant facts" that it says dictate its ruling that invocations and benedictions at public-school graduation ceremonies violate the Establishment Clause. Neither of them is in any relevant sense true.

The Court declares that students' "attendance and participation in the [invocation and benediction] are in a fair and real sense obligatory." But what exactly is this "fair and real sense"? According to the Court, students at graduation who want "to avoid the fact or appearance of participation," in the invocation and benediction are psychologically obligated by "public pressure, as well as peer pressure, . . . to stand as a group or, at least, maintain respectful silence" during those prayers. This assertion—the very linchpin of the Court's opinion—is almost as intriguing for what it does not say as for what it says. It does not say, for example, that students are psychologically coerced to bow their heads, place their hands in a Dürer-like prayer position, pay attention to the prayers, utter "Amen," or in fact pray. (Perhaps further intensive psychological research remains to be done on these matters.) It claims only that students are psychologically coerced "to stand . . . or, at least, maintain respectful silence." Both halves of this disjunctive (both of which must amount to the fact or appearance of participation in prayer if the Court's analysis is to survive on its own terms) merit particular attention.

To begin with the latter: The Court's notion that a student who simply sits in "respectful silence" during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. We 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. Since the Court does not dispute that students exposed to prayer at graduation ceremonies retain (despite "subtle coercive pressures") the free will to sit, there is absolutely no basis for the Court's decision. It is fanciful enough to say that "a reasonable dissenter," standing head erect in a class of bowed heads, "could believe that the group exercise signified her own participation or approval of it." It is beyond the absurd to say that she could entertain such a belief while pointedly declining to rise.

But let us assume the very worst, that the nonparticipating graduate is "subtly coerced" . . . to stand! Even that half of the disjunctive does not remotely establish a "participation" (or an "appearance of participation") in a religious exercise. The Court acknowledges that "in our culture standing . . . can signify adherence to a view or simple respect for the views of others." (Much more often the latter than the former, I think, except perhaps in the proverbial town meeting, where one votes by standing.) But if it is a permissible inference that one who is standing is doing so simply out of respect for the prayers of others that are in progress, then how can it possibly be said that a "reasonable dissenter . . . could believe that the group exercise signified her own participation or approval"? Quite obviously, it cannot. I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate—so that even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter's interest in avoiding even the false appearance of participation constitutionally trumps the government's interest in fostering respect for religion generally.

The opinion manifests that the Court itself has not given careful consideration to its test of psychological coercion. For if it had, how could it observe, with no hint of concern or disapproval, that students stood for the Pledge of Allegiance, which immediately preceded Rabbi Gutterman's invocation? The government can, of course, no more coerce political orthodoxy than religious orthodoxy. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). Moreover, since the Pledge of Allegiance has been revised since *Barnette* to include the phrase "under God," recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools (both from graduation ceremonies and from the classroom)? In *Barnette* we held that a public-school student could not be compelled to recite the Pledge; we did not even hint that she could not be compelled to observe respectful silence—indeed, even to stand in respectful silence—when those who wished to recite it did so. Logically, that ought to be the next project for the Court's bulldozer. . . .

The deeper flaw in the Court's opinion does not lie in its wrong answer to the question whether there was state-induced "peer-pressure" coercion; it lies, rather, in the Court's making violation of the Establishment Clause hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.

Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. . . .

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 constitutional traditions. Foremost among these has been the so-called *Lemon* test, see *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which has received well-earned criticism from many members of this Court. The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision. Unfortunately, however, the Court has replaced *Lemon* with its psychological coercion test, which suffers the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself. . . . For the foregoing reasons, I dissent.

Zobrest v. Catalina Foothills School District

509 U.S. 1, 113 S.CT. 2462 (1993)

The parents of James Zobrest, a deaf child, sued the Catalina Foothills School District after it refused to provide a sign-language interpreter to accompany James Zobrest to classes at a Roman Catholic high school. They alleged that the Individuals with Disabilities Education Act (IDEA) and the First Amendment's free exercise clause required the school district to provide the interpreter and that the amendment's (dis)establishment clause did not present an insurmountable barrier. After a federal district and appellate court disagreed, the Zobrests appealed to the Supreme Court, which granted *certiorari*.

The Court's decision was five to four; the majority's opinion was announced by Chief Justice Rehnquist. Justice Blackmun's dissent was joined by Justice Souter and in part by Justices Stevens and O'Connor. Justice O'Connor, joined by Justice Stevens, also delivered a dissenting opinion.

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□ *Chief Justice REHNQUIST delivered the opinion of the Court.*

We have never said that "religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen v. Kendrick*, 487 U.S. 589 (1988). For if the Establishment Clause did bar religious groups from receiving general government benefits, then "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Widmar v. Vincent*, 454 U.S. 263 (1981). Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally