

Corrected

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ROBERT E. LEE, INDIVIDUALLY AND AS
PRINCIPAL OF NATHAN BISHOP MIDDLE
SCHOOL, ET AL., Petitioners V.
DANIEL WEISMAN, ETC.

CASE NO: 90-1014

PLACE: Washington, D.C.

DATE: November 6, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT E. LEE, INDIVIDUALLY :
AND AS PRINCIPAL OF NATHAN :
BISHOP MIDDLE SCHOOL, :
ET AL., :
Petitioners : No. 90-1014
v. :
DANIEL WEISMAN, ETC. :

Washington, D.C.

Wednesday, November 6, 1991

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:02 a.m.

APPEARANCES:

CHARLES J. COOPER, ESQ., Washington, D.C.; on behalf of
the Petitioners.

GEN. KENNETH W. STARR, ESQ., Solicitor General, Department
of Justice, Washington, D.C.; on behalf of the United
States as amicus curiae, supporting the Petitioners.

SANDRA A. BLANDING, ESQ., Warwick, Rhode Island; on behalf
of the Respondent.

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1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 90-1014, Robert E. Lee v. Daniel
5 Weisman.

6 Mr. Cooper.

7 ORAL ARGUMENT OF CHARLES J. COOPER

8 ON BEHALF OF THE PETITIONERS

9 MR. COOPER: Mr. Chief Justice, and may it
10 please the Court:

11 At the 1989 graduation ceremony of the Nathan
12 Bishop Middle School in Providence, Rhode Island, Rabbi
13 Leslie Gutterman opened the exercise with an
14 invocation -- one characterized by the district court as
15 an example of elegant simplicity, thoughtful content, and
16 sincere citizenship.

17 QUESTION: How old were these youngsters, Mr.
18 Cooper?

19 MR. COOPER: I beg your pardon, Justice --

20 QUESTION: How old were these youngsters
21 graduating?

22 MR. COOPER: Your Honor, the graduates
23 themselves, were graduating from middle school and into
24 high school. So they were just completing their eighth
25 grade.

1 QUESTION: Well, how old were they is my
2 question. You haven't answered me.

3 MR. COOPER: Your Honor, I think --

4 QUESTION: About 13 or 14, aren't they?

5 MR. COOPER: Yes, Your Honor.

6 QUESTION: Are we getting so --

7 MR. COOPER: I'm sorry, I could not hear you.

8 QUESTION: Never mind, go ahead.

9 MR. COOPER: The district court and the court of
10 appeals concluded that Rabbi Gutterman's invocation -- and
11 he gave a benediction which contained a similar reference
12 to God -- he opened the ceremony with the statement, God
13 of the free, hope of the brave. The district court
14 concluded that that reference to the deity constituted an
15 endorsement of religion, and therefore violated the second
16 prong of this Court's three-part test under the Lemon
17 case.

18 QUESTION: Mr. Cooper, the injunction sought
19 here -- this plaintiff is now out of the middle school and
20 in high school.

21 MR. COOPER: Yes, Your Honor.

22 QUESTION: And what's sought to be enjoined is
23 the invocation in high school, isn't that right?

24 MR. COOPER: Your Honor, the injunction runs to
25 the public schools in Providence --

1 QUESTION: To the public schools in general.

2 MR. COOPER: And it includes certain high
3 schools, yes, Your Honor.

4 QUESTION: But the high school students, how old
5 are they? They're about 18, I would guess.

6 MR. COOPER: Your Honor, the graduates generally
7 are in the 18-year-old range, yes, Your Honor.

8 The district court and the court of appeals on
9 the concession of counsel for respondents concluded that
10 if the invocation and benediction had been recast to omit
11 reference to God that it would have been constitutionally
12 unobjectionable. So the courts enjoined the Providence
13 School Committee from encouraging or authorizing future
14 graduation ceremonies to include references to God, or
15 prayers including references to God.

16 We submit that if the courts below were correct,
17 that if the Establishment Clause forbids the governmental
18 expression of religious sentiments in a traditional civic
19 ceremony of this kind, then Rabbi Gutterman's elegantly
20 simple reference to God pales as a constitutional threat,
21 when compared with the opening ritual of this Court that
22 we have just witnessed.

23 We certainly believe that it cannot compare with
24 opening congressional sessions, and State legislative
25 sessions with prayer, as is practiced in Congress, and was

1 upheld by this Court in Marsh against Chambers.

2 QUESTION: Well, isn't one of the reasons that
3 the people who are listening to the prayer are capable of
4 exercising different degrees of judgment, and hence
5 different degrees of assent or nonassent by their being
6 there. Isn't that another distinction?

7 MR. COOPER: Yes, Your Honor it is. In fact, we
8 would concede that that is a very important part of the
9 nature and setting of either a graduation ceremony or a
10 classroom prayer, or prayer as expressed by this
11 Court's --

12 QUESTION: If the same prayer were offered at
13 the opening and closing of classes in the public schools,
14 would you be making the same argument?

15 MR. COOPER: No, Your Honor, I would not.

16 QUESTION: And why not? Under your test it
17 wouldn't be coercive. They wouldn't have to participate.

18 MR. COOPER: Your Honor, to the contrary, we
19 think that we would offer the following analytical
20 framework for determining whether or not governmental
21 expression of religious beliefs is coercive. The
22 first --

23 QUESTION: Now the very same prayer?

24 MR. COOPER: The very same prayer, yes, Your
25 Honor.

1 The first question would have to be, is exposure
2 to the Government's religious belief or religious
3 expression voluntary? Is it truly voluntary, or is it
4 forced upon the individual through some --

5 QUESTION: And why is it voluntary here?

6 MR. COOPER: Your Honor, it's, it's -- it's
7 voluntary here because the parties have stipulated to that
8 fact. There's a stipulation. There was no factual
9 dispute over whether it's voluntary.

10 Now, in a different case, there may well be a
11 graduation ceremony in which it was not voluntary,
12 where --

13 QUESTION: Children are perfectly free to attend
14 their commencement or not. Is that the theory?

15 MR. COOPER: Your Honor, that is the case by
16 stipulation in this case before you.

17 QUESTION: Has there been a stipulation that
18 there's no stigma to the student who absents him or
19 herself from the graduation during the prayer?

20 MR. COOPER: No, Your Honor, there is no
21 such --

22 QUESTION: I find it very difficult to accept
23 the proposition that it is not a substantial imposition on
24 a young graduate to say you have your choice of -- I want
25 to characterize it in a neutral way -- hearing this

1 prayer, or absenting yourself from the graduation. In our
2 culture, a graduation is a key event in the young person's
3 life. The family comes, aunts, uncles, brothers, sisters.
4 And I think it's a very, very substantial burden on the
5 person to say that he or she cannot -- can elect not to
6 go.

7 MR. COOPER: Your Honor, I think that one -- I
8 think that one can make out a very serious argument to
9 just that effect. And it would not be --

10 QUESTION: Maybe that line doesn't work, then.

11 MR. COOPER: I beg your pardon?

12 QUESTION: Maybe that line doesn't work, that
13 it's only okay if you don't have to listen to it. I mean
14 certainly counsel here, who listened to, you know, God
15 save the United States and this Honorable Court have to be
16 here.

17 MR. COOPER: That's true.

18 QUESTION: Right?

19 MR. COOPER: That is true.

20 QUESTION: I don't think we let them walk in
21 after that is said in the Court.

22 (Laughter.)

23 MR. COOPER: Well, Your Honor, yes, if -- if it
24 is -- if it is that the Government's religious expression
25 is forced upon the individual, then you must assess the

1 nature and the setting of that expression, and --

2 QUESTION: Well counsel have to be here, but
3 they don't have to agree to it, do they?

4 MR. COOPER: That's -- that is the point. And
5 the circumstances in which the Court's opening prayer is
6 expressed are in no way coercive. And in that regard --

7 QUESTION: Well, if you take that line, I just
8 don't see how you can draw the distinction, then, about
9 the same prayer given in the classroom.

10 MR. COOPER: Well, Your Honor --

11 QUESTION: You don't have to listen, right? I
12 mean that would be your theory.

13 MR. COOPER: No, to the contrary, Your Honor, I
14 think the classroom setting is much distinguishable.

15 QUESTION: Were -- were the children at this
16 commencement exercise all seated together?

17 MR. COOPER: Your Honor, the record does not
18 reflect that fact. And I do not know.

19 QUESTION: And you don't know. We don't know.
20 And you don't know if they were all asked to stand and bow
21 their heads?

22 MR. COOPER: Ah, there's -- there's no
23 indication that that was the case.

24 QUESTION: Counsel, if the point is that they
25 don't have to listen or don't have to participate, why

1 can't you use a sectarian prayer?

2 MR. COOPER: Your Honor, I don't think that a
3 sectarian prayer would, per se, be coercive. I think,
4 however, that the more theologically specific an
5 invocation is, or a prayer is, the more likely it is to be
6 coupled with coercive elements. But simply making the
7 prayer sectarian --

8 QUESTION: Why would a sectarian prayer be any
9 more coercive than this prayer?

10 MR. COOPER: I don't believe that it would,
11 necessarily, Your Honor.

12 QUESTION: The imposition would require the same
13 result if they, say they had Mass, if they prayed.

14 MR. COOPER: Your Honor, that, I think would be
15 an extreme example -- one that would --

16 QUESTION: Or say Our Father 13 times.

17 MR. COOPER: Your Honor, again, that might well
18 be the kind of extreme example that Justice Kennedy
19 referenced in Allegheny County -- exhortations of
20 religiosity that amounts to proselytization. I think that
21 may well cross the threshold of mere expression to
22 coercion.

23 QUESTION: Well, would one be any more coercive
24 than the other?

25 MR. COOPER: I beg your pardon?

1 QUESTION: Would one be any more coercive than
2 the other, under your view of what coercion means?

3 MR. COOPER: I think that one can imagine and
4 can hypothesize extreme examples -- examples that would,
5 indeed, cross the threshold from religious expression to
6 coercion. I don't think that it is --

7 QUESTION: How could you coerce the audience?
8 They don't have to listen. I don't understand how a
9 statement from the podium could be coercive under your
10 view.

11 MR. COOPER: Well, Your Honor, the statement from
12 the podium may be accompanied by various exhortations such
13 as Justice Kennedy has referenced, to actually participate
14 through visible means of assent.

15 QUESTION: Nothing more than please stand,
16 nothing more than please stand -- which I assume happens
17 in all graduations.

18 MR. COOPER: That may well be true, and I don't
19 think please stand would probably rise to the level.

20 QUESTION: But then -- but then a very sectarian
21 series of prayers, if the student need not listen to them?
22 Why is that any more coercive than this?

23 MR. COOPER: Your Honor, I am not making the
24 argument -- and I do not make the -- the argument that
25 merely adding sectarian references to the prayer is going

1 to make it more coercive. I simply suggest that one
2 should be alerted when that happens to the more likely
3 prospect that the Government is in --

4 QUESTION: The Government --

5 MR. COOPER: -- in that case --

6 QUESTION: -- is endorsing a particular
7 position.

8 MR. COOPER: Not necessarily endorsing, no. I
9 don't think that -- but rather that it is actually engaged
10 in an effort to coerce, engaged in exhortation to
11 religiosity.

12 QUESTION: I just simply don't follow you, why
13 one is more coercive than the other.

14 QUESTION: I don't either, Mr. Cooper. And
15 you're trying to say the only test is coercion. I
16 don't -- I just don't think that comports with our
17 tradition. You cite Thanksgiving proclamations, you cite
18 the God save the United States. I mean we don't say Jesus
19 Christ save the United States and this Honorable Court.
20 And I don't think that would be in accord with our
21 religious freedom tradition -- or, In Jesus Christ We
22 Trust on the coins. We wouldn't put that in there, would
23 we?

24 MR. COOPER: Your Honor, I don't think we --

25 QUESTION: And it's no more coercive than saying

1 God.

2 MR. COOPER: I don't think we would put that on
3 the coins, but I think that is because, at this stage,
4 that would not be politically possible, because --

5 QUESTION: If that's the only -- but if we could
6 get the votes for it, we could do it under the
7 Constitution? Is that what you think?

8 MR. COOPER: Your Honor, in 1983 the Congress
9 passed a joint resolution that declared the Year of the
10 Bible. And in that resolution, the Congress said that the
11 Bible is the word of God. The President issued that
12 proclamation. That is a sectarian proclamation. I don't
13 think that violates the Establishment Clause. And I don't
14 think it does anymore than In God We Trust, our Nation's
15 motto.

16 QUESTION: Would it do so if a State legislature
17 were to adopt a particular religion as the State religion,
18 just like they might pass a resolution saying the bolo tie
19 is the State necktie?

20 (Laughter.)

21 QUESTION: We'll pass the resolution that
22 whatever that particular church is, is the State
23 church -- although it's not coercive. We're not going to
24 enforce it.

25 MR. COOPER: If it is purely coercive --

1 QUESTION: Not coercive.

2 MR. COOPER: If it is purely noncoercive, then I
3 have a difficult time distinguishing that from the
4 proclamation that I've just cited, the Year of the Bible.

5 QUESTION: So in your view, that would be
6 perfectly okay.

7 MR. COOPER: Your Honor, I think that in light
8 of the rule of law that we believe, the founding fathers
9 established in the Establishment Clause, some finding of
10 Government coercion of religious sentiment is necessary to
11 make out a violation. So your hypothetical is not the --

12 QUESTION: Well, that certainly hasn't been our
13 case holdings over a substantial period of time. You
14 would ask us to overturn a line of this Court's precedents
15 to reach your view.

16 MR. COOPER: We are quite frank --

17 QUESTION: Yes.

18 MR. COOPER: -- in our request that you
19 re-examine at least Lemon's applicability to the context
20 of Government expression in symbology. But it is not --

21 QUESTION: But one can abandon Lemon without
22 going as far as you're asserting, Mr. Cooper. Why not
23 noncoercion plus nonsectarian? Don't you really think
24 that accords a lot more with all of the exam -- the
25 historical examples that you give, with perhaps the

1 exception of the Year of the Bible, which doesn't go back
2 to Thomas Jefferson.

3 MR. COOPER: Well, Your Honor, the creche is
4 sectarian, the menorah is sectarian. And those are --

5 QUESTION: Oh, yes --

6 QUESTION: -- those have been upheld by this
7 Court.

8 QUESTION: -- but we haven't confronted the
9 case where the creche is allowed to be put there but the
10 menorah not, where we say we're only going to allow the
11 creche to be put there, and the State will not allow other
12 religious symbols during other religious holidays to be
13 put there. That's a quite different issue.

14 You think that -- do you think you give a tax
15 exemption only to Christian churches, not to other
16 churches, or only to Presbyterian churches?

17 MR. COOPER: Oh, no, by no means, Your Honor.
18 But I do think that the Establishment Clause under this
19 Court's uniform holdings protects the nonbeliever no
20 more -- no less than it does the believer, and to the
21 extent --

22 QUESTION: Oh, I see. And you want to stick to
23 those holdings, but not -- but not to -- ah, ah -- the
24 three-part test.

25 MR. COOPER: I don't think that those holdings

1 depart from the rule of law ordained by the founding
2 fathers. In other words, if it is this Court's mission to
3 identify, in Justice Brennan's words, the line between the
4 permissible and the impermissible, and to discern that
5 that line accords with history and faithfully reflects the
6 understanding of the founding fathers, I don't think you
7 can depart from the conclusion that, indeed, the
8 Establishment Clause was intended to protect nonbelievers.

9 QUESTION: You think our historical tradition
10 establishes just as clearly that the State cannot favor
11 religion over irreligion, as it establishes that the State
12 cannot favor one religious sect over another religious
13 sect?

14 MR. COOPER: I don't think that the --

15 QUESTION: You don't see any difference between
16 them -- in our constitutional tradition?

17 MR. COOPER: I do not see any difference with
18 respect to coercion. I don't think that the founding
19 fathers would have any more countenanced a tax to support
20 all ministers, than a tax just to support Christian
21 ministers.

22 QUESTION: I'm talking apart from the coercion
23 context. I'm talking about Thanksgiving proclamations,
24 I'm talking about In God We Trust. You do not see
25 anything in our constitutional additions that says you

1 cannot be sectarian?

2 MR. COOPER: Your Honor, I certainly don't
3 quarrel with the proposition that by and large our
4 Government expression of religious values and sentiments
5 has been nonsectarian. It has been nondenominational.
6 And it has favored, and indeed endorsed religion. But I
7 believe that if one searches the -- searches the record of
8 the development of the Establishment Clause itself, it's
9 very difficult to say that the founding fathers, that the
10 framers of the Establishment Clause meant to, ah, permit
11 the establishment of religion, generally, but not the
12 establishment of a particular religion.

13 And so I think that the analysis, insofar as
14 coercion is concerned, is the same whether you're talking
15 about nonsectarian speech or sectarian speech, except to
16 the extent, again, that the more theologically specific it
17 is, the more likely it is to be coupled with elements of
18 coercion.

19 QUESTION: Mr. Cooper, it sounds very much --

20 QUESTION: Of course it's not --

21 QUESTION: -- as though your test would make the
22 test under the Establishment Clause more or less the test
23 used under the Free Exercise Clause, making the
24 Establishment Clause pretty much a redundancy, wouldn't
25 you say?

1 MR. COOPER: Your Honor, I do believe that the
2 Establishment Clause and the Free Exercise clause were,
3 ah, were framed by the founding fathers to accomplish
4 religious freedom generally, both to prevent the
5 Government from --

6 QUESTION: Well, is the test the same under
7 either clause for a particular challenge? You think it's
8 essentially the same inquiry.

9 MR. COOPER: Your Honor, I do believe that both
10 require the finding of some coercive pressure on the
11 individual --

12 QUESTION: Well, could you have coercion from an
13 establishment standpoint but not a free exercise
14 standpoint?

15 MR. COOPER: Could you, Your Honor?

16 QUESTION: Yes, in other words, if you find
17 coercion in one, do you necessarily find coercion in the
18 other? Do you have to have the same level of coercion to
19 satisfy an equal protection -- or an establishment
20 challenge, as you do a free exercise challenge?

21 MR. COOPER: Your Honor, I cannot think of an
22 instance where that might not be the case. But perhaps
23 you have.

24 I do think that, however, you can have coercion
25 without having direct coercion, without actually mandating

1 attendance, by holding out substantial inducements to
2 attendance that would amount to undue influence. I
3 believe that the graduation ceremony context may well be
4 such an instance.

5 So in that regard, if this case were coming
6 before you in the absence of the stipulation that
7 attendance was entirely voluntary, then there would have
8 to be an inquiry into whether it was voluntary.

9 And if the determination was that it was not
10 voluntary, that attendance, that exposure to the
11 Government's speech, was not purely voluntary, one must
12 assess the nature and the setting of that speech to
13 determine if it is coercive.

14 I don't --

15 QUESTION: Of course, if you said that the
16 Establishment Clause requires both noncoercion and
17 nonsectarianism, then it wouldn't have a content different
18 from the free exercise clause, would it?

19 MR. COOPER: Your Honor, I believe that is an
20 accurate statement. And certainly, if the rule
21 that -- the rule of law that you are suggesting is
22 incorporated in the Establishment Clause, then this
23 invocation in this benediction, anyway, before you, would
24 have to be upheld, because it was clearly
25 nondenominational.

1 With the Court's permission, I'd like to reserve
2 the balance of my time for --

3 QUESTION: Mr. Cooper, let me ask you a
4 question.

5 You say it was nondenominational. I read from
6 the benediction: "We must each strive to fulfill what you
7 require of us all, to do justly, to love mercy, to walk
8 humbly."

9 That's lifted almost verbatim from the sixth
10 verse of the eighth chapter of the prophet Micah, isn't
11 it?

12 MR. COOPER: Your Honor, I -- I believe that
13 you're right, yes.

14 QUESTION: You believe so?

15 MR. COOPER: I will not argue with that. But I
16 do not think that transformed what was otherwise a very
17 nondenominational invocation into something that was
18 sectarian.

19 But even if it did, again, I would want to
20 reiterate, that would not, in and of itself, mean that the
21 religious expression was coercive.

22 QUESTION: When you say sectarian, you mean that
23 the entire prayer has got to be lifted or taken verbatim
24 from some traditional, sectarian liturgy or traditional
25 expression of prayer? Or would it -- would it be -- let

1 me give you the alternative -- would it be sectarian if
2 selected phrases had been taken, not only from the Bible,
3 as Justice Blackmun suggested, but from recognized,
4 written prayers of a given religion, and had just been
5 en-sprinkled into this, and incorporated into this, but
6 not -- not verbatim? Would that qualify as sectarian?

7 MR. COOPER: Your Honor, it might well qualify
8 as sectarian. In other words, if -- to use a prayer that
9 is associated with just one sect, very clearly and
10 distinguishably to the audience, it would be very
11 difficult to maintain that that was not sectarian.

12 QUESTION: But how about using half a prayer or
13 a third of a prayer? I mean would -- is your using the
14 word sectarian to draw this distinction, would it be
15 sectarian if simply selected phrases had been taken out of
16 a traditional liturgy and rearranged and otherwise
17 incorporated into fresh material?

18 MR. COOPER: Your Honor, I don't see how anyone
19 could compose a prayer that did not include phrases that
20 had been used by different sects. And it would seem to me
21 that if one, ah, composed a prayer using phrases from a
22 number of different sects, they would have the very
23 definition of a nonsectarian prayer.

24 QUESTION: Thank you, Mr. Cooper.

25 MR. COOPER: Thank you.

1 QUESTION: General Starr, we'll hear now from
2 you.

3 ORAL ARGUMENT OF GEN. KENNETH W. STARR
4 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
5 SUPPORTING THE PETITIONERS

6 GEN. STARR: Thank you, Mr. Chief Justice, and
7 may it please the Court:

8 This Court has frequently looked to history and
9 tradition in its interpretation of the Establishment
10 Clause. Indeed, it was Justice Brennan who said that our
11 interpretation in this area must be guided by history, and
12 by the understanding of the founding fathers.

13 Rabbi Gutterman's invocation and benediction are
14 a far cry from practices that the founding fathers meant
15 to stop by means of the Establishment Clause. To the
16 contrary, the acknowledgement of God, the invocation of
17 God's blessing, the expression of thanks of the Nation to
18 God, are practices that are as old and enduring as the
19 republic itself.

20 QUESTION: It's sectarian --

21 GEN. STARR: Of course not.

22 QUESTION: -- General Starr, to use the word
23 God instead of Allah?

24 GEN. STARR: Absolutely not, not in our
25 traditions. It could be, at one level, a generality yes,

1 of course. Because you are asserting a theological belief
2 that stands squarely in the Judeo-Christian tradition,
3 yes. But not sectarian in the sense that this Court has
4 been concerned about it.

5 The concern has been manifested in two ways. Do
6 the particular practices accord, and are they tied to the
7 traditions and the history of the Nation? And from the
8 earliest days of this Nation, beginning with Washington's
9 own invocation, his own urging of the Nation to set aside
10 time for prayer, a practice that continues to this day.

11 The point has been that we believe ourselves, as
12 a people, to be one Nation under God. But we nonetheless,
13 while acknowledging that, in innumerable ways in our
14 public life, respect freedom of conscience. That was the
15 point in Wallace against Jaffree. It was that
16 unifying --

17 QUESTION: You're not urging that we reexamine
18 Engel v. Vitale, are you, the Supreme Court case?

19 GEN. STARR: We are not, because of concerns
20 about coercion that are, in fact, at the heart of
21 religious liberty. It is a violation, a denial of
22 religious liberty to coerce an individual with respect to
23 an act of conscience. That was --

24 QUESTION: Well, how -- how is it -- how does
25 the analysis fit in the situation where the child is

1 excused from participating in the classroom prayer? How
2 would your test meet that, and how is that different from
3 the graduation or commencement exercise, which all the
4 children, obviously, want to attend as part of their
5 school experience?

6 GEN. STARR: They do, indeed. With respect to
7 the classroom, we believe that even though the child is
8 told, you do not have to participate in this, there is,
9 nonetheless, a powerful subtle indirect coercive pressure
10 on the child in the classroom -- with all that that
11 means -- compulsory attendance laws, the school with its
12 officials, its authority figures and the like. In our
13 judgment, a commencement exercise, even on the school
14 property is much more in the nature of a celebration. It
15 is a ceremony. It is not part of the educational or
16 instructional -- I'm sorry --

17 QUESTION: Would this particular prayer, if
18 given at the opening of a classroom in school, in your
19 judgment be constitutional or unconstitutional?

20 GEN. STARR: If it is being given, Justice
21 Stevens --

22 QUESTION: In the classroom and compelled
23 by -- by the teacher and --

24 GEN. STARR: If it's compelled by -- oh, I think
25 that's unconstitutional.

1 QUESTION: That would definitely not pass your
2 test.

3 GEN. STARR: Yes, because I believe coercion is
4 very much at work in the classroom setting. That is why,
5 even though the Court has been debating now for many years
6 the extent to which coercion is the sine qua non of the
7 Establishment Clause --

8 QUESTION: So the distinction between this case
9 and that case is simply that the attendance at the
10 graduation is voluntary, whereas attendance at class is
11 not?

12 GEN. STARR: No, Justice Stevens. I tried to be
13 clear in saying that I believe the graduation ceremony is
14 a ceremonial event. It's not part of an instructional
15 program in the schools. It is more like attending the
16 inauguration of the President, or the mayor --

17 QUESTION: Suppose attendance were required at
18 the graduation ceremony?

19 GEN. STARR: I think the case becomes more
20 difficult. But I would still say, that as this Court's
21 cases have said, that acknowledgments of God and the role
22 of God in our life as a Nation is in fact a part of
23 accommodation. But it seems to me the correct answer is
24 to say, yes, you must be there. You cannot be required to
25 participate in the prayer such as you must rise, and the

1 like. But you can, in fact, exercise your freedom of
2 conscience the way we do when we're asked to pledge
3 allegiance -- allegiance to the flag of the United States.

4 QUESTION: Suppose the whole class was asked to
5 rise. Suppose that they walked down as a class together
6 to the strains of Elgar, and they sit as a class, and
7 they're all asked to rise. And I take it the option
8 you're suggesting --

9 GEN. STARR: We looked --

10 QUESTION: -- and this is a mandatory
11 attendance. I take it the option you're suggesting is
12 that the students who object can remain seated?

13 GEN. STARR: Well, they may choose to stand.
14 But --

15 QUESTION: Cross their fingers?

16 GEN. STARR: -- the point is, we
17 listened -- Justice Kennedy, we hear a lot of things in a
18 free society, with robust and uninhibited debate, with
19 which we fervently disagree. And a prayer may be among
20 them.

21 And the point is, are we seeking to accommodate
22 the traditions of the Nation, or are we trying to engage
23 in what this Court has warned about time and
24 again -- proselytizing.

25 QUESTION: Except the prayer is not --

1 GEN. STARR: I beg your pardon?

2 QUESTION: General, a prayer is not one element
3 in a dialogue between people. It's an element conceivably
4 in a dialogue between the people and God. But I don't see
5 how you can analogize that to free debate.

6 GEN. STARR: No, the point is that the act
7 itself is an act of acknowledgement of our traditions as a
8 people. When we look to history, when we heard what
9 happened in this courtroom this morning, God's name was
10 invoked in two instances.

11 QUESTION: You had to be here and you had to
12 stand up, didn't you?

13 GEN. STARR: I felt it necessary to stand up.
14 But the point is that we do, Justice Souter, have to
15 listen to things. We don't have to -- and this is the
16 distinction, and I hope I'm being clear -- and that is, in
17 Barnett, you shouldn't have to participate in the sense of
18 giving assent. You may have to be present to hear things
19 that you disagree with.

20 But does that violate freedom of conscience? I
21 don't think so, unless the Government is seeking to coerce
22 the individual through proselytizing.

23 The point on the sectarian point, it seems to me
24 that it is quite clear that our traditions -- and the law
25 of this Court is quite clear -- that the more

1 sectarian -- that sectarianism is, in fact, an inherently
2 divisive force, and that is something that the
3 Establishment Clause has long looked to guard against.

4 QUESTION: General, if --

5 GEN. STARR: Discrimination --

6 QUESTION: I'm sorry, I didn't mean to interrupt
7 you.

8 GEN. STARR: I was just going to say
9 discrimination among sects -- are saying we favor this
10 particular sect. Here in Pawtucket we favor Judaism, or
11 we favor the Roman Catholic Church, would be wrong. That
12 is an Establishment Clause danger that Madison warned
13 about. That's sectarianism.

14 QUESTION: If we accept the kind of the concept
15 of tradition as a source of a criterion, don't we really
16 have not an easy answer here, as I think you're
17 suggesting, but a difficult one? Because we've
18 got -- we've really got two traditions that we're going to
19 have to reconcile. One is a tradition of some religious
20 expression on public occasions, and the other is a
21 tradition which, I guess, is the school tradition, which
22 does not have such a history, and which -- at least so far
23 as your brother is concerned -- should be treated on the
24 assumption that Engel is good law.

25 So if Engel is going to be good law, then when

1 you get to the point of tradition, we've got to choose
2 which tradition it's going to be. Is it going to be the
3 tradition of Engel, or is it going to be the tradition of
4 noneducational public gatherings at which the deity is
5 mentioned?

6 GEN. STARR: I don't think that the Engel
7 tradition is implicated outside the classroom. I urge the
8 Court to think long and hard before it determines that a
9 graduation prayer is more in the nature of a classroom
10 event with the teacher in control of the classroom, and
11 with a child in that setting having to get up and vote
12 with her feet.

13 QUESTION: Isn't the analogy a lot closer there
14 than it is to a presidential inauguration?

15 GEN. STARR: It is certainly closer.

16 But the point -- may I, Mr. Chief Justice,
17 respond -- the points I would make very briefly are these.
18 There are parents and loved ones present. This is, after
19 all, as a legal matter -- and I think the legal aspect of
20 this should not be overlooked --

21 QUESTION: Have you ever been to a graduation
22 where the parents sit with the children?

23 GEN. STARR: I beg your pardon?

24 QUESTION: Have you ever been to a graduation
25 where the parents sit with the children?

1 GEN. STARR: No, the presence of the parents is
2 not a talisman. It's the point that this is a ceremony,
3 so the child knows that what the child is plugging into is
4 a tradition of ceremonial celebrations. You are plugging
5 into society by virtue of your being elevated from one
6 passageway to another. You're not in a classroom setting.
7 That is a clear distinction. The fact that the parents
8 are present there, and who have been able to advise the
9 child beforehand -- you may hear things that you don't
10 like and you don't agree with. You may hear a graduation
11 speaker with whom you fervently disagree. But that's the
12 nature of this society. That's part of a free society. I
13 think that --

14 QUESTION: Thank you, General Starr.

15 Ms. Blanding, we'll hear now from you.

16 ORAL ARGUMENT OF SANDRA A. BLANDING

17 ON BEHALF OF RESPONDENT

18 MS. BLANDING: Mr. Chief Justice, and may it
19 please the Court:

20 To convince the Court that this case represents
21 a threat to all manner of ceremonial traditions in this
22 country, the petitioners ignore an essential fact of this
23 case. And that is that this case deals with school prayer
24 at a public school function that is run by public school
25 teachers and officials, and that's organized for the

1 purpose of honoring public school students.

2 None of the examples which the petitioners or
3 the Government have suggested are comparable here occur in
4 the public school setting. All of the examples --

5 QUESTION: Well, what about the courtroom prayer
6 that we've heard argued and referred to this
7 morning -- ah, if you want to call it a prayer -- at least
8 the opening of court, in which the reference is made to
9 the deity, and where people are expected to be here and to
10 stand up and listen to it.

11 Now, how do you distinguish that?

12 MS. BLANDING: Your Honor, I would suggest that
13 there are two distinctions there. One is that the
14 courtroom opening does not occur in a public school. And
15 this Court has always, in every case that it has addressed
16 the interaction of religion and public school officials,
17 accorded special concern to that kind of interaction.
18 Secondly, the opening of court is a very -- it's more like
19 the Marsh kind of analysis. It's -- first of all, it has
20 a very longstanding history, and secondly, it's become a
21 rote kind of thing. So that the perception of a
22 reasonable observer, I would suggest, is different.

23 QUESTION: You don't think invocations at
24 graduations are a rote sort of thing?

25 (Laughter.)

1 QUESTION: Does this mean that a public school
2 cannot bring students in to a -- to a session of this
3 Court?

4 MS. BLANDING: No, Your Honor. But I do not
5 think that public school --

6 QUESTION: They can or they can't? They can?
7 Is that all right?

8 MS. BLANDING: It does not mean -- it does not
9 mean that students cannot be brought in to watch the Court
10 sessions --

11 QUESTION: As required class, I mean you have to
12 come to class and we're going to put you on a bus and you
13 come to hear the Court session, or you come to watch a
14 Presidential inauguration. Can the public school do that?

15 MS. BLANDING: I think that it is -- yes, I
16 think that the public school can bring their students --

17 QUESTION: Right, even though the word God would
18 be invoked?

19 MS. BLANDING: Yes, Your Honor, but I do not
20 think that prayers at graduation are by any means rote.
21 Even within the city of Providence, half of the
22 schools -- half of the middle schools and high schools did
23 not include prayer in their graduation ceremonies prior to
24 the district court's injunction in this case.

25 So the -- the kind of tradition that you're

1 talking about is completely different. There is not the
2 history. There is not the automatic kind of rotteness
3 that -- that I think -- that this Court's opening
4 suggests.

5 QUESTION: It may not be the history for the
6 past few decades, but I'll bet there was before -- before
7 there came to be any doubt about whether such invocations
8 could be given or not.

9 MS. BLANDING: Well, Your Honor, I -- I think
10 that public school education, as this Court has already
11 recognized, doesn't fall into the Marsh kind of analysis
12 to begin with, because the facts relating to the history
13 of public education are different than the facts relating
14 to legislative prayer.

15 QUESTION: Suppose that at this graduation the
16 rabbi was present and he stood up before the main
17 commencement speaker and said, I've been asked by the
18 principal, on behalf of all the clergy here in -- in
19 Providence to congratulate you and to welcome you. We've
20 been praying for you, and we want you to know that all of
21 our churches are open to you, and we hope that you take
22 advantage of the rich resources that the religious
23 community has here in Providence.

24 A violation?

25 MS. BLANDING: I think so, Your Honor.

1 QUESTION: They're not asked to stand.

2 MS. BLANDING: What you still have in that case,
3 is part of the facts of this case, which is that the
4 public school officials have chosen a particular clergy to
5 come in, knowing that that clergy is going to give a
6 message promoting religion. It is still a public school
7 function that is inherently part of the whole public
8 school educational process.

9 And the message that's conveyed to students is
10 that Government is sponsoring a religious organization's
11 religious message.

12 QUESTION: But does that mean that the school
13 can't invite a commencement speaker like Martin Luther
14 King, who might make all kinds of references to the
15 religious experience and the need to rely upon God's help
16 in creating a just society?

17 Now, is the school forbidden from doing that?

18 MS. BLANDING: No, Your Honor, absolutely --

19 QUESTION: To knowingly invite someone to be the
20 commencement speaker, knowing that it's very likely that
21 the person invited will speak in that fashion.

22 MS. BLANDING: I think that it is not prohibited
23 for the school to invite anyone that it chooses to be a
24 commencement speaker. I think that the problem
25 arises, for purposes of the Establishment Clause, when the

1 school does so, either approving or with the tacit
2 understanding that that speaker is going to deliver a
3 prayer. For a commencement --

4 QUESTION: Would your answers to these questions
5 that Justice O'Connor and I are asking be the same if this
6 Court or any of its justices were to use the dissent in
7 Allegheny as the analytical framework --

8 MS. BLANDING: Yes, Your Honor --

9 QUESTION: -- i.e., are you answering based on
10 the Lemon test or an -- or an endorsement sort of a test?

11 MS. BLANDING: I think, Your Honor, under any
12 test that the Court has adopted, that this practice
13 violates the Establishment Clause. Under the endorsement
14 test, I think that the clear message that is being given
15 to students is public school teachers are picking a
16 clergy. That clergy is delivering --

17 QUESTION: What about under the coercion test of
18 the Allegheny dissent?

19 MS. BLANDING: Under the coercion test that
20 the -- that was set forth in the Allegheny dissent, I
21 think yes, Your Honor there is definitely coercion here.
22 There is no difference here than --

23 QUESTION: Well, what is the coercion?

24 MS. BLANDING: There is no difference, Your
25 Honor, between voluntary prayer in the classroom, between

1 the fact situations of Abington, the fact situations of
2 Karen B., where children were not required to be present
3 in the first place, they could opt into the prayer
4 session; from the situation in Engel where children were
5 allowed to be excused, and there is in this situation.

6 QUESTION: Is there, then, a free exercise
7 violation, in your view?

8 MS. BLANDING: In this situation?

9 QUESTION: Yes.

10 MS. BLANDING: Yes, I think there is both. I
11 think that the child who was in --

12 QUESTION: Did you argue that there was a free
13 exercise violation?

14 MS. BLANDING: Pardon?

15 QUESTION: Have you argued in your briefs that
16 there's a free exercise violation?

17 MS. BLANDING: No, Your Honor, but in this
18 particular case, Deborah Weisman was 14 years old when
19 this graduation occurred. She was leaving the eighth
20 grade of a public school going into the ninth grade of
21 another public school. To suggest that there is no
22 continuity there, that somehow this one day of graduation
23 she was different -- she was not subject to peer pressure,
24 she was not subject to the pressure that comes from
25 looking at schoolteachers as authority figures and as

1 persons to emulate -- to suggest that there is some
2 magical difference between this one day is totally
3 unrealistic.

4 This day was --

5 QUESTION: Ms. Blanding, suppose in addition to
6 drawing the line between coercion and noncoercion, we drew
7 a line between instruction and noninstruction? Don't you
8 see a difference between a prayer at the opening of a
9 class in a context where students are there to learn, to
10 be instructed -- doesn't that have a different impact than
11 a prayer at a ceremony like a graduation, which is not an
12 educational program, it's not an instructional exercise.

13 Isn't there a difference between people
14 voluntarily wishing to invoke the blessing of God, and
15 people trying to instruct people about God? Isn't that a
16 difference that makes some sense?

17 MS. BLANDING: I don't think, Your Honor, that
18 this is a situation where people are voluntarily seeking
19 to invoke God. This is a ceremony that is directed to
20 children, that is developed for the purpose of honoring
21 children at a very important day of their lives. They
22 do --

23 QUESTION: Well, you -- we have invocations like
24 that at all sorts of events, not just high school
25 graduations. I mean, we do it at the opening of Court, we

1 do it at the opening of Congress. It's people in a
2 country which overwhelmingly believes in God wanting to
3 invoke God's blessing, without trying to instruct others
4 about that. Why is it suddenly different when it happens
5 at a high school graduation or a middle school graduation?

6 MS. BLANDING: I think it is different, Your
7 Honor, for the same reasons that this Court has always
8 accorded a different level of scrutiny to public school
9 situations. We do, in fact, have here a situation where
10 the children all walked into the graduation together.
11 They were not seated with their parents. They were seated
12 together. They were asked to stand to say the Pledge of
13 Allegiance. And they remained standing for purposes of
14 listening to the invocation.

15 QUESTION: Is this apparent from the record?

16 MS. BLANDING: It is not, Your Honor. This
17 record was submitted on an agreed statement of facts. And
18 the city, below --

19 QUESTION: Is that contained in the agreed
20 statement of facts?

21 MS. BLANDING: It is not, Your Honor. The city
22 never argued a coercion argument, either before the United
23 States Court of Appeals or before the district court. So
24 there was never a reason to raise the coercion -- the
25 facts related to coercion at those levels.

1 QUESTION: Well, I -- that may be a reason to
2 object to a particular argument made here. But I think
3 you probably should confine yourself to the record when
4 you're talking about facts.

5 MS. BLANDING: Yes, Your Honor.

6 QUESTION: Does the record tell us how often
7 prayers such as this have been said in graduation
8 ceremonies during the history of the country?

9 MS. BLANDING: No, Your Honor. The record --

10 QUESTION: It just tells us about this
11 particular graduation?

12 MS. BLANDING: The record goes beyond this
13 particular graduation and deals with all of the middle
14 schools and high schools in the City of Providence. And
15 the record states that out of 11 middle schools and high
16 schools, in the 5 years preceding this graduation, six of
17 those schools routinely included --

18 QUESTION: I understand that. Does it tell us
19 anything about the extent to which this practice has been
20 followed in any other school in the United States --

21 MS. BLANDING: It does not, Your Honor.

22 QUESTION: -- of any kind?

23 MS. BLANDING: It does not, Your Honor.

24 QUESTION: So we don't really know if there have
25 ever been such things before, do we?

1 MS. BLANDING: That's true, Your Honor. From
2 the record you don't know that.

3 Not only does the city's argument ignore the
4 essential nature of this case, but the city urges an
5 interpretation of the Establishment Clause which would set
6 the stage for radical changes in the relationship between
7 Government officials and religious institutions.

8 The coercion test that the city suggests has
9 been repeatedly rejected by this Court because in its
10 brief, the city suggests that the Establishment Clause
11 proscribes only the use of Government force or funds to
12 aid or inhibit religious practices.

13 Indeed, in its brief, the city openly suggests
14 that Government officials may participate in religious
15 debate, and that Government speech cannot amount to
16 coercion of religious -- religious liberty to the extent
17 that the Establishment Clause is implicated.

18 If this Court were to adopt the standard that
19 the city proposes, then graduation ceremonies in public
20 schools could open with a Roman Catholic mass. And as
21 long as the graduation ceremony was voluntary in the sense
22 that children were not obligated to attend, then that
23 would -- that practice would pass Establishment Clause
24 muster.

25 In fact, if the city's argument were adopted,

1 there is nothing to prevent a Government official from
2 standing up and saying that this is a Christian country
3 and that non-Christians are doomed to everlasting
4 damnation.

5 If speech alone, absent compelled attendance,
6 does not warrant the protection of the Establishment
7 Clause, then decades worth of cases which this Court has
8 decided, dealing with prayer in the public school setting,
9 must fall; Abington v. Schempp, Engel v. Vitale --

10 QUESTION: Of course, of course, on that line of
11 reasoning, I assume that the inaugural prayer and the
12 prayer in Marsh v. Alabama are also inappropriate. And
13 you're just asking us to reconsider those decisions as
14 well?

15 MS. BLANDING: I am not asking the Court to
16 reconsider those decisions, Your Honor --

17 QUESTION: But the logic of your argument
18 applies equally to those. And it seems if those are on
19 the books, that you should be required to notice, and to
20 make a distinction between a Catholic mass and a sectarian
21 prayer.

22 MS. BLANDING: I would suggest, Your Honor, that
23 taking Marsh, as an example, that the facts in Marsh are
24 radically different from the facts of a graduation
25 ceremony in a public school. The legislators, first of

1 all, were participants in the decision whether or not to
2 include prayer. The legislative sessions are much less
3 controlled than are graduation ceremonies. Legislators
4 can walk in and out as they please -- and they do walk in
5 and out as they please. Legislators are adults.

6 QUESTION: So there's less coercion. I mean,
7 all of these differences you're pointing out go precisely
8 to the coercion point, don't they?

9 MS. BLANDING: Well, Your Honor --

10 QUESTION: And if that's the -- I don't
11 understand your basis for saying schools are an entirely
12 different area, unless somehow it's a coercion basis, or
13 an instruction basis, is it? Because otherwise, Marsh and
14 the invocation at the beginning of Court, and in
15 Congress -- you're talking a few decades of cases, as you
16 mention. We're talking a few hundred years of traditional
17 practices in this country, which you somehow have to
18 reconcile with the notion that you can't have an
19 invocation at a high school graduation.

20 MS. BLANDING: I am not suggesting, Your Honor,
21 that the Court adopt a different test than it has used
22 over the last several decades. The Court has routinely
23 addressed difficult questions -- some dealing with old
24 traditions, some dealing with newer situations -- and has
25 reconciled those traditions under the Lemon test.

1 But I do suggest to the Court that even if the
2 Court were to examine this particular set of facts under a
3 coercion argument, that in fact what the school department
4 did here was coercive towards the graduating
5 children, just as the voluntary prayer in the classroom is
6 coercive.

7 The mere fact that this is removed from a
8 classroom and takes place at a public school function
9 instead of in the school building on a class day doesn't
10 change the essential nature of the case.

11 QUESTION: Well, is that a product of the manner
12 in which the graduation is held, and the freedom to come
13 and go -- or lack of freedom to come and go -- or is it
14 because of the sophistication of the children or the
15 adolescents, so that the effect of them is going to be
16 different from the effect on legislators who may be
17 standing here, or anyone in this courtroom who may be
18 standing here and hearing God save the United States?

19 MS. BLANDING: It is a combination, Your Honor,
20 of all of those factors. This, in a sense, all of the
21 Establishment Clause cases that this Court deals with are
22 fact-specific. They depend -- as an example, in County of
23 Allegheny -- they depend on the specific facts that are
24 before the Court. And this case, yes, you have
25 schoolchildren who are more impressionable than adults,

1 you have schoolchildren who are part of the public school
2 and public education arena and are subject to pressure
3 from teachers, and who use teachers as role models.

4 You have, in addition to that, you have the fact that
5 a school's generally -- and graduation ceremonies in
6 particular -- are much more controlled. The students have
7 no authority to control what happens at a graduation
8 ceremony.

9 QUESTION: What about graduation from State
10 universities, under your analysis. If we have prayer of
11 this sort, is the result going to be different, under your
12 view? I mean, graduating seniors today engage in
13 demonstrations; they certainly have not indicated undue
14 enthusiasm for authority figures in the last few decades.

15 (Laughter.)

16 QUESTION: Are you going to say there isn't as
17 much danger, and hence you're not going to come up with an
18 establishment conclusion?

19 MS. BLANDING: I think, Your Honor, that may be
20 a closer case. But I still think that if you analyze that
21 case under the traditional tests that this Court has used,
22 and under the endorsement test, that the message that's
23 being conveyed to the audience is still a message that
24 Government officials are supporting and endorsing and
25 favoring religious expression.

1 QUESTION: Then it is an endorsement test, not a
2 coercion test that you're resting on.

3 MS. BLANDING: Yes, Your Honor -- I am resting
4 on the traditional Court -- the traditional test that this
5 Court has always applied in school cases, in combination
6 with the endorsement test. But I am also saying that it
7 is coercive here. So that even if the Court were to adopt
8 the coercion test -- not the coercion test which the city
9 has suggested, because in that case, decades worth of
10 cases would fall, and there are many, many situations that
11 this Court has held violate the establishment Clause that
12 would not under the city's test, even sectarian prayer, as
13 the Court raised earlier.

14 But under the -- the -- under the coercion test
15 that acknowledges that coercion can be very subtle, that
16 it is not simply limited to is a citizen forced to pay
17 money to support a church, or is a citizen forced to stand
18 there and participate in a religious exercise. Under an
19 analysis of coercion that takes into account the subtle
20 kinds of pressures that can be exerted on people -- and
21 particularly on children -- then yes, I think that the
22 practice here was coercive.

23 QUESTION: On college seniors -- I mean, that
24 was the last hypothetical. On college seniors, do you
25 think they are being coerced, more than the people in this

1 courtroom when there is an apparent endorsement of
2 religion?

3 MS. BLANDING: I think that a coercion test
4 applied to college seniors would be a closer case, and
5 would need to -- would need to depend more on the facts.
6 But I think under the endorsement --

7 QUESTION: The problem is, if you don't use a
8 coercion test, if you use an endorsement test, which you
9 seem to be falling back on when you're presented with the
10 college example, then there's no basis for distinguishing
11 schools from courtrooms, from -- from halls of Congress.

12 MS. BLANDING: There is, Your Honor, because
13 part of the endorsement test depends on the perception of
14 the audience. And what a reasonable person in the
15 audience would perceive is the message that is being
16 promoted.

17 And in this case, the audience is primarily
18 schoolchildren. And they are -- the audience --

19 QUESTION: College, colleges, we're talking
20 about.

21 MS. BLANDING: I'm sorry, Your Honor, in a
22 college graduation.

23 QUESTION: I think you have to say that that's
24 good, unless you're using a coercion test rather than an
25 endorsement test.

1 MS. BLANDING: I think the message to college
2 seniors, Your Honor, would still remain under the
3 endorsement test, that the school officials that
4 are -- that are putting on and organizing the graduation,
5 if they are choosing a clergyman, as happened in this
6 case, if they are suggesting to the clergyman -- as
7 happened in this case also -- the school officials told
8 the clergyman what kind of prayer he could say. I don't
9 know how you could avoid saying that that is endorsement.

10 QUESTION: What about the coercion test -- what
11 about the coercion test? You said endorsement. I assume
12 that you meant endorsement.

13 MS. BLANDING: Yes.

14 QUESTION: Is your answer the same with
15 reference to coercion?

16 MS. BLANDING: I think that the question, with
17 regard to college seniors, Your Honor, is closer on the
18 coercion test. And I'm not prepared -- without -- I think
19 that, again, the Court would have to look at the specific
20 facts of that case that was before them.

21 QUESTION: Well, counsel, don't you think
22 that -- you ought to urge the Court not to depart from the
23 established precedent of Lemon?

24 MS. BLANDING: Yes, Your Honor, I am urging the
25 Court --

1 QUESTION: You sound like you really don't care
2 whether we depart from it or not.

3 MS. BLANDING: No, that's not true, Your Honor.
4 I --

5 QUESTION: Do you think making the decision turn
6 on coercion would be, in effect, overruling the line of
7 cases?

8 MS. BLANDING: Yes, I do, Your Honor. I think
9 that the Lemon test has, in essence, stood the test of
10 time. Although it is sometimes difficult to apply, I
11 don't think the coercion test is any easier to apply.

12 The Court, in the area of criminal law, for
13 example, has always wrestled with the issue of when a
14 confession is coerced and when it is voluntary. And even
15 in that scenario, the age of the people involved is
16 important.

17 I think that the National School Board
18 Association makes the point better than I could make it in
19 its amicus brief, which is that if this Court -- that
20 school officials and communities and parents have relied
21 on this Court's analysis under the Lemon test for decades.
22 And if this Court were to not rely on the Lemon
23 Court -- test in this case, that what it would be doing is
24 making all of the religion in the school cases for the
25 last several decades suspect.

1 QUESTION: Do you agree that this is a -- under
2 the Lemon test, this case turns on effects?

3 MS. BLANDING: I think, Your Honor, that both
4 under the purpose prong of the Lemon test and under the
5 effect prong of the Lemon test, that this practice must
6 fall under the Establishment Clause.

7 QUESTION: Well, the court below turned it on
8 effects.

9 MS. BLANDING: Pardon, Your Honor?

10 QUESTION: The court below turned it on effects.

11 MS. BLANDING: Yes, the court below addressed
12 the effects argument, and did not address the purpose
13 argument.

14 QUESTION: Well, tell me how do you think that
15 the primary effect of what went on at this ceremony is to
16 advance religion? And there is the word primary in the
17 Lemon, isn't there?

18 MS. BLANDING: Yes, Your Honor.

19 QUESTION: So there must be -- there might be an
20 effect advancing religion that isn't a primary effect.

21 MS. BLANDING: I think, Your Honor, that if the
22 Court looks at the effect test in concert with the
23 overtones of endorsement, the message that the school
24 committee --

25 QUESTION: Overtones of endorsement?

1 MS. BLANDING: Yes, Your Honor -- I think if the
2 Court looks at the effect test as it has been interpreted
3 in recent cases, in concert with the endorsement test, and
4 understanding --

5 QUESTION: Where did the endorsement test come
6 from? It isn't part of Lemon, is it?

7 MS. BLANDING: Well, Your Honor --

8 QUESTION: Is it or not?

9 MS. BLANDING: The way that I am --

10 QUESTION: Is it, or not?

11 MS. BLANDING: Well, I understand -- the way I
12 understand it, Your Honor, it is that the Court views the
13 endorsement test as part of the effects prong of the Lemon
14 test. And I think that the message that is conveyed, the
15 effect of having a school prayer -- a prayer delivered at
16 a public school function, that the effect and the message
17 that's conveyed to the primary audience -- which is the
18 schoolchildren -- is that public school officials are not
19 only endorsing religion, they're endorsing a particular
20 religious message that is being delivered by this
21 particular clergy whom they have chosen.

22 QUESTION: Ms. Blanding, do you subscribe to
23 that version of the Lemon test which says that the primary
24 purpose and effect must not be to advance religion, or to
25 the other version that says that a primary purpose or

1 effect must not be to advance -- because we've used both,
2 depending on whether we want to uphold or not to uphold.

3 (Laughter.)

4 QUESTION: Which one of the two do you like?

5 MS. BLANDING: Your Honor, under either
6 analysis, I think that the primary purpose and effect in
7 this case, of the school department's practice, is to
8 advance religion. There is nothing in the agreed
9 statement of facts that was submitted to the court below
10 that suggests the Government's purpose in including prayer
11 in part of the school's commencement exercises, and not
12 including them in other of the school's commencement
13 exercises.

14 The Government makes the argument that by
15 including prayer they are merely acknowledging religious
16 tradition. However, this Court has always recognized the
17 fact that prayer is the -- is inherently religious. It's
18 not simply a passive acknowledgement, as the display of a
19 nativity scene, or the display of a menorah may, in some
20 circumstances, be passive acknowledgement. It is active.
21 It is worship.

22 To say that any vocal prayer is merely an
23 acknowledgement of religious traditions is to diminish the
24 value of that prayer.

25 Furthermore, I don't think that it is possible

1 to devise a nonsectarian prayer that covers all people and
2 all religious beliefs. This country has become so much
3 more diverse than it was when it was founded in terms of
4 the religious beliefs of its citizens that it is virtually
5 impossible to devise a prayer which encompasses the
6 beliefs of all of those citizens.

7 With regard to the effect of including a prayer,
8 as I stated earlier, the message that must be given by
9 public school teachers who have chosen a particular
10 clergyperson and have brought him into a public school
11 function to deliver a prayer is that the public school
12 is -- at the very least -- saying that prayer is a
13 preferred practice. And by doing so, they are giving a
14 message to nonadherents and nonbelievers that their
15 religious beliefs are not as important, that they are
16 outsiders, and that the public school system does not
17 belong to them in the same way that it belongs to
18 believers.

19 QUESTION: Why doesn't a Thanksgiving
20 proclamation do that? And why is that any worse?

21 MS. BLANDING: A Thanksgiving -- I think under
22 its facts, Your Honor, a Thanksgiving proclamation is much
23 different than a prayer which is delivered to a specific
24 audience of children in a school setting which is as
25 controlled as this one. The Thanksgiving proclamation is

1 not really delivered to any specific audience. In fact,
2 I'm not sure that there is anyone that would have standing
3 to bring such a case before the Court.

4 QUESTION: But if you're talking about making
5 people -- you know, if that's the test, whether people are
6 made to feel like outsiders, if you're going to use an
7 endorsement test, is there anything that's more of an
8 endorsement than a Thanksgiving proclamation -- which
9 virtually every President has issued?

10 MS. BLANDING: Your Honor, I think that, again,
11 there are some Marsh elements, or in some sense the
12 Thanksgiving proclamation is more like Marsh and has some
13 more of the elements of Marsh than this particular case
14 does.

15 QUESTION: I don't see what a controlled
16 classroom environment has to do with endorsement. I can
17 see what it has to do with coercion, not with endorsement.

18 MS. BLANDING: I think that in terms of the
19 message that is being given to the audience, the primary
20 audience, the whole set of facts around a graduation
21 ceremony are relevant to the endorsement inquiry.

22 QUESTION: Isn't that also a substantial part of
23 the answer to the -- to Justice Scalia's question about
24 the Thanksgiving proclamation? Effect depends on --

25 MS. BLANDING: The audience --

1 QUESTION: -- who's receiving it, and the
2 audience is different. Don't you rely, at least in part,
3 on that?

4 MS. BLANDING: I do, Your Honor. Again, I think
5 this case is essentially a school prayer case. And it
6 must be looked at in that context, as this Court has
7 always looked at cases dealing with the interaction of
8 religion in the schools in a special context.

9 Thank you.

10 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
11 Blanding.

12 The case is submitted.

13 (Whereupon, at 11:02 a.m. the case in the
14 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 90-1014 - ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF NATHAN BISHOP MIDDLE SCHOOL, ET AL., Petitioners V. DANIEL WEISMAN, ETC.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *alan friedman*
(REPORTER)