



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

July 13, 1994

**Mr. Rufus J. Cormier**  
**Chair**  
**Texas Southern University**  
**Board of Regents**  
**3100 Cleburne Avenue**  
**Houston, Texas 77004**

**Letter Opinion No. 94-057**

**Re: Whether a state university may include prayers at commencement ceremonies and other official university events (RQ-659)**

**Dear Mr. Cormier:**

We have been asked "whether Texas Southern University violates its First Amendment responsibility of government neutrality in religion by providing invocations during convocations, commencement[] ceremonies and other official events." Correspondence challenging the university's practice submitted with the request asserts that the university begins faculty meetings, convocations and commencements with a Christian prayer. The correspondence also states that faculty members are required to attend faculty meetings.

This query requires us to consider whether the university's practice runs afoul of the United States Constitution, particularly the Establishment Clause of the First Amendment which provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. This prohibition applies equally to states, and applies to the university as an entity of the State of Texas. *See Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-2, at 567-69 (1978).

We are not aware of any case law that addresses your specific situation, *i.e.*, whether a state university may include prayers at convocations, faculty meetings, and commencement ceremonies. We have found a number of relevant United States Supreme Court opinions, however, which we hope will provide some guidance.

Traditionally, the Court has applied the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to determine whether a government practice violates the Establishment Clause. To satisfy the Establishment Clause, a government practice must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. More

recently in Establishment Clause cases, the Court has paid particular concern to whether a government practice has the effect of "endorsing" religion. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring); *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 592-97 (1989) (Blackmun, J., concurring); *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 249-52 (1990) (plurality opinion). The Court has not adhered to the *Lemon* test in every case, however. In *Marsh v. Chambers*, 463 U.S. 783 (1983), for example, the Court's conclusion that the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the state did not violate the Establishment Clause was based on an historical approach. In essence, the Court reasoned that the legislature's practice was permissible because "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786.

In a 1992 decision, *Lee v. Weisman*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 2649 (1992), the Court concluded that the Establishment Clause prohibited the practice of public middle and high schools in Providence, Rhode Island to include clergy who offer nonsectarian prayers as part of official school graduation ceremonies. Although the opinion of the Court invoked the *Lemon* test and refused to reconsider it, see 112 S. Ct. at 2655, the opinion did not expressly apply it. Instead, the Court reasoned that the state of Rhode Island's involvement in the school prayers violated the Constitution's guaranty "that government may not coerce anyone to support or participate in religion or its exercise." *Id.* The suggestion that standing or remaining silent during the prayers could signify respect, rather than participation, was rejected:

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity.

*Id.* at 2658-59. In the *Lee* case, the school principal at issue had decided that the prayers would be included in the graduation ceremony, chosen the rabbi who delivered the prayers, provided the rabbi with guidelines for the content of the prayers, and advised the rabbi that the prayers should be nonsectarian. *Id.* at 2655-56.

Several other factors were also taken into account. The Court believed that students at the graduation ceremony had no choice but to participate in the prayers, noting that "there are heightened concerns with protecting freedom of conscience from subtle

coercive pressure in the elementary and secondary public schools." *Id.* at 2658 (citations omitted). The Court dismissed the importance of a stipulation that attendance at graduation ceremonies is voluntary: "Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary,' for absence would require forfeiture of those intangible benefits which motivated the student through youth and all her high school years." *Id.* at 2659. Finally, despite the long history of prayer at high school graduations, the Court rejected any comparison to the *Marsh* case:

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. . . . At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program . . . . 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.

*Id.* at 2660. In doing so, the Court rejected the *Marsh* historical approach in high school graduation prayer cases.<sup>1</sup>

If the university's practice of beginning faculty meetings, convocations and commencement ceremonies with a prayer were challenged in court, we believe that the court would consider the practice in light of the foregoing authorities. It is not at all clear to us, however, how a court would apply them. It is not clear, for example, whether a court would examine prayer in the university context in the same manner it examined prayer in high school and secondary school in the *Lee* case. In the past, the United States Supreme Court has distinguished between the "impressionability" of university students and younger students. Compare *Lee*, 112 S. Ct. at 2658-59 (noting the heightened concerns with protecting the freedom of conscience of elementary and secondary school students) with *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.") and *Tilton v. Richardson*, 403 U.S. 672, 686 (1971) ("There is substance to the

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<sup>1</sup>Thus, the Court appears to have disapproved of *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), a federal appellate court decision following *Marsh* that upheld prayers in high school graduation ceremonies.

contention that college students are less impressionable and less susceptible to religious indoctrination." ). Thus, a court might apply the *Marsh* historical approach in the university context. On the other hand, a court might conclude that there is no real difference between the impressionability of graduating high school seniors in Rhode Island and college freshmen in Texas attending a convocation at the university.<sup>2</sup>

Furthermore, we have been provided with absolutely no information about the nature of the prayers offered at the university and the involvement of the university in the prayers. We have not been told who decides that prayers will be included in university events, who writes and delivers the prayers, or how the prayers are presented. Nor do we know anything about the content of the prayers. It may make a difference, for example, whether the prayers are sectarian or nonsectarian, or whether their content varies from event to event depending upon the celebrant.<sup>3</sup> The resolution of factual questions is crucial in any case, but is particularly important in Establishment Clause cases where subtle factual distinctions may have great significance for the outcome. The constitutionality of a Christmas nativity scene, for instance, may hinge upon whether it is surrounded by other "secular" symbols of the season. Compare *Lynch*, 465 U.S. at 687-94 (permissible holiday display) with *County of Allegheny*, 492 U.S. at 592-97 (impermissible holiday display). Subtle factual distinctions appear to be equally significant to the outcome of prayer cases. For example, the United States Court of Appeals for the Fifth Circuit, distinguishing *Lee* on its facts, held that a school district's resolution permitting high school seniors to choose student volunteers to deliver nonsectarian, nonproselytizing invocations at their graduation ceremonies did not violate the Establishment Clause. See *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), cert. denied, 113 S. Ct. 2950 (1993). Because the resolution of factual questions is beyond the purview of the opinion process, we are unable to draw such factual distinctions and therefore cannot provide a definitive answer to your question.

Depending upon the resolution of the foregoing and other factual issues, a court might conclude that the university's practice of beginning convocations, faculty meetings,

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<sup>2</sup>Because it implicates the university's employment relationship with its faculty members, the inclusion of prayers at faculty meetings raises a host of additional issues. For instance, we believe that a court would consider the extent to which faculty members are free not to participate in such prayers, and whether participation in such prayers is, either explicitly or implicitly, a condition of employment. See *Torcaso v. Watkins*, 367 U.S. 488 (1961) (Maryland practice of requiring public officials to declare belief in God violated First and Fourteenth Amendments of the United States Constitution).

<sup>3</sup>Although the court in *Plainwell Community Schools*, 822 F.2d 1406, concluded that the First Amendment does not prohibit prayers at high school graduation ceremonies, see *supra* note 1, it held that sectarian Christian prayers are not permissible.

and commencement ceremonies with a prayer is not unconstitutional. Given the host of difficult legal issues involved, however, we believe that the university's practice is problematic and we suggest that the university closely scrutinize its practice in light of the authorities discussed above.

**S U M M A R Y**

Texas Southern University's practice of beginning convocations, faculty meetings, and commencement ceremonies with a prayer raises difficult constitutional issues of first impression. A court considering the constitutionality of this practice would have to decide whether to apply one of two analytical approaches applied by the United States Supreme Court in Establishment Clause cases. *Compare Lemon v. Kurtzman*, 403 U.S. 602 (1971) with *Marsh v. Chambers*, 463 U.S. 783 (1983). A court would also have to resolve factual questions. Given the host of difficult legal issues involved, the Texas Southern University should closely scrutinize its practice.

Yours very truly,



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Opinion Committee