May 19, 2000


Dear John:

I agree with the substance of your draft but think some tightening and clarification would be helpful to readers. Listed below, three main suggestions, then some small points.

1. The carryover paragraph pages 10-11 concerns speech that is “private” in the sense of not public (i.e., not attributable to the State), rather than “intimate” speech. You start the paragraph with the sentence: “Generally, prayer is a most private kind of speech.” Readers might think at that point that “private” means “intimate” and raise an eyebrow. I wrote in the margin, “Billy Graham prays with a multitude at Madison Square Garden!” Even when stadiums and loudspeakers are not used, prayer is frequently uttered in congregation. Responsive reading of “The Lord’s Prayer” at a place of worship, for example, would be “private” for First Amendment purposes, though neither “intimate” nor part of a “public forum.” Would it not work better if you revised the first part of the paragraph (up to and including the sentence on page 11, first four lines, that ends with “discussed in those cases”) along these lines:

Speech is “private” in the relevant constitutional sense if it is not attributable to the government. In the instant case, where an official government policy enables speech to occur on government property at a government-sponsored event, the question arises whether the speech could be attributed to the government. Of course, not every message delivered under such circumstances is the government’s own. Speech is “private” for First Amendment purposes if it is delivered as one contribution among many to an open discussion in a public forum. The District contends that the speech at issue in the present case falls into that category. It is clear, however, that the pre-game ceremony is not the type of forum envisioned and discussed in our cases.

2. At pages 16-17, the opinion maintains that the policy’s stated purpose of “solemnizing” the football games suggests a non-sectarian purpose. Solemnization is
already well treated at page 14, and the return to the subject here seems to me a reprise best skipped. The heart of the argument is that, in light of the local history, the District’s policy is transparently a call to prayer. Without that history, it is doubtful that use of the word “solemnize” would necessarily connote prayer, as the opinion’s very reference to the National Anthem suggests. Also, as a graduate of an institution whose football team boasts a record-setting 44-game losing streak (Columbia), I can empathize with the observations made in footnote 19. Nevertheless, I think the aside is more distracting than elucidating.

3. Part III, which begins on page 18, explains why the District’s policy runs afoul of the prohibition on religious coercion and also maintains that the election process itself is unconstitutional. Both points need to be made, but the opinion runs them together in a way that may confuse the reader. The last sentence of the last full paragraph on page 18 says that the District acts coercively simply by mandating the election. That is true in a trivial sense: every time a government body mandates anything, it acts coercively. But I take it you mean something more, namely, that by instituting an election, the District is being coercive in a way that violates Lee. Isn’t an adjustment needed? The coercion in Lee is coercion to participate in a religious activity. True, the election will probably lead to a religious activity. But that truth doesn’t make the election itself a religious activity. The election is unconstitutional, I agree, but not because it is in itself unconstitutionally coercive with respect to religious practice. The real reason is, as the opinion says later on, that the Establishment Clause removes religious matters from the majoritarian process. My suggestion is a short one. Drop the last sentence of the last full paragraph on page 18.

Small points:

1. On page 2, in the first paragraph, the opinion identifies one of the respondent families as Mormon and the other as Catholic. Nothing about the case turns on the religious affiliations of the respondents. That being so, why call attention to those affiliations?

2. On page 7, footnote 8 reproduces a quotation from an order of the District Court. The quotation is accurate, but it is confusing. The District Court said that “the deliverance of a prayer over the school’s public address system prior to each football and baseball game coerces student participation in religious events, because student attendance at school is mandatory.” The reader will naturally think this is a non-sequitur: of course attendance at school is mandatory, but this case is about attendance at school sporting events, which is a different thing. This was careless language on the part of the District Court, and I would not repeat it in this Court’s opinion.
At mid-page 11, I’m not sure that the regulations “narrowly limit” the content of the student’s message. Why not say, simply, “regulations that confine the content . . .”?

Next to last line page 11, should there not be a case citation at the end of the paragraph’s opening sentence?

At page 17, paragraph starting 9 lines up from bottom line, I would drop “Whether perceived or actual,” and open the sentence with “School endorsement . . .”

At page 19, last sentence of full paragraph, I’m not ready to find the District “correct” in arguing that pressure to attend the game in a small town in Texas is not as strong as a senior’s desire to attend her own graduation ceremony. Perhaps say: “And we can assume, for purposes of this decision, that the District is correct in urging that . . .”

At page 24, next to last sentence of full paragraph, in lieu of “inherently private subject of religion,” perhaps say “inherently nongovernmental subject of religion . . .”

Respectfully,

[Signature]

Justice Stevens