

COMMENT

What Is the Court Trying to Establish?: An Analysis of *Lee v. Weisman*

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Introduction

Just when many thought the United States Supreme Court's prayer-in-school dilemma was over, the subject came back to haunt them. This time, however, the dispute did not concern prayers in the classroom. Rather, the Court examined an area it had never before addressed: the constitutionality of public school graduation prayers.

The Establishment Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion."¹ Although the Court interpreted this phrase strictly in *Everson v. Board of Education*,² since then, the Court has broadened its effect in analyzing Establishment Clause cases. Some commentators³ believed that *Lee v. Weisman*⁴ would reaffirm this trend towards religious accommodation and "revive the interaction between religion and government for the next several decades."⁵ The Court declared, however, that prayers delivered as part of a graduation ceremony in a public school violate the Establishment Clause of the First Amendment.⁶ This holding was surprising for at least two reasons. First, the opinion was delivered by Justice Kennedy, whose recent opinion in *County of Allegheny v. ACLU*⁷ had suggested that he would join the dissenters in *Lee*. Second, Justice Kennedy's opinion ignored the test of *Lemon*

1. U.S. CONST. amend. I. These prohibitions are applicable to state action abridging religious freedom under the Fourteenth Amendment of the Constitution. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

2. 330 U.S. 1 (1947). *Everson* addressed the constitutionality of a program that authorized reimbursement to parents for costs associated with transporting their children to school on public buses. Many of the students attended Roman Catholic schools. Although the program was upheld, the Court used strong language in defining what the Establishment Clause was intended to prohibit:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to "erect a wall of separation between church and State."

Id. at 15-16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

3. See Ralph D. Mawdsley & Charles J. Russo, *High School Prayers at Graduation: Will the Supreme Court Pronounce the Benediction?*, 69 EDUC. L. REP. 189, 201 (1991); Timothy V. Franklin, *Squeezing The Juice Out Of The Lemon Test*, 72 EDUC. L. REP. 1, 16-17 (1992). See also Joseph L. Conn, *Courtroom Contender: Pat Robertson Escalates His Courtroom Campaign*, CHURCH & STATE, June 1992, at 4, 5 (noting that Pat Robertson, a religious broadcaster, was quoted as saying that *Lee v. Weisman* will be a "stunning defeat for the ACLU and its left-wing allies."). *Id.*

4. 112 S. Ct. 2649 (1992).

5. Mawdsley & Russo, *supra* note 3, at 202.

6. *Lee*, 112 S. Ct. at 2661.

7. 492 U.S. 573, 655 (1989) (Kennedy, J., concurring).

v. Kurtzman,⁸ which the Court had used in all public school prayer cases since 1971.

Part I of this Comment examines the history of the Establishment Clause, beginning with the first case involving prayer in public schools. A thorough discussion of *Lee v. Weisman* follows in Part II, with a detailed analysis of Justice Kennedy's majority opinion, the concurring opinions, and the dissent. Part III criticizes the Court's method of analysis as unsupported by precedent and unpersuasive in reason. By inventing a new coercion test without clarifying the status of *Lemon*, the Court has left the law in a state of confusion. Since the Court refused to overrule *Lemon* in *Lee*, it should have respected the principle of stare decisis and applied the *Lemon* test in that case. Accordingly, an analysis of the facts of *Lee* under the *Lemon* test follows. Finally, the legal ramifications of the *Lee* decision as well as some alternatives to the graduation prayer dilemma are examined in Part IV.

I. Background

In 1962, *Engel v. Vitale*⁹ became the first case to consider the constitutionality of prayer in public schools. In *Engel*, a New York school district, acting under state law, directed a school principal to have students recite a daily prayer in public school classrooms.¹⁰ New York state officials composed the prayer, and suggested that it be published as part of their "Statement on Moral and Spiritual Training in the Schools."¹¹ Parents of some schoolchildren challenged the constitutionality of the New York law authorizing the district to direct the use of the prayer, as well as the district's regulation of the particular prayer to be recited.¹²

The Supreme Court held that New York state laws condoning the use of this prayer violated the Establishment Clause because the prayer was drafted by state officials with the goal of advancing religious beliefs.¹³ The Court stated that the prohibition against laws respecting an establishment of religion "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."¹⁴ School officials had argued that the prayers were nondenominational and that the state

8. 403 U.S. 602, 612 (1971).

9. 370 U.S. 421 (1962).

10. *Id.*

11. *Id.* at 423.

12. *Id.*

13. *Id.* at 425.

14. *Id.*

program permitted students to remain silent or leave the room.¹⁵ The Court felt that this did not cure the statute's constitutional defects.¹⁶

A year later, in *Abington School District v. Schempp*,¹⁷ the Court fashioned a test to evaluate Establishment Clause cases.¹⁸ The test asked, "[W]hat are [sic] the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution."¹⁹ Applying this test, the Court held that a state may not require Bible readings or the recitation of the Lord's prayer in public schools, whether or not participation is mandatory.²⁰

The test in *Abington* became part of a three-prong analysis the Court later developed to evaluate Establishment Clause cases. The Court announced this test, popularly known as the *Lemon* test, in *Lemon v. Kurtzman*.²¹ In order for a statute to survive an Establishment Clause challenge: 1) it "must have a secular legislative purpose"; 2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and 3) "the statute must not foster 'an excessive government entanglement with religion.'"²²

In *Lemon*, the Court evaluated the constitutionality of two state statutes authorizing government aid to private schools.²³ One statute allowed private school teachers to receive salary supplements as long as they taught courses offered in public schools and refrained from teaching religion.²⁴ The second statute permitted private schools to be reimbursed for various expenditures related to providing educational services to students.²⁵ Again, reimbursement was limited to those expenditures associated with secular subjects.²⁶

Although the statutes were meant to improve private school education and had no aims of promoting religion, Roman Catholic schools were the primary beneficiaries. The Court feared that govern-

15. *Id.* at 430. The prayer in question read as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

16. *Id.* at 430.

17. 374 U.S. 203 (1963).

18. *Id.* at 222.

19. *Id.*

20. *Id.* at 223-25.

21. 403 U.S. 602 (1971).

22. *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). The entanglement prong was first introduced in *Walz*, where the Court upheld the granting of tax exemptions to religious organizations for property used for religious worship. 397 U.S. at 676-80.

23. *Lemon*, 403 U.S. at 606.

24. *Id.* at 607-09.

25. *Id.* at 609-10.

26. *Id.*

ment, in monitoring compliance with the statutes' conditions, would become too entangled with religion.²⁷ Consequently, the Court found that both statutes violated the Establishment Clause.²⁸

The *Lemon* test was cited with approval over ten years later in *Lynch v. Donnelly*.²⁹ In *Lynch*, the Court upheld the inclusion of a crèche as part of a city's Christmas display. The Court found that under *Lemon*, there was a secular purpose for including the crèche, the city did not impermissibly advance religion, and the presence of the crèche did not result in excessive entanglement between religion and government.³⁰ Although the Court in *Lynch* relied entirely on the *Lemon* analysis in upholding the city's display, the Court indicated an unwillingness to restrict itself to one single test in the delicate area of Establishment Clause jurisprudence.³¹

Justice O'Connor developed a less stringent analytical framework for analyzing Establishment Clause cases in her concurrence in *Lynch*. Justice O'Connor's "endorsement test" focused on government endorsement or disapproval of religion.³² According to Justice O'Connor, including the crèche as part of the larger display was a "celebration of the public holiday through its traditional symbols."³³ Thus, the city neither endorsed Christianity nor disapproved of non-Christian religion.³⁴

The Court again applied the *Lemon* test in *Wallace v. Jaffree*,³⁵ which held unconstitutional an Alabama statute authorizing a period of silence "for meditation or voluntary prayer"³⁶ in all public schools.³⁷ The Court found that the government's purpose in enacting the statute was to endorse religion,³⁸ giving much weight to the fact that Alabama already had a statute authorizing a one-minute period

27. *Id.* at 614-22.

28. *Id.* at 624-25.

29. 465 U.S. 668 (1984).

30. *Id.* at 685-87.

31. *Id.* at 678-80. "The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. . . . The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. . . . In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." *Id.* (citations omitted).

32. *Id.* at 688 (O'Connor, J., concurring).

33. *Id.* at 691.

34. *Id.* at 692.

35. 472 U.S. 38 (1985).

36. Ala. Code § 16-1-20.1 (Supp. 1984).

37. *Wallace*, 472 U.S. at 48.

38. *Id.* at 56.

of silence for meditation.³⁹ In addition, the Court noted that Senator Donald Holmes had admitted that the legislation was targeted at restoring voluntary prayer to the public schools.⁴⁰

The next major Establishment Clause case to reach the Supreme Court was *County of Allegheny v. ACLU*.⁴¹ In *Allegheny*, the Court held that the display of a crèche on a staircase of the county courthouse violated the Establishment Clause, but the display of a menorah next to a forty-five-foot decorated Christmas tree did not.⁴² The Court noted that, unlike the crèche in *Lynch*, which was surrounded by other Christmas decorations, the crèche on the staircase in *Allegheny* stood alone. This, the Court thought, sent a message that the county supported the Christian praise to God above that of the Jewish faith.⁴³ Because the menorah stood next to the tree, however, there was neither endorsement nor disapproval of one particular faith.⁴⁴

II. *Lee v. Weisman*

A. Factual Background

In June of 1989, Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence, Rhode Island.⁴⁵ For years, the Providence School Committee and Superintendent of Schools had a policy of permitting their principals to invite clergy members to give invocations and benedictions at middle and high school graduations.⁴⁶ In keeping with this tradition, the school principal, Robert E. Lee, invited Rabbi Leslie Gutterman of Temple Beth El to deliver the prayers at Deborah's graduation.⁴⁷ The principal gave Rabbi Gutterman a pamphlet entitled "Guidelines for Civic Occasions."⁴⁸ It was customary for Providence school officials to provide invited clergy with this pamphlet, which was prepared by the National Conference of Christians and Jews.⁴⁹ Along with the pamphlet, Rabbi Gutterman was advised that the invocation and benediction should be

39. *Id.* at 58-60.

40. *Id.* at 56-57.

41. 492 U.S. 573 (1989).

42. *Id.* at 621.

43. *Id.* at 598-601.

44. *Id.* at 613-21. Although the *Allegheny* Court discussed the *Lemon* principles, it seemed to be focusing its analysis in terms of whether the challenged government action endorsed religious beliefs. *Id.*

45. *Lee v. Weisman*, 112 S. Ct. 2649, 2652 (1992).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

nonsectarian. Rabbi Gutterman's prayers were brief, lasting only a few minutes.⁵⁰

Before the graduation, Deborah and her father sought a temporary restraining order in the District Court of Rhode Island to prevent the school from including the prayers in the ceremony.⁵¹ Because the court did not have adequate time to consider the constitutionality of the proposed prayers, it denied their request.⁵² Deborah and her father attended the graduation, which was held on the premises of Nathan Bishop Middle School. Following the graduation, Mr. Weisman and Deborah amended their complaint to seek a permanent injunction barring Providence school officials from sponsoring prayers at future graduations.⁵³

50. Rabbi Gutterman's prayers were as follows:

INVOCATION

God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled. AMEN.

BENEDICTION

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. AMEN.

Id. at 2652-53.

51. *Id.* at 2653-54.

52. *Id.* at 2654. It is not unusual for a court to grant a preliminary injunction prohibiting graduation prayers shortly prior to the ceremony when there is a clear Establishment Clause violation. *See, e.g., Bennett v. Livermore Unified Sch. Dist.*, 193 Cal. App. 3d 1012 (1987); *Graham v. Central Community Sch. Dist.*, 608 F. Supp. 531 (S.D. Iowa 1985).

53. *Lee*, 112 S. Ct. at 2654. At the time the complaint was amended, Deborah Weisman was a student at Classical High School in Providence, Rhode Island, and it was highly likely that an invocation and benediction would be given at her high school graduation. Consequently, the issues were not moot and Mr. Weisman and Deborah had standing to seek the injunction. *Id.*

The district court granted the permanent injunction.⁵⁴ The First Circuit Court of Appeals affirmed the district court's decision.⁵⁵ School officials filed a petition for a writ of certiorari in the Supreme Court of the United States.⁵⁶

The Supreme Court affirmed the judgment of the Court of Appeals.⁵⁷ Justice Kennedy delivered the opinion of the Court, in which Justices Blackmun, Stevens, O'Connor, and Souter joined. Justices Blackmun and Souter filed concurring opinions; Justices Stevens and O'Connor joined both concurring opinions. Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justices White and Thomas joined.⁵⁸

B. The Opinions

1. *The Majority*

Early in the opinion, the majority stated its intention to decide the case without invoking the *Lemon* test when it declared, "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."⁵⁹ Rather than using the *Lemon* test, the Court held the challenged graduation prayer unconstitutional because it violated the central principle that "government may not coerce anyone to support or participate in religion or its exercise"⁶⁰

54. *Weisman v. Lee*, 728 F. Supp. 68 (D. R.I. 1990). The court applied the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and found that the practice of the Providence School Committee violated the second prong of the test.

[T]he practice of having a benediction and invocation delivered at public school graduation ceremonies has the effect of advancing religion. The special occasion of graduation coupled with the presence of prayer creates an identification of governmental power with religious practice. Finally, the practice of including prayer may have the effect of either endorsing one religion over others, or of endorsing religion in general. For these reasons, the practice of providing guidelines for "non-sectarian" prayer fails to withstand constitutional scrutiny.

Weisman, 728 F. Supp. at 71-73.

55. *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990). Writing for the majority, Judge Torruella agreed with the district court without any elaboration. *Id.* In his concurrence, Judge Bownes went beyond the district court's conclusions and found that the prayer violated all three prongs of the *Lemon* Test. *Id.* at 1094-95 (Bownes, J., concurring).

56. *Lee v. Weisman*, 499 U.S. 918 (1991).

57. *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

58. *Id.*

59. *Id.* at 2655. The majority cited various cases in support of this statement: *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

60. *Lee*, 112 S. Ct. at 2655.

The majority listed several reasons why the State's involvement in the graduation prayer was problematic. First, school officials elected to include a prayer in the graduation ceremony.⁶¹ Second, the principal selected a rabbi to lead the prayers.⁶² These decisions were easily traceable to the State. Finally, the principal furnished Rabbi Gutterman with the "Guidelines for Civic Occasions" pamphlet and instructed him to keep the prayers nonsectarian.⁶³ Thus, the principal "directed and controlled the content of the prayer."⁶⁴

Although school officials attempted to keep the graduation prayers nonsectarian, the majority refused to give this any weight in its analysis. According to the majority, the question was not whether the school tried to make the prayer acceptable to the general audience, but whether the school could properly conduct a religious exercise which students must attend.⁶⁵ The majority felt that the students would perceive the efforts of the school officials to monitor the prayer as an inducement to participate in activities they might otherwise reject.⁶⁶

The majority rejected the argument that the formal prayer ceremony was a form of protected speech that should be tolerated just as certain ideas that may be offensive to some students must be tolerated in the classroom.⁶⁷ The First Amendment protects speech by guarding its absolute expression, even when the government is a participant.⁶⁸ Freedom of religion, on the other hand, is protected by eliminating governmental participation. As the majority stated in *Lee*, the Establishment Clause is a "specific prohibition" on state intervention in religious affairs.⁶⁹

The majority also addressed "heightened concerns with protecting freedom of conscience from subtle coercive pressure" in the public school setting.⁷⁰ Previous decisions recognized that prayer exercises in public schools carry a "particular risk of indirect coercion."⁷¹ To a believer, asking a nonbeliever to sit through a religious exercise might seem nothing more than a request that the nonbeliever respect a religious practice. In the school context, however, this request could ap-

61. *Id.*

62. *Id.*

63. *Id.* at 2656.

64. *Id.*

65. *Id.*

66. *Id.* at 2657.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 2658.

71. *Id.* (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) and *Engel v. Vitale*, 370 U.S. 421 (1962)).

pear to be "an attempt to employ the machinery of the State to enforce a religious orthodoxy."⁷²

The majority paid special attention to the peer pressure inherent in the graduation ceremony. It likened the subtle and indirect pressures of standing with the group or remaining silent during the prayers to overt compulsion.⁷³ Many of the students, the majority stated, viewed standing or remaining silent as an "expression of participation" in Rabbi Gutterman's prayers.⁷⁴ The Court did not address whether this analysis would apply to "mature adults."⁷⁵ However, the Court appeared convinced that adolescents attending the graduation would be susceptible to the pressures of conforming.⁷⁶

The majority refused to find that the rabbi's prayers were of a *de minimis* character because "[t]o 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."⁷⁷ Similarly, the majority rejected the argument "that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself. . . . Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme."⁷⁸ In this society, the majority noted, high school graduation is a significant occasion. Although attendance is voluntary, "it is apparent that a student is not free to absent herself from the graduation exercises in any real sense of the term 'voluntary,' for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years."⁷⁹

Finally, the majority distinguished *Marsh v. Chambers*,⁸⁰ which upheld the right of the Nebraska legislature to begin its sessions with a

72. *Id.*

73. *Id.*

74. *Id.*

75. See *infra* notes 177-80 and accompanying text.

76. *Lee*, 112 S. Ct. at 2658-59 (citing Clay V. Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 AM. SOC. REV. 385, 390 (1963); Donna Rae Clasen & B. Bradford BROWN, *The Multidimensionality of Peer Pressure in Adolescence*, 14 J. OF YOUTH AND ADOLESCENCE 451, 464 (1985); Donna Rae Clasen, et al., *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents*, 22 DEVELOPMENTAL PSYCHOL. 521, 528 (1986)).

77. *Id.* at 2659.

78. *Id.*

79. *Id.* Later in the opinion, the Court cited *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224-25 (1963), and *Engel v. Vitale*, 370 U.S. 421, 430 (1962), to refute the argument that voluntary attendance at the graduation ceremony frees the prayers from constitutional attack. *Lee*, 112 S. Ct. at 2660. Even though the students in *Engel* and *Schempp* could be excused from the daily prayers, the Court nonetheless found the practice to violate the Establishment Clause. *Id.*

80. 463 U.S. 783 (1983).

prayer.⁸¹ It listed a number of critical differences between the public school system and a session of a state legislature. First, at the opening of a session of a state legislature, “adults are free to enter and leave with little comment”⁸² This, the majority explained, is unlike the “constraining potential” of a graduation ceremony.⁸³ During a high school graduation, the students and ceremony remain under the firm control of teachers and school officials. This degree of control makes the prayer at graduation a “state-sanctioned religious exercise in which student[s are] left with no alternative but to submit.”⁸⁴

In sum, the majority opinion stated that the key question was whether students were compelled to participate in a religious exercise.⁸⁵ Answering this question in the affirmative, the Court declared that the graduation prayers at Nathan Bishop Middle School violated the Establishment Clause of the First Amendment.⁸⁶

2. *The Concurring Opinions:*

a. Justice Blackmun

According to Justice Blackmun, although coercion is not required for an Establishment Clause violation, it is sufficient, and the graduation prayer violated the Establishment Clause because it pressured students to participate in a religious exercise. He began his concurring opinion with the broad statement that “[g]overnment may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution.”⁸⁷ He cited with approval the words of Thomas Jefferson that the clause against the establishment of religion “was intended to erect ‘a wall of separation between church and State.’”⁸⁸ In addition, Justice Blackmun cited *Engel* and *Schempp* as authority for his position.⁸⁹ Although the prayer in *Engel* was nondenominational and the students were not compelled to participate, the *Engel* Court nonetheless found the Establishment Clause was violated.⁹⁰ Likewise, the *Schempp* Court found the exercise of reading prayers at the beginning of each school morning a violation of the Establishment Clause.⁹¹

81. *Id.* at 795.

82. *Lee*, 112 S. Ct. at 2660.

83. *Id.*

84. *Id.*

85. *Id.* at 2661.

86. *Id.*

87. *Id.* at 2661-62 (Blackmun, J., concurring).

88. *Id.* at 2662 (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947)).

89. *Id.* at 2662-63.

90. *Id.* at 2663.

91. *Id.*

Unlike the majority, Justice Blackmun reviewed the graduation prayer question under the principles of the *Lemon* test.⁹² He felt compelled to apply *Lemon* because the Court had vigorously applied the *Lemon* factors in every case involving religious activities in public schools since 1971.⁹³ Although Justice Blackmun did not analyze the prayer separately under each prong of *Lemon*, he noted that the rabbi's prayer, which asked for God's blessings, was unquestionably religious. This acknowledgement of divine faith, according to Justice Blackmun, is precisely the type of activity that *Lemon* was designed to prohibit.⁹⁴

Concluding his analysis under *Lemon*, Justice Blackmun stated the question simply as whether the government had "plac[ed] its official stamp of approval" on the prayer.⁹⁵ He then answered his own question as follows:

[W]hen the government "compose[s] official prayers," selects the member of the clergy to deliver the prayer, has the prayer delivered at a public school event that is planned, supervised and given by school officials, and pressures students to attend and participate in the prayer, there can be no doubt that the government is advancing and promoting religion.⁹⁶

Justice Blackmun further stated that government is not merely forbidden from coercing religious practices. Rather, government may not involve itself in any way with religion.⁹⁷ Although coercion is sufficient proof of a violation of the Establishment Clause, it is not a necessary element.⁹⁸ "The mixing of government and religion can be a threat to free government, even if no one is forced to participate."⁹⁹

Justice Blackmun concluded by observing that religion is strengthened without the aid and sponsorship of government. In order to make as much room as possible for the expression of different beliefs and creeds, he noted, government must not side with any particular faith.¹⁰⁰

92. *Id.* at 2663-64.

93. *Id.* at 2663 n.4.

94. *Id.* at 2664.

95. *Id.* (quoting *Engel*, 370 U.S. at 429).

96. *Id.* (citations omitted). Justice Blackmun supported this conclusion in a footnote, stating that the phrase in the benediction, "We must each strive to fulfill what you require of us all, to do justly, to love mercy, to walk humbly," was taken from the Book of the Prophet Micah. This, he said, promotes the Judeo-Christian message. *Id.* at 2665 n.5.

97. *Id.* at 2664.

98. *Id.*

99. *Id.* at 2665.

100. *Id.*

b. Justice Souter

Justice Souter agreed with the majority's coercion analysis, but wrote separately to clarify whether the Establishment Clause applies to government activity that does not favor one religion over others. He also considered whether coercion, as opposed to mere endorsement, is a required element for an Establishment Clause violation.¹⁰¹

He began his discussion with a quote from *Everson v. Board of Education*.¹⁰² The Establishment Clause forbids government action that "aid[s] one religion . . . or prefer[s] one religion over another" and action that "aid[s] all religions."¹⁰³ Justice Souter acknowledged, however, that there have been challenges to this precedent.¹⁰⁴ Some have argued that nonpreferential government aid to religion is permitted under the Establishment Clause.¹⁰⁵ For example, in a dissent from *Wallace v. Jaffree*,¹⁰⁶ Justice Rehnquist wrote that "[t]he Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion."¹⁰⁷ Justice Souter found no support for Justice Rehnquist's position, however, when viewed in light of the Establishment Clause's textual development.¹⁰⁸

Justice Souter traced this textual development, which began with one of James Madison's proposals to amend the Constitution to protect religious freedom.¹⁰⁹ Madison's proposal, however, did not prevail and after various changes by the House and Senate, the current version of the First Amendment was finally passed.¹¹⁰ Justice Souter relied heavily on the fact that, unlike previous drafts, the final language of the First Amendment is not limited to laws respecting an establishment of "a religion," "a national religion," "one religious sect," or "specific articles of faith."¹¹¹ Instead, Justice Souter claimed, the amendment's language is broader and prohibits state support for religion in general.¹¹²

101. *Id.* at 2667 (Souter, J., concurring).

102. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

103. *Lee*, 112 S. Ct. at 2667 (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947)).

104. *Id.* at 2668.

105. *Id.* at 2668-70.

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

107. *Lee*, 112 S. Ct. at 2668 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting)).

108. *Id.*

109. *Id.* The original language of the religion clause read: "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.* (quoting 1 ANNALS OF CONG. 434 (1789)).

110. *Id.* at 2669-70.

111. *Id.*

112. *Id.* at 2669.

To further strengthen his view, Justice Souter explained that while nonpreferentialists would prohibit sectarian religious practices, ecumenical religious practices would be acceptable.¹¹³ Thus, under a nonpreferentialist interpretation, an Establishment Clause challenge would require the Court to investigate the specific religious practice at issue. This, Justice Souter claimed, would be impermissible because it would “invite the courts to engage in comparative theology.”¹¹⁴ In sum, Justice Souter stressed that the Establishment Clause applies even to government activities that do not favor one religion over another.

Justice Souter next discussed whether coercion is a necessary element for an Establishment Clause violation. He began this segment of his analysis with a review of the many United States Supreme Court cases that invalidated noncoercive state laws and practices. For example, in *County of Allegheny v. ACLU*,¹¹⁵ despite the Court’s finding that the crèche did not coerce anyone into accepting a particular religious belief, a majority held that the display nonetheless unconstitutionally endorsed Christian beliefs.¹¹⁶ According to Justice Souter, precedent cannot support the view that coercion is a necessary element for an Establishment Clause violation.¹¹⁷

Justice Souter further examined the prevailing circumstances under which the Establishment Clause was framed. He acknowledged that while the religion clauses were adopted in response to widespread state-coerced religious practices, coercion alone did not account for the Framers’ hostility. Both Jefferson and Madison opposed any political appropriation of religion.¹¹⁸ For example, Jefferson refused to issue Thanksgiving Proclamations because he felt they violated the religion clauses.¹¹⁹ Likewise, during his first three years in office, Madison would not call for days of thanksgiving and prayer.¹²⁰ Although Justice Souter acknowledged that the First Congress may

113. *Id.* at 2671.

114. *Id.*

115. 492 U.S. 573 (1989).

116. *Id.* at 589-94, 598-602. *See also* *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down moment-of-silence statute not because the statute coerced students to pray, but because its existence conveyed a message that the State approved of prayers in public classrooms); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down state law barring the teaching of Darwin’s theory of evolution not because the statute coerced people to support religion, but because the statute was enacted purely for a religious purpose).

117. *Lee*, 112 S. Ct. at 2672.

118. *Id.* at 2673-74.

119. *Id.* at 2674.

120. *Id.* at 2675. During the War of 1812, Madison called four times for days of thanksgiving and prayer. Justice Souter, however, noted that Madison’s inability to stick to his own convictions in times of political pressure did not erase his convictions. *Id.*

have engaged in practices contrary to the separationists' views,¹²¹ this only showed that the Framers lacked a common understanding of the Establishment Clause.

Finally, Justice Souter discussed the concept of neutrality embedded in the Establishment Clause.¹²² He noted that although the government must remain neutral in matters of religion, state accommodation of free exercise of religion is not prohibited.¹²³ However, there is one requirement: "accommodation must lift a discernible burden on the free exercise of religion."¹²⁴ In light of the foregoing, Justice Souter stated that the graduation prayers were an unconstitutional establishment of religion. Nobody, according to Justice Souter, could realistically argue that eliminating the prayer would burden an individual's free exercise of religion.¹²⁵

3. *The Dissent: Justice Scalia*

Justice Scalia, in a strongly worded dissent, focused on history and tradition. He began his opinion with a quote from Justice Kennedy's opinion in *County of Allegheny v. ACLU*.¹²⁶ "[G]overnment policies of accommodation, acknowledgment, and support for religion [are] an accepted part of our political and cultural heritage."¹²⁷ Justice Scalia further wrote that prohibiting invocations and benedictions at public school graduation ceremonies "lays waste a tradition that is as old as public-school graduation ceremonies themselves"¹²⁸

Justice Scalia acknowledged that the existence of a practice in our nation's heritage is not conclusive evidence of its constitutionality.¹²⁹

121. *Id.* (citing *Marsh v. Chambers*, 463 U.S. 783, 788 (1983)).

122. *Id.* at 2676-78.

123. *Id.* at 2676.

124. *Id.* at 2677.

125. As an alternative, Justice Souter stated that individuals wishing to express their religious feelings could do so either before or after the ceremony. For example, nothing in the Establishment Clause would prohibit a group of individuals from organizing a privately sponsored baccalaureate. *Id.* at 2677-78.

126. 492 U.S. 573 (1989).

127. *Lee*, 112 S. Ct. at 2678 (quoting *Allegheny*, 492 U.S. at 657). As the following excerpt from his opinion demonstrates, Justice Kennedy's tone was quite strong in *Allegheny*:

Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

Allegheny, 492 U.S. at 657 (citations omitted).

128. *Lee*, 112 S. Ct. at 2679 (Scalia, J., dissenting).

129. *Id.* (citing *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring)).

He claimed, however, that tradition should be a significant consideration when interpreting the Establishment Clause.¹³⁰ Justice Scalia stated the necessity of inquiring into the history of prayers and he noted those in the inaugural addresses of George Washington,¹³¹ Thomas Jefferson,¹³² James Madison,¹³³ and George Bush.¹³⁴ Justice Scalia continued his historical examination with references to the tradition of Thanksgiving Proclamations and the legislative session prayers accepted in *Marsh v. Chambers*.¹³⁵ Justice Scalia concluded this segment of his dissent with a reminder that the United States Supreme Court opens its sessions with the invocation, "God save the United States and this Honorable Court."¹³⁶ In abandoning this long-standing American tradition of nonsectarian prayers at public celebrations, Justice Scalia claimed that the Court "invent[ed] a boundless, and boundlessly manipulable, test of psychological coercion"¹³⁷

130. *Id.*

131. As part of his first official act, President Washington made the following prayer:

[I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes.

Id. (quoting INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 2 (1989)) (hereinafter INAUGURAL ADDRESSES).

132. In his second inaugural address, President Jefferson acknowledged his need for divine guidance in the following prayer:

I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.

Id. at 2680 (quoting INAUGURAL ADDRESSES, *supra* note 131, at 22-23).

133. In James Madison's first inaugural address, he placed his confidence

in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.

Id. (quoting INAUGURAL ADDRESSES, *supra* note 131, at 28).

134. President Bush, in his first official act as president, followed the tradition established by George Washington and "asked those attending his inauguration to bow their heads" as he said a prayer. *Id.* (citing INAUGURAL ADDRESSES, *supra* note 131, at 346).

135. *Id.* (citing *Marsh v. Chambers*, 463 U.S. 783, 787 (1983) (applying historical analysis, Court concludes that prayers during opening of legislative session do not violate the Establishment Clause)).

136. *Id.*

137. *Id.* at 2679.

Justice Scalia completely rejected the notion that students at graduation ceremonies are psychologically coerced to stand or maintain silence and he likened the majority's thinking to "psychology practiced by amateurs."¹³⁸ Students are not "psychologically coerced to bow their heads, place their hands in a . . . prayer position, pay attention to the prayers, utter 'Amen,' or in fact pray."¹³⁹ Justice Scalia noted that in our society, standing is more often than not viewed as simple respect for the views of others.¹⁴⁰ He stated sweepingly that respect for the religious practices of others is essential to any civilized society.¹⁴¹ Moreover, the government's interest in promoting respect for religion outweighs a non-believer's interest in avoiding the guise of participation.¹⁴²

Justice Scalia further criticized the majority's contention that the State "directed and controlled the content of the prayer."¹⁴³ The principal acted within his delegated authority, Justice Scalia claimed, when he invited Rabbi Gutterman to deliver the invocation and benediction at the graduation. Moreover, the pamphlet's purpose was simply to give general advice on civic, nonsectarian prayers.¹⁴⁴ School officials did not write, revise, or censor the prayers.¹⁴⁵

Next, Justice Scalia looked at the meaning of coercion and the type of coercion the Establishment Clause was adopted to prohibit. This type, according to Justice Scalia, is coercion of "religious orthodoxy and of financial support *by force of law and threat of penalty*."¹⁴⁶ Justice Scalia felt that there was no evidence that Rabbi Gutterman's nondenominational invocation and benediction violated the Constitution of the United States.¹⁴⁷ No one, Justice Scalia declared, was legally coerced to recite these prayers. On the contrary, the prayers were "so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself."¹⁴⁸ Justice Scalia further criticized the Court for relying on the school-prayer

138. *Id.* at 2681.

139. *Id.*

140. *Id.* at 2682.

141. *Id.*

142. *Id.*

143. *Id.* at 2683.

144. *Id.*

145. *Id.*

146. *Id.* To support his argument, Justice Scalia gave a brief description of the colony of Virginia, where the Church of England was established. By law, ministers were obligated to submit to the doctrine of the Church of England. All individuals had to attend church and honor the Sabbath. In addition, they were required to support the Anglican ministers, and to pay taxes for the costs of constructing and restoring churches. *Id.* (citing LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 4 (1986)).

147. *Id.* at 2684.

148. *Id.*

cases¹⁴⁹ to support its arguments.¹⁵⁰ First, he noted, school instruction is not tantamount to a public ceremony like a graduation.¹⁵¹ Moreover, mandatory attendance and the instructional setting distinguish prayer in the classroom from the prayers at issue in *Lee*.¹⁵²

Justice Scalia ended his dissent by commending the Court for ignoring the *Lemon* test.¹⁵³ He considered this to be proof of the test's irrelevance.¹⁵⁴ Nevertheless, he expressed his concern that the Court had replaced *Lemon* with a "psycho-coercion test, which [has] no roots whatever in our people's historic practice, and [is] as infinitely expandable as the reasons for psychotherapy itself."¹⁵⁵

Finally, Justice Scalia wrote that despite *Lee*, invocations and benedictions could still be given at future graduations with certain safeguards.¹⁵⁶ Any constitutional defects, according to Justice Scalia, could be cured if school officials made an oral or written announcement, at the opening of the graduation ceremony, stating that individuals are not forced to stand during the prayers and those who do stand will not be assumed to have ratified the prayers.¹⁵⁷ This, Justice Scalia suggested, would enable public schools to circumvent the Court's decision.

III. Analysis

This Part will discuss three areas of the *Lee* opinion that are particularly weak and unpersuasive: 1) its reliance on the school-prayer cases; 2) its likening of standing during prayer to overt compulsion in prayer; and 3) its discussion of *Marsh v. Chambers*. Finally, this Part will analyze *Lee* under the principles of the *Lemon* test. Although the *Lemon* test has lost its popularity over the years, the *Lee* Court refused to overrule it. Consequently, the test should have been used to analyze the graduation prayers.

A. School-Prayer Cases

An initial difficulty with the *Lee* majority's analysis is its reliance on the school-prayer cases, *Engel v. Vitale*¹⁵⁸ and *Abington School*

149. See, e.g., *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

150. *Lee*, 112 S. Ct. at 2684-85 (Scalia, J., dissenting).

151. *Id.* at 2685.

152. *Id.* at 2684.

153. *Id.* at 2685.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. 370 U.S. 421 (1962).

District v. Schempp,¹⁵⁹ to support its coercion theory. The opinion compared classroom prayers, found to violate the Establishment Clause in *Engel* and *Schempp*, to prayers in the graduation context.¹⁶⁰ For several reasons, this comparison is not convincing.

Although the prayers in *Engel* violated the Establishment Clause despite their voluntary nature and nondenominational tone, the *Lee* Court overlooked some crucial differences. First, students recited the prayers in *Engel* daily.¹⁶¹ Second, the prayers were recited in the classroom.¹⁶² Third, the prayers were given to young children.¹⁶³ Fourth, a teacher directed the prayers.¹⁶⁴ Finally, the school officials in *Engel* composed and recommended the prayer as part of their "Statement on Moral and Spiritual Training in the Schools."¹⁶⁵

Similarly, in *Abington*, the Bible readings occurred daily.¹⁶⁶ Moreover, the readings were broadcast into each classroom through an intercommunications system under the supervision of a teacher.¹⁶⁷ As in *Engel*, the children involved were young. Given these factors, the United States Supreme Court found the risk of coercion too great to allow these practices to continue.

A graduation prayer takes place in a different environment. The invocations and benedictions are recited only once a year. The ceremony is usually held at a secular location, such as an auditorium or athletic facility.¹⁶⁸ The ceremonies do not take place during school hours, but after the school year has ended.¹⁶⁹ Finally, because a teacher typically does not deliver the prayers, there is less risk that there will be coercion due to the authoritative teacher-student relationship.¹⁷⁰

159. 374 U.S. 203 (1963).

160. *Lee*, 112 S. Ct. at 2658 ("Our decisions in *Engel v. Vitale* and *Abington School District [v. Schempp]*, recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion." *Id.* (citations omitted)).

161. *Engel*, 370 U.S. at 422.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 423.

166. *Abington*, 374 U.S. at 206.

167. *Id.* at 207.

168. In Providence, Rhode Island, high school students usually graduate off school grounds, at Veterans Memorial Auditorium, which the Providence School Department rents for the occasion. Middle school ceremonies usually take place at the schools themselves. *Weisman v. Lee*, 728 F. Supp. 68, 69 (D. R.I. 1990). *See also* *Stein v. Plainwell Comm. Sch.*, 822 F.2d 1406, 1408 (6th Cir. 1987).

169. *Stein*, 822 F.2d at 1415 (Wellford, Cir. J., dissenting).

170. *Id.* at 1409 (graduation context does not implicate the special nature of the teacher-student relationship); Dawn N. Zammitti, *An Establishment Clause Analysis of Graduation Ceremony Invocations: Stein v. Plainwell Community Schools*, 21 CONN. L. REV. 133, 156 (1988).

Graduating seniors¹⁷¹ are less affected by the coercive pressures present in *Engel* and *Abington*. High school graduation in America represents an individual's passage into young adulthood.¹⁷² Although some students are still impressionable at this age, most have developed a maturity level and degree of understanding beyond that attained by young elementary-age children such as those in *Engel* and *Abington*.¹⁷³ In older students, there is less opportunity for religious indoctrination and peer pressure. Overall, the heightened concerns of protecting elementary and secondary students from the coercive pressures present when prayers are delivered in the classroom are not present in the graduation context.¹⁷⁴

B. Overt Compulsion

The majority's analysis was also unpersuasive when it likened standing or maintaining respectful silence during the graduation prayers to compelled participation. The opinion insisted that the high school graduation ceremony places both public and peer pressure on students to stand.¹⁷⁵ Moreover, when students do stand, they are "being forced by the State to pray in a manner [that their] conscience will not allow" ¹⁷⁶

Students may feel some pressure to stand with their peers. Their participation, however, is not necessarily a consequence of coercion. Rather, standing or remaining silent could merely be an expression of respect for the views of others, analogous to someone rising during a standing ovation for a poor performance.

The majority concluded the coercion portion of its analysis by stating that to allow the invocation and benediction would burden the students by making them choose between joining the prayers or protesting.¹⁷⁷ Interestingly, the majority explicitly refused to address whether this burden would be present if the affected citizens were

171. See *supra* note 53 and accompanying text. Rhode Island's practice of inviting members of the clergy to give invocations and benedictions applied to both public middle and high schools. See *Lee*, 112 S. Ct. at 2650. In the initial suit for a temporary restraining order, Deborah Weisman was a middle school student. At the time the permanent injunction was sought, however, Deborah was a high school student. Although the Court's prohibition of graduation prayers applies to city public schools generally, and does not distinguish between middle and high school students, the majority's analysis focused on high school seniors. Consequently, Part III of this Comment focuses on the opinion's troubling application of the coercion analysis to high school seniors.

172. See Zammitti, *supra* note 170, at 156 n.194.

173. *Id.* at 156.

174. See *Stein*, 822 F.2d at 1414-15 (Wellford, J., dissenting); Zammitti, *supra* note 170, at 156-57.

175. *Lee*, 112 S. Ct. at 2658.

176. *Id.*

177. *Id.*

“mature adults.”¹⁷⁸ As mentioned before, graduation signifies the passage into young adulthood. As its holding extends to high school graduations,¹⁷⁹ it is incongruous for the Supreme Court to find that individuals entrusted with the rights and obligations of voting and military service¹⁸⁰ are so susceptible to coercion that they are not worthy of the label “mature adults.”

The Court’s protection of high school students from coercion in *Lee* is different from the many protections that this country affords our teenagers in other contexts. Statutory rape laws prohibiting sexual relations between teenagers and adults protect teenagers from disease and unwanted pregnancies.¹⁸¹ Similarly, minimum drinking-age laws are meant to safeguard the health and safety of teenagers.¹⁸² Ill-advised sex and alcohol use are recognized as having harmful effects on teenagers as well as adults. There is no evidence that a teenager listening to a sixty-second prayer during a graduation ceremony will suffer any grave or imminent danger.¹⁸³

C. *Marsh v. Chambers*

The majority opinion became most perplexing and strained when it distinguished prayers delivered during a legislative invocation from prayers delivered during a graduation.¹⁸⁴ The Court’s treatment of legislative prayers appears in *Marsh v. Chambers*.¹⁸⁵

In *Marsh*, a chaplain opened each session of the Nebraska legislature with a prayer.¹⁸⁶ The chaplain was compensated with public funds and was selected every two years by the Executive Board of the

178. *Id.*

179. *See supra* note 171 and accompanying text.

180. *Lee*, 112 S. Ct. at 1478. *See* Michaelle S. DiGrazia, Comment, *Sands v. Morongo Unified School District: Graduates, Will We Stand And Join in Prayer?*, 23 PAC. L. J. 1449, 1487 (1992).

181. In *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), the United States Supreme Court gave deference to California’s statutory rape law, the purpose of which is to prevent illegitimate teenage pregnancies and the significant harmful and identifiable consequences of teenage pregnancies. *Id.* at 470-73.

182. Drinking age laws are generally enacted to enhance traffic safety. In *Craig et al. v. Boren*, 429 U.S. 190 (1976), the United States Supreme Court acknowledged that the protection of public health and safety represent important state and local government functions. The District Court in *Craig* concluded that the legislature’s purpose in enacting the Oklahoma drinking law was to “promote the safety of the young persons affected and the public generally.” *Walker v. Hall*, 399 F. Supp. 1304, 1311 n.6.

183. Any *inherent* harm present when people participate in a religious exercise that they would not ordinarily attend would undoubtedly be *de minimis*. In addition, *Marsh v. Chambers*, 463 U.S. 783 (1983), indicated that such participation would be no real threat.

184. *Lee*, 112 S. Ct. at 2660-61.

185. 463 U.S. 783 (1983).

186. *Id.* at 784. From 1965, until at least the time of the *Marsh* decision, a Presbyterian minister had offered the prayers. *Id.* at 785.

Legislative Council.¹⁸⁷ The prayers were in the Judeo-Christian tradition.¹⁸⁸ A tax-paying member of the Nebraska legislature brought an action challenging the constitutionality of this practice.¹⁸⁹ The District Court of Nebraska held that although the prayers did not violate the Establishment Clause, the payment of the chaplain out of public funds did.¹⁹⁰ The Court of Appeals for the Eighth Circuit found that *both* the prayers and the chaplain's remuneration from public funds violated the Establishment Clause of the First Amendment.¹⁹¹ The United States Supreme Court, in an opinion by Chief Justice Burger, reversed, finding that neither Nebraska's statute authorizing the practice of legislative prayers nor the payment of the chaplain out of public funds violated the Establishment Clause.¹⁹²

The Court in *Marsh* ignored the three-prong *Lemon* test, breaking away from established precedent. Instead, the Court relied on the history of legislative prayer in this country to reach its decision. For example, in 1774, the Continental Congress began the custom of paying a chaplain to open its sessions with a prayer.¹⁹³ Moreover, the First Congress selected a chaplain to open the legislative sessions with a prayer, just three days prior to the Congressional approval of the language of the Bill of Rights.¹⁹⁴ This, the *Marsh* Court felt, was clear evidence that the drafters of the First Amendment's religion clauses did not view such legislative chaplaincy programs as violative of that amendment.¹⁹⁵

The majority's attempt in *Lee* to distinguish the holding in *Marsh* was not very persuasive. First, the *Lee* opinion stated that the atmosphere of the opening session of a state legislature does not have the constraining effects of a high school graduation because during a legislative session "adults are free to enter and leave" as they wish.¹⁹⁶ Sec-

187. *Id.* at 784-85. In addition, the Legislature allowed itself to vote to collect and publish the prayers in prayerbooks at the public's expense. *Id.* at 785 n.1.

188. For example, on March 20, 1978, the chaplain gave the following invocation:

Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory. The power of the cross reveals your concern for the world and the wonder of Christ crucified. The days of his life-giving death and glorious resurrection are approaching. This is the hour when he triumphed over Satan's pride; the time when we celebrate the great event of our redemption.

Id. at 824 n.2 (Stevens, J., dissenting). After a 1980 complaint from a Jewish legislator, the chaplain removed all references to Christ in his prayers. *Id.* at 793 n.14.

189. *Id.* at 785.

190. *Id.*

191. *Chambers v. Marsh*, 675 F.2d 228, 234-35 (8th Cir. 1982).

192. *Marsh*, 463 U.S. at 793-96.

193. *Id.* at 787.

194. *Id.* at 788.

195. *Id.*

196. *Lee*, 112 S. Ct. at 2660.

ond, at a high school graduation, principals and teachers retain a significant amount of control over the content of the program. In this atmosphere, noted the Court, 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[s are] left with no alternative but to submit.”¹⁹⁷ The Court then cited *Engel v. Vitale* and *Abington School District v. Schempp* as the more applicable precedent.¹⁹⁸

The first argument assumes that a graduation ceremony has the constraining effects that the Court described. On the contrary, graduation exercises are festive, with family and friends of all ages in attendance. The ceremonies often occur in large open areas with people entering and leaving at different times. This atmosphere of celebration and amusement can hardly be characterized as constraining.

With respect to the second argument, the Court misread its own opinion in *Marsh*. The *Lee* opinion based much of its argument on the degree of control school officials have over the ceremony.¹⁹⁹ Having a principal choose a clergy member to deliver the invocation and benediction is not markedly different from having the Executive Board of the Legislative Council choose the chaplain. It is strange that the Court did not deem the legislature’s selection of a chaplain to be controlling. Indeed, in *Marsh*, the same minister delivered the legislative prayer for sixteen years.

Not only did the State in *Marsh* control who delivered the legislative prayer, but it also controlled the content of the prayer.²⁰⁰ The Court in *Marsh* explicitly stated that the content is not of concern to judges when “there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”²⁰¹ The Court implied, therefore, that it would step in and prevent prayers that promote a particular faith. Likewise, school officials controlled the content of the prayers in *Lee* when they gave the rabbi a pamphlet explaining the types of prayers that would be acceptable. Arguably, the rabbi could have ignored the pamphlet, but this would be highly unlikely because as a religious figure, he would not want to lose his respect in the community.²⁰²

197. *Id.* at 2660-61.

198. *Id.* at 2661.

199. *Id.* at 2655-60.

200. *Marsh*, 463 U.S. at 794-95. In *Marsh*, Reverend Palmer eliminated the Christian references in his prayers in response to the complaints of some state senators. *Id.* at 820 n.44 (Brennan, J., dissenting). Thus, these state senators indirectly controlled the content of the reverend’s program by their complaints, just as the secular guidelines controlled the content of the prayer in *Lee*.

201. *Id.*

202. *Lee*, 112 S. Ct. at 2656.

A deeper flaw in the *Lee* majority's reasoning was its characterization of a graduation prayer as a state-sanctioned religious exercise, having refused to characterize a legislative prayer as such in *Marsh*.²⁰³ To treat invocations for judges, legislators, and public officials differently than invocations for graduating students is inconsistent. The appearance of state sponsorship of religion is seemingly greater for prayers in a legislative session than prayers in an individual school. A legislative prayer is more likely to be viewed by the public as linking religious belief to the state than a high school graduation prayer.²⁰⁴ Even if this were not true, and the public viewed both prayers as equivalent establishments of religion, *Lee* and *Marsh* should have reached the same conclusion.

The *Lee* majority's argument that the coercive pressures present in a graduation context are not applicable to legislators is met by Justice Brennan's dissenting opinion in *Marsh*: "Legislators, by virtue of their instinct for political survival, are often loath to assert in public religious views that their constituents might perceive as hostile or non-conforming."²⁰⁵ Given that the Court believed there to be coercive pressures in the graduation prayer context, it would have been more consistent for the Court to overrule *Marsh* than to distinguish it in an unconvincing manner.

In sum, the majority's analysis in *Lee* is logically unsound and unpersuasive. Its reliance on the school-prayer cases, its coercion argument, and its attempt to distinguish *Marsh* are unsupported by legal precedent. Despite the weak reasoning in *Lee*, however, there are persuasive reasons to conclude that the Court reached an appropriate result under *Lemon*.

D. *Lemon v. Kurtzman* Analysis

Although several members of the Court have criticized the *Lemon* test,²⁰⁶ the Court has never explicitly overruled *Lemon*.²⁰⁷ In *Lee*, the Court decided the case without invoking the principles of

203. *Id.* at 2660-61.

204. *See Marsh*, 463 U.S. at 798 (Brennan, J., concurring).

205. *Id.* at 798 n.5.

206. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Scalia, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 110-13 (1985) (Rehnquist, J., dissenting); *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 768-69 (1976) (White, J., concurring in the judgment).

207. In a recent case, *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993), the Court decided an Establishment Clause case without following the *Lemon* test, but did not overrule the test. *See infra* notes 267-74 and accompanying text.

Lemon. However, as evidenced by Justice Blackmun's concurrence in *Lee*, *Lemon* has not yet been permanently abandoned.

In his concurrence, Justice Blackmun analyzed the constitutionality of public school graduation prayers under *Lemon*.²⁰⁸ Moreover, in a footnote, Justice Blackmun reminded the Court that since 1971, *Marsh v. Chambers* was the only Establishment Clause case out of thirty-one that the Court decided without invoking the *Lemon* test.²⁰⁹ Prior to *Lee*, all cases involving religious activities in public schools applied the *Lemon* test.²¹⁰

In adherence to the doctrine of stare decisis, the Court should have relied on *Lemon*'s principles to support its decision in *Lee*. Applying the *Lemon* factors to the facts of *Lee* would have given the Court's holding a more solid foundation.²¹¹ Although there is no violation of the secular purpose prong of *Lemon*, the public school graduation prayers fail both the effect and entanglement prongs.

1. *Secular Purpose*

Graduation prayers pass the secular purpose prong of the *Lemon* test for several reasons. *Lemon* does not mandate that the government activity have an exclusively secular purpose. *Lemon* only requires that there be at least one secular purpose.²¹² As such, Rabbi Gutterman's prayer should be viewed in the context of the entire graduation ceremony. While carrying a religious tone, the prayer was brief and was delivered in the larger context of recognizing and honoring the graduates for their achievements. Furthermore, the prayer served to solemnize the public occasion, thank the teachers and administrators for their efforts, and express hope for posterity.²¹³ Thus, the purpose of the prayer was not merely to advance religion.²¹⁴

208. See *supra* notes 92-96 and accompanying text.

209. *Lee*, 112 S. Ct. at 2663 n.4 (Blackmun, J., concurring). After *Lee*, the Court in *Zobrest v. Catalina Foothills Sch. Dist.* 113 S. Ct. 2462 (1993), held that the government does not violate the Establishment Clause when it provides a deaf student an interpreter at a Roman Catholic high school. The Court did not mention the *Lemon* case at all, but did not overrule it either. *Id.* See *infra* notes 267-74 and accompanying text.

210. *Lee*, 112 S. Ct. at 2663-64 n.4.

211. In order for a statute or activity to pass the *Lemon* test, 1) it "must have a secular legislative purpose"; 2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and 3) "the statute must not foster 'an excessive entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13. See *supra* notes 21-28 and accompanying text.

212. *Lynch v. Donnelly*, 465 U.S. 668, 681 n.6 (1984).

213. See *id.* at 693 (O'Connor, J., concurring).

214. See, e.g., *id.* at 671, 685. In *Lynch*, the Court upheld the display of a crèche as part of a city's Christmas display. The crèche was only part of the larger display, which included reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout clown and animal figures, colored lights, and a large banner with the words "SEASONS GREETINGS." *Id.* Compare *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), where

2. *Primary Effect*

Unlike the primary purpose prong of *Lemon*, an analysis under the primary effect prong reveals some constitutional problems. The graduation prayer in *Lee* does have the primary effect of identifying the State with religion. The prayers “advance religion by creating an identification of school with a deity, and therefore [with a] religion.”²¹⁵ Moreover, graduation is a unique and special occasion in the lives of many. The union of prayer, school, and an important occasion identifies religion with a public school function.²¹⁶

An analysis under Justice O’Connor’s endorsement test,²¹⁷ which is closely related to the effect prong of *Lemon*, also suggests that the graduation prayer is unconstitutional. By authorizing an appeal to a deity during the public school graduation ceremony, the Providence School District conveys the message that government prefers religion over nonreligion. This is endorsing religion. This “[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”²¹⁸

Supporters of graduation prayers might argue that the prayers are a mere “ceremonial deism.”²¹⁹ For example, the phrase “In God We Trust” has been printed on United States coins and currency since the Civil War.²²⁰ Although it identifies the state with a deity, and therefore a religion, it does not violate the Constitution. Other examples of “ceremonial deism” include the opening of court sessions with “God save the United States and this Honorable Court” and the reciting of the words “One Nation Under God” as part of the Pledge of Allegiance.²²¹ These features of public life are distinguishable from graduation prayers. Mottos, with fixed wordings, do not present as great a risk of creating the appearance that government is approving a particular religious belief or practice. Although the expressions use the

the Court held that a crèche placed on the Grand Staircase of the Allegheny County Courthouse surrounded by some trees, a fence, and poinsettias violated the Establishment Clause. No other Christmas figures, such as Santa Claus or reindeer, appeared on the Grand Staircase. *Id.* at 598-602.

215. *See Weisman v. Lee*, 728 F. Supp. 68, 72 (D. R.I. 1990).

216. *Id.* at 72-73.

217. *See supra* note 32 and accompanying text.

218. *See Lynch*, 465 U.S. at 688 (O’Connor, J., concurring).

219. This language was used by Justice Brennan in his dissenting opinion in *Lynch*, 465 U.S. at 716.

220. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 826 (Cal. 1991) (Lucas, C.J., concurring).

221. *See Lynch*, 465 U.S. at 716 (Brennan, J., dissenting); *Marsh v. Chambers*, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring); *Sands*, 809 P.2d at 826 (Lucas, C.J., concurring).

term "God," they do not violate the Establishment Clause because their constant use, in secular settings, has stripped them of any religious meaning.²²²

By contrast, the mention of a deity during a prayer invokes an entirely different message. That the prayer may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise. According to one federal appellate court,

Prayer is perhaps the quintessential religious practice for many of the world's faiths . . . [prayer] is an address of entreaty, supplication, praise, or thanksgiving directed toward some sacred or divine spirit, being or object.²²³

Similarly, the United States Supreme Court has recognized the significance of prayer on more than one occasion. In *Engel v. Vitale*,²²⁴ the Court characterized prayer as "a solemn avowal of divine faith and supplication for the blessings of the Almighty" and emphasized the inherently religious nature of prayers. More recently, the *Lee* majority stated that it would offend Rabbi Gutterman to characterize his prayers as void of any religious meaning.²²⁵

3. Entanglement

Although the violation of the effect prong of *Lemon* is alone sufficient to invalidate the practice of having prayers at a graduation ceremony,²²⁶ an entanglement prong analysis strengthens the *Lee* holding. The purpose of the excessive entanglement prong is to keep the state from becoming too "involved with the determination of religious practice."²²⁷ Specifically, this part of the test is meant to keep the state from unlawfully policing religious affairs.²²⁸ Allowing prayers at a public school graduation entangles government and religion in at least two ways: the government appoints the religious speaker and the prayer's content must conform to government standards.²²⁹

In *Lee*, entanglement was present when the principal of Nathan Bishop Middle School selected Rabbi Gutterman to deliver the invocation and benediction.²³⁰ Allowing school officials to choose reli-

222. *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting).

223. *Weisman v. Lee*, 908 F.2d 1090, 1097 (1st Cir. 1990) (citing *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982)).

224. 370 U.S. 421, 424-25 (1962).

225. *Lee*, 112 S. Ct. at 2659.

226. If the challenged governmental action fails to satisfy any one of the three prongs of the *Lemon* test, the Establishment Clause is violated. *Edwards v. Aguillard*, 482 U.S. 578, 582-83 (1987).

227. *Weisman v. Lee*, 908 F.2d 1090, 1095 (1st Cir. 1990).

228. *Id.*

229. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 818 (Cal. 1991).

230. *Lee*, 112 S. Ct. at 2655.

gious speakers causes excessive entanglement because the officials tend to appoint speakers that represent their own religious beliefs, or the beliefs of the majority of the community.²³¹ Entanglement was similarly present when the principal issued guidelines and told the rabbi to keep the prayers nonsectarian.²³² Moreover, litigation in this sensitive area would force the courts to evaluate the religious content of speech.²³³ This could eventually result in the unconstitutional development of judicial standards governing what constitutes a proper public prayer.²³⁴

Under the *Lemon* test, the *Lee* Court's invalidation of the graduation prayer would have rested on a more solid foundation. Cases that have followed *Lee* reflect the continuing confusion over graduation prayers and the Court's Establishment Clause jurisprudence in general.

E. Subsequent Cases

1. Jones v. Clear Creek Independent School District

At least one court has been faced with the constitutionality of public school graduation prayers since *Lee*. *Jones v. Clear Creek Independent School District*²³⁵ tested the constitutionality of student-organized prayer.

In 1986, the Clear Lake High School graduation invocation included references to the Christian faith.²³⁶ Following this invocation, two Clear Lake students and their fathers complained that the school district's policy of permitting invocations that consisted primarily of Christian prayer violated the Establishment Clause.²³⁷ They sought to enjoin the district from allowing invocations and benedictions at public high school graduations.²³⁸ In response to the litigation, the school district adopted a resolution²³⁹ that provided the following new guidelines:

1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
2. [t]he invocation and benediction, if used, shall be

231. *Sands*, 809 P.2d at 818.

232. *Lee*, 112 S. Ct. at 2656.

233. *Sands*, 809 P.2d at 818. See also *Aguilar v. Felton*, 473 U.S. 402, 410-11 (1985).

234. *Weisman v. Lee*, 728 F. Supp. 68, 74 (D. R.I. 1990).

235. 930 F.2d 416 (5th Cir. 1991).

236. *Id.* at 417. Specifically, the 1986 graduation ceremony contained the phrases "Lord," "Gospel," "Amen," and referred to God's omnipotence. *Id.*

237. *Id.*

238. *Id.*

239. The resolution was adopted just three weeks before the *Jones* case was to go to trial. *Id.*

given by a student volunteer; and 3. [c]onsistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.²⁴⁰

The district court applied the three-part *Lemon* test and held that invocations conforming with the district's resolution did not violate the Establishment Clause of the First Amendment.²⁴¹

The Court of Appeals for the Fifth Circuit affirmed the decision of the district court.²⁴² The Supreme Court vacated the judgment and remanded, however, for further consideration in light of *Lee v. Weisman*.²⁴³

On remand, the Fifth Circuit again affirmed the district court's decision in the school's favor, holding that the decision in *Lee* did not render student-organized prayer unconstitutional.²⁴⁴ Recognizing the confusion that resulted from the coercion analysis in *Lee*, the Fifth Circuit took an innovative approach to analyzing the case. From *Lemon* to *Lee*, the court noted, the Supreme Court has used five different tests to assess whether a public school's religious activities offend the Establishment Clause.²⁴⁵ Consequently, the court decided to use all five tests to analyze the graduation prayer resolution.²⁴⁶ Under each test, the court found the resolution constitutional.²⁴⁷

First, the court established that the resolution's purpose and effect were to solemnize the graduation ceremonies, and not to "advance religion."²⁴⁸ Therefore, it passed the secular purpose and primary effect tests. Second, the court held that the resolution passed the entanglement test because a public institution was not involved.²⁴⁹ Where in *Lee*, a rabbi wrote and delivered the prayer, in *Jones*, the resolution authorized students to write and deliver the prayer. Third, the court held that the policy of allowing student-organized prayer does not endorse religion because "a graduating high school senior who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer will understand that

240. *Id.*

241. *Id.* at 418.

242. *Id.* at 416.

243. 112 S. Ct. 3020 (1992).

244. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 965 (5th Cir. 1992).

245. *Id.* at 966. The five tests are as follows: 1) the secular purpose test; 2) the primary effect test; 3) the entanglement test; 4) the endorsement test; and 5) the coercion test. *See id.* at 966-69. The first three tests are taken from the Supreme Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The fourth test was introduced by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*, 403 U.S. 668, 688 (O'Connor, J., concurring). Finally, the coercion test surfaced for the first time in *Lee*. *Lee*, 112 S. Ct. at 2655.

246. *Jones*, 977 F.2d at 966.

247. *Id.* at 966-70.

248. *Id.* at 967.

249. *Id.* at 968.

any religious references are the result of student, not government, choice.”²⁵⁰ Finally, the court identified unconstitutional coercion as when “(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors.”²⁵¹ The court found that none of these elements of unconstitutional coercion were present, thereby allowing the resolution to pass the fifth and final test.²⁵² The United States Supreme Court denied certiorari.²⁵³

2. Lamb’s Chapel and Zobrest

Although the United States Supreme Court refused to review the decision in *Jones*, the Court has recently decided two Establishment Clause cases: *Lamb’s Chapel v. Center Moriches School District*²⁵⁴ and *Zobrest v. Catalina Foothills School District*.²⁵⁵ Unlike *Lee* and *Jones*, *Lamb’s Chapel* and *Zobrest* did not address the constitutionality of prayers in public schools. Nevertheless, a brief examination of these cases is helpful in evaluating current Establishment Clause jurisprudence and the status of the *Lemon* test.

Lamb’s Chapel involved a New York law giving school boards permission to regulate the use of school property after school hours. Pursuant to this law, the Center Moriches Union Free School District issued a rule stating that “[t]he school premises shall not be used by any group for religious purposes.”²⁵⁶ Accordingly, the district rejected Pastor John Steigerwald’s application for permission to use the school facilities. Steigerwald wanted to show a six-part film series focusing on how the media undermines society and how returning to traditional Christian family values could counterbalance the media’s effects.²⁵⁷

The Court held that denying Steigerwald the opportunity to show his film series was an unconstitutional application of the district’s rule. It is true that the rule did not discriminate among religions. However, because the school property could only be used to present issues on family values that did not relate to religion, the district impermissibly discriminated on the basis of viewpoint.²⁵⁸

Having held that denying Steigerwald the chance to present his film series violated his First Amendment right to free speech, the Court went on to analyze whether allowing the film series would vio-

250. *Id.* at 969 (emphasis omitted).

251. *Id.* at 970.

252. *Id.*

253. *Jones v. Clear Creek Indep. School Dist.*, 113 S. Ct. 2950 (1993).

254. 113 S. Ct. 2141 (1993).

255. 113 S. Ct. 2462 (1993).

256. *Lamb’s Chapel*, 113 S. Ct. at 2144 (quoting App. to Pet. for Cert. 57a).

257. *Id.*

258. *Id.* at 2146-48.

late the Establishment Clause.²⁵⁹ The Court began its analysis with an application of what appeared to be Justice O'Connor's endorsement test.

The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to Church members. . . . Under these circumstances, . . . there would have been no realistic danger that the community would think that the District was endorsing religion²⁶⁰

Although this analysis was sufficient to support the Court's view, Justice White's majority opinion surprisingly²⁶¹ invoked the *Lemon* test. In one sentence, the Court stated that the challenged action "[had] a secular purpose, [did] not have the principal or primary effect of advancing or inhibiting religion, and [did] not foster an excessive entanglement with religion."²⁶²

In Justice Scalia's humorous concurrence,²⁶³ he strongly criticized the majority for invoking *Lemon*.²⁶⁴ He then expressed some admiration for the constitutional scholars who disfavor *Lemon*.²⁶⁵ As a substitute to *Lemon*, Justice Scalia seemed to advocate a new test. In short, he stated that allowing Steigerwald to show his film series did not offend the Establishment Clause because "it [did] not signify state or local embrace of a particular religious sect."²⁶⁶

259. See *id.* at 2148 (citing *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)) (state's interest "in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgment of free speech otherwise protected by the First Amendment.").

260. *Id.*

261. Justice White, has, on several occasions, expressed his dissatisfaction with Establishment Clause precedent, namely, the *Lemon* test. See e.g., *Wallace v. Jaffree*, 472 U.S. 38, 90-91 (1985) (White, J., dissenting); *Grand Rapids v. Ball*, 473 U.S. 373, 400 (1985) (White, J., dissenting); *Widmar v. Vincent*, 454 U.S. 263, 282 (1981) (White, J., dissenting).

262. *Lamb's Chapel*, 113 S. Ct. at 2148.

263. A portion of Justice Scalia's opinion reads as follows:

As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six-feet under: our decision in *Lee v. Weisman* conspicuously avoided using the supposed 'test' but also declined the invitation to repudiate it. . . . The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will.

Id. 2149-50 (citations omitted) (Scalia, J., concurring).

264. *Id.*

265. *Id.* at 2150 (citing Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5, 13-14 (1987); William P. Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 497-98 (1986)).

266. *Id.* at 2151.

The Court's reference to *Lemon* in *Lamb's Chapel* has, once again, perpetuated Establishment Clause confusion. Although *Lemon* may not be the best test to apply, as long as the Court refuses to overrule it, lower courts must treat it as though it has some merit.

Eleven days after *Lamb's Chapel* was decided, the United States Supreme Court decided *Zobrest v. Catalina Foothills School District*.²⁶⁷ In *Zobrest*, a school district refused to provide a deaf child with a sign-language interpreter while he attended Roman Catholic school. The District Court of Arizona granted the school district's summary judgment motion on Establishment Clause grounds, stating that "[t]he interpreter would act as a conduit for the religious inculcation of James—thereby, promoting James' religious development at government expense."²⁶⁸ The Court of Appeals affirmed, relying completely on *Lemon*.²⁶⁹ The court held that the primary effect prong, but not the primary purpose prong, was violated. "By placing its employee in the sectarian school, the government would create the appearance that it was a 'joint sponsor' of the school's activities."²⁷⁰

In an opinion written by Chief Justice Rehnquist, the United States Supreme Court reversed the judgment of the Court of Appeals, holding that providing a deaf student enrolled in a religious school with an interpreter pursuant to the Individuals with Disabilities Education Act does not offend the Establishment Clause.²⁷¹ Despite the doctrine of stare decisis, the Court completely ignored the *Lemon* test. Instead, the Court relied on principles of neutrality to reach its decision. Chief Justice Rehnquist stated that "[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' it follows under our prior decisions that provision of that service does not offend the Establishment Clause."²⁷² The interpreter service, according to Chief Justice Rehnquist, was part of a general government program that gave benefits to qualified children, without considering the types of schools the children attended.²⁷³ As such, the aid flowed to the children, not the schools.²⁷⁴ Unfortunately, while lower courts are still applying *Lemon*, the Supreme Court has not, with any of these new cases, clarified the status of the *Lemon* test.

267. 113 S. Ct. 2462 (1993).

268. *Zobrest v. Catalina Foothills Sch. Dist.*, No. CIV-88-516 (D. Ariz. Oct. 19, 1989).

269. *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1193-96 (9th Cir. 1992).

270. *Id.* at 1194-95.

271. *Zobrest*, 113 S. Ct. at 2467-69.

272. *Id.* at 2467 (quoting *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481, 488 (1986)).

273. *Id.*

274. *Id.* at 2469.

IV. Options after *Lee v. Weisman*

Religion plays an important role in the lives of many of our country's citizens. The United States Supreme Court realizes that "[w]e are a religious people whose institutions presuppose a Supreme Being."²⁷⁵ Nonetheless, the Court often must make difficult decisions. The Court does not necessarily reach these decisions because they represent the popular view, but "because they are right, right in the sense that the law and the Constitution . . . compel the result."²⁷⁶ Prayer often provides people with hope and guidance, and it seems that there should be some viable alternatives to allow its public expression.

One alternative is a secular message delivered by a religious leader. Nothing in the United States Constitution "prevents a cleric of any denomination or anyone else from giving a secular inspirational message at the opening and closing of the graduation ceremonies."²⁷⁷ As Judge Boyle of the District Court of Rhode Island pointed out, the following benediction could have been delivered at Deborah's graduation:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we are thankful. May these young men and women grow up to enrich it. For the liberty of America, we are thankful. May these new graduates grow up to guard it. For the political process of America in which citizens may participate, for its court system where all can seek justice we are thankful. May those we honor this morning always turn to it in trust. For the destiny of America we are thankful. May the graduates of Nathan Bishop Middle School so live that they may help to share it. May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.²⁷⁸

A secular, but inspiring message of this sort would uplift those present without government endorsement or disapproval of religion.²⁷⁹

275. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

276. *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring).

277. *Weisman v. Lee*, 728 F. Supp. 68, 74 (D. R.I. 1990).

278. *Id.* at 74-75 n.10.

279. *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring). One judge has argued that manipulating a message so as not to invoke a deity does not solve the constitutional problem. Judge Bownes of the United States Court of Appeals for the First Circuit does not believe that the direct reference to a deity should be the guiding factor in the constitutional analysis. *Weisman v. Lee*, 908 F.2d 1090, 1097 (1st. Cir. 1990). Implicitly, Judge Bownes defines prayer as any statement by a religious official, regardless of whether the name of God is mentioned or specific references to religious beliefs or practices are made. This is simply too broad a definition, which would likely invade the religious official's freedom of speech. Expressing thanks for some of this country's greatest assets (e.g., diversity and the rights of minorities) is not necessarily religious expression.

As another alternative, a moment of silence during the graduation ceremony would allow students and those attending to meditate, pray, or reflect on their achievements and activities throughout the school year.²⁸⁰ A large number of states “permit or require public school teachers to have students observe a moment of silence in their classrooms.”²⁸¹ There are inherent differences between a state-sponsored moment of silence in the public schools and state-sponsored vocal prayers²⁸² or Bible readings.²⁸³ First, unlike prayers or Bible readings, silence is neither religious by nature nor intrinsically related to religious activities.²⁸⁴ Second, during a moment of silence, nonbelievers need not concede their beliefs.²⁸⁵ Students who do not wish to pray may be left to their own thoughts and do not have to listen to the thoughts or prayers of anyone else. Since moment-of-silence statutes have been widely accepted, even in the relatively coercive environment of the classroom,²⁸⁶ there does not appear to be any significant constitutional problem with having a moment of silence during a graduation commencement.

A further alternative is student-organized prayer at graduation.²⁸⁷ In *Jones*, the Fifth Circuit Court of Appeals made it clear that student-organized prayer would remain lawful in at least three states: Texas, Mississippi, and Louisiana.²⁸⁸ Nonetheless, the *Jones* decision is questionable. *Lee* emphasized the general principle that the state should not be involved in school prayers.²⁸⁹ This involvement could occur whether a rabbi or student delivers the prayer. The school district’s resolution in *Jones* granted school officials permission to advise and

280. In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Supreme Court held that an in-class moment-of-silence statute violated the Establishment Clause, though this should not be interpreted to mean that voluntary silent prayer under all circumstances is unconstitutional. *See id.* at 74. (O’Connor, J., concurring). According to Justice O’Connor, however, the federal trial courts are split on the constitutionality of moment-of-silence laws. *Id.* at 71.

281. *Id.* at 70-71.

282. *See, e.g., Engel v. Vitale*, 370 U.S. 421 (1962).

283. *See, e.g., Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

284. *Wallace*, 472 U.S. at 72 (O’Connor, J., concurring).

285. *Id.*

286. *See Abington*, 374 U.S. at 281 (Brennan, J., concurring) (“[A] moment of reverent silence at the opening of class may [serve] the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.”) *Id.* *See also* P. FREUND, *THE LEGAL ISSUE, IN RELIGION AND THE PUBLIC SCHOOLS* 23 (1965); Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 371 (1963); Paul G. Kauper, *Prayer, Public Schools, and the Supreme Court*, 61 MICH. L. REV. 1031, 1041 (1963).

287. *See supra* notes 235-53 and accompanying text.

288. Henry J. Reske, *Graduation Prayers, Part II*, A.B.A. J., July 1993, at 14, 14.

289. *Lee*, 112 S. Ct. at 2665.

counsel seniors regarding whether to include a prayer in the graduation ceremony. Unfortunately, this leaves the officials ample room to exploit the students. Moreover, because the prayer must be nonsectarian and nonproselytizing, a school official would undoubtedly have to review the prayer before it is given. Like the situation in *Lee*, the state will necessarily become involved in the prayer.

That notwithstanding, because certiorari in *Jones* was denied,²⁹⁰ student-organized prayer appears to be a viable option in the near future, no matter how constitutionally suspect the option may be.²⁹¹

Justice Scalia has suggested another option, saying that public schools can easily circumvent the *Lee* decision.²⁹² According to Justice Scalia, if school officials warn the audience at the beginning of the ceremony that the graduates are not forced to join the prayers and will not be assumed to have joined by rising, the prayers would not violate the Establishment Clause.²⁹³ It seems unlikely, however, that such a solution would pass constitutional muster. The Court is not concerned with who has joined the prayers. The Court in *Lee* opposed school officials directing and controlling school prayers, and government endorsing religion.²⁹⁴

One final option is prayers sponsored by private individuals outside of the school context. Nothing in the Constitution prohibits private parties from organizing baccalaureate or other ceremonies to remember and worship God. The entire senior class could attend such

290. *See supra* note 253.

291. At least one organization has protested the *Jones* decision. The ACLU maintains that student-organized prayers under *Jones* are unconstitutional. Henry J. Reske, *Graduation Prayers, Part II*, A.B.A. J., July 1993, at 14, 16. Particularly troubling, according to the ACLU, is that students vote for the prayers, and school officials are required to schedule and approve the prayers. *Id.* As Robert S. Peck, legislative counsel for the ACLU, has stated, "Constitutional rights would be meaningless if they could be overruled by a vote. It is important to understand that when we prohibit government from taking sides in a religious dispute, we are protecting religion from government control." *Id.* Nonetheless, the ACLU has apparently adopted the position that students may organize private prayers before and after the officially scheduled graduation time. However, to pass constitutional muster, such prayers would have to be "voluntary, held off of school grounds, and organized without participation by school officials." *Id.* In addition, Peck finds no constitutional violation if a student valedictorian injects a prayer into her speech, as long as the prayer was not pre-approved by school officials. *Id.* Pat Robertson, of the American Center for Law and Justice, has threatened to sue school boards that prevent student-organized prayers. *Id.* at 14. In response, Gwendolyn Gregory, deputy general counsel for the National School Boards Association (NSBA), has stated that the ACLU will file suit if students agree to lead a *Jones*-type prayer. *Id.*

292. *Lee*, 112 S. Ct. at 2685.

293. *Id.*

294. *Id.* at 2655. The Court in *Lee* referred to the *State's* involvement in school prayers as troubling. *Id.* (emphasis added).

an event, as long as school officials do not involve themselves in its organization and content.²⁹⁵

Conclusion

For the first time, the Court has ruled on the constitutionality of state-sponsored graduation prayers. In *Lee*, the Court invented a coercion test to support its holding that Rabbi Gutterman's high school graduation prayer violated the essential principles of the Establishment Clause.

Unfortunately, the Court's analysis was weak. Two especially troubling areas were the Court's reliance on the school-prayer cases and the Court's likening of standing during the prayer to overt compulsion. Moreover, no clear rationale or precedent supported the Court in its attempt to distinguish the legislative prayers approved in *Marsh* from the graduation prayers in *Lee*. Finally, because the Court did not overrule *Lemon*, it should have relied on *Lemon* to give its decision a more solid foundation.

The decision in *Lee* left the law in a state of confusion. Lower courts continue to have a hard time deciding whether to apply *Lee*, *Marsh*, or *Lemon* in deciding an Establishment Clause challenge to state-sponsored prayers. It is difficult to predict how the Court will treat public prayers in contexts other than graduations or legislative sessions. For example, in a ceremony for the opening of a public children's hospital, would the prayers offered fall under the *Marsh* holding or the *Lee* holding? Would the Court hold that the history of prayers in public ceremonies is enough to validate the prayers? Or would the Court recognize that children will be attending and apply the majority's psychological coercion standard? Unfortunately, the Court has left many open questions in the wake of *Lee*, and the Establishment Clause cases since *Lee* have not been successful in clearing up any of the confusion.

295. In his concurring opinion in *Lee*, Justice Souter has also suggested that the Establishment Clause would not prohibit individuals from organizing a privately sponsored baccalaureate. See *supra* note 125 and accompanying text.