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Lee v. Weisman: Unanswered Prayers

I. INTRODUCTION

When Deborah Weisman's middle school class graduated, little did the students expect that a year later the United States Supreme Court would characterize their graduation ceremony as "a state-sanctioned religious exercise in which the student was left with no alternative but to submit."¹ However, several days before graduation, Deborah and her father attempted to make this point by seeking to bar public school officials from their practice of including an invocation to God in the ceremony.² Their motion failed, but days later they returned to court in an attempt to permanently bar prayers at future graduations as a violation of the First Amendment's prohibition against state-established religion.³ Their case, *Lee v. Weisman*,⁴ went all the way to the Supreme Court, providing an opportunity, some thought, for the Court finally to unify the long-debated and much-unsettled area of Establishment Clause jurisprudence under a cohesive analytical theory. Over the years, the Court had built up and torn down the so-called "wall of separation"⁵ between church and state in its attempts to develop a standard against which to measure Establishment Clause challenges. For those who hoped *Weisman* would provide that standard, the Court's reasoning behind its decision that the school graduation prayers violated the First Amendment was disappointing. The decision was narrowly focused and its soundness questionable. Rather than moving the Court forward, the decision merely marked another brick in the old "wall" constructed by the Court forty-five years ago.⁶

This Note will examine the Court's disappointing decision in *Lee v. Weisman* and its implications for First Amendment analysis. Part II lays down the historical underpinnings of Establishment Clause case law,

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1. *Lee v. Weisman*, 112 S. Ct. 2649, 2660 (1992).
 2. *Id.* at 2654.
 3. *Id.*
 4. 112 S. Ct. 2649 (1992).
 5. See *infra* note 14 and accompanying text.
 6. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

with particular attention to the Court's analytical trends.⁷ The facts of the case are presented in Part III,⁸ followed by an analysis of the majority, concurring, and dissenting opinions in Part IV.⁹ In Part V, the educational, legislative, judicial and social impacts of the Court's decision are considered.¹⁰ Part VI concludes with a look at what might be considered the missed opportunities in *Lee v. Weisman*.¹¹

II. HISTORICAL BACKGROUND

The First Amendment states in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹² This Amendment reflected the determination of America's early settlers that the federal government would not obstruct their religious freedom in the newly established nation.¹³ One of the first images used to embrace the intentions of the Establishment Clause was that of a "wall of separation between church and state."¹⁴

7. See *infra* notes 12-177 and accompanying text.

8. See *infra* notes 178-90 and accompanying text.

9. See *infra* notes 191-284 and accompanying text.

10. See *infra* notes 285-327 and accompanying text.

11. See *infra* pp. 258-59.

12. U.S. CONST. amend. I.

13. *Everson v. Board of Educ.*, 330 U.S. 1, 8-10 (1947). The colonists had memories of the religious persecution they fled England and Europe to escape, but at the time of the drafting of the First Amendment, they were also witnessing the Old World practices beginning to thrive in the new America. Colonists sought freedom in America from England's governmentally ordained religion, and instead they found churches established under English charters commanding the colonists' loyalty and support. Taxes were imposed to support the government-sponsored churches and non-adherents were persecuted. *Id.* See also *Engel v. Vitale*, 370 U.S. 421, 427-28 (1962). (citing SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* (1902) (stating that by the time of the Revolutionary War, the Church of England was the established church in at least 7 of the 13 original colonies and established religions and religious persecution existed in several others)). It is in this context that the First Amendment language enjoys its full meaning. For an extended discussion of the First Amendment's historical framework, see generally LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986); A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* (1985); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE* (1982); MARK D. W. HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965); PAUL K. KAUPER, *RELIGION AND THE CONSTITUTION* (1964); LEO PFEFFER, *CHURCH, STATE AND FREEDOM* (1967).

14. *Everson*, 330 U.S. at 16. The Court borrowed the phrase from Thomas Jefferson, one of the framers of the First Amendment, who used the metaphor in an 1802 letter to the Danbury Baptist Association. *Id.* Although the image of the wall has endured for decades, it has not escaped criticism. In *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985), Justice Rehnquist argued that the wall of separation is "a metaphor based on bad history, a metaphor which has proved useless as a guide to judging." *Id.* at 2516 (Rehnquist, J., dissenting).

The image of the wall was seldom useful and often challenged or simply ignored over the years. However, the image persisted into the present, particularly in school prayer cases, as the Court attempted to shape an analytical formula that it could apply with consistency to Establishment Clause challenges.

A. *The 1940s: The Wall of Separation*

In 1947, the Establishment Clause of the First Amendment became applicable to the states through the Fourteenth Amendment in *Everson v. Board of Education*,¹⁵ in which the Court first acknowledged a wall of separation between church and state. In *Everson*, a taxpayer challenged the constitutionality of a New Jersey statute that authorized reimbursement to parents for the transportation of children attending sectarian¹⁶ schools.¹⁷ Justice Black, delivering the Court's opinion, devoted substantial efforts to reviewing the evil and fearful times in colonial America that led to the drafting of the First Amendment, especially with respect to the abusive imposition of taxes to support religion.¹⁸ The Court spoke of a "high and impregnable" wall of separation be-

15. 330 U.S. 1 (1947). In *Everson*, Justice Black referred to the incorporation of the First Amendment's Free Exercise Clause seven years earlier in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and determined that "there is every reason to give the same application and broad interpretation to the 'establishment of religion' clause." *Everson*, 330 U.S. at 15. For a provocative argument challenging the incorporation of the Establishment Clause against the states, see Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700 (1992) (arguing that the original intent of the Establishment Clause was to curb federal intrusion in church-state activities. Applying a federalist reading to the Clause, while advancing the theory of "selective incorporation" over total incorporation, the author finds the Establishment Clause a "poor candidate" for application against the states.)

16. One commentator argues that "sectarian" is a term of exclusion, used primarily to humiliate and marginalize certain groups of people. Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J. L. & POL. 449 (1990).

17. *Everson*, 330 U.S. at 3. The New Jersey statute stated: "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school." *Id.* (citing 1941 N.J. LAWS '191). Based on this statute, the township of Ewing's board of education passed a resolution to reimburse parents who used public transportation to bus their children to school. *Id.* Some reimbursements paid for the transportation of children to Catholic schools in the area. *Id.*

18. *Everson*, 330 U.S. at 8-15.

tween church and state that should resist the slightest breach,¹⁹ yet ultimately held that the statute did not violate the Establishment Clause.²⁰ The Court did clarify, however, those state actions that would breach the wall of separation: the state could not set up a church, pass laws that aid one religion over another, coerce a person to attend or refrain from attending church, support religious activities or institutions with taxes, or participate in the affairs of religious organizations.²¹ The Court lowered the wall when it distinguished “neutral” state services, such as police and fire protection, public highways, sidewalks, and sewage disposal, which it considered “indisputably marked off from the religious function” and, thus, not violative of the First Amendment.²² It was in this category of permissible state services that the Court placed the public busing of religious school students, claiming that to do otherwise would cast the state in an adversarial role.²³

One year later, Justice Black, in *McColum v. Board of Education*,²⁴ referred to his reasoning in *Everson* to prohibit a public school district from allowing religious instruction during school hours.²⁵ Delivering the Court’s opinion, Justice Black stated that the Champaign, Illinois, Board of Education’s practice of allowing religious instructors to conduct weekly classes on campus was “beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.”²⁶ The Court emphasized the impermissible integration of church and state that occurs when the compul-

19. *Id.* at 18.

20. *Id.* at 2. Perhaps the Court, in this first state case, set the tone for the ambiguity that would follow in Establishment Clause jurisprudence. In his dissenting opinion, Justice Jackson characterized the Court’s holding as “utterly discordant” with its stated intention to completely and uncompromisingly separate church from state. *Id.* at 19 (Jackson, J., dissenting).

21. *Id.* at 15-16. For a discussion of Supreme Court decisions regarding public support of sectarian schools, see Ralph M. Silberman, Annotation, *Supreme Court’s Views Regarding State Aid to Sectarian Schools Under Establishment and Freedom of Religion Clauses of United States Constitution*, 63 L. ED. 2D 804 (1992).

22. *Everson*, 330 U.S. at 17-18.

23. *Id.* at 18. The Court stated that cutting off general services to religious schools might discourage attendance or make it difficult for the schools to function. That, the Court stated, is not the intent of the First Amendment. *Id.* at 17-18.

24. 333 U.S. 203 (1948).

25. *Id.* at 212. A religious association made up of Jews, Catholics, and Protestants obtained permission from the Champaign, Illinois, Board of Education to offer religious instruction in the public schools on a weekly basis. The classes were conducted in public school classrooms during school hours and were attended by pupils with their parents’ approval. Students enrolled in the religious classes were required to be present. The religious instructors received no salary from the school, but the school’s superintendent hired and supervised the instructors. *Id.* at 207-09.

26. *Id.* at 210.

sory public education system is used to provide pupils for religious indoctrination.²⁷

B. *The 1950s: The Neutral Services Test*

Four years later, the Court in *Zorach v. Clauson*²⁸ reaffirmed the image of the wall when it declared that the separation between church and state must be complete and unequivocal.²⁹ At the same time, however, the Court declared as constitutional the New York law that allowed public schools to release students during school hours for religious instruction.³⁰ Justice Douglas, delivering the majority opinion, stated that on the one hand, the First Amendment's prohibition against the establishment of religion is absolute and "permits no exception."³¹ However, on the other hand, the First Amendment does not demand a separation of church and state in *every* respect.³² Justice Douglas declared: "We are a religious people whose institutions presuppose a Supreme Being."³³ The Court called for a common sense approach to the scope of First Amendment prohibitions to accommodate the people's spiritual needs and to prevent suspicion and hostility between state and religion.³⁴ As in *Everson*, the Court distinguished permissible neutral state practices from state practices that establish a religion. The Court included prayers in legislative halls, presidential messages invoking the deity, and courtroom oaths to God, among other activities, as not violative of Establishment Clause proscriptions.³⁵ To make them so, Justice

27. *Id.* at 212.

28. 343 U.S. 306 (1952). See Note, *The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court*, 83 YALE L.J. 1202 (1974).

29. *Zorach*, 343 U.S. at 312.

30. *Id.* at 315. The Court distinguished *Zorach's* "released time" program from *McCollum's*, based on the level of school support behind the program. In *Zorach*, students were allowed to leave during the regular school day to attend off-campus religious classes. No instruction took place in public school classrooms, no public funds were expended, and the school district did not supervise or approve the religious teachers or their curricula. *Id.*

31. *Id.* at 312.

32. *Id.* Justice Douglas found a clarity in the First Amendment that has eluded other Courts to this day. According to the Justice, the First Amendment "studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency" of church and state. *Id.* Justice Douglas did not elaborate on which of the 10 words in the Establishment Clause he felt provided this specific and definitive guidance.

33. *Id.* at 313.

34. *Id.* at 312.

35. *Id.* at 313. For extended discussions of the concept of neutrality in Establish-

Douglas concluded, would be “flouting” the First Amendment.³⁶

C. *The 1960s: The Purpose and Effect Test*

Nine years later, however, in *McGowan v. State of Maryland*,³⁷ Justice Douglas departed from his reasoning in *Zorach* when he refused to classify the state’s “Sunday Closing Laws”³⁸ as neutral state action and dissented³⁹ when the majority held that the laws did not violate the First Amendment.⁴⁰ The statute’s purpose and effect, the Court stated, is to provide a uniform day of rest for citizens, and the fact that Sunday happens also to be a symbolically significant day for Christians should not hinder the state from carrying out its secular aims.⁴¹ As the Court reasoned, “the ‘Establishment Clause’ does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.”⁴²

The following year, in *Engel v. Vitale*,⁴³ the Court raised the wall against nondenominational prayer in New York schools, even if the students voluntarily participated.⁴⁴ Without actually mentioning the

ment Clause analysis, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83 (1986).

36. *Zorach*, 343 U.S. at 313.

37. 366 U.S. 420 (1961).

38. In general, these statutes prohibit all labor, business and other commercial activities on Sunday. *Id.* at 422.

39. *Id.* at 561 (Douglas, J., dissenting).

40. *Id.* at 452-53. The Court traced the closing laws back to their thirteenth century origins and concluded that although originally the laws’ purpose was to “keep[] holy the Lord’s day,” the laws had evolved over the centuries into a modern-day secular means to enforce relaxation from the work week. *Id.* at 432-34.

41. *Id.* at 445.

42. *Id.* at 442. To explain its reasoning, the Court referred to society’s proscriptions on criminal activity, such as murder. Regulation of this type of conduct, the Court stated, was no less valid because it happened to harmonize with the tenets of Judeo-Christian religions. *Id.* The Court applied similar reasoning in *Gallagher v. Crown Kasher Super Market, Inc.*, 366 U.S. 617 (1961), and *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961). *But cf.* *Thornton v. Caldor, Inc.*, 472 U.S. 703, 710-11 (1985) (finding that a statute excusing employees from working on their own Sabbath violated the Establishment Clause).

43. 370 U.S. 421 (1962).

44. The Court clarified that the Establishment Clause, unlike the First Amendment’s Free Exercise Clause, does not require the state to show coercion. Rather, the Establishment Clause is violated by state laws or conduct that establish an official religion, whether or not they directly coerce non-observing individuals. *Id.* at 424-25.

wall, yet stressing the dangers of uniting church and state, the Court held that the daily classroom prayer was a religious activity, "a solemn avowal of divine faith" in the Almighty,⁴⁵ and, as such, was no part of the government's business.⁴⁶ While on one hand, the Court acknowledged that "[t]he history of man is inseparable from the history of religion,"⁴⁷ the Court also emphasized the First Amendment's most immediate purpose: to prevent a union of government and religion.⁴⁸

In *Abington School District v. Schempp*,⁴⁹ the Court grappled with the tension between the nation's religious heritage and First Amendment concerns as it struck down Bible readings in public schools as unconstitutional.⁵⁰ The Court emphasized that for twenty years its rulings have firmly maintained the conviction that separation between church and state must be complete and permanent.⁵¹ The Court acknowledged the nation's deeply embedded religious traditions,⁵² but

45. *Id.* at 424. For an examination of what "prayer" actually means within the constitutional standard, see D.H. White, Annotation, *What Constitutes "Prayer" Under Federal Constitutional Prohibition of Prayer in Public Schools*, 30 A.L.R.3D 1352 (1992). See also Annotation, *Comment note: Prayers in Public Schools*, 86 A.L.R.2D 1304 (1992); David L. Gregory & Charles J. Russo, *Let Us Pray (But Not "Them!")*: *The Troubled Jurisprudence of Religious Liberty*, 65 ST. JOHN'S L. REV. 273 (Winter 1991).

46. *Engel*, 370 U.S. at 429. The Court discussed at length The Book of Common Prayer, the sixteenth-century governmental "bible" of prayers, to underscore the point that this very practice of establishing governmentally composed prayers for religious services was one of the reasons many of the early colonists left England and sought religious freedom in America. *Id.* at 425.

47. *Id.* at 434.

48. *Id.* at 431. History reveals, the Court explained, that this union "tends to destroy government and to degrade religion." *Id.* "[E]xperience witnesseth the ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation . . . pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution." *Id.* at 431 n.14 (quoting Memorial and Remonstrance against Religious Assessments, II Writings of Madison 183, 187).

49. 374 U.S. 203 (1963).

50. *Id.* at 205. The Commonwealth of Pennsylvania required that at least 10 verses from the Holy Bible be read without comment at the opening of each school day. Most often, students read the verses and were joined in the Lord's Prayer by the class. Any student could be excused from participating in Bible readings with a note from a parent. *Id.* at 205-07.

51. *Id.* at 217.

52. "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Id.* at 213. As

emphasized that religious freedom is likewise strongly embedded in the country's public and private life.⁵³ This freedom is protected, the Court stated, in the Establishment Clause's clear and concise language.⁵⁴ In a step toward formalizing an analytical approach, the Court proposed that the proper test for an Establishment Clause violation is one that examines the purpose and the primary effect of the state practice.⁵⁵ The Court explained that if either the purpose or the effect of the state practice advances or inhibits religion, the enactment would be unconstitutional.⁵⁶ Examined in this way, the Court found that the Bible reading was a religious ceremony and was intended by the state to be so.⁵⁷ "The place of religion in our society is an exalted one," the Court stated. "[I]t is not within the power of government to invade that citadel."⁵⁸

In a subsequent school case, *Board of Education v. Allen*,⁵⁹ the Court examined a statute requiring public school districts to loan textbooks to religious school students. The Court concluded that both the statute's purpose and effect were neutral and did not violate the Establishment Clause.⁶⁰ However, later that year, the Court, in *Epperson v. Arkansas*,⁶¹ relied on *Schempp*'s purpose/effect test to invalidate a state law that prohibited teaching the theory of evolution in public schools.⁶² The state's purpose in enacting the law, the Court found, was to select "from the body of knowledge a particular segment which

in *Everson*, the Court referred to the contemporary manifestations of this religious heritage, such as the ceremonial opening prayers in Congress, presidential oaths of office that swear "So help me God," and sessions of the Supreme Court which are opened with an invocation to the grace of God. *Id.*

53. *Id.* at 214.

54. *Id.* at 222.

55. *Id.*

56. *Id.*

57. *Id.* at 224.

58. *Id.* at 226. For other prayer-in-school cases in which the Court applied similar reasoning, see *Murray v. Curlett*, 374 U.S. 203 (1963); *Chamberlin v. Dade County Bd. of Pub. Instruction*, 377 U.S. 402 (1964).

59. 392 U.S. 236 (1968).

60. *Id.* at 237. For a provocative discussion of the merits of state-subsidized textbooks for *racially discriminatory* private schools, see *Norwood v. Harrison*, 413 U.S. 455 (1973), where the Court, in dicta, distinguished *Allen* and found no value in upholding governmental support of discrimination. For further Court discussion of governmental neutrality in matters of religion, see *Gillette v. United States*, 401 U.S. 437 (1971) (identifying "benevolent" neutrality as the controlling principle of the Establishment Clause).

61. 393 U.S. 97 (1968).

62. *Id.* at 103. In *Epperson*, a high school biology teacher challenged the "anti-evolution" statute in order to be able to lawfully use a new textbook that contained a chapter on evolution. *Id.* at 100.

it proscribes for the sole reason that it is deemed to conflict with . . . a particular interpretation of the Book of Genesis by a particular religious group."⁶³ The Court declared that the effect of this selective proscription was state-endorsed religious preference, a clear violation of the First Amendment's mandate of religious neutrality.⁶⁴ The Court referred to Justice Black's language twenty years before in *Everson*: "Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another."⁶⁵

D. The 1970s: The Lemon Test

The Court, in *Walz v. Tax Commission*,⁶⁶ pointed out the difficulty in toeing the mark of constitutional neutrality. In *Walz*, a property owner claimed that property tax exemptions for religious organizations violated the Establishment Clause.⁶⁷ Characterizing the First Amendment as "not the most precisely drawn portion[] of the Constitution,"⁶⁸ Justice Burger, delivering the opinion of the Court, declared that the Amendment's purpose "was to state an objective not to write a statute."⁶⁹ He stated that the Court's past attempts to rigidly apply the perceived mandate of neutrality have resulted in considerable inconsistency in the Court's opinions.⁷⁰ Justice Burger urged that continuing such an approach could defeat the basic purpose of the Establishment Clause.⁷¹ "The course of constitutional neutrality . . . cannot be an absolutely straight line," Justice Burger stated. "[T]here is room for play."⁷² Thus, avoiding a rigidly literal interpretation of the Establish-

63. *Id.* at 103.

64. *Id.*

65. *Id.* at 106 (citing *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947)). However, Justice Black, in his concurring opinion in *Epperson*, emphasized his reluctance to decide *Epperson* at all. *Id.* at 110. He believed that the statute was vague, the state had never moved to enforce it and, most important, the state should have the power to remove a controversial class from its public school curricula. *Id.* at 110-13 (Black, J., concurring).

66. 397 U.S. 664 (1970).

67. *Id.* at 664.

68. *Id.* at 668.

69. *Id.*

70. *Id.*

71. *Walz*, 397 U.S. at 668-69.

72. *Id.* at 669. At the very least, the Court stated, government may be permitted to exercise a kind of "benevolent neutrality . . . generally so long as [no one religion] was favored over others and none suffered interference." *Id.* at 676-77.

ment Clause, the Court held that the tax exemption for religious organizations neither advanced nor inhibited religion.⁷³ The *Walz* Court relied on and enlarged the purpose/effect test and explored whether a given statute encourages excessive government entanglement with religion.⁷⁴ Examined in this way, the Court concluded that “[t]here is no genuine nexus between tax exemption and establishment of religion.”⁷⁵

The Court in *Lemon v. Kurtzman*⁷⁶ jettisoned the wall imagery of earlier courts, stating that the First Amendment prohibitions create something more like a barrier than a wall, “blurred” and “indistinct,” that shifts depending on the circumstances.⁷⁷ The *Lemon* Court disagreed with the *Abington* Court’s characterization of the clear and concise language in the First Amendment.⁷⁸ Chief Justice Burger, delivering the majority opinion, claimed that the Court can only dimly perceive the wall’s “lines of demarcation” on the First Amendment terrain and called the language of the religion clauses “at best opaque.”⁷⁹ However, the Court made clear that it did not intend to “engage in a legalistic minuet in which precise rules and forms” govern.⁸⁰ Rather, the Court acknowledged the “extremely sensitive” nature of this area of the law and attempted to define an appropriately flexible standard for analysis.⁸¹ In the absence of precisely stated constitutional prohibitions, the

73. *Id.* at 672. The state had the right, the Court determined, to identify certain entities beneficial to the moral or mental health of the community, such as churches, hospitals, libraries and playgrounds, and encourage their continued existence by granting tax exemptions. *Id.* at 672-73. The Court distinguished this type of permissible assistance from a direct money subsidy from government to church, which would be “a relationship pregnant with involvement.” *Id.* at 675.

74. *Id.* at 674.

75. *Id.* at 675.

76. 403 U.S. 602 (1971). In *Lemon*, a Rhode Island statute, enacted to attract competent teachers to private schools, provided state funds to supplement teacher salaries in nonpublic elementary schools. *Id.* at 607. The Court held that the statute unconstitutionally aided religion. *Id.*

77. *Id.* at 614. In contrast, see Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463 (1981).

78. *Lemon*, 403 U.S. at 612. In particular, the Court examined the Clause’s prohibition against any law “respecting an establishment of religion.” *Id.* A law “respecting” an establishment of religion, the Court stated, is more difficult to decipher than an outright violation of the Clause. *Id.* The court reasoned that a law might not succeed in actually establishing a religion and yet might be “a step that could lead to such establishment and hence offend the First Amendment.” *Id.* It is in this context that the Court developed the three-part *Lemon* test.

79. *Id.*

80. *Id.* at 614.

81. *Id.* at 615. The Court stressed that prior holdings do not mandate total separation between church and state, nor is such separation even possible. *Id.* at 614. It is “inevitable,” the Court stated, that some relationship between government and reli-

Lemon Court developed three criteria to analyze Establishment Clause challenges.⁸² First, the state practice must have a "secular purpose";⁸³ second, its primary effect must not "advance or inhibit religion";⁸⁴ and third, it must not create "excessive government entanglement" with religion.⁸⁵

gious organizations will exist in the "neutral" contacts first described in *Everson v. Board of Educ.*, 330 U.S. 1 (1947). *Lemon*, 403 U.S. at 615.

82. For more than 20 years, critics have raised their pens to attack the *Lemon* test. See, e.g., Timothy V. Franklin, Comment, *Squeezing the Juice out of the Lemon Test*, 72 W. EDUC. L. REP. 1 (1992) (tracing the uneven application and unpredictable results of the *Lemon* test, concluding that the sentiment to change *Lemon* is at a "threshold level"); Stuart W. Bowen, Jr., Comment, *Is Lemon a Lemon? Crosscurrents in Contemporary Establishment Clause Jurisprudence*, 22 ST. MARY'S L.J. 129 (1990) (proposing abandonment of *Lemon* in favor of a test focused solely on impermissible religious purposes); Raul M. Rodriguez, Comment, *God Is Dead: Killed by Fifty Years of Establishment Clause Jurisprudence*, 23 ST. MARY'S L.J. 1155 (1992) (criticizing *Lemon* as not being in accord with the First Amendment framers' intent); Julie K. Underwood, *Changing Establishment Analysis Within and Outside the Context of Education*, 33 HOW. L.J. 53 (1990) (comparing the differing *Lemon* approaches in education and non-education settings); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987) (proposing a substantial revision to each prong of the *Lemon* test that can be applied more consistently); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817 (1984) (calling for a complete abandonment of the "subjective" *Lemon* test); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847 (1984) (arguing for a departure from *Lemon*). See also *Wallace v. Jaffree*, 472 U.S. 38 (1985), in which Justice Rehnquist, in a bitter dissent, presented a roster of contradictory decisions, all attributable to the *Lemon* test.

83. *Lemon*, 403 U.S. at 612-13. The issue of what actually constitutes an impermissible religious purpose is provocatively raised by Daniel O. Conkle in *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1 (1991) (proposing two types of religious purposes—the "spiritual" and the "worldly"—and sorting out which are permissible, given the "inseparable connection" between religion, morality, and law in contemporary society). See generally Hal Culbertson, Note, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, 1990 U. ILL. L. REV. 915 (1990) (arguing that *Lemon's* purpose test unnecessarily prevents religious involvement in the political process); Scott Titshaw, Note, *Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions*, 23 GA. L. REV. 1085 (1989) (proposing that challenged practices be viewed from the perspective of a "reasonable humanist" on the lookout for conduct that endorses a majority religion).

84. *Lemon*, 403 U.S. at 612-13. An argument in favor of the effects prong alone is offered by William B. Peterson in 'A Picture Held Us Captive': *Conceptual Confusion and the Lemon Test*, 137 U. PA. L. REV. 1827 (1989) (disparaging the causal connection between purpose and effect, and favoring, instead, an effects prong based on a contextual analysis).

85. *Lemon*, 403 U.S. at 612-13. "In order to determine whether the government

Two years after *Lemon v. Kurtzman*, the Court in one day struck down two state statutes authorizing aid to church-related schools. *Sloan v. Lemon*⁸⁶ challenged Pennsylvania's legislation reimbursing parents for sending their children to nonpublic schools.⁸⁷ Justice Powell, writing for the Court, examined the legislation using the *Lemon* test and found that the state's secular purpose of reducing the enrollment burden at beleaguered public schools was valid.⁸⁸ Nevertheless, the reimbursement had the impermissible effect of advancing religion and, therefore, violated the Establishment Clause.⁸⁹ Similarly, in *Committee for Public Education v. Nyquist*,⁹⁰ Justice Powell found the state's neutral aim in enacting aid to nonpublic schools passed the *Lemon* test's purpose prong,⁹¹ but the overall effect of state-supported religion did not pass the *Lemon* test.⁹² In both cases, the Court felt it unnecessary to scrutinize for third prong excessive entanglement once it was established that a violation existed.⁹³

entanglement with religion is excessive," the Court declared, "we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615. For Court cases elaborating on third-prong entanglement, see *Tilton v. Richardson*, 403 U.S. 672 (1971) (finding no entanglement); *Hunt v. McNair*, 413 U.S. 734 (1973) (no entanglement); *Norwood v. Harrison*, 413 U.S. 455 (1973) (no entanglement); *cf. Levitt v. Committee for Pub. Educ. and Religious Liberty*, 413 U.S. 472 (1973) (improper entanglement). See also Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten-Year Assessment*, 27 UCLA L. REV. 1195 (1980) (discussing the practical problems in implementing the *Lemon*'s entanglement prong).

86. 413 U.S. 825 (1973).

87. *Id.* at 827.

88. *Id.* at 829.

89. *Id.* at 829-31. The Court distinguished the state's program, which "singled out a class of its citizens for a special economic benefit . . . as an incentive to parents to send their children to sectarian schools, or as a reward for having done so" with the state law in *Everson*, in which the free bus benefits "were carefully restricted to the purely secular side of church-affiliated institutions" by aiding *all* parents. *Id.* at 832.

90. 413 U.S. 756 (1973).

91. *Id.* at 773.

92. *Id.* at 783. Appellees urged that *Lemon*'s second prong required the Court to invalidate a statute only if its *primary* effect was to subsidize religion. *Id.* The Court avoided that "metaphysical" argument, stating that a law will not pass the effect test if it has the "primary" or "direct" or "immediate" effect of advancing religion. *Id.* Appellees also urged the Court to differentiate between tuition reimbursements for money already expended on one hand and direct contributions in advance of tuition payments or state grants directly to nonpublic schools on the other. *Id.* However, the Court saw no constitutional importance in the differentiation. *Id.* at 784-86.

93. *Sloan*, 413 U.S. at 833; *Nyquist*, 413 U.S. at 794. See also *Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972) (emphasizing that the Establishment Clause cannot be read to require state-subsidized private education).

E. The 1980s: The Endorsement Test

In *Stone v. Graham*,⁹⁴ the Court never made it past the first prong of the *Lemon* test when it held invalid a Kentucky statute that required school officials to post the Ten Commandments in public classrooms.⁹⁵ Although the state claimed a neutral purpose for posting the biblical verses,⁹⁶ the Court held that the primary purpose was plainly religious.⁹⁷ "The Ten Commandments are undeniably a sacred text," the Court stated, "and no legislative recitation of a supposed secular purpose can blind us to that fact."⁹⁸

In *Larkin v. Grendel's Den*,⁹⁹ for the first time in the *Lemon* test's eleven-year existence, the Court examined all three prongs of the test. In *Grendel's Den*, Justice Burger, delivering the opinion of the Court, held unconstitutional the Massachusetts statute giving churches veto power over liquor license applications.¹⁰⁰ The Court acknowledged that the state's purpose to protect churches from the "hurly-burly" associated with liquor outlets" was valid.¹⁰¹ Examining the second prong of the *Lemon* test, however, the Court found that the "mere appearance of a joint exercise of legislative authority by Church and State" violated the

94. 449 U.S. 39 (1980).

95. *Id.* at 41. See J. David Smith, Jr., Comment, *Stone v. Graham: A Fragile Defense of Individual Religious Autonomy*, 69 KY. L.J. 392 (1980-81) (contending that although the holding in *Stone* was correct, the Supreme Court "artlessly and incompletely" applied the *Lemon* test).

96. *Stone*, 449 U.S. at 41. The statute required that the Ten Commandments be followed by a small note, stating: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.*

97. *Id.*

98. *Id.* The Court also considered it unimportant that the Bible verses were simply posted on the wall rather than recited in class or that the posted copies were paid for by private contributions. *Id.* at 42. Mixing the language of the purpose and effects prongs, the Court stated that the posting serves no educational purpose, but rather would have the effect of inducing the schoolchildren "to read, meditate upon, perhaps to venerate and obey, the Commandments." *Id.*

99. 459 U.S. 116 (1982).

100. *Id.* at 127. The statute states: "Premises . . . located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto." *Id.* at 117 (quoting MASS. GEN. LAWS ANN. ch. 138, § 16C (West 1980)).

101. *Id.* at 123-24. However valid the state's objective, the Court suggested that it could be accomplished in more appropriately secular ways. For example, the state could enact a complete ban on liquor outlets within a specified distance from churches and schools. *Id.* at 124.

Establishment Clause.¹⁰² This time, however, the Court did not stop after having established a violation mid-way through the *Lemon* analysis. Rather, the Court proceeded to the third prong to examine the legislation for excessive entanglement, and found that the statute “enmeshe[d] churches in the processes of government and create[d] the danger of [p]olitical fragmentation and divisiveness along religious lines.”¹⁰³ The wall of separation, Justice Burger claimed, “was a useful figurative illustration to emphasize the concept of separateness,” and it had been “substantially breached” by this legislation.¹⁰⁴

However, in the following year, 1983, Chief Justice Burger departed entirely from the *Lemon* test when he delivered the majority opinion in *Marsh v. Chambers*,¹⁰⁵ upholding the constitutionality of opening prayers at legislative sessions.¹⁰⁶ Ignoring the lower court’s *Lemon* analysis and shunning any reference to the old wall of separation, Chief Justice Burger instead looked to the nation’s history and traditions to support the Court’s reasoning.¹⁰⁷ The Court examined the “unambiguous and unbroken history” of more than 200 years of ceremonial prayer from the early Continental Congress¹⁰⁸ to the contemporary Supreme Court¹⁰⁹ and determined it to be “part of the fabric of our society.”¹¹⁰ To invoke divine guidance in this context, the Court reasoned, is not an establishment of religion; rather, it is an “acknowledgment of beliefs widely held among the people of this country.”¹¹¹

102. *Id.* at 125-26. The Court noted that even if the church never used the veto power to further its own religious goals, simply possessing the power “provides a significant symbolic benefit to religion in the minds of some.” *Id.*

103. *Id.* at 127 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971)).

104. *Id.* at 123.

105. 463 U.S. 783 (1983).

106. The Nebraska Legislature opens each legislative day with a prayer by a chaplain paid with state funds. *Id.* at 784-85.

107. *Id.* at 786-90.

108. The Court acknowledged that historical patterns cannot justify contemporary violations of constitutional guarantees, but in this context, their actions reveal what the draftsmen intended the Establishment Clause to mean. *Id.* at 790. “Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice . . . has continued without interruption ever since that early session of Congress.” *Id.* at 788. “[T]he Founding Fathers looked at invocations as ‘conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions.’” *Id.* at 792 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)(alterations in original)).

109. The invocation, “God save the United States and this Honorable Court” occurs at all Supreme Court sessions. *Id.* at 786.

110. *Id.* at 792.

111. *Id.* See John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847 (1984) (arguing for a “single, more encompassing construction” of the Establishment Clause rather than repeating “slogans” and formulas).

The Court further chipped away at the metaphor of the wall the following year in *Lynch v. Donnelly*,¹¹² holding that the inclusion of a crèche in a city's annual Christmas display did not violate the Establishment Clause.¹¹³ Chief Justice Burger, once again delivering the majority opinion, declared that no fixed, *per se* rule could be framed to embody the Establishment Clause objectives.¹¹⁴ He viewed the *Lemon* test, which he first introduced thirteen years earlier, as "not all-determining,"¹¹⁵ and characterized the wall of separation as "not a wholly accurate description" of the relationship between church and state.¹¹⁶ Rather, Chief Justice Burger advised against taking a rigid, absolutist view of the Establishment Clause and mechanically invalidating all governmental conduct that benefits religion. Instead, challenged conduct should be scrutinized "to determine whether, *in reality*, it establishes a religion or religious faith, or tends to do so."¹¹⁷ Chief Justice Burger referred to a history "replete with official references to the value and invocation of Divine guidance," pointing to coins inscribed with the national motto "In God We Trust," the Pledge of Allegiance to "one nation under God," official recognition of Christmas and other religious holidays, along with state-supported art galleries and museums displaying religious paintings.¹¹⁸ These are government's "acknowledgement" of our religious heritage, the Chief Justice noted, and, as such, do not constitute an establishment of religion.¹¹⁹ In her concurring opinion, Justice O'Connor clarified that this "acknowledgment exception" serves

112. 465 U.S. 668 (1984). See William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770 (1984) (recognizing the trend toward accepting an affiliation between government and religion, and replacing the "wall" of separation with a "bridge" toward symbiosis); Glenn S. Gordon, Note, *Lynch v. Donnelly: Breaking Down the Barriers to Religious Displays*, 71 CORNELL L. REV. 185 (1985) (suggesting a departure from *Lemon's* separationist approach for an accommodationist approach).

113. *Lynch*, 465 U.S. at 672.

114. *Id.* at 678.

115. Although Chief Justice Burger acknowledged the usefulness of the *Lemon* test in the past, he stressed the Court's unwillingness to be confined to any single test or criterion in the sensitive area of Establishment Clause violations. *Id.* at 679.

116. *Id.* at 673.

117. *Id.* at 678 (emphasis added).

118. *Id.* at 675.

119. *Id.* at 677. Focusing on the crèche in particular, the Court considered it, in the context of the overall display, to be a passive symbol in spite of its religious associations. The benefit to religion, the Court stated, was indirect, remote, and incidental. *Id.* at 683.

"the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."¹²⁰ However, Justice O'Connor also cautioned that it is crucial that government acknowledgement of religious traditions is not misread as government endorsement or disapproval of religion.¹²¹

The following year, in 1985, the Court looked with more favor on the *Lemon* test in three consecutive cases. In *Wallace v. Jaffree*,¹²² the Court relied primarily on a *Lemon* analysis in its decision that a one-minute period of silence in public schools for "meditation and voluntary prayer" violated the Establishment Clause.¹²³ Justice O'Connor concurred with the opinion, but declared that the Court should refine the *Lemon* test to more properly become an "endorsement test," inquiring into whether the state practice operated as an endorsement of religion.¹²⁴ Applying this analytical approach to the facts of the case, Justice O'Connor reasoned that the message to the objective observer was that the praying child in the school room would be favored over the

120. *Id.* at 693 (O'Connor, J., concurring).

121. *Id.* at 692 (O'Connor, J., concurring). "Endorsement 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 . . ." *Id.* at 688 (O'Connor, J., concurring). Justice O'Connor suggested a modified *Lemon* test in which the purpose and effect prongs inquire into whether there is an endorsement message in the governmental conduct. *Id.* at 692 (O'Connor, J., concurring). For an extended discussion of the superiority of Justice O'Connor's modified *Lemon* test over the original, see generally *Establishment of Religion*, 55 EDUC. L. REP. 807 (1985).

122. 472 U.S. 38 (1985).

123. *Id.* at 61. See Mary E. Q. Johnson, *School Prayer and the Constitution: Silence is Golden*, 48 MD. L. REV. 1018 (1989) (concluding that pure moment-of-silence statutes do not violate the Establishment Clause); Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 HARV. L. REV. 1874 (1983) (concluding that under the appropriate Establishment Clause analysis, most moment-of-silence statutes are unconstitutional); David Z. Seide, Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. REV. 364 (1983) (finding classroom moments of silence unconstitutional under a proposed standard based on religious neutrality in the schools); Patrick F. Brown, Note, *Wallace v. Jaffree and the Need to Reform Establishment Clause Analysis*, 35 CATH. U. L. REV. 573 (1986) (proposing a test to analyze the coercive nature of a state's activities); Note, *Wallace v. Jaffree: A New Twist on the Old Lemon?* 13 W. ST. U. L. REV. 659 (1986) (discussing methods of Establishment Clause analysis leading up to and applied in *Wallace*).

124. *Wallace*, 472 U.S. at 74 (O'Connor, J., concurring). For a chronology of the development of the endorsement test, see James M. Lewis & Michael L. Vild, Note, *A Controversial Twist of Lemon: The Endorsement Test as the Establishment Clause Standard*, 65 NOTRE DAME L. REV. 671 (1990).

nonpraying child.¹²⁵ Justice O'Connor declared that this favoritism was an impermissible state endorsement of religion.¹²⁶ It "go[es] against the grain," the Justice declared, "of religious liberty protected by the First Amendment."¹²⁷

That same month, Justice O'Connor again nudged the Court toward an analysis focused on endorsement in her concurring opinion in *Thornton v. Caldor, Inc.*¹²⁸ In *Caldor*, the Court found that a statute guaranteeing employees the absolute right not to work on their Sabbath violated the second prong of the traditional *Lemon* test.¹²⁹ The Court held that the "statute has a primary effect that impermissibly advances a particular religious practice."¹³⁰ "In essence," the Court reasoned, "the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee"¹³¹ Justice O'Connor took the Court's opinion one step further by clarifying that the statute impermissibly advanced religion by sending a message that it endorsed Sabbath observance.¹³² An objective observer, Justice O'Connor claimed, would no doubt perceive that "[t]he message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it."¹³³

A few days later, in *Grand Rapids School District v. Ball*,¹³⁴ the Court expressly reaffirmed the *Lemon* test as the standard for Establishment Clause challenges, particularly in school-related cases, where,

125. *Lynch*, 465 U.S. at 70 (O'Connor, J., concurring).

126. *Id.* (O'Connor, J., concurring).

127. *Id.* (O'Connor, J., concurring). In response to Justice Rehnquist's assertion that the drafters of the First Amendment supported prayer in public schools, Justice O'Connor pointed out that free public education was virtually nonexistent in the late 18th century. *Id.* at 80 (O'Connor, J., concurring). Thus, Justice O'Connor claimed, it is unlikely that the framers of the Amendment anticipated the problems of church and state interaction in this area. *Id.* (O'Connor, J., concurring).

128. 472 U.S. 703 (1985).

129. *Id.* at 707-08. The Connecticut statute declared, in pertinent part: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day . . . and shall not constitute grounds for his dismissal." *Id.* at 706 (citing CONN. GEN. STAT § 53-303e (1958)).

130. *Id.* at 710.

131. *Id.* at 709. This "unyielding weighting in favor of Sabbath observers," the Court emphasized, unlawfully advances a particular religious practice. *Id.* at 710.

132. *Id.* at 711 (O'Connor, J., concurring).

133. *Id.* (O'Connor, J., concurring).

134. 473 U.S. 373 (1985).

the Court stated, *Lemon* has always been relied upon.¹³⁵ At issue in *Ball* were two programs adopted by the city school board in which the public school system financed classes taught in nonpublic school classrooms.¹³⁶ Using the *Lemon* analysis to “give meaning to the sparse language and broad purposes of the [Establishment] Clause,”¹³⁷ the Court invalidated both programs as posing “a substantial risk of state-sponsored indoctrination.”¹³⁸ The Court reasoned that such indoctrination occurs not only when state funds promote religion,¹³⁹ but also when the state, through its funding efforts, becomes identified with a particular religion.¹⁴⁰ Thus, a proper inquiry into the effect of state conduct tests for a “symbolic union” of church and state,¹⁴¹ which conveys a message that the government endorsed or disapproved of religion.¹⁴² “The

135. *Id.* at 383. “We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children.” *Id.*

136. *Id.* at 375. The “Shared Time” program offered classes in state-required subjects that were taught in private school classrooms during the regular school day by public school teachers who traveled to the nonpublic schools. The “Community Education” program offered classes after regular school hours to children and adults taught by public school teachers who traveled to the nonpublic schools as well as to other locations. *Id.*

137. *Id.* at 381-82.

138. *Id.* at 387. “Teachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect.” *Id.* at 388. The Court did not consider it dispositive that the respondents were unable to present specific instances of religious indoctrination, allowing that that type of ideological influence would be difficult to detect by student, parent or teacher. *Id.* at 388-89.

139. The Court distinguished between permissible public funding that “indirectly” aids religion, such as the free bus transportation in *Everson v. Board of Education*, 330 U.S. 1 (1947), and impermissible state funding that provides “direct” aid to the religious enterprise, such as the salary supplements for religious school teachers in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), or the tuition grants for religious school attendance in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). *Ball*, 473 U.S. at 393-94. The key to differentiating the permissible from the impermissible funding, the Court stated, is whether the ultimate benefit to religion is incidental and insubstantial or direct and substantial. *Id.*

140. *Ball*, 473 U.S. at 389.

141. See Theodore C. Hirt, “Symbolic Union” of Church and State and the “Endorsement” of Sectarian Activity: A Critique of Unwieldy Tools of Establishment Clause Jurisprudence, 24 WAKE FOREST L. REV. 823 (1989) (arguing that “symbolic union” analysis obscures a proper *Lemon* test).

142. *Ball*, 473 U.S. at 389-90. The Court contrasted two earlier cases based on the extent to which a symbolic union was conveyed in each. In *McCullum v. Board of Education*, 333 U.S. 203 (1948), the Court prohibited religious instruction in public school classrooms, while in *Zorach v. Clauson*, 343 U.S. 306 (1952), similar religious classes offered off-campus were permitted. “[T]he *McCullum* program presented the students with a graphic symbol” of the union of church and state, the Court rea-

inquiry into this kind of effect," the Court emphasized, "must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years."¹⁴³

Two years later, in *Edwards v. Aguillard*,¹⁴⁴ the Court again relied on the *Lemon* test as it struck down as unconstitutional a "Creationism Act," forbidding public schools to teach the theory of evolution unless accompanied by instruction in "creation science."¹⁴⁵ Referring to the "special context" of public elementary and secondary schools, Justice Stevens emphasized that the Court has been "particularly vigilant" in monitoring compliance with the Establishment Clause because of the school's special position of trust in the community.¹⁴⁶ The state enjoys great authority, the Court declared, through mandatory attendance requirements, coercive power of teachers who serve as role models, and classmates who create peer pressure.¹⁴⁷ In this context, there must be guarantees that the classroom will not purposely be used to advance religious views.¹⁴⁸ "In no activity of the State," the Court stressed, "is it more vital to keep out divisive forces than in its schools."¹⁴⁹

As in *Edwards*, the Court focused on "context" in *Allegheny County v. Greater Pittsburgh ACLU*.¹⁵⁰ In *Allegheny*, the public display of a crèche was held to violate the Establishment Clause, while the display of a nearby menorah was not.¹⁵¹ The Court employed an "endorse-

soned, whereas in *Zorach*, that "symbolic union was conspicuously absent." *Ball*, 473 U.S. at 390-91.

143. *Ball*, 473 U.S. at 390. Thus, the Court spent a portion of the majority opinion painstakingly examining the procedures of both programs, from courses offered to whether religious symbols appeared in the classrooms and adjoining hallways where courses were taught. *Id.* at 375-79.

144. 482 U.S. 578 (1987).

145. *Id.* at 582-83. For an extended discussion of the constitutional implications of teaching or suppressing the teaching of creationism and evolution, see Gregory G. Sarno & Alan Stephens, Annotation, *Constitutionality of Teaching or Suppressing Teaching of Biblical Creationism or Darwinian Evolution Theory in Public Schools*, 102 A.L.R. FED. 537 (1992).

146. *Edwards*, 482 U.S. at 583-84.

147. *Id.* at 584.

148. *Id.*

149. *Id.* (quoting *McCollum v. Board of Educ.*, 333 U. S. 203, 231 (1948)).

150. 492 U.S. 573 (1989). The Court referred to the *Lemon* test, but specified that it had been "refined" in recent years to be an "endorsement" inquiry. *Id.* at 592. The Court then proceeded to dissect the settings in which each holiday display appeared, seeking signs of favoritism or disapproval toward religion ("the effect of a crèche display turns on its setting"). *Id.* at 593, 598.

151. *Id.* at 579. This controversial case attracted much attention. See Shahin Reza,

ment/context" analysis, reasoning that because the crèche appeared with no surrounding "secularizing" symbols to mitigate the religious message, the state was improperly involved in promoting a religious activity.¹⁵² Secular symbols of the holiday season surrounded the menorah, on the other hand, and thus no message of endorsement existed.¹⁵³ Justice Kennedy strongly disagreed with the Court's decision, charging that it reflected "an unjustified hostility toward religion."¹⁵⁴ Similarly, the concept of "context" was again the cornerstone of the Court's reasoning in *Board of Educ. v. Mergens*.¹⁵⁵ In *Mergens*, the Court upheld the students' right to form a Christian club on campus, reasoning that a message of governmental endorsement was unlikely, since the club met after school hours, was voluntary, and required no faculty participation.¹⁵⁶

Thus, in the years leading up to the case at hand, the Court has attempted to shape an analytical formula that can be applied with consis-

Note, *County of Allegheny v. ACLU: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503 (1990); Barbara S. Barrett, *Religious Displays and the First Amendment: County of Allegheny v. American Civil Liberties Union*, 13 HARV. J.L. & PUB. POL'Y 399 (1990); Gregory J. Blackburn, Comment, *Government, the Holiday Season, and the Establishment Clause: A Perspective on the Issues*, 20 STETSON L. REV. 217 (1990); Richard A. Lacroix, Comment, *County of Allegheny v. American Civil Liberties Union: How the Bench Stole Christmas*, 25 NEW ENG. L. REV. 523 (1990); Jeffrey R. Wagener, Comment, *A Survey of the Supreme Court's Approach to the Establishment Clause in Light of County of Allegheny v. American Civil Liberties Union*, 35 ST. LOUIS U. L.J. 169 (1990); Keith O. McArtor, Note and Comment, *A Conservative Struggles with Lemon: Justice Anthony M. Kennedy's Dissent in Allegheny*, 26 TULSA L.J. 107 (1990); Matthew P. Kammerer, Note, *County of Allegheny v. A.C.L.U.: Perpetuating the Setting Factor Myth*, 21 U. TOL. L. REV. 933 (1990); George M. Janoscko, *Beyond the "Plastic Reindeer Rule": The Curious Case of County of Allegheny v. American Civil Liberties Union*, 28 DUQ. L. REV. 445 (1990); Christopher S. Nesbit, Note, *County of Allegheny v. ACLU: Justice O'Connor's Endorsement Test*, 68 N.C. L. REV. 590 (1990).

152. *Allegheny*, 492 U.S. at 602. "The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day . . ." *Id.* at 601. For a discussion of the constitutional parameters for the public display of religious symbols, see Gary D. Spivey, Annotation, *Erection, Maintenance, or Display of Religious Structures or Symbols on Public Property as Violation of Religious Freedom*, 36 A.L.R. 3D 1256 (1992).

153. *Allegheny*, 492 U.S. at 618.

154. *Id.* at 655 (Kennedy, J., dissenting). "Rather than requiring government to avoid any action that acknowledges or aids religion," Justice Kennedy stated, "the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *Id.* at 657 (Kennedy, J., dissenting).

155. 496 U.S. 226 (1990).

156. *Id.* at 249-52. See Timothy M. Gibbons, Note, *The Equal Access Act and Mergens: Balancing the Religion Clauses in Public Schools*, 24 GA. L. REV. 1141 (1990) (examining the trend in public schools of excessive concern over the Establishment Clause).

tency to Establishment Clause challenges. The wall has been raised and lowered, theories have been tested and discarded, and the result has been, as one social commentator put it, "incoherent."¹⁵⁷

F. Establishment Clause Jurisprudence in the Lower Courts

In analyzing Establishment Clause challenges, lower courts have, in varying degrees, embraced Supreme Court precedents, questioned them and, at times, ignored them entirely. For example, in *Stein v. Plainwell Community Schools*,¹⁵⁸ the Sixth Circuit upheld, in theory, the state's power to use invocations and benedictions at public school graduation ceremonies, even though the court found that the language of the prayers in question violated the Establishment Clause.¹⁵⁹ In reversing the District Court decision, which upheld the prayers and relied heavily on a *Lemon* analysis, the Sixth Circuit instead analogized the graduation prayers to the legislative prayers in *Marsh v. Chambers*.¹⁶⁰ The court clarified that the *Marsh* concept of the "equal liberty of conscience" was the court's guiding principle.¹⁶¹ Like the "civil," ceremonial prayers in *Marsh*, the court stated, graduation prayers in general serve the same solemnizing function.¹⁶² Further, the court in *Stein* saw

157. Terry Eastland, *Prayer and Psycho-Law*, WASH. TIMES, June 26, 1992, at F1. For general analyses of Establishment Clause jurisprudence, see Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19 (Fall 1991) (analyzing the privatization thesis and the flaws in restricting religion to an explicitly private role); J. Woodford Howard, Jr. *The Robe and the Cloth: The Supreme Court and Religion in the United States*, 7 J.L. & POL. 481 (Spring 1991) (examining the Supreme Court's search for a manageable standard to resolve the dilemma of First Amendment analysis).

158. 822 F.2d 1406 (6th Cir. 1987). The Plainwell public schools included benedictions and invocations at their graduation ceremonies. The prayers were organized by the students and delivered by either students or student-selected clergy. *Id.* at 1407.

159. The prayers included the phrases "Heavenly Father," "God," "O Divine Master, and "Christ our Lord," among others. *Id.* at 1407. However, in dicta, the court suggested that these prayers would have been acceptable had they not contained these explicitly religious references. *Id.* at 1410.

160. 463 U.S. 783 (1983).

161. *Stein*, 822 F.2d at 1408. In the interests of "equal liberty of conscience . . . we have rejected the notion of a confessional state that supports religion in favor of a neutral state designed to foster the most extensive liberty of conscience compatible with a similar or equal liberty for others." *Id.*

162. *Id.* at 1409. Thus, the court stated, "to prohibit entirely the tradition of invocations at graduation exercises while sanctioning the tradition of invocations for judges, . . . does not appear to be a consistent application of the principle of equal

little danger of peer pressure, indoctrination, or coercion in the graduation ceremony.¹⁶³ Rather, “the public nature of the proceeding and the usual presence of parents act as a buffer against religious coercion.”¹⁶⁴

However, the California Supreme Court, in *Sands v. Morongo Unified School District*,¹⁶⁵ took to task the Sixth Circuit’s reasoning in *Stein*, characterizing it as “an improper extension of *Marsh*.”¹⁶⁶ The Supreme Court “has taken particular care,” the California court stated, “to explain that *Marsh* should not be applied to determine the constitutionality of public school practices.”¹⁶⁷ Rather, the court in *Morongo* applied the traditional *Lemon* test to find the graduation prayers at issue violated the Establishment Clause.¹⁶⁸

However, in *Griffith v. Teran*,¹⁶⁹ a federal district court in Kansas relied on *Lemon* to find that an invocation and benediction for a high school graduation ceremony did not violate the Establishment Clause.¹⁷⁰ In applying the *Lemon* test, the court weighed heavily that the prayers, which referred to “Oh Mighty Lord” and “God,” were to be read by a student at the graduation ceremony, that attendance was not mandatory, and that the ceremony was to be held at the local convention center, instead of on campus.¹⁷¹ The court interpreted the

liberty of conscience.” *Id.*

163. *Id.*

164. *Id.* In addition, the court stated, the graduation prayers should be analyzed under the *Marsh* standard because, although they occurred in the school context, the dynamics of a graduation ceremony are very different from those in a classroom where the students are learning values from an authority figure. *Id.*

165. 53 Cal. 3d 863 (1991). At all four Morongo public high schools, invocations and benedictions are delivered at the graduation ceremonies. Student-selected and school-approved clergy deliver the prayers, all of which contain explicitly religious language. *Id.* at 868-69.

166. *Id.* at 882.

167. *Id.* at 881. Nevertheless, in a concurring opinion, the Chief Justice insisted on a broader reading of *Marsh v. Chambers*, refusing to isolate *Marsh* “as an aberration in the mainstream of constitutional decisionmaking.” *Id.* at 901 (Lucas, C.J., concurring). The Chief Justice claimed that the famous footnote 4 in *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987), has been misread to limit *Marsh* to legislative prayer. *Sands*, 53 Cal. 3d at 898-99 (Lucas, C.J., concurring). In fact, *Marsh* has been “integrated into the analysis” of key Establishment Clause opinions. *Id.* at 900 (Lucas, C.J., concurring).

168. *Sands*, 53 Cal. 3d at 881.

169. 794 F. Supp. 1054 (D. Kan. 1992). In *Teran*, the prayers at the high school graduation ceremony were delivered by students. School officials approved the prayers and required that they be nonsectarian. *Id.* at 1055.

170. *Id.* at 1058-59.

171. *Id.* at 1055, 1057. The court perceived a “clear and meaningful distinction” between prayer in the classroom, where families entrust the education of their children, and at a graduation ceremony, where neither attendance nor education is compulsory. *Id.* at 1057.

first prong of *Lemon* to require *some* secular purpose, but not that the purpose be *only* secular, and thus found the school's aim of "solemnizing public occasions" to be a valid secular purpose.¹⁷² The court also found that the nonsectarian prayers did not have the primary effect of advancing religion in the context of a graduation ceremony.¹⁷³ Since a student was to deliver the prayers, and the principal's only function was to review them beforehand, the court found no excessive entanglement.¹⁷⁴ The court dismissed the possibility of a coercion component, stating that the parents' presence "may be expected to mitigate any 'coercive power' that might otherwise be present."¹⁷⁵ Although the court acknowledged that the Supreme Court did not intend for the *Marsh* decision to be extended to the school setting, it still likened the graduation prayers to the legislative prayer upheld in *Marsh*, rather than to the impermissible religious conduct in the traditional "prayer-in-school" cases.¹⁷⁶

Thus, lower courts have attempted to shape their own analytical mechanisms for Establishment Clause analysis, while recognizing, as the *Morongo* court put it, that "bright and immutable lines and rigid, absolute views are out of place in this area of the law."¹⁷⁷ This further

172. *Id.* at 1058-59.

173. *Id.* at 1059. Rather, the court held, referring to the Supreme Court's crèche cases, "the state may associate itself even with symbols that are unmistakably religious if the context of the association does not endorse religion." *Id.*

174. *Teran*, 794 F. Supp at 1059.

175. *Id.* at 1057.

176. *Id.* at 1058. See also *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991) (emphasizing that the *Lemon* test, not *Marsh* reasoning, should be applied in school-related Establishment Clause challenges); *Albright v. Board of Educ.*, 765 F. Supp. 682 (D. Utah 1991) (applying both *Lemon* and *Marsh* to uphold the graduation prayers, while trying to second-guess the Supreme Court's preference).

177. *Sands v. Morongo Unified Sch. Dist.*, 53 Cal. 3d 863, 886 (1991). In non-prayer cases, as well, the courts have wrestled with Supreme Court precedents to arrive at an analytical formula for Establishment Clause challenges. See *Barnes v. Cavazos*, 966 F.2d 1056, 1063, 1065-66 (6th Cir. 1992) (professing "confusion and frustration with *Lemon*'s analytical framework," yet using *Lemon*, along with a so-called "grossly disproportionate test," to uphold allocating education funds to private schools); *Otero v. State Election Bd.*, 975 F.2d 738 (10th Cir. 1992) (acknowledging the criticism aimed at the *Lemon* test, but exercising all three prongs of it to uphold the use of churches as polling places); *Americans United for Separation of Church and State v. City of Grand Rapids*, 1992 WL 77643 (6th Cir. 1992) (using *Lemon* test, endorsement test, and "context/composition/location" test to prohibit display of menorah in public square); *Cammack v. Waihee*, 932 F. 2d 765 (9th Cir. 1991) (using a full *Lemon* analysis to uphold a statute declaring Good Friday a state holiday); *Murray v. City of*

underscores the need for guidance in this area of the law, which the *Weisman* Court did not provide.

III. FACTS OF THE CASE

*Lee v. Weisman*¹⁷⁸ challenged the constitutionality of non-denominational prayers at public school graduation ceremonies. Deborah Weisman graduated from Providence, Rhode Island's Nathan Bishop Middle School on June 29, 1989.¹⁷⁹ It was the policy of Providence school district officials to allow principals to invite members of the clergy to offer invocations and benedictions at middle and high school graduation ceremonies.¹⁸⁰ Deborah's principal, Robert E. Lee, invited Rabbi Leslie Gutterman to deliver prayers at Deborah's graduation ceremony, and the rabbi accepted.¹⁸¹ As was the custom among Providence school officials, the rabbi was given a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews. The principal advised the rabbi that his prayers should be nonsectarian, as did the "Guidelines" pamphlet.¹⁸²

Four days before Deborah's graduation ceremony, Daniel Weisman, Deborah's father,¹⁸³ sought a temporary restraining order in the United States District Court for the District of Rhode Island to prohibit prayers

Austin, 947 F.2d 147 (5th Cir. 1991) (concluding that city insignia bearing Christian cross passed *Lemon* test); Southside Fair Hous. Comm. v. City of N.Y., 928 F.2d 1336 (2d Cir. 1991) (focusing on endorsement test to find that city's sale of land to Hasidic congregation was not an establishment of religion); Doe v. City of Clawson, 915 F.2d 244 (6th Cir. 1990) (relying on the endorsement test elaborated in *Allegheny County v. Greater Pittsburgh ACLU* to permit a nativity display on the front lawn of city hall); Hewitt v. Joyner, 940 F.2d 1561 (9th Cir. 1990) (applying all three prongs of *Lemon* to hold that the county's ownership and maintenance of a park displaying religious statuary did not violate the Establishment Clause); Garnett v. Renton Sch. Dist., 874 F.2d 608 (9th Cir. 1989) (holding that student religious group meetings in public school classrooms before hours could not pass *Lemon* test muster); Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir. 1985) (concluding that county seal bearing a cross and the motto "With This We Conquer" could not pass *Lemon* test, although acknowledging that *Lemon* was not the "be-all" and "end-all" in Establishment Clause cases); Carpenter v. City of S.F., 966 F.2d 1056 (N.D. Cal. 1992) (refusing to apply *Lemon* rigidly and allowing display of cross in public park).

178. 112 S. Ct. 2649 (1992).

179. *Id.* at 2653.

180. *Id.* at 2652.

181. *Id.*

182. *Id.* The pamphlet recommended that the prayers be composed with "sensitivity," and acknowledged that at certain civic events, prayers of any kind may be inappropriate. *Id.*

183. Daniel Weisman brought the suit as a Providence taxpayer and as next friend of Deborah. *Id.* at 2654.

from being included in the graduation ceremony.¹⁸⁴ The court denied the motion, citing a lack of time to consider it.¹⁸⁵ Deborah and her family attended the graduation ceremony, where the students stood during both the rabbi's prayers and the Pledge of Allegiance.¹⁸⁶

In July 1989, Daniel Weisman filed an amended complaint seeking a permanent injunction to bar school district officials from inviting clergy to offer prayers at future graduation ceremonies.¹⁸⁷ The district court held that including prayers at public school graduations suggested a governmental endorsement of religion and, thus, violated the Establishment Clause of the First Amendment.¹⁸⁸ On appeal, the United States

184. *Id.*

185. *Id.*

186. *Id.* at 2653. Rabbi Gutterman's recited the following prayers:

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.

187. *Id.* at 2654.

188. *Id.* The district court applied the three-pronged *Lemon* test and found that the state's practice violated the second prong of the test, which requires that a state practice neither advance nor inhibit religion. The district court did not address either the first or the third prong of the test. *Id.*

Court of Appeals for the First Circuit affirmed.¹⁸⁹ The United States Supreme Court granted certiorari to determine whether inclusion of prayers in public school graduation ceremonies is consistent with the Religion Clauses of the First Amendment.¹⁹⁰

IV. ANALYSIS OF THE COURT'S OPINION

A. Justice Kennedy's Majority Opinion

At the outset of the Court's opinion, Justice Kennedy¹⁹¹ laid the ground rules: *Lemon v. Kurtzman*¹⁹² would not be reconsidered, and the "difficult questions" dividing the Court leading up to *Weisman* would not be revisited.¹⁹³ Rather, Justice Kennedy proclaimed, "controlling precedents" compel the holding that the graduation prayers are unconstitutional.¹⁹⁴ Justice Kennedy identified the two "dominant facts" that dictated the Court's ruling: (1) state officials directed the performance of a religious exercise at a public school graduation ceremony, and (2) students were compelled to attend.¹⁹⁵

189. *Id.*

190. *Id.* at 2655.

191. Justices Blackmun, Stevens, O'Connor, and Souter joined Justice Kennedy in the majority opinion. *Id.* at 2652.

192. 403 U.S. 602 (1971).

193. *Weisman*, 112 S. Ct. at 2655. Justice Kennedy's opening statement signaled the controversy that the Court's opinion would create. Where the lower court in *Weisman* relied heavily on the *Lemon* analysis to find the graduation prayers unconstitutional, Justice Kennedy dismissed *Lemon* almost entirely. Justice Kennedy referred to *Lemon* in his recitation of *Weisman's* lower court history, but emphasized that this Court's decision rests on "the controlling precedents" in prior prayer-in-school cases, not on a traditional *Lemon* analysis. *Id.* *Lemon* would not be revisited, the Justice declared, nor would it be reconsidered. *Id.* (Three years earlier, Justice Kennedy had already postponed a reconsideration of the *Lemon* test. In *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), Justice Kennedy, in his dissenting opinion, acknowledged the "persuasive criticism" against *Lemon*, but declined to act on it at that time: "Substantial revision of our Establishment Clause doctrine may be in order; but it is unnecessary to undertake that task today." *Id.* at 656 (Kennedy, J., dissenting).) However, Justice Kennedy's majority opinion did not speak for the majority regarding *Lemon*. The four justices that joined in the Court's opinion each wrote separately and, to varying degrees, expressed support for *Lemon*. *Weisman*, 112 S. Ct. at 2661-86.

194. *Weisman*, 112 S. Ct. at 2655. Justice Kennedy declared that *Weisman* could be decided "without reconsidering the general constitutional framework," or, in other words, without applying the conventional analytical formulas, because the decision is so solidly rooted in history. *Id.* Yet, Justices Blackmun and Souter, in their concurring opinions, relied on history to support slightly different views than Justice Kennedy, *id.* at 2661-78 (Blackmun and Souter, J.J., concurring), and Justice Scalia, in his dissenting opinion, historically supported a view entirely at odds with the majority opinion. *Id.* at 2678-86 (Scalia, J., dissenting).

195. *Id.* at 2655. Justice Kennedy's opinion contrasts markedly with the separate

1. State Involvement in a Religious Exercise

Justice Kennedy, writing for the majority, stated unequivocally that, in the case at hand, the government's involvement with a religious activity was "pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."¹⁹⁶ At a minimum, the majority declared, the First Amendment guarantees that this will not be permitted.¹⁹⁷

opinion he delivered three years earlier in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (Kennedy, J., dissenting), in which he argued that the display of a crèche was consistent with the constitutional objective of the Establishment Clause. *Id.* at 657 (Kennedy, J., dissenting). Justice Kennedy argued against casting the Court in the role of "jealous guardians of an absolute 'wall of separation.'" *Id.* (Kennedy, J., dissenting). Rather, rejecting the Court's endorsement test, Justice Kennedy proposed a "proselytization" test, which would prohibit state efforts to proselytize on behalf of a particular religion. *Id.* at 661 (Kennedy, J., dissenting). In describing what would constitute proselytization, Justice Kennedy used words like "permanent," "year-round," and "continual," and characterized the crèche as "no realistic risk" for proselytization. *Id.* at 664 (Kennedy, J., dissenting). Rather, Justice Kennedy argued, displaying the crèche is an "accommodation" of religion. *Id.* (Kennedy, J., dissenting). (However, the majority disagreed, stating that government can accommodate religion only when there exists an identifiable burden on the free exercise of religion. *Id.* at 613 n.59). In *Allegheny*, Justice Kennedy also introduced "coercion" as a necessary element for an Establishment Clause violation, but stated that where the coercion is not direct, it must be of such a degree that it actually establishes a religion. *Id.* at 662 (Kennedy, J., dissenting). Otherwise, there is no "realistic risk" of impermissible establishment. *Id.* at 662 (Kennedy, J., dissenting). It is curious that Justice Kennedy abandoned the proselytization test in *Weisman* in favor of a "psychological coercion" test. Had the proselytization test alone been applied in *Weisman*, it seems unlikely that the graduation prayers would have been improper, since they occurred only once yearly, were nonsectarian and, the coercion argument aside, attendance was voluntary.

196. *Weisman*, 112 S. Ct. at 2655.

197. *Id.* However, Justice Kennedy launched into his argument against an establishment of religion without defining just what "religion" means in a constitutional sense. This core issue has provoked decades of scholarly debate and has yet to be resolved. See, e.g., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6 (1978) (proposing that, for Establishment Clause analysis, any conduct that is "arguably non-religious" should not be considered impermissible); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982) (suggesting that the legal definition of religion should not be abstract or esoteric, but rather "specific and understandable to produce fair and uniform results"); George C. Freeman, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983) (arguing that, because religion cannot be defined, the courts need only agree on a "standard of meaning of religion"); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817 (1984) (concluding that no constitution-

Justice Kennedy clarified what the Court considered to be the “pervasive involvement” of the school officials that drew the state into its improper role in the graduation ceremony.¹⁹⁸ The principal’s decision to include an invocation and benediction in the graduation became the state’s decision, Justice Kennedy declared, and for all intents, the perception was “as if a state statute decreed that the prayers must occur.”¹⁹⁹ Also attributable to the state was the principal’s selection of a rabbi to officiate,²⁰⁰ and, even more troubling for the Court, the

al definition of religion is possible); Paul J. Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y.U. L. REV. 177 (1979) (proposing an all-encompassing definition of religion as “any belief system,” and suggesting that the courts prohibit the state from the establishment or suppression of any viable religious construct); Note, *Toward A Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978) (providing a historical overview of the Court’s approach to defining religion).

198. *Weisman*, 112 S. Ct. at 2655-57. Laurence Tribe insists that “[s]ecular tools will almost always suffice to pursue government’s interests.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1285 (2d ed. 1988). Tribe lists seven dangers likely to occur when the government employs religious tools unnecessarily that Justice Kennedy could have used as a checklist in *Weisman*: (1) the government makes religious choices; (2) in doing so, the government likely violates denominational neutrality; (3) in trying to achieve neutrality, administrative entanglement results; (4) the government endorses religion; (5) the religion itself becomes secularized; (6) the government puts itself on a religious pedestal; and (7) the government sends a message of exclusion to non-adherents. *Id.* at 1286-87.

199. *Weisman*, 112 S. Ct. at 2655. Justice Kennedy did not object to similar state involvement when he relied on *Marsh v. Chambers*, 463 U.S. 783 (1983), to support his argument in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989). In *Marsh*, the Court upheld legislative prayers in which the state involvement exceeded that in *Weisman*. The legislature in *Marsh* not only selected the clergy member (who had been delivering their opening prayers for sixteen consecutive years), but the clergyman was paid out of state funds. *Marsh*, 463 U.S. at 785. Justice Kennedy supported the Court’s decision on the basis that the prayers had become a part of the fabric of society. *Weisman*, 112 S. Ct. at 2660-61. Yet, as Justice Scalia pointed out, prayer at public school ceremonies is a tradition as deeply rooted as inaugural prayers, Thanksgiving prayers and prayers in the legislature (notwithstanding Justice O’Connor’s contention to the contrary, see *supra* note 127). *Weisman*, 112 S. Ct. at 2679-80 (Scalia, J., dissenting). More importantly, the state’s involvement in those ceremonial prayers is no less than in the case at hand. Thus, it appears that, based on past Court decisions, Justice Kennedy’s claim of improper state involvement cannot stand alone to constitute a violation of the Establishment Clause. Its viability depends on the viability of the Court’s central argument, that the state psychologically coerced participation in a religious exercise.

200. *Weisman*, 112 S. Ct. at 2655. The reason for the choice of a rabbi is not on the record, but the record does suggest that the principals are free to invite clergy of any denomination. *Id.* at 2652. In an interview subsequent to the announcement of the Court’s decision, Mr. Weisman indicated that he had attended an earlier graduation ceremony in which a prayer to Jesus Christ was offered. *Ban on School Prayer is Upheld; Court Stuns Conservatives by Reinforcing Church-State Split*, STAR TRIB., June 25, 1992, at 1A.

principal's advice about the contents of the prayer accompanied by the "Guidelines" pamphlet.²⁰¹ Through these means, the principal, and by extension, the state, controlled and directed the content of the prayer,²⁰² thereby violating a cornerstone principle of Establishment Clause jurisprudence: that "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."²⁰³

The Court then addressed the argument that a "civic religion" had emerged in the country, a phenomenon in which religion had been secularized into nondenominational prayers, acceptable to all.²⁰⁴ Acknowl-

201. *Weisman*, 112 S. Ct. at 2656.

202. *Id.* The Court's strong opposition to the principal's advice and the guidelines' suggestions would seem more reasonable if both were encouraging a sectarian message. As it is, the Court acknowledged that both the advice and the pamphlet were merely good-faith efforts to ensure a nonsectarian message. *Id.*

203. *Id.* (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)). In *Engel*, however, the state had actually written the prayers that the public school system adopted. *Engel*, 370 U.S. at 423. In the case at hand, there is nothing on the record to indicate that the principal even saw the prayers before they were delivered.

204. *Weisman*, 112 S. Ct. at 2656. Justice Kennedy dismisses in a few sentences a provocative analytical theory that is currently enjoying attention from legal scholars. Yehudah Mirsky, in *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986), explains that civil, or civic, religion is a secular phenomenon in which society "hallows" its political life, expressing its most abiding values and ideals. *Id.* at 1238-39.

By developing and nurturing civil religions the members of modern societies attempt to recapture some of the lost, organic solidarity of pre-modern societies by linking political ideas . . . with a network of hallowed meanings. By so doing, a society can link its political ideas and institutions to its basic, heartfelt sentiments and aspirations.

Id. at 1250. American civil religion, Mirsky claims, developed to fill the gap left by the demise of the established church as a means by which people could express social cohesiveness. *Id.* at 1251. If the Court understood the role of civil religion in American life, Mirsky explains, the Court would no longer mistake civil religion for its traditional, sacral counterpart. *Id.* at 1255. Of note, Justice Scalia, in his dissent, underscored the virtue of prayer in terms very similar to Mirsky's, characterizing it as an "important unifying mechanism" and "characteristically American." *Weisman*, 112 S. Ct. at 2686 (Scalia, J., dissenting). For related arguments for and against civil religion, see Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992) ("A scrupulous secularism in all aspects of public life touched by government . . . warded off the dangers of majoritarian religion, but it exacerbated the equal and opposite danger of majoritarian indifference or intolerance toward religion."); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992) ("The negative bar against establishment of religion implies the affirmative 'establishment' of a civil order for the resolution of public moral disputes."); Sanford Levinson, *Religious Language*

edging that there may be some empirical support for this argument, Justice Kennedy emphasized that although the pursuit of a common moral and ethical ground between all societies might be worthwhile, the First Amendment prohibits government from undertaking that task itself. Furthermore, the Court declared, measured against Establishment Clause standards of neutrality in which “all creeds must be tolerated and none favored,” endorsing a civic religion is “a contradiction that cannot be accepted.”²⁰⁶

2. State Coercion of Participation in a Religious Exercise

Justice Kennedy devoted a major portion of the Court’s opinion to an analysis of the dynamics of the school environment and the Court’s heightened interest in protecting the students’ “freedom of conscience” in this context.²⁰⁶ At the outset, the Court rejected the argument that the graduation prayers were “speech” to be endured by the students in much the same way that any other objectionable idea should be tolerated in a free society.²⁰⁷ Rather, the Court emphasized, “The First Amendment protects speech and religion by quite different mechanisms.”²⁰⁸ The government protects speech by ensuring its open expression and may ultimately even participate in this process if it happens that the speech persuades government to adopt an idea as its own. The government’s method for protecting freedom of religion is “quite the

and the Public Square, 105 HARV. L. REV. 2061 (1992) (book review) (“To force the religious to speak solely in the language of the secular is to impose a uniformity of discourse that demeans those whose ‘native language’ includes a deeply religious vocabulary.”).

205. *Weisman*, 112 S. Ct. at 2657.

206. *Id.* The Court’s psychological coercion argument is vulnerable to attack because it is based on the premise that the Court has successfully read the minds of the students involved. Instead, the Court might have more effectively used the endorsement test that Justice O’Connor introduced in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and elaborated upon in *Wallace v. Jaffree*, 472 U.S. 38 (1985). Although there are apparent dissimilarities, the Court may have analogized the graduation benediction, with its on-campus ceremony in which faculty and students participated, to *Wallace’s* classroom situation, especially in light of the Court’s heightened concern for Establishment Clause abuse in schools. Also, inasmuch as the endorsement test uses an objective standard to measure questionable state practices, the Court could have avoided entering a realm where, as Justice Scalia said, it had no right to be. *Weisman*, 112 S. Ct. at 2681 (Scalia, J., dissenting).

207. *Weisman*, 112 S. Ct. at 2657.

208. *Id.* The Court distinguished between the protections guaranteed in the Free Exercise Clause and the Establishment Clause. While “[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment,” the Establishment Clause specifically prohibits state involvement in religious affairs with “no precise counterpart in the speech provisions.” *Id.*

reverse," because the Establishment Clause specifically forbids state involvement in religion. The Court further explained that the difference lies in the lesson of history that inspired the Establishment Clause.²⁰⁹ This "timeless lesson," Justice Kennedy stated, teaches that religious establishment is antithetical to the freedom of all, because that which begins as government's tolerant expression of religious views might end in enforced indoctrination. State-sponsored religion, Justice Kennedy warned, means that the state has turned its back on its "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."²¹⁰ The Court stressed that the lessons of history are no less urgent now than in the 18th Century when the framers of the First Amendment sought to protect their religious freedom in the New World.²¹¹

Justice Kennedy then turned to the Court's central argument: the "undeniable fact" that the state coerced students into participating in a religious ceremony. Referring to past prayer-in-school cases,²¹² Justice Kennedy emphasized that prayer in public schools carries a particular risk of indirect coercion that can be as real to an impressionable student as any overt compulsion.²¹³ For the students in *Weisman*, the graduation prayers bore the imprint of the state, Justice Kennedy claimed. As such, the state created public pressure, as well as peer pressure, for the students to stand as a group or, at least, remain respectfully silent during the prayers.²¹⁴ Justice Kennedy believed that

209. *Id.* at 2658. However, just three years earlier, Justice Kennedy argued that *Marsh* had already legitimated all "practices with no greater potential for an establishment of religion" than those "accepted traditions dating back to the Founding." *Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 602 (1989).

210. *Weisman*, 112 S. Ct. at 2658. Justice Kennedy concluded that the preservation and transmission of religious worship is properly committed to "the private sphere." *Id.* at 2656. Yet, later in the opinion, the Justice acknowledged the soundness of the *Marsh* decision upholding prayers in the legislature, prayers that are decidedly not in the private sphere. *Id.* at 2658.

211. *Id.*

212. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). Although the prayer-in-school cases bear some resemblance to the case at hand—both involve a school environment, students and faculty—the dissimilarities are more striking. For example, in *Weisman*, the prayers did not occur in a classroom where the students' presence was legally compelled, neither a teacher nor a student read the prayers, and the students' behavior was not monitored as it would be in a classroom.

213. *Weisman*, 112 S. Ct. at 2658.

214. *Id.* Justice Kennedy acknowledged that in a non-school context, standing during

either of these options would be perceived by the students as participation in the prayer.²¹⁵ Furthermore, the Court stated, the “embarrassment and the intrusion of the religious exercise” cannot be refuted by claims that the prayers were nonsectarian or of a *de minimis* character, or in the alternative, that the prayers were essential to the ceremony.²¹⁶

The Court dismissed as “formalistic” the claim that attendance at graduation ceremonies was voluntary and, thus, not coercive.²¹⁷ Characterizing high school graduation as “one of life’s most significant occasions,” Justice Kennedy declared that it is “apparent” a student is not free to absent herself from a ceremony that embraces her school years, her aspirations, her family, and her friends.²¹⁸ In no real sense, the Court claimed, can a student voluntarily forfeit “those intangible benefits which have motivated the student through youth and all her high school years.”²¹⁹ To require her to do so, the Court stated, “turns conventional First Amendment analysis on its head,” since “[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”²²⁰

It is the component of psychological coercion, Justice Kennedy explained, that distinguished *Weisman* from an earlier case, *Marsh v.*

a prayer would probably be nothing more than “a reasonable request” that the nonbeliever respect the differing religious practices. However, in a school context such as in the case at hand, the request may appear to the nonbeliever “to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” *Id.*

215. *Id.* Thus, without explanation, Justice Kennedy dismissed the possibility that a student could actually stand during the prayer merely as a sign of respect and not as means of participation. The Justice claimed that standing is “no doubt” an expression of participation and relied on “[r]esearch in psychology” to support this contention. *Id.* at 2659.

216. *Id.* at 2659-60. That the prayers were nonsectarian, Justice Kennedy claimed, does not lessen the sense of isolation a nonbeliever might have felt. In addition, characterizing the prayers as *de minimis* is insulting to the Rabbi who delivered them, the Justice stated, and claiming they are essential to a graduation ceremony does not justify state-enforced religious conformity. *Id.*

217. *Id.* at 2659. Petitioner’s central argument was that because the graduation exercises were voluntary, no inducement or coercion in the ceremony itself could exist.

218. *Id.* “To say that a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme A school rule which excuses attendance is beside the point.” *Id.*

219. *Id.*

220. *Id.* at 2660. Justice Kennedy compared *Weisman* to the classroom prayer cases, emphasizing that simply making the classroom prayers voluntary did not shield them from invalidation. In the same way, the Justice stated, the voluntary nature of the graduation does not remove the risk of state-compelled participation. *Id.*

Chambers,²²¹ in which the Court held that prayer at the opening of a legislative session did not violate the First Amendment.²²² There, the Court reasoned, adults are free to come and go in a much less formal atmosphere, unlike the "constraining potential" of the one event most important to the student, her graduation ceremony.²²³

Justice Kennedy concluded the Court's opinion by acknowledging that Establishment Clause jurisprudence remained "delicate and fact sensitive."²²⁴ Every state action involving religion, Justice Kennedy declared, does not necessarily offend the First Amendment. "Our jurisprudence in this area is of necessity one of line drawing, . . . but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."²²⁵

221. 463 U.S. 783 (1983).

222. The difference between *Marsh* and *Weisman*, according to Justice Kennedy, lies in the facts of each case. At *Weisman's* graduation, "teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students." In *Marsh's* congressional halls, however, adults, not impressionable students, "are free to enter and leave." The atmosphere lacks "the influence and force of a formal exercise." *Weisman*, 112 S. Ct. at 2660-61.

223. *Id.* at 2660.

224. *Id.* at 2661. Yet in *Allegheny*, Justice Kennedy attacked the "endorsement test" as being a "jurisprudence of minutiae" because it employed a fact-sensitive approach. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 674 (1989). The majority in *Allegheny* warned Justice Kennedy that "he should be wary of accusing the Court's formulation as 'using little more than intuition and a tape measure,'" when his own "proselytization" test might be "convicted on an identical charge." *Id.* at 608.

225. *Weisman*, 112 S. Ct. at 2661 (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)). However, Justice Kennedy did not really clarify how to distinguish between "threat" and "shadow" stating:

The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so *directly* or *substantially* involve the state in religious exercises or in the favoring of religion as to have *meaningful* and *practical* impact.

Id. (emphasis added). However, these latest terms do not enable the Court to "draw lines" with any more certainty than the Court has in the past 50 years of Establishment Clause jurisprudence.

B. Justice Blackmun's Concurring Opinion

In his concurring opinion, Justice Blackmun²²⁶ examined over a century of state and federal Establishment Clause jurisprudence and found that the Court had nothing short of a mandate to reach the decision that it did.²²⁷ Justice Blackmun distilled the laundry list of Establishment Clause "don'ts" first enumerated in *Everson* to one clear principle: "Government 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."²²⁸ Since 1971, Justice Blackmun continued, the Court has relied on the *Lemon* test to weigh the merits of state legislation in relation to this principle.²²⁹ According to Justice Blackmun, a straightforward application of *Lemon* reveals that "there can be no doubt that the government is advancing and promoting religion."²³⁰ Relying on the Court's language in *Engel v. Vitale*,²³¹ Justice Blackmun stated that the Rabbi's prayer at Weisman's graduation ceremony clearly was "a religious activity," "a solemn avowal of divine faith and supplication for the blessings of the Almighty."²³² The government placed its "official stamp of approval" on this prayer, Blackmun declared, when it planned and supervised the graduation

226. *Id.* at 2661 (Blackmun, J., concurring).

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

228. *Id.* (Blackmun, J., concurring). Thus, in the same way that Justices Kennedy, Souter and Scalia grounded their opinions in history, Justice Blackmun also supported his separationist approach with a survey of over 100 years of Supreme Court jurisprudence. In particular, Justice Blackmun referred to several late nineteenth and early twentieth century cases, including *Reynolds v. United States*, 98 U.S. 145 (1879) (identifying Jefferson's "wall of separation" as the proper standard of Establishment Clause analysis) and *Davis v. Beason*, 133 U.S. 333 (1890) (prohibiting legislation supporting any religion), along with the modern Establishment Clause cases prohibiting prayer in school.

229. *Weisman*, 112 S. Ct. at 2663 (Blackmun, J., concurring). In spite of the fact that *Lemon* was conspicuously absent from *Weisman*'s majority opinion, Justice Blackmun stressed in his own opinion that "[i]n no case involving religious activities in public schools has the Court failed to apply vigorously the *Lemon* factors." *Id.* at 2663 n.4 (Blackmun, J., concurring).

230. *Id.* at 2664 (Blackmun, J., concurring). Having said this, however, Justice Blackmun's application of the *Lemon* test was less than straightforward. Thus, although Justice Blackmun did not specify precisely, it can only be assumed that the "purpose" prong was violated by the inherent religious nature of the prayer, and the government's "stamp of approval" violated the "effects" prong. Justice Blackmun did refer to the entanglement prong of the *Lemon* test in a footnote, but it is unclear what conduct in *Weisman* he considered violative. *Id.* at 2663 n.3.

231. 370 U.S. 421 (1962).

232. *Weisman*, 112 S. Ct. at 2664 (Blackmun, J., concurring) (quoting *Engel*, 370 U.S. at 424). Justice Blackmun cited the Book of the Prophet Micah, chapter 6, verse 8 as the source of a portion of the Rabbi's prayer, which the Justice labeled as being within the Judeo-Christian tradition. *Id.* n.5 (Blackmun, J., concurring).

ceremony and pressured students to attend.²³³ However, Justice Blackmun stressed that although coercion is not a necessary component of an Establishment Clause violation, where it is present, it is sufficient.²³⁴ "But it is not enough," Blackmun stated, "that the government restrain from compelling religious practices: it must not engage in them either."²³⁵

Justice Blackmun emphatically warned of the peril of a government engaged in religion, claiming that "[a]nguish, hardship and bitter strife' result 'when zealous religious groups struggl[e] with one another to obtain the Government's stamp of approval.'"²³⁶ He cautioned that government "abandons its obligation as guarantor of democracy" when it "arrogates to itself a role in religious affairs."²³⁷ Democratic government will not endure, Justice Blackmun stated, "when proclamation replaces persuasion as the medium of political exchange."²³⁸ Justice

233. *Id.* at 2664 (Blackmun, J., concurring).

234. *Id.* (Blackmun, J., concurring). Whereas a coercion analysis was the cornerstone of the majority opinion, Justice Blackmun cited several cases dismissing coercion as a predicate for an Establishment Clause violation. Rather, Justice Blackmun emphasized that past decisions have "turned only on the fact that the government was sponsoring a manifestly religious exercise." *Id.* (Blackmun, J., concurring) (citing *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 786 (1973)). At one point, while reducing the coercion component to a mere footnote, Justice Blackmun conceded that "[a]s a practical matter, of course, anytime the government endorses a religious belief there will almost always be some pressure to conform." *Id.* at 2664 n.6 (Blackmun, J., concurring). But the Justice refused to confine Establishment Clause analysis to such a constrained scope: "[T]he fullest possible scope of religious liberty' entails more than freedom from coercion. The Establishment Clause protects religious liberty on a grand scale." *Id.* at 2665 (Blackmun, J., concurring) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963)).

235. *Weisman*, 112 S. Ct. at 2664 (Blackmun, J., concurring).

236. *Id.* at 2665 (Blackmun, J., concurring) (quoting *Engel v. Vitale*, 370 U.S. 421, 429 (1962)). Relying on a different brand of psychological research than Justice Kennedy did in the majority opinion, Justice Blackmun quoted Freud: "[A] religion, even if it calls itself the religion of love, must be hard and unloving to those who do not belong to it." *Id.* at 2666 n.10 (Blackmun, J., concurring) (citing SIGMUND FREUD, *GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO* 51 (1922)).

237. *Id.* at 2666 (Blackmun, J., concurring). "Democracy requires the nourishment of dialogue and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation. When the government appropriates religious truth, it 'transforms rational debate into theological decree.'" *Id.* (Blackmun, J., concurring) (quoting Jonathan E. Nuechterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1131 (1990)).

238. *Id.* (Blackmun, J., concurring). "Democratic government will not last long when

Blackmun underscored James Madison's early warning that a government that controls religion is a tyrant and the people forced to submit to it are slaves.²³⁹ Government-forced support of religion, Justice Blackmun pronounced, referring once again to a warning to the people from Madison, differs only in degrees from the Inquisition itself. "The one is the first step, the other the last in the career of intolerance."²⁴⁰

C. Justice Souter's Concurring Opinion

Justice Souter wrote a concurring opinion²⁴¹ to resolve two specific Establishment Clause issues: (1) whether the Clause applies to governmental practices that are non-denominational, and (2) whether government coercion is a necessary element of an Establishment Clause violation.²⁴²

Addressing the first issue, Justice Souter emphatically stated at the outset that the Establishment Clause prohibits state-sponsored school prayers even if those prayers are nondenominational.²⁴³ Referring to this principle as "settled law," Justice Souter traced a fifty-year line of precedent, beginning with *Everson*, from which he did not find a compelling reason to depart.²⁴⁴ This precedent is firmly rooted in the history of the Establishment Clause,²⁴⁵ Justice Souter stated, and he elaborated at length on the textual evolution of the Clause from the first draft to its final formulation as proof of the framers' intent that the Establishment Clause prohibits nonpreferential²⁴⁶ support of reli-

proclamation replaces persuasion as the medium of political exchange." *Id.* (Blackmun, J., concurring).

239. *Id.* (Blackmun, J., concurring).

240. *Id.* 2666 n.10 (Blackmun, J., concurring).

241. Justices Stevens and O'Connor joined in the opinion.

242. *Weisman*, 112 S. Ct. at 2667 (Souter, J., concurring).

243. *Id.* (Souter, J., concurring).

244. *Id.* at 2668. (Souter, J., concurring). As Justices Kennedy, Blackmun and Scalia had done in their opinions, Justice Souter grounded his own argument on history, tradition and precedent. However, Justice Souter built the broadest historical base of the three on which to argue that "history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some." *Id.* at 2670 (Souter, J., concurring).

245. Justice Souter claimed that it is this history of the Clause's textual development that provides the most powerful argument that the Clause does, in fact, prohibit both preferential and non-preferential aid to religion. *Id.* at 2668 (Souter, J., concurring).

246. Justice Souter alluded to the prickly issue of what constitutes nonpreferential support, when at the same time that the framers were drafting the Establishment Clause, ceremonial prayers were routinely heard in the halls of Congress and in presidential messages. Referring to these ceremonial proclamations as "at worst trivial

gion.²⁴⁷ To suggest otherwise, Justice Souter declared, would be to

breaches of the Establishment Clause," *id.* at 2670 n.3 (Souter, J., concurring), Justice Souter seemed to suggest that there was no distinction to be made between sectarian prayers, which would violate the Establishment Clause, and prayers that some considered "ecumenical enough to pass Establishment Clause muster." *Id.* at 2671 (Souter, J., concurring). It is not the Court's province, Justice Souter stated, to indulge in this type of comparative theology. *Id.* (Souter, J., concurring). Thus, where Justice Kennedy in the majority opinion condoned legislative prayers, finding no Establishment Clause violation based on the non-school context in which they were given, Justice Souter would likely find these prayers to be a violation of the Establishment Clause, albeit a "trivial" violation. "[R]eligious invocations in Thanksgiving Day addresses and the like, rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular, inhabit a pallid zone worlds apart from official prayers delivered to a captive audience of public school students and their families. Madison himself respected the difference between the trivial and the serious in constitutional practice." *Id.* at 2678 (Souter, J., concurring).

247. *Id.* at 2668-70 (Souter, J., concurring). James Madison's draft of the Establishment Clause presented at the First Congress in 1789 read: "The 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.* at 2668 (Souter, J., concurring) (citing 1 ANNALES OF CONG. 434 (Joseph Gales ed., 1789)). A House select committee edited it to read that "no religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* (Souter, J., concurring). The House rejected the select committee's language, which ensured only that "no religion" could be preferred over others, broadening it to read: "Congress shall make no laws touching religion, or infringing the rights of conscience." *Id.* at 2669 (Souter, J., concurring). The House then narrowed this language and forwarded to the Senate a version that prohibited laws establishing religion in general, reading: "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *Id.* (Souter, J., concurring) (citing 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 136 (Senate Journal) (L. de Pauw ed. 1972)). The Senate edited the House version to return to a prohibition of preferential support only, but ultimately drafted a broader proposal, reading: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." *Id.* (Souter, J., concurring) (citing 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 166 (Senate Journal) (L. de Pauw ed. 1972)). The House rejected this version and convinced the Senate to adopt the final version as it now appears in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.* (Souter, J., concurring). What is remarkable in this textual evolution, Justice Souter stated, is that "unlike the earliest House drafts or the final Senate proposal, the prevailing language is not limited to laws respecting an establishment of 'a religion,' 'a national religion,' 'one religious sect,' or specific 'articles of faith.'" *Id.* (Souter, J., concurring). The framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for 'religion' in general." *Id.* at 2669-70 (Souter, J., con-

suggest that the framers were “extraordinarily bad drafters.”²⁴⁸

Addressing the second issue, Justice Souter departed from the majority’s heavy reliance on a coercion analysis to declare that coercion is not a necessary component of an Establishment Clause violation.²⁴⁹ Acknowledging that the language of the Establishment Clause “is not pellucid,”²⁵⁰ Justice Souter emphasized that in spite of this, the framers had always intended,²⁵¹ and the Court had always read, the Clause to ban more than merely a coercive establishment of religion.²⁵² Rather, the Justice stated, although “the Establishment Clause’s concept of neutrality is not self revealing, our recent cases have invested it with specific content: the state may not favor or endorse either religion generally over nonreligion or one religion over others.”²⁵³ Justice Souter

curing).

248. *Id.* at 2670 (Souter, J., concurring). The framers were particularly aware of the origins of Virginia Statute for Religious Freedom, Justice Souter pointed out, which was enacted to protect colonists against *any* establishment of religion, however nonpreferentialist. Thomas Jefferson wrote the statute and James Madison sponsored it. *Id.* (Souter, J., concurring).

249. *Id.* at 2671-72 (Souter, J., concurring). Rather, Justice Souter declared, to adopt such an interpretation would be to abandon settled law, for the Court has declared invalid many non-coercive government practices aiding religion. *Id.* (Souter, J., concurring).

250. *Id.* at 2672 (Souter, J., concurring).

251. Justice Souter disputed the claim that because the early Presidents included religious messages in their speeches that the framers did not intend the Establishment Clause to prohibit such noncoercive state conduct. *Id.* at 2673-75 (Souter, J., concurring). On the contrary, Justice Souter characterized the use of such prayers by Jefferson and Madison as mere diversions from the principle often stated by both that the Establishment Clause encompasses such noncoercive religious activity. *Id.* (Souter, J., concurring).

To be sure, the leaders of the young Republic engaged in some of the practices that separationists like Jefferson and Madison criticized. The First Congress did hire institutional chaplains . . . and Presidents Washington and Adams unapologetically marked days of public thanksgiving and prayer Those practices prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next.

Id. at 2675 (Souter, J., concurring).

252. *Id.* at 2672-73 (Souter, J., concurring). “In Madison’s words, the Clause in its final form forbids ‘everything like’ a national religious establishment . . . and, after incorporation, it forbids ‘everything like’ a State religious establishment.” *Id.* (Souter, J., concurring).

253. *Id.* at 2676 (Souter, J., concurring). For an extensive analysis of the flaws in the no endorsement test, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266 (1987) (characterizing the no endorsement test as a “doctrinal dead end” and pointing out the futility of seeking neutrality as a guide to church-state conduct).

characterized this principle as “the foundation of Establishment Clause jurisprudence, . . . protecting religion from the demeaning effects of any governmental embrace.”²⁵⁴

D. Justice Scalia's Dissenting Opinion

Justice Scalia delivered a scathing dissent in reaction to the Court's decision, which he characterized as a “jurisprudential disaster.”²⁵⁵ Signaling the tone that he would assume throughout, Justice Scalia began by holding up to Justice Kennedy his own words from *Allegheny County v. Greater Pittsburgh ACLU*.²⁵⁶ In *Allegheny*, Scalia reminded the Court, Justice Kennedy insisted that the Establishment Clause “must be construed in light of the ‘[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.’”²⁵⁷ Furthermore, Justice Kennedy claimed in *Allegheny* that any reading of the Clause that would “invalidate longstanding traditions cannot be a proper reading of the Clause.”²⁵⁸ Justice Scalia continued by reminding Justice Kennedy of yet another earlier remark of his: “[T]he meaning of the Clause is to be

254. *Weisman*, 112 S. Ct. at 2676 (Souter, J., concurring). Justice Souter acknowledged that governmental neutrality did not foreclose governmental accommodation of religion under the Free Exercise Clause. *Id.* (Souter, J., concurring). Permissible accommodation, he stated, “lift[s] a discernible burden on the free exercise of religion.” *Id.* at 2677 (Souter, J., concurring). When no burden exists, accommodation becomes an impermissible establishment of religion. *Id.* (Souter, J., concurring). For extended discussions of the relationship between the Free Exercise and Establishment Clauses, see PHILLIP B. KURLAND, *RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT* (1962); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT L. REV. 673 (1980); J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381 (1967); John N. Moore, *The Supreme Court and the Relationship Between the “Establishment” and “Free Exercise” Clauses*, 42 TEX. L. REV. 142 (1963); Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968).

255. *Weisman*, 112 S. Ct. at 2685 (Scalia, J., dissenting). Justice Scalia was joined by Chief Justice Rehnquist and Justices White and Thomas.

256. 492 U.S. 573 (1989). In *Allegheny*, Justices Kennedy and Scalia were aligned against the majority that found a Christmas crèche display violative of the First Amendment. *Id.* at 655.

257. *Weisman*, 112 S. Ct. at 2678 (Scalia, J., dissenting) (quoting *Allegheny*, 492 U.S. at 657).

258. *Id.* (Scalia, J., dissenting) (quoting *Allegheny*, 492 U.S. at 670).

determined by reference to historical practices and understandings.”²⁵⁹

Calling the majority opinion “conspicuously bereft” of any historical foundation, Justice Scalia accused the Court of laying waste an American tradition of nonsectarian prayer at public celebrations.²⁶⁰ The Court would have to be “oblivious to our history,” Justice Scalia claimed, to overlook the many governmental ceremonies and proclamations existing in all three branches of the federal government in which prayer plays an integral part without transforming the event into a religious exercise,²⁶¹ including the first public school graduation ceremony in 1868.²⁶² In light of this, Justice Scalia reminded the Court, “interpretation of the Establishment Clause should comport with what history reveals was the contemporaneous understanding of its guarantees.”²⁶³ The Justice then addressed both areas on which the majority based its opinion.

1. State Involvement in a Religious Exercise

Justice Scalia dismissed in a mere two paragraphs the Court’s characterization of the state as having directed and controlled the school graduation ceremonies.²⁶⁴ The Justice accused the Court of nothing less

259. *Id.* (Scalia, J., dissenting) (quoting *Allegheny*, 492 U.S. at 670). In his relentless pursuit of this theme, Justice Scalia declared that “our Nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court.” *Id.* at 2679 (Scalia, J., dissenting).

260. *Id.* at 2678-79 (Scalia, J., dissenting). Actually, Justice Kennedy *did* refer to America’s tradition of ceremonial prayers when he distinguished *Weisman* from *Marsh v. Chambers*, 463 U.S. 783 (1983). However, Justice Kennedy used *Marsh* to emphasize how different the ceremony in *Weisman* was from those types enumerated by Justice Scalia. And, as has already been discussed, *see supra* notes 193, 228, and 244, and accompanying text, Justices Kennedy, Blackmun, and Souter, as well as Justice Scalia, have all presented detailed historical support for their divergent opinions. In fact, Justices Blackmun and Souter both provided substantially more historical authority for their views than did Justice Scalia.

261. *Weisman*, 112 S. Ct. at 2679-80 (Scalia, J., dissenting).

262. *Id.* at 2680 (Scalia, J., dissenting).

263. *Id.* at 2679 (Scalia, J., dissenting). Justice Scalia refers to the Court’s reasoning in an earlier case that “[t]he existence from the beginning of the Nation’s life of a practice, [while] not conclusive of its constitutionality . . . , is a fact of considerable import in the interpretation of the Establishment Clause.” *Id.* (Scalia, J., dissenting) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring)). Yet, as discussed above, Justice O’Connor raised the question of whether prayers at public school graduations were even a practice at the time the Establishment Clause was drafted (*see supra* note 127 and accompanying text). Justice Scalia has only “one account” claiming that this is so. *Weisman*, 112 S. Ct. at 2679 (Scalia, J., dissenting).

264. *Id.* at 2682-83 (Scalia, J., dissenting).

than distorting the record for its own purposes.²⁶⁵ No evidence, Justice Scalia stated, supports the Court's claim of state direction and control: the principal invited a member of the clergy to deliver a prayer at the graduation ceremony and provided him with a two-page flyer giving general advice on prayers for civic occasions.²⁶⁶ Justice Scalia considered it "difficult to fathom" how the Court transformed these facts into a violation of the U.S. Constitution.²⁶⁷

2. State Coercion of Participation in a Religious Exercise

Justice Scalia considered the linchpin of the Court's opinion—that the state had psychologically coerced student participation in a religious exercise—as "nothing short of ludicrous."²⁶⁸ Lambasting the Court for its "psycho-journey" into the dynamics of peer pressure, Justice Scalia disparaged the Court's opinion as "psychology practiced by amateurs."²⁶⁹ Justice Scalia disputed at length the Court's contention that the act of simply sitting or standing quietly during the prayer signaled forced participation in the ceremony.²⁷⁰ By doing either one, Justice Scalia claimed, the student could signal both her nonparticipation and, at the same time, her respect for the views of others.²⁷¹

265. *Id.* at 2683 (Scalia, J., dissenting).

266. *Id.* (Scalia, J., dissenting). Rather than this being direction and control, Justice Scalia claimed, "directing" and "controlling" the graduation ceremonies "has a sound of liturgy to it" and provoked images for him of a formal religious exercise, in which the principle directs "acolytes where to carry the cross" or shows "the rabbi where to unroll the Torah." *Id.* (Scalia, J., dissenting).

267. *Id.* (Scalia, J., dissenting). There is nothing in the record, Justice Scalia emphasized, "remotely suggesting that school officials have ever drafted, edited, screened or censored" the prayers "or that Rabbi Gutterman was a mouthpiece of the school officials." *Id.* (Scalia, J., dissenting).

268. *Id.* at 2681 (Scalia, J., dissenting).

269. *Id.* (Scalia, J., dissenting). Interestingly enough, three years earlier, Justice Kennedy lambasted the *Allegheny* Court for its "psycho journey" of sorts into the dynamics of religious symbolism, accusing the Court of transforming itself into a "national theology board." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 678 (1989).

270. *Weisman*, 112 S. Ct. at 2681-82 (Scalia, J., dissenting). Justice Scalia points out the rather innocuous nature of simply sitting or standing during the prayers by emphasizing that the students were not "psychologically coerced to bow their heads, place their hands in a Dürer-like prayer position, pay attention to prayers, utter 'Amen,' or in fact pray." *Id.* at 2681 (Scalia, J., dissenting).

271. *Id.* at 2681-82 (Scalia, J., dissenting). It is "beyond the absurd," Justice Scalia

Justice Scalia also took issue with the Court's presumption that psychological coercion could constitute a violation of the Establishment Clause.²⁷² The coercion that the First Amendment was enacted to prevent, the Justice claimed, was coercion of religious compliance by force of law or threat of penalty.²⁷³ There is no reason, Justice Scalia stated, to expand the coercion concept to include a psychological dimension not intended by the framers of the First Amendment.²⁷⁴ Justice Scalia distinguished *Weisman* from the school-prayer cases, in which students are legally coerced (under threat of penalty) to attend school.²⁷⁵ In contrast, the Justice claimed, Deborah Weisman's graduation ceremony was "utterly devoid of legal compulsion."²⁷⁶ Furthermore, Justice Scalia stated, prayer in the classroom, which is essentially an instructional setting, raises special concerns that a voluntary prayer at a one-time graduation ceremony does not.²⁷⁷

claimed, to believe that a student who remained seated during a prayer while the rest of the class stood was signaling any participation in the prayer. *Id.* at 2682 (Scalia, J., dissenting). And even if the student did stand during the prayer, the Justice stated, it is just as reasonable to assume that the student is standing out of respect for the ceremony as it is to assume that the student is actually participating. *Id.* (Scalia, J., dissenting). Justice Scalia took his argument one step further by sarcastically questioning why the Court was not similarly concerned that the students had also stood for the Pledge of Allegiance, which contained not only political, but also religious orthodoxy in the phrase "under God." Scalia asked if that would be the next target for the Court's "bulldozer of its social engineering." *Id.* (Scalia, J., dissenting).

272. *Id.* at 2683 (Scalia, J., dissenting).

273. *Id.* (Scalia, J., dissenting). Thus, Justice Scalia does not dispute that coercion is a component of an Establishment Clause violation, and in fact concedes that he has "no quarrel with the Court's general proposition that the Establishment Clause 'guarantees that government may not coerce anyone to support or participate in religion.'" *Id.* at 2684 (Scalia, J., dissenting). He contends, however, that based on the context in which the First Amendment was drafted, Justice Kennedy's "psychological coercion" is not the type the Clause was meant to prohibit. Rather, the Clause was a protection against coercion of religious worship, forced tithes and taxes for the church, and punishment for noncompliance. *Id.* at 2683-84 (Scalia, J., dissenting).

274. *Id.* (Scalia, J., dissenting).

275. *Id.* at 2684-85 (Scalia, J., dissenting). These cases in no way "compel the Court's psycho journey," Justice Scalia claimed. *Id.* at 2684 (Scalia, J., dissenting). The coercion that justified the invalidation of the prayers in the classroom was the legal coercion on the students to attend school. *Id.* (Scalia, J., dissenting). The question of whether coercion exists in the classroom "is quite different" from the question of whether forbidden coercion exists at a graduation ceremony, where the student is not compelled to attend. *Id.* (Scalia, J., dissenting).

276. *Id.* at 2685 (Scalia, J., dissenting).

277. *Id.* (Scalia, J., dissenting). Justice Scalia acknowledged the power of peer pressure, but in a different context than the Court had done. In the classroom, the Justice claimed, parents are not present to counter "the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.* (Scalia, J.,

However, the Court's "lamentable decision" had at least one "happy byproduct," Justice Scalia declared. The Court had seemingly abandoned the *Lemon* test, characterized by Justice Scalia as a "formulaic abstraction" in conflict with the nation's history and traditions.²⁷⁸ Justice Scalia regretted, however, that the Court replaced *Lemon* with the psycho-coercion test, "which suffers from the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself."²⁷⁹

Referring to the "odd basis for the Court's decision,"²⁸⁰ Justice Scalia concluded his opinion with a rather odd statement of his own. Justice Scalia stated that in spite of what the Court had just proclaimed in *Weisman*, public schools will be able to include prayers in their graduation ceremonies as usual as long as they make it clear that no student is compelled to participate in them.²⁸¹ For, while Deborah Weisman's interests have been addressed throughout, the Justice noted, the "interests on the other side" of the issue are consequential as well.²⁸² Justice Scalia emphasized the power of prayer and the need to "acknowledge and beseech the blessing of God as a people and not just as individuals."²⁸³ "One can believe in the effectiveness of such public worship or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it."²⁸⁴

dissenting). Prayer at a graduation ceremony attended by friends and family, Justice Scalia continued, does not raise the same concerns. *Id.* (Scalia, J., dissenting).

278. *Id.* (Scalia, J., dissenting). The Court demonstrated "the irrelevance of *Lemon* by essentially ignoring it." *Id.* (Scalia, J., dissenting).

279. *Id.* (Scalia, J., dissenting).

280. *Id.* (Scalia, J., dissenting).

281. *Id.* (Scalia, J., dissenting). To evade the *Weisman* Court's decision, Justice Scalia advised, a school need only include a statement with the graduation program, clarifying that even though all students will be asked to stand for the invocation and benediction, students are not compelled to join in the prayers and will not be thought to be participating simply because they are standing with the group. *Id.* (Scalia, J., dissenting).

282. *Id.* (Scalia, J., dissenting).

283. *Id.* at 2686 (Scalia, J., dissenting). "[N]othing, absolutely nothing," the Justice stated, "is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together." *Id.* (Scalia, J., dissenting).

284. *Id.* (Scalia, J., dissenting).

V. IMPACT OF THE COURT'S DECISION

A. *Judicial Impact*

The decision in *Lee v. Weisman* signaled the arrival of what commentators have characterized as a moderately conservative "troika" in the Supreme Court.²⁸⁵ Justices Kennedy, Souter, and O'Connor make up this "subgroup" of what court watchers had presumed was a firmly entrenched conservative majority. They are exhibiting "a generally cautious approach to deciding cases, a hesitancy to overturn precedents and a distaste for aggressive arguments."²⁸⁶ Observers have attributed this shift in the mood of the Court to various factors, "from the nature of conservatism, to the maturing of the justices, the weight of the job's responsibility and the justices' differing personalities."²⁸⁷ Whatever the

285. Linda Greenhouse, *Changed Path for Court?: New Balance Is Held By 3 Cautious Justices*, N.Y. TIMES, June 26, 1992, at A1. Although the Court's rulings on over 100 cases during the 1991-92 term suggest a decidedly conservative Court, "favoring government over an individual's liberties, business over labor, police power over criminals' rights," several high-profile decisions, including *Weisman*, issued during the Court's final weeks surprised court watchers and support the troika theory advanced by many of them. Dick Lehr, *Centrist Troika Slows the Right on High Court*, BOSTON GLOBE, July 3, 1992, at 1.

286. Greenhouse, *supra* note 285, at A1. Kenneth Starr, the former Bush Administration's Solicitor General, refused to downplay the *Weisman* decision, which he called "just stunning It says something very significant about the mood of the Court. It's really a new Court." *Id.* And an "unhappy Court," according to Robert Bork, former Supreme Court nominee, who attacked the Court for its trend toward an "ahistorical and free-handed liberalism." Robert H. Bork, *Again, a Struggle for the Soul of the Court*, N.Y. TIMES, July 8, 1992, at A-19.

287. Lehr, *supra* note 285, at 1. Personality is a factor that has been underestimated, claims University of Michigan law professor Yale Kamisar, referring to Scalia's "slashing style." *Id.* Other commentators have questioned whether the troika is "responding almost viscerally to the swashbuckling reach of opinions by Justices Scalia and Thomas." Greenhouse, *supra* note 285, at A1. Addressing the personality issue, Richard Samp, chief counsel for the conservative Washington Legal Foundation, called for more consensus-building among the conservative justices. "Unfortunately," he stated, "Scalia, although the most powerful intellect, is not only not good at consensus-building; he even goes out of his way to criticize colleagues who deign to stray slightly from how he sees things." Lehr, *supra* note 285, at 1. The troika might also represent an emergence from the shadows of mentors and supporters, Yale Kamisar suggested, to avoid being labeled as someone's "clone or subordinate." *Id.* "For O'Connor, observers said, it meant emerging . . . from the shadow of Rehnquist, who strongly supported her nomination For Kennedy and Souter . . . it has meant 'emerging as much more complicated and open-minded than anyone expected.'" *Id.* In fact, Justice Souter is "a far cry from what conservatives thought they were getting" when the White House assured them that he would be a "home run." Paul M. Barrett, *Independent Justice: Souter Irks Rightists*, SACRAMENTO BEE, February, 14, 1993, at F1. That prediction was "miserably inaccurate," complained Thomas Jipping, a prominent support-raiser for nominee Souter and vice president of the Free Con-

factors, court observers agree that *Weisman* confirms that the Court "is not on the runaway right-wing course that conservatives and liberals alike had predicted from a group molded by Presidents Bush and Reagan."²⁸⁸

However, *Weisman* failed to clearly delineate what would be the Court's future course. Rather than shape a definitive standard for Establishment Clause analysis,²⁸⁹ the majority in *Weisman* relied on a theory of psychological coercion that, if it withstands future criticism, will most likely only be useful in a limited number of school cases similar to *Weisman*.²⁹⁰ In addition, noticeably absent from Justice Kennedy's opinion was any reliance on the various existing analytical approaches, most particularly the *Lemon* test.²⁹¹ This may signal either a future overruling of the *Lemon* decision, although Justice Kennedy declined to do so in the case at hand, or, less drastically, a future reconsideration of the *Lemon* test. If it expressly overrules *Lemon*, the Supreme Court could open the door to government subsidies for church-related schools,²⁹² a dramatic departure from past concerns about the separa-

gress Foundation. *Id.*

288. Lehr, *supra* note 285, at 1. This is an especially provocative development in light of the recently announced retirement of Justice White and the expected retirement of at least one other justice during the new Democratic administration. Although Justice Blackmun, author of *Roe v. Wade*, has not announced retirement plans, at 84 he is the oldest justice on the Court. Where it was once believed that *Roe* survived by one vote alone, *Roe* has found unexpected support in the new Court, signaling that perhaps the "wall of separationists" will find similar support. *Id.*

289. Narrow cases can have broad impact. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), although the Court's decision related to the limited question of state subsidies, the Court's reasoning became the cornerstone of Establishment Clause analysis. In the same way, the Court's reasoning in *Weisman* could have far-reaching implications for Establishment Clause jurisprudence.

290. It seems unlikely that the psycho-coercion test would be a useful analytical tool in an Establishment Clause challenge involving, for example, religious art on postage stamps, state recognition of a religious holiday or state subsidies for private school textbooks.

291. Justice Kennedy noted in passing that the lower court relied on the *Lemon* test, finding petitioner's actions violative of the second prong, and that the state's conduct can neither advance nor inhibit religion. *Weisman*, 112 S. Ct. at 2654.

292. Marc Stern of the American Jewish Congress, among others, predicted that abandoning the *Lemon* test completely "could allow more government aid to parochial schools, make it easier to have religious displays on public property and permit other governmental involvement with religion." Ruth Marcus, *Justices Asked to Lower Wall Between Church, State; If High Court Accepts Graduation Prayer Case, Ruling Could Redefine Religion's Public Role*, WASH. POST, March 18, 1991, at A4.

tion of church and state.²⁹³ If, on the other hand, the *Lemon* test is reconsidered, the Court will be questioning an analytical tool that once was considered the cornerstone of Establishment Clause analysis.²⁹⁴

When the Court agreed to review *Lee v. Weisman*, it shelved a number of cases, pending that decision.²⁹⁵ The implication was that the Court believed *Weisman* would provide an important analytical tool in Establishment Clause analysis. On the contrary, the decision seems to narrowly apply to a very specific set of circumstances, leaving the Court with, what one observer termed, its "notoriously incoherent Establishment Clause jurisprudence."²⁹⁶

293. Bruce Fein, *Prayer and Psycho-Law*, WASH. TIMES, June 26, 1992, at F1. Fein claims that *Weisman* confirms that five justices—Chief Justice Rehnquist, along with Justices White, Scalia, Kennedy and Thomas—are prepared to overrule *Lemon* to improve relations between state and religion. *Id.* However, August Steinhilber, general counsel to the National Association of School Boards, does not believe that the Court will form a coalition to depart from *Lemon's* strict church-state separation for a more liberal standard that would bar the state only from coercing people into religious practice. Marshall Ingwerson, *High Court's School-Prayer Ruling Puts Bush's Voucher Plan in Doubt*, CHRISTIAN SCI. MON., June 26, 1992, at 1. Mark Tushnet, law professor at Georgetown University Law Center agreed. "From the tone of the opinion," Tushnet stated, "Kennedy is saying we've gone about as far from a classic separationist doctrine as we are going to go." *Id.* Tushnet, however, allowed that the Court might move to a coercion test in a future case. *Id.*

294. However, the *Lemon* test is not short on critics. "The *Lemon* test gave the illusion of Euclidian certitude, but has failed miserably as respectable constitutional doctrine. Its three prongs are divorced from the language and purposes of the establishment clause, and their multiple ambiguities have fostered idiosyncratic rulings." Bruce Fein, *Recasting Church State Doctrine*, WASH. TIMES, July 30, 1991, at G1. The Justice Department criticized the test's "rigid doctrinal framework" as "the source of widespread confusion and deep division among the lower federal courts." Marcus, *supra* note 292, at A4. Yehudah Mirsky discusses the analytical flaws in the *Lemon* test, among them that its "crisp dichotomies (secular/religious, advance/not-advance, excessive/acceptable entanglement) are themselves not supple enough to do justice to the complex nature of church-state interaction." *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1243 (1986).

295. *Ban on School Prayer is Upheld; Court Stuns Conservatives by Reinforcing Church-State Split*, STAR TRIB., June 25, 1992, at 1A. In the wake of *Weisman*, the Court during the 1992-93 term will be considering several of these cases and perhaps will illuminate the analytical direction of the Court for the future. In *Zobrest v. Catalina Foothills School District*, 963 F.2d 1190 (9th Cir. 1992), the Ninth Circuit held that state funding of a sign-language interpreter at a Catholic high school violated the Establishment Clause. In *Church of the Lukumi Babalu Aye v. Hialeah*, 936 F.2d 586 (11th Cir. 1991), the named church challenged a state law banning animal sacrifice as a restraint on their free exercise of religion. In *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 959 F.2d 381 (2d Cir. 1992), a religious group is challenging the school's refusal to allow them after-hours use of public school facilities.

296. Terry Eastland, *Prayer and Psycho-Law*, WASH. TIMES, June 26, 1992, at F1.

B. *Impact on Education*

1. Higher Education

The *Weisman* Court never drew a firm line at the high school border to indicate that graduation prayers at post-high school ceremonies would be acceptable.²⁹⁷ However, based on Justice Kennedy's reasoning in the majority opinion, it is unlikely that *Weisman* will affect public college graduation ceremonies. The majority justified its "psychological coercion" test primarily because of its "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."²⁹⁸ Justice Kennedy stressed that the Court's opinion was "fact sensitive" and limited to this context and no other.²⁹⁹ By this language, the Justice implied that the Court had no interest in extending the "psychological coercion" test to higher education.³⁰⁰

2. Elementary and Secondary Schools

Justice Scalia's contention that *Weisman's* impact will be limited is being debated by school officials, social commentators, and legal observers.³⁰¹ According to Justice Scalia, prayers at future public school

297. Bruce Fein, in a newspaper commentary, went so far as to herald the Court's decision as "a strategic defeat for church-state separationists," because it did not overtly bar prayers during state college or university ceremonies. Bruce Fein, *Prayer and Psycho-Law*, WASH. TIMES, June 26, 1992, at F1.

298. *Weisman*, 112 S. Ct. at 2657.

299. Throughout his opinion, Justice Kennedy referred to "adolescents," "young graduates," "young people" and students of "high school age."

300. *Weisman*, 112 S. Ct. at 2661. In his dissent, Justice Scalia could not even tolerate the test for high school seniors, claiming that high school graduation signifies "a transition from adolescence to young adulthood Why, then, does the Court treat them as though they were first-graders?" *Id.* at 2682 (Scalia, J., dissenting). This argument could be made with even more force if the psychological coercion test were imposed on college graduates, where, presumably, there is more maturity and less peer pressure to submit.

301. When the Supreme Court granted review of *Weisman*, 35 religious, political and educational groups, including the National School Boards Association and the National Association of School Boards, filed or joined briefs to the Court. The education groups said they wanted clear guidance from the Supreme Court, but more than that, observers note, "[r]eading these briefs makes it clear that to vast sections of the public, this case poses not an abstract issue of constitutional doctrine, but an urgent question of national self definition." Linda Greenhouse, *The Fight Over God's Place in America's Legacy*, N.Y. TIMES, Nov. 1, 1991, at B10 [hereinafter Greenhouse, *The*

graduations will continue as usual, with minor modifications,³⁰² in the wake of *Weisman*.³⁰³ However, the *Weisman* Court laid down ground rules that suggest this will not be the case: elementary and secondary public school officials are prohibited from participating in graduation ceremony prayers. Based on *Weisman*'s reasoning, it is likely that "participating" could include anything from writing the prayer and selecting the speaker to providing the podium and even, perhaps, to distributing the "No Coercion" announcement that Justice Scalia suggests will solve the problem.

As the graduation season approaches, school districts, state lawmakers, and special interest groups are trying to construe *Weisman* for their own purposes. In the wake of *Weisman*, the American Center for Law and Justice, evangelist Pat Robertson's conservative legal group, sent a letter to the nation's public school superintendents, informing them that "student-initiated" prayer is constitutional.³⁰⁴ The American Civil Liberties Union fired back with their own letter, warning the superintendents that *any* graduation prayer would violate the constitution.³⁰⁵ However, it appears that, in varying degrees, school districts

Fight]; Linda Greenhouse, *Supreme Court to Take Fresh Look at Disputed Church State Boundary*, N.Y. TIMES, March 19, 1991, at A16 [hereinafter Greenhouse, *Supreme Court*].

302. Justice Scalia advised that school officials will simply have to inform attendees that they are not compelled to join in the prayers and assure them that the fact that they are standing will not send a message that they are participating. *Weisman*, 112 S. Ct. at 2685 (Scalia, J., dissenting). Solicitor General Kenneth Starr, who appeared on behalf of the former Bush Administration to urge the court to allow the prayers, concurred that the decision does not place an absolute ban on prayers at graduation ceremonies. *Ban on School Prayer is Upheld; Court Stuns Conservatives by Reinforcing Church-State Split*, STAR TRIB., June 25, 1992, at 1A. Starr suggested the possibility that student-initiated prayers, unsupervised by school officials, might hurdle the obstacles set up by Justice Kennedy's Court. *Id.*

303. Although many public schools have already eliminated prayers from their graduation ceremonies, many others still have them. According to the National School Board Association, of the 21 major school districts surveyed, 14 allowed graduation prayers and several other districts claimed that they would also if they did not fear lawsuits. Greenhouse, *The Fight*, *supra* note 301 at B10.

304. *ACLU Mails Warnings on Prayer at Grad Ceremonies*, L.A. TIMES, May 15, 1993, at B5 [hereinafter *ACLU Mails Warnings*]. Robertson's group relied on the Fifth Circuit's ruling in *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), which was decided several months after *Weisman*. In *Clear Creek*, the court upheld prayers at graduation ceremonies as long as a majority of the students voted in favor of them. *Id.* at 969. Robertson's group plans to dispatch so-called "SWAT teams" nationwide to inform schools of this loophole that will allow them to include student-sponsored prayer in their graduation ceremonies. *ACLU Mails Warnings at B5; Graduation Prayers, Again*, WASH. POST, May 12, 1993, at A18.

305. *ACLU Mails Warnings*, *supra* note 304 at B5. In its counter-mailing, the ACLU denounced the Fifth Circuit's ruling in *Clear Creek* as "wrongly decided." *Id.* "Consti-

across the country are finding ways to get around *Weisman* as they bow to community pressure for graduation prayers.³⁰⁶ Some schools are simply flouting the Supreme Court decision by openly planning graduation prayers; in other schools, students are protesting with walk-outs, mass mailings to their congressional representatives, or "surprise" prayers during the ceremony.³⁰⁷ Additionally, some state legislatures have passed laws to override *Weisman's* prohibition on prayer.³⁰⁸ Civil libertarians oppose acts that encourage student-initiated prayer, contending that such prayer at state-sponsored events remains coercive.³⁰⁹ Some school officials and legal observers caught in the middle predict dramatic changes in future graduation ceremonies, while others consider the decision ambiguous in its implications.³¹⁰

3. Legislative Impact

At the same time that Justice Kennedy was announcing the opinion of the Court in *Lee v. Weisman*, the former Bush administration was putting the final touches on its voucher plan for schools.³¹¹ This plan would have allowed parents to use a \$1000 annual education voucher at any school of their choice, including religious schools.³¹² In light of the Court's decision in *Weisman*, and in light of the Court's reluctance to turn away from its prior *Lemon* holding,³¹³ former President Bush's

tutional rights would be meaningless," the ACLU claimed, "if they could be overruled by a vote" of the students. *Id.* Seemingly applying *Weisman's* coercion test, other civil liberties advocates considered putting the prayer question to a student vote, the worst solution yet because "it could increase peer pressure and stigmatize students who . . . don't want a prayer." Tony Mauro, *Prayer Issue Graduates to Next Debate*, USA TODAY, May 12, 1993, at 1A.

306. Larry Witham, *Schools Get Around Court's Ban on Prayer*, WASH. TIMES, May 22, 1993, at A1.

307. *Id.*

308. *Id.* The Arkansas legislature, for example, amended its equal access law to allow student-planned religious graduation ceremonies. *Id.* Similarly, the Tennessee legislature voted overwhelmingly to pass a bill allowing student-initiated prayer, which the governor is expected to sign in spite of warnings from the state attorney general that it is unconstitutional. *Id.*

309. *Id.*

310. Mary Jordan, *Changes Await Most School Ceremonies: Prayer Ban Still Ambiguous*, ATTORNEYS SAY, WASH. POST, June 25, 1992, at A25.

311. Marshall Ingwersen, *High Court's School-Prayer Ruling Puts Bush's Voucher Plan in Doubt*, CHRISTIAN SCI. MON., June 26, 1992, at 1.

312. *Id.*

313. There are obvious similarities between *Lemon's* prohibition of state-subsidized

voucher plan would likely have met strong resistance in 1993.³¹⁴ However, President Clinton has already voiced vehement opposition to the voucher plan, substituting instead a charter school plan that does not involve federal aid to private education.³¹⁵ Thus, President Clinton, characterized by his campaign press secretary as “a religious man,”³¹⁶ has rushed to assert, at least in one area, his view of the proper relationship between church and state.³¹⁷

religious education and the Bush plan. Of course, in *Lemon*, religious schools received subsidies directly from the state, while, in the voucher plan, it would appear that the parent serves as middleman between the church and state.

314. Various voucher plans are currently being proposed and debated nationwide, some extending the subsidy to private schools and others expressly excluding them. For a thoughtful analysis of the constitutional obstacles to school voucher plans, see James B. Egle, Comment, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459 (1992) (concluding that the Establishment Clause may not necessarily preclude state subsidies for private education).

315. Ronald Brownstein, *What the Fuss Will Be About*, L.A. TIMES, Jan. 11, 1993, at A1. In the charter school plan, the state would grant charters to parents, teachers or community organizations within the public school system to set up alternative schools and would provide funding to the students attending the charter schools. *Id.* Within a matter of weeks after President Clinton's inauguration, California governor Pete Wilson proposed charter school districts within the state and is preparing legislation on the issue. Wilson intends this legislation to counteract an upcoming ballot initiative for a school voucher program. Daniel M. Weintraub, *Wilson Calls for Schools to Set Own Rules*, L.A. TIMES, Jan. 29, 1993, at A1.

316. Ari L. Goldman, *Religion Notes*, N.Y. TIMES, July 25, 1992, at 1-9.

317. However, many questions about President Clinton's overall view of the relationship between church and state persist. Dee Dee Myers, press secretary for the Democratic campaign, emphasized that for Clinton, “[t]he Bible is an important part of his life. He is inspired by it and to a large extent guided by it.” Ari L. Goldman, *supra* note 316, at 1-9. President Clinton invited evangelist Billy Graham to deliver an invocation and benediction at the presidential inauguration in January. Paul Houston, *Transition Watch*, L.A. TIMES, Jan. 11, 1993, at A5. Also, in a pre-election speech at the University of Notre Dame, President Clinton aligned himself with the Catholic “social mission” of “service to the poor and fidelity to God’s justice.” Colman McCarthy, *Pandering to Pat Robertson*, WASH. POST, Sept. 19, 1992, at A21. Further, Vice President Gore's book, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT*, “just oozes religious faith.” Peter Steinfels, *The 1992 Campaign: Religion in Politics; Southern Baptists Team of Democrats Represents a New Strain of the Church*, N.Y. TIMES, Oct. 8, 1992, at A31. In light of Gore's promise to elevate environmental issues to top priority in the Clinton Administration, observers cannot help but note that Gore's environmental policy is firmly “rooted in the unshakable belief in God as creator and sustainer, a deeply personal interpretation of and relationship with Christ, and an awareness of a constant and holy spiritual presence in all people, all life, and all things.” ALBERT GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* 368 (1992). Even Hillary Clinton has publicly acknowledged her commitment to “[d]aily prayer and reflection.” Steinfels, *supra* at A31. However, some observers feel that, unlike Jimmy Carter, who taught Sunday School while in office and often made others uncomfortable with his “forthright piety, . . . Mr. Clinton and Mr. Gore do not speak of being born again and having their hearts cleansed by Jesus.” *Id.* Thus, al-

C. Social Impact

According to one Washington Times commentator and social scientist,³¹⁸ the *Weisman* decision will confirm in the minds of many that their public schools "cannot be friendly to the religious beliefs of most Americans, even if they wanted to be."³¹⁹ Parents are already discouraged with what appears to be a "value-free" public school system, dispensing condoms and outlawing prayers.³²⁰ Yet, according to public polls, a large majority of the American public did not object to prayers in school thirty years ago when the Supreme Court first banned them, and an almost identical majority expressed approval of school prayers as late as last year.³²¹

Predictably, conservative groups expressed outrage at the *Weisman* ruling.³²² This opinion was handed down by a conservative Court,³²³

though President Clinton has opposed prayer in public schools, *id.*, how the religious factor overall will eventually play out in the Clinton Administration is unclear.

318. Terry Eastland is a resident fellow at the Ethics and Public Policy Center.

319. Eastland, *supra* note 296, at F1. Interestingly enough, three years ago in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) Justice Kennedy repeatedly accused the Court of "hostility" and "callous indifference" toward religion for their decision that the display of a crèche was unconstitutional.

320. *Id.* Capturing this spirit, a South Carolina legislator, commenting on an Establishment Clause challenge to the distribution of Bibles in school, remarked: "What kind of sense does it make when you can't pass out the Bible but you can pass out condoms . . . ?" Isabel Wilkerson, *Bible Giveaway is a Rural Ritual to Some, an Offense to Others*, N.Y. TIMES, Jan. 12, 1992, at 1-12. This spirit is echoed across the country. In 1992, the South Carolina Board of Education encouraged "a moment of silent meditation" in the schools, reasoning that "[p]ublic school children need the inspiration, motivation, and discipline of the religious values on which our country was founded." *Id.* About 20 southern states have enacted similar laws, in spite of court prohibitions against them. "[P]rayer and Bible distribution go on in schools because townspeople quietly agree to it no matter what the courts have said." *Id.*

321. In 1962, Gallup conducted the poll, in which almost four-fifths approved of school prayers. In 1991, Yankelovich Clancy Shulman obtained virtually the same results. While a majority of Americans endorse the separation of church and state, "they don't see voluntary prayer in the schools as violative of that principle." Everett C. Ladd, *School Prayer Gets a New Day in Court*, CHRISTIAN SCI. MON., Mar. 20, 1992, at 18.

322. David G. Savage, *Prayers Banned at School Ceremonies; Supreme Court: The Justices Rule 5 to 4 that Grade School and High School Officials May Not Invoke Name of God. Decision is a Setback for Bush Administration.*, L.A. TIMES, June 25, 1992, at A1.

323. Justices O'Connor and Kennedy were appointed by Ronald Reagan; Justice Souter was appointed by George Bush.

and based on earlier Court decisions allowing religious clubs on school campuses and religious symbols in Christmas displays,³²⁴ it was assumed that the Court would allow the graduation prayers, characterized by former President Bush as part of a “venerable and proper American tradition.”³²⁵ Conservative spokespersons accused the Court of using the First Amendment for religious censorship, and one conservative spokesman complained that the decision “sounds like the Warren Court.”³²⁶

Thus, although *Weisman*'s impact is somewhat uncertain, it will surely be felt as the year progresses—in the June 1993 graduation ceremonies across the nation, in the Supreme Court's 1993 Term decisions, and in parents' reactions to President Clinton's school proposals. Only then will it be clear whether *Weisman* has, in fact, provided the “important restatement of core principles”³²⁷ that was hoped for or, more likely, whether *Weisman* has become a mere footnote in Establishment Clause jurisprudence.

VI. CONCLUSION

Lee v. Weisman is a case rich in dimension. Although ostensibly about a school graduation ceremony, *Weisman* raises issues that go to the heart of Establishment Clause analysis. In *Weisman*, the Court had the opportunity to explore how a religion is “established”: what does a state do to “advance” a religion; how can the Court determine if a religion is benefitted by a state action; when is prayer not a religious activity. The Court, however, missed the opportunity to explore these controversial core issues in any meaningful way. Instead, *Weisman* produced four opinions that substantially confused an already muddled area of the law. Rather than clarify whether the *Lemon* test, formerly the centerpiece of Court analysis, remained the proper analytical approach for Establishment Clause challenges, the majority largely ignored the test, the concurring opinions praised it, and the dissent gleefully buried it. Equally confusing, each opinion steadfastly relied on history and tradition to support these, at times, entirely divergent views. And “coercion,” said to be the key to the majority decision, was given as many interpretations as there were opinions.

Rather than moving the Court forward, the *Weisman* Court returned

324. *Westside Community Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989).

325. *Savage*, *supra* note 322, at A1.

326. *Id.*

327. Ruth Marcus, *High Court Bans Graduation Prayer at Public Schools*, WASH. POST, June 25, 1992, A1.

to the old myth of the wall, the strict separationist position that, from the start, has been impossible for the Court to maintain. *Weisman* could have been a landmark decision, in which the Court finally shaped a coherent analytical theory for this much-unsettled area of the law. Instead, *Weisman* became just another brick in the "blurred, indistinct" wall of separation.

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