# THE FATE OF GRADUATION PRAYERS IN PUBLIC SCHOOLS AFTER *LEE V. WEISMAN*

The use of invocations and benedictions in public ceremonies, including school commencement exercises, is a long-standing tradition in our Nation.[1] The permissibility of prayer at public school graduation ceremonies is an issue touching many school districts across the country.[2] In *Lee v. Weisman*,[3] the United States Supreme Court held that a member of the clergy may not deliver nondenominational prayers at public high school graduation ceremonies without violating the First Amendment.[4] *Lee v. Weisman* continues the national debate about the proper role of religious prayers in public schools that began with the first school prayer cases.[5] *Weisman* answers the narrow question whether a member of the clergy may deliver a nondenominational prayer at a public school graduation ceremony but leaves open the question whether other nondenominational types of prayer are proscribed at all public school ceremonies.[6] Moreover, *Weisman* departs from the settled framework which has guided Establishment Clause analysis for more than twenty years and

1. Lee v. Weisman, 112 S. Ct. 2649, 2678-79 (Scalia, J., dissenting). "In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court . . . lays waste a tradition that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally." *Id. See also infra* note 137.

The National School Boards Association ("NSBA") conducted a survey of the largest public school districts across the country to determine the pervasiveness of invocations and benedictions at graduation ceremonies. Within the 21 school districts surveyed, having a total student enrollment of 2,652,571, 14 of the districts, representing 1,472,103 pupils, permitted some form of graduation prayer. Brief for National School Boards Association in support of Petitioner at *7, Lee v. Weisman, 112 S. Ct. 2649 (1992) (No. 90-1014) (LEXIS, Genfed library, S. Ct. file).

2. Brief for Utah, Idaho, North Dakota, Pennsylvania and Wyoming in support of Petitioner at *5-7, Lee v. Weisman, 112 S. Ct. 2649 (1992) (No. 90-1014) (LEXIS, Genfed library, S. Ct. file).

3. 112 S. Ct. 2649 (1992).

4. The First Amendment bars Congress from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

5. Over the past decade many constitutional amendments authorizing prayer in schools have been proposed. In 1980, Senator Helms' efforts centered around legislation curbing the Court's jurisdiction. In May 1982, former President Reagan proposed a constitutional amendment providing that "nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions." Despite intensive lobbying efforts supporting the proposition, the proffered amendments failed. Mary Ellen Quinn Johnson, Comment, *School Prayer and the Constitution: Silence is Golden,* 48 MD. L. REV. 1018, 1019 nn.4 & 5 (1989).

6. *See infra* notes 140-45 and accompanying text.

creates uncertainty as to the proper legal standards applicable in church-state jurisprudence.

Part II of this Recent Development discusses the evolution of the primary principles governing Establishment Clause cases generally, paying special attention to the elementary and secondary public school setting. Part III then examines the Court's departure from well-settled Religion Clause analysis in *Lee v. Weisman* and the Court's formulation of a new test to govern this area of law. Finally, Part IV explores some of the possible effects of the new principles on the future of Establishment Clause jurisprudence.

## I. INTRODUCTION

The Founding Fathers of our Constitution did not foresee that confusion and disagreement would eventually plague the relationship between religion and government.[7] The authors of the eighty-five essays comprising the *Federalist Papers*[8] briefly spoke to the church/state issue with two short sentences.[9] To end any lingering doubts that the Constitution did not adequately protect religious freedoms, the drafters of the Bill of Rights added the First Amendment to prohibit Congress from legislating with respect to the establishment or exercise of religion.[10]

The First Amendment contains two clauses addressing religion.[11] These Religion Clauses demand that Congress make no law with respect to the "establishment of religion or prohibiting the free exercise thereof."[12] The first clause is referred to as the Establishment Clause; the second is the Free Exercise Clause. An inherent tension exists between

7. Gregg Ivers, Redefining the First Freedom: The Supreme Court and the Consolidation of State Power, New Brunswick, New Jersey: Transaction Publications (forthcoming 1992).

8. A total of 85 essays, 51 authored by Alexander Hamilton, 29 by James Madison, and 5 by John Jay, on the proposed new federal constitution were put together in a book called *The Federalist*.

9. Gregg Ivers, *Organized Religion and the Supreme Court*, 32 J. Church & St. 775 (1990). "In *The Federalist*, Publius mentioned only that 'in a free government, the security . . . for religious rights consists in the multiplicity of sects,' and that 'the degree of security will depend on the number of . . . sects' allowed to flourish." *Id.* at 775.

10. *Id.* at 775-76.

11. U.S. Const. amend. I. The Constitution also mentions the subject of religion in Article VI, clause 3 which provides that: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. art. VI, cl.3.

12. Both of the Religion Clauses apply to the states through the Due Process Clause of the Fourteenth Amendment. The Establishment Clause was first held applicable to the states in *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 18 (1947); the Free Exercise Clause was held applicable to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

the two clauses because one prohibits the government from establishing religion and the other commands the government not to inhibit its practice.[13] This Recent Development deals primarily with the Establishment Clause[14] which, under the holding of *Lee v. Weisman*, speaks directly to whether government may support prayer at public school graduations.[15]

## II. THE PRIMARY PRINCIPLES GOVERNING RELIGIOUS ESTABLISHMENT

The development of rules governing the variety of problems that arise under the Establishment Clause has been far from fluid. To compound this dilemma, the proper separation of church-state relations has been an intensely divisive issue for the Justices on the current Court.[16] A majority of the Justices have openly expressed immense dissatisfaction with the test that the Court enunciated in 1971 in *Lemon v. Kurtzman.*[17] Nonetheless, *Lemon* has provided the most settled framework for determining when government involvement with religious practices collides with the Constitution.[18]

Rather than using *Lee v. Weisman* as an opportunity to reconsider this

13. *See generally*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1158-66 (2d ed. 1988) (discussing the conflict between the directives of the two clauses); *see* Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

14. This Recent Development does not focus upon the Free Exercise Clause. For a discussion of the Free Exercise Clause, see M. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990); *see also*, Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

15. The focus of this Recent Development, however, should not obscure the fact that the two religion clauses are interrelated. The provisions protect overlapping values, both promoting the goal of protecting an individual's freedom of religious belief. *See* Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817 (1984).

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

17. 403 U.S. 602 (1971). *See e.g.*, County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order. . . ."); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("[A] pessimistic evaluation . . . of *Lemon* is particularly applicable to the 'purpose' prong. . . ."); Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) ("[The *Lemon* test is] a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply, and yields unprincipled results. . . ."); Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (raising substantial "doubts about [*Lemon's* third prong] the entanglement test"); Roemer v. Maryland Public Works Bd., 426 U.S. 736, 768 (1976) (White, J., concurring) ("I am no more reconciled now to *Lemon* than I was when it was decided.").

18. *See infra* notes 51-59 and accompanying text.

existing law, the Court expressly declined the invitation to do so.[19] However, the Court, while purporting to apply *Lemon,* in fact ignored the *Lemon* framework entirely—paying lip service to the case in only one brief instance in the majority opinion.[20] Instead of relying on *Lemon*, the Court focused on the coercive nature of the school prayer in question creating a new coercion test to govern Establishment Clause analysis.[21] Thus, the viability of *Lemon* and its progeny, under current First Amendment jurisprudence, is imperiled.[22]

### *A. Evolution of the* Lemon *Test*

The history and tradition of religious activity in our Nation has influenced Establishment Clause analysis.[23] As the three-pronged *Lemon* test evolved through caselaw, the Court made certain to incorporate the fundamental role of history and tradition in Establishment Clause jurisprudence.

The Court planted first seed of the *Lemon* analysis and the role of history and tradition in Establishment Clause law in *Engel v. Vitale*.[24] In *Engel*, the New York Board of Regents drafted and recommended that school districts have classes recite aloud a nondenominational prayer mentioning God.[25] Relying heavily on history and tradition,[26] the Court

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19. 112 S. Ct. at 2655.

> This case does not require us to revisit the difficult . . . questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens. [T]he controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here. . . . Thus, we do not accept the invitation to reconsider our decision in *Lemon v. Kurtzman*.

*Id.*

20. The majority opinion cited *Lemon* once. *Id.* Only the concurring Justices expressly relied upon the *Lemon* formula. *Id.* at 2663-64 (Blackmun, J., concurring). Justice Blackmun set forth the three prongs of the *Lemon* test and emphasized that the application of these principles to the instant case mandated the decision reached by the Court. *Id.* Blackmun would have found the challenged invocation and benediction in *Weisman* an unconstitutional violation of *Lemon's* second prong—advancing or promoting religion. *Id.* at 2664.

21. *See infra* notes 99-127 and accompanying text.

22. Since *Lemon* in 1971, the Supreme Court has decided 31 Establishment Clause cases. With only a single exception, the decision in Marsh v. Chambers, 463 U.S. 783 (1983), the Court has continued vigorously to apply the *Lemon* tripartite framework. Lee v. Weisman, 112 S.Ct. 2649, 2663 (1992) (Blackmun, J., concurring).

23. *See, e.g.*, Lynch v. Donnelley, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); Walz v. Tax Commission, 397 U.S. 664 (1970).

24. 370 U.S. 421 (1962).

25. The prayer consisted of "Almighty God, we acknowledge our dependence upon Thee, and beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

held that recitation of a state-composed prayer in public school classrooms was unconstitutional.[27] In his concurrence, Justice Douglas emphasized the coercive nature of prayer in the elementary and secondary public school setting in light of the fact that school attendance was mandatory.[28] Thus *Engel* highlighted that vocal prayers inside the public school classroom were unconstitutionally coercive because classroom attendance was not voluntary.[29] However, *Engel* left open the question whether prayers were permissible at voluntary, extracurricular public school events such as graduation ceremonies.[30]

One year after *Engel*, the Court extended the guiding principles supporting its holding beyond the area of state-composed prayers while making its first attempt to formulate a standard for judging Establishment Clause cases. In *Abington School District v. Schempp*,[31] members of the Unitary Church challenged a state law requiring that ten verses from the Bible be read aloud at the opening of each public school day.[32] Justice Clark, writing for the majority, found the law unconstitutional in that it violated a "purpose" and "effect" test which would later form the basis for the first and second prongs, respectively, of the *Lemon* test.[33]

Subsequently, in *Walz v. Tax Commission*[34] the Court expanded the

26. *Id.* at 425-435. Justice Black, writing for the Court, noted that objections to "this very practice of establishing governmentally composed prayers" prompted many of the colonists to leave England. He added, quoting James Madison, that the prayer's purported nondenominational character did not save it because "the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects." *Id.* at 436.

27. The Court stated that "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.* at 425.

28. *Id.* at 441. The Court believed that compulsory attendance policies brought the students within the realm of the state's coercive powers.

29. However, the *Engel* Court did not require coercion for an Establishment Clause violation. See *infra* note 101.

30. *See infra* notes 99-112 and accompanying text for the Weisman Court's discussion of the role of "voluntariness" versus "coercion" in determining whether a challenged practice is constitutionally permissible.

31. 374 U.S. 203 (1963).

32. The Pennsylvania law provided: "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon written request of his parent or guardian." PA. STAT. ANN. tit. 24, § 15-1516 (1960).

33. The Court stated that, to survive an Establishment Clause challenge, an activity must have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Schempp*, 374 U.S. at 222.

34. 397 U.S. 664 (1970).

two-pronged test articulated by Justice Clark in *Schempp*.[35] In *Walz*, the Court upheld property tax exemptions for religious organizations as part of a broad scheme for exempting a variety of nonprofit institutions. *Walz* added a new ingredient to the Establishment Clause test, stating that the challenged program must not foster "excessive government entanglement with religion."[36] The "entanglement" test later appeared as the third prong of the *Lemon* test.[37] As with previous Establishment Clause cases, the *Walz* Court was clearly influenced by history; the historical tradition of over 200 years of granting exemptions similar to those at issue.[38]

The Court continued to develop the three prongs emerging from *Schempp* and *Walz*. Although *Lemon* formulated the three inquiries as a single test, the relationship between the prongs remained unclear. In *Stone v. Graham*,[39] the Supreme Court established that failure to satisfy any one prong of the *Lemon* test would create a constitutional violation.[40] Despite recurring criticism of the *Lemon* standard as applied in

35. *See supra* note 33.

36. *Walz*, 397 U.S. at 664-80. To be valid, the tax exempt program must: (1) have a secular purpose; (2) not have a primary effect of advancing or inhibiting religion; and (3) avoid causing an excessive entanglement between government and religion. *Id.* The Court found that the tax scheme had a secular purpose and only incidentally aided religion. *Id.* at 676-77.

37. *Lemon*, 403 U.S. at 614-15. The "entanglement" test has been the target of substantial criticism from numerous legal commentators. *See* Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses: A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195 (1980), and Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207 (1979).

38. *Walz*, 397 U.S. at 675-80.

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

40. In *Stone*, the Court held unconstitutional a Kentucky statute requiring that a copy of the Ten Commandments be posted on the walls of each public classroom. The Kentucky statute provided in pertinent part:

> It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth.

449 U.S. at 39.

The Court relied on the *Lemon* test, finding that the Kentucky requirement had "no secular legislative purpose." *Id.* at 41. The Court determined that the Ten Commandments were:

> [U]ndeniably a sacred text in the Jewish and Christian faiths . . . [and] [i]f the posted copies . . . are to have any effect at all, it will be to induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

449 U.S. at 41-42.

The asserted secular purpose of the statute was written on each display of the Ten Commandments and provided: "The secular application of the Ten Commandments is clearly seen in its adop-

*Stone*,[41] it is the only test upon which a majority of the Court has reached a consensus.[42]

After *Stone* articulated the proper application of the *Lemon* test, the Court turned to whether moment-of-silence statutes survived *Lemon* scrutiny. *Wallace v. Jaffree*[43] held unconstitutional Alabama's moment-of-silence statute[44] which authorized schools to set aside one minute at the start of the school day "for meditation or voluntary prayer."[45] The background surrounding the legislative scheme demonstrated that it "had no secular purpose."[46] In response to a growing dissatisfaction with the *Lemon* test among some members of the Court,[47] Justice O'Connor, in her concurring opinion, developed an alternative framework. O'Connor reformulated the first "purpose" and "effect" prongs of the *Lemon* inquiry into a single "endorsement" test which asks whether the challenged practice has the effect of endorsing or disapproving of religious beliefs.[48] Although the Court's recent trend signaled a desire to

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tion as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* at 41. Justice Rehnquist's dissent insisted that "the fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render [the law] unconstitutional." *Id.* at 44.

*Stone* enunciated that a statute violating any one of the prongs of the *Lemon* framework will be found unconstitutional without consideration of the remaining two prongs of the analysis. "If a statute violates any of [the] three [*Lemon*] principles, it must be struck down under the Establishment Clause. We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose, and is therefore unconstitutional." 449 U.S. at 40-41. This conjunctive approach to the *Lemon* framework has been restated in Edwards v. Aguillard, 482 U.S. 578, 582-83 (1987), and Wallace v. Jaffree, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring).

41. *See supra* note 17 and accompanying text.

42. The three-part *Lemon* test "is the only coherent test a majority of the Court has ever adopted." Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring).

43. 472 U.S. 38 (1985).

44. *Id.* at 60. Twenty-one states have legislative schemes which either permit or require public school students to observe a moment of silence. Johnson, *supra* note 5, at 1019. For a discussion of the constitutional problems inherent in moment-of-silence statutes see Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 HARV. L. REV. 1874 (1983).

45. *Wallace*, 472 U.S. at 40. For a thorough analysis of the Court's rationale, see David Lubecky, Note, *Silent Moments in Public Schools: Wallace v. Jaffree*, 54 U. CIN. L. REV. 1405 (1986).

46. *Wallace*, 472 U.S. at 60. The statute in question was an amendment to an earlier statute authorizing a moment of silence "for meditation" only. *Id.* at 40. The Bill's sponsor stated that the amendment was "an effort to return voluntary prayer" to the public schools. *Id.* at 43.

47. *See supra* note 17.

48. Justice O'Connor first enunciated the endorsement test in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring), stating that the Court should examine a statute or practice for

adopt this new endorsement test,[49] the Justices declined the opportunity to do so in *Lee v. Weisman* when they expressly refused to reconsider the validity of the original *Lemon* analysis.[50] It is thus important at this juncture to examine the *Lemon* decision itself.

### *B. The* Lemon *Test*

*Lemon v. Kurtzman*[51] involved two state legislative schemes that provided state aid to private schools. Together the statutes made state aid available for secular subjects in private Catholic schools, but forbade such aid for religious subjects.[52] The *Lemon* Court identified a three-pronged test for determining whether a religious practice is consistent with the Establishment Clause.[53] To satisfy this tripartite framework, the practice must: (1) have a secular purpose; (2) neither advance nor inhibit religion; and (3) not result in excessive entanglement of government and religion.[54] Pursuant to the third prong of the test,[55] the *Lemon*

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whether it has "the effect of communicating a message of government endorsement or disapproval of religion." 465 U.S. at 692.

*See generally*, Christopher C. Nesbit, Note, *County of Allegheny v. ACLU: Justice O'Connor's Endorsement Test*, 68 N.C.L. REV. 590 (1990), and Comment, Lemon *Reconstituted: Justice O'Connor's Proposed Modification of the Lemon Test for Establishment Clause Violations*, 1986 B.Y.U.L. REV. 465.

49. After first announcing the endorsement test in Lynch v. Donnelly, 465 U.S. at 687-89 (O'Connor, J., concurring), Justice O'Connor restated the test in Wallace v. Jaffree, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring), and a plurality of the Court adopted the endorsement test in County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 598-613 (1989) (plurality opinion). The *Allegheny* Court, enunciating the primary issue as whether the endorsement test was satisfied, asked whether the display of a creche and menorah in the particular physical setting in the instant case had the effect of endorsing or disapproving of religious beliefs. 492 U.S. at 597.

50. *See supra* note 19. It is therefore consistent that in County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989), Justice Kennedy attacked Justice O'Connor's endorsement test as fundamentally flawed and unworkable in practice. 492 U.S. at 669 (Kennedy, J., dissenting).

51. 403 U.S. 602 (1971).

52. *Id.* at 606-607. The Rhode Island scheme provided fifteen percent salary supplements to teachers of secular subjects in private schools where the per-pupil expenditure was lower than that of the public schools. *Id.* at 607-609. In the second program, Pennsylvania authorized the reimbursement of nonpublic schools for a fraction of teacher salaries and instructional materials in secular subjects. *Id.* at 609-11. Under both state systems, Catholic schools were the main beneficiaries of the programs.

53. 403 U.S. at 612-13.

54. *Id.* The *Lemon* Court provided that in order not to violate the Religion Clauses in the Constitution, any state statute must pass all three tests. "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.*

55. Chief Justice Burger, writing for the Court, found the first prong of the *Lemon* test satisfied

Court held the statutes at issue unconstitutional because they fostered excessive entanglement between state government and religion.[56] As discussed earlier, the three basic elements comprising the *Lemon* standard were not newly devised in *Lemon*, but developed gradually from the Supreme Court's Establishment Clause decisions.[57]

As evinced by the cases giving rise to the *Lemon* test, history and tradition have played, and continue to play, an integral role in Religion Clause analysis.[58] The Court in *Lemon* acted consistently with this premise by relying on the historical tradition of the practice at issue. In *Lemon*, the Court was disturbed by the innovative nature of the statutes in question and the lack of a historical tradition of the practice the statutes sought to establish.[59] The absence of a historical sanction of the challenged practice buttressed the result dictated by the *Lemon* formula.

While the *Lemon* test contained no requirement of history or tradition in support of the challenged practice, the Court had always looked to historical evidence when deciding Establishment Clause cases. However, the role of the history and tradition of a challenged religious practice rose to new and unexpected heights in *Marsh v. Chambers*.[60] The *Marsh*

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because he accepted the legislature's claim that it intended to promote a secular purpose of nonreligious education. *Id.* at 613. The Court did not reach a precise ruling with respect to whether the program had the primary effect of advancing religion. 403 U.S. at 613-14.

56. *Id.* at 607. The majority held that in assessing the degree of entanglement, three factors were to be considered: (1) the character and purpose of the institution being benefitted; (2) the nature of the aid; and (3) the resulting relationship between government and religious authorities. *Id.* at 615.

The complexity of the excessive entanglement prong of the *Lemon* test has generated a great deal of judicial and scholarly criticism. For the view that this prong leads to inconsistency in Establishment Clause cases and thus should be reformulated see David E. Steinberg, *Alternatives to Entanglement*, 80 KY. L.J. 691 (1991-92).

57. Indeed, the Supreme Court expressly recognized that Lemon was the culmination of past Establishment Clause concepts: "[*Lemon* reflects] the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause." Committee for Public Educ. v. Nyquist, 413 U.S. 756, 773 n.31 (1973), (quoting Tilton v. Richardson, 403 U.S. 672, 677-78 (1971)). *See also* Meek v. Pittenger, 421 U.S. 349, 358 (1975) ("These tests constitute a convenient, accurate distillation of this Court's efforts over the past decades . . . .").

58. The Supreme Court has refused to "construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970) (citing *Everson v. Board of Educ.*, 330 U.S. 1 (1947)). The Court's "interpretation of the Establishment Clause has [consistently] comported with what history reveals was the contemporaneous understanding of its guarantees." Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

59. *Lemon*, 403 U.S. 602, 624-25 (1971).

60. 463 U.S. 783 (1983).

Court flatly ignored the *Lemon* test in deciding an Establishment Clause case, and relied solely upon historical evidence to sustain the religious activity in issue.

### C. *The* Marsh *Decision*

In *Marsh*, the Supreme Court held that a statute which provides for a state-employed, legislative chaplain to give an invocation at the beginning of each legislative session was constitutional.[61] In so holding, the Court did not pretend to apply the three-pronged *Lemon* analysis.[62] Instead, the Justices sustained the practice by applying a test that relied solely on the history and tradition of the legislative prayers at issue.[63] The *Marsh* Court's "history and tradition" test weighed the constitutional concerns surrounding the challenged practice against the historical background and tradition of implementing the practice to determine whether history and tradition could validate the practice.[64] The Court concluded that because the Framers of the Constitution had paid legislative chaplains to open their daily sessions with a prayer, this practice must not be violative of the First Amendment Establishment Clause.[65]

Since the *Lemon* decision was rendered in 1971, *Marsh* marks the only time in the history of the Supreme Court's Establishment Clause jurisprudence in which the Court ignored the *Lemon* framework.[66] The *Marsh* Court, departing from the traditional *Lemon* analysis on the issue of the constitutionality of government sponsored ceremonial invocations, paved the foundation for courts to rely solely on history and tradition as justification for validating invocations at public school graduation ceremonies.[67] After *Marsh*, it became unclear whether the Court was adopting the position that certain practices so solidly and strongly rooted

61. *Marsh*, 463 U.S. at 792-95.

62. *Id.* at 796. "The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause." *Id.* (Brennan, J., dissenting).

63. *Id.* at 786-87. The Court also emphasized that Congress voted in favor of the appointment of a chaplain only three days before it agreed on the final wording of the Bill of Rights. *Id.* at 788. Thus, the implication arises that the Framers of the First Amendment saw no conflict between the proscriptions of that Amendment and the daily observance of prayer at the very seat of government.

64. 463 U.S. at 792-93.

65. The Court reasoned that the Nebraska state legislative prayer at issue must be permissible under the Establishment Clause if analogous prayers were deemed constitutional by the Framers on the federal level. *Id.* at 790-91.

66. Lee v. Weisman, 112 S. Ct. 2649, 2663 n.4 (1992) (Blackmun, J., concurring).

67. *See, e.g.*, Stein v. Plainwell Comm. Sch., 822 F.2d 1406 (6th Cir. 1987).

throughout history should be exempt from the three-pronged *Lemon* test and be sustained on the basis of tradition alone.[68]

Thus, a conflict soon emerged among the lower courts as some courts chose to apply the three-pronged *Lemon* test to the issue of whether invocations and benedictions were permissible at public school ceremonies, while others adopted the *Marsh* test, attempting to sustain graduation prayers through the use of historical evidence alone.[69] Because the lower courts were articulating conflicting views concerning the proper analytical framework that should govern the constitutionality of ceremonial prayer in the public schools, a significant need arose for the Supreme Court to settle the bitter dispute. Unfortunately, *Weisman* proved elliptical on this critical point.

## III. *LEE V. WEISMAN*

*Lee v. Weisman*[70] found its genesis on June 20, 1989, when Rabbi Leslie Gutterman delivered the invocation[71] and benediction[72] at the gradua-

68. TRIBE, *supra* note 13, § 14-2, 115-57 (2d ed. 1988) (discussing the role of history and tradition).

69. The debate over whether the *Marsh* test or the *Lemon* test applies in the public school graduation ceremony setting, as well as whether reference to a deity in graduation prayer is dispositive of the prayer's constitutionality, has generated a plethora of decisions at the state appellate court and federal district court level. Brief for Utah, Idaho, North Dakota, Pennsylvania and Wyoming in support of Petitioner at *5-6, *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (No. 90-1014) (LEXIS, Genfed library, S. Ct. file). Prayer at graduation was upheld in Grossberg v. Deusebio, 380 F.Supp. 285 (E.D.Va. 1974); Wood v. Mt. Lebanon Township Sch. Dist., 342 F.Supp. 1293 (W.D.Pa. 1972); Sands v. Morongo Unified Sch. Dist., 225 Cal.App.3d 1385 (1989); and Wiest v. Mt. Lebanon Township Sch. Dist., 320 A.2d 362 (Pa. 1974). Analogous graduation prayers were invalidated in Lundberg v. West Monona Comm. Sch. Dist., 731 F.Supp. 331 (N.D.Iowa 1989); Kay v. David Douglas Sch. Dist. No. 40, 719 P.2d 875 (Or. 1986).

*See also*, Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989) (applying *Lemon* to invocations before high school football games); Stein v. Plainwell Comm. Sch., 822 F.2d 1406 (6th Cir. 1987) (applying *Marsh* to high school graduation invocations and benedictions to hold that they serve a constitutionally secular purpose); Collins v. Chandler Unified Sch. Dist., 644 F.2d 759 (9th Cir. 1981) (applying *Lemon* to strike down opening prayers recited by a student at voluntary school pep rallies); Berlin v. Okaloosa County Sch. Dist., (N.D. Fla. Mar. 1, 1988) (1988 WL 85937) (applying *Marsh* to invocations before high school football games); Graham v. Central Comm. Sch. Dist., 608 F. Supp. 531 (S.D.Iowa 1985) (applying *Lemon* to high school graduation invocations to hold that they promote a Christian religious purpose); Bennet v. Livermore Unified Sch. Dist., 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987) (applying *Marsh* to high school graduation invocations).

70. 112 S. Ct. 2649 (1992).

71. For his invocation, Rabbi Gutterman prayed as follows:

> 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

tion ceremony at Nathan Bishop Middle School, a public school in Providence, Rhode Island.[73] Daniel Weisman, whose daughter Deborah was among the graduates, filed a lawsuit in federal district court.[74] Weisman contended that the inclusion of the prayers violated the First Amendment.[75]

The district court ruled in favor of Weisman holding that the graduation prayers unconstitutionally advanced religion because they created a close nexus between the school and a deity in violation of the *Lemon* test.[76] In so ruling, the District Court of Rhode Island expressly declined to follow *Stein v. Plainwell Community Schools*.[77] In *Stein*, the

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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.

112 S. Ct. at 2652.

72. For his benediction, Rabbi Gutterman offered the following prayer:

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.

112 S. Ct. at 2653.

73. *Weisman*, 112 S. Ct. at 2652.

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

75. *Weisman*, 112 S. Ct. at 2654. Four days before the ceremony, Daniel Weisman sought a temporary restraining order to prevent the inclusion of an invocation and benediction in the public junior high school graduation ceremony. *Id.* at 2653-54. The district court denied the motion the day before the ceremony, due to a lack of time to consider the motion adequately before the scheduled event. *Id.* at 2654.

After attending the graduation ceremony where the prayers were delivered, Daniel Weisman filed an amended complaint seeking a permanent injunction barring the clergy from delivering invocations and benedictions at future public school graduations in Providence, Rhode Island. *Id.*

76. 728 F. Supp at 68-71. The district court determined that the Rabbi's invocation and benediction failed under the second prong of the *Lemon* test. *Id.* at 71-73. *See supra* notes 51-59 and accompanying text for an in-depth discussion of the *Lemon* test. The second prong of the test addresses whether the challenged practice has as its principal or primary effect the advancement or inhibition of religion. *Lemon*, 403 U.S. at 612-13.

The district court did not reach the inquiries raised by the first and third prongs of the *Lemon* test—whether the practice had a secular purpose and whether it fostered an excessive entanglement with religion. *Weisman*, 728 F. Supp. at 71-75. Violation of any one of the three prongs of the *Lemon* analysis renders the challenged practice unconstitutional. *See supra* note 54 and accompanying text.

77. Stein v. Plainwell Comm. Sch., 822 F.2d 1406 (6th Cir. 1987).

Sixth Circuit ruled that nondenominational invocations and benedictions at public school graduation ceremonies are not per se unconstitutional.[78] The *Stein* court relied upon the *Marsh* history and tradition test[79] and determined that nondenominational prayers mentioning God were deeply rooted in the history of public school graduation ceremonies.[80] The district court in *Weisman* conversely concluded that the *Marsh* decision had only limited application to the unique situation of legislative prayer.[81] The First Circuit Court of Appeals affirmed the district court's decision in a majority opinion that simply adopted the lower court's reasoning.[82]

A bare majority of the members of the Supreme Court agreed with the courts below that members of the clergy could not deliver prayers at public school graduation ceremonies without running afoul of the Establishment Clause.[83] Although five Justices believed the challenged invocation and benediction unconstitutional,[84] they were not unanimous in their reasoning. Coercion was the focal point of the majority's opinion.

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78. *Stein*, 822 F.2d at 1409-10. The Stein majority examined the language of the prayer at issue and concluded that it violated the Establishment Clause under the *Marsh* test. *Id.* at 1410. In sharp contrast to the secular invocation involved in *Marsh*, the prayer in *Stein* impermissibly favored the Christian religion because it "expressly invoke[d] the name of Jesus as the Savior" and " 'symbolically place[d] the government's seal of approval on one religious view.' " 822 F.2d at 1410. Thus, the *Stein* opinion left open the possibility that a secularly worded prayer at graduation would pass constitutional muster under the *Marsh* analysis.

79. For a discussion of *Marsh*, see *supra* notes 60-68 and accompanying text. The *Stein* Court concluded that the invocations and benedictions at issue were governed by the *Marsh* standard because graduation ceremonies were analogous to the legislative and judicial sessions at issue in *Marsh*. *Stein*, 822 F.2d at 1409.

80. *Id.* *Stein* involved graduation exercises at the Plainwell and Portage Central High Schools in Western Michigan. *Id.* at 1407. Invocations and benedictions had been a historical part of the Plainwell High School commencements since 1980, 822 F.2d at 1411 (Wellford, J., dissenting), and a traditional part of the Portage Central High School commencements since 1970. *Id.* at 1407.

The *Stein* Court relied on *Marsh* to conclude that secularized prayer at graduation ceremonies has the legitimate secular purpose of providing solemnity and dignity to the occasion. *Id.* at 1409.

81. *Weisman*, 728 F. Supp. at 73-74. The district court also implicitly noted that Rabbi Gutterman's invocation and benediction might have withstood an Establishment Clause challenge if they had not referred to a deity. *Id.*

82. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990). Judge Bownes' concurring opinion traveled one step farther than that of the majority, finding that the graduation prayer violated all three prongs of the *Lemon* analysis. *Id.* at 1094-95. Judge Bownes elaborated on the purpose and entanglement prongs of the *Lemon* test, which the district court did not address. *Id.* Judge Bownes also stated in dictum that even a prayer not mentioning a Deity violates the Establishment Clause. 908 F.2d at 1097.

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

84. Justice Kennedy delivered the opinion of the Court joined by Justices Blackmun, Stevens, O'Connor and Souter.

Four concurring justices believed that, although the students were coerced into attending their graduation ceremony, coercion was not a necessary element in an Establishment Clause violation.[85]

Justice Kennedy, authoring the majority opinion, ignored the long-standing history and tradition of graduation prayers. Focusing on the special context of public schools, Kennedy held that the historical analysis adopted in *Marsh* upholding daily prayer at legislative sessions[86] did not apply to prayer at public school graduations.[87] Justice Kennedy opined that the earlier teachings of *Engel*[88] and *Schempp*[89] commanded that the Court be particularly vigilant when monitoring public school officials' compliance with the Establishment Clause.[90] Justice Kennedy emphasized that the individuals affected by the challenged prayer in *Marsh* were mature adults in a legislative session who, presumably, were not readily susceptible to religious indoctrination and capable of independent thought.[91] In sharp contrast, Justice Kennedy reasoned that the affected persons in *Weisman* were impressionable young students.

### *A. The Role of State Sponsorship*

Justice Kennedy argued that the challenged prayers superseded the limitations that the Establishment Clause imposed upon government.[92] Cognizant of *Engel*'s mandate that government refrain from engaging in the business of writing or sanctioning official prayers in the classroom,[93] it logically followed that consistency under the *Lemon* framework required prohibition of the school's graduation prayer. Without expressly relying upon *Lemon*,[94] it is clear that Justice Kennedy was suggesting

85. *See infra* notes 113-21 and accompanying text.

86. *See supra* notes 60-68 and accompanying text.

87. *Weisman*, 112 S. Ct. at 2660-61. In his dissent, Scalia argued that history and tradition play a crucial role in determining the constitutionality of graduation prayers. *Id.* at 2678-86. *See infra* subpart III(C).

88. 370 U.S. 421 (1962). *See supra* notes 24-30 and accompanying text.

89. 374 U.S. 203 (1963). *See supra* notes 31-33 and accompanying text.

90. 112 S. Ct. at 2658. "As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id.*

91. *Id.* at 2660-61. Justice Kennedy also noted that it was normal for adults in the legislature to come and go with ease. *Id.* These dynamics were quite different from those of a junior high school graduation ceremony. *Id.*

92. *Id.* at 2655.

93. 370 U.S. 421, 433-36 (1962).

94. Justice Scalia stated that the majority opinion "demonstrates the irrelevance of *Lemon* by essentially ignoring it." *Weisman*, 112 S. Ct. at 2685 (Scalia, J., dissenting).

that the invocation and benediction violated the "excessive entanglement" prong of the *Lemon* analysis, by "creating a state-sponsored and state-directed religious exercise in a public school."[95]

Justice Kennedy emphasized that the school principal's selection of Rabbi Gutterman as the graduation speaker constituted a choice that was directly attributable to the state of Rhode Island.[96] Moreover, evidence of state sponsorship of the prayer was heightened when the principal provided Rabbi Gutterman with a copy of "Guidelines for Civic Occasions" and counseled the Rabbi that the prayers should reflect only nonsectarian beliefs.[97] Although the principal's command to the Rabbi that he compose a neutral prayer reflected a good faith effort to ensure nonsectarianism, Justice Kennedy opined that such subjective intent was irrelevant to the question of the legitimacy of having prayer at graduation ceremonies.[98]

### *B. The Role of Coercion*

The majority next turned its attention toward the coercion element. Justice Kennedy believed that something less than the traditional, direct,

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95. *Weisman*, 112 S. Ct. at 2655 (1992).

96. *Id.* Justice Kennedy opined that the principal's choice of speaker transformed the challenged practice into a state statute decreeing that prayers be recited at graduation. *Id.* Justice Kennedy found it necessary to make this connection because the *Lemon* test was specifically created to deal with the constitutionality of state statutes. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). However, the Court had extended *Lemon* to governmental policies and practices as well as legislative schemes. *See* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) (plurality opinion) (applying *Lemon* to governmental practices); Widmar v. Vincent, 454 U.S. 263, 271 (1981) (applying *Lemon* to governmental policies). Thus, Justice Kennedy had to either analogize the challenged invocation and benediction to a practice or policy, or in the alternative, liken the action to a state statute in order to apply the *Lemon* test.

97. Lee v. Weisman, 112 S. Ct. 2649, 2656 (1992). Justice Kennedy commented that because the principal provided the Rabbi with guidelines:

> [t]hrough these means the principal directed and controlled the content of the prayer. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard.

*Id.*

98. *Id.* Justice Kennedy acknowledged that principal Robert Lee had engaged in a genuine attempt to guarantee that the sectarianism of prayer "which is so often the flashpoint for religious animosity be removed from the graduation ceremony." *Id.* Nonetheless, the school had offended the Constitution because government may not "establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Id.* at 2657. Justice Souter expressed a similar view emphasizing the principle that "the Establishment Clause forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be." *Id.* at 2667 (Souter, J., concurring).

legal coercion triggers an Establishment Clause violation.[99] His focus centered upon indirect, psychological coercion.[100] Justice Kennedy's inquiry concentrated upon whether the challenged graduation prayers operated to "psychologically coerce" the students of Nathan Bishop Middle School to participate in a religious exercise.[101] Justice Kennedy believed that the unique characteristics of the school environment[102] coupled with the youth and impressionability of junior high school students[103] gave rise to heightened concerns that psychological or socially coercive pressures existed.[104]

In examining the potential for coercion, the *Weisman* Court focused specifically upon the dynamics of the graduation ceremony itself as a vehicle for religious compulsion.[105] When Rabbi Gutterman stood to deliver the invocation, Justice Kennedy feared that a student would be left with no meaningful choice but to rise from his or her seat and stand respectfully in silence in conformity with teachers and fellow students.[106]

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99. 112 S. Ct. at 2658-60. *See infra* notes 122-27 and accompanying text for Justice Scalia's views on the role of direct, legal coercion.

100. *Id.* at 2658. *See infra* notes 101-12 and accompanying text.

101. 112 S. Ct. at 2658. *Cf.* Engel v. Vitale, 370 U.S. 421 (1962). For a discussion of *Engel*, see *supra* notes 24-30 and accompanying text. "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Engel*, 370 U.S. at 430.

102. *See generally*, Malcolm Stewart, *The First Amendment, The Public Schools, and the Inculcation of Community Values*, 18 J. L. & EDUC. 23 (1989). The school house atmosphere has been deemed inherently special because of its inculcative function, highly sensitive and impressionable youthful composition, physically confining setting, and the demands of the educational mission. Bethel v. Fraser, 478 U.S. 675 (1986) (justifying restrictions on student speech that would not be justifiable for adults in non-school settings).

103. The Court has consistently recognized that the inherent immaturity and inexperience of young, school-age children will often justify their special protection. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978) (holding that George Carlin's vulgar monologue, which had been aired on public radio, was without First Amendment free speech protection because of the broadcasting's unique accessibility to children). "[T]he government's interest in the 'well-being of its youth' . . . justified the regulation of otherwise protected expression." *Id.* at 749.

104. "Our decisions . . . recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there." Lee v. Weisman, 112 S. Ct. at 2658.

105. *Id.* at 2658-61.

106. *Id.* Kennedy noted that in the American culture, standing and remaining silent for a speech or prayer can signify different feelings; adherence to the views espoused or mere respect for the views of others. *Id.*

> But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation,

In this fashion, students attending the graduation ceremony were forced to succumb to public pressure as well as peer pressure which, however "subtle and indirect, can be as real as any overt compulsion."[107] Although mature adults might be able to avoid yielding to such pressures of conformity, Justice Kennedy refused to require the same of primary and secondary school children.[108]

Justice Kennedy, rebuking the claims of the principal and school that graduation was not a mandatory event,[109] determined that potential psychological coercion became real psychological coercion because the inherent importance of a graduation ceremony compels students to attend, transforming graduation into an involuntary activity.[110] Commencement is an impressive and memorable occasion in virtually every school in the Nation. It represents the achievement of a goal that students, their parents, friends and teachers have worked long and hard to attain.[111] Jus-

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the act of standing or remaining silent was an expression of participation in the Rabbi's prayer.

*Id.*

107. *Id.* at 2658. Justice Kennedy believed that a student could not choose to remain seated, because of the obvious peer pressures placed on the student. *Id.*

108. 112 S. Ct. at 2659. The Court has continued to recognize that young school-aged children are more susceptible than adults to religious messages. "We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children . . . [because] the government's activities in this area can have a magnified impact on impressionable young minds. . . ." Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 383 (1985). *See also* Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools . . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.").

109. The principal and school argued that, because students were free to choose whether or not to attend the graduation ceremony, there was no coercion to participate in the religious prayers recited at the ceremony. *Weisman*, 112 S. Ct. at 2659. Unlike the classroom prayer situation in Engel v. Vitale, 370 U.S. 421 (1962), where school attendance was mandatory thus forcing students to be present for morning prayer or suffer embarrassment when choosing not to participate in the morning prayer, students at Nathan Bishop Middle School had the luxury of staying away from the graduation ceremony altogether. Brief for the Petitioner at *31, *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (No. 90-1014) (LEXIS, Genfed library, S. Ct. file).

110. *Id.* at 2659.

> Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary'.

*Id.*

111. *Id.* "Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young

tice Kennedy believed that graduation could not reasonably be deemed "voluntary" in any real sense of the word because students' absence from graduation would require forfeiture of those intangible benefits which motivate students throughout their youth and all their high school years.[112]

Justice Kennedy's focus on the indirect coercive effects of the graduation prayer on the school's students[113] prompted Justice Blackmun to write a separate concurring opinion. In his concurrence, Justice Blackmun expressed the view that government coercion of religious conformity was not a necessary element of an Establishment Clause violation.[114] Justice Blackmun traced the Court's Establishment Clause decisions to demonstrate that historically, Establishment Clause violations consistently were found absent any government compulsion of religious participation.[115] Justice Blackmun, concluding that the school had actively promoted the Rabbi's commencement prayer, would have rested the Court's finding of a constitutional violation on the government's endorsement of a religious practice.[116] While agreeing with Justice Kennedy that the school had indirectly coerced the students into participating in a religious exercise, Blackmun viewed the value of coercion as an indicia of the government's endorsement of religion.[117]

Justice Souter also parted company with the majority on the issue of coercion as a necessary component of an Establishment Clause violation.[118] Justice Souter believed that Justice Kennedy's psychology-of-co-

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person the role that it is his or her right and duty to assume in the community and all of its diverse parts." *Id.*

112. *Id.* The principal and school recognized that graduates had a strong desire to attend their graduation ceremony, but contended that such a desire could not be said to rise to the level of government compulsion to attend the commencement exercise. Brief for the Petitioner at *31, *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (No. 90-1014) (LEXIS, Genfed library, S. Ct. file).

113. *See supra* notes 99-112 and accompanying text.

114. Justice Blackmun was joined by Justices Stevens and O'Connor.

For the view that the Framers of the First Amendment intended only to protect against government coercion of religious conformity see M. McConnell, *The Origins of the Religion Clauses of the Constitution: Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

115. *Weisman*, 112 S. Ct. at 2664-67 (1992) ("The Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion."). This premise was articulated in Comm. for Public Ed. v. Nyquist, 413 U.S. 756, 786 (1973), where the Court stated that "proof of coercion is not a necessary element of any claim under the Establishment Clause." *Id.*

116. 112 S. Ct. at 2664.

117. *Id.* Justice Blackmun noted that "[g]overnment pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion." *Id.*

118. Justice Souter's concurring opinion was joined by Justices Stevens and O'Connor.

ercion test blurred the line the Court had consistently drawn between asserted Free Exercise Clause violations, in which coercion is a factor appropriately considered, and Establishment Clause violations, which reach beyond a prohibition of government coercion.[119] Justice Souter held that to require government coercion, even Justice Kennedy's indirect, psychological coercion, of religious participation in an Establishment Clause violation, would make the Free Exercise Clause a redundancy.[120] Moreover, an analysis based upon coercion would undermine Establishment Clause values recognized in longstanding precedent.[121]

The majority's view of what constituted "coercion" encompassed a wider array of governmental actions than did the dissent's. In his dissent, Justice Scalia was deeply troubled by the Court's decision to "invent[ ] a boundless, and boundlessly manipulable test of psychological coercion."[122] Scalia defined "coercion" in its traditional sense as a legal compulsion carrying the "threat of penalty" or "force of law".[123] He did not agree that social or psychological coercion triggered an Establishment Clause violation. Applying a legal definition of coercion, Scalia concluded that the majority's result in *Weisman* did not follow. Justice Scalia reasoned that the students were not legally compelled to attend graduation or participate in the Rabbi's prayers, nor would they suffer a

119. *Weisman*, 112 S. Ct. at 2667. "The distinction between the two [Religion] Clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Id.* at 2673 (quoting School Dist. of Abington v. Schempp, 374 U.S. 203, 223 (1963)).

120. 112 S. Ct. at 2672-73. Justice Souter rejected the newly formulated coercion test as running afoul of both precedent and the text and structure of the Establishment Clause itself. *Id.* at 2671-76.

*See also* Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986). Professor Laycock asserted that because the Framers wrote two Religion Clauses into the First Amendment, it is unlikely that the two clauses would have the exactly the same meaning. *Id.* at 922-23. "If coercion is also an element of the Establishment Clause, establishment adds nothing to free exercise." *Id.* at 922.

121. The Court stated in Engel v. Vitale, 370 U.S. 421, 430 (1962), that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce the nonobserving individuals or not." Recently, the Court reiterated that "this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis." County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 628 (1989) (O'Connor, J., concurring). Justice Souter expressed the appropriate legal analysis to be one devoid of coercion where "the state may not favor or endorse either religion generally over nonreligion or one religion over others." *Weisman*, 112 S. Ct. at 2676 (Souter, J., concurring).

122. 112 S. Ct. at 2679 (Scalia, J., dissenting).

123. *Id.* at 2683.

penalty if they chose to abstain.[124]

The dissent reprimanded the majority for parading as psychologists and cautioned the Justices against basing their decision on a "few citations of 'research in psychology' " that showed the susceptibility of adolescents to coercion.[125] Even assuming arguendo that psychological coercion was a necessary element in an Establishment Clause violation, Justice Scalia concluded that those students attending the graduation ceremony were not psychologically "coerced" in the real sense of the word "coercion."[126] Scalia found the Court's "psycho-coercism" unpersuasive.[127]

### C. *The Role of History and Tradition*

For Justice Scalia, the role of history and tradition, not the presence or absence of coercion (legal or psychological), was the dispositive factor. Yet, *Lee v. Weisman* was totally devoid of any mention of history and tradition. In his acerbic dissent,[128] Justice Scalia embraced the *Marsh* test of looking to the historical tradition supporting the challenged practice.[129] The dissent sharply criticized the majority's failure to consider adequately the history and tradition of invocations and benedictions in American public ceremonies.[130] Scalia observed that "a page of history is worth a volume of logic,"[131] and yet the Court's opinion was "conspicuously bereft of any reference to history."[132]

Scalia opined that public prayers at civil ceremonies have been a fixture of America's life and heritage since the Nation's inception and were not the type of activity that the Framers intended the Establishment

124. *Id.* at 2684. Justice Scalia contrasted *Weisman* with West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 629-30 (1943) (regarding a law that mandated that schoolchildren recite the Pledge of Allegiance or else face expulsion).

125. *Weisman*, 112 S. Ct. at 2681 (Scalia, J., dissenting).

126. *Id.* at 2684.

127. *Id.* at 2683.

128. Justice Scalia referred to Justice Kennedy's majority opinion as a "lamentable decision" and a "jurisprudential disaster." *Id.* at 2685. Justice Scalia opined that "depriv[ing] our society of that important unifying mechanism [nondenominational prayer] . . . is as senseless in policy as it is unsupported in law." *Id.* at 2686.

129. *Id.* at 2678-81. Justice Scalia was joined by the Chief Justice and Justices White and Thomas.

130. *Weisman*, 112 S. Ct. at 2678-79.

131. 112 S. Ct. at 2679 (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

132. *Weisman*, 112 S. Ct. at 2678.

Clause to forbid.[133] To the contrary, the Founders uniformly welcomed and encouraged public ceremonial prayers and appeals for guidance to the "Almighty."[134] Justice Scalia was particularly impressed by the notion that virtually every president has adhered to the tradition of giving "Thanksgiving Proclamations" praying gratitude to God.[135]

Justice Scalia observed that it is significant that the *Weisman* opinion ignores history and tradition.[136] The Court refused to consider the long-

133. *Id.* at 2678-79. "[T]he Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally." *Id.* at 2679.

134. *Id.* at 2679. Justice Scalia pointed to the Declaration of Independence as an example of an official ceremonial expression of a religious belief by the Founders which "appeal[ed] to the Supreme Judge of the world, [God]" and relied upon "the protection of divine Providence." 112 S. Ct. at 2679. The dissent also noted that George Washington began the longstanding tradition of opening presidential inaugural ceremonies with prayer in his first inaugural address, seeking the blessings of God, "that Almighty Being." *Id.* Justice Scalia also noted that Thomas Jefferson prayed in his first inaugural address to the "Infinite Power which rules the destinies of the universe . . . ." *Id.* at 2680. More recently, former President Bush included in his first inaugural address statements of religious sentiment and appeals for God's assistance. *Id.*

Presidents are also constitutionally required to take the Presidential oath upon the Bible. Article II of the Constitution provides:

> Before he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

U.S. CONST. art. II, § 1, cl. 8. The clause represents a sacred vow. Brief for United States at *11, Lee v. Weisman, 112 S. Ct. 2649 (1992) (No. 90-1014) (LEXIS, Genfed library S. Ct. file). So too are jurors and witnesses participating and serving in the court system required to swear upon the Bible and take oaths under "those solemn obligations which appeal to the God of Truth impose." *Id.*

135. *Id.* at 2680. Justice Scalia observed that ceremonial references to God had been adopted by the legislative and judicial branches of government as well. *Id.* As early as 1774, the first Continental Congress opened with a prayer. Lynch v. Donnelly, 465 U.S. 668, 673-74 (1984). After the framing of the Constitution, and "[i]n the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid Chaplains for the House and the Senate." 465 U.S. at 674.

The federal judiciary has encouraged religious proclamations within its tribunals. The Supreme Court's own sessions have been opened with the invocation "God save the United States and this Honorable Court" since as early as the court of Chief Justice Marshall. *Weisman*, 112 S. Ct. at 2680 (citing WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 469 (1922)). Prayer as an opening to circuit court became a routine occurrence. Brief for United States at *11, *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (No. 90-1014) (LEXIS, Genfed library S. Ct. file).

It has been considered significant that Thomas Jefferson, regarded as one of the strictest advocates for separation of church and state, expressed a divine blessing during his second inaugural address. Brief for United States at *9, *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (No. 90-1014) (LEXIS, Genfed library S. Ct. file).

136. *See supra* notes 128-135. Only Justice Souter's concurring opinion addresses the history

standing history and tradition of allowing invocations and benedictions at public high school graduation ceremonies[137] or to consider other traditional acknowledgments of religion at public ceremonies.[138] Scalia clearly found that the requisite historical sources were present to support the challenged practice in *Weisman*.

## IV. IMPACT OF *LEE V. WEISMAN*

On a fundamental level, *Lee v. Weisman* presented the opportunity for the Court to end the confusion existing in the very volatile and divisive area of Establishment Clause jurisprudence. However, instead of providing clarity, the Court further clouded the difficult First Amendment issues raised by prayer at public high school ceremonies. It is quite apparent from *Weisman* that a majority of the Court have signaled a retreat from the longstanding history and tradition formula when dealing with the public school context. It may be that the presence of governmental coercion overrides any showing that the practice is strongly rooted in history and tradition.

Moreover, the Court's decision to ignore the *Lemon* test is particularly significant in light of the Court's failure to address the impressive histori-

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and tradition of religious prayers at public ceremonies. *Weisman*, 112 S. Ct. at 2668-70 (Souter, J., concurring). Even after meticulously perusing the Framers' intent and the history of their religious activity, Justice Souter concluded that "since there is no conclusive evidence to the contrary, . . . on balance, history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for" preferential as well as nonpreferential religion. *Weisman*, 112 S. Ct. at 2670 (Souter, J., concurring). *See* Jeffrey Rosen, *The New Republic*, January 18, 1993, at 20.

Rosen, *The New Republic*, *supra*, also notes the inconsistent position Scalia takes in his adherence to history and tradition in *Weisman*. There is an inherent tension between such a use of extrinsic evidence to buttress his claim that religious prayer at civic ceremonies is rooted in the Framers' past when one examines Justice Scalia's reluctance to consult extrinsic evidence of Congress' intent when engaging in statutory interpretation. Scalia is well known for his position that extrinsic evidence is unreliable for shedding any light on Congress' legislative intent. *See, e.g.*, Blanchard v. Bergerson, 498 U.S. 87 (1989). It seems that Justice Scalia arbitrarily invokes extrinsic evidence of the Framers' intentions with respect to interpreting the Constitution when it suits his purpose.

137. Public education had its origin in religious schools. It is thus not surprising that it is from churches that schools have inherited the traditional graduation ceremony itself. In 1642, the first graduation took place at the well-known Ivy League School, Harvard University. That graduation included a prayer given by the President of the University. When commencement exercises made their way into the high school setting in the 1800s, the high schools mirrored their graduation ceremonies after the colleges and universities, which included a religious prayer. Brief of the State of Delaware in Support of Petitioners, at *10, Lee v. Weisman, 112 S. Ct. 2649 (1992) (No. 90-1014) (LEXIS, Genfed library S. Ct. file) (citing A. FINK, EVALUATION OF COMMENCEMENT PRACTICES IN AMERICAN PUBLIC SECONDARY SCHOOLS 24 (1940)). *See also supra* note 1.

138. *See supra* notes 134-135.

cal and traditional evidence supporting prayer at graduation and civic ceremonies. Throughout the evolution of church and state jurisprudence, the Court has emphasized the history and tradition of the challenged practice as evidence within the context of the *Lemon* framework. Additionally, the use of historical evidence has provided the underlying structure for the three prongs of the *Lemon* test. The Court has often utilized the history and tradition of a challenged practice to show that it involved no significant danger of raising a religious purpose, effect or an entanglement of government and religion. Yet in *Weisman*, the existence of substantial historical approval of the challenged graduation prayers was not used to support the result that the Court reached. Thus, it is possible that the Court strategically chose to abandon its usual reliance on history and tradition in order to avoid having to reconsider the proper role of *Lemon* in Establishment Clause jurisprudence when the *Lemon* test yields a result in conflict with a strong showing of history and tradition.

By ignoring the role of history and tradition in Establishment Clause analysis, disregarding the *Lemon* framework and utilizing a new coercion test, the plurality leaves uncertain the applicability of the *Lemon* test in all Establishment Clause cases. The Court has expressed, in the past, an "unwillingness to be confined to any single test or criterion" in the sensitive area of church and state.[139] Only further litigation will determine whether the existence or absence of governmental coercion is now the determinative element in Establishment Clause disputes, supplanting history and tradition and the *Lemon* analysis—or whether coercion is only one factor to consider in addition to these other well-settled principles.

On a more specific level, *Lee v. Weisman* leaves many questions unanswered. In its most narrow terms, *Weisman* effectively outlaws all prayer at public school graduation ceremonies. But the ruling does not go so far as to outlaw all prayer in other public school settings. In *Weisman*, Justice Kennedy took pains to emphasize that the school's act of selecting the Rabbi to speak at graduation was tantamount to state sponsorship and endorsement of prayer.[140] Thus, the Court leaves open the possibility that student selection of a graduation speaker to deliver prayer is permissible. Similarly, the Court leaves open the question whether stu-

139. *Lynch*, 465 U.S. at 679.

140. *See supra* notes 92-98 and accompanying text.

dent volunteers, themselves, could deliver a nondenominational prayer at a graduation ceremony.[141] Because of the absence of direct involvement on the part of school officials, both of these cases would be distinguishable from *Weisman*, and would differ greatly from the active participation of the school principal in *Weisman*.[142] Therefore, *Weisman* may not impose an absolute barrier to student-initiated prayers, unsupervised by school officials.

Significantly, the particular invocations and benedictions at issue in *Weisman* expressly mentioned a deity.[143] Thus, *Weisman* on its facts does not proscribe all prayers, regardless of their content. A graduation prayer that did not include the word "God," might withstand Establishment Clause scrutiny.[144] In addition, the Court's opinion did not address whether public school ceremonies that carry less importance than a graduation ceremony may contain a school prayer. The *Weisman* Court found graduation to play such a significant part of a student's life as to render it mandatory.[145] The members of the Court would clearly ban school prayer at a school function for which students feel pressure or coercion to attend; but perhaps the Court would find school prayer less offensive in a more innocuous school activity such as a high school football game.

As this Recent Development has shown, the Court has a long history of disallowing any form of organized religion in public schools. Given this predisposition, it is likely that the current Court would hold any type of prayer at a public school ceremony to be a constitutional infirmity.

*Amy Louise Weinhaus*

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141. *Weisman,* 112 S. Ct. at 2661. Justice Kennedy stated that this case dealt only with "whether a religious exercise may be conducted at a graduation ceremony." *Id.* Therefore, the question remains unanswered whether a non-denominational prayer, not delivered by a member of the clergy, may be constitutionally allowed at public school graduations.

142. Stein v. Plainwell Comm. Sch., 822 F.2d 1406 (6th Cir. 1987), involved both scenarios of student-organized graduation prayers. The Sixth Circuit found the content of the prayers unconstitutional because they impermissibly favored Christian theology. *Id.* at 1410.

143. *See supra* notes 71-72.

144. The district court in *Weisman* edited the challenged invocation and benediction to provide a model prayer that would pass constitutional muster. *Weisman v. Lee*, 728 F. Supp. 68, 74 n.10. The edited version merely deleted all express and implied references to "God."

145. *See supra* notes 109-12 and accompanying text.