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# The Progeny of *Lee v. Weisman*: Can Student-Invited Prayer at Public School Graduations Still be Constitutional?

Thomas A. Schweitzer\*

## I. INTRODUCTION

Over thirty years ago, the United States Supreme Court ended the American practice<sup>1</sup> of reciting prayers in public schools, holding that this violated the Establishment Clause of the First Amendment.<sup>2</sup> Just three years ago in *Lee v. Weisman*<sup>3</sup> the Court held that a prayer led by a rabbi who was invited by public school authorities to pray at a public school's graduation was also unconstitutional.

After *Lee*, numerous observers concluded that the Court had outlawed any form of prayer at public school graduations.<sup>4</sup> Nevertheless, several courts have allowed prayer to survive a constitutional challenge under certain situations. Prayers in public school graduations have been found constitutional if they are: (1) requested by the graduating students rather than by school authorities, and (2) if they are delivered by students.<sup>5</sup>

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1. While our system of free public schools originated in the mid-19th century, the tradition of prayer in schools dates back to the 17th century.

2. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); see U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

3. *Lee v. Weisman*, 112 S. Ct. 2649 (1992); see Dina F. El-Sayed, *What Is the Court Trying to Establish?: An Analysis of Lee v. Weisman*, 21 HASTINGS CONST. L.Q. 441 (1994); Marilyn Perrin, *Lee v. Weisman: Unanswered Prayers*, 21 PEPP. L. REV. 207 (1994); Thomas A. Schweitzer, *Lee v. Weisman: Whither the Establishment Clause and the Lemon v. Kurtzman Three-Pronged Test?*, 9 TOURO L. REV. 401 (1993).

4. See *Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993); Christina E. Martin, *Student-Initiated Religious Expression after Mergens and Weisman*, 61 U. CHI. L. REV. 1565 (1994); Henry J. Reske, *Graduation Prayers, Part II*, A.B.A. J., July 1993, at 14, 16.

5. *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991) *vacated and remanded for reconsideration in light of Lee v. Weisman*, 112 S. Ct. 3020 (1992), *on remand*, 977 F.2d 963, (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 864 F. Supp. 1473, 1479, 1488 (S.D. Miss. 1994) (supporting a broad statute

This article will first discuss the *Lee v. Weisman* holding. Second, it will examine the holdings of courts that have ruled on school prayer cases arising after *Lee*. Finally, this article will analyze whether the "student-initiated exception" to *Lee* is consistent with the First Amendment.

## II. *LEE V. WEISMAN*

As proponents of the exception for student-initiated graduation prayers have pointed out, the Supreme Court in *Lee v. Weisman* did not proscribe public school graduation prayers per se.<sup>6</sup> Rather, the Court narrowly tailored its decision to the facts of the case and emphasized the pervasive government involvement in planning and preparing for graduation prayers. Thus, given what appears to be a narrow ruling, it is not impossible to argue that graduation prayers in different circumstances may still be constitutional.

The 1992 *Lee* decision originated when Daniel Weisman, a Jew, was offended during the middle school graduation of his daughter because the Baptist minister that gave the invocation and benediction asked the audience to stand for a moment of silence to give thanks to Jesus Christ. Three years later, when Mr. Weisman's younger daughter Deborah was to graduate from the same school, he asked the middle school's principal to eliminate the graduation prayers.<sup>7</sup> The principal refused to conduct the ceremony without prayer but attempted to placate Weisman by asking a rabbi to deliver the invocation and benediction at that year's graduation.<sup>8</sup> Pursuant to school district policy, the invited rabbi was given a set of "Guidelines for Civic Occasions" concerning public prayers at

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permitting "nonproselytizing student-initiated voluntary prayer" during a variety of "school-related student events" enjoined except for high school graduation or commencement ceremonies following *Jones*); *Adler v. Duval County Sch. Bd.*, 851 F. Supp. 446 (M.D. Fla. 1994); *Harris v. Joint Sch. Dist. No. 241*, 821 F. Supp. 638 (D. Idaho 1993), *aff'd in part and denied in part*, 41 F.3d 447 (9th Cir. 1994); *see also Harris*, 41 F.3d at 459 (Wright, J., dissenting in pertinent part).

Other courts appear to believe that *Lee* contains no exception even for prayers at public school graduations requested, written, and delivered by students. *Harris*, 41 F.3d 447; *ACLU of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, Civ. No. 93-5368 (3d Cir. filed Jun. 25, 1993); *Gearon*, 844 F. Supp. at 1097.

6. As one court noted, "The Court had the opportunity in *Lee* to ban all prayer at graduation ceremonies. Rather than focus upon and, indeed, emphasize the need for fact sensitivity, the Court could have stated that *any* prayer at public high school graduation ceremonies violates the Constitution under *any* circumstances. It did not do so. Or, the Court could have required that separate baccalaureate services be held in lieu of including invocations and/or benedictions in official graduation ceremonies. Again, the Court declined to so hold." *Adler*, 851 F. Supp. at 456.

7. *Lee*, 112 S. Ct. at 2652.

8. *Id.*

nonsectarian civic ceremonies and was advised that his invocation and benediction should be nonsectarian.<sup>9</sup>

Despite these steps taken by the school district to have a nonsectarian prayer, the Supreme Court affirmed the decisions of the lower courts and struck down the school's graduation prayers. Justice Kennedy, writing for the 5-4 majority, argued that "[t]he government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."<sup>10</sup> Thus characterized, the prayers plainly conflicted with basic First Amendment principles of separation of church and state.<sup>11</sup>

### III. *JONES V. CLEAR CREEK INDEPENDENT SCHOOL DISTRICT*

The facts of *Jones v. Clear Creek Independent School District*<sup>12</sup> were quite different from those in *Lee*. In *Jones*, high school senior Pamela Jones and other graduating seniors sued to enjoin invocations and

9. *Id.*; see Thomas A. Schweitzer, *Lee v. Weisman and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable?*, 69 U. DET. MERCY L. REV., 113, 119-21 (1992).

10. *Lee*, 112 S. Ct. at 2655. Justice Kennedy also concluded that "the principal directed and controlled the content of the prayer," *id.* at 2656, and that the students attending the graduation ceremony were subject to subtle "coercive pressure" from both the public and their peers to participate in the rabbi's prayers, *id.* at 2658. But to state that the school principal "controlled the content" of the rabbi's prayers is a considerable exaggeration as the rabbi never submitted the prayer texts to the principal or anyone else for review before praying. See *id.* at 2658.

There is also considerable question regarding the degree of "coercion" that existed for the students to "participate" in the rabbi's prayers. Justice Kennedy conceded that the significance of the act of standing for prayer is ambiguous; he acknowledged this can represent adherence to a view or simple respect for the views of others. *Id.*

Justice Scalia caustically attacked the majority's "boundless, and boundlessly manipulable, test of psychological coercion." *Id.* at 2679 (Scalia, J., dissenting). Others have similarly questioned the validity of the Court's social science conclusions. See, e.g., Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science*, 37 VILL. L. REV. 1569, 1603-04 (1992) (agreeing with Justice Scalia and criticizing the Supreme Court's selective use of psychological research in its "coercion" analysis in *Lee*); Scott V. Carroll, Note, *Lee v. Weisman: Amateur Psychology or an Accurate Representation of Adolescent Development? How Should Courts Evaluate Psychological Evidence?*, 10 J. CONTEMP. HEALTH L. & POL'Y 513 (1994).

11. See, e.g., *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 591 (1989); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Engel v. Vitale*, 370 U.S. 421, 425 (1962) ("It is not 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."); *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947); see also *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

12. *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991).

benedictions which contained overt Christian references.<sup>13</sup> These prayers had traditionally been included in their high school's graduation ceremonies.<sup>14</sup>

Three weeks before the trial was to commence, however, the school district's Board of Trustees adopted a resolution specifying that the decision whether to include the prayers in the graduation ceremonies was up to the students and that, in any event, the prayers were to be "nonsectarian and nonproselytizing in nature."<sup>15</sup> Applying the familiar three-pronged Establishment Clause test from *Lemon v. Kurtzman*,<sup>16</sup> the Fifth Circuit concluded that the resolution satisfied all three prongs: (1) The Board's resolution was said to have had the "secular purpose" of "solemnizing"<sup>17</sup> the graduation occasion; (2) its primary effect was not to advance religion (because the graduating students affected were almost

13. *Id.* at 417.

14. *Id.*

15. The resolution was drafted by the district's counsel to conform with Judge Merritt's opinion in *Stein v. Plainwell Community Schs.*, 822 F.2d 1406, 1409 (6th Cir. 1987). The resolution provided:

1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
2. The invocation and benediction, if used, shall be given by a student volunteer; and
3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

*Jones*, 930 F.2d at 417.

16. 403 U.S. 602 (1971). While Justices Ginsberg and Breyer have not yet expressed opinions discussing the *Lemon* test, at least five of the other Supreme Court Justices have expressed either outright opposition to the test, *see, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("pessimistic evaluation" of *Lemon*); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141, 2150 (1993) (Scalia, J., joined by Thomas, J., concurring in the judgment); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (*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."); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 656 (Kennedy, J., concurring in judgment in part and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order."), or argued that it needs revision, *see, e.g.*, *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (voicing "doubts about the entanglement test"). In *Lee*, Justice Kennedy advanced his agenda by ignoring *Lemon* and relying instead on the "coercion test" which he wants the Court to adopt. *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992).

For a look at a recent case construing modern Establishment jurisprudence in another context, *see generally* Scott S. Thomas, Note, *Beyond a Sour Lemon: A Look at Grumet v. Board of Education of the Kiryas Joel Village School District*, 8 B.Y.U. J. Pub. L. 531 (1994).

17. Justice O'Connor first suggested the justification of religious public ceremonies in *Lynch v. Donnelly*, 465 U.S. 668 (1984): "[G]overnment acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purpose . . . of solemnizing public occasions." *Id.* at 693 (O'Connor, J., concurring in the judgment).

adults and were consequently mature and not impressionable concerning any religious influences of the prayers); and (3) the fact that the prayers were written and presented by student volunteers eliminated the risk of excessive entanglement, notwithstanding the fact that once a year the senior class principal was called upon to “pre-screen” the proposed invocations for sectarianism and proselytization.<sup>18</sup>

Surprisingly, after the Supreme Court vacated and remanded *Jones* for reconsideration in light of its decision in *Lee*, the Fifth Circuit again reached its initial holding. Following that holding, the Supreme Court denied plaintiffs’ petition for certiorari.<sup>19</sup> The Fifth Circuit panel again concluded that the graduation prayers did not violate any of the three prongs of the *Lemon* test, but went on to scrutinize the prayers under the “endorsement test”<sup>20</sup> and the *Lee* “coercion test.” The court concluded that “endorsement” of religion was absent since the resolution did not mandate an invocation but merely permitted one if the students so chose.<sup>21</sup> In addition, the Fifth Circuit found that the “coercion” which required the proscription of the prayers in *Lee* was absent in *Jones* since the resolution expressly required that the state government not decide whether prayers would occur, leaving that decision to the graduating students. The resolution also precluded anyone but a student volunteer not chosen by government officials from offering the prayers, thereby ensuring a different person each year and avoiding use of the same clergyman. Finally, the resolution only specified that the prayers be “nonsectarian and non-proselytizing,” unlike the detailed guidelines provided to the rabbi by the principal.<sup>22</sup>

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18. *Jones*, 930 F.2d at 419-23.

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

20. Justice O’Connor proposed the “endorsement” test for Establishment Clause violations in *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985):

The Establishment Clause is infringed when the government makes adherence to religion relevant to a person’s standing in the political community. Direct governmental action endorsing religion or a particular religious practice is invalid under this approach because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

*Id.* (O’Connor, J., concurring) (citations omitted).

21. See *Jones*, 977 F.2d at 968-69.

22. *Id.* at 969-71. The court further concluded that there was less danger of impermissible psychological pressure to participate in the prayers in *Jones* than in *Lee*:

We think that the graduation prayers permitted by the Resolution place less psychological pressure on students than the prayers at issue in *Lee* because all students, *after having participated in the decision of whether prayers will be given*, are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy.

*Id.* at 971.

IV. *HARRIS v. JOINT SCHOOL DISTRICT No. 241*

The central issue in *Jones*—whether an Establishment Clause violation can be avoided when students vote to have graduation prayers and deliver the prayers themselves—reappeared again in an appellate court decision.<sup>23</sup> While the Idaho federal district court in *Harris v. Joint School District No. 241* relied on *Jones*,<sup>24</sup> the Ninth Circuit rejected its approach and struck down the graduation prayers at issue.<sup>25</sup>

High school graduation programs in Idaho School District 241 had sometimes included invocations and benedictions, and the Grangeville High School senior class voted to have a student give an invocation and benediction at its graduation.<sup>26</sup> Phyllis Harris, the mother of three children who attended school in the district, sued in 1991 to enjoin this practice.<sup>27</sup>

In this case the school district superintendent had instructed all principals in the district to let graduating seniors vote whether they wanted prayers at their graduation ceremonies.<sup>28</sup> The superintendent's

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23. *Harris v. Joint Sch. Dist. No. 241*, 821 F. Supp. 638 (D. Idaho 1993), *aff'd in part and denied in part*, 41 F.3d 447 (9th Cir. 1994).

24. *Harris*, 821 F. Supp. at 638.

25. *Harris*, 41 F.3d at 447.

26. *Harris*, 821 F. Supp. at 641.

27. Robert L. Phillips, *The Constitutionality of High School Graduation Prayers under Harris v. School District No. 241*, 8 B.Y.U. J. PUB. L. 491, 504-05 (1994). The district court denied plaintiffs' motion for a preliminary injunction and deferred ruling on motions for summary judgment by the plaintiffs and intervenor by the defendants pending the Supreme Court's decision in *Lee*. *Harris*, 821 F. Supp. at 638. Harris was subsequently "administratively terminated" and was reopened with further discovery and briefs by the parties after the Supreme Court's June 24, 1992 decision. *Id.*

28. The superintendent sent the following memorandum to the principals of District 241:

I just want to make sure we are all doing the same thing for Invocation and Benediction at graduation. The school board is permitting Invocation and Benediction at graduation and not requiring Invocation and Benediction at graduation. These are the guidelines I want you to follow:

1. Let the senior students vote on whether they do or don't want Invocation and Benediction at graduation.
2. If the answer is yes, then they should vote on whether they want a minister or a student to say the Invocation and Benediction.
3. If the students vote for a minister, then the students should vote on which minister they want to say the Invocation and Benediction.
4. If the students vote for students to say the Invocation and Benediction, you may want to have the 3rd and 4th students in GPA do this. Make everything an option and let the students vote. We will dictate nothing to the students. If a student does not want to go to graduation, I would not force the issue. Give him/her the diploma after the graduation exercise.

*Harris*, 821 F. Supp. at 641-42 n.7. The school district informed the court that the superintendent's memorandum did not change prior practice but merely reaffirmed the school

guidelines put this choice entirely up to the students.<sup>29</sup> While it had earlier deferred ruling on the pending motions for summary judgment pending the Supreme Court decision, the court emphasized that the Supreme Court's ruling was heavily fact-dependent and did little to resolve the issues in *Harris*.<sup>30</sup>

However, the court concluded that "the Supreme Court is willing to tolerate some prayer at graduation ceremonies"<sup>31</sup> because it had passed up two opportunities to impose a blanket ban on such prayers.<sup>32</sup> The key fact in *Harris*, unlike *Jones*, was that the senior graduating students themselves, rather than faculty or administrators, determined every element of the graduation and "the record demonstrat[ed] that faculty and administrators [had] little or no involvement in that process."<sup>33</sup> Accordingly, the court concluded that "the practice of allowing students to determine whether or not to include prayer in their graduation ceremonies does not violate the Establishment Clause."<sup>34</sup>

On appeal, the Ninth Circuit totally rejected the reasoning of the district court and of *Jones*, on which the district court had relied.<sup>35</sup> In

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district's neutrality on the issue. The only change in the district's practice from that of the preceding fifteen years was to supply students with written ballots and to insert in the graduation programs a disclaimer stating that School District 241 "neither promotes nor endorses any statements made by any person involved in the graduation ceremony," and that any statements made during the graduation ceremony "should not be considered the opinions or beliefs of the District, the Board of Trustees or the Superintendent." *Id.* at 642.

29. In 1993, the seniors at Clearwater Valley High, also in the district, voted for a moment of silence at graduation without any prayer. *Id.* at 641 n.6; *Harris*, 41 F.3d at 453. At Grangeville High, no school official reviewed the prayers prior to commencement, and, at the graduation ceremony, no one was asked to participate in the prayer by standing, bowing their heads, or removing their hats. *Id.* at 453. In addition, the following disclaimer had appeared since 1991 in the Grangeville High commencement programs:

The Board of Trustees of Joint School District No. 241 neither promotes nor endorses any statements made by any person involved in the graduation ceremony. The District endorses each person's free exercise of speech and religion and any comments or statements made during the graduation ceremony should not be considered the opinions or beliefs of the District, the Board of Trustees or the Superintendent.

*Harris*, 821 F. Supp. at 642.

30. *Harris*, 821 F. Supp. at 640.

31. *Id.* at 643.

32. See *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992).

33. *Harris*, 821 F. Supp. at 643. Student control of the entire process was a reality: While Principal Leuck recommended that Class President Mike Heath write down the prayer and give her a copy of it, he did neither but was still permitted to give the invocation and benediction. Phillips, *supra* note 27, at 504-05.

34. *Harris*, 821 F. Supp. at 643-44. Although the court indicated it was not bound to follow *Jones*, much of the reasoning in *Jones* was "persuasive." *Id.* at 643.

35. "As implied by this discussion, we find the reasoning of *Jones* and cases following it flawed." *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 457 (9th Cir. 1994) (citing *Adler v. Duval County Sch. Bd.*, 851 F. Supp. 446 (M.D. Fla. 1994)).



the court of appeal's view, *Lee* and the Ninth Circuit's earlier decision in *Collins v. Chandler Unified School District*<sup>36</sup> required the conclusion that the student-initiated graduation prayers were unconstitutional. Ignoring differences such as the fact that graduating seniors and not members of the clergy delivered the prayers at Grangeville High School, and that the praying students were requested to do so by their classmates and not by the high school principal, the court asserted that "Grangeville High's graduation is in many if not most respects like the graduation at issue in *Lee*."<sup>37</sup> The Ninth Circuit in *Collins* had held unconstitutional a public high school principal's permission to the Student Council to begin assemblies during the school day with a prayer by a student; the court assumed without discussion that *Collins* controlled the much different graduation ceremony context.<sup>38</sup>

The core of the *Lee* decision was the following:

These dominant facts mark and control the confines of our decision: [1] State officials direct the performance of a formal religious exercise at . . . graduation ceremonies for secondary schools. [2] Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.<sup>39</sup>

The Ninth Circuit began by attempting to tailor the facts of *Harris* into this pattern. This court stated that pervasive "state involvement" was present in the use of graduation prayers when "the school ultimately controls the event"<sup>40</sup> and that "the seniors have authority to make decisions regarding graduation only because the school allows them to have it."<sup>41</sup> Secondly, the school provided the building for the graduation ceremony and subsidized it.<sup>42</sup> The court regarded the senior class which had voted for prayers as an "agent" to which the school district had invalidly "delegated" its authority to make decisions regarding a school-

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36. *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981).

37. *Harris*, 41 F.3d at 452.

38. The court's only reference to the significant factual differences between prayer as an everyday practice in public schools and prayer once a year at a graduation ceremony attended by families and friends is the simplistic observation "[t]hat school officials establish the time of graduation renders irrelevant the fact that graduation does not take place during normal school hours." *Id.* at 454 n.5.

39. *Id.* at 451 (quoting *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992)).

40. *Id.* at 454. As in *Collins*, the *Harris* court found "no meaningful distinction" between school officials acting directly and school officials "merely permitting students to direct the exercises." *Id.*

41. *Id.*

42. *Id.*

controlled event; giving majorities such powers would undermine the counter-majoritarian protections of the First Amendment and would inject "divisiveness" into the public schools.<sup>43</sup>

The court rejected the claim that the school district had made the Grangeville High School graduation ceremony an open forum, as the school district contended. Only speakers chosen by the majority of the senior class were allowed, and this closed the ceremony to minority views.<sup>44</sup> In addition, the court implied that these graduation prayers were coercive, stating that "[s]tudents are as obligated to attend and participate in graduation prayers, either by bowing their heads or maintain[ing] respectful silence, at Grangeville High graduation as at the high school commencement discussed in *Lee*."<sup>45</sup>

The court completed its analysis with a perfunctory application of the first two prongs of the three-pronged test from *Lemon*.<sup>46</sup> The court agreed with the *Collins* decision that "the invocation of assemblies with

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43. *Id.* at 455.

44. The court said these facts made other cases "inapposite," including *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141 (1993), *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990), and *Garnett v. Renton Sch. Dist.* No. 403, 987 F.2d 641 (9th Cir.), *cert. denied*, 114 S. Ct. 72 (1993). *Harris*, 41 F.3d at 456. In an "open forum" under traditional First Amendment doctrine, the government may not limit the speech that occurs. *Id.* at 458. The court's conclusion that the graduation ceremony was not an open forum disposed of the argument that the students had a freedom of speech right to deliver the graduation prayers. In addition, since the students were free to pray outside of the graduation ceremony, the Court rejected defendants' argument that they had a free exercise right to pray at the ceremony. *Id.*

45. *Id.* at 457 (citing *Lee v. Weisman*, 112 S. Ct. 2649, 2658 (1992)). This conclusion appears to contradict the defendants' claims, unrefuted by plaintiffs and quoted with evident agreement by the court, that "[n]o one is asked to participate in the prayer by standing, bowing their heads, or removing their hats" *Id.* at 453.

46. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). To survive a challenge to its constitutionality under the Establishment Clause, a state action or enactment must have a secular purpose, its primary effect must be neither to advance nor inhibit religion, and it must not foster excessive entanglement between government and religion. *Id.* This widely-criticized test has been the established standard for Establishment Clause violations for over twenty years but has been criticized by at least five current or former Supreme Court Justices. *See* discussion *supra* note 16. Nevertheless, the test's much-anticipated demise has never come about, and the Supreme Court in recent cases has increasingly chosen to disregard *Lemon*, thus further confusing the rather incoherent muddle of Establishment jurisprudence. *See e.g.*, *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Lee*, Justice Kennedy, the pivotal fifth vote who wrote the majority opinion, was clearly intent on promoting his "coercion" test for Establishment Clause violations, barely mentioning *Lemon*. *See generally Lee*, 112 S. Ct. at 2649. This has further confused matters for lower court judges, many of whom, in order to play it safe, apply both the *Lemon* and coercion tests, as the Ninth Circuit did in *Harris*. *Harris*, 41 F.3d at 451. In *Jones* the Fifth Circuit applied both these tests as well as Justice O'Connor's "endorsement" test. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992).

prayer has no apparent secular purpose"<sup>47</sup> and rejected the school district's argument that the secular purpose was to "solemnize the occasion," as prayer was "objectively and inherently religious."<sup>48</sup> In addition, because the graduation prayers were indistinguishable from prayers recited in a church service, the court concluded that the primary effect of graduation prayers was to advance religion in violation of the Establishment Clause.<sup>49</sup>

## V. OTHER RECENT CASES

A case involving student-sponsored prayers at a public high school graduation is currently pending in the Third Circuit.<sup>50</sup> After the authorities at the Highland Regional High School in New Jersey decided to permit a student-sponsored prayer at the graduation exercises, the American Civil Liberties Union of New Jersey sued ten days before graduation seeking to enjoin all such prayers. Following a hearing on four days prior to the graduation, the federal district court denied plaintiff's application for a preliminary injunction, noting that "there was no evidence of encouragement or sponsorship by the defendants, and that in fact students at the high school were responsible for both the decision to have a prayer at the graduation and the selection of the student who would give the prayer."<sup>51</sup> The next day, the Third Circuit Court of Appeals reversed this decision and preliminarily enjoined all graduation prayers in the school district, deeming the case essentially indistinguishable from *Lee*.<sup>52</sup> Justice Souter denied a stay of the Third Circuit's

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47. *Harris*, 41 F.3d at 458 (quoting *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 762 (1981)). The defendant school district in *Collins*, of course, had not even suggested any secular purpose for the school prayers, so the court had no choice but to conclude as it did. *Id.* This conclusion on an uncontroverted point, however, should not be taken as a universal truth.

48. *Id.*

49. *Id.* The court did not discuss excessive entanglement. *Id.*

50. *ACLU of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, Civ. No. 93-2651 (D.N.J. Mar. 29, 1994).

51. *Id.*

52. The court made the following observation:

[T]he graduation ceremony is a school sponsored event; the fact that the school board has chosen to delegate the decision regarding one segment of the ceremony to the members of the graduating class does not alter that sponsorship, does not diminish the effect of a prayer on students who do not share the same or any religious perspective, and does not serve to distinguish, in any material way, the facts of this case from the facts of *Lee v. Weisman* . . . .

*ACLU of New Jersey v. Black Horse Pike*, Civ. No. 93-5368 (3d Cir. June 25, 1993), *cert. denied*, \_\_\_ U.S. \_\_\_, June 25, 1993, *denied request for vacating injunction*, Civ. No. 93-5368 (3d Cir. June 28, 1993), *permanent injunction entered on remand*, Civ. No. 93-2651 (D.N.J. Mar. 29, 1994).

order on graduation day, and in early 1994 the district court, on the same record, permanently enjoined all graduation prayers in the school district.<sup>53</sup>

In two other recent federal district court cases, *Gearon v. Loudoun County School Board*,<sup>54</sup> and *Adler v. Duval County School Board*,<sup>55</sup> opposite conclusions were reached regarding high school graduation prayer. Both cases involved the same circumstances as *Jones* and *Harris*, namely that, in both of the recent cases, plaintiffs challenged the constitutionality of school district policies which permitted students to request and deliver prayers at graduation ceremonies.

Pursuant to a school board resolution in *Gearon*, the following ballot was distributed to seniors for a vote at each of the four Loudoun County, Virginia high schools:

Do we, the Senior Class at [school name], wish to have a nonsectarian, non-proselytizing invocation/benediction/prayer or inspirational message presented at graduation?

Yes, I vote in favor of the above proposition.

No, I vote against the above proposition.<sup>56</sup>

The students at all four schools voted in favor of graduation prayer. The messages delivered by students at two of the schools were clearly prayers, while the other two were clearly inspirational but not theological.<sup>57</sup> The court agreed with plaintiffs' argument that graduation prayers are per se unconstitutional.<sup>58</sup> However, in light of its recognition that no other court had so held,<sup>59</sup> the court went on to accept plaintiffs'

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53. The district judge made it clear that he still believed that injunctive relief was not warranted but was constrained to bow to superior authority. *Black Horse Pike*, Civ. No. 93-2651 (D.N.J. Mar. 29, 1994). An appeal of the permanent injunction was argued in the Third Circuit in January 1995 and was pending when this article went to press.

54. 844 F. Supp. 1097 (E.D. Va. 1993).

55. 851 F. Supp. 446 (M.D. Fla. 1994).

56. *Gearon*, 844 F. Supp. at 1100.

57. They were addressed to "Dear Heavenly Father" and "Almighty," respectively. *Id.* at 1101. The language of the other two messages were inspirational but not theological: one endorsed a "spiritual" answer and the other included the admonition, "Let our faith guide us through these lessons of life . . . ." *Id.* at 1102.

58. The court was persuaded that the correct view was the one represented by plaintiffs' primary argument, *i.e.*, that a constitutional violation inherently occurs when, in a secondary school graduation setting, a prayer is offered, regardless of who makes the decision that the prayer will be given and who authorizes the actual wording of the remarks. *Id.* at 1099. The court went so far as to claim that "[t]o involuntarily subject a student at such an event [his/her graduation] to a display of religion that is offensive . . . to his or her own religion or lack of religion is to constructively exclude that student from graduation, given the options the student has." *Id.* at 1100. Nor could the state simply "delegate" the decision regarding prayers at graduation to the graduating class, because "[t]he notion that a person's constitutional rights may be subject to a majority vote is itself anathema." *Id.*

59. *Id.* at 1100 n.4.

secondary position, holding that all four graduation ceremonies entailed excessive state entanglement of the public schools with religion in violation of the *Lemon* test: they were sponsored by the school district and arranged by the principals who organized the student vote and reviewed the students' remarks prior to the ceremony in three of the schools.

The court in *Adler* reached the opposite result on similar facts. The Duval County School Superintendent initially directed school principals to eliminate graduation prayers after *Lee* was decided. However, after this action met with protests, the superintendent asked the board's legal counsel to research the issue. She later advised him that student-initiated and student-led prayer would be permissible as long as the administration and faculty did not participate in the decision. On May 5, 1993, counsel issued a memorandum to all county high school principals which stated:

This area of the law is far from clear at this time, and we have been threatened by lawsuits from both sides on the issue depending on what action we take. The key to the *Lee v. Wiseman* [sic] decision was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather than by permissive student choice and initiative. With that premise in mind, the following guidelines may be of some assistance:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;
2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board [sic], its officers or employees.

The purpose of these guidelines is to allow the students to direct their own graduation message without monitoring or review by school officials.<sup>60</sup>

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60. *Adler v. Duval County Sch. Bd.*, 851 F. Supp. 446, 449 (M.D. Fla. 1994) (quoting the deposition of the Superintendent of Schools, Larry Zenke). At its June 1 meeting, the school board voted 4-3 against a proposal to substitute a moment of silence for any student-initiated message at graduation; thus the May 5 memorandum became official Board policy. *Id.*

Pursuant to these guidelines, the graduating seniors at ten of the seventeen county high schools voted to include prayer in their graduation ceremonies.<sup>61</sup>

The district court analyzed the challenged policy under both the *Lemon* test and *Lee*, and, based on several reasons, concluded that it satisfied both standards. First, eschewing any effort to analyze the motives, intentions, and purposes of individual administrators and board members, the court found that the policy in the May 5 memorandum had the secular purpose of “retain[ing], the graduating students so desired, the giving of messages to solemnize the occasion and to observe and protect the right of free speech of the students giving such messages.”<sup>62</sup> Second, the court found that the policy’s primary effect was not to advance religion because adherence to the guidelines might not result in any prayer: seven of the seventeen schools concerned had no prayers in their graduation ceremonies, and, of those schools which did have prayer, none was initiated by public authorities. Third, the public high school graduation ceremonies were designated, limited public fora as they were traditionally held at coliseums, not in the school buildings, and nearly the entire program consisted of speeches by leaders of both the students and the community. Because the religious speech was communicated in a public forum, the state neither endorsed nor approved of it. The court determined that the school board policy did not entail excessive entanglement of governmental and religious institutions; indeed, there was no entanglement: the students had total freedom to determine the content of their messages as they were not reviewed by any school official.

Turning to the “coercion” test of *Lee*, the court found that the circumstances in *Adler* were quite different from those in *Providence*. The guidelines did not mandate or solicit graduation prayers; they merely permitted them. The high school principal did not decide to have the prayers or designate the prayer-giver, as in *Lee*. Unlike the facts in *Lee*,

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61. *Id.* Apparently the other seven schools’ graduation ceremonies were limited to secular messages. *Id.* at 449-50.

62. *Id.* at 453. Such a finding of secular purpose was supported by two recent cases. In *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (en banc), the court held that the State of Georgia would not violate the Establishment Clause were it to permit a Jewish group to erect a Chanukah menorah—a religious symbol—on the plaza in front of the state capitol building. Permitting the display, the court held, “would advance the secular purpose of providing an arena for its citizenry’s exercise of the constitutional right to free speech,” and would therefore not violate the *Lemon* test. *Miller*, 5 F.3d at 1389, quoted in *Adler*, 851 F. Supp. at 452-53. Similarly, the Sixth Circuit had recently declared that “[A] policy of treating religious speech the same as all other speech certainly serves a secular purpose.” *Americans United For Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1543 (6th Cir. 1992) (en banc), quoted in *Adler*, 851 F. Supp. at 453.

only students, and not clergy, gave the prayers. In addition, their prayers exerted less psychological pressure on other students than the prayers in *Lee* because the students realized that the prayers represented the will of their peers who were less able to coerce participation than authoritative figures from the state or clergy.<sup>63</sup> The court concluded that the challenged school board policy did not violate the Establishment Clause and granted summary judgment for the defendants.<sup>64</sup>

## VI. ANALYSIS

The remaining question for decision by the United States Supreme Court in the area of prayer at public high school graduations is whether the Establishment Clause is violated when students request, compose, and deliver graduation prayers, and school districts and administrators merely acquiesce. Despite Justice Kennedy's verbal overkill in *Lee* and his insistence on finding state coercion where there was none,<sup>65</sup> the *Lee* decision was narrowly tailored to the facts. The three most important facts were that the high school principal decided that an invocation and benediction would be included in the graduation ceremony, he invited a rabbi to deliver them, and he provided the rabbi with guidelines and recommendations concerning the content of the prayers. None of these factors was present in *Jones v. Clear Creek Independent School District*, *Harris v. Joint School District No. 241*, *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education*, *Gearon v. Loudoun County School Board*, or *Adler v. Duval County School Board*. In these cases, students requested to have prayers, they composed them, and they delivered them at graduation. These cases are clearly distinguishable from *Lee*, and the Supreme Court could uphold the constitutionality of graduation prayer in these cases without diluting *Lee*.

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63. *Adler*, 851 F. Supp. at 456 (quoting *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 97 (5th Cir. 1991)).

64. See also *Goluba v. School Dist. of Ripon*, 1995 WL 8235 (7th Cir. Jan. 11, 1995); *Brody v. Spang*, 957 F.2d 1108 (3d Cir. 1992); *Ingebretsen v. Jackson Public Sch. Dist.*, 864 F. Supp. 1473 (S.D. Miss. 1994); *Griffith v. Teran*, 794 F. Supp. 1054 (D. Kan. 1992) *reconsidered in light of Lee v. Weisman*, 807 F. Supp. 107 (D. Kan. 1992); *Society of Separationists, Inc. v. Taggart*, 862 P.2d 1339 (Utah 1993).

65. See *Justice Kennedy's Tortured Opinion* in Schweitzer, *supra* note 3, at 434-39. For example, as noted above, the school principal invited a rabbi to deliver the prayers and furnished him with guidelines though the rabbi was left to compose the prayers himself. Justice Kennedy nevertheless asserted that the principal "directed and controlled the content of [the rabbi's prayer]" and that school officials "monitored prayer" and attempted to "compose official prayers." *Lee v. Weisman*, 112 S. Ct. 2649, 2656 (1992). Similarly, although there was no indication that graduating students and others in the audience were asked to stand or to bow their heads or did either of these things when the rabbi spoke, Justice Kennedy asserted that school officials "compel[led students] to participate in a religious exercise." *Id.* at 2661.

The district court in *Gearon* favored an absolute ban on graduation prayers and had the candor to acknowledge that neither the Supreme Court in *Lee* nor any other court had held that an absolute prohibition was required by the Establishment Clause.<sup>66</sup> The *Gearon* court made an alternate holding that the state was excessively entangled with religion; the high school principals arranged to have the seniors vote on the prayer issue, and some of the principals reviewed the remarks before they were made. The first factor—principals arranging a student vote—is immaterial, but one can make a colorable claim that the prior review of religious remarks did violate the entanglement prong of the Establishment Clause.<sup>67</sup>

The Ninth Circuit opinion in *Harris*, on the other hand, is most unpersuasive. Its finding of “ultimate control” over the graduation ceremonies by the school—because the seniors only had the authority to make decisions concerning graduation where the school allowed them to have it—is irrelevant and disregards the record evidence that the school authorities in no way influenced either the decision to have prayers or the content of the prayers the students delivered. Equally irrelevant is the fact that the school provides the building in which graduation is held and incurs the expenses. Public funding and “ultimate control” retained by the school authorities are characteristic of all graduations, and to say that such factors are pivotal is to exclude any possibility of constitutional graduation prayer.<sup>68</sup> Rather than engaging in such spurious “analysis,” the court would have been more candid in holding that graduation prayer is per se unconstitutional. In addition, it verges on senselessness to assimilate school assemblies to graduation ceremonies on the basis of the fact that the school officials set the time for both, thereby ignoring all the obvious differences between the classroom environment and the commencement ceremony.<sup>69</sup>

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66. *Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097, 1100 (E.D. Va. 1993). Of course, District Judge Bryan seems to have caught the spirit of though surpassing Justice Kennedy’s exaggeration when Judge Bryan asserted that to involuntarily subject a student at his graduation to a display of religion that is offensive or not agreeable to his/her religion “is to constructively exclude that student from graduation.” *Id.*

67. It should be emphasized that *Gearon* is the only one of the cases discussed in which such prior review occurred.

68. The dissent in *Harris* provided the correct answer to the majority’s argument: “The Supreme Court has clarified that custodial oversight ‘does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities.’” *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 460 n.2. (9th Cir. 1994) (Wright, J., dissenting in part) (quoting *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, 253 (1990)).

69. In applying *Collins* (concerning school assemblies) to *Harris*, the Ninth Circuit stated, “That school officials establish the time of graduation renders irrelevant the fact that



Similarly, the Ninth Circuit exhibits myopia in its inability to discern any secular purpose in having graduation prayers. Again, Judge Wright in dissent had an appropriate response: "The School District merely accommodates the students' decision. Accommodation of and incidental benefits to religion do not violate the Establishment Clause. Accommodation does not endorse religious belief over disbelief, but rather shows respect for the fundamental values of others."<sup>70</sup> By all accounts, some students are intensely desirous of distinguishing this landmark event in their lives with prayer, and there is plainly a secular purpose in attempting to satisfy such aspirations.

On balance, the Idaho federal district judge in *Harris*, the Fifth Circuit in *Jones v. Clear Creek*, and the Florida federal district judge in *Adler v. Duval County School Board* have the more persuasive arguments. It bears reiterating that the school authorities in those cases did not decide to have prayers or in any way regulate or monitor the content of the prayers, all of which were delivered by students. The school authorities acquiesced in the student majority's desire for such prayers, reserved time in the graduation program schedule, and then left the students to their own devices. Accordingly, these cases more closely resemble *Widmar v. Vincent*<sup>71</sup> and *Board of Education of Westside Community Schools v. Mergens*<sup>72</sup>—in which schools gave a place to meet to student religious groups without compromising First Amendment principles—than *Lee v. Weisman*, with its significant degree of control over the prayer by the school authorities.

I have argued in two previous articles, and I continue to believe, that graduation school prayer can be constitutional under carefully controlled circumstances.<sup>73</sup> The fact patterns of the cases discussed embody such circumstances, with the possible exception of *Gearon*. However, the fault lines in the federal courts appear to be widening and other courts are probably destined to align themselves with either the Fifth Circuit or the Third and Ninth Circuits on this issue. It appears that the split in authority will soon make it appropriate if not necessary for the Supreme

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graduation does not take place during normal school hours." *Harris*, 41 F.3d at 454 n.5. Under such reasoning, any prayer or religious activity on school premises would be unconstitutional, since presumably they would have to take place at times approved by school officials, and *Mergens* was wrongly decided.

70. *Id.* at 460 (Wright, J., dissenting in part) (citations omitted).

71. *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that permitting a student religious group to meet on state university premises did not violate the Establishment Clause).

72. *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990) (upholding the federal Equal Access Act, which protects the rights of student religious clubs, *inter alia*, to meet on public high school premises before or after class hours).

73. See generally Schweitzer, *supra* note 3; Schweitzer, *supra* note 9.

Court to consider another graduation prayer case and resolve some of the questions the Court left unanswered in *Lee v. Weisman*.

