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## Lee v. Weisman and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable?

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***Lee v. Weisman* and the Establishment  
Clause: Are Invocations and  
Benedictions at Public School  
Graduations Constitutionally  
Unspeakable?**

THOMAS A. SCHWEITZER\*

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## I. INTRODUCTION

A case now pending before the United States Supreme Court could lead to a revolution in the jurisprudence of the First Amendment Establishment Clause. Upon learning that the school authorities had invited a rabbi to deliver an invocation and benediction at the forthcoming graduation of his daughter from a public high school in Providence, Rhode Island, plaintiff Daniel Weisman went to court in order to block that segment of the ceremony. While the court denied him a temporary restraining order the day before the graduation,<sup>1</sup> it later heard the case on the merits and entered a permanent injunction barring the school district from "authorizing or encouraging the use of prayer in connection with school graduation or promotion exercises."<sup>2</sup> After the First Circuit affirmed this decision,<sup>3</sup> defendants sought and were granted a writ of certiorari.<sup>4</sup> The case was argued on November 6, 1991.

For twenty years, the prevailing test to determine whether challenged laws or practices violated the Establishment Clause has been the three-pronged inquiry set forth in *Lemon v. Kurtzman*.<sup>5</sup> The "*Lemon* test" has engendered increasing controversy in recent years, and five of the current Justices have expressed either outright oppo-

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1. *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 59 U.S.L.W. 3635, No. 90-1014 (March 18, 1991), argued November 6, 1991. "Lee v. Weisman, Arguments Before the Court," 60 U.S.L.W. 3351 (U.S. Nov. 12, 1991). The district judge explained that this was "essentially because the Court was not afforded adequate time to consider the important issues of the case." *Id.* at 69. The next day, Deborah Weisman and her family attended the graduation ceremony, at which Rabbi Leslie Gutterman delivered an invocation and benediction both addressed to God. *Id.* at 69 n.2; *Id.* at 70 n.3.

2. *Id.* at 75. The court found that the invocation and benediction violated the rule of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

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

4. *Weisman v. Lee*, 59 U.S.L.W. 3635 (U.S. Mar. 18, 1991). Petitioners' brief stated the questions presented as follows: "1. Do school authorities violate the Establishment Clause by allowing a speaker at a public junior high or high school graduation ceremony to offer an invocation and a benediction that acknowledge a diety [sic]?" and "2. Whether direct or indirect government coercion is a necessary element of an Establishment Clause violation?" The Solicitor General filed an amicus brief in favor of the writ stating the question presented as "[w]hether government accommodation of religion in civic life violates the Establishment Clause, absent some forum of government coercion."

5. *Lemon*, 403 U.S. at 612-13 (1971). "First, the [practice] must have a secular . . . purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion." *Id.* (citing *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968)). Finally, "the practice must not foster 'an excessive entanglement with religion.'" *Id.* at 612-13 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

sition to it or reservations about it.<sup>6</sup> The Solicitor General has urged the Court to use *Weisman* as a vehicle to overturn the *Lemon* test,<sup>7</sup> and various commentators have predicted that the Court will accept this invitation.<sup>8</sup> Moreover, the most vehement and outspoken critic of the *Lemon* test has been Chief Justice Rehnquist.<sup>9</sup> No

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6. The Solicitor General furnished the following list of examples: *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment 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) ("pessimistic evaluation . . . of the totality of *Lemon* is particularly applicable to the 'purpose' prong"); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, C.J., dissenting) (*Lemon* test is a "constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, [and] is difficult to apply and yields unprincipled results"); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (expressing "doubts about the entanglement test" of *Lemon*); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in judgment) ("I am no more reconciled now to *Lemon I* than I was when it was decided . . . . The threefold test of *Lemon I* imposes unnecessary, and . . . superfluous tests for establishing [a First Amendment violation].") Brief for the United States as Amicus Curiae Supporting Petitioners at 6 n.4, *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 59 U.S.L.W. 3635 (U.S. Mar. 18, 1991) (No. 90-104) (hereinafter "United States May 1991 Brief"). Moreover, the author of *Lemon*, Chief Justice Burger, ignored the *Lemon* test in upholding the use of a chaplain by the Nebraska State Legislature in *Marsh v. Chambers*, 463 U.S. 783 (1983), evidently feeling that the less said about the major exception that case opened up in the Court's Establishment Clause jurisprudence, the better.

7. Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit (February 1991) at 8, 15, *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 59 U.S.L.W. 3635 (U.S. Mar. 18, 1991) (No. 90-1014) (hereinafter United States February 1991 Brief); United States May 1991 Brief at 6-7. The aggressiveness of the Justice Department's action in seeking to have the *Lemon* test overruled here is underscored by the fact that petitioners, while critical of the *Lemon* test, did not explicitly seek to have it overruled, apparently in the belief that they could prevail on narrower grounds. Compare Norman Dorsen, *The United States Supreme Court: Trends and Prospects*, 21 HARV. C.R.-C.L. L. REV. 1, 25 n.167 (1986) (discussing a similar instance of Justice Department "aggressiveness" in July 1985).

8. E.g., W. John Moore, *Breaching the Church-State Wall*, NAT'L J., Aug. 10, 1991, at 2002; Bruce Fein, *Recasting Church-State Doctrine*, THE WASH. TIMES, July 30, 1991, at G1.

In denying a preliminary injunction against invocations and benedictions at public high school graduation ceremonies, the most recent court to address the issue stated, "[t]he court rules that . . . plaintiffs have not demonstrated the necessary likelihood of success for purposes of injunctive relief. It appears that there is a reasonable likelihood that the Supreme Court will abandon the *Lemon* test." *Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682, 689 (D. Utah 1991).

9. The fullest exposition of his critique is his dissent in *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting). This dissent, of course, repudiated the cornerstone of modern Establishment Clause jurisprudence, *Everson v. Board of Educ.*, 330 U.S. 1 (1947), and the "wall of separation" that it "constitutional-

great respecter of *stare decisis*,<sup>10</sup> Rehnquist has made no bones about his willingness to overturn precedents he disagrees with;<sup>11</sup> and the retirement of Justices Brennan and Marshall has probably given him the majority he needs to bring about a major change in the law of the Establishment Clause.

Another factor which might presage significant doctrinal change when *Weisman* is decided is that the Court seems to have reached out to review a practice as to which there has been little recent disagreement among lower courts. Earlier courts upheld the constitutionality of clergymen and others delivering invocations and benedictions at public school graduation ceremonies.<sup>12</sup> Recently,

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ized", which Rehnquist said embodied "a mistaken understanding of constitutional history." *Wallace*, 472 U.S. at 91-92, 112.

10. In *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), the Supreme Court overruled *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989), which held that the Eighth Amendment barred the admission of victim impact evidence during the penalty phase of a capital trial. Responding to petitioner's argument of *stare decisis* based on two such recent cases, the Chief Justice stated for the majority that

when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." *Stare decisis* is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible."

*Id.* at 2609-10 (citations omitted). The opinion went on to list 33 of its own previous constitutional decisions which the Supreme Court had overruled in whole or in part during the past twenty terms. *Id.* at 2610.

11. See also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), in which the Court overruled by a 5-4 vote *National League of Cities v. Usery*, 426 U.S. 833 (1976), which held that the Commerce Clause did not empower Congress to enforce the minimum wage and overtime provisions of the Fair Labor Standards Act against the states in areas of traditional government functions. Justice Rehnquist's dissent in *Garcia* indicated that his position "will, I am confident, in time again command the support of a majority of this Court." *Id.* at 580. *National League of Cities v. Usery* had overruled a recent precedent, *Maryland v. Wirtz*, 392 U.S. 183 (1968), and the *Garcia* Court received a good deal of criticism for making two 180-degree turns on the subject within a period of 17 years. Rehnquist's dissent suggests that he is perfectly ready for yet another judicial about-face as soon as he can garner one more vote for his position. Contrast this with the philosophy of Justice Harlan, who according to a former law clerk, "cared far less about any given decision, no matter how significant, than about the overall stability of the Court . . . . Privately, he often spoke about the need to keep things on an 'even keel.'" Norman Dorsen, *The United States Supreme Court: Trends and Prospects*, 21 HARV. C.R.-C.L. L. REV. 1, 23 (1986).

12. *Wood v. Mount Lebanon Township Sch. Dist.*, 342 F. Supp. 1293 (W.D. Pa. 1972); *Wiest v. Mount Lebanon Sch. Dist.*, 320 A.2d 362 (Pa. 1974), *cert. denied*, 419 U.S. 967 (1974); *Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974). But see *Lemke v. Black*, 376 F. Supp. 87 (E.D. Wis. 1974), *vacated and remanded without opinion*, 525 F.2d 694 (7th Cir. 1975) (unconstitutional to hold public high school graduation in Roman Catholic Church; *Wood v. Lebanon Sch. Dist.* decision disapproved).

however, courts have uniformly held that such practices violate the Establishment Clause, although their mode of analysis varies.<sup>13</sup> After certiorari was granted in *Weisman* in March, 1991, the Fifth Circuit held in *Jones v. Clear Creek Independent School District*<sup>14</sup> that a school board resolution authorizing student volunteers to give non-sectarian and nonproselytizing invocations and benedictions at commencement, if the graduating senior class so desired, did not violate the Establishment Clause.<sup>15</sup> The federal district court in Utah denied a preliminary injunction to student plaintiffs on similar facts in *Albright v. Board of Education of Granite School District*.<sup>16</sup>

Thus, at the time the Court granted certiorari in *Weisman*, no United States court since 1974 had upheld the constitutionality of invocations or benedictions at public school graduations, and at least six courts since 1983 had found Establishment Clause violations in prayers delivered at public school graduations and other extracurricular events.<sup>17</sup> The Court's decision to grant certiorari suggests that it might be seizing an opportunity to modify or discard the *Lemon* three-pronged test, and that *Weisman* is as good a vehicle as any to achieve this purpose.

This Article considers the constitutionality of prayer at public

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13. *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987) (applying test in *Marsh*, 463 U.S. at 783); *Graham v. Cent. Community Sch. Dist. of Decatur*, 608 F. Supp. 531 (S.D. Iowa 1985) (applying *Lemon* test); *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982); *Kay v. David Douglas Sch. Dist. No. 40*, 719 P.2d 875 (Or. Ct. App. 1986); *Bennett v. Livermore Unified Sch. Dist.*, 238 Cal. Rptr. 819 (Cal. Ct. App. 1987); *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809 (Cal. 1991).

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

15. *Id.* at 417, 423.

16. *Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682 (D. Utah 1991).

17. While they differed as to whether *Lemon* or *Marsh* controlled, the lower courts had reached a "bottom-line" consensus to invalidate prayers at public school graduation ceremonies; and there seemed to be no pressing need for review at this time, at least insofar as the Court's role of maintaining uniformity of doctrine is concerned. Establishment Clause violations were also found on the basis of prayers at other extracurricular school events in *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989) (invocations preceding high school football games); *Steele v. Van Buren Public Sch. Dist.*, 845 F.2d 1492 (8th Cir. 1988) (band teacher's prayer sessions prior to concerts and practices); and *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982) (prayer at athletic contests and pep rallies in addition to graduation ceremonies). *But see* *Goodwin v. Cross County Sch. Dist.*, 394 F. Supp. 417 (E.D. Ark. 1973) (insufficient evidence of religious character of baccalaureate service, despite fact that it was conducted by a minister, in absence of indication that prayers or Bible readings were engaged in); *Berlin v. Okaloosa County Sch. Dist.*, No. PCA 87-30450-RV, 1988 WL 85937 (N.D. Fla. Mar. 1, 1988) (denying preliminary injunction to bar explicitly Christian pre-game invocation by local minister at public high school football game).

school graduations<sup>18</sup> under the Establishment Clause in light of the facts in *Weisman*, as well as under other possible factual circumstances evincing less official sponsorship of the prayer by the school authorities.<sup>19</sup> Part II summarizes, describes, and compares the court decisions in *Weisman* and the other cases involving prayer at public school graduations and at other public school functions. It also considers and analyzes the facts of other cases involving prayer at public school graduations and other public school functions.

Part III is an in-depth analysis of how the three prongs of the *Lemon* test should be applied to invocations and benedictions in *Weisman* and the other cases. It concludes that further factual information would be required to ascertain whether the lower courts in *Weisman* correctly determined that the graduation prayers violated the three-pronged test. However, while the constitutionality of Rabbi Gutterman's prayers is a close question, the Article also concludes that graduation prayers can be constitutional under carefully restricted conditions. To that end, Part III provides a model for planning and conducting graduation invocations and benedictions in a way which would violate neither the *Lemon* three-pronged test nor the Establishment Clause; it consists of the school authorities furnishing in a neutral manner a forum for expression of the private beliefs of the prayer-giver, which the authorities neither endorse nor disapprove.

Part IV considers the broader issues of the propriety and validity of the *Lemon* test from the standpoint of sound constitutional jurisprudence. It reviews persuasive criticisms of the *Lemon* test in general, and the secular purpose and entanglement prongs in particular, and concludes that the three-pronged test should be re-

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18. Prayer at graduation ceremonies has invariably consisted of an invocation at the beginning of the ceremony and a benediction towards the end. Their significant origins have been attributed to centuries-old religious ceremonies: "First, the academic ceremonies of graduation date back before the foundation of our country, and indeed are largely drawn from religious ceremonies. The modern pattern is still largely a carbon copy of the ancient rites, 'consist[ing] primarily of an *invocation*, a commencement address, the awarding of earned degrees, the awarding of honorary degrees *and the benediction*.' Other features such as the academic procession, direct descendant of the clerical procession, identify the religious roots of the entire graduation ceremony." Robert K. Du Puy, *Religion, Graduation, and the First Amendment: A Threat or a Shadow?*, 35 *DRAKE L. REV.* 323, 358 (1985) (emphasis in original) (quoting K. SHEARD, *ACADEMIC HERALDRY IN AMERICA* 69, 71 (1962)). Both invocations and benedictions are obviously forms of prayer, and the author assumes that there is no legally significant distinction between them.

19. The Article does not attempt to review the numerous progeny of *Engel v. Vitale*, 370 U.S. 421 (1962) and *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203 (1963), banning prayer and Bible readings, respectively, from the public high school classroom and academic program. Rather, it focuses on prayer as a part of graduation ceremonies and other extracurricular and non-academic functions such as baccalaureate services and football games.

placed with a new test focusing on coercion and religious liberty. The author's general conclusion is that Establishment Clause jurisprudence is discredited and in disarray, and this is traceable in large part to fundamental flaws in *Everson v. Board of Education*<sup>20</sup> and *Lemon*. Simply stated, it is time for fundamental doctrinal change, which, however, need not and should not change the results in many past cases.<sup>21</sup>

## II. THE GRADUATION PRAYER CASES

### A. *Weisman v. Lee*

*Weisman v. Lee* originated when Daniel Weisman and his daughter, Deborah, unsuccessfully sought a temporary restraining order to prevent inclusion of an invocation and benediction in the ceremony marking her graduation from Nathan Bishop Middle School in Providence, Rhode Island on June 20, 1989. The Providence School Committee and Superintendent had a policy permitting principals of public schools to include invocations and benedictions delivered by members of the clergy in graduation and promotion ceremonies, and most such ceremonies during the preceding five or six years had included them.<sup>22</sup> The Assistant Superintendent of Schools of Providence had distributed to school principals a pamphlet prepared by the National Conference of Christians and Jews entitled "Guidelines for Civic Occasions," which suggested ways of composing "public prayer in a pluralistic society" and emphasized

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

21. In the interests of full disclosure, it should perhaps be noted that the author worked on the case *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980) in 1979 while an associate at Davis Polk & Wardwell in New York City. Davis Polk & Wardwell represented four intervenor defendant non-public schools (Horace Mann-Barnard School, LaSalle Academy, Long Island Lutheran High School, and St. Michael School) in the case, in which the Supreme Court upheld by a 5-4 decision the constitutionality of reimbursing secular and religious private schools for the expense of performing various testing and reporting services mandated by New York State law. The author has not worked on or written about Establishment Clause cases or issues since that time.

22. Daniel Weisman stated that he first became concerned with graduation prayer when his older daughter graduated from the Nathan Bishop Middle School, two years before Deborah. On that occasion, Mr. Weisman was offended when the minister who gave the invocation had asked all present to give thanks to Jesus. (Weisman was interviewed on Public Television's MacNeil-Lehrer Report on November 6, 1991, the evening following the Supreme Court argument.) Ironically, the choice of Rabbi Gutterman to deliver prayers at the graduation ceremony of Weisman's second daughter, Deborah, was evidently an effort by the school authorities to mollify Weisman, since they knew he was Jewish. Weisman said, however, that he was not seeking "squeaky wheel" treatment but instead was opposed in principle to prayers at public school graduation ceremonies, even when delivered by a representative of his own faith.



the importance of "inclusiveness and sensitivity."<sup>23</sup>

The two school teachers who planned Ms. Weisman's graduation ceremony invited Rabbi Leslie Gutterman of Temple Beth El in Providence to deliver such prayers. Robert E. Lee, principal of the Nathan Bishop Middle School, provided Rabbi Gutterman with "Guidelines for Civic Occasions" and advised him that any prayers the rabbi delivered at the ceremony should be non-sectarian. After learning of the plans for the invocation and benediction, Daniel Weisman, who is a practicing Jew,<sup>24</sup> applied in federal district court for a temporary restraining order on June 16, 1989. Chief Judge Francis J. Boyle denied his application on June 19th on the ground that there was not sufficient time for adequate consideration of the important issues involved.

The next day, the Weismans attended Deborah's graduation at the middle school. Rabbi Gutterman's invocation began with the words "God of the Free, Hope of the Brave," and ended with "Amen"; the text expressed thanks for America's diversity, liberty, democracy and court system.<sup>25</sup> His benediction began with "O God, we are grateful to you . . .," ended with "[w]e give thanks to You, Lord . . .,"<sup>26</sup> and was an expression of gratitude for the graduates' accomplishments. The parties agreed that both the invocation and the benediction were prayers.

After the graduation, the Weismans sought a permanent injunction against the inclusion of invocations and benedictions in graduation ceremonies in the Providence public schools. Invoking the approach followed by the court in *Stein v. Plainwell Community Schools*,<sup>27</sup> defendants argued that *Marsh v. Chambers*<sup>28</sup> governed, and that the prayers did not violate the Establishment Clause. Since every case involving the issue of prayer in school since 1971 had applied the *Lemon* test, Judge Boyle found *Stein's* use of the *Marsh* rationale "not persuasive."<sup>29</sup>

Judge Boyle quickly concluded that Rabbi Gutterman's prayers

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23. *Weisman*, 728 F. Supp. at 69.

24. Respondent's Brief in Opposition to Petition for Writ of Certiorari at 5, *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 59 U.S.L.W. 3635 (Mar. 18, 1991) (No. 90-1014).

25. *Id.*

26. *Id.* at 70. As Justice Blackmun noted at the Supreme Court argument, part of the text was taken almost verbatim from Micah 6:8 in the Bible. *Lee v. Weisman*, Arguments Before the Court, 60 U.S.L.W. 3351, 3352 (U.S. Nov. 12, 1991).

27. *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987).

28. *Marsh v. Chambers*, 463 U.S. 783 (1983). The First Congress, which ratified the First Amendment prior to its adoption in 1791, also hired a chaplain, as had the Continental Congress. The basic thesis of *Marsh* is that in light of this fact, the Framers could not have believed that chaplains violated the Establishment Clause.

29. *Id.* at 74.

violated the second prong of the *Lemon* test and therefore deemed it unnecessary to consider the first and third prongs. Referring to *McCullum v. Board of Education*<sup>30</sup> and *Grand Rapids School District v. Ball*,<sup>31</sup> he stated that: "One method of determining whether a state action advances or inhibits religion is to determine whether the action creates an identification of the state with a religion, or with religion in general."<sup>32</sup> He concluded that: "In this case, the benediction and invocation advance religion by creating an identification of school with a deity, and therefore religion. The invocation and benediction present a 'symbolic union' of the state and schools with religion and religious practices."<sup>33</sup>

In this case, "the reference to a deity necessarily implicates religion,"<sup>34</sup> so the next inquiry was whether the challenged commencement prayers had implicitly been endorsed by government. Judge Boyle found that they had:

In this case, the Providence School Committee has in effect endorsed religion in general by authorizing an appeal to a deity in public school graduation ceremonies. The invocations and benedictions convey a tacit preference for some religions, or for religion in general over no religion at all. School children who are not members of the religions sponsored, or children whose families are non-believers, may feel as though the school and government prefer beliefs other than their own.<sup>35</sup>

Therefore, Judge Boyle concluded, the invocation and benediction had the effect of advancing religion in violation of the *Lemon* test and the Establishment Clause, and it made no difference that they were supposed to be non-denominational, that participation in these prayers was voluntary, and that the graduation prayers were given only once a year rather than every day.<sup>36</sup>

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30. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

31. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

32. *Weisman*, 728 F. Supp. at 71.

33. *Id.* at 72.

34. *Id.* Weisman's attorney conceded in court that omission of all references to God from the prayer would have removed any violation of the Establishment Clause, *id.* at 74, and Judge Boyle paraphrased Rabbi Guterman's benediction to yield what he considered an acceptable text by removing all such references. *Id.* at 74 n.10. He further stated that it would not be unconstitutional even for clergymen to give "a secular inspirational message at the opening and closing of the graduation ceremonies." *Id.* at 74.

35. *Id.* at 72-73.

36. Judge Boyle hinted that he might not personally agree with the Establishment Clause jurisprudence he was bound to apply when he quoted Justice Kennedy's statement in the flag-burning case that judicial power is often difficult to exercise, and judges must sometimes make decisions they do not like. *Id.* at 75 (quoting *Texas v. Johnson*, 491 U.S. 397 (1989) (Kennedy, J., concurring)). Judge Boyle wistfully stated,

On appeal, the First Circuit affirmed, with Judge Campbell dissenting.<sup>37</sup> In a two-paragraph opinion, Judge Torruella stated that “[w]e are in agreement with the sound and pellucid opinion of the district court and see no reason to elaborate further.”<sup>38</sup> Judge Bownes concurred in Judge Boyle’s “very good opinion”<sup>39</sup> but felt compelled by the importance of the case to add additional comments. He found that the challenged prayers violated all three prongs of the *Lemon* test: their “primary purpose [was] religious,”<sup>40</sup> they had the effect of communicating a message of “government endorsement of religion,”<sup>41</sup> and the choice of the rabbi and supervision of the content of the prayers “implicate[d] the entanglement prong.”<sup>42</sup>

Judge Bownes distinguished *Marsh* on the grounds that middle school students were at a different stage of development than state legislators, and the prayers were imposed on them, unlike the legislators who were able to debate and vote on whether to have prayers. He found troubling the approach of the judges in *Stein* who parsed the content of the prayers to determine if they were too offensive. Finally, he found that even omission of the deity would not preserve

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[t]he fact is that an unacceptably high number of citizens who are undergoing difficult times in this country are children and young people. School sponsored prayer might provide hope to sustain them, and principles to guide them in the difficult choices they confront today. But the Constitution as the Supreme Court views it does not permit it. Choices are made in order to protect the interests of all citizens. Unfortunately, in this instance, there is no satisfactory middle ground. Neither the legislative, nor the executive, nor the judicial branch may define acceptable prayer. Those who are anti-prayer thus have been deemed the victors. That is the difficult but obligatory choice this Court makes today.

*Weisman*, 728 F. Supp. at 75. (citation omitted).

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

38. *Id.* at 1090.

39. *Id.*

40. *Id.* at 1095.

41. *Id.*

42. *Id.* Incredibly, Judge Bownes could not resist the additional observation that “there is formidable religious authority condemning prayer in public: ‘And when thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men . . . when thou prayest enter into thy closet, and when thou has shut the door, pray to thy Father in secret . . .’ Matthew 6: 5-7 (King James).” *Id.* at 1090-91 n.1. It may be doubted whether most Christian authorities would agree that this New Testament text means that Jesus opposed public prayer. But regardless of its meaning, to use this text, in which Jesus clearly attacked some of the Jews of his time as “hypocrites” for praying ostentatiously in public, to chastise Rabbi Gutterman for delivering the graduation invocation and benediction could not help but be deeply offensive to Jews, not to mention that it inappropriately blends a particular religious text into an opinion ostensibly defending the separation of church and state.

the constitutionality of the prayer, as Judge Boyle had suggested.<sup>43</sup>

Judge Campbell dissented, although he acknowledged that Judge Boyle's position "may be more in keeping with Supreme Court consensus."<sup>44</sup> He believed *Marsh* applied to "public meetings" like graduations,<sup>45</sup> and he endorsed the approach in *Stein*, provided that the authorities

have a well defined program for ensuring, on a rotating basis, that persons representative of a wide range of beliefs and ethical systems are invited to give the invocation. The rule should make provision not only for representatives of the Judeo-Christian religions to give the invocation, but for the representatives of other religions and of non-religious ethical philosophies to do so . . . .<sup>46</sup>

He concluded that by banning invocations, even those which mention a deity,

we deprive people of an uplifting message that seems especially suitable for a rite of passage like a graduation, where those present wish to give deeply felt thanks. Our First Amendment jurisprudence normally protects speech rather than suppressing it. It seems anomalous to outlaw Rabbi Guterman's tolerant, benign, nonsectarian supplication — a message so entirely appropriate in that setting, and surely inoffensive to virtually all of those present.<sup>47</sup>

### B. The Earlier Cases

*Weisman v. Lee* is one of the latest in a series of cases during the last two decades challenging prayer as part of public school graduation ceremonies.<sup>48</sup> These cases fall into three periods: a) an initial

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43. *Weisman*, 908 F.2d at 1097 (citing *Weisman*, 728 F. Supp. at 74).

44. *Id.* at 1097.

45. *Id.* at 1098.

46. *Id.* at 1099 (emphasis in original). Judge Campbell also expressed dismay that the court's decision would require the banning of edifying speech which he believed the vast majority of those attending graduation would want to hear. *Id.*

47. *Id.* at 1098.

48. A handful of even older cases challenged the constitutionality or legality of religious baccalaureate programs in connection with high school graduations. All of these challenges were rejected by the courts. Robert K. Du Puy, *Religion, Graduation, and the First Amendment: A Threat or A Shadow?*, 35 *DRAKE L. REV.* 323, 324-28 (1985), contains a good description of these baccalaureate cases. In 1916, the Supreme Court of Wisconsin upheld denial of a writ of mandamus sought by petitioner taxpayers and parents to order a school district to cease the practice of holding graduation exercises in various churches and permitting Protestant ministers and Catholic priests to deliver "nonsectarian" invocations. *State ex rel. Conway v. District Bd. of Joint Sch. Dist. No. 6 of Towns of Plymouth, Wonewoc, and City of Elroy*, 156 N.W. 477 (Wis. 1916). The court held that holding graduation exercises in a church building did not violate article 10, section 3 of the Wisconsin Constitu-

flurry of cases in 1972-74 undoubtedly inspired by the Supreme Court's *Engel* and *Schempp* decisions, in which the constitutionality of the challenged prayers was upheld;<sup>49</sup> b) a decade of quiescence from 1975 to 1985 marked by a virtual absence of cases, apparently because the matter was regarded as settled;<sup>50</sup> and c) the almost uniformly successful series of Establishment Clause challenges brought during the last seven years.<sup>51</sup>

tion, which forbade sectarian instruction in the public schools, or article 1, section 18, which provided that no one "shall . . . be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent . . .," since it would be "far-fetched" to say that the parents and pupils at such ceremonies were compelled to attend a place of worship. *Id.* at 479-80. The court indicated, nevertheless, its belief that "it would be a wise exercise of official discretion to discontinue such practices as are here complained of when objection thereto is made by any substantial number of school patrons." *Id.* at 479.

49. *Wood v. Mt. Lebanon Township Sch. Dist.*, 342 F. Supp. 1293 (W.D. Pa. 1972); *Goodwin v. Cross County Sch. Dist.*, 394 F. Supp. 417 (E.D. Ark. 1973); *Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362 (Pa. 1974), *cert. denied*, 419 U.S. 967 (1977); *Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974). *Wood* and *Wiest* were brought by the same plaintiff's attorney.

50. The only two relevant cases during this period peripherally concerned graduation ceremonies. *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982); *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980). In *Doe*, the court held that the reciting or singing of a school prayer at athletic contests, pep rallies, and graduation ceremonies violated the Establishment Clause and all three prongs of the *Lemon* test. The court in *Florey* upheld the constitutionality of a set of rules developed by the school board which provided for, *inter alia*, benedictions and invocations at graduation ceremonies:

Therefore, the practice of the Sioux Falls School District shall be as follows:

2. Traditions, i.e., invocation and benediction, inherent in commencement ceremonies, should be honored in the spirit of accommodation and good taste.

3. Because the baccalaureate service is traditionally religious in nature, it should be sponsored by agencies separate from the Sioux Falls School District.

*Florey*, 619 F.2d at 1320. See also *Brandon v. Board of Educ. of Guilderland Cent. Sch.*, 635 F.2d 971, 979 (2d Cir. 1980) (dictum): "[W]here a clergyman briefly appears at a yearly high school graduation ceremony, no image of official state approval is created."

51. *Graham v. Central Community Sch. Dist. of Decatur*, 608 F. Supp. 531 (S.D. Iowa 1985); *Kay v. David Douglas Sch. Dist. No. 40*, 719 P.2d 875 (Or. Ct. App. 1986), *rev'd on other grounds*, 738 P.2d 1389 (Or. 1987), *cert. denied*, 484 U.S. 1032 (1988); *Bennett v. Livermore Unified Sch. Dist.*, 238 Cal. Rptr. 819 (Cal. Ct. App. 1987); *Stein v. Plainwell Community Schs.*, 610 F. Supp. 43 (W.D. Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987); *Sands v. Morongo Unified Sch. Dist.*, 262 Cal. Rptr. 452 (Cal. Ct. App. 1989), *rev'd*, 809 P.2d 809 (Cal. 1991), *petition for cert. filed*, 60 U.S.L.W. 3209 (U.S. Oct. 1, 1991) (No. 91-477); *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3161 (U.S. Sept. 10, 1991) (No. 91-310); *Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682 (D. Utah 1991). See also *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492 (8th Cir. 1988) (challenging band teacher's prayer sessions prior to

The courts in three of the 1972-74 cases<sup>52</sup> quickly concluded on the basis of rather limited evidence that the invocation and benediction did not violate the Establishment Clause.<sup>53</sup> In neither case was there the slightest indication of the nature of the prayer in question or who was to deliver it, since it had not yet been delivered.<sup>54</sup>

It appears that the plaintiffs in these cases argued that under *Engel v. Vitale*,<sup>55</sup> any prayer at a public school function like graduation violates the Establishment Clause. The courts rejected these arguments, and the reasoning of the court in *Wood* was typical. The court distinguished the graduation prayers from the official state-composed prayers struck down in *Engel* on the grounds that attendance at the graduation ceremonies was voluntary, and that "they are ceremonial and are in fact not a part of the formal, day-to-day routine of the school curriculum to which is attached compulsory at-

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concerts and practices); *Berlin v. Okaloosa County Sch. Dist.*, No. PCA 87-30450-RV, 1988 WL 85937 (N.D. Fla. Mar. 1, 1988) (challenging pre-game invocations at high school football games); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989); *Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa, 1989) (plaintiff minister denied injunction to force school board to allow him to say prayers at his son's graduation). It is noteworthy that the trial court decisions in *Bennett*, *Kay*, *Stein*, and *Graham* were all issued in a 12-month period between 1984 and 1985 after the 10-year hiatus following *Wood*, *Wiest*, and *Deusebio*. Plaintiffs won all the cases except for *Lundberg*, *Berlin* (denying a preliminary injunction), *Jones*, and *Albright* (denying a preliminary injunction).

52. See *Wood*, *Wiest*, and *Deusebio*, *supra* note 49. Accord *Brandon v. Board of Educ. of Guilderland Cent. Sch. Dist.*, 635 F.2d 971, 979 (2d Cir. 1980).

53. In the fourth case, *Goodwin*, the court found the terse four-sentence stipulation of facts concerning the baccalaureate services insufficient to satisfy plaintiff's burden of proving a First Amendment violation. *Goodwin*, 394 F. Supp. at 421, 427.

54. *Wood*, *Wiest*, and *Grossberg* sought injunctive relief against inclusion of the prayers in the graduation ceremony; *Goodwin* sought a declaratory judgment that the baccalaureate service, *inter alia*, was unconstitutional. Thus, all four cases illustrate a strategic dilemma facing a plaintiff in this situation: If she fails to seek injunctive or other relief beforehand to block inclusion of the prayer in the graduation ceremony, the seriousness of her commitment may be challenged, and one may ask why she should be permitted to challenge that which she did not seek to prevent before it happened. On the other hand, the attempt to block any speech, including a prayer of unknown text, before it is delivered appears to be a prior restraint. As such, it might violate the First Amendment's freedom of speech clause, even if Establishment Clause concerns are raised. *E.g.*, *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Near v. Minnesota*, 283 U.S. 697 (1931). See Ken Jorgensen, Note, *Making Prior Restraint an Enforcement Tool of the Establishment Clause: Stein v. Plainwell Community Schools*, 1989 B.Y.U. L. Rev. 305 (1989). Moreover, a prospective plaintiff is unlikely to know much about the intended prayer or its text beforehand, except in the unlikely event that a prospective adversary is so obliging as to furnish a copy. Accordingly, such a plaintiff is likely to have difficulty spelling out why a prayer would violate the Establishment Clause.

55. *Engel v. Vitale*, 370 U.S. 421 (1962).

tendance.”<sup>56</sup> Less persuasively, the *Wood* court maintained that there was “no governmental stamp of approval placed on the invocation and benediction to be said at the graduation ceremony,”<sup>57</sup> that the ceremony had a “primarily secular” purpose, and that its primary effect neither advanced nor inhibited religion.<sup>58</sup>

### C. Recent Cases

The courts in five of the seven cases challenging prayer at public school graduations since 1984<sup>59</sup> found Establishment Clause violations,<sup>60</sup> although the latest two cases have not.<sup>61</sup> Only the court in *Stein* applied the test for ceremonial prayer in *Marsh*;<sup>62</sup> all the other courts applied the *Lemon* three-pronged test. Since Oregon and Cal-

56. *Wood*, 342 F. Supp. at 1294. *Accord Wiest*, 320 A.2d at 366 n.5. The *Grossberg* court followed the *Wood* and *Wiest* decisions. *Grossberg*, 380 F. Supp. at 289.

57. *Wood*, 342 F. Supp. at 1294.

58. *Id.* at 1295. *Accord Wiest*, 320 A.2d at 366; *Grossberg*, 380 F. Supp. at 289-91. The court in another contemporary case rejected the reasoning in *Wood* when it enjoined a school district's plans to hold its graduation ceremony at a Roman Catholic Church. *Lemke v. Black*, 376 F. Supp. 87 (E.D. Wis. 1974), *vacated and remanded without opinion*, 525 F.2d 694 (7th Cir. 1975). Noting that some “members” of the school district had averred that it violated their consciences to attend a ceremony in a Catholic Church, the *Lemke* court concluded: “Despite the Defendant’s contention, the voluntariness of the ceremony is not dispositive of the matter. Graduation is an important event for students . . . . It is cruel to force any individual to violate his conscience in order to participate in such an important event in the individual’s life.” *Lemke*, 376 F. Supp. at 89. *But see* *Miller v. Cooper*, 244 P.2d 520 (N.M. 1952) (permitting public school commencement to be held in a church building because no public buildings in the community were adequate to accommodate the ceremony). The *Miller* decision was cited by Justice Brennan in his concurrence in *Schempp*, 374 U.S. at 265 n.29.

59. See cases cited *supra* note 51. There were also two cases challenging pre-game invocations at public high school football games: *Berlin v. Okaloosa County Sch. Dist.*, No. PCA 87-30450-RV, 1988 WL 85937 (N.D. Fla. Mar. 1, 1988) and *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989), and one challenging prayer at band practices and concerts, *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492 (8th Cir. 1988).

60. The trial court in *Stein v. Plainwell Community Schs.*, 610 F. Supp. 43 (W.D. Mich. 1985) and the intermediate appellate court in *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809 (Cal. Ct. App. 1989) held that the prayers involved did not violate the Establishment Clause, but these decisions were reversed on appeal.

61. *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991); *Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682 (D. Utah 1991).

62. Utilizing a historical approach, the Supreme Court in *Marsh* upheld the practice of the Nebraska State Legislature in employing a chaplain to open legislative sessions with a prayer. The Court did not attempt to reconcile its decision with the *Lemon* three-pronged test, which some had thought applied to all Establishment Clause cases. The dissenters in *Stein*, Judges Merritt and Wellford, also applied the *Marsh* test; Judge Milburn, concurring, argued that the prayers in question must satisfy both the *Lemon* and *Marsh* tests, and he found that they failed both tests. *Stein*, 822 F.2d at 1410-17. The court in *Albright* referred to the *Lemon* and the *Marsh* tests in denying plaintiffs injunctive relief.

ifornia had adopted the *Lemon* test to measure violations of their strict state constitution establishment clauses, the conclusion that the test had been violated also constituted a finding that both state constitutions had been violated.<sup>63</sup>

There was a good deal of similarity in the factual circumstances of the seven cases. Apparently attendance at the graduation ceremony was not required by any school district to graduate and to receive a diploma.<sup>64</sup> Each case involved an invocation, a prayer at the beginning of the ceremony, and a benediction, which was delivered near the end. Most cases indicate that the practice of having both an invocation and a benediction at the graduation ceremonies was a long-standing tradition for the school or school district.<sup>65</sup> This suggests that their continuation was taken for granted by all concerned, although a few cases indicate that a particular group requested that the prayers be included for that year.<sup>66</sup>

Those designated to deliver the prayers varied: clergymen,<sup>67</sup> graduating seniors,<sup>68</sup> teachers,<sup>69</sup> clergymen or graduating seniors,<sup>70</sup>

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63. *Kay*, 719 P.2d at 878-79 (citing *Eugene Sand & Gravel v. City of Eugene*, 558 P.2d 338 (Or. 1976)); OR. CONST. art. 1, § 5; *Bennett v. Livermore Unified Sch. Dist.*, 238 Cal. Rptr. 819, 823 (Cal. Ct. App. 1987) (citing *Johnson v. Huntington Beach Union High Sch. Dist.*, 137 Cal. Rptr. 43 (Cal. Ct. App. 1977)); CAL. CONST. art. 1, §§ 4, 24; art. 9, § 8; art. 16, § 5; *Sands*, 809 P.2d at 820.

64. Five courts stated this explicitly; the courts in *Jones* and *Albright* did not mention this, but presumably, it is also true of those schools.

65. See, e.g., *Albright*, 765 F. Supp. at 684 ("nearly 80 years" for the Alpine School District); *Sands*, 809 P.2d at 810 (since 1937 at the Twenty-Nine Palms High School and since 1968 at Yucca Valley High School, both in the Morongo Unified School District).

66. The school boards requested the prayers in *Graham*, 608 F. Supp. at 532, and in *Kay*, 719 P.2d at 877. The graduating class at Orem, Utah High School voted 345 to 41 to have graduation prayer in response to a questionnaire. *Albright*, 765 F. Supp. at 687 n.10. The rules adopted by the Clear Creek, Texas Independent School District after they were sued provided that "[t]he 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 . . ." *Jones*, 930 F.2d at 417. The Portage, Michigan Central High School "permitted the graduating seniors to organize and develop the content of their own commencement exercises" and to select a minister to give the invocation and benediction. *Stein v. Plainwell Community Schs.*, 610 F. Supp. 43, 45 (W.D. Mich. 1985), *rev'd and remanded*, 822 F.2d 1406 (6th Cir. 1987). The courts in *Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974), and *Goodwin v. Cross County Sch. Dist.*, 394 F. Supp. 417 (E.D. Ark. 1973) (upholding baccalaureate service held in school auditorium), emphasized the fact that student representatives decided to include the invocations.

67. *Graham*, 608 F. Supp. at 532-33; *Stein*, 610 F. Supp. at 45; *Sands*, 809 P.2d at 810.

68. *Jones*, 930 F.2d at 417; *Albright*, 765 F. Supp. at 684; *Stein*, 610 F. Supp. at 45.

69. *Kay*, 719 P.2d at 877.

70. *Bennett*, 238 Cal. Rptr. at 820.



and clergymen and teachers.<sup>71</sup> Most of the clergymen invited to deliver invocations and benedictions were Protestant ministers; a few were Catholic priests and Rabbi Gutterman in *Weisman* was the only rabbi mentioned.

Some schools sought neutral prayers. The Portage, Michigan, school authorities in *Stein* instructed ministers to be brief and to keep the invocation and benediction "nondenominational."<sup>72</sup> Influenced by the Sixth Circuit opinion in *Stein*, the Board of Trustees of the Clear Creek, Texas schools adopted rules specifying that "the invocation and benediction shall be nonsectarian and nonproselytizing in nature."<sup>73</sup> In the same vein, the Alpine, Utah School District counseled students who were to deliver graduation prayers "to speak in non sectarian, non doctrinal and non proselytizing terms so as to represent and respect diverse views."<sup>74</sup>

Monitoring of the prayers' content, however, was limited. In *Jones*, a faculty member reviewed the invocations submitted by student volunteers.<sup>75</sup> In the other cases, those praying were apparently given free rein to say what they wished without official monitoring or supervision.<sup>76</sup>

Virtually all of the prayers which resulted mentioned God or a synonym for God.<sup>77</sup> Nearly half of the prayers described in the cases explicitly mentioned or were addressed to Jesus Christ.<sup>78</sup>

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71. *Sands*, 809 P.2d at 810. Local ministers gave the invocations in the football game cases, *Berlin* and *Jager*, although the school district in *Jager* came up with an "equal access" plan after the *Jagers* protested. *Jager*, 802 F.2d at 827. The equal access plan would have allowed any student, parent, or school staff member to deliver an invocation. *Id.*

72. *Stein*, 610 F. Supp. at 45. The court assumed that "nondenominational" meant "harmonious with all Christian beliefs" rather than "harmonious with both Christian and Judaic beliefs." *Id.* at 45 n.2.

73. *Jones*, 930 F.2d at 417. Clear Creek's rules were adopted three weeks before the *Jones* case was to be tried; the Board of Trustees' attorney drafted the rules to conform with the *Stein* opinion. *Id.* at 417-18.

74. *Albright*, 682 F. Supp. at 684.

75. *Jones*, 930 F.2d at 418. In *Kay*, a teacher wrote and delivered the proposed invocation. *Kay*, 719 P.2d at 876-77.

76. *E.g.*, *Stein*, 610 F. Supp. at 45: "Neither the school administrators nor the senior class representatives preview the content of the minister's presentation"; see also *Graham*, 608 F. Supp. at 533: "The minister who conducts the invocation and benediction has complete control of what he will say. Nobody tells him what the content of the invocation and benediction shall be; that is entirely up to the minister, who acts in accordance with his conscience. The content has always been a Christian prayer or communication."

77. *E.g.*, *Sands*, 809 P.2d at 811: "Heavenly Father" and "our Lord" at the Yucca Valley High School 1985 invocation; "Dear Father" at the Yucca Valley High School 1986 benediction. The one exception was the benediction in *Kay*, 719 P.2d at 876. The *Graham*, *Jager*, and *Albright* opinions do not include the text of the prayers concerned.

78. "At earlier commencement exercises at Portage Central [High School, Michigan], invocations have included a statement that one must keep Jesus Christ

Those in attendance were invited to join in the prayers in about half of the cases.<sup>79</sup> Even if those in attendance were not explicitly asked to signify their assent to the prayers being offered by standing up or bowing their heads, it is likely that all members of the audience would be expected to manifest respect if not reverence by their posture or demeanor.<sup>80</sup> None of the cases, moreover, mention any dis-

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as one's savior." *Stein*, 822 F.2d at 1407 n.2 (Portage May 31, 1985 invocation). See *Graham*, 608 F. Supp. at 533. See also *Jager*, 862 F.2d at 826, and the invocation delivered before the November 6, 1987 football game at Crestview High School in Okaloosa County, Florida: "We thank you Lord that we have the strength and power and the glory to live in the nature of your spirit. We ask you Lord to give us the sportsmanlike spirit this evening in this fellowship . . . Bless the winners and bless the losers for we are all winners through Jesus Christ, our Lord, Amen." *Berlin*, 1988 WL 85937 at \*1.

79. Some ministers who delivered invocations and benedictions showed solicitude for the views of those with different beliefs. Thus, the United Methodist minister whose graduation prayers were enjoined in *Graham* had planned to say just before the invocation, "[w]ill those who wish to pray with me join me" but not to ask those present to stand; he had planned to make a similar statement before giving the benediction. *Graham*, 608 F. Supp. at 533. The minister who delivered the invocation at the 1985 Yucca Valley High School graduation stated, "[s]o if you would like to you can bow your head, if not, feel free not to, that is what freedom is all about." *Sands*, 809 P.2d at 812 n.2. In contrast, the teacher who delivered the benediction at the same graduation ceremony began with "[w]ill the audience please stand and join us in prayer." *Id.* at n.3. See also *Steele*, 845 F.2d at 1493-94; *Jager*, 862 F.2d at 826 ("The invocations often opened with the words 'let us bow our heads' or 'let us pray' and frequently invoked reference to Jesus Christ or closed with the words 'in Jesus' name we pray.'")

80. Pressure to conform to majority piety can be strong, and at a public event, this pressure and deep religious beliefs can exert conflicting pulls on members of religious (or non-religious) minorities. Plaintiff Tammy Berlin, a Jewish high school sophomore, experienced an agonizing dilemma when explicitly Christian pre-game invocations were offered at her high school football games: "Tammy Berlin also attends Crestview High's home football games and sits with her parents. She goes because her brother is a player and because the games are the most popular event of the evening for students. Tammy does not stand during the invocation. If, as is sometimes the case, she is walking around a track outside the stadium when the invocation is given, she continues walking. She testified that she receives 'weird looks' because of her behavior during the invocation. Students have asked her why she does not stop walking and have told her that she should stop. She 'gets the impression' that she is being treated as an outcast when she continues walking during the invocation. She testified that her classmates' remarks, glances, and general attitude cause her to feel as if her religion, Judaism, is wrong." *Berlin*, 1988 WL 85937 at \*2. Tammy Berlin's crisis of conscience evokes the cruel dilemma in which the Jehovah's Witness children were placed in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), when they were compelled by West Virginia to salute the flag, an act which their religion proscribed as idol worship in violation of the commandment in Exodus 20:4 and 5, or else risk expulsion. It also evokes the dilemma faced by the Unitarian plaintiff in *Schempp*, who decided not to have his children excused from the daily Bible reading and recitation of the Lord's Prayer in their public school classroom, although these were contrary to their religious beliefs, for fear that they might be regarded as "odd balls" or even atheists, with all the bad connotations that term carried. *Schempp*, 374 U.S. at 206-08. The plaintiffs

claimer in the graduation program to indicate that the person delivering the prayers was speaking only for himself, herself, or perhaps a significant group in the community, and did not represent the official views of the community itself.

### 1. Bennett, Kay and Graham

While they reached opposite conclusions, the decisions in the first batch of cases were as perfunctory in their reasoning as *Wood*, *Wiest*, and *Deusebio* had been a decade earlier. The trial court in *Bennett* concluded that graduation prayer violated all three prongs of the *Lemon* test.<sup>81</sup> Prayer is a "quintessentially religious" act<sup>82</sup> and the involvement of school administrators supervising the graduation ceremony caused excessive entanglement between government and religion.<sup>83</sup> The First District Court of Appeal summarily affirmed.<sup>84</sup> Since "prayer is a primary religious activity in itself,"<sup>85</sup> "the primary purpose of a religious invocation is religious."<sup>86</sup> Inclusion of the invocation in the graduation ceremony "conveys a message of endorsement of the particular creed represented in the invocation, and of religion in general."<sup>87</sup> Finally,

the School District here admits that should we hold some forms of religious invocation permissible, it will be necessary to oversee the students' choice of ceremony to ensure that the limits set here are not exceeded. It is just this kind of surveillance which causes the entanglement condemned

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in *Graham* were also Unitarian. The plaintiffs in *Weisman* and *Berlin* were Jewish and the plaintiffs in *Jager* were "Native Americans" of unspecified religion, but apparently not Christian. The religion of the plaintiffs in the other graduation prayer cases was not specified.

81. California had adopted the three-pronged *Lemon* test to govern its state constitution's religion provisions. *Bennett*, 238 Cal. Rptr. at 823 (citing *Johnson v. Huntington Beach Union High Sch. Dist.*, 137 Cal. Rptr. 43 (Cal. Ct. App. 1977)).

82. *Id.*

83. *Id.* Compare *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982): "Prayer is perhaps the quintessential religious practice of many of the world's faiths, and it plays a significant role in the devotional lives of most religious people." The *Bennett* appellate court held that *Marsh* was distinguishable since there was no historical indication that the drafters of the First Amendment had intended to approve the practice of prayer at graduation, and it declined to impose on the dissenting minority the "odious choice of either foregoing their graduation ceremony or participating in a ceremony with which they have fundamental disagreement." *Bennett*, 238 Cal. Rptr. at 825.

84. *Bennett v. Livermore Unified Sch. Dist.*, 238 Cal. Rptr. 819 (Cal. Ct. App. 1987). While it copiously summarized Supreme Court precedent, only five short paragraphs (less than half a page) of the court's seven-page opinion consist of analysis and application of the *Lemon* three-pronged test. *Id.* at 823-24.

85. *Id.* at 823 (quoting *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982); accord *Wallace v. Jaffree*, 472 U.S. 38, 43 n.22 (1985)).

86. *Bennett*, 238 Cal. Rptr. at 823.

87. *Id.* at 823-24.

in the third part of the *Lemon* test.<sup>88</sup>

Thus, the court concluded that the practice violated all three prongs of the *Lemon* test, and therefore violated the First Amendment.<sup>89</sup>

The Oregon courts in *Kay* were similarly terse. The circuit court simply declared in a two-page judgment that "the inclusion of formal public prayer at defendants' commencement exercises" violated the United States and Oregon Constitutions.<sup>90</sup> The Oregon Court of Appeals affirmed, holding that the proposed invocation by a senior teacher violated the first two prongs of the *Lemon* test:<sup>91</sup> "[p]rayer by its nature is religious; accordingly, the purpose for which a prayer is given necessarily must be religious. It would be a contradiction in terms to say that the giving of a prayer has no religious purpose."<sup>92</sup> The court further reasoned that inclusion of an invocation delivered by a senior teacher at the beginning of such an important ceremony as graduation would give the impression that the school district endorsed prayer and religion and indeed sponsored them. Accordingly, the proposed prayer violated article I, section 5 of the Oregon Constitution.<sup>93</sup>

The United States District Court decision in *Graham* was also brief and conclusory.<sup>94</sup> The evidence heavily favored plaintiffs' case. The United Methodist minister who was to give the graduation invocation and benediction and three expert clergymen witnesses for plaintiffs (one of them also a United Methodist minister) testified

88. *Id.* at 824 (citation omitted).

89. The court distinguished *Widmar v. Vincent*, 454 U.S. 263 (1981), *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Marsh v. Chambers*, 463 U.S. 783 (1983), limiting *Marsh* on the facts.

90. *Kay v. David Douglas Sch. Dist.*, No. A-8404-02438 (Multnomah County, Or. July 2, 1984), summarized in Du Puy, *supra* note 48 at 332. The court did not comment on a 1964 opinion of the Oregon Attorney General that "a high school commencement program may legally include an invocation and benediction from members of the clergy." 31 Op. Or. Att'y Gen. 428, 431.

91. *Kay v. David Douglas Sch. Dist.* No. 40, 719 P.2d 875 (Or. Ct. App. 1986). Oregon had also adopted the *Lemon* three-pronged test to determine violations of article I, section 5 of its State Constitution: "No money shall be drawn from the treasury for the benefit of any religeous [sic] or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly." *Kay*, 719 P.2d at 877-79.

92. *Kay*, 719 P.2d at 880.

93. OR. CONST. art. I, § 5. While the court did not reach the First Amendment claim, its conclusion that the *Lemon* test had been violated is equivalent to a holding that the practice violated the Establishment Clause. Judge Rossman, in dissent, argued that the proposed prayer passed muster under all three prongs of the *Lemon* test. *Kay*, 719 P.2d at 882-87 (Rossman, J., dissenting). On appeal, the Oregon Supreme Court reversed, holding that since the David Douglas High School commencement had been held before the circuit court entered its judgment, no justiciable controversy remained at that time and the court should have dismissed the case. *Kay*, 738 P.2d 1389 (Or. 1987) (en banc).

94. *Id.* at 533-34.

that the prayer's purpose was solely religious and not secular.<sup>95</sup> The rather weak response of the new Superintendent of the School District was that the principal purpose of the prayers was "traditional," and they imparted "a serious note" to the ceremony.<sup>96</sup> Not surprisingly, the court concluded that the prayers "serve a Christian religious purpose, not a secular purpose."<sup>97</sup> The court further found that "the great weight of the evidence" in the case supported the conclusion that "the invocation and benediction portions of defendant's commencement exercises have as their primary effect the advancement of the Christian religion . . . ."<sup>98</sup> The court did not reach the third prong of the *Lemon* test because the plaintiffs did not raise an entanglement argument.<sup>99</sup>

## 2. *Stein v. Plainwell Community Schools*

*Stein v. Plainwell Community Schools*,<sup>100</sup> apparently decided right after *Graham*,<sup>101</sup> was the first decision to analyze in depth the legal issues raised by graduation invocations and benedictions.<sup>102</sup> The case involved challenges to invocations and benedictions planned for the graduations at two Michigan school districts, Plainwell and Portage. At Plainwell, graduating seniors had given the prayers since 1980; Portage Central High School had permitted graduating seniors, for the past fifteen years, to organize and plan the content of the commencement exercises and to select a minister to give the invocation and benediction.<sup>103</sup>

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95. *Graham*, 608 F. Supp. at 531.

96. *Id.* at 534. In addition to the testimony of a second, rather ineffectual witness, the only other factor supporting the defendant's position was a petition signed by about 700 persons expressing support for inclusion of the invocation and benediction in the graduation ceremonies. *Id.*

97. *Id.* at 535.

98. *Id.* at 536.

99. *Id.* While disagreeing with their emphasis on the voluntary nature of attendance at graduation, the court distinguished *Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362 (Pa. 1974), and *Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974) on the facts before those courts, which it accurately said "were not very thoroughly developed." *Graham*, 608 F. Supp. at 537.

100. *Stein v. Plainwell Community Schs.*, 610 F. Supp. 43 (W.D. Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987).

101. The reporter gives the dates of decision for *Graham* and *Stein* as May 9, 1985 and March 22, 1985, respectively. However, *Graham* appears in 608 F. Supp. and *Stein* appears in 610 F. Supp., and *Stein* refers to *Graham* while *Graham* does not mention *Stein*. Thus, evidently, the *Graham* decision was originally issued prior to May 9, 1985. See also Timothy S. Eckley, Comment, *Invoking the Presence of God at Public High School Graduation Ceremonies: Graham v. Central Community School District*, 71 IOWA L. REV. 1247, 1269 (1986) (noting that *Stein* was "decided immediately after *Graham*").

102. The district court's opinion devotes four pages of a seven-page decision to these precise issues. *Stein*, 610 F. Supp. at 47-50.

103. *Id.* at 45. The stipulations of fact by the parties to the case gave no indica-

The court noted at the outset that the practice of offering invocations and benedictions at high school graduations "falls into the grey area between [the] two extremes"<sup>104</sup> of *Engel v. Vitale* and *Abington School District v. Schempp*, on the one hand, and *Marsh v. Chambers*, on the other. The court decided to apply the *Lemon* three-pronged test. With respect to the secular purpose prong, it incisively noted that the purpose of the person delivering the prayer might differ from that of the audience or the sponsoring school district.

Thus, while the purpose of the minister delivering the invocation and benediction at the Portage graduation may be assumed to be religious,

[a]t the same time, to some members of the audience, the invocation and benediction will be merely a formal way of opening and closing the graduation ceremonies. To these people, the purpose of the prayer will be ceremonial. Thus, the Court recognizes a dual nature of prayer in this context, partly religious and partly ceremonial.<sup>105</sup>

Furthermore, the authorities might have their own different purpose here, so one should not focus solely on the person giving the prayer:

Given the dual nature of the kind of prayer at issue in this case, the Court must not be misled by looking solely at the purpose of the person who is delivering the prayer. Even if the purpose of the speaker is purely religious, the practice may still be constitutional if the purpose of the sponsoring governmental body is primarily secular.<sup>106</sup>

While neither school district had clearly articulated its purpose in having the graduation prayers, the stipulations of fact revealed that they were interested in continuing a long tradition of such prayers and in having students plan and participate in their own commencement ceremony.<sup>107</sup> There was "no evidence of a secret purpose of the school district to proselytize the audience to accept the tenets of any particular faith."<sup>108</sup>

The court also concluded that the second prong of the *Lemon* test had not been violated as the primary effect of including invocations and benedictions in the graduation ceremonies would not be

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tion of the content of the proposed prayers or of past invocations and benedictions at either school's graduation ceremonies. *Id.*

104. *Id.* at 46.

105. *Id.* at 47.

106. *Id.* at 47 (citation omitted) (emphasis in original).

107. *Id.* at 48.

108. *Id.* The court distinguished *Graham* on this basis, since the record in that case revealed that Christian prayer was permitted in the classroom at least on one occasion, the school board president had expressed the hope that plaintiffs' children could be exposed to Christianity in school, and Gideon Bibles had been distributed to students in their classrooms. *Id.*

to advance religion. It noted that 1) the graduation ceremony was voluntary and not a mandatory part of the school curriculum; 2) school employees did not deliver the prayers, nor did the schools have any control over their content; 3) the prayers lasted only a few minutes, were given only once a year, and reached a different audience each time, so there was no danger of daily indoctrination; 4) the audience was comprised mostly of adults and graduating seniors who were no longer impressionable or readily susceptible to religious indoctrination; 5) the purpose of the ceremony was not "pedagogical" but merely "ceremonial"; and 6) there was no evidence of intent to proselytize on the part of the speakers delivering the prayers.<sup>109</sup> Finally, the court found that a "once-a-year ceremony requiring minimal relations between school officials and local clergy" presented no risk of a prohibited entanglement. Therefore, it concluded, the proposed practices did not violate the Establishment Clause, and plaintiffs' motion for a preliminary injunction was denied.<sup>110</sup>

On appeal, the Sixth Circuit reversed.<sup>111</sup> In the meantime, the Plainwell and Portage graduations were held with the challenged prayer included, and the Sixth Circuit had before it the texts of the graduation prayers. The June 6, 1985 Plainwell commencement invocation referred to "Heavenly Father," "God," and "Lord,"<sup>112</sup> and the invocation delivered by a Lutheran minister at the May 31, 1985 Portage Central High School commencement ended with "through Christ our Lord. AMEN."<sup>113</sup>

Judge Merritt stated that the graduation ceremonies in question "are analogous to the legislative and judicial sessions referred to in *Marsh* and should be governed by the same principles."<sup>114</sup> Judge Merritt claimed that the invocation and benediction served the "solemnizing" function described by Justice O'Connor, concurring in *Lynch v. Donnelly*,<sup>115</sup> but that the presence of parents would "act as a buffer against religious coercion."<sup>116</sup> In addition, "the graduation context does not implicate the special nature of the teacher-student relationship—a relationship that focuses on the transmission of knowledge and values by an authority figure."<sup>117</sup> *Marsh*, however,

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109. *Id.* at 49-50.

110. *Id.* at 50. On the basis of this opinion, the district court later dismissed plaintiffs' claims on the merits.

111. *Stein, v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987).

112. *Id.* at 1407 n.1.

113. *Id.* at 1407 n.2. The Plainwell student's invocation also included a quotation from philosopher Kahlil Gibran, and ended with the prayer attributed to St. Francis of Assisi. *Id.* at 1407 n.1.

114. *Id.* at 1409.

115. *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring).

116. *Stein*, 822 F.2d at 1409.

117. *Id.*

sanctioned "nonsectarian" and "nonproselytizing" legislative invocations that did not "symbolically place the government's official seal of approval on one religious view."<sup>118</sup> Judge Merritt concluded that the prayers in question placed the government's seal of approval on the Christian view, so they failed the *Marsh* test. Accordingly, the court reversed and remanded *Stein* for the lower court to grant appropriate equitable relief to the plaintiffs.<sup>119</sup>

Judge Wellford, in his dissent, apparently agreed that the challenged prayers should be scrutinized under both the *Lemon* test and *Marsh*, but he concluded that they were constitutional under either test. In support of this conclusion, he emphasized that the prayers occurred only once a year and took place in athletic facilities, not the classroom, after the end of the school year. Furthermore, the authorities did not select or deliver the prayers nor did they review their content. Thus, the authorities did not approve them. In addition, the audience was comprised not of impressionable children but largely of adults and graduating seniors.<sup>120</sup> Therefore, the primary effect of the prayers was not to advance religion, and the second prong of the *Lemon* test was satisfied.<sup>121</sup>

Judge Wellford also pointed out an important stipulation by the parties that some people attending the graduation ceremonies would find the invocation and benediction to be "ceremonial in effect."<sup>122</sup> He concluded that to the extent they were "essentially ceremonial," they would satisfy the secular purpose prong.<sup>123</sup> Finally, because of the prayers' brevity and the fact that government funds were not expended, he found that including the prayers in the program did not involve excessive entanglement between church and state.<sup>124</sup>

118. *Id.* at 1409 (quoting *Marsh*, 463 U.S. at 792).

119. *Id.* at 1410. Judge Milburn concurred, stating that to be constitutional, ceremonial commencement prayers "must be nonsectarian and nondenominational." *Id.* (Milburn, J., concurring). He further maintained that "ceremonial school commencement prayers" must also satisfy the three-pronged *Lemon* test. Most if not all of the challenged prayers, in his opinion, failed the *Lemon* test.

120. *Id.* at 1415 (Wellford, J. dissenting).

121. *Id.* Judge Wellford analogized the brief prayers during otherwise secular ceremonies lasting some 75 minutes to the religious creche scene erected by the city of Pawtucket, Rhode Island, in a shopping area, which the Supreme Court had deemed constitutional in part because it was surrounded by secular holiday symbols. *Id.* at 1416-17 (citing *Lynch v. Donnelly*, 465 U.S. 668 (1984)).

122. The stipulation stated that "some people in attendance at the graduation ceremonies will find the prayers at Invocation and Benediction to have a religious effect while others will find the prayers to be merely a formal way of opening and closing the graduation and, therefore, are [sic] only ceremonial in effect." *Id.* at 1411.

123. *Id.* at 1415.

124. *Id.* at 1417 (Wellford, J., dissenting).



## 3. Sands v. Morongo Unified School District

*Sands v. Morongo Unified School District*<sup>125</sup> has produced the most thorough judicial discussion to date of the constitutionality of graduation prayers, culminating in the lengthy California Supreme Court decision invalidating the practice.<sup>126</sup> The Morongo Unified School District operated four high schools, all of which had included invocations and benedictions in their graduation ceremonies: Twenty-Nine Palms High School since 1937, Yucca Valley High School since 1968, Sky High School since 1977, and Monument High School since 1978. Plaintiffs Sands and Bertollette, taxpayers in the district, brought an action for declaratory and injunctive relief to terminate this practice in June, 1986. While the case was pending in the trial court, the Court of Appeal for the First District decided *Bennett v. Livermore Unified School District*,<sup>127</sup> which held that such prayers were unconstitutional, and the parties filed cross motions for summary judgment. The San Bernardino County Superior Court granted plaintiffs' motion and enjoined the district from conducting religious invocations and benedictions at any public school ceremonies in the district.<sup>128</sup>

On appeal, the Fourth District Court of Appeal disagreed with the First District's decision in *Bennett* and reversed. Its reasoning concerning the Establishment Clause challenge closely resembled that of the Sixth Circuit in *Stein*, and correspondingly rejected at every turn that of its brethren in *Bennett*. Like the Sixth Circuit, the appellate court in *Sands* rejected the defendant school district's suggestion that it apply the principles set forth in *Marsh* and instead applied the three-pronged *Lemon* test. Noting that the United States Supreme Court had pointed out that to "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation . . . ,"<sup>129</sup> the court disagreed with the *Bennett* court's conclusion that the secular purpose inquiry ends once the religious nature of prayer is recognized. The court stated that the purpose of the graduation ceremony itself was "wholly secular,"<sup>130</sup> and in that context it concluded that "the invocation adds a note of dignity and decorum to the ceremony and serves to focus the audience's attention."<sup>131</sup> Therefore, the secular purpose prong of the *Lemon* test

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

126. The majority opinion, three concurring opinions, and two dissenting opinions total 57 pages. *Id.* at 809-65.

127. *Bennett v. Livermore Unified Sch. Dist.*, 238 Cal. Rptr. 819 (Cal. Ct. App. 1987).

128. *Sands*, 809 P.2d at 810-11.

129. *Sands*, 262 Cal. Rptr. at 459 (quoting *Lynch*, 465 U.S. at 680 (1984)).

130. *Id.*

131. *Id.* (citing *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring)) (legislative invocations have legitimate secular purposes of "solemnizing public occasions, ex-

was satisfied.

The court found that the second *Lemon* prong had also been satisfied following the reasoning outlined in *Grossberg v. Deusebio*.<sup>132</sup> The *Grossberg* court concluded that the graduation invocation was constitutional because it did not occur in a repetitive or pedagogical context, was not part of a program of calculated indoctrination, and was a brief and peripheral part of a ceremonial function.<sup>133</sup> Similarly, the *Sands* court found that the religious effect of the graduation prayers was "remote and incidental," and the second *Lemon* prong was satisfied.<sup>134</sup> Finally, the *Sands* court found that, because no continuing state supervision was required for an invocation, no excessive entanglement existed to violate the third *Lemon* prong. The court emphasized, however, that it found "only nonsectarian invocations and benedictions constitutional,"<sup>135</sup> and suggested that this holding would eliminate the possibility of divisive sectarian disputes.<sup>136</sup>

The California Supreme Court, sitting en banc, reversed the Court of Appeal's decision and held that religious invocations and benedictions at public high school graduation ceremonies are "constitutionally impermissible" under both the United States and California Constitutions.<sup>137</sup> Justice Kennard's majority opinion, a forceful and effective statement of the complete separationist viewpoint on church-state relations, concluded that the prayers violated the primary effect and entanglement prongs of the *Lemon* test and that it was unnecessary to reach the secular purpose prong. The court went out of its way to emphasize that the United States Supreme Court remained committed to the *Lemon* test and had decisively rejected Justice Kennedy's proposal in *County of Allegheny v. American Civil Liberties Union*<sup>138</sup> that the *Lemon* standard be relaxed to

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pressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society"). See also *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979).

132. *Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974).

133. *Id.*

134. *Sands*, 262 Cal. Rptr. at 461.

135. *Id.*

136. *Id.* The court also rejected plaintiffs' arguments that the graduation invocations and benedictions violated the California Constitution's establishment clause (article XVI, § 5) and article IX, § 8 (prohibiting the teaching of "sectarian or denominational doctrine" in the California public schools). *Id.* at 461-62. Justice McDaniel concurred in a polemic which ascribed many of the nation's ills to the lack of moral education in the schools attributable in part to "a wholly distorted view of the establishment clause which a century of well intentioned but misguided decisions has spawned." *Id.* at 463.

137. *Sands*, 809 P.2d 809, 810 (Cal. 1991). Three justices wrote concurring opinions and two wrote dissenting opinions. *Id.* at 809.

138. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

achieve a "flexible accommodation" of religion.<sup>139</sup>

Like the courts in *Bennett* and *Graham*, the court quoted *Karen B. v. Treen*<sup>140</sup> to affirm the essentially religious nature of prayer:

Prayer is perhaps the quintessential religious practice for many of the world's faiths . . . . Prayer is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object. That it may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise.<sup>141</sup>

The court noted that in *Sands*, school officials organized, controlled, and funded the important high school graduation ceremony and contended that opening or closing the ceremony with a prayer "sends a powerful message that [the school district] approves of the prayer's religious content."<sup>142</sup> Embracing Justice O'Connor's formulation of the *Lemon* test in *Allegheny*,<sup>143</sup> the California Supreme Court concluded that:

[r]egardless of its actual purpose, when the government sponsors prayers at high school graduation ceremonies it gives the appearance of taking a position on religious questions. Through the practices challenged in this case, the government appears to prefer religion over nonreligion; appears to prefer religions that acknowledge the practice of petitionary prayer over religions that do not recognize such prayer; appears to prefer the religious belief that prayer should be public over the belief that prayer should be pri-

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139. Justice Panelli's dissenting opinion stated that in *Board of Educ. of the Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990), "the lead opinion's treatment of the *Lemon* test did not receive five votes." *Sands*, 809 P.2d at 849 n.6. In response, the majority pointed out that even Justices Rehnquist and White had joined Justice O'Connor's opinion in applying *Lemon* in *Mergens*. *Id.* at 813 n.3. The majority concluded that "[f]ar from showing that the *Lemon* test cannot command five votes in the high court, the *Mergens* decision, in which seven Justices expressed their adherence to *Lemon*, convincingly demonstrates *Lemon*'s continued vitality." *Id.* at 813 n.3.

140. *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982).

141. *Sands*, 809 P.2d at 813.

142. *Id.* at 814. While the record contained no evidence of whether those attending the graduation ceremonies actually regarded the prayers as conveying a message of government approval of religion, the court deemed such record evidence unnecessary, since "a reasonable observer would view the inclusion of graduation prayers in an official school ceremony as signifying approval of the practice of prayer and the religious content. The message of sponsorship is unavoidable." *Id.* at 814 n.5.

143. "The Establishment Clause, at the very least, *prohibits government from appearing to take a position on questions of religious belief* or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.* at 814 (quoting *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (emphasis added by California Supreme Court)).

vate; and implicitly endorses religions that address a single, anthropomorphic, and male deity over those that do not.<sup>144</sup>

Responding to various arguments made by defendant school district, the court denied that the message of government endorsement of religion was dispelled by the fact that the graduation ceremony occurred only once a year, and the invocations were brief. It also rejected the lower court's argument based on *Allegheny* that the predominantly secular nature of the graduation ceremony outweighed the religious nature of the brief prayers. Those attending might be asked to stand and join in prayer, and "[s]uch practices cannot be equated with the passive display of religious objects."<sup>145</sup> "Nonsectarian" prayers were no more acceptable, since the United States Supreme Court had made it clear that the Establishment Clause "prohibits not only explicit denominational preferences, but also government favoritism in general."<sup>146</sup> Moreover, the prayers did not embody a justifiable accommodation of religion since "[t]here is no free exercise right for government officials to include prayers in a public school ceremony."<sup>147</sup>

The court also rejected the school district's argument that no state coercion was involved, because "[i]t has been clear for almost three decades that coercion is not an element of an establishment clause violation."<sup>148</sup> Finally, since the public school is designed as "perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people,"<sup>149</sup> and because it is an institution in which it is critically important to keep out divisive forces,<sup>150</sup>

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144. *Id.* The court referred to *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990), *aff'd* 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 59 U.S.L.W. 3635 (U.S. Mar. 18, 1991) (No. 90-1014), which it said involved "a practice of including prayer at a high school's graduation ceremonies that was virtually identical to the practice involved here." *Id.* The court emphasized that in deciding *Weisman*, the federal district court observed that "students who were not members of the religions endorsed, or whose families were nonbelievers, might view the school's action as indicative of a preference for beliefs other than their own." *Id.*

145. *Id.* at 816.

146. *Id.*

147. *Id.* The court rejected any analogy to the *Mergens* decision in which the Supreme Court stressed that under the act "school officials may not promote, lead, or participate in any [high school religious club] meeting." *Id.* at 816 n.7. By way of contrast, the court noted that here, "school officials do promote, lead, and participate in the religious ceremonies: they are directly and finally responsible for the selection of religious speakers at graduations, and in at least one instance a faculty member delivered the prayer." *Id.* This plainly constituted endorsement. *Id.*

148. *Id.* at 817 (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)).

149. *Id.* (quoting *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring)).

150. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987): "[t]he public school is at once the symbol of our democracy and the most pervasive means of promoting our

an Establishment Clause violation still exists even when the dissenting students could choose not to attend their graduation. Accordingly, the challenged prayers conveyed the message that the school district preferred the speaker's religious beliefs, and indicated to nonadherents that they were less than full members of the political community. Therefore, they violated the "effect" prong of *Lemon*.

The court held that the challenged prayers violated the "excessive entanglement" prong of *Lemon* because they involved both government selection of religious speakers and approval of the content of public prayer. It admonished the school district, with respect to their choice of speakers, that "[b]ecause the tendency is great to make such choices dependent on the religious preference of the school official, or on the religious preferences of the majority of the school community, the degree of entanglement is unacceptably high."<sup>151</sup> School officials would have to monitor the content of the prayers to ensure against promotion of specific religious beliefs or concepts, and "such prophylactic government monitoring of religious speech is constitutionally impermissible."<sup>152</sup> This "inevitably leads to gradual official development of what is acceptable public prayer,"<sup>153</sup> which the district court in *Weisman* held was as much a violation of the Establishment Clause as composition of an official state prayer.<sup>154</sup> The court further rejected dissenting Justice Baxter's recommendation that the court could "fashion guidelines" to determine what is constitutionally permissible prayer for a public school graduation ceremony, because this would impermissibly entangle government in religious matters.<sup>155</sup>

The court next rejected any application of *Marsh* to this case. Not only had the Supreme Court in *Edwards v. Aguillard*<sup>156</sup> disclaimed any relevance of the *Marsh* historical approach to the public

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common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . ."

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

152. *Id.*

153. *Id.*

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

155. *Sands*, 809 P.2d at 862 (Baxter, J., dissenting). The court commented:

[T]o establish and administer guidelines for acceptable public prayer would require a court to address at least these questions: Does the required diversity mean that each different sect of each religion be represented, or do only 'major denominations' have a right to deliver prayers? Do clergy of what some might consider 'fringe' religions possess a right to give invocations? If not, why not? And if so, how frequently? What references to a particular religion's theology or doctrine are acceptable? Are some doctrinal references permissible but not others? Is a prayer that proselytizes acceptable? If not, what is the line between judicially acceptable prayer and improper proselytizing?

*Id.* at 819, n.8.

156. *Edwards*, 482 U.S. 578 (1987).

school context,<sup>157</sup> but the Court in *Allegheny* had opposed Justice Kennedy's attempt to extend the *Marsh* holding to encompass the facts of that case.<sup>158</sup> Because the Sixth Circuit in *Stein*<sup>159</sup> had ignored the *Edwards* dictum, the court concluded that "represents an improper extension of *Marsh*,"<sup>160</sup> but it noted that because the Morongo School District's prayers contained religious references which were indistinguishable from those in *Stein*, they would not even pass constitutional muster under *Stein*.<sup>161</sup>

157. In *Edwards*, the Court noted that the historical approach taken in *Marsh* is "not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." *Edwards*, 482 U.S. at 583 n.4 (quoted in *Sands*, 809 P.2d at 819). Similarly, the Court in *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) implied that the approach utilized to uphold legislative prayers in *Marsh* against an Establishment Clause challenge, i.e., that they were based on long historical usage and lack of particular sectarian content, could not be used to validate prayers in the schools. *Id.* at 390 n.9.

158. *Allegheny*, 109 S. Ct. at 3142.

159. *Stein v. Plainwell Community Schs.*, 610 F. Supp. 43 (W.D. Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987).

160. *Sands*, 809 P.2d at 820. Moreover, the court deemed the approach in *Stein* unacceptable, since it would require judges and other officials to pass on the acceptability of specific religious references in such prayers, which was clearly forbidden by the Establishment Clause. *Id.*

161. *Id.* The court held that the challenged prayers independently violated article I, § 4 of the California Constitution, which it interpreted as being more protective of the principle of separation of church and state than the First Amendment Establishment Clause, as well as article XIV, § 5 of the California Constitution. *Id.* Chief Justice Lucas, concurring, reluctantly concluded that in light of the Supreme Court's cases, the practice of invocations and benedictions at defendant school district's graduations violated the second prong of *Lemon*, the "effect" test. *Id.* at 821. However, Justice Lucas did state that he "would, if free to do so, uphold the challenged practice of the school district." *Id.* at 833. In addition, Justice Lucas would not have reached plaintiffs' claim that the challenged prayers violated the California Constitution. *Id.*

Justice Mosk, on the other hand, criticized Lucas' approach as a virtual abdication of responsibility and emphasized the strong tradition under the California Constitution of absolute separation between church and state. *Id.* at 836-37. Justice Arabian, also concurring, felt that the challenged prayers violated the second *Lemon* prong, since it was "undeniable" that they "reflect[ed] mainstream Judeo-Christian beliefs." *Id.* at 843. Justice Arabian emphasized that it was critical to view the issue from the perspective of those who adhered to non-Western religions, had no religion at all, or otherwise dissented from majority religious preferences. *Id.* at 842-43. On the other hand, Arabian stated that "[p]ublic prayer is an American tradition," and the appearance of clergymen of different faiths to deliver brief prayers at such gatherings as high school graduation ceremonies "does not reflect an official religious bias, but rather celebrates an enlarged and liberal policy of religious freedom which 'gives to bigotry no sanction.' (Washington's Letter to the Hebrew Congregation of Newport, R.I., Aug. 17, 1790.)" *Id.* at 844. Accordingly, he concurred reluctantly and expressed the hope that the Supreme Court would soon take advantage of the *Weisman* case to "endorse another view." *Id.*

Justice Panelli, in a 21-page dissent, repeated the protest of Judge Wellford, dissenting in *Stein*, that outlawing graduation invocations and benedictions would

## 4. Jones v. Clear Creek Independent School District

Three weeks before the California Supreme Court's decision in *Sands*, the Fifth Circuit held in *Jones v. Clear Creek Independent School District*<sup>162</sup> that a school board resolution authorizing "nonsectarian and nonproselytizing" invocations and benedictions at the option of the graduating class at public high school graduation ceremonies was constitutional.<sup>163</sup> Graduation ceremonies at Clear Creek High School had traditionally included invocations and benedictions written and delivered by graduating seniors, which contained overt Christian references. A year after commencement of a lawsuit challenging these practices and three weeks before the scheduled trial date, the school district's Board of Trustees adopted a resolution governing prayers, which its attorney had drafted and patterned on the majority opinion in *Stein*.<sup>164</sup>

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also necessitate the "absurd" outlawing of such patriotic songs as "America," "God Bless America" and the "Battle Hymn of the Republic," all of which contain repeated references to the Deity. *Id.* at 844-45. Observing that only two courts applying the *Lemon* test to graduation prayers had upheld them as constitutional (the district court in *Stein* and the Court of Appeals in this case), while all the others had held them unconstitutional, and that all the courts applying other tests had upheld the practice, Justice Panelli expressed the hope that the Supreme Court would apply the accommodationist approach exemplified by *Zorach v. Clauson*, 463 U.S. 783 (1952), to "accommodate the religious beliefs of . . . citizens by allowing brief religious invocations and benedictions at high school graduation ceremonies." *Id.* at 849. Panelli refuted at length the plurality's opinion that California constitutional law erected an even higher wall of separation between church and state than the First Amendment. *Id.* at 853-59.

A second dissenter, Justice Baxter, contended that while past Morongo School District graduation practices might have violated the First Amendment, the superior court had gone too far in banning all such prayers and should not have been upheld by the majority. *Id.* at 860-62. Justice Baxter concluded that a brief invocation would not necessarily be perceived as government endorsement of prayer or as a departure from the principle of complete government neutrality towards religion. Thus, he would not have held that graduation prayer is in all circumstances unconstitutional. Instead, he favored fashioning guidelines for speakers delivering such prayers and anticipated that the guidelines would be complied with, and thus he saw no need for the authorities to review the content of proposed invocations before their delivery and thereby risk undue entanglement. *Id.* at 862-63. Baxter also concluded that the challenged prayers did not violate the California Constitution. *Id.* at 863-64.

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

163. *Id.* at 417.

164. The resolution, adopted December 15, 1987, 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.

of Texas and the Fifth Circuit applied the *Lemon* test and upheld the resolution and practice. The appellate court accepted the school district's argument, invoking Justice O'Connor's opinion in *Lynch v. Donnelly*,<sup>165</sup> that the prayers fulfilled the secular purpose of solemnizing the event: "While the Resolution apparently tolerates invocations addressing a deity, we think that this is as consistent with the secular solemnizing purpose as any religious purpose."<sup>166</sup>

The court focused on several of the same factors cited by other courts in finding that the prayers satisfied the primary effect test. The invocations lasted less than a minute, students typically only experienced them once in four years, and the presence of their parents made less likely the "subtle official and peer coercion" which can occur in the different setting of the classroom.<sup>167</sup> The court further held that the school district's "passive role in the invocation inclusion process" — it was up to the graduating class to decide whether to have invocations — distinguished its situation from the state-sanctioned, officially written prayers struck down in *Engel*.<sup>168</sup>

Finally, the court determined that the regulations did not encourage excessive entanglement between church and state. Institutional entanglement was rendered impossible because student volunteers, and not clergymen, gave the prayers. Furthermore, the school district did not decide who gave the prayers, and pre-screening proposed invocations for "sectarianism and proselytization," which the third part of the Board of Trustees' resolution seemed to contemplate, was constitutional.<sup>169</sup>

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165. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

166. *Id.* at 420. The court was unable to envision a suitable secular substitute for this purpose, and plaintiffs probably did not help their case by agreeing that a hypothetical invocation text concluding with "[t]hank you for our past experience, and please, help us all to be successful in the future" was not offensive. *Id.* at 420 n.3. The court accurately commented, "we do not consider invocations such as the 1987 proposal approved by Jones any more secular for veiling references to a deity in pronouns and hidden objects." *Id.* at 420.

167. *Id.* at 422. The court quoted a dictum in *Engel v. Vitale*, 370 U.S. 421 (1962), in which the Court had admonished that "[t]here is of course nothing in the decision reached here that is inconsistent . . . with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." *Engel*, 370 U.S. at 435 n.21 (emphasis in original).

168. *Id.*

169. *Id.* at 422 n.4, 423. Judges Garwood and Barksdale concurred specially. They agreed with the majority opinion that the *Lemon* test was satisfied and was the most rigorous test that might be applied. They did suggest, however, that some less restrictive or rigid test might be applicable in this setting and looked to the Supreme Court's decision in *Weisman v. Lee* for enlightenment on this score.



## 5. Albright v. Board of Education of Granite School District

In the most recent graduation prayer case, *Albright v. Board of Education of Granite School District*,<sup>170</sup> the court stayed all proceedings except plaintiffs' application for a preliminary injunction, pending the outcome of *Lee v. Weisman*. Defendant Alpine School District<sup>171</sup> had an eighty-year-old tradition of permitting prayer at graduation by students selected on the basis of scholastic achievement, who were "counseled only to speak in non sectarian, non doctrinal and non proselytizing terms so as to represent and respect diverse views."<sup>172</sup> School officials did not regulate, control, or preapprove the content of the prayers used.

After reviewing the case law on the subject, the court concluded that the plaintiffs had not satisfied the traditional four-part test for obtaining a preliminary injunction. Although they had shown irreparable harm and that the proposed injunction would not be adverse to the public interest, the "balance of hardships" test presented a close question. The damage to students who desired prayer at graduation,<sup>173</sup> a unique occasion in their lives, was comparable to the offense it caused to those who opposed it.

The injunction's availability thus hinged on the fourth part of the test — likelihood of success on the merits. The court concluded that plaintiffs had not satisfied this test. The court stated that "[i]t appears that there is a reasonable likelihood that the Supreme Court will abandon the *Lemon* test,"<sup>174</sup> and if it did not, the Court might apply the *Marsh* and *Stein* reasoning and thereby uphold graduation prayer. Even if the *Lemon* test were deemed applicable, a court could conclude, as the Fifth Circuit had done in *Jones*, that the prayer was constitutional. As for the district court,

[t]his court's own view of the present state of the law is that prayer with appropriate content at ceremonial graduation events does not violate the Establishment Clause under either the Supreme Court's ceremonial exception in *Marsh* or under the three pronged requirements of *Lemon*. In this

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170. *Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682 (D. Utah 1991).

171. Granite School District was also a co-defendant, but unlike the Alpine School District, it settled the case with a stipulation that graduation in its two high schools for the 1991 school year would not contain prayers, although one of them would have a moment of silence. *Id.* at 684 n.2.

172. *Id.* at 684.

173. In response to a questionnaire circulated by the Senior Class President at Orem High School, the graduating seniors voted 345 to 41 in favor of graduation prayer. Affidavit of David J. Moss, *id.* at 687 n.10. The court noted that the Supreme Court in *Schempp* had stated that the First Amendment "has never meant that a majority could use the machinery of the state to practice its beliefs." *Id.* (quoting *Schempp*, 374 U.S. at 226).

174. *Albright*, 765 F. Supp. at 689.

court's opinion, there is a reasonable likelihood that the Supreme Court will follow its own precedent in *Marsh v. Chambers*, and regard invocations and benedictions at high school graduation ceremonies to constitute an exception analogous to opening ceremonies at legislative sessions.<sup>175</sup>

Following the Fifth Circuit's reasoning in *Jones*, the *Albright* court further concluded that the Alpine School District's graduation prayer policy satisfied the *Lemon* test:

This court also considers that the policy of defendant School District in this case, which permits rather than requires the giving by students of prayers with content which is non proselytizing, non denominational and non doctrinal, under voluntary and non coercive circumstances, does not violate the establishment of religion clause under the *Lemon* test. This court finds that prayers which may be rendered pursuant to such policy would have the secular purpose of solemnizing the occasion, that the primary effect would neither advance nor endorse religion and that there would be created no excessive entanglement of government with religion. Under the Alpine defendants' policy, excessive entanglement of government with religion is avoided because of clear guidelines as to acceptable content, no preliminary review by school officials of the prayers, and no monitoring.<sup>176</sup>

Accordingly, since plaintiffs had failed to demonstrate a substantial likelihood of success on the merits, the court denied them a preliminary injunction.<sup>177</sup>

In conclusion, the court admonished defendants concerning acceptable prayer at their approaching graduation ceremonies by setting forth guidelines similar to those of the Clear Creek Independent School District in *Jones*:

Any prayer by way of invocation and/or benediction at forthcoming graduation ceremonies should be under a policy which permits voluntary participation by students, which ensures no direct or indirect coercion, no identification with a particular religion, and that such be non sectarian, non denominational and non proselytizing in character. It should be recognized that high school stu-

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175. *Id.*

176. *Id.* (citations omitted).

177. The court declined to reach the Utah constitutional issues plaintiffs had raised, particularly under article I, section 4, which contains an Establishment Clause identical to that of the First Amendment, since the forthcoming decision in *Lee v. Weisman* would probably be "substantially persuasive to the Utah Supreme Court" as to the meaning of this clause. *Id.* at 690.

dents are not "babes in arms" and that in fact they are mature enough to understand that a school does not endorse or promote a religion by permitting prayer under the guidelines just described. It may well be that in future graduation ceremonies prayer will be permitted on public ceremonial occasions "provided authorities have a well-defined program for ensuring on a rotating basis that persons representative of a wide range of beliefs and ethical systems are invited to participate."<sup>178</sup>

#### 6. *The Football Pre-Game Invocation Cases*

Two other cases<sup>179</sup> have involved challenges to the constitutionality of invocations preceding public high school football games, a common practice in the South. There is a fairly close analogy between extracurricular events like football games and commencement ceremonies, because both are official school occasions but neither is an integral part of the academic curriculum.

In *Berlin v. Okaloosa County School District*,<sup>180</sup> the plaintiffs were a Jewish family whose son Max played on the football team at Crestview High School. For thirty years, the official announcer at Crestview home football games had asked those present to stand and bow their heads before each game while a local minister delivered an invocation. At least one of the invocations was explicitly Christian in language,<sup>181</sup> and plaintiff Tammy Berlin, a sophomore at Crestview, testified that she received "weird looks" when she did not stand or continued walking around a nearby track during the invocation.<sup>182</sup> Max and Tammy Berlin and their parents sought a temporary restraining order in November, 1987 to enjoin the defendants from sanctioning a prayer at the beginning of each home football game and to ban the football coaches from praying with the team before

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178. *Id.* at 691 (citations omitted) (quoting Campbell, J., dissenting opinion in *Weisman v. Lee*, 908 F.2d 1090, 1099 (1st Cir. 1991)). The first omitted footnote referred to *Widmar v. Vincent*, 454 U.S. 263 (1981) and *Board of Educ. v. Mergens*, 110 S. Ct. 2356, 2372 (1990) ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.") The second omitted footnote referred to Judge Campbell's dissenting opinion in *Weisman v. Lee*.

179. *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989); *Berlin v. Okaloosa County Sch. Dist.*, No. PCA 87-30450-RV, 1988 WL 85937 (N.D. Fla. Mar. 1, 1988).

180. *Berlin*, 1988 WL 85937.

181. The November 6, 1987 invocation included the following: "We thank you Lord that we have the strength and power and the glory to live in the nature of your spirit . . . Bless the winners and bless the losers for we are all winners through Jesus Christ, our Lord, Amen." *Id.* at \*1.

182. *Id.* at \*2. See discussion *supra* note 80 and accompanying text.

and after games or authorizing, encouraging, or aiding others to do so.<sup>183</sup> Treating the motion as an application for a preliminary injunction, the court had to consider plaintiffs' Establishment Clause challenge in analyzing whether they were likely to prevail on the merits at trial.

The court held that it was "obligated to utilize the *Lemon* form of analysis under the present state of the law."<sup>184</sup> The court found that the invocation served "the clearly secular purpose of lowering the high emotional state of the crowd, 'solemnizing public occasions . . . and encouraging the recognition of what is worthy of appreciation.'"<sup>185</sup> Despite what the court acknowledged to be the religious nature of the invocation, the presence of students who can exert peer pressure, and that of teachers who can act as role models, the court concluded that "there is an inadequate basis from which to find that the invocation produces a prohibited effect."<sup>186</sup> Since the invocation was offered by a religious leader, who was not a school employee and who chose the prayer's content, and "there is no evidence that the school is sponsoring the religious leader during the invocation or adopting his invocation,"<sup>187</sup> the court concluded that "there is no highly visible union of government and religion in this case."<sup>188</sup> Accordingly, the court found the invocation satisfied the effect prong of the *Lemon* test.

The court concluded "that the plaintiffs have not demonstrated a substantial likelihood of prevailing on the merits on either the purpose or effects prongs of *Lemon*."<sup>189</sup> Therefore, plaintiffs' motion for a preliminary injunction was denied.<sup>190</sup>

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183. *Berlin*, 1988 WL 85937 at \*2.

184. *Id.* at \*5.

185. *Id.* at \*11 (quoting O'Connor, J., concurring in *Lynch v. Donnelly*, 465 U.S. at 693).

186. *Id.* at \*13. The court claimed that "[t]he coercive presence of teachers and students is effectively neutralized by the presence of parents and the general public." *Id.* at \*14. Any coercive effect was thus *de minimis*, in contrast with "the daily enforcement of religious beliefs that can occur in the classroom setting." *Id.* at \*14-15. Commenting on Tammy Berlin's statement that her classmates gave her weird looks for her failure to participate in the invocation, and "they made her feel outcast and believe that her religion was wrong, unreal, and immoral," *id.* at \*14, the court contended that "[its] evaluation of the invocation's effect must be from the perspective of an objective observer. See *Smith v. Board of Sch. Comm'rs of Mobile County*, 827 F.2d 684, 693 (11th Cir. 1987). The nature of [its] inquiry thus minimizes the significance of the Berlins' characterization of the effect, from their perspective, of what happens during the invocation." *Berlin*, 1988 WL 85937 at \*14.

187. *Berlin*, 1988 WL 85937 at \*15.

188. *Id.*

189. *Id.*

190. Ruling from the bench, the court also found that plaintiffs failed to demonstrate irreparable harm, *id.* at \*2, but the judge did not discuss this in his written decision.

*Jager v. Douglas County School District*<sup>191</sup> produced a diametrically different result. Plaintiff Doug Jager, a non-Christian Native American, and his family attacked the forty-year-old practice at Douglas County High School of having Protestant ministers deliver invocations prior to home football games.<sup>192</sup> The school district responded with an "equal access plan" which would permit students, parents, and school staff members, but not clergymen, to deliver invocations whose content would not be monitored by the school authorities.<sup>193</sup> The Jagers rejected this compromise, sued in federal court, and obtained a temporary restraining order barring the invocations. The federal district court later held the invocations unconstitutional, but denied plaintiffs' request for a permanent injunction barring them. The trial court later held the equal access plan constitutional. Both sides appealed.

The Eleventh Circuit first found that the *Lemon* test governed, and that *Marsh* was irrelevant.<sup>194</sup> The court proceeded to find that the equal access plan violated the first two prongs of *Lemon*. Its analysis was facilitated by the fact that the trial court found the equal access plan had four purposes, one of which was "to satisfy the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity."<sup>195</sup> In addition, the school system attorney told the district judge at the hearing on the temporary restraining order that the pre-game invocations at the football stadium "ha[d] no secular purpose whatsoever . . . ."<sup>196</sup>

The Eleventh Circuit concluded that since defendant school district had rejected the Jagers' proposed compromise consisting of a secular inspirational speech, which would have fulfilled the three secular purposes, the school district was most interested in the fourth purpose, *i.e.*, publicly expressing support for Protestant Christianity. The Eleventh Circuit had stated in *Jaffree v. Wallace*<sup>197</sup>

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191. *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th cir. 1989).

192. Doug Jager was a member of the marching band, so presumably his presence at the football games was required.

193. *Jager*, 862 F.2d at 827.

194. The rationale was that "invocations at school-sponsored football games were nonexistent when the Constitution was adopted." *Id.* at 829. The *Jager* court rejected the Sixth Circuit's approach of utilizing a *Marsh* analysis in *Stein* on the same grounds as the California Supreme Court in *Sands*, *i.e.*, that the *Stein* court had ignored the Supreme Court's statement in *Edwards v. Aguillard* that the historical approach taken in *Marsh* was not useful in determining the proper roles of church and state in public schools, since free public education hardly existed when the Constitution was adopted. *See supra* note 157 and accompanying text.

195. *Jager*, 862 F.2d at 829. The other three were to continue a longstanding tradition, to add a solemn and dignified tone to the proceedings, and to emphasize the importance of sportsmanship and fair play.

196. *Id.* at 829 n.11.

197. *Jaffree v. Wallace*, 705 F.2d 1526 (1983), *aff'd*, 472 U.S. 38 (1985).

that "[r]ecognizing that prayer is the quintessential religious practice implies that no secular purpose can be satisfied."<sup>198</sup> The court concluded that "the preeminent purpose behind having invocations was to endorse Protestant Christianity," which violates the secular purpose prong of the *Lemon* test.<sup>199</sup>

The court used the same logic to find a violation of the second prong of the *Lemon* test, the "primary effect" prong. The court stated that it was obvious that the religious invocation conveyed a message of endorsement by the school when it was offered via a school-controlled sound system at a school-sponsored event at a school-owned facility. Because past pre-game invocation speakers were almost without exception Protestant ministers, and Protestantism is the majority religion in Douglas County, the equal access plan would make it likely for the Protestant invocations to continue and would require those attending the games to participate in a group prayer. Therefore, the plan violated the primary effect prong.<sup>200</sup> Since it violated two prongs of the *Lemon* test, the court held that the Equal Access plan was unconstitutional.<sup>201</sup>

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198. *Id.* at 1534 (quoted in *Jones*, 862 F.2d at 830).

199. *Jones*, 862 F.2d at 830.

200. *Id.* at 831. The court found that the equal access plan did not violate the entanglement prong. *Id.*

201. *Id.* at 832. The court rejected several arguments proffered by defendant school district in an attempt to distinguish the school prayer cases: that the football games occurred outside the instructional environment of the classroom, that they were directed at an audience of sixteen to eighteen-year-olds and adults who were not very impressionable, that attendance was purely voluntary, and that the invocations could be no more than a *de minimis* violation of the Establishment Clause since they lasted only from 60 to 90 seconds. The court commented that football games are an integral part of the school's extracurricular program and provide a powerful incentive for students to attend; that teachers were permitted to deliver the prayers and even if others did so, the message of government endorsement of religion was clear; that whether an individual's presence is voluntary or not is irrelevant to Establishment Clause analysis; and that brevity does not cure an Establishment Clause violation. *Id.* at 831-32. The court declined to reach plaintiffs' claim that the invocations violated article I, § 2, para. 7 of the Georgia Constitution, which prohibits monetary aid to any religious group. *Id.* at 834 n.15.

Judge Peck concurred in Judge Johnson's majority opinion. Judge Roney dissented, concluding that the *Marsh* analysis was more appropriate than the *Lemon* test in analyzing the challenged practice. He concluded that "[t]he invocations here appear to be no more an endorsement of Protestant Christianity or of religion than the legislative prayer upheld in *Marsh*," *id.* at 837, in which a Presbyterian minister held the position of chaplain to the Nebraska legislature for many years. Accordingly, he concluded that they were constitutional. But he maintained that the invocations would also satisfy all three prongs of the *Lemon* test, since they helped "solemnize" the occasion, they lasted only from 60 to 90 seconds, they were given only five times a year, and there was no danger of entanglement. *Id.* at 838-39. See also *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492 (8th Cir. 1988), which affirmed the trial court's holding that the band teacher's leading a public high school band in prayer at mandatory rehearsals and performances violated the Establishment Clause. On appeal, the defendant school district did not contest this

## III. ANALYSIS AND DISCUSSION

A threshold issue which must be addressed is what yardstick should be used to gauge the constitutionality of invocations and benedictions at public school graduations. School graduation ceremonies present interesting constitutional issues because of their dual character: They are both official school functions and public festivities designed to recognize and celebrate the achievement of the graduates.<sup>202</sup> Their purpose is essentially ceremonial rather than pedagogical. Moreover, while the school could dispense with graduation ceremonies altogether without compromising its teaching role, a suggestion that it do so would undoubtedly be met with strenuous protests by the graduates and their families, desirous of marking this important milestone in their lives with a formal rite of passage. Thus, the principal purpose of such ceremonies is to honor the graduating students, and this has critical importance for Establishment Clause analysis.

Since graduation ceremonies are public functions rather than classroom instruction, a number of courts have concluded that *Marsh* furnishes the appropriate analytical framework.<sup>203</sup> A considerable majority of courts, however, have applied the *Lemon* three-pronged test, and the Supreme Court has strongly hinted that *Lemon*, not *Marsh*, must be applied to all public school cases:

The *Lemon* test has been applied in all cases since its adoption in 1971, except in *Marsh v. Chambers* . . . . The Court based its conclusion in that case on the historical acceptance of the practice. Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.<sup>204</sup>

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holding but did argue that the case was moot and contested an award of more than \$15,000 in fees and costs to plaintiffs. *Id.* at 1494. The Eighth Circuit reduced the fee amount by less than \$1,000 and otherwise affirmed the district court's decision.

202. Thus, the district court in *Stein v. Plainwell Community Schs.*, 610 F. Supp. 43, 46 (W.D. Mich 1985) stated that the offering of invocations and benedictions at high school graduations "falls into the grey area" between the "extremes" represented by the fact situations in *Engel* and *Schempp*, on the one hand, and *Marsh v. Chambers*, on the other. Chief Justice Lucas, concurring in *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809 (Cal. 1991), astutely observed that "[t]his case lies at the crossroads between public instruction and public ceremony. As such, it affords an opportunity to reexamine basic principles and values underlying the religion clauses of the First Amendment." *Id.* at 822.

203. See *Jones v. Douglas County Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991); *Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682 (D. Utah 1991).

204. *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (citation omitted). *Accord* *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 812 n.2, 819 (Cal. 1991); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 828-29 (11th Cir. 1989); *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416, 419 (5th Cir. 1991).

Moreover, the Supreme Court noted in *Grand Rapids School District v. Ball*<sup>205</sup> that it had "relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children."<sup>206</sup> Thus, unless it discards the *Lemon* three-pronged test when deciding *Lee v. Weisman*, the Court is most likely to apply the test.<sup>207</sup> An analysis of graduation prayers under the *Lemon* test follows.

#### A. Secular Purpose

The first prong of the *Lemon* test, that a challenged enactment or practice must have a "secular legislative purpose" in order to survive constitutional challenge under the Establishment Clause,<sup>208</sup> has historically been the easiest part of the test to satisfy. As Justice Scalia has noted, "[a]lmost invariably, we have effortlessly discovered a secular purpose for measures challenged under the Establishment Clause, typically devoting no more than a sentence or two to the matter."<sup>209</sup> Nevertheless, courts in several recent graduation prayer cases have concluded that the challenged prayers failed the secular purpose requirement. The courts often treated this as a truism and devoted only "a sentence or two to the matter."<sup>210</sup>

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205. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

206. *Id.* at 383.

207. *But see* Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987). With reference to government sponsorship of religious symbols or ceremonies, Beschle states that:

Despite the incantation of the *Lemon* test in several of these cases, the Supreme Court has been quite tolerant of these practices when the direct, measurable effect on religious beliefs is perceived to be trivial. Thus, paid legislative chaplains, Christmas creches, *invocations at public school commencement exercises*, and other symbols and ceremonies are *permitted without serious attempts to apply the Lemon criteria*.

*Id.* at 187 (citations omitted) (emphasis added). Beschle cites *Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974) and *Wood v. Mount Lebanon Township Sch. Dist.*, 342 F. Supp. 1293 (W.D. Pa. 1972) as examples of cases which did not seriously attempt to apply the *Lemon* test, but he acknowledges that later cases like *Graham v. Central Community Sch. Dist.*, 608 F. Supp. 531 (S.D. Iowa 1985) "strictly applied *Lemon*" and disallowed such prayers. Beschle, *supra*, at 187 n.190.

208. *Lemon*, 403 U.S. at 612.

209. *Aguillard*, 482 U.S. at 613 (Scalia, J., dissenting). At least up until 1987, the Supreme Court had only invalidated laws for lack of a secular purpose on three occasions: *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam); *Epperson v. Arkansas*, 393 U.S. 97 (1968). *Id.* As the Court acknowledged in *Lynch v. Donnelly*, 465 U.S. 668 (1984), it has not required that a challenged law or practice have "exclusively secular" objectives, but only that it have a secular purpose. *Id.* at 681 n.6.

210. *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883, 886 (S.D. Tex. 1982); *Graham*, 608 F. Supp. at 535; *Bennett v. Livermore Unified Sch. Dist.*, 238 Cal. Rptr. 819, 823 (Cal. Ct. App. 1987); *Jager*, 862 F.2d at 830. The courts in *Wood*, *Florey*, *Kay*, *Stein*, *Berlin*, *Jones*, and *Albright* concluded that there was a secular pur-



For this conclusion, the *Graham*, *Jager*, and *Bennett* courts relied on the decision in *Karen B. v. Treen*,<sup>211</sup> in which the Fifth Circuit struck down a Louisiana statute authorizing voluntary prayer by students or teachers and a Jefferson Parish implementing regulation specifying, *inter alia*, a minute of prayer per day. The *Treen* court stated that "[p]rayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people . . . . [P]rayer is a primary religious activity in itself . . . ." <sup>212</sup> Even if the legislature's objective in passing the statute was not strictly religious, it sought to achieve this through "an intrinsically religious practice," <sup>213</sup> and this was forbidden. "The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests." <sup>214</sup> Similarly, the courts in *Graham*, *Bennett*, and *Jager* quickly concluded that the secular purpose prong had been violated, as if the notion that prayer could have a secular purpose was a contradiction in terms.

The idea that prayer, which is inherently religious, cannot possibly have any secular purpose at a public event seems like a truism, and some arguments used to justify prayer are rather lame. In some of the early cases, the courts took comfort in the fact that invocations and benedictions consumed only a few minutes of a ceremony which typically lasts more than an hour; they accordingly concluded that the fundamentally secular nature of the ceremony was unaffected.

Judge Merhige, who was evidently disinclined to prohibit an invocation and benediction at a Henrico County, Virginia public school graduation, wrestled with this problem in *Grossberg v. Deusebio*.<sup>215</sup> At the outset, he acknowledged that "[a]n invocation is a prayer, and it is hard to conceive the purpose or effect of allowing a prayer being anything other than the advancement of religion." <sup>216</sup> He later conceded that "[p]laintiffs' claim, then, has many of the

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pose to the challenged prayers, and the courts in the remaining cases either did not reach the issue or found insufficient evidence to find a violation. District Judge Boyle in *Weisman* did not reach the secular purpose prong, but found that the prayers violated the primary effect prong; the First Circuit affirmed, but Judge Bownes wrote separately to indicate that he believed Rabbi Gutterman's invocation and benediction also violated the secular purpose prong.

211. *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982); *Graham*, 608 F. Supp. at 536; *Jager*, 862 F.2d at 830; *Bennett*, 238 Cal. Rptr. at 823.

212. *Treen*, 653 F.2d at 901; *accord* *Wallace v. Jaffree*, 472 U.S. 38, 43 n.22 (1985); *Weisman*, 908 F.2d at 1097 (Bownes, J., concurring); *Graham*, 608 F. Supp. at 535.

213. *Treen*, 653 F.2d at 901.

214. *Id.*

215. *Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974).

216. *Id.* at 288.

indicia of a technical constitutional violation.”<sup>217</sup> The graduation prayers, however, differed from the proscribed prayers in *Engel v. Vitale*,<sup>218</sup> in that they were brief and transient rather than repetitive and pedagogical, and they contained no element of calculated indoctrination. Since the primary purpose of the graduation program was neither educational nor religious but rather “ceremonial,” and other portions of the program such as prayer were “peripheral to” its primary function of awarding honors and diplomas, Judge Merhige concluded that the secular purpose prong was satisfied.<sup>219</sup>

The obvious problem with such an approach is that it seems to be based on the idea that graduation prayers, while essentially and solely religious in character, are at most a *de minimis* violation of the Establishment Clause because of their infrequency and brief duration. The Supreme Court, however, has often espoused a kind of absolutism regarding Establishment Clause questions. In his influential dissent in *Everson v. Board of Education*,<sup>220</sup> Justice Rutledge, referring to James Madison’s famous *Memorial and Remonstrance Against Religious Assessments*,<sup>221</sup> attributed such an absolutist approach to Madison:

With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that freedom. Hence he sought to tear out the institution not partially but root and branch, and to bar its return forever. In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even “three pence” contribution was thus to be exacted from any citizen for such a purpose. . . . Madison and his coworkers made no exceptions or abridgments to the complete separation they created.<sup>222</sup>

While *Everson* involved a challenge to the expenditure of public funds for bus transportation of students to Catholic schools, Justice Black applied this principle to school prayer in *Engel*:

To those who may subscribe to the view that because the Regents’ official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the

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217. *Id.*

218. *Engel v. Vitale*, 370 U.S. 421 (1963).

219. *Grossberg*, 380 F. Supp. at 288-89. Similarly, the court in *Wood v. Mt. Lebanon Township Sch. Dist.*, 342 F. Supp. 1293, 1294-95 (W.D. Pa. 1972) found that the challenged invocation and benediction satisfied the secular purpose test since the graduation ceremony of which they were a small part was “primarily secular.”

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

221. J. MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS*, II WRITINGS OF J. MADISON (1965) [hereinafter *REMONSTRANCE*].

222. *Everson*, 330 U.S. at 40-41 (citation omitted).

words of James Madison, the author of the First Amendment:

"[I]t is proper to take alarm at the first experiment on our liberties . . . [w]ho does not see that 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? . . ."<sup>223</sup>

Perhaps because the *de minimis* concept appears to be inapplicable in Establishment Clause cases, a more widespread approach has developed which attributes to graduation prayers the secular purpose of "solemnizing" a public occasion. Justice Douglas implied in *Zorach v. Clauson*<sup>224</sup> that prayers in legislatures, presidential messages invoking God and proclaiming Thanksgiving Day a holiday, and "all other references to the Almighty that run through our laws, our public rituals, our ceremonies" could not reasonably be deemed to violate the Establishment Clause.<sup>225</sup> The court in *Wiest v. Mount Lebanon School District*<sup>226</sup> inferred from this that the commencement exercises at Mt. Lebanon High School, together with the planned invocation and benediction, "were just such a public ritual or ceremony which Mr. Justice Douglas may have had in mind,"<sup>227</sup> and concluded that the challenged practice "is a permissible accommodation between church and state."<sup>228</sup> And even while outlawing prayer in the public schools, Justice Black in *Engel* was careful to emphasize that the decision did not invalidate ceremonial and patriotic references to God in the schools.<sup>229</sup>

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223. *Engel*, 370 U.S. at 436 (quoting REMONSTRANCE, *supra* note 221, at 185-86). See also Justice Black's opinion for the court in *Abington Sch. Dist. v. Schempp*:

"Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experimentant [sic] on our liberties.'"

*Schempp*, 374 U.S. 203, 225 (1963) (citations omitted).

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

225. *Id.* at 313. Justice Douglas made the famous statement: "We are a religious people whose institutions presuppose a Supreme Being." *Id.*

226. *Wiest v. Mount Lebanon Sch. Dist.*, 320 A.2d 362 (Pa. 1974).

227. *Id.* at 366.

228. *Id.*

229. *Id.* at 435 n.21. Justice Black stated,

[t]here is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or cere-

The defendant school board argued in *Wiest* that the challenged invocation and benediction "are to serve secular purposes by providing 'an air of dignity' to the occasion, and by developing a 'serious and solemn atmosphere' for it,"<sup>230</sup> although this was not mentioned as a basis for the majority's holding that they were constitutional.<sup>231</sup> Three courts, however, accepted a similar argument in upholding challenged legislative prayers several years later. The Eighth Circuit in *Bogen v. Doty*,<sup>232</sup> in which plaintiffs challenged prayer by a local unpaid clergyman at county board meetings, stated: "The challenged invocation practice reflects a clearly secular purpose. It is directed toward establishing a solemn atmosphere and serious tone for the board meetings. There is certainly nothing sinister in that purpose. Nor can we say that a prayer will not advance that goal."<sup>233</sup> Similarly, the Supreme Judicial Court of Massachusetts, in a case challenging chaplains for the state legislature, concluded that "[t]he secular purposes of opening invocations are the maintenance of long tradition and the continuation of a ritual which prompts legislators to reflect on the gravity and solemnity of their responsibilities and of the acts they are about to perform."<sup>234</sup>

Subsequently, both Justices O'Connor and Brennan in *Lynch v. Donnelly*<sup>235</sup> indicated in similar language that acknowledgements of religion in American public life could serve an appropriate "solemnizing" function.<sup>236</sup> Justice O'Connor stated that legislative

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monial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

*Id.* A leading authority commented at the time that "graduation invocations . . . present a somewhat different problem" from the school prayers struck down in *Engel* and *Schempp*. Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 408 (1963).

230. *Wiest*, 320 A.2d at 369 n.8 (Pomeroy, J., concurring).

231. Justice Pomeroy, concurring, commented on this in a caustic fashion: "To many, this relegation of prayer to a meaningless ritual will seem a shabby purpose indeed, quite incompatible with communion with a Supreme Being." *Id.*

232. *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979).

233. *Id.* at 1113-14.

234. *Colo v. Treasurer and Treasurer General*, 392 N.E. 2d 1195, 1200 (Mass. 1979). See also *Marsa v. Wernik*, 430 A.2d 888, 896 (N.J. 1981) (arguing non-denominational invocations by council members at a borough council meeting had a legitimate secular purpose of "calling on the consciences of those in attendance" and "establish[ing] a solemn atmosphere and serious tone for the public meetings").

235. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

236. A perceptive analyst has noted that the "acknowledgement exception" to the Establishment Clause "fails to make constitutional sense of the problem of public religion" because "it is an inherently unprincipled way of dealing with an elusive problem, relying more on intuition and a devotion to the status quo than on reasoned analysis," and also because it is inconsistent with the three main frames of reference for the Establishment Clause: Madisonian, Jeffersonian, and that of Roger Williams. Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1246 (1986).

prayers, Thanksgiving Proclamations, printing "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court"

serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.<sup>237</sup>

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237. *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). Justice Brennan, while conceding that he "remain[ed] uncertain about these questions," suggested that "In God We Trust" as the national motto and references to God in the Pledge of Allegiance "can best be understood, in Dean Rostow's apt phrase, as a form of 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content." *Id.* at 716 (Brennan, J., dissenting) (citation omitted). He went on to say, in words remarkably similar to Justice O'Connor's, that "these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non religious phrases." *Id.* at 717.

The author finds Justice O'Connor's and Justice Brennan's statements singularly unconvincing. There is no explanation of how references to God are related to "expressing confidence in the future," "encouraging the recognition of what is worthy of appreciation in society," or "inspiring commitment to meet some national challenge." Furthermore, there is no attempt to justify doing this by religious means even if the implausible premise that such a relationship exists is accepted. Compare Justice Brennan's statement in his concurrence in *Schempp* where he stated: "[G]overnment may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice." *Schempp*, 374 U.S. at 265 (citation omitted). Justice Brennan's mimicking of Justice O'Connor's language here (and probably also his and Justice Blackmun's enthusiastic embrace of her "endorsement" refinement of the *Lemon* test) may have less to do with the logic of what she said than with the logic of coalition-building and her pivotal position as a "swing" Justice.

*Lynch v. Donnelly*, 465 U.S. 668 (1984) was a 5-4 decision by an increasingly conservative Court to uphold a city's officially-sponsored creche scene. It is hard to square with prior precedent. Remarkably, five years later when the Court was still more conservative, another creche case, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) came out the opposite way just because Justice O'Connor switched sides (the core separationist bloc of Justices Brennan, Marshall, Blackmun and Stevens held firm in both cases). Justice Brennan's skills as a coalition-builder were renowned, and in *Allegheny* Justice O'Connor appears to have succumbed to his blandishments in a case whose facts were not very different from the facts in *Lynch*. (Maybe it was because he serenaded her with a melody which she herself had written and was proud of.) In any event, in *Allegheny*, the wily old Justice was apparently willing to swallow the gnat of the "solemnizing" justification for public religious references so that the Court and the country would not have to swallow the camel in city hall.

In contrast, Professor Laycock, an eminent separationist who wrote the brief

Understandably, in light of the fact that such "solemnizing" religious vestiges constitute a rare instance of officially-tolerated religious references by government, defendant school boards in graduation prayer cases seized upon this notion and argued that invocations and benedictions also served a valid "solemnizing" or similar secular purpose. Defendant high school principal Utz in *Kay v. David Douglas School District No. 40*<sup>238</sup> "testified that the [graduation] program was planned with the view of creating an atmosphere of dignity and solemnity and that the invocation is included for that purpose."<sup>239</sup> Similarly, defendant Superintendent Spear in *Graham v. Central Community School District of Decatur County*<sup>240</sup> testified that the invocation and benediction were a tradition at Central Decatur High School which lent a "serious note" to the ceremony.<sup>241</sup>

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for amici curiae American Jewish Congress, Baptist Joint Committee on Public Affairs et al. in *Lee v. Weisman*, argues persuasively that even such seemingly innocuous references to the deity as "In God We Trust" are inconsistent with the Court's Establishment Clause jurisprudence. Besides opposing the decisions in *Marsh* and *Lynch*, which he calls "wholly unprincipled and indefensible," he follows the logic of the "wall of separation" out to its logical conclusion even in lesser matters. He notes,

[a] little bit of government support for religion may be only a little bit of establishment, but it is still an establishment. The government should not put 'In God We Trust' on coins; it should not open court sessions with 'God save the United States and this honorable Court'; and it should not name a city or a navel vessel for the Body of Christ or the Queen of the Angels. Perhaps religious minorities should not waste political capital on minor violations such as these. But neither should the Supreme Court legitimate such violations.

*Id.* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religion Speech by Private Speakers*, 81 N.W. U. L. REV. 1, 8 (1986) (citations omitted).

Five leading Establishment Clause authorities who take the same position as Laycock are cited in the Reply Brief for the Petitioners, at 2, n.1, *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990) *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 59 U.S.L.W. 3635 (U.S. Mar. 18, 1991) (No. 90-1014).

238. *Kay v. David Douglas Sch. Dist. No. 40*, 719 P.2d 875 (Or. Ct. App. 1986).

239. *Id.* at 877. School Board Chairman Robert Reese, another defendant, stated that the religious invocation was a traditional part of the graduation ceremony which most taxpayers wanted to retain. *Id.*

240. *Graham v. Central Community Sch. Dist. of Decatur*, 608 F. Supp. 531 (S.D. Iowa 1985).

241. *Id.* at 534. See also *Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989): "Plaintiffs asserted, somewhat weakly, at the hearing in this matter that prayer serves the secular purpose of conferring solemnity to the ceremony." *Id.* at 342 (citations omitted); *Weisman*, 908 F.2d at 1095. Such claims are somewhat reminiscent of the secular purposes which were put forward for the Bible readings challenged in *Schempp*, 374 U.S. at 278 (Brennan, J., concurring): that they would "foster better discipline," and would "contradict . . . the materialistic trends of our time," *id.* at 279, "establish a discipline [sic] tone," *id.*, and "foster [ ] harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline." *Id.* at 280. Justice Brennan noted, however, that even most courts which had upheld devotional exercises under state law

While some courts rejected this argument,<sup>242</sup> a few have endorsed it. The district court in *Stein* found that the challenged prayers served the secular purposes of following a long tradition, honoring the desires of the graduating seniors, and providing a necessary "form of solemn opening and closing for these ceremonial events."<sup>243</sup> Similarly, the Court of Appeal in *Sands* concluded that: "[I]n context, the invocation adds a note of dignity and decorum to the ceremony and serves to focus the audience's attention. This legitimate secular purpose satisfies the first prong of the *Lemon* test."<sup>244</sup>

Ultimately, the "solemnizing" argument rings hollow. It is based on the premise that prayer, which William James called "the very soul and essence of religion,"<sup>245</sup> is constitutionally innocuous because it has evolved into a meaningless if not obsolete cultural ritual.<sup>246</sup> While the desire to retain what to some is no doubt a comfortable habit or tradition by emptying it of its deep religious mean-

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had recognized "the primarily religious character of prayers and Bible readings." *Id.* at 277.

242. *Lundberg*, 731 F. Supp. at 342-43; *Bennett*, 238 Cal. Rptr. at 823; *Kay*, 719 P.2d at 880; *Graham*, 608 F. Supp. at 534, 535.

243. *Stein*, 610 F. Supp. at 48. The Sixth Circuit agreed with this point but reversed on other grounds. *Stein*, 822 F.2d at 1409 (1987).

244. *Sands*, 262 Cal. Rptr. at 459. See also *Jones*, 930 F.2d at 420: "While the Resolution [regarding high school graduation invocations and benedictions] apparently tolerates invocations addressing a deity, we think that this is as consistent with the secular solemnizing purpose as any religious purpose." *Accord* *Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682, 688-89 (D. Utah 1991). In addition, a secular solemnizing purpose was found by the district courts in *Jager*, 862 F.2d at 829, and in *Berlin v. Okaloosa County Sch. Dist.*, No. PCA 87-30450-RV, 1988 WL 85937 (N.D. Fla. Mar. 1, 1988); and by dissenting Judges Roney in *Jager*, 862 F.2d at 837-38, Rossman in *Kay*, 719 P.2d at 884, and Panelli in *Sands*, 809 P.2d at 851-52. Judge Bownes in *Weisman* concluded that "[a]lthough reciting a prayer before a graduation ceremony might, as appellants argue, have the residual sectarian effects of solemnizing the occasion, the primary purpose is religious." *Weisman*, 908 F.2d at 1095 (citation omitted). Chief Justice Lucas, concurring in *Sands*, stated that "invocations and benedictions serve an important secular function at high school graduations. They provide a sense of tradition, continuity, and transcendence that evokes positive emotions and expectations. These elements, in turn, serve to unify the community and provide a foundation for moral and ethical standards." *Sands*, 809 P.2d at 829. He further observed: "Appearing, as they do, at the beginning and end of the ceremony, invocations and benedictions serve to solemnize, highlight, and set off what goes on between." *Id.* Chief Justice Lucas also indicated that one reason references to God were inoffensive was that they were "weak symbols" which had become emptied of most of their meaning and had thereby become "almost an empty sign" which meant many different things to different people. *Id.* at 828.

245. *Wiest*, 320 A.2d at 368 (citing WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 352 (Mentor Book ed. 1958)).

246. The "solemnizing" argument necessarily trivializes the meaning of prayer to any religious person who takes it seriously; it treats invocations and benedictions as mere punctuation marks which conveniently begin and end a ceremony whose

ing is understandable, this cannot help but offend the devoutly religious for whom prayer constitutes a vital communication with God. Both upholders and opponents of graduation prayer have recognized this in rejecting the "solemnizing" secular purpose argument. Judge Pomeroy, concurring in *Wiest*, stated that "this relegation of prayer to a meaningless ritual will seem a shabby purpose indeed, quite incompatible with communion with a Supreme Being."<sup>247</sup> And Judge Bownes, concurring in *Weisman*, commented as follows:

It is ironic that many groups that advocate prayer (or "religious liberty"), argue that prayer has no religious intent or effect. They emphasize the "solemnizing function" of an invocation or benediction at graduation and other ceremonies. Inevitably, they analogize prayer to public situations where religion is a dead letter, such as the use of "God" on coins or the "under God" language in the Pledge of Allegiance, to support their position. I am surprised that religious groups would support an argument that explicitly relegates the value of religion in our society to the merely ceremonial.<sup>248</sup>

Similarly, Justice Kennard for the majority in *Sands* rejected Chief Justice Lucas' suggestion that public prayers should be upheld as constitutional since they could be regarded by detached observers as a "throwback to another day," and references to God were "weak symbols" and "almost an empty sign."<sup>249</sup> Kennard stated that "[w]e decline to construe public prayer as essentially meaningless or trivial in order to find it inoffensive to the United States Constitution."<sup>250</sup>

Despite the vacuousness of the principal argument that graduation prayers have a secular purpose, (*i.e.*, the "solemnizing" argument) there nevertheless is a plausible argument that such prayer has a secular purpose. Even though the person delivering the invocation or benediction has an exclusively religious purpose for doing so, the school authorities may have a different and legitimate purpose for permitting him or her to speak. An example of a permissible public purpose would be respecting the wishes of a majority of the graduating students, where they want to include prayers in the ceremony marking this important milestone in their lives,<sup>251</sup> and the

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substance is in between, much like inert bookends which are useful for holding up a row of books located in between them.

247. *Wiest*, 320 A.2d at 369 n.8 (Pomeroy, J. concurring).

248. *Weisman*, 908 F.2d at 1095 n.13.

249. *Sands*, 809 P.2d at 813 n.4.

250. *Id.*

251. *Cf. Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. v. Mergens*, 110 S. Ct. 2356 (1990). While it could be contended that the school authorities



school is merely providing a public forum for such religious expression. As one writer noted, "courts have wrongly taken the phrase 'secular religious purpose' to imply that it is improper for a state to be motivated by the desire to accommodate religious exercise."<sup>252</sup> Yet, as the Supreme Court noted in *Lynch v. Donnelly*, the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."<sup>253</sup> Accordingly, if it is possible to avoid explicit endorsement by the government of the prayers presented, the government may pursue legitimate secular purposes of its own even while providing a platform for individuals delivering prayers.

Only a couple of judges seem to have recognized this possibility. One was District Judge Gibson in *Stein v. Plainwell Community Schools*:

Given the dual nature of the kind of prayer at issue in this case, the Court must not be misled by looking solely at the

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achieve a secular purpose by fostering free exercise of religion through graduation prayer, such an argument is problematic, except in the probably non-existent case that 100% of the graduating students are of one faith or consented to have a particular clergyman pray on their behalf. In all other cases, any free exercise claim by the speaker would legitimately be overcome by reasonable time, place, and manner regulations, since graduation ceremonies have not traditionally been deemed public forums. *Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331, 337-38 (N.D. Iowa 1989) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983)). *Lundberg*, an Evangelical Free Church minister, sued the school board for the school from which his son was graduating, claiming a First Amendment right to be on the program and to say an invocation and benediction. The court denied him the preliminary injunction:

This court finds that defendant has not violated plaintiffs' right to free speech because plaintiffs have failed to establish that a high school graduation ceremony is a public forum. This court also finds that plaintiffs have not established that defendant violated their free exercise of religion rights because plaintiffs failed present [sic] competent evidence sufficient to persuade this court that public prayer at the graduation ceremony constitutes a central part of their religious beliefs.

*Id.* at 336.

252. Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 339 (1986). The same observation — "a 'religious purpose' is not the same as a 'purpose of accommodating religious beliefs'" — is made by Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1135 (1990) (quoting *Thomas v. Reinch*, 450 U.S. 707, 726 (1981) (Rehnquist, J., dissenting)). Nuechterlein gives the example of a non-Hindu person who is having Hindu friends over for dinner and keeps meat out of the refrigerator: "he does this regardless of, not because of, his own religious beliefs. He does it not because he thinks that his Hindu friends' religious beliefs are true, but simply because accommodating their religious scruples is a respectful thing to do. Label this attitude 'secular respect.'" *Id.* Nuechterlein points out that even some commentators have fallen into the "semantic mistake" of confusing a purpose of accommodating religious beliefs with a religious purpose. *Id.* at 1135, n.50.

253. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

purpose of the person who is delivering the prayer. Even if the purpose of the speaker is purely religious, the practice may still be constitutional if the purpose of the sponsoring governmental body is primarily secular.<sup>254</sup>

In a similar vein, Justice Panelli, dissenting in *Sands v. Morongo Unified School District*, observed that the many persons involved in the decision to have an invocation at graduation — the superintendent, the principal, and the students — might have varied reasons for doing so, some religious and others secular.<sup>255</sup>

For such a claim of secular purpose to be taken seriously, of course, the public school authorities would have to see to it that no impression of favoritism towards a particular religion was given. No religion should have a monopoly from year to year over the giving of prayers, if others in the community are desirous that their faith also be represented.<sup>256</sup> Rabbi Gutterman, however, was invited to

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254. *Stein*, 610 F. Supp. at 47 (emphasis in original) (citation omitted). Judge Gibson noted that the parties' stipulations of fact revealed two valid secular purposes for including the prayers in the graduation ceremony: a long tradition of prayers and the custom at both Portage and Plainwell High Schools of permitting the graduating students to organize their own graduation program. *Id.* at 48. Similarly, Judge Rossman, dissenting in *Kay*, stated that "[t]radition and history are also legitimate secular purposes for the use of prayer in public ceremonies." *Kay*, 719 P.2d at 884. Tradition alone, of course, cannot immunize a practice against an Establishment Clause challenge: "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . ." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

255. *Sands*, 809 P.2d at 851. See also Timothy S. Eckley, *Invoking the Presence of God at Public High School Graduation Ceremonies: Graham v. Central Community School District*, 71 IOWA L. REV. 1247, 1254 (1986): With regard to the first prong of the Lemon test as applied to invocations and benedictions at public school graduations, "[t]he focus should be on the contextual purpose of the challenged activity and not on the abstract inherent nature of the practice."

The opposite approach is exemplified by the court in *Kay*, which acknowledged that there was evidence in the record that defendant school board had included the religious invocation in the graduation ceremony in response to the wishes of a majority of the students and taxpayers. The court commented,

[i]n any event, no matter what the subjective intent of the school board, prayer by its nature is religious; accordingly, the purpose for which a prayer is given necessarily must be religious. It would be a contradiction in terms to say that the giving of a prayer has no religious purpose.

*Kay*, 719 P.2d at 880. The first statement is a *non sequitur*, at least insofar as it fails to recognize that the school board could have a secular purpose of gratifying the desires of students and others for a religious element at graduation, even if the purposes of the students themselves were religious. With regard to the second statement, the Supreme Court has never held that a challenged practice must have no religious purpose, so long as it also has a genuine secular purpose.

256. According to Daniel Weisman, a Protestant minister had delivered prayers at his older daughter's graduation from the Nathan Bishop Middle School a few years earlier, before the 1989 graduation at which Rabbi Gutterman delivered the invocation and benediction. *MacNeill-Lehrer Report* (PBS television broadcast, Nov. 6, 1991). The majority in *Marsh v. Chambers*, 463 U.S. 783 (1983), discounted the

speak by teachers at the school. The fact that they designated him and took the initiative of inviting him puts in question any claim of secular purpose on the part of the school district because of the appearance of "endorsement" which this might be thought to create.<sup>257</sup>

To be sure, it is implausible in the United States, in which Jews comprise only about two percent of the total population, that a display of a Jewish symbol like a menorah on government property or prayers by a rabbi at a public function could reasonably be understood as an official endorsement of Judaism to the detriment of Christian and other religions.<sup>258</sup> Nevertheless, it would be inappro-

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importance of the fact that the Nebraska Legislature's chaplain had been the same Presbyterian minister for 16 years, *id.* at 793-94:

We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him . . . Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.

*Id.* at 793-94. Such reasoning is plainly inapplicable to public school graduations in the presumably universal case where the graduating students are of different persuasions.

257. Justice O'Connor, concurring in *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring), suggested a "clarification" of the Lemon three-pronged test according to which "[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Id.* at 687. Government violates this standard when it endorses or disapproves of religion; "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688; *See also* *County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring). Justice O'Connor's refinement of the *Lemon* test, moreover, was adopted by Justices Blackmun and Brennan. *Id.* at 589-94 (Blackmun, J.); *id.* at 637 (Brennan, J., dissenting).

258. While one of the challenged displays in *County of Allegheny* consisted of a menorah adjacent to a Christmas tree, which Justice Blackmun said could not plausibly be viewed as "endorsing Jewish faith alone," he suggested that display of a menorah alone might well have the effect of endorsing a minority faith like Judaism in Pittsburgh, with approximately 45,000 Jews out of a population of 387,000. *Id.* at 616 n.64. Justice O'Connor also contended that "the governmental display of a minority faith's religious symbol," such as a menorah alone, could reasonably be understood to convey a message of endorsement of that faith. *Id.* at 634. While it is obvious that creche scenes and other Christian displays and observances by the federal, state, or local governments can give minorities like Jews a clear message that they are "outsiders" in a majority Christian country (*cf. e.g.*, *Berlin v. Okaloosa County Sch. Dist.*, No. PCA 87-30450-RV, 1988 WL 85937 (N.D. Fla. Mar. 1, 1988)), it would be laughable to claim that display of a menorah, even alone, or for that matter graduation prayers by a rabbi, could constitute the kind of endorsement which "sends a message to [Christians] that they are outsiders, not full members of the political community, and an accompanying message to [Jews] that they are in-

priate for the school authorities to show favored treatment to minority religions compared with majority Christians just because there is less danger of this being interpreted as endorsement under the circumstances.

An official declaration of secular purpose could also be undermined if an invocation or benediction appealed to those present to pray, or contained any element of proselytization. While those present at a graduation ceremony may be required to maintain respectful silence while religious sentiments or beliefs which they do not share are expressed, it would be a facial violation of the Establishment Clause for the prayer-giver to exhort them to join with him, or even for him to include them in his prayer against their will.<sup>259</sup> The authorities, of course, may not know beforehand the nature or text of prayers at forthcoming graduations, and it is argued below that it is impermissible for them to inquire. The importance of ensuring that prayer-givers do not coerce those present into involuntary participation in affirmations of religious belief which they do not share, however, necessitates that the authorities clearly inform prayer-givers beforehand that it is not permissible for them to proselytize or to request audience participation in their prayers.

### B. Primary Effect

The second or "primary effect" prong of the *Lemon* three-pronged test requires that the challenged enactment or practice have a "principal or primary effect . . . that neither advances nor inhibits religion."<sup>260</sup> This standard is so vague and nebulous that applying it conscientiously to a situation like graduation invocations and benedictions is a forbidding task. The inevitable result is that the one performing the analysis must apply his or her own subjective notions of the terms in order to derive a result. Not surprisingly, there has been substantial judicial disagreement as to whether challenged prayers violate the primary effect prong, and much of this disagreement has occurred among judges looking at the same facts

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siders, favored members of the political community." *County of Allegheny*, 492 U.S. at 634 (quoting *Lynch*, 465 U.S. at 688 (1984) (O'Connor, J., dissenting)).

259. Thus, prayers such as the one given by a student in *Stein*, 822 F.2d at 1407 n.1, which began "Heavenly Father, we ask your blessing upon all of us who are gathered here this evening," *id.* at 1407, vitiate any secular purpose claim by the school district that it is merely providing a forum for the speaker to express freely his individual religious views, since the prayer, rather than a mere statement of personal belief, impermissibly enlists all members of the audience, including the unwilling and non-believers, in an affirmation of religious belief against their will. In contrast, the prayer given at the Yucca Valley High School graduation in California in 1985, which was in the first person singular and began "Heavenly Father, I thank you for the privilege it is to see these graduates going forth receiving their diplomas this evening" is not subject to the same objection. *Sands*, 809 P.2d at 811.

260. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

in the same case.<sup>261</sup>

District Judge Boyle in *Weisman* and the California Supreme Court in *Sands* provided the most thoughtful and in-depth judicial analyses among the cases which concluded that graduation prayers violated the primary effect prong.<sup>262</sup> The crux of Judge Boyle's decision is that Rabbi Gutterman's graduation invocation and benediction impermissibly created the kind of "symbolic union" between

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261. For example, in *Sands*, the trial court, evidently relying on the decision in *Bennett v. Livermore Unified Sch. Dist.*, 238 Cal. Rptr. 819 (Cal. Ct. App. 1987), enjoined the graduation prayers. The Court of Appeal unanimously reversed, 262 Cal. Rptr. 452 (Cal. App. 1989), finding that the primary effect prong was satisfied and disagreeing fundamentally on this and other issues with the court in *Bennett*. The California Supreme Court reversed the Court of Appeal with three concurring and two dissenting opinions in addition to the majority opinion. *Sands*, 809 P.2d 809 (Cal. 1991). The three Court of Appeal judges and dissenting Supreme Court Justices Panelli, *id.* at 844, and Baxter, *id.* at 859, believed that the prayers did not violate the primary effects test; the supreme court majority, *id.* at 810, and concurring Justices Lucas, *id.* at 821, Mosk, *id.* at 835, and Arabian, *id.* at 842, believed that it did.

Similarly, in *Kay v. David Douglas Sch. Dist. No. 40*, 719 P.2d 875 (Or. Ct. App. 1986), Judge Buttler and concurring Judge Warren agreed that the challenged prayer violated both the secular purpose and primary effect prongs, *id.* at 822; dissenting Judge Rossman disagreed as to both prongs and believed that the prayer was constitutional. *Id.* In *Stein v. Plainwell Community Schs.*, 610 F. Supp. 43 (W.D. Mich. 1985), District Judge Gibson found that the challenged prayers satisfied all three *Lemon* prongs, as did dissenting Circuit Judge Wellford, *Stein*, 822 F.2d at 1410; concurring Circuit Judge Milburn found that they violated all three *Lemon* prongs, *id.*, and Circuit Judge Merritt rejected the *Lemon* test for the standards of *Marsh v. Chambers*, which he said the prayers did not satisfy. *Id.* at 1407.

Such embarrassing judicial disarray is perhaps a predictable result of what Judge Easterbrook calls the transformation of First Amendment "rules" into "standards": "The migration from rule to standard in constitutional law erodes limits of every kind. It erodes the boundary between legislative and judicial functions, because at a high enough level of generality every constitutional doctrine tells the political branches to select wise policy . . ." If the

Constitution is simply a collection of standards, judges readily can adjust the rules to the times and their circumstances. The price of this, however, is the elimination of rules. *The only feature of history that seems to bind is the decision* (actually one inferred from the structure of government rather than located in the text) *transferring decisionmaking authority to judges.*

*American Jewish Congress v. City of Chicago*, 827 F.2d 120, 139 (7th Cir. 1987) (Easterbrook, J., dissenting) (emphasis added). The judges in these cases, like other individuals, hold varied personal opinions, and these appear to be reflected in the above results.

262. A number of courts substituted tautologies for analysis. For instance, the California Court of Appeal in *Bennett* simply stated that "[t]he practice of including a religious invocation in a graduation ceremony conveys a message of endorsement of the particular creed represented in the invocation, and of religion in general." *Bennett*, 238 Cal. Rptr. at 823-24. *Accord Weisman*, 908 F.2d at 1095 (Bownes, J., concurring). The court in *Albright* was equally perfunctory in reaching the opposite conclusion, *i.e.*, that the primary effect of the challenged graduation prayer "would neither advance nor endorse religion . . ." *Albright*, 765 F. Supp. at 689.

government and religion which the Supreme Court condemned in *Grand Rapids School District v. Ball*.<sup>263</sup> The importance of the “symbolic union” concept, as the Court had explained in *Grand Rapids*, was that “[g]overnment promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any — or all — religious denominations as when it attempts to inculcate specific religious doctrines.”<sup>264</sup>

Where “symbolism” is the key, certainly any inclusion of religious elements in a public assembly could be interpreted as official endorsement of such elements. Important facts distinguish the situations in *Grand Rapids* and *Weisman*, however. In *Grand Rapids*, the parochial school children received secular instruction under the challenged programs in the same parochial school building and from the same parochial school teachers as during the rest of their parochial school education. The fact that these teachers were now labelled public teachers and used the same classrooms could not help but lead impressionable children to identify government powers and responsibilities with the denomination sponsoring the parochial school.<sup>265</sup>

In contrast, Rabbi Gutterman in *Weisman* was not a teacher at all, let alone one wearing two hats, and that fact was presumably obvious to those in attendance. The court opinions do not indicate how he was introduced at the graduation ceremony, but presumably he and his congregation were identified in the program. This would be consistent with the school district’s merely providing a forum for the expression of religious belief by an individual unaffiliated with it, rather than seeming to merge public and parochial religious teach-

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263. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985). The Court in *Grand Rapids* invalidated a Michigan program in which the classrooms of private schools (40 out of 41 of which were religious) were utilized to provide instruction in secular subjects both during and after the school day to students in those schools. The city school district leased the classrooms, on which signs designating them as “public school classroom[s]” were posted, and from which all religious objects had been removed. *Id.* at 378. The Supreme Court found that the program violated the second (primary effect) prong of the Lemon test because it impermissibly advanced religion in three ways: 1) the participating teachers, most of whom were on the staffs of the private schools in whose classrooms the programs were conducted, might inculcate religious tenets; 2) “the programs may provide a crucial symbolic link between government and religion, thereby enlisting — at least in the eyes of impressionable youngsters — the powers of government to the support of the religious denomination operating the school”; and 3) the programs directly promoted religion by subsidizing the primary religious mission of the institutions affected. *Id.* at 385. The first point is inapposite to *Weisman*, since Rabbi Gutterman did not purport to be a public school teacher, and the third is also inapplicable, since there is no indication in the record that he was paid for delivering the prayers, and if he was, any such expenditure would undoubtedly be *de minimis*.

264. *Grand Rapids*, 473 U.S. at 389; *accord Weisman*, 728 F. Supp. at 71; *Sands*, 809 P.2d at 814-15.

265. *Grand Rapids*, 473 U.S. at 389.

ing functions, as in *Grand Rapids*. In addition, because of the minority status of Judaism in Rhode Island and the rest of the country, Judge Boyle's claim that school children who were members of other religions than Judaism (undoubtedly predominantly Christians in this case) "may feel as though the school and government prefer beliefs other than their own"<sup>266</sup> is simply hard to believe.

Judge Boyle also concluded that the invocations and benedictions conveyed a tacit preference for "religions in general over no religion at all,"<sup>267</sup> and the California Supreme Court agreed in *Sands* that such prayers gave the appearance that the government preferred religion over "non-religion."<sup>268</sup> The school district, of course, could argue that in permitting graduation prayers it was not expressing its own preference for religion over disbelief but merely going along with the desires of the majority of graduating seniors and of the community that the important milestone of graduation be marked in a religious way. Nevertheless, the inference of a governmental preference for religion over non-religion here is plausible, and such a preference seems inconsistent with the separationist absolutism of the Supreme Court.<sup>269</sup>

On the other hand, Justice Douglas stated in *Zorach v. Clauson*<sup>270</sup> that "[w]e are a religious people whose institutions presuppose a Supreme Being,"<sup>271</sup> and he stated in *Engel v. Vitale* that "[a]t the same time I cannot say that to authorize this prayer is to establish a religion in the strictly historic meaning of those words. A religion is not established in the usual sense merely by letting those who choose to do so say the prayer that the public school teacher leads."<sup>272</sup> For Justice Douglas, the constitutional flaw in the New York Regents' Prayer which the Court struck down in *Engel* was that the government was financing a religious exercise, not that it was

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266. *Weisman*, 728 F. Supp. at 72-73.

267. *Id.*

268. *Sands*, 809 P.2d at 814.

269. Justice Black stated in *Everson* that under the Establishment Clause, "[n]either a state nor the Federal Government . . . can pass laws which . . . aid all religions . . ." *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). In *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), he stated that "[n]either [a state nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers . . ." And the Fourth Circuit in *Hall v. Bradshaw*, 630 F.2d 1018 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1980), struck down a "Motorist's Prayer" which the state of North Carolina had placed on official maps; it stated, "[a] prayer, because it is religious, does advance religion, and the limited nature of the encroachment does not free the state from the limitations of the Establishment Clause. . . . *No de minimis exception is tolerable.*" *Id.* at 1021 (emphasis added).

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

271. *Id.* at 313.

272. *Engel v. Vitale*, 370 U.S. 421, 442 (1962).

exercising any coercion or compulsion.<sup>273</sup> If state funding was the only constitutional defect in the Regents' Prayer, which was recited daily to and by a captive audience of young schoolchildren, then a persuasive argument can be made that graduation invocations and benedictions delivered by an unpaid clergyman once a year to a mostly adult audience, most of whom desire to hear such prayers, do not violate the Establishment Clause.<sup>274</sup>

As for the California Supreme Court's solicitude towards religions which ostensibly do not acknowledge petitionary prayer or prefer private to public prayer, there is no record of such preferences in the case law. If such views are widely held, they have not been vigorously argued in Establishment Clause litigation.<sup>275</sup> More-

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273. *Id.* at 438-41.

274. Needless to say, a government preference for religion over unbelief would not violate the "non-preferentialist" interpretation of the Establishment Clause espoused by Justice Rehnquist, *i.e.*, that it was intended to bar discrimination among religions but not to bar non-discriminatory government aid to all religions. *See* *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE* (1982). The clear weight of scholarly authority rejects the non-preferentialist interpretation. *See* Douglas Laycock, "Non-preferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986).

However, the legislative history of the First Amendment discloses some support for the non-preferentialist view. For instance, Representative Benjamin Huntington of Connecticut in the House of Representatives debates on the Establishment Clause on August 15, 1789 expressed apprehension that the text under consideration might hurt the cause of religion. He hoped that "the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all." *Wallace v. Jaffree*, 472 U.S. 38, 86 (Rehnquist, J., dissenting) (quoting 1 ANNALS OF CONG. 758 (Joseph Gale ed., 1789)). Establishment Clause jurisprudence since *Everson v. Board of Education*, however, has relied almost exclusively on the expressed views of Madison and Jefferson. No explanation has been given to the author's satisfaction why the correct construction and interpretation of an enactment like the First Amendment can depend solely on the views of two men, one of whom (Jefferson) was in France at the time, to the exclusion of many others, particularly those in New England, who held quite different views. Legislative history of the First Amendment and the rest of the Bill of Rights is a murky, obscure matter without adequate sources, but a correct view of legislative history must encompass the views of the entire body of framers who ratified the First Amendment.

275. Given the great number of American religious groups and the diversity of their tenets and beliefs, it is almost inevitable that legislation with no discriminatory bias will inadvertently offend the views of some group. Examples of conflicts between laws and minority groups which members of mainstream religions might not intuitively anticipate include the Jehovah's Witnesses' belief that the flag salute constitutes idolatry because it violates the biblical injunction against worshipping graven images, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)); an Abenaki Indian's belief that the government's assignment of a Social Security number to his daughter would rob her of her spirit under Native American religious beliefs, *Bowen v. Roy*, 476 U.S. 693 (1986); ingestion of the drug peyote in American Indian religious ceremonies, which constituted "misconduct" disqualifying a termi-



over, it is unconvincing to claim that “[w]hen a school district opens or closes the graduation ceremony with a prayer, it sends a powerful message that it approves of the prayer’s religious content.”<sup>276</sup> In *Weisman* and most other cases, the authorities did not review the prayers beforehand and therefore could not even know their content.<sup>277</sup>

Finally, it would be hard to imagine a better measure of the “primary effect” of graduation prayers than the impact they have on the audience. Having heard the invocation and benediction and

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nated employee from receiving unemployment benefits, *Employment Div. v. Smith*, 110 S. Ct. 1595 (1990); and a religious objection (based on the Second Commandment against “graven images” (Exodus 20:4; Deuteronomy 5:8)) to state requirement that driver’s license have driver’s photograph on it, *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff’d sub nom. Jensen v. Quaring*, 472 U.S. 478 (1985). Legislatures with no representatives who hold such minority religious beliefs, however, are not to blame if they fail, out of innocent ignorance, to enact exemptions to accommodate such minority religious scruples. It is the minorities’ job to educate the legislatures (and the courts) about such matters. The courts, however, should not otherwise hypothesize or conjure up such problems, as the California Supreme Court here appears to have done with respect to the alleged religions which oppose public and petitionary prayer.

276. *Sands*, 809 P.2d at 814.

277. The challenged “Resolution” adopted in *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991), subjected proposed invocations to review by a faculty representative. *Id.* at 417-18. None of the other graduation prayer cases discussed indicated that school authorities reviewed the texts of graduation invocations and benedictions beforehand. As argued below, such monitoring itself violates the entanglement prong of the Lemon test. In any case, however, neither a school district nor anyone else could or would communicate its approval of a message with unknown contents. For the same reason, the California Supreme Court’s assertion that “when the government sponsors prayers at high school graduation ceremonies it gives the appearance of taking a position on religious questions,” *Sands*, 809 P.2d at 814, makes no sense, except in the trivial sense that the government may be understood as showing approval of prayer in the abstract. The same is true of the Eleventh Circuit’s statement in *Jager v. Douglas County School District*, 862 F.2d 824, 831 (11th Cir. 1989): “When a religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school-owned facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation . . . .” The conclusion of the Oregon Court of Appeals in *Kay v. David Douglas School District No. 40* is more valid because it refers merely to “prayer” rather than to its content:

More than creating an atmosphere of dignity and solemnity, the inclusion of a religious invocation at the beginning of the ceremony would have created, from an objective standpoint, the impression that the school district assigned special significance to prayer. The fact that the invocation was to be read by a senior teacher could have intensified that impression. The school district’s affirmative decision directing that a prayer, rather than some other appropriate non-religious statement or reading, be included in this important school event conveyed the message that it had given its endorsement to prayer and to religion.

*Kay*, 719 P.2d at 880.

having observed the entire graduation ceremony, would a spectator feel that the prayers would tend to advance or endorse religion? While such testimony might seem the most probative, the Supreme Court has indicated to the lower courts that it is beside the point. *Weisman, Sands*, and most of the other decisions finding a violation of the primary effect prong are devoid of such evidence.<sup>278</sup> The principal reason for this is no doubt the fact that the Supreme Court in similar cases has treated such issues as questions of law or of ultimate fact.<sup>279</sup> The *Sands* court noted that the record in the case did not disclose whether the audience at the graduation ceremony “understood the inclusion of prayers in the official program as conveying a message of governmental approval of religion,”<sup>280</sup> and stated that “such evidence is not necessary,” since the United States Supreme Court had treated the question of impermissible effect as a question of law.<sup>281</sup> The court concluded that in any event, a “reasonable observer” would view the graduation prayer “as signifying approval of the practice of prayer and the prayer’s religious content.”<sup>282</sup>

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278. Significant exceptions include *Berlin v. Okaloosa County Sch. Dist.*, No. PCA 87-30450-RV, 1988 WL 85937 (N.D. Fla. Mar. 1, 1988) (testimony of Tammy Berlin) and *Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682, 685 n.5 (D. Utah 1991).

279. *E.g.*, *Aguilar v. Felton*, 473 U.S. 402, 414 (1985).

280. *Sands*, 809 P.2d at 814 n.5.

281. *Id.* (citing *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3103-05 (1989)). The Court determined as a matter of law that the government had supported the communication of a religious message by the way it displayed the creche.

282. *Sands*, 809 P.2d at 814 n.5. The “reasonable observer” standard appears to be equivalent to the “objective observer” standard suggested by Justice O’Connor in her concurring opinion in *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985), which elaborated on the refinements she made to the *Lemon* three-pronged test in *Lynch v. Donnelly*, 104 S. Ct. 1355, 1366 (1984) (O’Connor, J., concurring). In contrast to the California Supreme Court, assuming the two standards to be the same, Judge Vinson in *Berlin* interpreted the “objective observer” standard quite differently from the California Supreme Court in *Sands*. Tammy Berlin had testified that the explicitly Christian invocations at the football games made her feel like an outcast and that her classmates disapproved of her Jewish religion. Judge Vinson believed that the “objective observer” standard required that he “minimize[ ] the significance of the Berlins’ characterization of the effect, from their perspective, of what happens during the invocation.” *Berlin*, 1988 WL 85937 at \*14. Consequently, Judge Vinson refused to enjoin the invocations. The stark contrast in the two approaches — the California Supreme Court finding no need for record testimony since a “reasonable observer” would interpret the graduation prayer as advancing religion, and Judge Vinson concluding that the Berlins had not shown a substantial likelihood of prevailing on the merits in showing advancement of religion, despite Tammy’s compelling eye-witness testimony of the effects the Christian prayers had on her — illustrates the subjectivity of Justice O’Connor’s “objective observer” test and suggests that it may not be the long-sought solution to the Establishment Clause conundrum. In particular, the test may fail Professor Choper’s goal of clearing up the confusion in Establishment Clause jurisprudence, which Justice O’Connor adopted in *Wallace*, “to frame a principle for constitutional adjudication

Perhaps it is understandable that the Supreme Court should desire to eliminate the vagaries of witnesses' testimony and trial courts' judgment from the process of applying the primary effect test, and that it should arrogate to itself the task of deciding "constitutional facts" in the matter. Such an approach makes for nationwide consistency in decision-making. On the other hand, one drawback is that it separates judicial fact-finding from external reality and turns fact-finding into a solitary judicial exercise with no empirical component.<sup>283</sup>

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... that is ... capable of consistent application to the relevant problems." *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring) (quoting Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 332-33 (1963)).

283. The most egregious example of this approach in Establishment Clause jurisprudence is *Aguilar v. Felton*, in which the Supreme Court held unconstitutional New York City's use of Title I federal funds to send public school teachers into religious and other private schools to provide remedial instruction as well as clinical and guidance services for educationally-deprived poor children. *Aguilar v. Felton*, 473 U.S. 402, 414 (1985). Over a period of 19 years, insofar as the record in the case showed, there had never been a single incident in which a Title I instructor subtly or overtly attempted to indoctrinate the students in particular religious tenets at public expense. *Id.* at 424 (O'Connor, J., dissenting) (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 397 (1985)). Totally disregarding this fact, Justice Brennan, writing for the Court, held that the program failed the entanglement test because of the cooperation required between public and private school personnel, as well as the need for constant, on-going monitoring by government agents to guard against the danger that non-Catholic teachers entering Catholic schools under the program might suddenly become instruments of Catholic indoctrination. *Id.* at 413. As Justice Goldberg stated in his concurrence in *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring), "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Id.* The *Aguilar* Court's stubborn preference for its own "constitutional facts" even when they are totally unsupported and indeed undermined by record evidence is a classic example of mistaking a "mere shadow" for a "threat." It would be salutary for the Court to recall and to abide by the ancient maxim of logic: *Contra factum argumentum non valet*, "an argument contrary to the facts is worthless."

Physical location appears to have been paramount in explaining the Supreme Court's different decisions in *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (outlawing the providing of religious education without discrimination among religious groups, in public school buildings) and *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding New York's released time program whereby public schools released students before the end of the school day so that they could go to places of worship for religious instruction). Similarly, the Court in *Meek v. Pittenger*, 421 U.S. 349 (1975) invalidated a program to provide counseling services to parochial school students at the parochial school, whereas it upheld in *Wolman v. Walter*, 433 U.S. 229 (1977) a similar program where such services were provided in a mobile home across the street from the parochial school. The same consequence has resulted from *Aguilar v. Felton*; New York City has been compelled to purchase or rent portable classrooms stationed near the parochial schools, at great expense, to continue its program of remedial education. *Aguilar*, 473 U.S. at 402-04. Professor Marshall comments, "[t]o say that the same counselor would

Those courts which found that graduation invocations and benedictions did not violate the primary effect test tended to make many of the same points, all of which minimized the religious impact of the practice: The challenged prayers were brief, most if not all less than two minutes in length; they occurred only once a year, and each student experienced them on the average of once in four years; attendance at graduation was voluntary and was not required for graduation; the prayers were part of a principally secular ceremony with no instructional purpose; the students present were graduating seniors, who were more mature and less impressionable because of their age; the students were surrounded in any event by parents and relatives, who could act as "buffers" to protect them against unwelcome religious influence; the prayers (usually) had no proselytizing purpose; those delivering the prayers were typically outsiders rather than teachers or school employees; and the graduation program had an essentially secular ceremonial function, which outweighed the religious nature of the prayers.<sup>284</sup>

The brevity of graduation invocations and benedictions, which comprise less than two minutes of a predominantly secular ceremony lasting more than an hour, and the fact that a typical student only experiences them once, at graduation, highlight the enormous difference in any advancement of religion between such prayers and the daily classroom prayers struck down in *Engel v. Vitale* and *Abington School District v. Schempp*.<sup>285</sup> Thus, in a quantitative sense, any

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behave differently while providing counseling services in a particular building as opposed to across the street, defies any rational explanation. The decision can only be explained in terms of the symbolism involved in providing state aid on or off the parochial school premises." William P. Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 526 (1986) (citation omitted).

284. See, e.g., *Stein v. Plainwell Community Schs.*, 610 F. Supp. 43, 48-50 (W.D. Mich. 1985); *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416, 421-22 (5th Cir. 1991); *Stein v. Plainwell Community Schs.*, 822 F.2d 1406, 1415-17 (6th Cir. 1987) (Wellford, J., dissenting). Interestingly, some of these points had been anticipated nearly thirty years ago by Professor Choper in what may have been the first published comment on the subject of graduation prayers. Choper, *supra* note 282. His article was published after *Engel v. Vitale* was decided and before *Abington School District v. Schempp* was decided. Choper stated that graduation invocations by clergymen "must be considered as solely religious despite efforts to make [them] non-sectarian." *Id.* at 408. But he found several reasons for defending the constitutionality of such invocations: Research had not disclosed that mere listening to such invocations violated anyone's religious or conscientious beliefs; dissenting students were not compelled to attend the invocation part of the graduation, and if they did, their parents' and relatives' presence would be supportive; and prayer was only a small part of the program. *Id.*

285. However, Justice David Souter in the November 6, 1991 argument in *Lee v. Weisman* "expressed doubts about the Solicitor General's assertion that the Court could permit graduation prayers without overruling *Engel v. Vitale* . . . ." N.Y. TIMES, Nov. 7, 1991, at A22.

Establishment Clause violation is *de minimis* when contrasted with the day-in, day-out indoctrination which occurred with the Regents' Prayer struck down in *Engel*.<sup>286</sup> The court in *Stein v. Plainwell Community Schools* was surely correct when it stated that graduation does not implicate the special nature of the teacher-student relationship, which is "the transmission of knowledge and values by an authority figure."<sup>287</sup>

The graduation ceremony experience in general is quite different from the classroom experience. In the classroom, the student deals at close quarters with a teacher, who instructs her and is supposed to receive her obedience and respect. At a graduation ceremony, graduating students and the rest of those attending are spectators and members of a large group from which nothing is expected other than respectful attention to the proceedings. Being a member of such a large spectator group in a school auditorium or sports stadium is more like attending a football game than going to school; Professor Choper likened it to "an opening of Congress or a presidential inauguration."<sup>288</sup> Both students and other members

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286. Indeed, if graduation invocations and benediction prayers were clearly governed by *Engel*, it would be surprising that the issue of their constitutionality was still awaiting resolution nearly 30 years after that decision. As noted above, of course, the *de minimis* concept seems inapplicable to Establishment Clause questions.

287. *Stein*, 822 F.2d at 1409. A clergyman is an authority figure. But if he or she is a stranger to a graduating 18-year-old, then he or she is not that student's relevant authority figure, whom the student has had a relationship with in school and has been taught to respect. Other students delivering prayers are not authority figures either, but rather peers. Classroom teachers and school administrators, however, are authority figures for the graduates; and their participation in prayer would violate the primary effect test.

288. Jesse H. Choper, *supra* note 282, at 408. Similarly, Solicitor General Starr asserted at the November 6th *Lee v. Weisman* argument that graduation prayer resembled prayer at inaugurations more than classroom prayer. Justice Souter, appearing to disagree, suggested that graduation prayer was more analogous to classroom prayer than to prayer at inaugurations.

Another common element between presidential inaugurations and high school graduation ceremonies is that attendance is voluntary, even for those graduating. This was emphasized by some of the courts upholding the constitutionality of graduation prayers, and at the November 6th argument, Charles J. Cooper, representing the Providence school officials, noted that because attendance at graduation ceremonies was voluntary, students who were offended by prayers there were free not to attend. Justice Kennedy disputed this assertion: "In our culture, graduation is a key event in a young person's life. It is a very substantial burden to say that he or she can elect not to go." N.Y. TIMES, Nov. 7, 1991, at A22. Justice Kennedy's statement echoes the statements of the courts in *Lemke v. Black*, 376 F. Supp. 87 (E.D. Wis. 1974) and *Bennett v. Livermore Unified Sch. Dist.*, 238 Cal. Rptr. 819 (Cal. Ct. App. 1987), that it is harsh to dismiss a graduating student's conscience-based objections to religious ceremonies at such an important event in her life as graduation with the observation that attendance is voluntary and not required to get a diploma. See *supra* notes 58 and 83. As these statements appear to suggest, the voluntariness of a student's attendance at graduation should not be deemed to

of the audience at such ceremonies are in a real sense lost in the throng; their participation is usually limited to occasional applause. Thus, they can relax and expect not to be called upon in any way to respond to or take part in what is said from the podium, in contrast with the classroom situation, in which prayer truly puts the dissenting or non-believing student "on the spot."<sup>289</sup>

A primary effect of advancing religion is present, however, when a faculty member leads graduation prayers, as occurred in *Kay v. David Douglas School District No. 40*,<sup>290</sup> and *Sands v. Morongo Unified School District*.<sup>291</sup> Direct teacher participation in prayer creates a symbolic union between the school district and religion which undermines any claim that the authorities are merely providing a platform for the free exercise of religion by a clergyman or some other outside party. Teacher-led graduation prayers violate the primary effect prong and should be deemed unconstitutional *per se*.<sup>292</sup>

The surest way for a school district to avoid violating the pri-

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palliate a violation of the Establishment Clause; if the practice of graduation prayers is unconstitutional, the voluntariness of attendance would not make it any the less so. Cf. *Sands*, 809 P.2d at 817.

289. The California Supreme Court in *Sands*, unlike the other courts which minimized the importance of graduation prayers because the typical student experienced them only once in a lifetime, emphasized the significance of the event precisely because it is a rare milestone in the students' lives. But this fact distinguishes graduation from the day-to-day educational environment with a captive student audience which triggers the most rigorous Establishment Clause scrutiny of a challenged practice. In that respect, the case is more like *Marsh* than *Engel* and *Schempp*. More precisely, it raises the same issues of constitutional propriety as do invocations at presidential inaugurations and other similar events. Commenting on Judge Boyle's conclusion in *Weisman* that students who were members of other religions than the one endorsed or who were non-believers might view graduation prayers as showing a preference for beliefs other than their own, the California Supreme Court in *Sands* stated that "[i]n our view, the same is true of parents, teachers, and guests." *Sands*, 809 P.2d at 815. If that is deemed to invalidate the practice, it argues equally for the unconstitutionality of invocations at presidential inaugurations and other such public functions; such a principle is not peculiar to schools or school ceremonies.

290. *Kay v. David Douglas Sch. Dist. No. 40*, 719 P.2d 875 (Or. Ct. App. 1986).

291. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809 (Cal. 1991) (Yucca Valley 1985 and 1986 graduations).

292. Upholding the challenged Equal Access Act in *Board of Education v. Mergens*, the Supreme Court stressed that under the statute, "school officials may not promote, lead, or participate in any [high school religious club] meeting." *Mergens*, 110 S. Ct. at 2372-73. The statute would probably have been held unconstitutional had this provision been absent. Conversely, where the school district merely plays a "passive role" — permitting the graduating class to decide to have an invocation but not requiring it, as in *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991) — it bolsters the impression of official neutrality and satisfies the primary effect test. So long as the prayers are not delivered by a teacher or school official, it makes no difference from the standpoint of the primary effect test and the Establishment Clause if they are given by a clergyman, a student, or some other person.

mary effect prong is not to include an invocation and benediction in the graduation ceremony unless a majority of the graduating students explicitly request it,<sup>293</sup> and the students themselves deliver the prayers.<sup>294</sup> As Congress noted in enacting the Equal Access Act,<sup>295</sup> "students below the college level are capable of distinguishing between State-initiated, school sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other."<sup>296</sup> If this accurately describes religious clubs meeting in the school building, the heart of the school where the danger of a symbolic union of the school with religion is greatest, then it is true *a fortiori* of a graduation ceremony which is only marginally related to the school's program of instruction. To further strengthen its case for not violating the primary effect prong, the school district should include in the graduation program an explicit disclaimer indicating that while it has permitted an invocation and a benediction at the request of the graduating students, it in no way sponsors them.<sup>297</sup>

Similarly, any prayer which contains proselytizing elements or calls directly upon the audience to participate should constitute a *per se* violation of the primary effect prong of the *Lemon* test. For that reason, several of the prayers in *Sands* were unconstitutional, as were the prayers in *Jager v. Douglas County School District*, *Berlin v. Okaloosa County School District*, and the invocations at Portage Central High School which included the statement that "one must keep Jesus Christ as one's savior."<sup>298</sup> However, the invocation and benediction of Rabbi Guterman in *Weisman* are devoid of any proselytizing

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293. *E.g.*, *Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682 n.169 (D. Utah 1991).

294. *E.g.*, *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987).

295. 20 U.S.C. § 4071 (1984).

296. S. REP. NO. 357, 98th Cong., 2d Sess. 9-10 (1984) (quoted with apparent approval in *Mergens*, 110 S. Ct. at 2372).

297. "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a non-discriminatory basis." *Mergens*, 110 S. Ct. at 2372 (citation omitted). This is probably most true of graduating seniors who are presumably the least impressionable students at the primary or secondary level, because they are the oldest and most sophisticated. As several courts noted, this also lessens the danger that they would be indoctrinated by graduation prayer, in contrast to the younger students subjected to classroom prayer in *Engel* and *Schempp*. See, *e.g.*, *Jones*, 930 F.2d at 421.

Deborah Weisman and her classmates were graduating from a middle school, not a high school, and were thus presumably about 14 years old, while the other graduation cases involved graduating high school seniors. The above generalizations from *Mergens* carry less weight with respect to 14-year-old secondary school students than 18-year-olds since they are younger and presumably less mature.

298. *Stein*, 822 F.2d at 1407 n.2. The district court's conclusion in *Berlin* that "there is an inadequate basis from which to find that the invocation produces a prohibited effect," *Berlin*, 1988 WL 85937 at \*14, is totally erroneous in light of the

ing elements and probably pass the primary effect prong, unless use of the first person plural is understood to improperly enlist the audience in the prayer.<sup>299</sup>

Finally, some courts explicitly require that graduation prayers be "non-sectarian" in order to survive Establishment Clause scrutiny.<sup>300</sup> The appeal of such a principle is obvious, since it can greatly reduce the potential that religious listeners will find the prayers offensive.<sup>301</sup> Nevertheless, the idea of requiring non-sectarian prayer is fatally flawed for two reasons: 1) in attempting to satisfy the primary effect prong of the *Lemon* test, it runs afoul of the third prong by causing excessive entanglement between the government and religion;<sup>302</sup> and 2) there is simply no prayer, religious formula, or statement of faith to which everyone, including atheists, can subscribe.<sup>303</sup> Therefore, the constitutionality of prayer in a

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proselytizing elements and the intolerable effect they produced upon Tammy Berlin.

299. E.g., "God of the Free, Hope of the Brave: For the legacy of America . . . we thank You . . . [f]or the liberty of America, we thank You . . . ." *Weisman*, 728 F. Supp. at 69 n.2 (emphasis added).

300. See *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987) (Milburn, J., concurring) (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)); accord *Jones*, 930 F.2d 416; *Albright*, 765 F. Supp. 689; *Sands*, 262 Cal. Rptr. at 461. In *Marsh*, Reverend Robert E. Palmer, the Presbyterian minister who served as chaplain to the Nebraska State legislature since 1965, characterized his prayers as "non-sectarian," "Judeo-Christian," and with "elements of the American civil religion." *Marsh*, 463 U.S. at 793 n.14. The Sixth Circuit in *Stein* read *Marsh* as upholding "nonsectarian" or "nonproselytizing" legislative invocations that do not "symbolically place the government's official seal of approval on one religious view." *Marsh*, 463 U.S. at 792-93.

301. In particular, omission of any reference to Jesus Christ is likely to remove the principal source of offense to Jews and other non-Christians. See, e.g., *Berlin v. Okaloosa County Sch. Dist.*, No. PCA 87-30450-RV, 1988 WL 85937, at \*5 (N.D. Fla. Mar. 1, 1988) ("Mrs. Berlin testified that the only offensive portion of the invocation given on November 6, 1987, was the reference to Jesus Christ."). Similarly, Daniel Weisman was offended when the minister who gave the invocation at his older daughter's graduation asked all present to give thanks to Jesus. *Weisman*, 728 F. Supp. at 69; see *supra* text accompanying note 23. The same might be true of some Unitarians. (Plaintiffs in *Schempp* and *Graham* were Unitarians.) Apart from the fact that some Christian groups oppose graduation prayers in general, the cases discussed disclose no instance in which the language of Christian graduation prayers offended another Christian group because of its sectarian content.

302. See *infra* text and footnotes accompanying the section on "Excessive Entanglement." As explained above, the school authorities must direct those reciting prayers not to proselytize or to ask the audience to join with them in prayer; this does not violate the entanglement prong of the *Lemon* test.

303. M. William Howard, President of the National Council of the Churches of Christ in the United States stated in Congressional hearings that "there is simply no such thing as 'nonsectarian' prayer . . . ." *Prayer in Public Schools and Buildings — Federal Court Jurisdiction, Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 46-47 (1980) (quoted in *Marsh*, 463 U.S. at 819 n.39 (Brennan, J., dissenting)). See also



given public context cannot be contingent upon the absence of sectarian content. As Justice Brennan stated in his concurring opinion in *Schempp*, “*Engel* is surely authority that non-sectarian religious practices, equally with sectarian exercises, violate the Establishment Clause.”<sup>304</sup>

The New York Regents were actuated by the same desire to avoid sectarian offense and to bring the maximum number of religions together under a formulation that all could share when they composed the prayer which was struck down in *Engel v. Vitale*.<sup>305</sup> Justice Black for the Supreme Court nevertheless declared that despite its “non-denominational” nature, it was a prohibited establishment of religion: “Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause . . . .”<sup>306</sup> Moreover, the Supreme Court in *Marsh* stated that “[t]he content of the prayer is not of concern to judges,”<sup>307</sup> and it would not parse or evaluate the content of prayer where there was no indication that the prayer in question had been used to proselytize, advance, or disparage any belief. This appears to imply that a court should not specify nonsectarian prayer, since otherwise it would have to parse the content of such prayers to ensure that they had satisfied its test. The conclusion seems clear that courts should not attempt to influence the content of graduation prayer, even to make it “non-sectarian,” except for the limited purpose of excluding any proselytization.

The basic question whether graduation invocations and benedictions satisfy the primary effect prong is a close one, and it is probably impossible to give a general answer for all cases. Ulti-

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Abington Sch. Dist. v. Schempp, 374 U.S. 203, 283-87 (1963) (Brennan, J., concurring).

304. *Schempp*, 374 U.S. at 287 (Brennan, J., concurring).

305. *Engel v. Vitale*, 370 U.S. 421, 422 (1962) (“Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.”) *Id.*

306. *Id.* at 430. *Accord* *Sands*, 809 P.2d at 816. *Engel* involved mandatory school prayer in the classroom which violated the Establishment Clause. The premise of this Article is that under narrowly restricted circumstances, prayers at graduation may be constitutionally permissible as an instance of free exercise. But if this premise is wrong, making the graduation prayers “non-denominational” or “non-sectarian” would not rescue them from a finding of unconstitutionality.

307. *Marsh*, 463 U.S. at 794-95. Judge Bownes, concurring in *Weisman*, applied *Engel* and *Marsh* to graduation prayer and drew the same conclusion: “Judges should not be passing on the acceptability of specific passages in prayers. The ruling in *Stein* invites parents and students to review prayers to determine if the content is sufficiently neutral. That creates more rather than less religious friction by encouraging individuals to debate the content of prayers.” *Weisman*, 908 F.2d at 1097 (citation omitted).

mately, the text of the invocation or benediction is of critical importance in answering this question, and the cases contain only a limited number of examples of such texts. Certainly, any prayer which either has explicit proselytizing content or involves pressure on those in attendance to participate in the prayer, like the 1985 graduation benediction at Yucca Valley High School in California,<sup>308</sup> is a facial violation both of the primary effect prong and of the Establishment Clause. Most graduation prayers described or quoted in the cases, however, make no attempt to impose the speaker's religious views on his audience, and some of them make explicit reference to the right of dissenters not to participate in the prayers.<sup>309</sup> As to such unimposing prayers, probably most of those in attendance would not regard them as having significantly "advanced" either religion in general or the particular denomination of the prayer-giver.

The Supreme Court, however, may deem the audience's view of the prayer's effect on them to be irrelevant, and it may wish to emphasize the symbolic linkage between public school and religion, however brief and infrequent, that an invocation or benediction creates. If that kind of hair-trigger sensitivity is deemed appropriate, then the Court might well conclude that such prayer violates the primary effect prong.<sup>310</sup> Ultimately, the Court is faced with a choice of analogies; if it likens the case to *Lynch v. Donnelly*,<sup>311</sup> it should find the primary effect prong not violated, but if it hearkens back to the symbolic absolutism of *School District of Grand Rapids v. Ball*<sup>312</sup> or *Aguilar v. Felton*,<sup>313</sup> then it would be hard to avoid a finding of violation of the primary effect prong of the *Lemon* test.<sup>314</sup>

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308. The teacher who gave the invocation began with the words: "Will the audience please stand and join us in prayer." See *supra* notes 78-80.

309. E.g., the invocation delivered by a minister at the 1985 Yucca Valley High School graduation. See *supra* note 79.

310. As the Court noted in *Lynch v. Donnelly*, "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680. Even if the violation is *de minimis*, as has been noted, it is doubtful whether this would save it in the sensitive universe of the Establishment Clause.

311. *Lynch*, 465 U.S. at 668.

312. *Ball*, 473 U.S. at 373.

313. *Aguilar*, 473 U.S. at 402.

314. Symbolism has played a powerful role in Establishment Clause jurisprudence, and it is quite possible that the Court will decide *Lee* on this basis rather than requiring more tangible evidence of establishment. As Professor Marshall has stated, "in demonstrating the extent to which a symbolic understanding best describes the establishment cases, I submit that the most significant establishment cases, the school prayer decisions [*Engle v. Vitale* and *Abington School District v. Schempp*] are best understood in symbolic terms." William P. Marshall, "We Know It When We See It": *Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 528 (1986).

### C. *Excessive Entanglement*

Under the third prong of the *Lemon* test, a challenged law or practice is unconstitutional if it fosters an excessive entanglement between government and religion.<sup>315</sup> Neither party in *Weisman* strongly argued the entanglement prong, although First Circuit Judge Bownes, in his concurring opinion, found that it was violated because school teachers chose Rabbi Gutterman to speak and they supervised the content of the prayers by giving him the pamphlet "Guidelines for Civic Occasions."<sup>316</sup> The courts in other graduation prayer cases were rather evenly split between those who found the entanglement prong violated,<sup>317</sup> those who found it not violated,<sup>318</sup> and those who did not reach the issue.<sup>319</sup>

Justice O'Connor, who in recent years has become a pivotal swing vote in Establishment Clause cases,<sup>320</sup> stated that "[t]he entanglement prong of the *Lemon* test is properly limited to institu-

315. See *supra* note 5. The entanglement prong was derived from *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664 (1970), which upheld property tax exemptions for churches. In *Walz*, a substantial financial benefit was involved, and there is some ambiguity about whether the entanglement prong applies only to such situations. None of the graduation prayer cases indicate that the prayer-giver was compensated by the school district, so if the entanglement prong is understood as being limited to financial questions, it would automatically be satisfied in these cases. Other courts have interpreted the entanglement prong more broadly, as pertaining to any excessive interaction between religious and government figures.

316. *Weisman*, 908 F.2d at 1095 (Bownes, J., concurring).

317. *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982); *Bennett v. Livermore Unified Sch. Dist.*, 238 Cal. Rptr. 819 (Cal. Ct. App. 1987); *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809 (Cal. 1991).

318. *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir. 1980); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989); *Kay v. David Douglas Sch. Dist. No. 40*, 719 P.2d 875 (Or. Ct. App. 1986) (Rossman, J., dissenting); *Stein v. Plainwell Community Schs.*, 610 F. Supp. 43 (W.D. Mich. 1985); *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987) (Wellford, J., dissenting); *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991); *Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682 (D. Utah 1991); *Sands v. Morongo Unified Sch. Dist.*, 262 Cal. Rptr. 452 (Cal. Ct. App. 1989).

319. *Graham v. Central Community Sch. Dist. of Decatur*, 608 F. Supp. 531 (S.D. Iowa 1985); *Kay v. David Douglas Sch. Dist. No. 40*, 719 P.2d 875 (Or. Ct. App. 1986); *Berlin v. Okaloosa County Sch. Dist.*, No. PCA 87-30450-RV, 1988 WL 85937 (N.D. Fla. Mar. 1, 1988); *Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989); *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987); *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990). The decision in *Wood v. Mount Lebanon Township Sch. Dist.*, 342 F. Supp. 1293 (W.D. Pa. 1972) was issued before *Lemon v. Kurtzman*, 411 U.S. 192 (1973). The decisions in *Wiest v. Mount Lebanon Sch. Dist.*, 320 A.2d 362 (Pa. 1974) and *Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974), issued one year after *Lemon* in 1974, did not purport to apply the *Lemon* test and did not discuss entanglement.

320. If Justices Souter and Thomas live up to conservative expectations on Establishment Clause issues, a conservative majority may already be in place, which would render Justice O'Connor's centrist position irrelevant and eliminate her ability to tip the balance in a close case.

tional entanglement.”<sup>321</sup> Thus, where an invocation or benediction is given by a student or even a teacher, rather than a clergyman, at least one form of impermissible entanglement is avoided.<sup>322</sup> Even where a minister delivers an invocation or benediction, there is no excessive entanglement if he is not instructed about the content of the prayers<sup>323</sup> and the authorities do not preview their content.<sup>324</sup>

321. *Lynch v. Donnelly*, 465 U.S. 668, 689 (1983) (O'Connor, J., concurring).

322. The Fifth Circuit stated in *Jones*: “By requiring that invocations be non-sectarian and written and presented by student volunteers, the Resolution effectively excludes religious institutions from its purview. Such exclusion renders entanglement impossible under Justice O'Connor's statement of Lemon's third test.” *Jones*, 930 F.2d at 423. See also *Kay*, 719 P.2d at 886 (Rossman, J., dissenting) and *Stein*, 610 F. Supp. at 45.

323. The only exception is that the speaker must be told that he may not proselytize or ask the audience to participate in his prayer. See *supra* note 302.

324. In *Jager*, while the court correctly found that the explicitly Christian pre-football game invocations violated the primary effect prong, it also correctly determined that “[o]n the face of the equal access plan, the School District is not entangled with religion at all. The School District does not monitor the content of the invocations, and the [Douglas County Ministerial Association] will no longer choose the invocation speakers or deliver the pregame prayers.” *Jager*, 862 F.2d at 831. See also *Stein*, 610 F. Supp. at 50; *Stein*, 822 F.2d at 1411, 1417 (Wellford, J., dissenting)(school authorities and graduating seniors had no prior knowledge of content of the invocation and benediction at Portage High School 1985 graduation). As a practical matter, it seems inconceivable that school authorities would criticize the content of a clergyman's graduation prayer after the fact and notify him of this, even if the prayer contained proselytizing elements. Moreover, none of the cases indicate that school authorities discussed prayers with prayer-givers after graduation. This would arguably be inappropriate, although it would not be inappropriate to refuse to invite back any prayer-giver who transgressed the bounds of what is permissible. Thus, it is contended that excessive entanglement is avoided if there is a neutral manner of selecting a prayer-giver, and that person is not instructed about the appropriate contents of such prayer, even though this leaves open the risk of inappropriate elements in the prayer. As Justice Baxter, dissenting in *Sands*, persuasively stated,

[t]he United States Constitution does not demand that a governmental agency which sponsors a public ceremony screen its content in order to avoid any possible offense. It requires only that the governmental agency take reasonable steps to ensure that it is not knowingly conveying the impression that it sponsors or endorses a religious message, and to prevent the continuation of past practices which may have done so.

*Sands*, 809 P.2d at 863 (Baxter, J., dissenting) (citation omitted).

The school district in *Bennett*, whose graduations had included prayers by both graduating students and clergymen, conceded that if invocations were permissible, it would “be necessary to oversee the students' choice of ceremony to ensure that the limits set here are not exceeded.” *Bennett*, 238 Cal. Rptr. at 824. The court concluded that it was “just this kind of surveillance” which violated the entanglement prong. *Id.* The school district's concession was surely unnecessary, but in any event a proper understanding of “entanglement” does not encompass a school's relationship with its own students.

The California Supreme Court, in *Sands*, posited a similar “impermissible risk of entanglement”:

If a school district permits members of the clergy or adherents of various

On the other hand, explicit guidelines concerning the contents of prayers raise a difficult problem. While they are clearly intended to avoid violation of the second or primary effect prong of the *Lemon* test, they are likely to create the very entanglement forbidden by the third prong. As noted above, the court in *Stein v. Plainwell Community Schools* held that graduation prayer would be constitutional so long as it was non-sectarian and non-proselytizing, similar to the prayer by the Nebraska State Legislature chaplain whose constitutionality was upheld in *Marsh v. Chambers*.<sup>325</sup> Defendant school district in *Jones v. Clear Creek Independent School District* modeled its graduation invocations and benedictions on the majority opinion in *Stein*.<sup>326</sup>

But even if discriminating between "non-sectarian" and other prayer were a permissible objective,<sup>327</sup> the mere task of framing guidelines to achieve this end and *a fortiori*, any monitoring to ensure that the guidelines are complied with, constitutes excessive entanglement of government with religion.<sup>328</sup> As the California

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religions to deliver graduation prayers, how will it ensure against promotion of specific religious beliefs or concepts? Local school officials would have to evaluate the content of the prayers. But such prophylactic government monitoring of religious speech is constitutionally impermissible.

*Sands*, 809 P.2d at 818. The simple answer is given in Justice Baxter's dissent: The government is not obligated to screen the content of everything that may be said at a ceremony which it sponsors in order to avoid any possible offense, although it should not knowingly give the impression that it sponsors or endorses a religious message. *Id.* at 863. Thus, the government cannot and need not totally ensure against promotion of specific religious beliefs or concepts, although it should make clear that it opposes such promotion. Somewhat similarly to the California Supreme Court in *Sands*, the court in *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982) erroneously concluded that there was "an excessive entanglement with religion" when a school prayer was sung in school buildings "and District employees were involved in supervising both the school property and the events which took place there." *Id.* at 888. The court in *Aldine* evidently confused the primary effect prong, which was violated, with the entanglement prong.

325. *Stein*, 822 F.2d at 1408 (citing *Marsh v. Chambers*, 463 U.S. 783, 792-93 (1983)).

326. *Jones v. Clear Creek Indep. Sch. Dist.*, 903 F.2d 416, 417-18 (1991). Similar use of school district guidelines was recommended by California Supreme Court Justice Baxter, dissenting in *Sands*, 809 P.2d at 862; accord, *Albright*, 765 F. Supp. at 689. The Fifth Circuit in *Jones* went a step further and declared that "[w]e think that Clear Creek . . . may constitutionally pre-screen proposed invocations for sectarianism and proselytization." *Jones*, 930 F.2d at 423. All the invocations in that case were written and presented by student volunteers, not clergymen. *Id.* at 417.

327. As argued above, there is no constitutionally cognizable difference between sectarian and "non-sectarian" prayer, and in a given situation, the Constitution forbids them both equally or not at all.

328. In *Sands*, the California Supreme Court rejected the guidelines proposed by Justice Baxter's dissent. *Sands*, 809 P.2d at 819 n.8. The court cited difficulties in deciding which sects and denominations would be considered and the appropriate content of the prayer. *Id.* The court concluded that "Justice Baxter's approach would in effect make this court a standing committee on approved theology. This is a task for which we are, to say the least, not well equipped." *Id.* Similarly, Judge

Supreme Court noted in *Sands v. Morongo Unified School District*, “[t]o allow preventive monitoring by the state of the content of religious speech inevitably leads to gradual official development of what is acceptable public prayer.”<sup>329</sup> This would represent unacceptable government involvement in the realm of religion. Thus, school district guidelines regarding graduation invocations and benedictions must be limited to an admonition against proselytizing and inviting the audience to participate in prayer. Any attempt by public officials to devise guidelines concerning appropriate prayer, or to pre-screen or monitor the content of such prayer, is itself contrary to the Establishment Clause.<sup>330</sup>

Did Rabbi Gutterman’s invocation and benediction in *Weisman* violate the entanglement prong of the *Lemon* test? While the choice of the rabbi and providing him with the National Conference of Christians and Jews Guidelines appear to create an entanglement of government and religion, the author believes that it is impossible to determine whether the entanglement is “excessive” based on the facts in the district court and First Circuit opinions. Based on those facts, it *appears* that any entanglement was minor and not excessive.

However, one would need to know more about both the content of the Guidelines and prior practice at Nathan Bishop Middle School graduations to reach an informed and definite conclusion. For example, do the National Conference of Christians and Jews Guidelines merely warn against proselytizing and trying to get the

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Bowles noted in *Weisman* that the “Guidelines for Civic Occasions” prepared by the National Conference of Christians and Jews, which were utilized by the Nathan Bishop Middle School, suggest what kind of prayers should be written. This supervision of the content of the prayers by the school officials implicates the entanglement prong. The school is impermissibly involved in regulating the content of the prayer.” *Weisman*, 908 F.2d at 1095 (Bowles, J., concurring). The author generally agrees with these statements, except that he believes that a school district can and must oppose proselytizing in prayers without having to define the boundaries beforehand. The author suggests that to eliminate any suspicion of favoritism on the part of the officials choosing prayer-givers, the school should draw lots to determine which religious groups’ representatives will deliver the invocation and benediction.

329. *Sands*, 809 P.2d at 818. Similarly, Judge Bowles noted in *Weisman* that the “‘Guidelines for Civic Occasions’ prepared by the National Conference of Christians and Jews, which were utilized by the Nathan Bishop Middle School, suggest what kind of prayers should be written. This supervision of content of the prayers by the school officials implicates the entanglement prong. The school is impermissibly involved in regulating the content of the prayer.” *Weisman*, 908 F.2d at 1095 (Bowles, J., concurring).

330. The court in *Albright* concluded that “[u]nder the Alpine defendants’ policy, excessive entanglement of government with religion is avoided because of clear guidelines as to acceptable content, no preliminary review by school officials of the prayers, and no monitoring.” *Albright*, 765 F. Supp. at 689. The absence of preliminary review and of monitoring helps avoid an entanglement violation, but “clear guidelines as to acceptable content” have the opposite effect.

audience to pray against its will (both acceptable), or do they contain detailed descriptions of appropriate theological content for "non-sectarian prayer" (unacceptable)? And was any one faith consistently favored in having its adherents selected to give graduation invocations and benedictions over the years, or had clergymen of other faiths, chosen by a neutral system, also given the prayers?<sup>331</sup> Only with answers to these questions may a definitive assessment be made as to whether the entanglement prong was violated in *Weisman*, although it appears that it was not.<sup>332</sup>

In conclusion, the first or secular purpose prong of the *Lemon* test is the easiest for graduation prayer to satisfy. The third or excessive entanglement prong is slightly more difficult to prove, although careful structuring of the process of selecting a prayer-giver should satisfy this requirement. The most difficult prong to satisfy is the second or primary effect prong. Obviously, the easiest and surest way for a school district to avoid violating the Establishment Clause is to eliminate prayers from graduation ceremonies, but this Article concludes that if they are carefully structured, it is possible for graduation ceremonies with invocations and benedictions to pass constitutional muster. The next section gives a description of how this can be done.

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331. There was almost certainly no favoritism of Judaism or any other faith in Nathan Bishop Middle School graduations since, as has been noted, on a prior occasion a Christian minister gave the prayers. *See supra* note 22. In *Marsh*, the same Presbyterian minister had served as chaplain of the Nebraska State Legislature for over 16 years, but the Supreme Court made little of this fact. It observed that two United States Senate chaplains had served for terms of 12 and 20 years, respectively. *Marsh*, 463 U.S. at 785, 794 n.17. However, Justice Stevens, dissenting, stated that

[r]egardless of the motivation of the majority that exercises the power to appoint the chaplain, it seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause of the First Amendment.

*Id.* at 823. In contrast to what may be appropriate for a legislative body or Congress, who can vote to change matters, schools must preserve an appearance of impartiality in order to protect the rights of students who have no such power. Thus, there would be a clear presumption of invalid entanglement if a public high school used the same clergyman, or clergymen of the same religion, every year. If a school or school district is to engage in the constitutionally risky practice of graduation prayers, it must see to it that the process of selecting prayer-givers is neutral, preferably random, and that both the students and the community are convinced that the process of selection is not biased in favor of any religion.

332. The same is true of most of the graduation prayer cases: the challenged prayers do not appear to violate the entanglement prong, but more information would be required to make a definitive assessment. *But see* *Kay v. David Douglas Sch. Dist. No. 40*, 719 P.2d 875 (Or. Ct. App. 1986) (a teacher giving the invocation at the 1984 graduation represents a facial violation of the entanglement prong).

*D. Graduation Prayer: A Constitutional Model*

A school district could avoid certain pitfalls and maintain the integrity of its secular purpose in offering invocations and benedictions at its graduation ceremonies by adopting prophylactic measures such as the following: Inform graduating students and members of the community in advance of the possibility that an invocation or benediction will be part of the graduation ceremony, and allow the graduates to decide whether to include the prayers. If the graduating class votes to have such prayers, members can nominate clergymen or other persons to deliver them. No denominations should be excluded from the selection process. The choice of speakers can be made by drawing names from two different hats — one for invocations and one for benedictions — in order to make it more likely that representatives of different denominations deliver the invocation and benediction.

Those chosen to give an invocation or benediction should be told not to proselytize and not to ask the audience to pray with them,<sup>333</sup> or even to adopt any demeanor or posture of prayer.<sup>334</sup> Beyond these minimum admonitions, however, school authorities should carefully refrain from advising the prayer-givers what the prayers should contain.<sup>335</sup> The school authorities should also re-

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333. "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion' . . . and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *accord Schempp*, 374 U.S. at 220. Thus, the clergyman or other person delivering an invocation or benediction must be instructed to refrain from any statement like "Let us pray," *see, e.g., Jager*, 862 F.2d at 826, which would seek to elicit a direct affirmation of belief from those who might not believe.

334. One's demeanor or posture can signify that one is engaged in prayer; as Justice Douglas noted, "[t]he act of praying often involves body posture and movement as well as utterances. It is nonetheless protected by the Free Exercise Clause." *Brandenburg v. Ohio*, 395 U.S. 444, 455 (1969) (Douglas, J., concurring). By the same token, the audience at public school graduations should not be pressured to adopt a posture which would indicate that they are participating in prayers from which they dissent; this would be an example of impermissible compelled speech. *Compare West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compulsory flag salute violates the First Amendment); *Wooley v. Maynard*, 430 U.S. 705 (1977) (infringement of individual's First Amendment rights for state to require individual to display an ideological message on license plate on his automobile). For this reason, the prayer-giver at a public school graduation must also be instructed to refrain from asking those present to stand, to bow their heads, or otherwise to manifest their adherence to his or her religious message. The student who delivered the invocation at the 1984 graduation ceremony at the Plainwell, Michigan Schools asked the audience to stand, and this was of questionable constitutionality. *Stein*, 822 F.2d at 1410-11 (Wellford, J., dissenting).

335. As the Supreme Court has stated, "[it is not] in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." *Fowler v. Rhode*



frain from requiring that the texts of planned prayers be submitted for official review before they are given.<sup>336</sup> In addition, they should not review the content of prayers after they have been given, except

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Island, 345 U.S. 67, 70 (1953). Surely the same is true of prayers, even if they are delivered at public school functions rather than at religious meetings. Thus, it is impermissible for government officials to specify or to monitor the content of prayers in any way, since this would constitute an impermissible entanglement of government with religion.

This is a delicate matter, since prayer by a representative of one denomination may offend members of another denomination, as well as atheists. *E.g.*, *Graham*, 608 F. Supp. at 534; *Berlin*, 1988 WL 85937 at \*2. Rabbi Gutterman's invocation and benediction in *Weisman* were ecumenical in tone, and it is hard to imagine that their wording could be objectionable to any Christian group. It is also difficult to imagine any Jewish prayer which would offend Christian audiences given that Christianity has borrowed so much, including the Old Testament, from Judaism. The converse is not true; for example, prayers addressed to Jesus Christ as "Lord" would offend Jews. *Id.*; *Schempp*, 374 U.S. at 209 (referring to the expert testimony at trial by Dr. Solomon Grayzel to the effect that "from the standpoint of Jewish faith, the concept of Jesus Christ as the Son of God was 'practically blasphemous.'") *Id.*

Sectarian references would indeed be inappropriate, especially since they would reinforce the sense of "outsiderhood" to which Jews have been subjected since the beginning of the country because of the idea that America is "a Christian nation," which has been assumed by many and occasionally stated explicitly. *See, e.g.*, statement in *Church of Holy Trinity v. United States*, 143 U.S. 457, 471 (1892), that "this is a Christian nation," cited in *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J. dissenting); JUSTICE STORY'S COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 630-32 (5th ed. 1891) (quoted in *Wallace v. Jaffree*, 472 U.S. 38, 104 (1984) (Rehnquist, J., dissenting)); *County of Allegheny v. ACLU*, 492 U.S. 573, 604 (1989) (citing *MORTEN BORDEN, JEWS, TURKS, AND INFIDELS* (U. of N.C. Press 1984)); *Berlin*, 1988 WL 85937 at \*5; Chicago's Mayor Daley's statement in October, 1959 that "[w]e are a Christian nation. I think the more religion we can get in politics, the better off we are," quoted in *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 126 (7th Cir. 1987).

Unfortunately, the only way to prevent such inappropriate sectarian references in graduation prayers is for the authorities to adopt policies like the "Guidelines for Civic Occasions" prepared by the National Conference of Christians and Jews, which recommended nonsectarian prayer for a pluralistic society. These guidelines were adopted by the school district in *Weisman*, 728 F. Supp. at 669. The permissibility of the approach to "secular purpose" outlined here, however, depends on the fact that government's role is limited to providing a forum for expression of piety by a private individual. Thus, for a public official to regulate and monitor the content of prayers in order to avoid impropriety and offense to one group would cause a greater impropriety, the entanglement of government with religion. Even "watered-down" expressions of "civic religion" or ceremonial deism will offend devout atheists, and will probably offend some devout religionists. *See* Justice Brennan's concurrence in *Schempp*, 374 U.S. at 283-87. Justice Brennan noted, "*Engel* is surely authority that non-sectarian religious practices, equally with sectarian exercises, violate the Establishment Clause." *Id.* at 287. The dilemma of making a public school graduation platform available as a forum for the free expression of private religious views, while seeking to avoid offense to dissenting auditors, is a difficult one; plainly, the easiest way to resolve it is simply to eliminate prayers from the program.

336. This would also constitute a forbidden "entanglement."

to ensure that the rules against proselytizing and appeals to the audience to join in prayer with the prayer-giver have been respected.<sup>337</sup> Finally, it would be advisable if not essential for the school authorities to include in the program an explicit disclaimer, either oral or written, which would state plainly that the school system endorses no religion, including that of the prayer-giver.<sup>338</sup>

#### IV. CONCLUSION: THE LEMON TEST AND THE FUTURE OF THE ESTABLISHMENT CLAUSE

The results in the public school graduation prayer cases add up

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337. If this rule were violated, it would be appropriate to bar the prayer-giver and perhaps his or her denomination from consideration for presenting future prayers.

338. The following, which could be stated orally by the high school principal or other person officiating at the ceremony, would constitute an acceptable disclaimer:

I would now like to introduce The Reverend Dr. X, who has been requested by members of the graduating class to give an invocation (or benediction). The United States Constitution, of course, leaves each of us free to practice whatever religion he or she pleases, or no religion at all. We emphasize that Blackacre School District does not endorse any religious denomination or belief but instead remains neutral in religious matters, as the Constitution requires.

Such explicit statements by government should be presumptively valid and effective, and they should be taken at face value. Thus, the author disagrees with the court in *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987), in which no less than six disclaimer signs were attached to a nativity scene in the Chicago City Hall lobby, two to each exposed side. The signs, each of which was approximately seven and one-half by ten inches, stated: "Donated by the Chicago Plasterer's Institute — this exhibit is neither sponsored nor endorsed by the Government of the City of Chicago." *Id.* at 123. The Seventh Circuit, however, declined to take the Chicago city government at its word. It held that the location of the nativity scene in the City Hall lobby, at the seat of local government, "inevitably creates a clear and strong impression that the local government tacitly endorses Christianity," and concluded that "the message of government endorsement generated by this display was too pervasive to be mitigated by the presence of disclaimers." *Id.* at 218. Thus, the court concluded that the display violated the primary effect prong of the *Lemon* test and was therefore unconstitutional.

Ironically, the disclaimers had been required in the first place pursuant to a consent decree between the city government and the ACLU, which decree terminated an earlier challenge by the ACLU to the nativity scene display. *Id.* at 122-23. The author believes that in an overwhelmingly literate country, clear public disclaimers should be deemed effective and taken literally. The Seventh Circuit's conclusion that the disclaimers are ineffective illustrates how the Establishment Clause endorsement test can be manipulated to reach results desired by the judges deciding the case. Furthermore, the author believes that the Seventh Circuit's decision, whose *ratio decidendi* is that the creche scene was placed inside Chicago City Hall rather than in a public park 300 feet away, as in *Lynch*, 465 U.S. at 668, fails to distinguish *Lynch* successfully. See *American Jewish Congress*, 827 F.2d at 128-40 (Easterbrook, J., dissenting). Under the approach suggested here, the disclaimers would not save the nativity scene if it could be shown that other religions, and for that matter secular groups, were denied similar access to City Hall for displays which they might wish to sponsor.

to a picture of judicial disarray which is a microcosm of the general confusion and disarray which exist in religion clause jurisprudence. Presented with similar fact situations, the lower courts strikingly failed to reach a consensus on the constitutionality of graduation prayers and diverged widely in their approaches and analysis. While the religion clauses undoubtedly present thorny and intractable problems, the Supreme Court is largely responsible for the confused state of the law. A principal reason for this incoherence is that the Supreme Court has treated the Establishment Clause and the Free Exercise Clause as separate and distinct bodies of law, producing inconsistent results.<sup>339</sup> The author believes that a *sine qua non* of coherence in the area of religion clause jurisprudence is restoring consistency between the two clauses, and this conclusion draws upon the great mass of scholarly writing in the field to suggest ways to approach this result.<sup>340</sup>

That the law of the religion clauses is confused has become a matter of observation which no longer requires argument.<sup>341</sup> The

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339. See, e.g., William P. Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 504-06 (1986) ("well-documented" tension between the two religion clauses). In *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), the Supreme Court stated that "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Id.* at 668-69.

340. There is a wealth of scholarship in this field, and to summarize the debate would require another article. The following merely sketches the author's views of how to restore the integrity of the religion clause jurisprudence.

341. E.g., Marshall, *supra* note 339, at 497 n.20 (citing commentators who find the area "hopelessly confused" and characterized by "doctrinal chaos" and state that the results in cases are "legendary in their inconsistencies"), *id.* at 495; Phillip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978-79); Norman Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094, 1149 (1985) ("[T]he path has been irregular, and the results far from coherent . . ."); Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997 (1986) ("[V]irtually everyone who has thought about the religion clauses, finds the Supreme Court's treatment of religion clause issues unsatisfactory."); Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337, 338 ("[A] decent argument can be made that the net contribution of the Court's precedents toward a cohesive body of law . . . has been zero. Indeed, some would say that it has been less than zero . . ."); Stephen L. Carter, *The Inaugural Development Fund Lectures: Scientific Liberalism, Scientific Law — Lecture Two: The Establishment Clause Mess*, 69 OR. L. REV. 495 (1990); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 819 (1984) ("Conceptual chaos . . . pervades this area of the law. Doctrinally, first amendment religion law is a mess."); *Id.* at 839. Professor Marshall observed that the inadequacy of current religion clause jurisprudence is "the one salient point upon which academia has reached almost universal agreement." William P. Marshall, *Introduction: Religion and the Law Symposium*, 18 CONN. L. REV. 697, 698 (1986). Professor Ellis West reiterates this point: "Current church-state law is in shambles. The Court's decisions in this area have been so weak in terms of clarity, consis-

modern origin of this confusion is *Everson v. Board of Education*,<sup>342</sup> which represented a major turning point in the law.<sup>343</sup> In *Everson*, Justice Black purported to erect a high and impregnable wall of separation between church and state providing that "[n]o tax in any amount, large or small, can be levied to support any religious activities . . . ,"<sup>344</sup> while he concluded with the 5-4 majority that it was constitutional for a town to reimburse parents for the cost of sending their students by bus to the local Catholic school.<sup>345</sup> Justice Douglas also contributed to the confusion in the field. His decision in *Zorach v. Clauson*<sup>346</sup> is the most notable statement of the accommodationist viewpoint,<sup>347</sup> while in later opinions he reverted to an

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tency, and cogency that there is scarcely a constitutional law scholar alive who has not excoriated the Court for creating a legal mess." Ellis West, *The Case Against A Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 611 (1990). Some Supreme Court Justices have agreed with these characterizations. Justice Scalia, dissenting in *Edwards v. Aguillard*, 482 U.S. 578 (1987), referred to "our embarrassing Establishment Clause jurisprudence." *Id.* at 639. Justice Rehnquist, dissenting in *Wallace v. Jaffree*, 472 U.S. 38 (1985), stated that "[i]n the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified." *Id.* at 107.

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

343. *Everson* for the first time interpreted the Establishment Clause to require strict separation between church and state. One commentator notes, "[b]efore that time, the Supreme Court readily upheld government actions concerning religion that seem highly problematic by present standards." Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 86. See, e.g., *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (upholding contract between Commissioner of Indian Affairs and Bureau of Catholic Indian Missions whereby Commissioner agreed to pay Bureau a certain sum for each Sioux child educated in its schools); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding payment of federal funds to hospitals run by order of Roman Catholic nuns).

344. *Everson*, 330 U.S. at 16.

345. As Professor Marshall comments, "[f]rom the outset it has been painfully clear that logical consistency and establishment clause jurisprudence were to have little in common." Marshall, *supra* note 339, at 495.

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

347. *Zorach*, 343 U.S. at 314 (distinguishing *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948)). The Court upheld the constitutionality of New York's released time program for religious education, under which students whose parents wanted them to attend religious instruction at places of worship were released early by the public schools, while other students were required to stay at school. Justice Douglas stated,

[w]e are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . . .

*Id.* at 314.

extreme separationist viewpoint.<sup>348</sup> Complete separation between government and religion is an impossibility,<sup>349</sup> and the "wall of separation" metaphor has proven singularly unhelpful as an aid to constitutional adjudication.<sup>350</sup> Nevertheless, Justice Black in *Everson* endorsed a separationist absolutism<sup>351</sup> hardly distinguishable from that of Justice Rutledge's famous dissent, while the Court's holding manifested a spirit of common sense and moderation which conflicted with his absolutist rhetoric.<sup>352</sup>

Perhaps the next most important contributor to Establishment Clause confusion was Chief Justice Burger, the author of the *Lemon* three-pronged test. Burger observed in *Lemon* that the language of the First Amendment Religion Clauses was "at best opaque,"<sup>353</sup> and to many the three-pronged test failed to shine even a faint ray of

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348. For example, Justice Douglas was the only dissenter in *Walz v. Tax Comm'n*, 397 U.S. 664, 700 (1970), which upheld the constitutionality of tax exemptions for church property.

349. For example, no one, to the author's knowledge, has suggested that churches be denied police and fire protection.

350. Justice Rehnquist stated in *Wallace v. Jaffree* that

[w]hether due to its lack of historical support or its practical unworkability, the *Everson* 'wall' has proved all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that "[metaphors] in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."

*Wallace*, 472 U.S. at 107 (Rehnquist, J., dissenting) (citations omitted). Rehnquist's indictment seems completely accurate.

351. The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . .

*Everson*, 330 U.S. at 15-16.

352. Justice Jackson's dissent sarcastically compared Justice Black to Julia in the poem by Lord Byron who, "whispering 'I will ne'er consent,' — consented." *Id.* at 19 (Jackson, J., dissenting). Justice Jackson himself was not free of inconsistency in this area. In his landmark decision in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down a compulsory state flag salute statute as applied to Jehovah's Witnesses, who considered the salute sinful idolatry), he stated,

[i]f 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. If there are any circumstances which permit an exception, they do not now occur to us.

*Id.* at 642. Four years later, Justice Jackson complacently observed in *Everson* that the entire system of public education in the United States had more in common with Protestantism than with Catholicism, thus carving out an exception to this principle to his own liking. *Everson*, 330 U.S. at 21 (Jackson, J., dissenting).

353. *Lemon*, 403 U.S. at 612.

light into the darkness surrounding the clause it was supposed to illuminate. Burger frequently disagreed with the Court's application of his own three-pronged test,<sup>354</sup> and he disregarded it completely in *Marsh v. Chambers*.<sup>355</sup>

Finally, Justice O'Connor has significantly added to the Establishment Clause confusion with her refinement of the three-pronged test which focuses on government endorsement of religion.<sup>356</sup> While her proposed "clarification"<sup>357</sup> has won support from other Justices,<sup>358</sup> it has also been criticized on the grounds that it does not provide much clarification.<sup>359</sup> In particular, the "objective ob-

354. *E.g.*, *Sloan v. Lemon*, 413 U.S. 825, 835 (1973); *Meek v. Pittenger*, 421 U.S. 349, 385 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977); *State of N.Y. v. Cathedral Academy*, 434 U.S. 125, 134 (1977); *Stone v. Graham*, 449 U.S. 39, 43 (1981); *Aguilar v. Felton*, 473 U.S. 402, 419 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 84 (1985).

355. *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice Burger emphasized the Court's "unwillingness to be confined to any single test or criterion in this sensitive [Establishment Clause] area." *Id.* at 679. In *Lynch*, Chief Justice Burger upheld the Pawtucket, Rhode Island city-sponsored Christmas creche scene; in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), after his old Minnesota friend retired, Justice Blackmun faced a similar fact situation. He uncharitably remarked, "[t]he rationale of the majority opinion in *Lynch* is none too clear . . . the opinion offers no discernible measure for distinguishing between permissible and impermissible endorsements." *County of Allegheny*, 492 U.S. at 594.

356. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring in the judgment).

357. *Lynch*, 465 U.S. at 687.

358. *See supra* note 237.

359. *E.g.*, *County of Allegheny*, 492 U.S. at 669 (Kennedy, J., dissenting). Professor Steven Smith believes that Justice O'Connor is engaged in a futile endeavor to extract Establishment Clause doctrine from the barren ideal of "neutrality". Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987). After an in-depth critical examination, he concludes that

the "no endorsement" test is riddled with analytical flaws that can only compound the confusion and inconsistency afflicting current establishment doctrine. Thus, adoption of the 'no endorsement' test would simply initiate another era of chaotic results—and ensuing accusations of disingenuousness and doctrinal manipulation. While establishment doctrine undoubtedly needs reexamination, the 'no endorsement' test is not the solution. The test's deficiencies should rather prompt scholars and jurists to explore other doctrinal alternatives . . . ."

*Id.* at 331 (citing as "much more promising" the emphasis on coercion favored by Professor Michael W. McConnell in *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) and Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980)). For more favorable evaluations of her test, which Justice O'Connor cited in her concurrence in *County of Allegheny*, 492 U.S. at 627, *cf.* Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 No-

server" standard<sup>360</sup> has led different judges to reach different conclusions in similar fact situations.<sup>361</sup> In at least one respect, Justice O'Connor's "interpretation" of one of the prongs, totally changes it.<sup>362</sup>

Moreover, even as modified by Justice O'Connor, the *Lemon* test has led to disparate and conflicting results in the graduation prayer cases<sup>363</sup> and elsewhere. Dean Choper's statement of more than a decade ago remains true today: "application of the Court's three-prong test has generated ad hoc judgments which are incapable of being reconciled on any principled basis."<sup>364</sup> Even Professor Laycock, a strong separationist, conceded that the test has been "so

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TRE DAME L. REV. 151 (1987) and William P. Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986).

360. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring); *County of Allegheny*, 492 U.S. at 630-31 ("reasonable observer").

361. See *supra* note 282.

362. In *Lynch v. Donnelly*, she states that

[f]ocusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it, in fact, causes, even as a primary effect, advancement or inhibition of religion. What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.

*Lynch*, 465 U.S. at 691 (emphasis added). Yet outlawing a statute or practice which has the primary effect of advancing or inhibiting religion is precisely what the primary effect prong in *Lemon*, 403 U.S. at 612, requires; when, as here, one rejects the plain meaning of a simple text, this can in no way be deemed "interpretation." It is a change, and should be candidly labelled as such.

363. Compare the Court of Appeal decision in *Sands v. Morongo Unified Sch. Dist.*, 262 Cal. Rptr. 452 (Cal. Ct. App. 1989), with the decision of the California Supreme Court in that case, *Sands*, 809 P.2d 809, and a different Court of Appeal in *Bennett v. Livermore Unified Sch. Dist.*, 238 Cal. Rptr. 819 (Ct. App. 1987). Compare the dissenting opinions of Supreme Court Justices Baxter and Panelli in the California Supreme Court decision in *Sands*. Compare also the dissents of Justice Rossman in *Kay v. David Douglas Sch. Dist. No. 40*, 719 P.2d 875, 882 (Or. App. 1986), Judge Campbell in *Weisman v. Lee*, 908 F.2d 1090, 1097 (1st Cir. 1990), and Judge Wellford in *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987) with the courts' decisions in those cases. And in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), while the opinions of Justices Blackmun, Brennan, and Stevens each incorporated elements of Justice O'Connor's endorsement approach to the three-pronged test, Justices Brennan, Stevens, and Marshall disagreed with her conclusion that the menorah display did not violate the Establishment Clause. Indeed, the only Justice who agreed with Justice O'Connor on the constitutionality of both the creche and the menorah was Justice Blackmun, yet Justice O'Connor disagreed with his reasoning in reaching that result. *County of Allegheny*, 492 U.S. at 632 (O'Connor, J., concurring).

364. Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680 (1980). See also Rosalie Berger Levinson, *Separation of Church and State: And the Wall Came Tumbling Down*, 18 VAL. U. L. REV. 707, 709 (1984) (criticizing "the inconsistencies and the internal confusion in [the *Lemon* three-pronged] 'test'").

elastic in its application that it means everything and nothing.”<sup>365</sup>

From a purely practical standpoint, a legal test or standard should be expected to clarify matters and help predict case results. If it is so general and open-ended that it appears to serve as a ready vehicle for the expression of the individual philosophical preferences of the judge applying it, as the *Lemon* test evidently has done, it has failed. It should not be enough if after applying the test we are left with the same degree of opaqueness concerning the Establishment Clause that existed before — to redeem itself, the test must lessen that opaqueness and provide at least some illumination. Having failed that, the *Lemon* test is a suitable target for the application of Ockham’s razor.<sup>366</sup> Even if the Court does not have a ready-made substitute for the *Lemon* test, candor and clarity would benefit if the Court acknowledged that the test was useless, did away with it, and started afresh.<sup>367</sup>

There are additional reasons for jettisoning the *Lemon* three-pronged test beyond the fact that it does not seem to have led, over a period of twenty years, to any predictability in its application. Both the secular purpose prong and the excessive entanglement prong are fatally flawed.

#### A. *The Secular Purpose Prong*

The secular purpose prong demands an investigation of legislative purpose which the Supreme Court normally eschews in determinations of constitutionality.<sup>368</sup> In the first place, determination of

365. Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 450 (1986).

366. This is the philosophical principle, announced by the medieval philosopher William of Ockham, which enjoined economy in explanation and counselled that the number of assumptions utilized in philosophical arguments should be kept to a minimum.

367. Such a jurisprudential “spring cleaning,” which would sweep away old and useless clutter, need not work a revolution in the law, since the Court would be left with its precedents. Through the gradual process of case-by-case adjudication, it could work towards re-articulating suitable rationales for its holdings. Other areas of First Amendment jurisprudence seem to have done well without explicit formulaic tests, three-pronged or otherwise.

368. As Justice Brennan observed,

[i]n contrast to the general rule that legislative motive or purpose is not a relevant inquiry in determining the constitutionality of a statute, our cases under the Religion Clauses have uniformly held such an inquiry necessary because under the Religion Clauses government is generally prohibited from seeking to advance or inhibit religion.

*McDaniel v. Paty*, 435 U.S. 618, 636 (1978) (citation omitted). Justice Brennan offers no rationale or explanation for the Court’s practice in this area compared to other First Amendment areas such as freedom of expression or freedom of the press. Professor Marshall notes that while inquiry into legislative purpose is not limited to Establishment Clause cases, “establishment is unique in that the absence of proper purpose alone, irrespective of effect, will lead to a finding of unconstitu-



the purpose, motivation, and intent of an entire legislative body which enacts a statute is notoriously difficult in many cases. Because of all the vagaries of the legislative process and the manifold influences which affect the vote of a single legislator, it is hard to determine for certain what was paramount in determining the vote of such a legislator, let alone what moved an entire body including others with different or opposite views.

As Justice Scalia convincingly argued in *Edwards v. Aguillard*, "discerning the subjective motivation of those enacting the statute, is, to be honest, almost always an impossible task."<sup>369</sup> It is often extremely difficult to ascertain an individual legislator's motivation from the traditional sources of legislative history, which include committee reports, media reports, and postenactment recollections, all of which can be manipulated and distorted. These problems are multiplied when one must divine how many members of a legislative majority had the "invalidating intent."<sup>370</sup> As Justice Scalia noted, the Supreme Court recognized as early as Chief Justice Marshall in *Fletcher v. Peck*<sup>371</sup> that determining the subjective intent of legislators is a perilous enterprise, and the present Supreme Court would be well-advised to heed this difficulty.

Only a few Supreme Court cases have found Establishment Clause violations based on the secular purpose prong of the *Lemon* test.<sup>372</sup> *Wallace*, which struck down Alabama's moment of silence statute, and *Edwards*, which struck down Louisiana's statute requiring "balanced treatment" of creationism and evolution in the public schools, exemplify the problems with the secular purpose prong. Half of the states had moment of silence statutes,<sup>373</sup> and the Court in *Wallace* made clear that they were constitutional.<sup>374</sup> It seems

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tionality." Marshall, *supra* note 339, at 526 n. 182. In Equal Protection analysis, for instance, legislative intent to discriminate must be found before a facial discrimination claim will be upheld. *Washington v. Davis*, 426 U.S. 229 (1976). However, a finding of intent does not automatically invalidate the statute. *Id.*

369. *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

370. *Id.* at 638.

371. *Fletcher v. Peck*, 6 U.S. (1 Cranch) 87, 130 (1810).

372. *Stone v. Graham*, 449 U.S. 39 (1980); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 578 (1987).

373. *Wallace v. Jaffree*, 472 U.S. at 70 (1985) (O'Connor, J., concurring in the judgment).

374. Alabama passed three statutes authorizing periods of silence in the public schools not to exceed one minute. The constitutionality of each was challenged under the Establishment Clause. *Wallace*, 472 U.S. at 40. The statutes enacted in 1981 and 1982, which were ultimately held unconstitutional, provided that teachers "may announce" a period of silence "for meditation or voluntary prayer . . ." *Id.* at 41-42. The 1978 statute, however, merely prescribed a minute of silence "for meditation." Before the Supreme Court heard the case, appellees had abandoned any claim that it was unconstitutional, and the Court did not suggest otherwise. *Id.* at 40 n.1.

plain, moreover, that all the moment of silence statutes were passed for the purpose of giving children in public schools an opportunity to pray.<sup>375</sup> Nevertheless, because the Alabama Legislature made no bones about the fact that it was trying to foster prayer by enacting the statute,<sup>376</sup> its statute was held unconstitutional for violating the secular purpose prong.<sup>377</sup>

Since a moment of silence is non-coercive and "not inherently religious,"<sup>378</sup> and the constitutional 1978 statute protected the right of students to engage in voluntary silent prayer, as Justice Stevens noted approvingly,<sup>379</sup> it seems clear that the Alabama Legislature could have achieved the same purpose and had its statute upheld if it had disguised its intentions and omitted the word "prayer" from both the statute and legislative history.<sup>380</sup> As one commentator notes, the *Wallace* decision

plainly penalize[s] legislators for expressing religious convictions and aspirations. Legislators may hold religious beliefs and may even act upon them, but if they express these beliefs, courts will invalidate the products of their legislative efforts as endorsements of religion. So understood, the rationale of *Wallace* . . . raises a potentially serious threat to the freedom of expression of legislators who hold religious beliefs and punishes not only the legislators but also their constituents.<sup>381</sup>

On the other hand, as Smith notes, it is unclear whether the

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375. See, e.g., Jesse H. Choper, *Essay — Church, State and the Supreme Court: Current Controversy*, 29 ARIZ. L. REV. 552, 555 (1987).

376. Senator Donald Holmes sponsored the bill which became Alabama Code § 16-1-20.1 (Supp. 1984) (authorizing minute of silence "for meditation or voluntary prayer"). The senator inserted into the legislative record, apparently without dissent, a statement indicating that the bill's purpose was an "effort to return voluntary prayer" to the public schools. *Wallace*, 472 U.S. at 56-57. When questioned later in district court, he conceded that he "did not have no other purpose in mind." *Id.* The Court noted that the State did not present evidence of any secular purpose. *Id.*

377. *Id.* at 61. For similar reasons, including the statements of its sponsor, Senator Bill Keith, the Supreme Court held that the Louisiana Creationism Act, requiring that if evolution was taught in public schools, then "creation science" must also be taught, had no secular purpose and violated the Establishment Clause. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

378. *Wallace*, 472 U.S. at 72 (O'Connor, J., concurring in the judgment).

379. *Id.* at 59.

380. Justice Rehnquist concluded in *Wallace* that "the constitutionality of a statute may depend upon what the legislators put into the legislative history and, more importantly, what they leave out." *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting).

381. Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 994 (1989). Similarly, former Solicitor General Rex Lee has stated that "[i]t makes no sense to permit moments of silence in all states that want to adopt them except those states unlucky enough to have legisla-

outcomes in *Wallace* and *Edwards* were determined by the improper statements of the legislators or their improper belief. If their beliefs were the problem, the two cases suggest that "even if a statute's content is itself constitutional, so that it would be upheld if adopted on secular grounds, it will not pass constitutional muster if religious beliefs and aspirations motivated the legislators' support."<sup>382</sup> If that properly describes *Wallace* and *Jaffree*, then the cases no longer impinge on legislators' freedom of expression to the same extent, but instead pose a direct threat to their freedom of belief, which should be absolute.<sup>383</sup>

As Smith notes, such an interpretation of *Wallace* and *Edwards* "imposes a special disability on legislators whose religious convictions inform their approach to political issues."<sup>384</sup> The Free Exercise Clause prohibits a state from imposing sanctions on people because of what they believe,

[b]ut protection for belief is largely illusory if the law purports to guarantee devoutly religious (or, for that matter, irreligious) citizens the right to serve in the legislature or other public office but then invalidates the products of their service on the ground that these citizens were religiously motivated. Ultimately, there is little practical difference between denying a person the right to be a legislator and depriving a sitting lawmaker of the power to pass valid legislation.<sup>385</sup>

Such a result also does violence to the separation of powers. First, it fails to show the respect due to a coordinate branch of government

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tors who said the wrong things when the statute was debated." Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337, 343 (1986).

382. Smith, *supra* note 381, at 996.

383. Only a handful of cases, like *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Indiana Employment Sec. Div.*, 450 U.S. 707 (1981), have carved out exceptions from facially neutral social welfare legislation to benefit plaintiffs with unusual religious beliefs. Unlike freedom of action, however, freedom of belief is absolute, and no state interest should be deemed compelling enough to infringe on it.

384. Smith, *supra* note 381, at 996.

385. *Id.* Moreover, as Professor Laycock noted,

[b]ecause religiously motivated speech is protected by free speech and free exercise clauses, there can be no doubt that churches and believers are entitled to participate in political affairs. *Those who attack the right of churches to participate in politics simply misunderstand the first amendment: they have been misled by the metaphor of separation of church and state. The word 'separation' does not appear in the first amendment . . . The first amendment does not restrict church efforts to influence the state. Those efforts are constitutionally protected, just like any other private efforts to influence the state in a democracy.*

Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 439 (1986) (emphasis added).

from judges and second, it embodies one of the principal abuses of an unelected judiciary, which critics of *Marbury v. Madison*<sup>386</sup> feared.

Moreover, the Court's same secular purpose logic could be extended to question the motives of the legislators' constituents: "It would seem anomalous to hold a law invalid if legislators adopted it on the basis of their own religious convictions but not if they adopted it in response to their constituents' religious convictions."<sup>387</sup> For many religious persons, it is impossible to segregate their religious beliefs and values from their secular ones, since religious beliefs and values may permeate a person's world view by underlying, reinforcing, and interacting with other "secular" convictions.<sup>388</sup> Thus, if mere presence of a religious purpose suffices to invalidate a statute, a thoroughgoing implementation of the secular purpose prong threatens to disenfranchise religious legislators and civilians, unless they are going to hide or dissimulate their beliefs and purposes in seeking to have legislation passed.

In addition, as Dean Choper has noted, a thoroughgoing implementation of the secular purpose prong logically would force the Court to declare unconstitutional many statutes universally taken for granted, such as those outlawing murder and theft, merely because their legal prohibitions coincide with the tenets of virtually every major world religion.<sup>389</sup> Religious motivations derived from the Judeo-Christian moral tradition have played important roles in such diverse movements in American history as the campaign to abolish slavery, the civil rights movement and the campaign for legislation of the 1960's, and social welfare legislation to feed and house the homeless. Surely, however, the religious origin of such enactments does not render them unconstitutional.<sup>390</sup> Moreover, as

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386. *Marbury v. Madison*, 5 U.S. 137 (1803).

387. Smith, *supra* note 381, at 998.

388. *Id.* at 997 (citing KENNETH GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 30-48 (1988)). Smith also quotes Richard Neuhaus: "In everyday life, people do not and cannot bifurcate themselves so at one moment they are thinking religiously and at another secularly, so to speak." Smith, *supra* note 381, at 997 (quoting RICHARD NEUHAUS, THE NAKED PUBLIC SQUARE 25 (1984)).

389. Jesse H. Choper, *Church, State and the Supreme Court: Current Controversy*, 29 ARIZ. L. REV. 551, 557-58 (1987).

390. This point was made by Justice Scalia, dissenting in *Edwards v. Aguillard*, 482 U.S. 578 (1987):

Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. Also, political activism by the religiously motivated is part of our heritage. Notwithstanding the majority's implication to the contrary, we do not presume that the sole purpose of a law is to advance religion merely because it was supported strongly by organized religions or by adherents of particular

one commentator noted, "it is difficult to understand why it is necessarily unconstitutional for legislation to have the purpose or effect of assisting religious practice generally, when the Constitution itself gives a special status to religion."<sup>391</sup> Standing alone, the importance of the Free Exercise Clause should give governmental efforts to facilitate religious practice a presumptively valid secular purpose.<sup>392</sup>

To summarize, the secular purpose prong of the *Lemon* test, in endeavoring to protect against an establishment of religion, requires that a challenged statute or practice be struck down if it merely lacks a secular purpose. The secular purpose prong thereby poses a threat to either the freedom of expression or the freedom of belief of religiously-motivated legislators, and it thus pits the First Amendment against itself. The threat it poses to constitutional rights should be sufficient to discredit it as a test for constitutionality.

The only solution to this dilemma is to recognize that a religious purpose on the part of legislators may foster a secular result. Thus, even a primarily religious purpose should not suffice to invalidate a statute under the Establishment Clause.<sup>393</sup>

Furthermore, there should not be a separate secular purpose prong. An additional, non-constitutional objection to the secular purpose prong is that trying to divorce purpose from effect is an artificial exercise. Even the Supreme Court has been unable to keep the secular purpose and primary effect prongs of the *Lemon* test distinct.<sup>394</sup> Purpose and effect are like two sides of a coin:

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faiths. To do so would deprive religious men and women of their right to participate in the political process.

*Edwards*, 482 U.S. at 615 (Scalia, J., dissenting) (citation omitted).

391. Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 827 (1984).

392. An example of this would be a Congressional statute aimed at overriding the Air Force regulation which was upheld in *Goldman v. Weinberger*, 475 U.S. 503 (1986) (rejecting Free Exercise challenge to Air Force regulation (prohibiting wearing of headgear indoors by members of Air Force) by Orthodox Jew whose religion required him to wear a yarmulke). The purpose of such a Congressional override would be to benefit religion, apart from the fact that removing barriers to free exercise of religion may serve a secular purpose of accommodation of and respect for the religious. But such an override, even though it could be said to advance the religion of Judaism in a small way, should be upheld because it in no way threatens a creeping establishment of religion.

393. See William B. Petersen, Comment, "A Picture Held Us Captive": *Conceptual Confusion and the Lemon Test*, 137 U. PA. L. REV. 1827, 1842 (1987), where the author states that "[t]he Court assumes that a religious purpose can never lead to a secular effect. This is incorrect."

394. Cf. Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 826 (1978) ("The facts on which [the Supreme Court] has relied to determine primary effects are often indis-

At most, "purpose" and "effect" are but the subjective and objective components of the same inquiry and it is inappropriate to pry them apart into distinct "prongs" as separate levels of constitutional inquiry. More to the point, "wrong" motivation or purpose should be neither a necessary nor a sufficient condition for finding a classification unconstitutional, but rather a highly relevant fact to be considered in evaluating (or, as noted above, "presuming") a classification's religious (or racial) effects.<sup>395</sup>

The primary effect prong, or some variant thereof, can and must have an important role to play in determining whether a challenged law violates the Establishment Clause, and it should be merged with the secular purpose prong to illuminate the inquiry.

### B. *The Excessive Entanglement Prong*

The third prong of the *Lemon* test states that a challenged statute "must not foster 'an excessive government entanglement with religion' "<sup>396</sup> if it is to withstand Establishment Clause scrutiny. The excessive entanglement prong, which originated in *Walz v. Tax Commission*,<sup>397</sup> has been interpreted by the Supreme Court in two different ways. In *Lemon v. Kurtzman*, it was defined as a "comprehensive, discriminating and continuing state surveillance" of religious organizations that was required to implement governmental policies.<sup>398</sup> In *Walz*, it was described as a "divisive kind [] of state involvement in religious matters."<sup>399</sup> The Court considers religious issues particularly likely to arouse political passion and hostility, and it has conferred upon itself the mission of policing and limiting such "divisiveness" by invalidating government measures that aid religion and are thought to engender divisive political competition for

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tinguishable from the kind of information it might use to evaluate legislative purpose.") *Id.*

395. Michael A. Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 344 (1986) (citations omitted). Another commentator states that

the Court often incorrectly assumes a causal relationship between the first two parts of the *Lemon* test, and concludes that a religious purpose necessarily leads to a religious effect. Because of this conceptual confusion, the Court often uses the term purpose when it means effects. While this incorrect wording seems unimportant, it clouds the Court's understanding of effects, which in turn greatly obscures the Court's analysis of the establishment clause.

Petersen, *supra* note 392, at 1842.

396. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

397. *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

398. *Lemon*, 403 U.S. at 619.

399. *Walz*, 397 U.S. at 695 (Harlan, J., concurring).

such benefits.<sup>400</sup>

Commentators "have almost uniformly found the 'entanglement' prong imprecise, circular, or both."<sup>401</sup> Professor Laycock criticizes the excessive entanglement prong as follows:

"Entanglement" is such a "blurred, indistinct and variable" term that it is useless as an analytic tool. Sometimes it seems to mean contact, or the opposite of separation; it has also been used interchangeably with "involvement" and "relationship." Sometimes it seems to mean anything that might violate the religion clauses.<sup>402</sup>

Dean Choper blames the "conceptual chaos forged by the Court's [*Lemon*] test" on the entanglement prong.<sup>403</sup> Moreover, Justice White, who has opposed the *Lemon* test longer and more consist-

400. *Id.* Justice Harlan inserted the "divisiveness" factor in his concurrence in *Walz*, citing a recent law review article by Professor Paul A. Freund, *Public Aid to Religious Schools*, 82 HARV. L. REV. 1680 (1969). According to Justice Harlan, "history cautions that political fragmentation on sectarian lines must be guarded against," and this was a reason to scrutinize government action aiding religion which was independent from its purpose and effects. *Id.* Interestingly, Professor Freund cited no source for his contention that sectarian "divisiveness" was one thing the Establishment Clause specifically sought to prevent. Freund, *supra*, at 1692.

Political divisiveness by itself, however, no longer constitutes a violation of the excessive entanglement prong. The Court stated in *Lynch v. Donnelly* that "this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct. And we decline to so hold today." *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984); *accord* *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 n.17 (1987). Moreover, Justice O'Connor stated in *Lynch* that "[i]n my view, political divisiveness along religious lines should not be an independent test of constitutionality." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

401. Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 345 n.153 (1986) (citing Phillip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 19 (1978) (the entanglement test is "either empty or nonsensical")), and Donald A. Gianella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 154 (excessive entanglement or undue involvement begs the question; entanglement is simply "another way of referring to the appropriate degree of separation of church and state").

402. Douglas Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1392 (1981).

403. Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681 (1980). Professor (and former Solicitor General) Rex Lee endorses abolition of the excessive entanglement prong, Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337, 340-42 (1986), as does Professor Simson, Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 933 (1987), and Dean Choper seems to agree. ("I believe that avoidance of church-state entanglement, at the expense of forsaking legitimate secular pursuits or the more general value of

ently than any other Justice, attacked the excessive entanglement prong as "insolubly paradoxical," "curious and mystifying," and substantially the same as the secular purpose prong.<sup>404</sup> Justice Rehnquist has criticized the excessive entanglement prong as part of his attack on the *Lemon* three-pronged test in general,<sup>405</sup> and Justice O'Connor has "question[ed] the utility of entanglement as a separate Establishment Clause standard in most cases."<sup>406</sup>

Another problem with the excessive entanglement test is the "Catch-22" situation it creates in school aid cases. As Justice Rehnquist noted in *Wallace v. Jaffree*, the Supreme Court has required that "aid to parochial schools be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement."<sup>407</sup> This dilemma appeared in *Meek v. Pittenger*, in which the Court stated that "[t]he prophylactic contacts required to ensure that teachers play a strictly non-ideological role . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and state."<sup>408</sup>

It is disingenuous, to say the least, to have a "test" which in the nature of things, a challenged statute or practice must fail. More fundamentally, however, it is questionable why entanglement should be a separate constitutional consideration at all. The plain fact is that it is impossible for the government to avoid entangle-

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preserving religious liberty, is mandated neither by the Establishment Clause nor good sense.") Choper, *supra* at 683.

404. *Roemer v. Board of Public Works of Md.*, 426 U.S. 736, 768-69 (1976) (White, J., concurring). Justice White added that it was unclear whether the "weight and contours of entanglement as a separate constitutional criterion" were any more settled in 1976 than they were at its inception in 1973. *Id.* at 769.

405. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 109-112 (1985) (Rehnquist, J., dissenting).

406. *Aguilar v. Felton*, 473 U.S. 402, 422 (1985) (O'Connor, J., dissenting).

407. *Wallace*, 472 U.S. at 109 (Rehnquist, J., dissenting).

408. *Meek v. Pittenger*, 421 U.S. 349, 370 (1975). As Dean Choper noted, a state that wishes to aid parochial schools is faced with an insoluble dilemma. Since church-related elementary and secondary schools are presumably 'permeated' with religion, the Court often requires that even the most neutral forms of aid be continually monitored so as to ensure that they will not be used for religious purposes; but such monitoring engenders 'excessive entanglement' and thus renders the program invalid.

Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680 (1980). Rather than holding state legislators to an impossible test which they are bound to fail, it would be more honest for the Court to simply state that it does not intend to uphold significant aid of any kind to religious schools, regardless of what result the application of neutral doctrines might require. Justice Stevens, who is Justice Rutledge's former clerk and the most extreme separationist on the Court, has been candid enough to do this. Justice Stevens, dissenting in *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980), stated that "the entire enterprise of trying to justify various types of subsidies to nonpublic schools should be abandoned." *Id.* at 671.



ment with religion in various areas. Examples of unavoidable entanglements in sensitive areas include the broad range of state regulations of curriculum and other matters to which parochial schools are subjected, the necessity of determining whether various groups are bona fide religions when they seem to have been formed purely for the secular purpose of tax avoidance, and the need for both legislators and courts to decide whether to accommodate religious persons by granting them exemptions from burdensome civil regulation. However delicate and difficult such questions are, it is the government's duty to grapple with and resolve them. Given the wide range of inevitable entanglements between government and religion, and the unclarity as to what is "excessive" in this context, the entanglement prong of the *Lemon* test appears to give judges a license to invalidate particular statutes or practices which they dislike.<sup>409</sup>

Ironically, one purpose of the excessive entanglement prong is allegedly to protect religious groups from the threat of government interference.<sup>410</sup> This aspect of the entanglement prong seems highly illogical. While government money certainly comes with strings attached, and for that reason many churches refuse government aid, the decision of whether to accept such aid is the church's to make. As former Solicitor General Lee has stated: "Yet it is the church itself that wants money. If the church is willing to submit to inspections in order to receive funding, what business is that of anyone except the church?"<sup>411</sup> The Court's ostensible concern for protecting religious groups from harm which will result if they receive government money seems disingenuous if not hypocritical.<sup>412</sup>

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409. A total misapplication of the excessive entanglement prong occurred in *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982), where the court found that the prong was violated when a school prayer was sung in school buildings supervised by district employees. The court obviously confused the primary effect and excessive entanglement prongs, and the fact that such confusion commonly occurs does not speak well for the clarity of the three-pronged test.

410. The Supreme Court stated, "[w]hen the state becomes enmeshed with a given denomination in matters of religious significance, . . . the freedom of . . . adherents of the denomination is limited by the governmental intrusion into sacred matters." *Aguilar v. Felton*, 473 U.S. 402, 409 (1985). For an incisive argument that much of the muddled analysis in Establishment Clause cases is attributable to the fallacious premise that religion can be established by being inhibited, see Robert E. Riggs, *Judicial Doublethink and the Establishment Clause: The Fallacy of Establishment by Inhibition*, 18 VAL. U. L. REV. 285 (1984).

411. Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337, 341.

412. Professor Laycock stated that "[a]n atheist plaintiff asserting a church's right to be left alone at the cost of losing aid is the best possible illustration of why there are standing rules." Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1383 (1981).

Finally, the "political divisiveness" version of entanglement is not only arbitrary and unnecessary for protecting Establishment Clause values, it is directly subversive of other First Amendment rights like freedom of expression and free exercise of religion. As Dean Choper states,

I believe . . . that, like its companion element of administrative entanglement, avoidance of political strife along religious lines neither should, nor can, represent a value to be judicially secured by the Establishment Clause. Indeed, if government were to actually ban religious conflict in the legislative process, this would raise serious questions under those provisions of the first amendment that guarantee political, as well as religious, liberty.<sup>413</sup>

Whatever historical support may exist for Professor Freund's claim that "political divisiveness" along religious lines was one of the prime evils the Establishment Clause sought to prevent,<sup>414</sup> the way to guard against such an evil is not for the Supreme Court to muzzle politicians desirous of aiding religion or to rule an entire area of discourse off limits. Indeed, the "political divisiveness" notion, which the Court to its credit appears to have rejected,<sup>415</sup> is one of the most notable examples of judicial hubris in recent times. As Dean Choper concludes, "religious antagonism in the political arena, though perhaps regrettable, is a fact of life in our pluralistic governmental system which cannot be effectively suppressed through the Establishment Clause."<sup>416</sup> Thus, the need to get rid of

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413. Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. OF PITT. L. REV. 673, 683-84 (1980). See also Edward M. Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205, 212 (1980).

414. See *supra* note 399 and accompanying text. Freund gave no source in support of his claim. Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Gaffney, *supra* note 412, at 209. Justice Harlan's injection of this into his Supreme Court decision in *Walz*, 397 U.S. at 695 (and Chief Justice Burger's subsequent incorporation of it in the *Lemon* test) must be counted as one of the most dubious contributions of the normally conservative Justices.

415. See *supra* note 399 and accompanying text.

416. Choper, *supra* note 412, at 685. Moreover, as Paulsen states, "divisiveness" is a double-edged legal sword. The invalidation of a "divisive" policy because of its supposed "divisiveness" can be the most "divisive" action of all. Worse, the "divisiveness" concept is inherently unprincipled. There is no principled basis for deciding in favor of one side rather than the other in a religiously-divisive dispute simply because of the issue's divisiveness.

Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 347 (1986) (citation omitted). Paulsen notes the ironic fact that "[s]ome of the most religiously-divisive events and issues of American history have been spurred or exacerbated by judicial decisions." *Id.* at 347 n.160 (citing *Roe v. Wade*, 410 U.S. 113 (1973)); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962);

the unconstitutional "political divisiveness" version of the excessive entanglement prong is even more urgent than the need to get rid of the arbitrary and meaningless excessive entanglement prong itself.

In summary, the excessive entanglement prong of the *Lemon* test is at best arbitrary and repetitive of the first two prongs, and at worst subversive of constitutional rights. It should be discarded outright.

### C. *Towards a Defensible Establishment Clause Test*

The Supreme Court's Establishment Clause cases since *Everson v. Board of Education* are characterized by a doctrinal absolutism and emphasis on symbolism. The *Lemon* three-pronged test resembles a minefield designed to ensure the failure of any attempt by government to aid religious enterprises like schools in a significant way. While in some instances, that symbolism has led to correct results,<sup>417</sup> in others the Court has been preoccupied by chimeras and fears which at times do not have the slightest factual basis in the record.<sup>418</sup>

One reason for this may be that despite the fulsome statements in *Zorach v. Clauson*,<sup>419</sup> the Supreme Court for nearly fifty years

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Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Professor Johnson makes a similar observation:

The second problematic assumption [of the divisiveness principle rationale] is that courts alleviate divisiveness when they take an issue away from the voters and legislators and decide it on the basis of a constitutional principle. This is a most implausible idea, and such evidence as exists seems to be against it. Many of us find it easier to accept being outvoted by a majority of our fellow citizens or their representatives than by a handful of judges. Legislative battles over the issue of legalized abortion seem to have become *more* bitter and divisive since the Supreme Court attempted to preempt the issue in *Roe v. Wade*.

Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 830 (1984) (citation omitted) (emphasis original).

417. The author believes that *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) were correctly decided although the laws they struck down did not threaten an establishment of the traditional form.

418. In *Aguilar v. Felton*, 473 U.S. 402 (1985), for example, most of the schools involved were Catholic. The Court was apprehensive about the possibility that public school teachers, largely non-Catholic, would become instruments of Catholic indoctrination when they entered parochial schools to provide remedial education, despite the total absence in the record of any evidence this had ever happened during 20 years of the program.

419. *Zorach v. Clauson*, 343 U.S. 306 (1952). For example, the Court stated, [w]e are a religious people whose institutions presuppose a Supreme Being . . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Con-

seems to have had a rather jaundiced view of religion. As Professor Johnson notes, one factual assumption which underlies the political divisiveness version of the entanglement prong is that "religious disputes and religious people are particularly contentious, so that state involvement in religious matters is more likely to breed bitter conflicts than state involvement in such matters as the distribution of wealth or civil rights."<sup>420</sup> Professor Hitchcock noted that in the school aid cases, "[t]he Justices' favored word for active religious bodies was 'sect,' a term implying narrowness, fanaticism, and exclusiveness, but used by them in historically and sociologically imprecise ways."<sup>421</sup> He concludes that

[t]he Court's particular horror of religious conflict, and its consequent willingness to go to considerable lengths to inhibit it, seems to rest on largely unexamined assumptions. Furthermore, the Court seems also to work out of an unexamined assumption that religious influences threaten or contaminate the public order in ways that other kinds of influences do not.<sup>422</sup>

It is doubtful, however, whether religion and what Justice Frankfurter called "the strife of sects"<sup>423</sup> are significant sources of conflict in American society.<sup>424</sup> Nevertheless, the Supreme Court

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stitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence . . . .

*Id.* at 313-14.

420. Johnson, *supra* note 390, at 830. Johnson notes that while religious conflicts have led to wars and persecutions, as have conflicts over secular ideologies like fascism and communism, it is "problematic" in contemporary American society that school prayers, legislative chaplains, and Christmas displays are more hotly disputed than many secular matters which routinely confront state legislatures. *Id.*

421. James Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 *St. Louis U. L.J.* 183, 198 (1979-81) (citing as examples Justices Frankfurter, Black, Douglas, and Jackson).

422. *Id.* at 201. As a result, Hitchcock claims that "the Court's stated philosophy, inconsistent though it might be in many of its details, has had the overall thrust, [since 1945], of both encouraging and ratifying the process by which religion has ceased to be seen as having an honored and central place in American life . . . ." *Id.* at 204.

423. Frankfurter stated in *Illinois ex rel. McCollum v. Board of Educ.* that "the public school must keep scrupulously free from entanglement in the strife of sects." *McCollum*, 333 U.S. at 216-17.

424. According to Hitchcock, "it has probably always been the case in America that other kinds of conflict — racial, sectional, economic (now, perhaps between genders) — have been more intense and more divisive than has religion." Hitchcock, *supra* note 420, at 201. Moreover, religious passions have probably cooled in the United States since *Everson*. Two significant developments which support this

has stubbornly stuck to its preconceptions concerning the largely hypothetical danger of religious conflict caused by challenged legislation, undeterred by the absence of record evidence that these fears have come to fruition.<sup>425</sup> It often appears as though the Supreme Court in contemporary Establishment Clause cases, imbued with Jefferson's Enlightenment-influenced bias against organized religion,<sup>426</sup> is boldly and resolutely manning the ramparts to do battle against the evils of the Sixteenth and Seventeenth Centuries.<sup>427</sup>

In addition, the Court has developed and fostered a "hair-trigger" sensitivity to the religious (and in some cases anti-religious) sensibilities of dissenters, atheists, and agnostics while failing to show a corresponding concern for the sensibilities of religious people protected by the Free Exercise Clause. After the decision in *Engel*, a prominent constitutional authority suggested that:

If the protection afforded in the name of religious freedom against a state-prescribed non-theistic orthodoxy is that a person cannot be compelled to participate, whereas the protection afforded in the name of the establishment clause is that a person may demand that any exercise promoting theistic belief be completely eliminated, the result is that the freedom protected by the establishment clause is re-

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hypothesis are the election of the first Roman Catholic President in 1960, and the ecumenical movement, which has lessened centuries-old tensions among various Christian groups and between Christians and Jews. To the author's knowledge, the Court has never taken note of such developments.

425. The most salient example is the school aid cases, whose records are bare of evidence of actual sectarian strife in the state legislatures over funding for the programs involved. The Justices have continued to hypothesize such strife nevertheless. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 795, 797-98 (1973); *Aguilar v. Felton*, 473 U.S. 402, 414 (1985).

426. *Hitchcock*, *supra* note 420, at 199-200 (citing ROBERT HEALEY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION 161-62 (1962)).

427. Chief Justice Burger, who originated the *Lemon* test and incorporated Justice Harlan's concern with political divisiveness into it, eventually became exasperated with the Court's preoccupation with hypothetical threats to religious liberty, stating in *Aguilar v. Felton* that "[i]t borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the Nation's schoolchildren as textbooks, transportation to and from school, and school nursing services." *Aguilar*, 473 U.S. at 419-20 (Burger, J., dissenting) (citations omitted). The program struck down in *Aguilar* provided training in reading skills, remedial mathematics, a second language, and remedial reading for children with learning disabilities. The beneficiaries were educationally-deprived children from low-income families attending parochial schools. Justice Burger commented, [t]he notion that denying these services to students in religious schools is a neutral act to protect us from an Established Church has no support in logic, experience, or history. Rather than showing the neutrality the Court boasts of, it exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools.

*Id.* at 420.

garded as having a higher value than the freedom protected by the free exercise clause.<sup>428</sup>

The courts' tender solicitude for the sensibilities of those objecting to prayers in school and at graduation stands in marked contrast to the hostile reception they have given religious groups raising the opposite kinds of objections. As noted above, the courts' decisions in the graduation prayer cases were influenced by the testimony of plaintiffs who were personally offended by prayers at graduation ceremonies.<sup>429</sup> On the other hand, federal courts have held that religious groups are not entitled to any special protection against elements of the public curriculum they may deem offensive.<sup>430</sup>

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428. Paul G. Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1030, 1063 (1962). Thus, even in the wake of *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (the Court held that the board was enjoined from enforcing a regulation requiring children to say the Pledge of Allegiance), the Pledge of Allegiance *could* continue to be recited, unlike the official prayer struck down in *Engel*. The author does not disagree with this state of affairs, believing officially-endorsed prayers to be a violation of the Establishment Clause. But the issue is different when the government does not sponsor or endorse prayer but merely affords a forum for private individuals to pray in public. Even though public prayer might offend the sensibilities of some auditors, it does not violate the Establishment Clause so long as it is made clear that there is no government sponsorship.

429. See e.g., *Graham*, 608 F. Supp. at 534 (Unitarian plaintiffs); *Albright*, 765 F. Supp. at 685 n.5 (eight plaintiffs who sued the Alpine Sch. Dist.). But see *Berlin*, 1988 WL 85937 (favoring "objective observer" perspective and discounting testimony of Jewish plaintiffs that they were offended by references to Jesus Christ in prayers delivered at public school football games).

430. E.g., *Mozert v. Hawkins County Pub. Schs.*, 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988); *Smith v. Board of Sch. Comm'rs of Mobile County*, 827 F.2d 684 (11th Cir. 1987) (rejecting a challenge to use of home economics, history, and social studies books that "advance secular humanism and inhibit theistic religion.") But see *Ware v. Valley Stream High Sch. Dist.*, 550 N.E.2d 420 (N.Y. 1989), reversing trial court's grant of summary judgment to defendant school district. The trial court rejected a Free Exercise Clause challenge to a state-mandated AIDS education program brought by the Plymouth Brethren, a devoutly religious group which insulates its members from society and objected to the program's omission of any mention of "fear of God" and "fear of eternal penalty" as reasons for refraining from immoral conduct. *Id.* at 420. The New York Court of Appeals reversed and remanded for findings by the trial court on the degree of integration of the Brethren into the larger society, whether the AIDS curriculum threatened their continued existence as a church community, whether their children's education left them ill-equipped to cope with the dangers of AIDS, and whether the state had a compelling interest in the AIDS epidemic which would override any burden the AIDS curriculum imposed on the Brethren's practice of their religion. See also *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down a state "anti-evolution" statute). As Justice Jackson stated in *McCullum*:

Authorities list 256 separate . . . religious bodies . . . Each of them . . . has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects . . . we will leave public education in shreds.

The Supreme Court has observed that in the context of political speech, "the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense . . . '[W]e are often "captives" outside the sanctuary of the home and subject to objectionable speech.'" <sup>431</sup> To permit authorities or private citizens to stifle speech with which they disagree would be to allow a "heckler's veto" on the right of free speech, which would subvert the First Amendment. There is no principled way to justify greater deference to the sensibilities of non-believers who find public prayers offensive <sup>432</sup> than is shown to religious persons who are offended by public criticism of their religion or beliefs. Accordingly, the court in *Grossberg v. Deusebio* correctly rejected the "offensiveness" argument, <sup>433</sup> and several commentators agree. <sup>434</sup> Of course, when religious speech which the auditor finds offensive is officially sponsored or the auditor is re-

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*McCollum*, 333 U.S. at 235. In a related area, the New York City Board of Education recently adopted a plan to distribute condoms in schools in an attempt to limit the spread of AIDS but refused to permit parents with moral objections to have their children excluded. Parents desirous of safeguarding their right to bring up their children as they see fit are likely to challenge the program in court. *Cf. Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (finding an act requiring parents to send their children to public school interferes with parents' right to direct the education of their children).

431. *Cohen v. California*, 403 U.S. 15, 21 (1971) (quoting *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970)).

432. One of the more dramatic spectacles of the presence of religion at the seat of government in recent times was the mass said in 1979 by Pope John Paul II on the National Mall in Washington, D.C., which is a sort of national town common. The famous atheist militant, Madalyn Murray O'Hair, who was offended by this prospect, sought to enjoin the mass in federal district court on the grounds that "the Government's permitting a religious service to take place on Government property . . . will be demonstrating to the world that the United States Government will approve the spiritual content of the Pope's mass." *O'Hair v. Andrus*, 613 F.2d 931, 938 (D.C. Cir. 1979) (MacKinnon, J., concurring). Noting that use of the Mall was available to all groups on a permit basis without discrimination, the district court denied the injunction, and the court of appeals affirmed. Judge MacKinnon rejected appellants' argument that permitting the mass constituted United States Government endorsement of its spiritual content. He stated, "[r]ather, it appears to me that the Government by permitting the religious service to take place on Government property will be demonstrating to the world that the United States Government supports the free exercise of religion." *Id.* (MacKinnon, J., concurring).

433. "The Court recognizes that some may be offended by what is said [in the graduation prayers], but it is not convinced that the Constitution protects individuals from this type of offense." *Grossberg v. Deusebio*, 380 F. Supp. 285, 290 (E.D. Va. 1974).

434. Professor Marshall notes, "[o]bviously, some persons are offended by prayer (at least the plaintiffs were); yet protection of religious sensibilities is not and cannot be a proper establishment clause goal." Marshall, *supra* note 339, at 530; accord Choper, *supra* note 388, at 556. Judge Easterbrook stated that the Establishment Clause cannot be equated with a legal rule mandating "[d]o nothing

quired or pressured to participate in such speech, there is an Establishment Clause violation.<sup>435</sup>

Removal of the privileged position heretofore enjoyed by those claiming Establishment Clause violations will have several consequences. In the first place, it will help to establish parity and harmony between the Establishment and Free Exercise Clauses, a goal which has been endorsed by many.<sup>436</sup> Second, it argues for the overruling of *Flast v. Cohen*,<sup>437</sup> and no clear reason appears why the general rules regarding taxpayer standing to sue should be inapplicable in Establishment Clause cases.<sup>438</sup> Third, the symbolism and absolutism characteristic of Establishment Clause jurisprudence would be sharply reduced.<sup>439</sup>

Finally, the Supreme Court should accept the invitation of the

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that will give offense to religious minorities." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 138 (7th Cir. 1987) (Easterbrook, J., dissenting).

435. Marshall notes that the "touchstone" of a constitutional violation in this context "is not that some are offended by the religious view being propagated, but that it is the state doing the propagation." Marshall, *supra* note 339, at 530.

436. Justice Goldberg, concurring in *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (Goldberg, J., concurring), stated regarding the religion clauses:

These two proscriptions are to be read together and in light of the single end which they are designed to serve. [This] basic purpose . . . is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.

*Id.* at 305. Justice Rutledge stated in *Everson* that "[e]stablishment' and 'free' exercise [are] correlative and co-extensive ideas, representing only different faces of the single great and fundamental freedom." *Everson*, 330 U.S. at 40 (Rutledge, J., dissenting). Commentators generally endorse the view that the two clauses are to be read together as coordinate rights. See e.g., Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1146 (1990); Paulsen, *supra* note 394, at 315 ("Part III argues that the religion clauses should be considered *together* and understood as advancing fundamentally similar interests")(emphasis in original). See also Justice O'Connor's statement in *Wallace v. Jaffree*: "The element of truth in the United States' arguments, I believe, lies in the suggestion that Establishment Clause analysis must comport with the mandate of the Free Exercise Clause that government make no law prohibiting the free exercise of religion." *Wallace*, 472 U.S. at 81 (O'Connor, J., concurring).

437. *Flast v. Cohen*, 392 U.S. 83 (1968).

438. It is settled that taxpayers who are pacifists cannot sue on religious or other grounds to enjoin spending of a large part of the federal budget on defense. Similarly, taxpayers who regard abortion as a grave moral evil are compelled to pay for abortion for the indigent with their tax dollars in states like New York without having standing to challenge such expenditures in court. It seems inconsistent that taxpayers should be able to challenge expenditure of government funds for allegedly religious purposes.

439. This would be a necessary consequence of the first objective, bringing the two religion clauses into greater harmony. Decisions like *Aguilar v. Felton* and *Grand Rapids Sch. Dist. v. Ball* would have to be overruled; the courts and litigators would be relegated to the factual record in the case and judges would have to rely on the facts rather than their personal philosophies and assumptions.



Solicitor General and of appellants in *Lee v. Weisman* to replace the *Lemon* three-pronged test with a test which focuses on coercion.<sup>440</sup> This author's preference is for the test proposed by Dean Choper: "The Establishment Clause should be held to be violated when two criteria are met: (1) when government action is found to have a religious purpose, and (2) when it is shown that the action meaningfully endangers religious liberty."<sup>441</sup> Choper's test requires both a religious purpose and an infringement of religious liberty before an enactment would be found to violate the Establishment Clause. This would remove the much-noted and embarrassing conflict between the two religion clauses, whereby what may be required of government as an accommodation of free exercise rights might also violate the Establishment Clause under the *Lemon* test.<sup>442</sup>

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440. This was argued by Justice Kennedy, concurring in part and dissenting in part, in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) ("Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.") *Id.* at 662. Justice Kennedy's opinion, which was joined by Justices Rehnquist, White, and Scalia, was roundly castigated by each of the other Justices, who charged that his reading of *Marsh* "would gut the core of the Establishment Clause, as this Court understands it." *Id.* at 604. The doctrinal differences between the two camps might not be as wide as they appear. While rejecting as dictum the statement in *Engel*, 370 U.S. at 430, that coercion is not required to find an Establishment Clause violation, Justice Kennedy indicated that the prayer struck down in *Engel* "was unquestionably coercive in an indirect manner . . ." *Id.* at 661, n.1.

441. Jesse H. Choper, *Essay — Church, State and the Supreme Court: Current Controversy*, 29 ARIZ. L. REV. 551, 552 (1987). Dean Choper had earlier suggested a similar test: "[T]he Establishment Clause should forbid only government action whose purpose is solely religious and that is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs." Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 675 (1980). Interestingly, Dean Choper endorsed Justice Kennedy's approach to the Establishment Clause at the United States Law Week Constitutional Law Conference on September 6-7, 1991 in Washington, D.C. According to the summary of his presentation, "Choper said he favors the Kennedy approach, which he finds to be in tune with the major function of the Religion Clauses — to protect religious liberty. He said both clauses should permit some accommodations of or exemptions for religion, even though it is clear that some might be for a religious purpose. Choper would require that there be some meaningful threat to religious liberty in order to violate the Establishment Clause. And government encouragement could be enough to find a meaningful threat." Constitutional Law Conference, 60 U.S.L.W. 2257 (1991).

442. This conflict has been noted by Dean Choper. Under the Court's balancing test, a "seemingly irreconcilable conflict" occurs:

[O]n the one hand the Court has said that the Establishment Clause forbids government action whose purpose is to aid religion, but on the other hand the Court has held that the Free Exercise Clause may require government action to accommodate religion. Unfortunately, the Court's separate tests for the Religion Clauses have provided virtually no guidance for determining when an accommodation for religion, seemingly required under the Free Exercise Clause, constitutes impermissible aid to religion under the Establishment Clause. No has the Court adequately explained

Some separationists have argued that the Free Exercise Clause should not confer any constitutional right to religion-based exemptions to public health, safety, and welfare legislation.<sup>443</sup> Others maintain that the "accommodation" of religion, which such exemptions constitute, is only warranted where it relieves a significant burden on a religious group. Choper's test would promote free exercise values by permitting government to establish such exemptions even absent a serious burden and even when the express purpose of the exemption is to accommodate or "advance" religion.<sup>444</sup>

Establishment Clause jurisprudence has been in disarray for too long, and the *Lemon* three-pronged test constitutes a considerable part of the problem. Even advocates of the test do not attempt to defend it specifically against criticisms. Rather, proponents rely on *stare decisis* and appeal to the natural apprehension most people feel at the prospect of uprooting decades of judicial precedent.<sup>445</sup> In the

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why aid to religion, seemingly violative of the Establishment Clause, is not actually required by the Free Exercise Clause.

Choper, *supra* note 440, at 674.

443. *E.g.*, Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1989). The Supreme Court appears to have adopted this view in *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990). The Court held that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended," *id.* at 878. The Court further held that the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), did not even apply to free exercise challenges to the application of criminal laws. For example, an individual must submit to criminal laws without the right to argue that they conflict with his religious beliefs. The Court resurrected Justice Frankfurter's opinion in the discredited case *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586 (1940), which was overruled by *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). *Smith* is a pernicious precedent which should be overruled, a result which would be consistent with the Choper test.

444. For example, the government could make an exception to the head covering rule of the Air Force and permit Orthodox Jewish officers to wear yarmulkes on duty. *Cf. Goldman v. Weinberger*, 475 U.S. 503 (1986); *see supra* note 391. To protect the constitutionality of such a rule or statute, there would be no need to dissimulate its plain religious purpose since it could not plausibly be argued that it "meaningfully endangers religious liberty" or threatens an establishment in a country whose population is only 1.8% Jewish. N.Y. TIMES, Nov. 21, 1991, at B1 (citing statistics from Graduate School and University Center of the City University of New York).

445. At the conclusion of an article which describes the chaos and confusion generated by the *Lemon* test, Professor Esbeck lamely defends it by taking refuge in the maxim, "[b]etter to live with the devil we do know, than the devil we [do not]." Carl H. Esbeck, *The Lemon Test: Should It Be Retained, Reformulated or Rejected?*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513, 548 (1989). Another commentator, who blames the confusion on the pursuit of the unrealistic goal of complete separation between church and state, claims that the continued use of the current framework for Establishment Clause analysis is not evidence of its essential soundness but "more clearly reflects the Court's failure to create satisfactory alternatives, despite the need for such alternatives." He predicts that as long as the Court holds to the

past, however, the Court has not hesitated to uproot ancient precedents which it felt embodied unsound doctrine, despite the after-shocks this created.<sup>446</sup>

The confusion and inconsistency in the law of the religion clauses is not of recent vintage; it has existed for decades, and the problem only grows worse with time. The time for temporizing is gone. If the Supreme Court has respect for its mission and wishes to retain the respect of the people whose lives it affects daily, it must act now to overhaul the law and restore its integrity by bringing the law of the two religion clauses into harmony. A good place to start would be to replace the *Lemon* three-pronged test with another test, such as that developed by Professor Choper, which would safeguard, rather than undermine, religious liberty and the right of free exercise of religion.

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unrealistic goal of complete separation of church and state, "[s]tare decisis, or simple inertia, will assure the survival of current doctrine, however imperfect." Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987).

446. *E.g.*, *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).