CONSTITUTIONAL LAW—FIRST AMENDMENT—ESTABLISHMENT CLAUSE PROHIBITS STATE-SPONSORED INVOCATIONS AT PUBLIC SCHOOL GRADUATION CEREMONIES—*Lee v. Weisman*, 112 S. Ct. 2649 (1992).

The First Amendment to the United States Constitution provides, in part: "Congress shall make no law respecting an establishment of religion . . . ."[1] Ever since the Supreme Court first applied the Establishment Clause to the states through the Fourteenth Amendment,[2] the Court has struggled to ascertain the

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[1] U.S. CONST. amend. I. The First Amendment contains two distinct clauses that address religion, the Free Exercise Clause and the above quoted language, which is generally referred to as the Establishment Clause. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-2, at 1155-57 (2d ed. 1988). The amendment as originally proposed by James Madison to the First Congress provided: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789).

Madison is commonly viewed as having supported a strict separation between church and state. *See* TRIBE, *supra*, § 14-3, at 1161. One commentator has rejected this view, however, because Madison's proposal prohibited only a national religion and did not circumscribe all government participation in religious affairs. *See* PETER J. FERRARA, RELIGION AND THE CONSTITUTION: A REINTERPRETATION 20-21 (1983). It is likely that many of Madison's contemporaries would have balked at the notion that a state may not prefer religion over non-religion. *See* TRIBE, *supra*, § 14-3, at 1161 (advancing that one purpose of the Establishment Clause was to protect existing state religious establishments from federal interference); Laura Zwicker, *The Politics of Toleration: The Establishment Clause and the Act of Toleration Examined*, 66 IND. L.J. 773, 791-92 (1991) (arguing that the Framers' intent was not to create a "wall of separation" between church and state). Peter Sylvester of New York, who delivered the opening speech in the First Congress's debate over the religion clauses, expressed concern that the Establishment Clause would be viewed as completely abolishing religion. DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW 51 (1987).

[2] U.S. CONST. amend. XIV. Section 1 of the Fourteenth Amendment provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

Id.

Before 1925, the Supreme Court uniformly rejected the proposition that the Bill of Rights applied to the states. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.1, at 353 (4th ed. 1991). The Court reasoned that the constitutional amendments comprising the Bill of Rights "contain[ed] no expression indicating an intention to apply them to the state governments." Barron v. Baltimore, 32 U.S. 243, 250 (1833). Additional cases evidencing the Court's early refusal to apply the Bill of Rights to the states, include Twitchell v. The Commonwealth, 74 U.S. 321, 325-27 (1869); Withers v. Buckley, 61 U.S. 84, 89-91 (1858);

permissible extent of state involvement in religion.[3] Some mem-

Fox v. Ohio, 46 U.S. 410, 434-35 (1847); Lessee of Livingston v. Moore, 32 U.S. 469, 551-52 (1833). Although the Fourteenth Amendment was ratified in 1868, the Supreme Court failed to recognize the full power of the Amendment until the turn of the century, when the Court struck a Louisiana statute because it deprived an individual of his "liberty" rights without affording him due process of law. *See* NOWAK & ROTUNDA, *supra*, § 11.2, at 361-62 (citing Allgeyer v. Louisiana, 165 U.S. 578 (1897)). In 1925, the Court abandoned its early precedents and applied one of the Bill of Rights guarantees to the states through the Due Process Clause of the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925). The modern Court has selectively incorporated the Bill of Rights' protections and presently applies most of them to the states. *See* NOWAK & ROTUNDA, *supra*, § 11-6, at 385-87.

The Court applied the Establishment Clause to state action for the first time in Everson v. Board of Educ., 330 U.S. 1 (1947). TRIBE, *supra* note 1, § 14-2, at 1156; *see infra* notes 26-29. Many scholars, however, have argued that the Establishment Clause was never intended to apply to the states. *See, e.g.*, DREISBACH, *supra* note 1, at 90; FERRARA, *supra* note 1, at 25. Commentators cite the plain text of the amendment to support this contention because the amendment contains no reference to state action, but instead provides that Congress shall make no law respecting an establishment of religion. FERRARA, *supra* note 1, at 25. Furthermore, representative James Blaine introduced a resolution that would have specifically mandated that the First Amendment be applied to the states. *See* DREISBACH, *supra* note 1, at 92. The Forty-Fourth Congress, which included twenty-three members of the Congress that passed the Fourteenth Amendment, refused to adopt this resolution. *Id.* By 1950, proposals similar to Blaine's were rejected by Congress at least twenty-five times. *Id. See also* Stanley Morrisson, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L.REV. 140, 173 (1949) (claiming that incorporation of the Bill of Rights into the Fourteenth Amendment is an "effort to put into the Constitution what the [F]ramers failed to put there").

Although the practice of selective incorporation is rarely questioned by the courts today, some pockets of resistance remain. *See* RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION 135 (1987). Disregarding Supreme Court precedent, Judge W. Brevard Hand ruled that the First Amendment was not incorporated in the Fourteenth Amendment. Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983), *rev'd*, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 459 U.S. 1314 (1983). Judge Hand concluded that the legislative history of the First and Fourteenth Amendments "leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate." *Id.* at 1128. For an analysis of Judge Hand's reasoning in *Jaffree*, see SMITH *supra* at 145-70; *cf.* Abington School Dist. v. Schempp, 374 U.S. 203, 257 (1963) (Brennan J., concurring) (reasoning that it is "too late in the day" to challenge the process of selective incorporation).

[3] *See* J. Woodford Howard, Jr., *The Robe and the Cloth: The Supreme Court and Religion in the United States*, 7 J.L. & POL. 481, 482 (1991) (positing that the Supreme Court still searches for standards of adjudication for the religion clauses). Significantly, Justice Blackmun has conceded that "[t]his is an area where we have not done well." Stuart Taylor Jr., *The Morning Line on the Bench, Revised*, N.Y. TIMES, Sept. 25, 1986, at B10. Chief Justice Burger also expressed the Court's difficulty in this area when he explained that the "language of the Religion Clauses of the First Amendment is at best opaque," and acknowledged that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). *See* NOWAK & ROTUNDA, *supra* note 2, § 17.3 n.2, § 17.4, at 1181 (observing that the individual Justices disagree about the purpose of the Establishment Clause); FERRARA, *supra* note 1, at 13 n.30

bers of the United States Supreme Court have advocated a complete separation between government and religious affairs,[4] while others have been willing to uphold certain state actions that endorse religion.[5] Despite this ongoing debate, a majority of the Court continues to reject state-initiated religious observances in the public schools.[6] Recently, the United States Supreme Court

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(explaining that "Supreme Court precedents relating to the religion clauses are confused and contradictory").

[4] *See* Howard, *supra* note 3, at 498. Justice Rutledge espoused the view that the Establishment Clause forbade "[n]ot simply an established church, but any law respecting an establishment of religion . . . ." Everson v. Board of Educ., 330 U.S. 1, 31 (1947) (Rutledge, J., dissenting). Justice Rutledge believed that the Framers' intention to completely separate church and state was supported by Madison's writings. *See id.* at 31-72 (Rutledge J., dissenting) (citing Madison on nearly every page of a thirty-five page dissent and appending the entirety of Madison's *Memorial and Remonstrance* to the opinion). Justice Jackson shared a similar view. *See* Zorach v. Clauson, 343 U.S. 306, 325 (1952) (Jackson J. dissenting).

Justice Black opined that a state may not constitutionally use tax-raised funds to support religious schools, "even to the extent of one penny." Board of Educ. v. Allen, 392 U.S. 236, 254 (1968) (Black, J., dissenting). Justice Brennan has echoed the view of Alexis de Tocqueville that a strict separation of church and state is not only mandated by the Constitution, but is desirable for its effect of invigorating the spirits of both religion and freedom. *See* Marsh v. Chambers, 463 U.S. 783, 822 (1983) (Brennan J., dissenting).

[5] *See* Ralph D. Mawdsley & Charles J. Russo, *High School Prayers at Graduation: Will the Supreme Court Pronounce the Benediction?*, 69 EDUC. L. REP. 189, 199 (1991) (surveying the current Justices' views on Establishment Clause adjudication). According to Justice Story, when the First Amendment was drafted "the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 726 (Fred B. Rothman & Co. 1991) (1833). Mindful of the difference between encouraging and coercing religious observance, Justice Story posited that the preeminent purpose of the Establishment Clause was not to harm or help non-Christians, but to prevent rivalry among religious sects "and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." *Id.* at 727-28. Justice Black has posited that "[t]he First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State." Zorach v. Clauson, 343 U.S. 306, 312 (1952). Justice Stewart has argued that prayer in schools should be permitted because it provides children the opportunity to share in the nation's "spiritual heritage." Engel v. Vitale, 370 U.S. 421, 445 (1962) (Stewart J., dissenting). Chief Justice Burger has concluded that a complete separation between church and state is not possible. *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). Justice Powell observed that "[i]t has never been thought . . . desirable to enforce a regime of total separation" between church and state. Committee For Public Educ. v. Nyquist, 413 U.S. 756, 760 (1973).

[6] *See* Edwards v. Aguillard, 482 U.S. 578 (1987) (overturning a statute that mandated the teaching of creation science in public schools where theory of evolution is taught); Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating a moment of silence statute); Stone v. Graham, 449 U.S. 39 (1980) (striking a statute that required the Ten Commandments to be posted in public school classrooms); Epperson v. Ar-

ruled on the constitutionality of invocations[7] and benedictions[8] at public high school graduations in *Lee v. Weisman*.[9] In *Lee*, the Court held that a state-sponsored nonsectarian prayer at a public school graduation ceremony violated the Establishment Clause.[10]

On June 20, 1989, Deborah Weisman attended a formal ceremony that marked her graduation from public junior high school.[11] Despite protests from Weisman and her father,[12] the program included the introduction of a rabbi to deliver an invocation.[13] The principal, Robert E. Lee, provided the rabbi with a copy of "Guidelines for Civic Occasions"[14] and explained that the prayers should be nonsectarian.[15] At the ceremony, Weisman and her classmates rose for the Pledge of Allegiance and continued to stand during the invocation,[16] which presumably

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kansas, 393 U.S. 97 (1968) (holding unconstitutional a statute that prohibited any state-supported school from teaching the theory of evolution).

7 "Invocation" is defined as: "The action or act of invoking or calling upon (God, a deity, etc.) in prayer or attestation; supplication, or an act or form of supplication, for aid or protection." THE OXFORD ENGLISH DICTIONARY 54 (2d ed. 1989).

8 "Benediction" is defined as: "The utterance of a blessing; solemn invocation of blessedness upon a person; devout expression of a wish for the happiness, prosperity, or success of a person or enterprise . . . ." THE OXFORD ENGLISH DICTIONARY 109 (2d ed. 1989). Throughout this Note, the terms "invocation" and "school prayer" will be used to encompass both invocations and benedictions.

9 112 S. Ct. 2649 (1992).

10 *Id.* at 2661. The Court invalidated the state practice by a five-Justice majority over a strong dissent. *Id.* at 2649.

11 Weisman v. Lee, 728 F. Supp. 68, 69 (D.R.I. 1990). Weisman's school was located in Providence, Rhode Island. *Id.* Most middle school graduations in Providence take place on school grounds; high school graduation ceremonies are usually held elsewhere. *Id.*

12 *Id.* Weisman's father, Daniel Weisman, sought a temporary restraining order to enjoin the rabbi from delivering the invocation. *Id.* This motion, which was filed several days before the ceremony, was denied because the court did not have adequate time to examine the case. *Id.*

13 *Id.* The practice of offering invocations and benedictions at graduation ceremonies was a tradition in the Providence public schools. *Id.*

14 *Id.* "Guidelines for Civic Occasions" is a pamphlet drafted by the National Conference of Christians and Jews. *Id.* The pamphlet is intended to guide speakers in forming nonsectarian prayers with "inclusiveness and sensitivity." *Id.*

15 *Id.*

16 Lee v. Weisman, 112 S. Ct. 2649, 2653 (1992). The text of the invocation and benediction delivered was as follows:

> INVOCATION
>
> God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.
>
> For the political process of America in which all its citizens may

lasted less than two minutes.[17]

After the ceremony, the Weismans instituted an action in the United States District Court for Rhode Island seeking a permanent injunction that would prohibit the Providence School District from continuing its longstanding practice of offering religious invocations at graduation ceremonies.[18] The district court found that prayer[19] at a public school graduation ceremony has the impermissible effect of advancing religion.[20] The district

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participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

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

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

BENEDICTION

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

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

The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. AMEN

Id. at 2652-53 (quoting App. 22-23).

[17] *Id.* at 2653.

[18] Weisman v. Lee, 728 F. Supp. 68, 70 (D.R.I. 1990). Although the ceremony had already taken place, Weisman retained standing to bring suit because there was a high probability that a similar invocation would be conducted at her high school graduation ceremony as well. Lee v. Weisman, 112 S. Ct. 2649, 2654 (1992).

[19] The parties stipulated that the rabbi's presentations were "prayers" and that the case turned on an interpretation of the Establishment Clause. *Weisman*, 728 F. Supp. at 70.

[20] *Id.* at 71. The court explained that, by sponsoring the invocation, the state created a "symbolic union" of church and state. *Id.* at 72 (quoting Grand Rapids School Dist. v. Ball, 473 U.S. 373, 392 (1985)). The court rejected the school district's contention that *Marsh v. Chambers* should apply. *Id.* at 73-74 (citing Marsh v. Chambers, 463 U.S. 783 (1983)). In *Marsh*, the Supreme Court validated prayer at the opening of each session of the Nebraska state legislature. *Marsh*, 463 U.S. at 795. The district court explained that the *Marsh* holding was limited to the specific facts of that case and would not apply in a public school setting. *Weisman*, 728 F. Supp. at 74. The district court also rejected the reasoning of a circuit court decision which suggested in dicta that nondenominational prayer at a high school graduation ceremony would be constitutional. *Id.* at 73-74 (citing Stein v. Plainwell Community Schools, 822 F.2d 1406, 1409-10 (6th Cir. 1987)). In dismissing use of the *Stein* decision as clear precedent, the district court noted that each of the three judges in *Stein* wrote opinions utilizing different reasoning. *Id.* at 74 n.9.

Since the district court's decision in *Stein*, other courts have faced similar issues. *See* Jager v. Douglas County School Dist., 862 F.2d 824 (11th Cir. 1989);

court, therefore, held that the school district's practice regarding invocations at graduation ceremonies was unconstitutional.[21]

The United States Court of Appeals for the First Circuit affirmed without opinion,[22] and the United States Supreme Court granted certiorari[23] to determine whether a state-sponsored invocation at a public graduation ceremony is permissible under the Establishment Clause.[24] Writing for the Court, Justice Kennedy held that, by inviting clergy to deliver an invocation, the school district violated the First Amendment mandate that gov-

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Jones v. Clear Creek Independent School Dist., 930 F.2d 416 (5th Cir. 1991). The United States Court of Appeals for the Eleventh Circuit, rejecting an application of *Marsh*, held that a state-sponsored invocation before a high school football game was unconstitutional. *Jager*, 862 F.2d at 831. The United States Court of Appeals for the Fifth Circuit, however, has validated a public high school's practice of allowing volunteer members of the graduating class to deliver an invocation at the graduation ceremony. *Jones*, 930 F.2d at 423.

21 *Weisman*, 728 F. Supp. at 75. Despite this ruling, the district court was not without sympathy for the school district's position. *See id.* Judge Boyle stated poignantly:

> The 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 [school prayer].

Id. at 75.

Judge Boyle further posited that the prohibition of any "union" of prayer and public school may cause students to turn away from religion. *Id.* at 72 n.7. The Judge also stated that "[t]here is no factual basis for an historical argument that the [F]irst [A]mendment was intended by the drafters to isolate religion from education." *Id.* at 73 n.8.

22 Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990). Judge Bownes concurred and, after reviewing Establishment Clause history and original intent, frankly stated that the " 'historical record' is inconclusive." *Id.* at 1093 (Bownes, J., concurring). Judge Bownes rejected, as had the district court, the application of *Marsh* and found the *Stein* decision unpersuasive. *Id.* at 1096 (Bownes, J., concurring). Judge Bownes concluded that he might have found a constitutional violation even if a deity was not mentioned in the invocation. *Id.* at 1097 (Bownes, J., concurring).

Citing *Marsh* and *Stein* with approval, dissenting Judge Campbell suggested that invocations should be permitted, provided that "persons representative of a wide range of beliefs *and ethical systems* are invited to give the invocation." *Id.* at 1099 (Campbell, J., dissenting). Judge Campbell, as the district court before him and the Supreme Court after him, found it ironic that public school students are subjected to destructive habits such as drug-abuse and televised violence but denied a two minute prayer at their graduation ceremony. *See id.* at 1098 (Campbell, J., dissenting); *Cf. Weisman*, 728 F. Supp. at 75 (opining that prayer may be beneficial to a great number of students); Lee v. Weisman, 112 S. Ct. 2649, 2657 (1992) (noting that students are regularly subjected to offensive and irreligious ideas in their studies).

23 111 S. Ct. 1305 (1991).

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

ernment action may not coerce participation in religious exercise.[25]

The Supreme Court first applied the Establishment Clause to the states, through the Due Process Clause of the Fourteenth Amendment, in the seminal case of *Everson v. Board of Education*.[26] The Court in *Everson* reviewed a New Jersey statute that reimbursed parents of children in public and private schools for the cost of school transportation.[27] Interpreting the language of the First Amendment, the Court announced that the Establishment Clause placed a substantial restriction on government involvement with religion.[28] Nevertheless, the majority in *Everson* upheld the New Jersey law, reasoning that the statute benefitted the aid recipients irrespective of their religious beliefs.[29]

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[25] *Id.* at 2655. Justice Kennedy also stated that the school district ran afoul of the Establishment Clause by "act[ing] in a way which 'establishes a [state] religion or religious faith, or tends to do so.' " *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

[26] 330 U.S. 1, 15 (1947). For a discussion of the Court's incorporation of the Bill of Rights into the Fourteenth Amendment, see *supra* note 2.

[27] *Everson*, 330 U.S. at 3. The statute allowed the parent of any school child to be reimbursed for transportation expenses provided the students did not attend a private school that operated for profit. *Id.* at 1 n.1. Thus, some of the funds were distributed to parents of children who attended Catholic schools. *Id.* at 1.

[28] *Id.* at 15. The Court relied heavily on an historical analysis in reaching this conclusion. *See id. See also* Jonathan K. Van Patten, *In the End Is the Beginning: An Inquiry Into the Meaning of the Religion Clauses*, 27 ST. LOUIS U. L.J. 1, 13-18 (1983) (questioning the accuracy of the analysis used by the Court). Justice Black, writing for the Court, explained:

> 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. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation' between church and State.

Id. at 15-16 (citation omitted).

[29] *Id.* at 18. The Court explained that churches and church schools also receive services available to the general public, such as police and fire protection, use of sewage disposal lines, and public highways and sidewalks. *Id.* at 17-18. The First Amendment, the Court declared, does not mandate that the state be an adversary of religious believers. *Id.* at 18. Rather, the Court asserted, the Constitution requires the state to adopt a position of neutrality toward religion. *Id.* Thus, the

The Court first considered whether the Establishment Clause permits the practice of religion in public schools in *Illinois ex. rel. McCollum v. Board of Education*.[30] In this case, the Court invalidated a school district's policy of allowing religious instruction on school grounds during school hours.[31] The government's support and control of religious practices in the schools, the Court explained, was a clear violation of the Establishment Clause.[32] Specifically, the Court observed that children were

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Court reasoned that the state did no more than offer a program of assistance without regard to religious affiliation, a position in accord with the First Amendment. *Id. But see* Howard, *supra* note 3, at 494-95 (reflecting that in the very case where the Court announced the strict standard of separation between church and state, the Court compromised that standard by upholding the New Jersey law).

The Court has since had some difficulty in applying consistent reasoning to other school-aid cases. *See* Developments in the Law, Religion and the State, 100 HARV. L. REV. 1606, 1680 (1987) [hereinafter Developments]. *See also* Aguilar v. Felton, 473 U.S. 402 (1985) (striking by 5-4 vote practice of using state funds to compensate public school teachers who also teach in religious schools); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (holding by 5-4 vote program in which the state provided instruction to non-public school students in classrooms leased from non-public schools impermissibly advances religion); Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973) (invalidating by 6-3 vote tuition reimbursement and tax relief plan to parents of non-public school children); Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding unconstitutional by 8-1 vote direct subsidies to non-public schools and teachers); Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding by 7-2 vote state's lending of textbooks to private school children).

30 333 U.S. 203 (1948).

31 *Id.* at 205, 210. Children attended classes that were taught by religious teachers from the Catholic, Protestant, and Jewish faiths at their parents' request. *Id.* at 207. These weekly classes lasted thirty to forty-five minutes. *Id.* at 207-08. Non-participating students pursued secular studies in another part of the school building. *Id.* at 209.

32 *Id.* at 209-10. The eight Justice majority concluded: "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." *Id.* at 210. The majority opined that the wall that separates church and state "must be kept high and impregnable." *Id.* at 212. The Court's enforcement of this principle in *McCollum* caused a considerable stir. Samuel A. Alito, Note, *The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court*, 83 YALE L.J. 1202, 1202 (1974). For example, ten bishops and four Cardinals of the Roman Catholic Church called the *McCollum* decision a victory for "doctrinaire secularism." *Id.* (citation omitted).

Commentators have also expressed dissatisfaction with the outcome in the *McCollum* case. *See, e.g., id.*; ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 143 (1982). Professor Cord has criticized the Court for basing its Establishment Clause principles on a distorted view of history. CORD, *supra*, at 145. Professor Cord has identified a paradox in the Supreme Court's logic. *Id.* at 135-41. While the Supreme Court relies on the writings of Jefferson, Professor Cord explains, many of Jefferson's own proposals, which advocated a close relationship between state universities and religious schools, would have failed to pass constitutional muster under the Court's present view of the Establishment Clause. *Id.* at 135-37.

subject to compulsory attendance laws[33] and the superintendents of school monitored the religious instructors.[34] Although the Court in *McCollum* foreclosed the possibility of religious instruction in the school building, the Court left open the question of whether the Establishment Clause allows schools to release students from secular classes for religious instruction off school property.[35]

Four years later, the Supreme Court addressed this question in *Zorach v. Clauson*.[36] In *Zorach*, the Court examined a "released time" program, which allowed religious instruction during school hours but off school grounds.[37] Adopting the view that the state was merely cooperating with religious institutions rather than using the public schools to further religious interests, the Court upheld the program.[38] Writing for the majority, Justice

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[33] *McCollum*, 333 U.S. at 205. Under the Illinois compulsory education law, parents were required to send their children, between the ages of seven and sixteen, to either public or private school. *Id.* Parents who did not do so were subject to a fine. *Id.*

[34] *Id.* at 208. The superintendent held the power to reject religious instructors from the program and also exercised discretion over whether certain religious groups would be invited to the school. *Id.* at 208 n.3.

[35] Alito, *supra* note 32, at 1226.

[36] 343 U.S. 306 (1952). *Zorach* is often cited for the proposition that "[w]e are a religious people whose institutions presuppose a Supreme Being." Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1241 (1986) (citing Zorach v. Clauson, 343 U.S. 306, 313 (1952)).

[37] *Zorach*, 343 U.S. at 315. Instruction classes were given only to students whose parents submitted written consent. *Id.* at 308. The statute limited the religious classes given on school time to one hour per week. *Id.* at 308 n.1. Non-participating students remained in regular classes. *Id.* at 308.

[38] *Id.* at 314. The Court explained that by cooperating with religion, the state "follow[ed] the best of our traditions." *Id.* The three dissenters viewed the program in *Zorach* as no more acceptable than the one in *McCollum*, because both used the state's power to further religious interests. *See id.* Justice Jackson, disagreeing with the Court's validation of the released time religious training program, stated that "[t]he wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected." *Id.* at 325 (Jackson, J., dissenting). After the Supreme Court announced its decision in *Zorach*, Justice Jackson lamented that "[t]he battle for *separation* of Church and School is lost." *See* Howard, *supra* note 3, 496 (citing Letter from Robert H. Jackson to Felix Frankfurter (April 30, 1952)). One scholar has suggested that by allowing the released time program in *Zorach*, the Court was responding to an overwhelming public support for the program. *See* Alito, *supra* note 32, at 1228; *see also* Howard, *supra* note 3, at 496 (calling *Zorach* and *Everson* "sobering lessons regarding popular limits on judicial power").

Professor Cord criticized the dissenters' view in *Zorach* that the combination of the released time programs and compulsory school attendance laws amounted to a union of church and state. CORD, *supra* note 32, at 174. If attendance at parochial schools, where religious teachings are pervasive, can be used to satisfy the state's compulsory education laws, Professor Cord argued, then the weekly one-hour class

Douglas distinguished the *McCollum* case by asserting that the released time program in *Zorach* was held off of school property and involved no funding by the state.[39]

The Supreme Court faced the issue of state-composed school prayer for the first time in *Engel v. Vitale*,[40] where the parents of ten pupils challenged a New York school district's practice of opening each school day with a prayer.[41] With only one Justice dissenting, the Court held that a state may not, consistent with the Establishment Clause, mandate prayer at the beginning of each school day.[42] The majority declared that the government was prohibited from engaging in the writing or sanctioning of official school prayers.[43] Justice Black, writing for the Court,

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at issue in *Zorach* must be permitted as well. *Id.* Professor Cord took the argument one step further to argue that if parochial schools are accepted as a substitute for public school, then the religious schools should be able to receive state aid. *Id.* at 175.

[39] *Zorach*, 343 U.S. at 308-09. For an attempt at explaining the apparent contradiction in the *McCollum* and *Zorach* decisions, see Alito, *supra* note 32, at 1228-33.

[40] 370 U.S. 421 (1962).

[41] *Id.* at 423. The text of the prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

[42] *Id.* at 436, 444. Justice Black, writing for the majority, relied on Madison's *Memorial and Remonstrance Against Religious Assessments*, a document submitted by Madison to the General Assembly of the Commonwealth of Virginia in 1785. *See* Letter from James Madison to the Honorable General Assembly of the Commonwealth of Virginia, *in* DREISBACH, *supra* note 1, at 173-77. The *Remonstrance* expressed Madison's view that the right of freedom of conscience is among the most basic rights of man. *See id.* Madison wrote:

> Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator.

Id. at 173.

Justice Stewart, unable to conclude that the school district's practice amounted to an "establishment of religion," dissented. *Engel*, 370 U.S. at 445 (Stewart, J., dissenting). The Justice maintained that the case should be decided in light of "the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government." *Id.* at 446 (Stewart, J., dissenting). After describing the religious practices of the three branches of the government, Justice Stewart concluded that if the Federal Government can engage in such practices, then the states can too. *See id.* at 446-50 (Stewart, J., dissenting).

[43] *Id.* at 435. The majority declared that its holding was "neither sacrilegious nor antireligious." *Id.* In the years following the Court's holding in *Engel*, the ma-

found no merit in the argument that the prayer at issue was non-denominational.[44] Moreover, that participation was voluntary, Justice Black explained, could not save the practice, as the Establishment Clause prohibits the government from establishing an official religion regardless of whether the state attempts to force participation.[45] The Court's decision in *Engel*, however, did not stop the states from attempting to establish religious practices in the public schools.[46]

In *Abington School District v. Schempp*[47], the parents of two public school children brought separate challenges to Pennsylvania and Maryland statutes that required Bible readings at the beginning of each school day.[48] The *Schempp* Court, in determining the validity of the statutes, inquired into their purpose and primary

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jority's view has encountered considerable resistance. Developments, *supra* note 29, at 1661. The Court's decision was often disregarded by school boards, which mandated the recitation of prayers. *Id.* at 1661 & n.105. Congress has also voiced its opposition. *Id.* at 1661 n.7. Within twenty-four hours of the Court's decision in *Engel*, ten Congressmen responded with vitriolic attacks on the Supreme Court. KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE 27 (1971). Congress has been presented with at least two-hundred constitutional amendments which would permit voluntary school prayer. Developments, *supra* note 29, at 1661 & n.7. President Reagan proposed a school prayer amendment that provided: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer." Message to the Congress Transmitting a Proposed Constitutional Amendment on Prayer in School, PUB. PAPERS 647-48 (1982). More recently, President Bush has expressed the view that voluntary prayer should be returned to the public schools and has similarly called upon Congress to pass a constitutional amendment. Remarks at the Annual Southern Baptist Convention in Atlanta, Georgia, PUB. PAPERS 615 (1991). *See also* CHARLES E. RICE, THE SUPREME COURT AND PUBLIC PRAYER: THE NEED FOR RESTRAINT 157 (1964) (arguing that the Supreme Court has erred in its interpretation of the Establishment Clause and the best solution to the problem is a constitutional amendment).

44 *Engel*, 370 U.S. at 430.

45 *Id.* at 430-31.

46 *See* Developments, *supra* note 29, at 1660-62.

47 374 U.S. 203 (1963).

48 *Id.* at 205. The Pennsylvania statute provided in relevant part:

> At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.

Id. (quoting 24 PA. CONS. STAT. § 15-1516 (Supp. 1960)). Pursuant to Art. 77, § 202 of the Annotated Code of Maryland, the Baltimore City Board of School Commissioners adopted a rule providing for opening exercises in city schools including " 'reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.' " *Schempp*, 374 U.S. at 211.

effect.[49] Applying this standard to the Pennsylvania and Maryland laws, the Court found that the statutes had no secular purpose and had the primary effect of advancing religion.[50] The Court opined that the Establishment Clause required government neutrality toward religion.[51] A statute that has the purpose or primary effect of advancing or inhibiting religion, according to the Court, violates this principle.[52] In so holding, the Court summarily rejected claims that its decision tended to permit a "religion of secularism."[53]

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49 *Id.* at 222 (citing Everson v. Board of Educ., 330 U.S. 1 (1947); McGowan v. Maryland, 366 U.S. 420 (1961)).

50 *Id.* at 223. Specifically, the Court noted that the state was requiring Bible reading in a public school, which children were required by law to attend. *Id.* Thus, Justice Clark distinguished the case from Zorach v. Clauson, 343 U.S. 306 (1952), in which religious exercises were held off school grounds and controlled by a non-state entity. *Id.*; *see* Zorach v. Clauson, 343 U.S. 306, 308 (1952).

The Court also differentiated between the First Amendment's prohibition of establishment of religion and its protection of the free exercise of religion. *Schempp*, 374 U.S. at 222-23. The Free Exercise Clause, the Court explained, was designed to prevent governmental invasion into an individual's religious liberty. *Id.* at 223. The Court stressed, however, that a violation of that clause requires a showing of coercion that "operates against [the complainant] in the practice of his religion." *Id.* A violation of the Establishment Clause, the Court explained, need not be predicated on such a showing. *Id. See also* Lee v. Weisman, 112 S. Ct. at 2649, 2664 (1992) (Blackmun, J., concurring) (emphasizing that "our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation").

Some commentators hold the view that the Constitution permits state recognition of religion on a non-denominational basis and therefore the prayer in *Engel* and the Bible reading in *Schempp* should have been upheld. SMITH, *supra* note 2, at 181. Professor Smith explained, however, that Bible reading might fail to pass constitutional scrutiny because use of a particular Bible version could evidence a preference for one religious group over another. *Id.* at 183.

51 *Schempp*, 374 U.S. at 222. Many commentators have rejected the idea that the Constitution mandates government neutrality toward religion. *See, e.g.*, DREISBACH, *supra* note 1, at 49-50; CORD, *supra* note 32, at 15. Dreisbach asserts that the idea that a state must be neutral in matters of religion is a radical misreading of history. DREISBACH, *supra* note 1, at 49-50. The Constitution, posited Dreisbach, was not intended to create a secular state, but rather "to *perpetuate* a Christian order." *Id.* (quoting ROUSAS JOHN RUSHDOONY, THE NATURE OF THE AMERICAN SYSTEM 2 (1978)). *See also* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 514 (1968) (arguing that the neutrality theory advocated by the Supreme Court collides with its activist approach of prohibiting all government aid to religion); RICHARD C. MCMILLAN, RELIGION IN THE PUBLIC SCHOOLS: AN INTRODUCTION 105-08 (1984) (discussing the view of government neutrality toward religion).

52 *Schempp*, 374 U.S. at 222. The "purpose" and "primary effect" tests were later incorporated as the first two prongs of the *Lemon* test. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); notes 58-61, *infra*, and accompanying text.

53 *Schempp*, 374 U.S. at 225. The Court stated, however, that an objective program of Bible study would be permissible under the Establishment Clause. *Id.* Jus-

Armed with the precedents of *Everson*, *McCollum*, *Engel* and *Schempp*, the Supreme Court in *Epperson v. Arkansas*[54] invalidated a state law that prohibited the teaching of the theory of evolution.[55] The Court concluded that the statute had a religious purpose.[56] The statute, the Court reasoned, aimed to exclude teachings that conflicted with the beliefs of a religious group and thus violated the Establishment Clause.[57]

Following *Epperson*, the Court established the modern standard for adjudicating Establishment Clause cases in the landmark decision of *Lemon v. Kurtzman*.[58] In this case, the Court examined

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tice Goldberg, in a concise yet insightful concurring opinion in *Schempp*, foreshadowed what was to be the root of controversy and divisiveness among members of the Court. *See id.* at 308 (Goldberg, J., concurring). Justice Goldberg explained:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Id.

54 393 U.S. 97 (1968).

55 *Id.* at 99 n.3, 103. The statute provided:

> It shall be unlawful for any teacher of other instructor in any University, College, Normal, Public School, or other institution of the State, which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.

Id. at 99 n.3 (quoting ARK. STAT. ANN. § 80-1627 (1960 Repl. Vol.)). Teachers who violated the Act were subject to a five hundred dollar fine and removal from their position. *Id.*

56 *Id.* at 107-09. As it did in Abington School Dist. v. Schempp, 374 U.S. 203 (1963), the Court made clear that an objective study of the Bible "from a literary and historic viewpoint" need not fall within the ambit of the Establishment Clause. *Id.* at 106.

57 *Id.* at 107-08. One scholar who disagreed with the Court's view that a state may not favor religion, nevertheless agreed with the Court's holding in *Epperson*. *See* CORD, *supra* note 51, at 15, 194. Professor Cord deemed the Court's task in *Epperson* relatively uncomplicated. *Id.* Professor Cord expressed that a state may favor religion, but may not constitutionally prefer one religion over another. *Id.* Thus, Professor Cord explained that because the intention and effect of the anti-evolution law struck down in *Epperson* was to advance the religious beliefs of "fundamental Christians," the law must fail. *Id.*

58 403 U.S. 602 (1971).

the propriety of state funding intended to augment secular education in non-public schools, and created a three part test in an attempt to provide more specific guidelines in this area of constitutional adjudication.[59] The test provided that "the statute must have a secular legislative purpose; . . . its principal or primary effect must be one that neither advances nor inhibits religion . . . [and it] must not foster 'an excessive government entanglement with religion.' "[60] In *Lemon*, the Court found that by providing financial assistance to non-public schools, the state fostered excessive government entanglement with religion and therefore violated the First Amendment.[61]

Although *Lemon* concerned state aid, the Court has subsequently utilized its standards to invalidate nearly all challenged religious practices in the public schools.[62] For example, in *Stone*

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[59] *Id.* at 607-13. *Lemon* involved Rhode Island and Pennsylvania statutes. *Id.* at 606. The Rhode Island statute provided salary supplements to non-public school teachers who taught only secular classes. *Id.* at 607 (citing R.I. GEN. LAWS § 16-51-1 (Supp. 1970)). The Pennsylvania statute provided payments to non-public schools for operating expenditures related to only secular subjects. *Id.* at 609-10 (citing PA. STAT. ANN. tit. 24, §§ 5601-5609 (Supp. 1971)). The Court found that about ninety-five percent of the pupils who benefitted from the statutes attended schools that were associated with the Roman Catholic Church. *Id.* at 610.

[60] *Id.* (citations omitted).

[61] *Id.* at 613-14. Writing for the Court, Chief Justice Burger distinguished *Lemon* from previous state aid cases. *Id.* at 621. The Court recognized that the programs in which the state provided aid to parents of public and private school children for transportation did not violate the Establishment Clause because the aid had been provided directly to the students' parents. *Id.* In *Lemon*, the Court explained, the state aid was provided only to private schools. *Id.* at 611-12. The Court also acknowledged the validity of a program where the state lent textbooks to private schools. *Id.* at 613 (citing Board of Educ. v. Allen, 392 U.S. 236 (1968)). In that case, the Court reasoned, the program did not offend the Establishment Clause because the textbooks' content could easily be ascertained. *Id.* at 617. The potential for entanglement in this case, Chief Justice Burger continued, existed because the statutes would require the states to monitor the teachers' lessons to ensure their secular content. *Id.* at 617, 620.

[62] Gregory M. McAndrew, *Invocations at Graduation*, 101 YALE L.J. 663, 664 n.6 (1991). Although the *Lemon* test has been consistently applied in the public school cases, it has met with considerable criticism by members of the Court. *See, e.g.*, Allegheny County v. ACLU, 492 U.S. 573, 655-56 (1989) (opinion of Kennedy, J.); Edwards v. Aguillard, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 108-12 (1985) (Rehnquist, J., dissenting); *Id.* at 91 (White, J., dissenting); Aguilar v. Felton, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); Grand Rapids School Dist. v. Ball, 473 U.S. 373, 400 (1985) (opinion of White, J.). Commentators have also expressed dissatisfaction with the *Lemon* test. *See* Nancy B. Hersman, Note, Lynch v. Donnelly: *Has the* Lemon *Test Soured?*, 19 LOY. L.A. L. REV. 133, 141 (1985) (contending that the *Lemon* test contributed more confusion than clarity to Establishment Clause cases); Developments, *supra* note 29, at 1644; Howard, *supra* note 3, at 504 (noting that consistent application of the *Lemon* test has been troublesome).

v. Graham,[63] the Court reviewed a Kentucky statute that required a copy of the Ten Commandments[64] to be displayed in each public school classroom.[65] The majority in *Stone*, reversing the judgment of the Kentucky Supreme Court,[66] held that the statute violated the first prong of the *Lemon* test because it had a plainly religious purpose.[67] In so holding, the Court brushed aside arguments that the statute had a secular purpose, that the Ten Commandments were never read aloud, and that the posted copies were purchased through voluntary contributions.[68] Authoring a strong dissent, Justice Rehnquist asserted that a complete separation between church and state is not required by the Establishment Clause.[69]

Although the Court permitted state involvement with reli-

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63 449 U.S. 39 (1980).

64 The Ten Commandments are:

> I. I, the Lord, am your God, who brought you out of the land of Egypt, that place of slavery. You shall not have other gods before me.
> II. You shall not take the name of the Lord, your God, in vain.
> III. Remember to keep holy the Sabbath day.
> IV. Honor your father and your mother, that you may have a long life in the land which the Lord, your God, is giving you.
> V. You shall not kill.
> VI. You shall not commit adultery.
> VII. You shall not steal.
> VIII. You shall not bear false witness against your neighbor.
> IX. You shall not covet your neighbor's house.
> X. You shall not covet your neighbor's wife, nor his male or female slave, nor his ox or ass, nor anything else that belongs to him.

Exodus 20:2-17; Deuteronomy 5:6-21 (Catholic Guild Edition).

65 *Stone*, 449 U.S. at 39. The funds for the program were to be raised through voluntary contributions. *Id.* at 40 n.1. At the bottom of the document was printed: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* (quoting KY. REV. STAT. ANN. 158.178 (Michie/Bobbs-Merrill 1980)).

66 *Id.* at 43.

67 *Id.* at 41-43. The Court denied oral argument and based its *per curium* opinion solely upon the record below. *Id.* at 47 (Rehnquist, J., dissenting).

68 *Id.* at 41-42.

69 *Id.* at 45 (Rehnquist, J., dissenting). Justice Rehnquist stated that "[t]he Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin" and admonished the majority for its "cavalier summary reversal" of the Kentucky Supreme Court. *Id.* at 45-47 (Rehnquist, J., dissenting). The Court was split 5-4, with Chief Justice Burger, Justice Blackmun, and Justice Stewart also dissenting. *Id.* at 43.

Stone reveals the Court's difficulty with the "purpose" prong of the *Lemon* test, namely that the statute may have more than one purpose, that different legislators in the same assembly may have different purposes in mind, and that such an inquiry does not easily lend itself to empirical testing. *See* Edwards v. Aguillard, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting).

gion in some areas,[70] the states remained completely powerless to introduce religion into the classrooms.[71] In *Wallace v. Jaffree*,[72]

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[70] Developments, *supra* note 29, at 1655. In Marsh v. Chambers, 463 U.S. 783 (1983) and Lynch v. Donnelly, 465 U.S. 668 (1984), the Court sidestepped the *Lemon* test to find state practices respecting religion constitutional. Mirsky, *supra* note 36, at 1243-45. In those cases, the Court relied primarily on historical analysis. *Marsh*, 463 U.S. at 787-90; *Lynch*, 465 U.S. at 673-78. *Marsh* concerned the Nebraska state legislature's practice of opening each session with a prayer given by a state-paid chaplain. *Marsh*, 463 U.S. at 784-85. The *Marsh* Court upheld the practice and concluded that because legislative chaplains existed when the Bill of Rights was drafted, its authors could not have intended to declare their own actions unconstitutional. *Id.* at 790. Chief Justice Burger wrote:

> It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

Id.

The *Marsh* Court failed to apply the standards established in *Lemon v. Kurtzman*, even though the United States Court of Appeals for the Eighth Circuit found that the state practice violated those standards. *Id.* at 786. Professor Smith has suggested that the Court validated the longstanding practice of legislative prayer in an effort of self-preservation. SMITH, *supra* note 2, at 258. To do otherwise, according to Professor Smith, would have created a public uproar which, in turn, may have led to the passage of an amendment restricting the Court's power of review in Establishment Clause cases. *Id.*

Lynch tested the constitutionality of a municipality's decision to erect a creche display each year. *Lynch*, 465 U.S. at 670-71. The Court acknowledged the religious significance of the creche but noted similar longstanding religious practices by the government such as the national motto, "In God We Trust," and the phrase in the Pledge of Allegiance, "One nation under God." *Id.* at 676. The Court pragmatically stated that scrutinizing only the religious aspects of any government activity would inevitably lead to a finding of unconstitutionality. *Id.* at 680. In this case, the Court explained, the secular purpose of the municipality was to celebrate and recognize the origins of a holiday. *Id.* at 681. The primary effect of the creche, the Court continued, was at most an incidental advancement of religion, and not enough to trigger the prohibition of the Establishment Clause. *Id.* at 681-83. Finally, the Court found that because the city did not exert any control over the content or design of the creche, and the city's financial contribution to the enterprise was *de minimis*, there was no government entanglement with religion. *Id.* at 683-84. For further examination of the Supreme Court's holding in *Lynch*, see Hersman, *supra* note 62, at 147-64.

One scholar has criticized the Court for permitting the municipality's annual erection of the creche display. William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770, 782-87. Professor Van Alstyne criticized the Supreme Court's perfunctory application of the *Lemon* test. *Id.* at 782-83. Professor Van Alstyne suggested that the Court supplanted the *Lemon* test with the "any more than" test. *Id.* at 783. Under the "any more than" test, according to Professor Van Alstyne, as long as the challenged government practice endorses religion no more than other generally accepted practices, the action will be upheld. *Id.*

[71] *See* County of Allegheny v. ACLU, 492 U.S. 573, 590 n.40 (1989) ("A State may neither allow public-school students to receive religious instruction on public

the Court examined an Alabama law permitting a one minute period of silence for prayer or meditation at the start of each day in public school classrooms.[73] The Court struck the Alabama statute because its sole purpose was to endorse religion.[74] The Court deduced that the statute was devoid of a secular purpose by examining its legislative history and the testimony of Alabama's Governor and a state senator.[75] Even though the statute under consideration in *Wallace* failed to pass constitutional muster, two concurring Justices took pains to state that a similar stat-

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school premises . . . nor allow religious school students to receive state-sponsored education in their religious schools.") (citations omitted).

72 472 U.S. 38 (1985).

73 *Id.* at 39 n.2. The statute provided:

> At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

Id. (quoting ALA. CODE § 16-1-20.1 (Supp. 1984)).

Two additional statutes were reviewed by the district court. *Id.* at 41 (citing Jaffree v. James, 544 F. Supp. 727, 732 (S.D. Ala. 1982)). One statute allowed a period of silence for "meditation" only. *Id.* at 40 n.1 (quoting ALA. CODE § 16-1-20 (Supp. 1984)). That statute, however, was not reviewed by the Supreme Court because the complainants had abandoned the claim that it was unconstitutional. *Id.* at 41. The other statute, which provided that teachers "may lead willing students in prayer" was previously struck down by the Supreme Court. *Id.* (citing Wallace v. Jaffree, 466 U.S. 924 (1984)).

74 *Id.* at 61. This so-called "endorsement test" was proposed by Justice O'Connor in *Lynch v. Donnelly*. *See* Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring). In *Lynch*, Justice O'Connor stated that "[t]he proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691 (O'Connor, J. concurring).

One scholarly article posited that an exclusive focus on the purpose of a statute ignores the more important inquiry of the statute's impact on children in the public school system. Developments, *supra* note 29, at 1662-63. The article set forth the following argument: Even if the statute was implemented with a secular purpose, its actual effect on children in the classroom must be considered. *Id.* at 1663. When a religious majority seeks to express its beliefs, even through a moment of silence, coercive pressure to conform is imposed on nonadherents. *Id.* Thus, a moment of silence statute which purports merely to accommodate the religious practices of the majority may result in the coercion of nonadherents, a result contrary to the statute's recited purpose of protecting religious freedom. *Id.* at 1663-64.

75 *Wallace*, 472 U.S. at 56, 56 n.44. The Court relied heavily on the statement of the statute's sponsor, state Senator Donald Holmes, who, when asked if he had any purpose besides permitting prayer in the schools, replied, "No, I did not have no other purpose in mind." *Id.* at 57 (quoting App. at 52). The Court observed that the legislative history also contained a statement by Senator Holmes in which the Senator expressed that the statute was an "*effort to return voluntary prayer to our public schools* . . . ." *Id.* at 57 n.43 (quoting App. at 50).

ute would be constitutional if it also had a secular purpose.[76]

One year after the *Wallace* decision the Court, in *Edwards v. Aguillard*,[77] again struck down a state statute for lack of a secular purpose.[78] The *Edwards* Court reviewed a Louisiana statute that forbade inclusion of evolution theory in the public school curriculum unless "creation science" was also taught.[79] Although Louisiana recited a secular purpose for the statute, Justice Brennan asserted that the stated legislative purpose must be more than a mere sham.[80] Justice Brennan concluded that the statute's sole purpose was to structure the scientific curriculum toward a particular religious viewpoint.[81] Accordingly, the Court found

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[76] *See id.* at 66 (Powell, J., concurring); *id.* at 84 (O'Connor, J., concurring) (stating that "the moment of silence statutes of many States should satisfy the Establishment Clause standard we have here applied"). *See also* May v. Cooperman, 780 F.2d 240 (3d Cir. 1985). In that case the United States Court of Appeals for the Third Circuit reviewed a New Jersey "minute of silence" statute. *Id.* at 241. The statute provided:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before opening exercises of each school day for quiet and private contemplation or introspection.

Id. (quoting N.J. REV. STAT. § 18A:36-4 (1983)).

Judge Gibbons, writing for a divided panel, held that because the statute lacked a secular purpose, it was unconstitutional. *Id.* at 253. The dissenting judge in *May* dismissed the majority's argument that the statute had a religious purpose merely because two assemblymen favored the statute for religious reasons. *Id.* at 261 (Becker, J., dissenting). The dissent postulated that, based on the writings of the Justices of Supreme Court, the statute would be found constitutional by that tribunal. *Id.* at 259 (Becker, J., dissenting). Judge Becker argued that a previous Supreme Court case "supports the proposition that moment of silence statutes that are permissive and facially neutral presumptively have a secular purpose." *Id.* at 257 (Becker, J., dissenting) (citing Abington School District v. Schempp, 374 U.S. 203, 281 (1963) (Brennan, J., concurring)). The United States Supreme Court determined that the complainants in *May*, former legislative officers, lacked standing, and dismissed their appeal for want of jurisdiction. Karcher v. May, 484 U.S. 72, 83 (1987).

[77] 482 U.S. 578 (1987).

[78] *Id.* at 585, 597.

[79] *Id.* at 581. The statute did not require that either theory be taught, but if one was included in the curriculum, then both had to be included. *Id.* (citing LA. REV. STAT. ANN. § 17:286.4A (West 1982)). The statute was therefore unlike the one in *Epperson*, which placed an outright prohibition on the teaching of the theory of evolution. Epperson v. Arkansas, 393 U.S. 97, 98 (1968).

[80] *Edwards*, 482 U.S. at 586-87 (citing Wallace v. Jaffree, 472 U.S. 38, 64 (1985) (Powell, J., concurring)).

[81] *Id.* at 590. The statute purported to "protect academic freedom." *Id.* at 586 (citing LA. REV. STAT. ANN. § 17:286.2 (West 1982)). The Court examined the legislative history of the statute and reasoned that the statute's actual purpose was a religious one. *Id.* at 587. In reaching that conclusion the Court observed that the statute's sponsor stated his preference that the curriculum include neither creation-

that the statute violated the Establishment Clause.[82] Thus, for the fourth time, the Supreme Court invalidated a state law for the reason that it was clearly devoid of a secular purpose.[83]

After thwarting numerous state attempts to inject religion into the public schools, the Supreme Court was called upon, in *Board of Education v. Mergens*,[84] to decide the constitutionality of the Equal Access Act, a federal statute that made it unlawful for federally funded public schools to deny student religious groups access to school facilities.[85] In *Mergens*, the school board denied a Christian club the recognition and privileges enjoyed by other high school clubs.[86] The school board contended that the Equal

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ism nor evolution. *Id.* That statement, the Court explained, was evidence of a legislative intent to restrict, not encourage academic freedom. *Id.*

[82] *Id.* at 587-94. Justice Brennan stressed the fiduciary relationship between the public schools and the community. *Id.* at 584. The Justice observed that the state exerts "great authority and coercive power" over public school children and that it would be a breach of trust to use the public schools to advance religious views that are not shared by the entire community. *Id.*

Justice Powell and Justice O'Connor concurred, as in *Wallace*, 472 U.S. 38 (1985), again to express the view that a statute is not necessarily invalid because it was partially motivated by religion. *Id.* at 599 (Powell, J., concurring). Justice Powell indicated that for a statute to be struck under the purpose prong, "[t]he religious purpose must predominate." *Id.*

Justice Scalia issued a scathing dissent. *Id.* at 610 (Scalia J., dissenting). Justice Scalia challenged the validity of the majority's contention that the statute had no clear secular purpose. *Id.* The Justice noted that the Court had drawn that conclusion in prior cases only when the statute was completely devoid of a secular purpose. *Id.* at 614 (Scalia J., dissenting) (citations omitted). The statute's recited legislative purpose of protecting academic freedom, reasoned the Justice, was plainly served. *Id.* at 629 (Scalia J., dissenting). Justice Scalia offered the testimony of a state legislator who expressed that creation science and evolution science are the only two explanations for the origin of man. *Id.* at 625 n.3 (Scalia J., dissenting). The clear secular purpose that flows from this statement, Justice Scalia concluded, was the assurance that each student would be free to choose what to believe about the origin of life. *Id.* at 627 (Scalia J., dissenting).

[83] *Edwards*, 482 U.S. at 594; *see* Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating one minute period of silence for "meditation or voluntary prayer"); Stone v. Graham, 449 U.S. 39 (1980) (striking statute requiring posting of the Ten Commandments in spite of stated secular purpose); Epperson v. Arkansas, 393 U.S. 97 (1968) (holding "anti-evolution" statute void for want of a secular purpose).

[84] 110 S. Ct. 2356 (1990).

[85] *Id.* at 2362. The Equal Access Act provides in pertinent part:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a) (1988).

[86] *Mergens*, 110 S. Ct. at 2362. The Christian club sought to use school facilities

Access Act violated the Establishment Clause.[87] The Court, however, held that the Act was a valid exercise of federal power.[88] Applying the *Lemon* test, the Court explained that the congressional objective of preventing discrimination based on religious affiliation embraced a permissible secular purpose.[89] Similarly, the Court continued, the primary effect of the statute was to allow private actors, not the government, to endorse religion.[90] Finally, the Court asserted that granting religious groups access to

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for Bible studies, group prayer, and fellowship. *Id.* The club intended to open membership to students of all religious affiliations. *Id.*

87 *Id.* at 2363. Because the school required a faculty sponsor for all school clubs, the school board argued that assigning a sponsor to a religious club would impermissibly endorse religion. *Id.* at 2363-70. Moreover, the school board contended that a religious club on school grounds would provide the club with the opportunity to proselytize other students. *Id.* Further, the school board asserted that the Equal Access Act did not apply to the school because the school did not create a "limited open forum." *Id.* at 2365. The Act stated, in pertinent part, that a "limited open forum" exists when a public school "grants an offering to or an opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b) (1988).

The Court explained that because the term "noncurriculum" was not defined in the Act, the Court's task would be to interpret the meaning of "noncurriculum." *Mergens*, 110 S. Ct. at 2365. Analyzing the plain meaning of "noncurriculum," the Court began by noting that the Act's legislative intent was to "address perceived widespread discrimination against religious speech in public schools." *Id.* at 2366. The Court observed that the school recognized over thirty clubs, including a rotary club, a chess club, a scuba diving club, and a photography club. *Id.* at 2368. The Court concluded that an interpretation that would allow the school to arbitrarily define "curriculum" to mean virtually anything but a religious club would defeat the desired result of Congress in passing the Act. *Id.* at 2369. The Court found that because other clubs recognized by the school were "noncurriculum" clubs, a "limited open forum" existed. *Id.* The Court therefore concluded that the Christian club was entitled to the protection of the Equal Access Act. *Id.*

88 *Mergens*, 110 S. Ct. at 2373.

89 *Id.* at 2371.

90 *Id.* at 2372. The Court stated that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* By way of illustration, the *Mergens* Court examined *Widmar v. Vincent*, 454 U.S. 263 (1981), in which a student religious group challenged a state university policy of denying religious groups equal access to university facilities. *Widmar*, 454 U.S. at 265. The university defended on the ground that it had a compelling interest in separating church and state as required by the Establishment Clause. *Id.* at 270. The Court rejected arguments that the primary effect of an equal access policy would be advancement of religion and held that the university's attempt to exclude religious groups from an open forum violated "the fundamental principle that a state regulation of speech should be content neutral." *Id.* at 273-77. One commentator, however, has taken the view that religious clubs have the tendency of allowing members to proselytize other students. Ruti Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U. L. REV. 174, 178 (1986).

school facilities does not amount to impermissible government entanglement with religion.[91]

Against this background, the United States Supreme Court decided *Lee v. Weisman*.[92] In *Lee*, the Court considered whether an invocation at a public school graduation ceremony violates the Establishment Clause.[93] Justice Kennedy, writing for the Court, declined petitioner's invitation to reconsider the principles established in *Lemon v. Kurtzman*, which prohibited the states from introducing religious exercises in public schools.[94] The Court held, therefore, that the invocation at issue in *Lee* violated the Establishment Clause of the First Amendment.[95]

The Court proceeded to examine the extent of the Providence, Rhode Island school system's involvement with religion.[96] Justice Kennedy explained that the actions of the school principal, who elected to have a rabbi deliver an invocation at Weisman's middle school graduation ceremony, were attributable to the state.[97] The state, through the school principal, not only chose the speaker, the Justice continued, but also directed the content of the prayer.[98] According to the majority, the princi-

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91 *Mergens*, 110 S. Ct. at 2370. The Court rejected the school's argument that the appointment of a faculty sponsor would precipitate excessive entanglement with religion. *Id.* at 2373. Justice O'Connor observed that the Equal Access Act prohibits school officials from promoting, leading, or participating in the group's meetings. *Id.* The Court maintained that "such custodial oversight of the student-initiated religious group, merely to ensure order and good behavior does not impermissibly entangle the government in the day-to-day surveillance or administration of religious activities." *Id.* The Court postulated that recognition of clubs regardless of affiliation would actually avoid entanglement with religion because the state could not control the admission of those clubs to the school. *Id.* The Court reasoned that a state's attempts to exclude religious speech, which would require the state to monitor group meetings, might well involve more entanglement with religion than an equal access policy. *Id.*

92 112 S. Ct. 2649 (1992).

93 *Id.* at 2652.

94 *Id.* at 2655. The United States, as amicus, also urged the Court to reconsider the principles set forth in *Lemon*. *Id.* For a discussion of *Lemon*, see *supra* notes 58-62 and accompanying text.

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

96 *Id.* at 2655-56.

97 *Id.* at 2655. Justice Kennedy asserted that although the record did not reveal why a rabbi was chosen, such state involvement with religion carried obvious potential to create divisiveness in the community. *Id.* at 2655-56.

98 *Id.* at 2656. Justice Kennedy noted that the school principal provided the speaker with a pamphlet entitled "Guidelines for Civic Occasions" and recommended that the invocation be nonsectarian. *Id.* Justice Kennedy reminded that " 'it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government.' " *Id.* (quoting Engel v. Vitale, 370 U.S. 421, 425 (1962)).

pal's advice to the rabbi to offer a nonsectarian prayer amounted to an impermissible government involvement in the content of prayer.[99] Although the invocation was influenced by both Judaism and Christianity rather than by one religion, the Court explained, it was undeniably a religious exercise that was virtually obligatory.[100] The Court maintained that government directed prayers, even nonsectarian prayers, are prohibited by the First Amendment's Religion Clauses.[101]

Having concluded that the graduation prayers were state-sanctioned, the Supreme Court considered the positions of the student proponents of and objectors to school graduation prayers.[102] The majority identified the subtle coercive pressure that might be placed upon students who do not wish to participate in religious exercises.[103] Justice Kennedy asserted that coercive pressure, which may exist in any setting, is particularly evident in the public schools.[104] The majority observed that an invocation in a school ceremony exerts peer pressure on dissenting students to stand for the prayer or, at a minimum, to remain

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99 *Id.* Attempts to include several religions may serve to narrow the number of dissenters, the Court observed, but may also cause them to feel an even greater sense of isolation. *Id.* at 2659.

100 *Id.* at 2656.

101 *See id.* The Court recognized the sense of community that could be achieved through a more inclusive prayer but cautioned that the state is without power to control such decisions, regardless of its motive. *Id.* The Court reasoned that the transmission of religious beliefs is a wholly private matter. *Id.* This, according to the majority, means that the Constitution not only protects the rights of the dissenting non-believer, but also operates to insulate religion from state intervention. *Id.* The Court quoted the principal drafter of the Bill of Rights, James Madison, who said: " '[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.' " *Id.* at 2657 (quoting James Madison, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), in 8 PAPERS OF JAMES MADISON 301 (W. Rachal, et al. eds., 1973)).

102 *Id.* at 2657-60.

103 *Id.* at 2658 (citing Board of Educ. v. Mergens, 496 U.S. 226, 261-62 (1990) (Kennedy, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 584 (1987); Abington School Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring)). Although Justice Kennedy is a modern proponent of a "coercion" analysis, the Justice is not the first to propose such a theory. *See, e.g.*, Zorach v. Clauson (examining the allegation that students were "coerced" into religious training). In *Zorach*, the Court found no evidence of coercion in the record, but stated that if coercion were used to compel participation in the program, "a wholly different case would be presented." *Id. See also* Abington School Dist. v. Schempp, 374 U.S. 203, 222-23 (1963) (distinguishing between the Free Exercise Clause and the Establishment Clause in that the former requires a showing of coercion).

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

silent during the exercise.[105] That pressure, according to the majority, could instill in a reasonable dissenter the belief that her standing for the prayer actually signified participation in the exercise.[106] The Court concluded that the dissenter would thus be placed in the position of either participating or protesting, a position that, insofar as it involves school children, collides with the Establishment Clause.[107]

The majority next addressed the concerns of the invocation proponents.[108] The Court acknowledged that the importance of graduation ceremonies was the justification offered by the school district for permitting the formal prayer.[109] The Court asserted, however, that the importance of the event augmented the risk that those who did not wish to join in religious prayer would be compelled.[110]

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105 *Id.* The Justice acknowledged that to believers the prayer merely represented a request that non-adherents respect their beliefs. *Id.* The Court explained that the dissenter, however, perceives that the state is using its power to impose the beliefs of the majority on her. *Id.*

106 *Id.* The majority averred that "pressure, though subtle and indirect, can be as real as any overt compulsion." *Id.* The majority recognized that some adult non-believers would not object simply to standing in respectful silence while others joined in a prayer. *Id.* The Court stated, however, that the state may not subject high school age children to state-composed prayers in which the non-believer has no real opportunity to avoid participation. *Id.* at 2658-59.

107 *Id.* The Court relied partly on psychological research to reach that conclusion. *See id.* at 2659. The Court reasoned that modern psychology supports the assumption that young people are particularly susceptible to peer pressure. *Id.* Given that fact, the Court explained that the Establishment Clause is no more lenient with the use of social pressure to compel religious conformance than it is with the use of more direct means. *Id.*

108 *Id.* at 2659-60.

109 *Id.* at 2659. The Court explained that the importance of the ceremony to both the believers and the dissenter was the principal reason why the prayer must not be allowed. *Id.* The majority recognized that the religious believers had a substantial interest in seeking divine guidance, but averred that the dissenter was protected from being compelled into religious conformance by the state. *Id.* at 2660.

110 *Id.* The Court stated that the Government's position was that the non-believer must act to avoid infringement on her religious freedom. *Id.* The majority asserted that such a view "turn[ed] conventional First Amendment analysis on its head." *Id.* The majority explained that the Court had long before settled the principle that a state may not compose prayers to be said in the public schools even if participation and attendance was voluntary. *Id.* (citing Engel v. Vitale, 370 U.S. 421, 430 (1962); Abington School Dist. v. Schempp, 374 U.S. 203, 224-25 (1963)).

The majority recognized the paradox that students who, in the course of their public school educations, had been subjected to irreligious and offensive ideas, would now be denied a two minute prayer at their graduation. *Id.* at 2657. Justice Kennedy explained, however, that our pluralistic society requires tolerance of speech that may be offensive to the listener. *Id.* The toleration of such speech, the Justice continued, is protected by a different mechanism than that by which freedom of religion is secured. *Id.* The Establishment Clause, Justice Kennedy clari-

Moreover, the Court was unpersuaded by arguments that the prayer was of a *de minimis* nature.[111] Even though the prayer was brief, the Court explained, the intrusion extended beyond its two minute length.[112] The Court also rejected the contention that attendance at the ceremony was voluntary.[113] Although attendance at the ceremony was voluntary in the literal sense, the majority asserted that, in reality, absence from one's own high school graduation would be a forfeiture of the intangible benefits of the ceremony.[114]

The majority distinguished the instant matter from *Marsh v. Chambers*,[115] and posited that the state legislative prayer validated in *Marsh* involved adults who were free to come and go during the prayers.[116] In the present case, the Court continued, the students were subjected to the authority and influence of teachers and had no real opportunity to avoid the prayer.[117] The Court recited its longstanding contention that Establishment Clause jurisprudence continues to be delicate and fact-sensitive, and refused to extend the *Marsh* rule to a public school case.[118] Thus,

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fied, forbids state intervention in religious matters, whereas speech is assured full expression even when the government is a participant. *Id.*

111 *Id.* at 2659.

112 *Id.* The fact that the prayer lasted roughly two minutes, the majority stated, was immaterial. *Id.* The *de minimis* argument, furthermore, would disrespectfully minimize the religious significance of the rabbi's presence and purpose in offering the prayer. *Id.*

113 *Id.* at 2659.

114 *Id.* Justice Kennedy acknowledged that attendance at the graduation ceremony was not a precondition to receipt of a diploma. *Id.* Justice Kennedy, however, wrote:

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

Id.

115 463 U.S. 783 (1983).

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

117 *Id.* The majority explained that *Marsh* expressly recognized the distinction between public schools and legislative sessions. *Id.* (citing *Marsh*, 463 U.S. at 792). The Court observed that during a high school graduation, the school administration exercises considerable control over nearly all aspects of the ceremony, including the dress, the behavior of the students, movements and timing, as well as the contents of the program. *Id.* (citation omitted).

118 *Id.* at 2661. The Court again stressed that in cases involving school prayer, the early precedents of *Engel* and *Schempp* still control. *Id.* *See supra* notes 40-53 and accompanying text. *See also* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (expressing that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law").

while the Court acknowledged that it would be unconstitutional to attempt to remove religion from public life completely,[119] the Court proclaimed that it is not permissible for a state to inject religion into a public school ceremony in which young graduates have no choice but to conform.[120]

Justice Blackmun, joined by Justice Stevens and Justice O'Connor, concurred.[121] The Justice first detailed relevant public school cases.[122] These cases, Justice Blackmun explained, revealed that government may not endorse, sponsor, or involve itself with religion.[123] The Justice made clear that it was on the basis of these precedents and not merely on the basis of "coercion" that he joined the majority.[124]

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119 *Lee*, 112 S. Ct. at 2661. The Justice explained: "A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Id.*

120 *Id.*

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

122 *Id.* at 2662-64 (Blackmun, J., concurring). Justice Blackmun examined the seminal case of Everson v. Board of Educ., 330 U.S. 1 (1948), and stressed that *Everson* demanded that there be a "wall of separation between church and State." *Lee*, 112 S. Ct. at 2662 (Blackmun, J., concurring) (quoting *Everson*, 330 U.S. at 16). Justice Blackmun also reaffirmed the validity of the early school prayer cases, Engel v. Vitale, 370 U.S. 421 (1962) and Abington School Dist. v. Schempp, 374 U.S. 203 (1963). *Lee*, 112 S. Ct. at 2662-63 (Blackmun, J., concurring). The Justice noted that in *Engel* the Court invalidated a statute that purported to be denominationally neutral and that did not require the participation of all students. *Id.* (citing *Engel*, 370 U.S. at 430). The Justice explained that the Court reached that result because the Establishment Clause forbade the government to use its power to influence religion. *Id.* Justice Blackmun further observed that the *Schempp* Court invalidated Bible reading in schools because it had the primary effect of advancing religion. *Id.* at 2663 (Blackmun, J., concurring). In Epperson v. Arkansas, 393 U.S. 97, 104 (1968), the Justice continued, the Court similarly struck down an "anti-evolution" statute because it aided religion. *Lee*, 112 S. Ct. at 2663 (Blackmun, J., concurring). Finally, the Justice explained that since 1971, the Court has relied on the principles established in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), which prohibit government action that has the purpose or primary effect of advancing or inhibiting religion or that fosters government entanglement with religion. *Lee*, 112 S. Ct. at 2663 (Blackmun, J., concurring).

123 *Id.* at 2667 (Blackmun, J., concurring).

124 *Id.* at 2664-65 (Blackmun, J., concurring). Justice Blackmun stated: "Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient." *Id.* at 2664 (Blackmun, J., concurring). Justice Blackmun explained that "[t]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." *Id.* at 2665 (Blackmun, J., concurring) (quoting 1 ANNALS OF CONG. 757 (Joseph Gales ed., 1789)). The Justice further postulated that "[a] government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some." *Id.* The Justice explained that, once the state assumes the role of religious arbiter, even the favored religion might be the target of manipulation by government officials. *Id.* at 2666 (Blackmun, J., con-

Justice Souter, joined by Justices Stevens and O'Connor, authored a separate concurring opinion.[125] Justice Souter first addressed the claim that the Framer's intent was not to prohibit aid to all religions, but rather to prevent the government from favoring one religion over another.[126] The Justice charged that an historical analysis is inconclusive[127] and asserted that Supreme Court precedent over four decades unequivocally demonstrates that a state law favoring all religions would violate the Constitution just as easily as a law that favors one religion over another.[128]

Justice Souter next considered whether coercion must be shown to constitute an Establishment Clause violation.[129] The Justice observed that the Court had invalidated numerous noncoercive statutes,[130] and concluded that coercion was not a neces-

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curring). Religion in the hands of private actors, observed the Justice, is a far more desirable result. *Id.*

125 *Id.* at 2667 (Souter, J., concurring). Justice Souter identified and addressed two issues: whether the Establishment Clause applied to government action that does not favor one religion over others, and whether government coercion of religious conformity, independent of governmental endorsement, was required to constitute an Establishment Clause violation. *Id.*

126 *Id.* at 2667-71 (Souter, J., concurring).

127 *Id.* at 2668-70 (Souter, J., concurring). Justice Souter examined the history of the Religion Clauses of the First Amendment to determine whether they prohibited the government from favoring all religions. *Id.* at 2670 (Souter, J., concurring). Justice Souter, having examined the evolution of the First Amendment from its initial draft through the final version, concluded that the drafters not only rejected language that would allow the establishment of a particular religion, but also rejected language that would permit the government to favor all religions. *Id.*

128 *Id.* at 2667-70 (Souter, J., concurring) (citations omitted). Justice Souter had faith in the Court's precedent, stating: "Such is the settled law. Here, as elsewhere, we should stick to it absent some compelling reason to discard it." *Id.* at 2668 (Souter, J., concurring).

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

130 *Id.* at 2671-73 (Souter, J., concurring) (citing Allegheny County v. ACLU, 492 U.S. 573 (1989); Wallace v. Jaffree, 472 U.S. 38 (1985); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Epperson v. Arkansas, 393 U.S. 97 (1968)). Justice Souter explained that in *Allegheny County*, for example, the Court invalidated a state's practice of displaying a nativity scene, not because it coerced anyone to view the display, but because it represented an impermissible state endorsement of religion. *Id.* at 2672 (Souter, J., concurring) (citing *Allegheny County*, 492 U.S. at 589-94, 598-602). Similarly, in *Wallace*, the Justice continued, the Court struck down a "moment of silence" statute that did not coerce student participation in prayer but did convey a message of government endorsement of religion. *Id.* (citing *Wallace*, 472 U.S. at 61). Justice Souter further noted that the Court invalidated an "anti-evolution" statute in *Epperson*, not on the basis of coercion, but because it had a purely religious purpose. *Id.* (citing *Epperson*, 343 U.S. at 89). Finally, Justice Souter reviewed the case of *Grand Rapids*, in which the Court invalidated a state's practice of sending public school teachers to religious schools to teach secular classes. *Id.* The Justice explained that even though no one was coerced to participate, the

sary element in an Establishment Clause violation.[131]

Justice Scalia, joined by Chief Justice Rehnquist, Justice White and Justice Thomas, dissented.[132] Justice Scalia began by criticizing the majority for eradicating a tradition dating back to the first public school graduation ceremony.[133] Justice Scalia indicated that the nature of constitutional principles should not depend upon the theories of individual Justices, but should be rooted in the nation's history and the intent of the founding fathers.[134] The dissent determined that these standards, applied to the case at bar, would compel a result different than that reached by the majority.[135]

The dissent also disputed the majority's finding that the state controlled the prayers.[136] Justice Scalia reasoned that the school's principal did not draft, edit, or censor the invocation.[137] Justice Scalia acknowledged that the principal invited the rabbi to speak at the ceremony, provided him with a pamphlet, and advised him that the invocation should be nonsectarian, but denied that the principal's conduct amounted to state control of a reli-

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state conveyed a message of state approval of religion. *Id.* (citing *Grand Rapids*, 473 U.S. at 397).

131 *Id.*

132 *Id.* at 2678 (Scalia, J., dissenting).

133 *Id.* at 2679-80 (Scalia, J., dissenting). The Justice noted that "[b]y one account, the first public-high-school graduation ceremony took place in Connecticut in July 1868 . . . when '151 seniors from Norwich Free Academy marched in their Sunday suits and dresses into a church hall and waited through majestic music and long prayers.' " *Id.* at 2680 (Scalia, J., dissenting) (citation omitted). Justice Scalia explained that nonsectarian prayer is not only acceptable at a high school graduation ceremony, but is also part of traditional American celebrations in general. *Id.* at 2679 (Scalia, J., dissenting). *See generally* MCMILLAN, *supra* note 51, at 75-119 (providing an expansive discussion of the history of religion in the public schools).

134 *Lee*, 112 S. Ct. at 2679 (Scalia, J., dissenting). Justice Scalia declared that, because the majority was so "oblivious" to the nation's history, a review was in order. *Id.* Justice Scalia quoted language from the inaugural addresses of George Washington, Thomas Jefferson, James Madison, and George Bush, each of which contained exhortations for divine guidance. *Id.* at 2679-80 (Scalia, J., dissenting). The Justice declared that Congress and the Judiciary also engage in religious practices. *Id.* at 2680 (Scalia, J., dissenting). Justice Scalia also cited the Court's decision in Marsh v. Chambers, 463 U.S. 783, 787 (1983), which validated the Nebraska state legislature's practice of opening each session with a prayer. *Lee*, 112 S. Ct. 2680 (Scalia, J., dissenting). The Supreme Court's own sessions, the Justice explained, open with the invocation "God save the United States and This Honorable Court." *Id.*

135 *Lee*, 112 S. Ct. at 2686 (Scalia, J., dissenting). Justice Scalia expressed that "the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it." *Id.*

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

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

gious exercise.[138]

Furthermore, Justice Scalia disagreed with the majority's definition of coercion.[139] Justice Scalia doubted that the students were really coerced into doing anything.[140] The type of coercion prohibited by the Establishment Clause, the Justice opined, is of a stronger sort than that contemplated by the majority.[141] Examining past cases where the Court invalidated religious practices in the schools, the Justice observed that the state action was

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138 *Id.*

139 *Id.* Justice Scalia observed that the majority relied primarily on a coercion analysis to invalidate the invocation and ignored the standards enunciated in *Lemon v. Kurtzman*. *Id.* at 2685 (Scalia, J., dissenting). While Justice Scalia approved of the majority's failure to utilize those standards, the Justice lamented that "the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself." *Id.*

140 *See id.* at 2681-82 (Scalia, J., dissenting). The Justice exclaimed that the idea that a student who chooses to sit during the invocation can be deemed to have participated in the prayer "is nothing short of ludicrous." *Id.* at 2681 (Scalia, J., dissenting). Justice Scalia opined that it was also a considerable stretch in reasoning to say that a student who simply stands when all others bow their heads could be thought to have joined in the exercise. *Id.* at 2682 (Scalia, J., dissenting). Justice Scalia argued that even if an objector to the prayer were "subtly coerced" to stand, the prayer should still be upheld. *Id.* The Justice maintained that the state's interest in accommodating religion constitutionally trumps the student dissenters' rights to be free from subtle coercion. *Id.*

Justice Scalia further explained that the Court neglected to consider that the students actually rose for the Pledge of Allegiance and remained standing for the invocation. *Id.* Justice Scalia observed that the phrase "under God" in the Pledge of Allegiance, under the majority's analysis, would subject the Pledge to the same scrutiny given to the invocation. *Id.* Although the Court had previously held that no student could be forced to recite the Pledge, Justice Scalia queried whether students could not even be compelled to maintain respectful silence while the Pledge was recited. *Id.* (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

The dissent also criticized the majority for declining to decide whether the psychological coercion exerted on high school students would be permitted by the Establishment Clause where mature adults are concerned. *Id.* Justice Scalia asserted that high school graduation was a symbolic passage from childhood to young adulthood and disagreed with the Court's treatment of high school students "as though they were first-graders." *Id.* Justice Scalia queried whether the Court would now develop a jurisprudence which differentiates between immature and mature adults. *Id.*

141 *Id.* at 2683 (Scalia, J., dissenting). Justice Scalia asserted that "[t]he coercion that was a hallmark of establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Id.* In colonial Virginia, Justice Scalia explained, the Church of England controlled the rites given by ministers, required church attendance, and taxed citizens to support the established church. *Id.* (citation omitted). The Justice agreed that the Establishment Clause proscribes such action, which constitutes "a brand of coercion that, happily, is readily discernable to those of us who have made a career of reading the disciples of Blackstone rather than of Freud." *Id.* at 2683-84 (Scalia, J., dissenting).

deemed coercive because the students were subject to compulsory school attendance laws.[142] Justice Scalia noted that these cases involved an instructional setting where students' parents were not present to counter the effects of peer pressure.[143] The Justice explained that there was no coercion in *Lee* because it involved a voluntary ceremony that students attended with their parents.[144]

Finally, the dissent contended that the majority failed to address adequately the interests of those who desired the prayer.[145] Justice Scalia argued that prayer is not just a private activity, but rather one that many adherents would choose to do in public.[146] The Justice asserted that when a group of diverse people pray together, the net result is a positive one.[147] Justice Scalia concluded that the majority's decision to favor a non-believer, who merely suffered the inconvenience of standing in respectful silence, at the expense of many who desired voluntary prayer, was senseless in policy and unsupported in law.[148]

The *Lee* decision marks the first time the Supreme Court has struck down a government practice respecting religion solely on the basis of "coercion."[149] According to the majority, there ex-

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142 *Id.* at 2684 (Scalia, J., dissenting) (citing Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963); Engel v. Vitale, 370 U.S. 421, 430 (1962)). Justice Scalia explained that in both *Engel* and *Schempp*, the Court emphasized that students were legally compelled to attend school. *Id.* The issue presented in the framework of legal coercion, the Justice asserted "is quite different from the question of whether forbidden coercion exists in an environment *utterly devoid of legal compulsion*." *Id.* at 2684-85 (Scalia J., dissenting).

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

144 *Id.*

145 *Id.*

146 *Id.* at 2685-86 (Scalia, J., dissenting). Justice Scalia explained that the majority's inquiry, whether the Establishment Clause prohibited the state from subjecting student dissenters to psychological coercion, missed the Constitutional issue in the case. *Id.* The real question, Justice Scalia continued, was whether the Constitution mandated that the religious majority succumb to the student dissenters. *Id.* at 2686 (Scalia, J., dissenting). "As the age-old practices of our people show," Justice Scalia concluded, "the answer to that question is not at all in doubt." *Id.*

147 *See id.*

148 *Id.* The dissent acknowledged that no one should be forced to participate in religion, but thought it "a shame" that the Court had deprived the American people the opportunity to join in prayer voluntarily. *Id.*

149 *See id.* at 2664 (Blackmun, J., concurring) (noting that coercion is not a necessary, but a sufficient, condition to finding a violation of the Establishment Clause). The potential for coercion in the public schools was mentioned in Zorach v. Clauson, 343 U.S. 306, 311-12 (1952), and Engel v. Vitale, 370 U.S. 421, 430-31 (1962), but was never utilized as an independent basis to invalidate a state law. *See Lee*, 112 S. Ct. at 2671 (Souter, J., concurring) (noting that the Court "could not adopt [a coercion analysis] without abandoning our settled law"). Just three years before

ists "subtle coercive pressure"[150] in the public school environment, which warrants special protection for impressionable young people against the influences of government-sponsored religion.[151] The *Lee* decision, therefore, apparently forecloses the possibility of any state-sponsored prayer in the public schools.[152] Even a voluntary, two-minute, nondenominational prayer before an audience of high school graduates will not be permitted so long as the state has control of the exercise.[153]

The four-justice dissent, on the other hand, outlined a more rugged standard for coercion.[154] The dissent would find an Establishment Clause violation only where an unwilling participant was legally coerced into a religious practice.[155] Therefore, even if Deborah Weisman was subtly coerced to participate in the prayer, the dissent would not have found an Establishment Clause violation.[156] Thus, while the Court is unified as to the

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the *Lee* decision, the Court had explicitly rejected the coercion analysis used to invalidate the state practice at issue in *Lee*. *See* Allegheny County v. ACLU, 492 U.S. 573, 597-98 n.47 (1989). Despite the utilization of a new test, the Court did not stray from a long line of precedent in which almost every state attempt to introduce prayer into the public school setting had been invalidated. *See Lee*, 112 S. Ct. at 2667-70 (Souter, J., concurring).

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

151 *Id. See* Edwards v. Aguillard, 482 U.S. 578 (1987). In *Aguillard*, Justice Brennan, writing for the Court, stated:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.

Id. at 583-84.

152 *See Lee*, 112 S. Ct. at 2658-59. The Court recognized that attendance at the ceremony at issue in *Lee* was in a real sense compulsory, and that students and teachers, by participating in the prayer, created a subtle pressure on other attending students to participate. *Id.* at 2658-59. The Court concluded that "the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position." *Id.*

153 *See id.* at 2655-61.

154 *See id.* at 2683 (Scalia, J., dissenting).

155 *Id.* Justice Scalia asserted:

> [T]here is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman—with no one legally coerced to recite them—violated the Constitution of the United States. To the contrary, they are so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself.

Id. at 2684.

156 *See id.* at 2683 (Scalia J., dissenting).

principle that the state may not compel or coerce anyone to say a prayer,[157] there is substantial division as to what degree of "coercion" is necessary for a finding of unconstitutionality.[158]

While there was an expectation that the Court might revamp or at least refine the *Lemon* test,[159] the Court here did not need to look beyond the finding of coercion.[160] Rather than analyze the district and circuit courts' application of *Lemon* in deciding the *Lee* case, the Court simply found that coercion was a sufficient condition precedent to unconstitutionality.[161] Perhaps this methodology will place lower courts in a quandary as to the proper test in Establishment Clause cases. It is clear, nevertheless, that constitutional adjudication in this area continues to be "delicate and fact sensitive."[162]

Though the courts are left without fixed standards, Justice

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157 *See id.* at 2686 (Scalia, J., dissenting)

158 *See id.* at 2658-59 ("government may no more use social pressure to enforce orthodoxy than it may use more direct means"); *cf. id.* at 2684 (Scalia, J., dissenting) ("there is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman—with no one legally coerced to recite them—violated the Constitution"). Justice Blackmun and Justice Souter each concurred separately, partly to express that coercion is not a necessary element in an Establishment Clause violation. *See id.* at 2664 (Blackmun, J., concurring); *id.* at 2672 (Souter J., concurring).

159 *See id.* at 2655; Mawdsley & Russo, *supra* note 5, at 201 (asserting that the Supreme Court was likely to reformulate the *Lemon* test in the *Lee* case).

160 The Court's jurisprudence in this area is founded on the basic premise that the Constitution has erected a "wall of separation" between government and religion. Everson v. Board of Educ., 330 U.S. 1, 16 (1947). In Abington School Dist. v. Schempp, 374 U.S. 203 (1963), the Court announced the purpose and primary effect test. *Id.* at 222. The entanglement prong was added in Waltz v. Tax Comm'n, 397 U.S. 664, 674 (1970), and the three pronged test was assembled in the case of Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). Justice O'Connor has recently proposed that the inquiry should be whether the challenged government act has the purpose or primary effect of endorsing religion. *See* Lynch v. Donnelly, 465 U.S. 668, 687-91 (1984) (O'Connor, J., concurring). The Court has since apparently adopted Justice O'Connor's view. *See* Wallace v. Jaffree, 472 U.S. 38, 60-61 (1985). Despite this long line of precedent and apparently clear tests, the circuit courts continue to be split on some Establishment Clause issues. *See, e.g.*, *supra* note 20.

161 *See Lee*, 112 S. Ct. at 2685 (Scalia, J., dissenting). The Supreme Court also refused to apply the *Lemon* test in Marsh v. Chambers, 463 U.S. 783 (1983). *See supra* note 70 (discussing *Marsh*).

162 *See Lee*, 112 S. Ct. at 2661. In past cases the Court has particularly relied on the *Lemon* test. *See id.* at 2663-64 n.4 (Blackmun, J., concurring) (explaining that since 1971, the Court has utilized the *Lemon* test in thirty out of thirty-one Establishment Clause cases). Recently in *Marsh v. Chambers*, however, the Court did not apply the test. *See* Marsh v. Chambers, 463 U.S. 783 (1983). The following year, the Supreme Court decided *Lynch v. Donnelly*, and utilized what Justice Brennan, in dissent, called a "relaxed application of the *Lemon* test." Lynch v. Donnelly, 465 U.S. 668, 713 (1984) (Brennan, J., dissenting). The Court's failure to apply the

Scalia's dissent provides a method by which the states might avoid the result reached by the majority.[163] According to Justice Scalia, to avoid a constitutional violation, the school would merely have to announce that no one is compelled to join in the prayer, and that standing or sitting in respectful silence during the invocation does not constitute participation in the exercise.[164] In light of the Court's precedent, however, it is likely that Justice Scalia has underestimated the Court's resolve to restrain the states from establishing religious practices in the public schools.[165]

A more effective method of avoiding constitutional scrutiny might be to remove partially the state from the enterprise. If the selection of a graduation speaker is left to private individuals such as parents and students, it may be less likely that the Court would find an Establishment Clause violation. Even the broadest reading of the Establishment Clause could not preclude private individuals from "establishing" religion. Second, the Court has twice upheld religious practices in the schools where the students and parents, not the state, desired the religious practice.[166] Therefore, both the text of the Constitution and Supreme Court precedent support the proposition that an invocation at a public high school graduation ceremony would be permissible if the state took no part in the religious elements of the exercise.

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test in *Lee* and heavy criticism of the test from members of the Court and various scholars leave the future of the *Lemon* analysis uncertain at best.

163 *See Lee*, 112 S. Ct. at 2685 (Scalia, J., dissenting).

164 *Id.*

165 In the early school prayer cases, upon which the *Lee* Court relied, there were stipulations that participation in the school prayer was voluntary. *Id.* at 2660 (citing Abington School Dist. v. Schempp, 374 U.S. 203, 224-25 (1963); Engel v. Vitale, 370 U.S. 421, 430 (1962)). The *Lee* majority explained that the voluntary nature of participation did not save the prayer in those cases, and it did not save the prayer in this case. *Id.*

166 *See* Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990); Zorach v. Clauson, 343 U.S. 306 (1952).