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## Lemon is Alive and Kicking: Using the Lemon Test to Determine the Constitutionality of Prayer at High School Graduation Ceremonies

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# LEMON IS ALIVE AND KICKING: USING THE LEMON TEST TO DETERMINE THE CONSTITUTIONALITY OF PRAYER AT HIGH SCHOOL GRADUATION CEREMONIES

*Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence . . . . It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely . . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.<sup>1</sup>*

## I. INTRODUCTION

Pat Baker, a senior at the local public high school, was thinking of graduation day.<sup>2</sup> All of his family and friends would be there to share in the joyous event. Pat's graduation day would begin with him wearing his cap and gown to church where all the graduates from the congregation would be honored. Then, Pat and his family would have brunch at the local diner, followed by the Baccalaureate service at the auditorium. Finally, Pat envisions the graduation service itself. After the processional, all of the graduates stand for the Pledge of Allegiance. After saying the Pledge of Allegiance, a brief invocation is read before many speeches and the distribution of diplomas. At the end of the ceremony, a benediction is performed. To Pat, the inclusion of an invocation and benediction enhances the graduation ceremony. Pat is grateful and wants to give thanks to God for providing him with guidance in achieving his diploma. High school graduation without prayer would be inconceivable for Pat.

Another senior, Tammy Faye Robertson, is remembering her own past experiences with high school graduation ceremonies. Tammy dreads attending the graduation ceremony. Tammy's apprehension about attending the upcoming graduation ceremony stems from

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<sup>1</sup> *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J., dissenting).

<sup>2</sup> This is a fictitious story made up for the purpose of this Note.

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attending the graduation of her older sister in which prayers were included. Tammy does not want to listen to prayers during her high school graduation ceremony. Graduating from high school is a joyous event for most people. Yet, if the graduation ceremony contains prayers, it will not be a joyful event for Tammy.<sup>3</sup> Tammy feels that it is her right under the First Amendment<sup>4</sup> of the United States Constitution to be free from being subjected, against her will, to other people's views about religion. Tammy believes that if there is some type of prayer given during the graduation ceremony her constitutional rights will be violated; it will be like the government is giving its seal of approval on religion. To Tammy, prayer and religion are a private matter and should not be a part of a public high school graduation ceremony. High school graduation with prayer would be distressing for Tammy. The court system will have to be utilized to resolve the dispute of whether to allow prayer at the graduation ceremony.

Despite widespread criticism<sup>5</sup> of the test developed by the United States Supreme Court in *Lemon v. Kurtzman*<sup>6</sup> to analyze Establishment

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<sup>3</sup> Sigmund Freud expressed: "[A] religion, even if it calls itself the religion of love, must be hard and unloving to those who do not belong to it." SIGMUND FREUD, *GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO* 30 (1967).

<sup>4</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

<sup>5</sup> See *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) ("[T]he internment of [*Lemon*] may be the one happy by product of the Court's otherwise lamentable decision."); *County of Allegheny v. ACLU of Greater Pittsburgh*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order."); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (stating a "pessimistic evaluation" of *Lemon*); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (voicing "doubts about the entanglement test"); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (commenting that the *Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results . . ."). See generally Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 359 ("*Lemon* has ceased to operate as a general Establishment Clause test."); Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 468 ("[T]he three-part test for compliance with the Establishment Clause announced in *Lemon v. Kurtzman* is possibly the most maligned constitutional standard the Court has ever produced."); *Laura A. Bowers, M.C.L. v. Florida: A Vignette of the Inconsistencies Plaguing Establishment Clause Jurisprudence*, 27 STETSON L. REV. 1437, 1459 (1998) ("The Supreme Court meant to clarify the ambiguous First Amendment Establishment Clause in *Lemon*. However, when the *Lemon* standard failed to work consistently, the Court fumbled with variations, resulting in individual Justices steadily withdrawing their support for the test - and confusing the country about *Lemon's* applicability and staying-power."); Michael W. McConnell, *Stuck with a Lemon: A New Test*

Clause issues, this Note proposes that it is the appropriate test and may be applied properly to determine the constitutionality of prayer in high school graduation cases.<sup>7</sup> The *Lemon* test is the best test available at this time for analyzing state action that deals with a proposed establishment of religion.<sup>8</sup> The *Lemon* test provides the best protection for individual freedom of separation of church and state. If the challenged action passes all three prongs of the *Lemon* test, its purpose will, by definition, be secular and, therefore, not encroach on an individual's civil liberties. In addition, it will not intend to advance or inhibit religion, and it will not excessively entangle the government with religion.

Section II of this Note will discuss the history of the First Amendment in relation to religion and the development of the separation of Church and State in relation to prayer at public schools.<sup>9</sup> Section III will analyze the development of the tests used by the Supreme Court in determining violations of the Establishment Clause.<sup>10</sup> Section IV will examine how the federal circuit courts analyze prayer in high school graduation cases and will discuss the different tests that the federal circuit courts apply.<sup>11</sup> Finally, Section V will propose a judicial approach which stipulates that the *Lemon* test should be used in all cases

for Establishment Clause Cases Would Help Ease Current Confusion, A.B.A. J., Feb. 1997, at 46 ("[T]he problems with the [*Lemon*] test are numerous.").

<sup>6</sup> 403 U.S. 602 (1971). The *Lemon* Test sets out three elements that courts look at in deciding if a statute violates the Establishment Clause: (1) the statute must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive government entanglement with religion. *Id.* at 612-13.

<sup>7</sup> See *infra* notes 236-59 and accompanying text.

<sup>8</sup> See generally Ivan E. Bodensteiner, *The "Lemon Test," Even with all its Shortcomings, is not the Real Problem in Establishment Clause Cases*, 24 VAL. U. L. REV. 409 (1990) ("[T]he factors listed by the Court in *Lemon* at a minimum encourage us to discuss the same issues, and maybe that is all we can expect of any standard or test in this area of constitutional interpretation."); Haran C. Rashes, *Try, Try, Try Again: The Kiryas Joel Village School District and the Separation of Shul, School, and State*, 29 U. TOL. L. REV. 485, 502 (1998) (citing *Grumet v. Cuomo*, 625 N.Y.S.2d 1004, 1005 (N.Y. Sup. Ct. 1995) (per Kahn, J.)) ("[A]lthough criticized, the *Lemon* case provides a sound analytical framework and there is clearly no consensus on a substitute."); Carole F. Kagan, *Squeezing the Juice from Lemon: Toward a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621, 632 (1995) ("Justice Scalia was right in suggesting that, despite the seeming aimlessness of the Court's Establishment Clause jurisprudence and Justice O'Connor's call to discard the *Lemon* test, the basic framework of *Lemon* still informs the majority's Establishment Clause jurisprudence.").

<sup>9</sup> See *infra* notes 13-49 and accompanying text.

<sup>10</sup> See *infra* notes 50-141 and accompanying text.

<sup>11</sup> See *infra* notes 142-234 and accompanying text.

that involve prayer at public high school graduation and Establishment Clause challenges.<sup>12</sup>

## II. HISTORY OF THE FIRST AMENDMENT: THE FOUNDING FATHERS AND DEALING WITH PRAYER AT HIGH SCHOOL GRADUATION

At the time of the adoption of the Constitution, America was a Christian nation; the Constitution reflects the Christian consciousness of the people.<sup>13</sup> Since that time, the United States has gone from a nation founded with a Christian conscience, one that allowed for freedom of religion and only prohibited the national government from establishing a national church, to a nation that holds that *any aid or benefit* to religion from government actions is unconstitutional.<sup>14</sup> Furthermore, the Supreme Court extended its Establishment Clause meaning from

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<sup>12</sup> See *infra* notes 236-59 and accompanying text.

<sup>13</sup> JOHN W. WHITEHEAD, *THE SEPARATION ILLUSION: A LAWYER EXAMINES THE FIRST AMENDMENT 93-94* (1977). Justice Story stated:

Probably at the time of the adoption of the Constitution, and of the amendment to it . . . the general, if not the universal, sentiment in America was that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation if not universal indignation.

*Id.* (citing Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law*, 62 HARV. L. REV. 149, 150 (1928)).

See also *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984). "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Id.* See, e.g., Raul M. Rodriguez, *God is Dead: Killed by Fifty Years of Establishment Clause Jurisprudence*, 23 ST. MARY'S L.J. 1155, 1162-65 (1992).

<sup>14</sup> The Supreme Court in *Everson v. Board of Education*, 330 U.S. 1 (1947), gave its definition of the Establishment Clause:

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 or 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 . . . . 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.

including no aid or benefit to also including no coercion by the government.<sup>15</sup>

In deciding if there is coercion on the part of the government, the Supreme Court has not been consistent. The Court concluded that it was not coercive for the government to employ a chaplain to open sessions of Congress with a prayer.<sup>16</sup> In addition, the Court will allow a recitation of the Pledge of Allegiance<sup>17</sup> during a high school graduation ceremony. It will not, however, allow a non-sectarian prayer<sup>18</sup> to be given by a local clergy member during a high school graduation.<sup>19</sup> The courts generally reason that the customary use of the phrase "under God" in the Pledge

<sup>15</sup> See *Lee*, 505 U.S. at 587 ("[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . .").

<sup>16</sup> *Marsh v. Chambers*, 463 U.S. 783, 786-87, 791 (1983) (forgoing the *Lemon* Test and instead using the unbroken history of more than 200 years of opening legislative sessions with prayer to find the practice constitutional). See also *Lee*, 505 U.S. at 635 (Scalia, J., dissenting) (discussing the opening of Supreme Court sessions with "God save the United States and this Honorable Court"); *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (discussing the fact that every branch of the United States armed forces employs chaplains).

<sup>17</sup> The Pledge of Allegiance to the Flag:

"I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.", should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.

36 U.S.C. § 172 (1994).

<sup>18</sup> Webster's dictionary defines non-sectarian as: "Not associated with or limited to a particular religious denomination." WEBSTER'S II NEW COLLEGE DICTIONARY 745 (2d ed. 1995). The invocation delivered in *Lee* read as follows:

God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it. For the liberty of America, we thank You. May these new graduates grow up to guard it. For the political process of America in which all its citizens may participate, for its court system where all can 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 [here today] so live that they 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.

*Weisman v. Lee*, 908 F.2d 1090, 1098 n.\* (1st Cir. 1990) (Campbell, J., dissenting).

<sup>19</sup> *Lee*, 505 U.S. at 638-39 (Scalia, J., dissenting) (questioning "[H]ow could [the Court] observe, with no hint of concern or disapproval, that students stood for the Pledge of Allegiance, which immediately preceded [the local clergy member's] invocation?").

of Allegiance has deprived the phrase of any religious significance.<sup>20</sup> Also, the courts generally treat high school seniors differently than adults under the Constitution.<sup>21</sup> The courts try to provide more protection for adolescents than for mature adults when fundamental rights are at issue.<sup>22</sup>

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<sup>20</sup> BARRY LYNN ET AL., *THE RIGHT TO RELIGIOUS LIBERTY: THE BASIC ACLU GUIDE TO RELIGIOUS RIGHTS* 16 (2d ed. 1995).

<sup>21</sup> See *Stein v. Plainwell Community Schs.*, 822 F.2d 1406, 1409 (6th Cir. 1987).

Like federal, state and local legislative and court sessions throughout the country, there are thousands of public graduation exercises annually. They are frequently memorable occasions for students, parents and friends. To prohibit entirely the tradition of invocations at graduation exercises while sanctioning the tradition of invocations for judges, legislators and public officials does not appear to be a consistent application of the principle of equal liberty of conscience.

*Id.*

*Cf. Lee*, 505 U.S. at 639 (Scalia, J., dissenting) ("Many graduating seniors . . . are old enough to vote. Why, then does the Court treat them as though they were first-graders? Will we soon have a jurisprudence that distinguishes between mature and immature adults?"); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 299-300 (1963) (Brennan, J., concurring) ("Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect."); *Lee*, 505 U.S. at 593 (using research from psychology reports to say that adolescents are often susceptible to pressure from their peers towards conformity in matters of social convention). *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). The Court, in holding that students had a right to protest the Vietnam War by wearing black arm bands, stated the following:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state. In our system, students may not be regarded as closed-circuit recipients of only that which the State wishes to communicate.

*Id.* at 511.

*Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682, 691 (D. Utah 1991) (commenting that "[i]t should be recognized that high school students are not 'babes in arms' and that in fact they are mature enough to understand that a school does not endorse or promote a religion by permitting prayer" which does not involve direct or indirect coercion and it is non-sectarian, non-proselytizing and non-denominational).

<sup>22</sup> See *Schempp*, 374 U.S. at 299-300; *Lee*, 505 U.S. at 593. *But see Lee*, 505 U.S. at 639 (Scalia, J., dissenting); *Tinker*, 393 U.S. at 511; *Albright*, 765 F. Supp. at 691.

### A. Founding Fathers' Intention to Build a Wall of Separation Between Church and State

When colonists crossed the Atlantic Ocean from England to America, some were seeking business opportunities<sup>23</sup> while others were seeking religious freedom.<sup>24</sup> Religion was an important part of the founding of America.<sup>25</sup> Many of the drafters of the Constitution were Christians, and the others lived their lives based on biblical principles and Christian presuppositions.<sup>26</sup> One of the major concerns when adopting the Bill of Rights was the freedom of religion.<sup>27</sup> This concern was dealt with in the

<sup>23</sup> PETER J. FERRARA, *RELIGION AND THE CONSTITUTION: A REINTERPRETATION* 17 (1983). Jamestown, the first permanent English settlement in America, was settled by investors looking to make a profit from the new colony. *Id.*

<sup>24</sup> The Pilgrims who landed at Plymouth Rock were looking to establish a new settlement where they could put their ideals of worship to practice. *Id.* at 17-18.

<sup>25</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 9 (1947) ("A large portion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches."). See also Charles J. Russo, *Prayer at Public School Graduation Ceremonies: An Exercise In Futility or A Teachable Moment?*, 1999 BYU EDUC. & L.J. 1, 4 ("[T]he earliest European settlers traveled to America in search of religious freedom."); FERRARA, *supra* note 23, at 17-18 (discussing religion as a dominant cultural factor in the colonies).

<sup>26</sup> WHITEHEAD, *supra* note 13, at 89. See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1158-59 (2d ed. 1988). Summarizing the three main views of religion among key framers:

[A]t least three distinct schools of thought . . . influenced the drafters of the Bill of Rights: first, the evangelical view (associated primarily with Roger Williams) that 'worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained;' second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interests (public and private) 'against ecclesiastical depredations and incursions;' and third, the Madisonian view that religious and secular interests alike would be advanced best by diffusing and decentralizing power so as to assure competition among sects rather dominance by any one.

*Id.*

See, e.g., C. GREGG SINGER, *A THEOLOGICAL INTERPRETATION OF AMERICAN HISTORY* 44 (1969) ("[I]t is conceded that a . . . Christian philosophy permeated the thinking and actions of the members.").

<sup>27</sup> WHITEHEAD, *supra* note 13, at 89. The drafters of the First Amendment had two interrelated concerns they were dealing with in the religion clause. *Id.* The drafters wanted to prevent the federal government from establishing a national church, and this would allow the drafters to protect the state-preferred Christian denominations or state-established churches. *Id.* "[M]odernizing the language of the First Amendment, it would read like this today, The federal government shall make no law having anything to do with supporting a single church, or prohibiting the free exercise of religion by the states." *Id.* at 90. See also Gey, *supra* note 5, at 466 n.8. Setting out the viewpoint of Michael McConnell, Gey states:

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First Amendment to the United States Constitution and states in relevant part "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>28</sup>

The most quoted phrase dealing with the First Amendment focuses on "building a wall of separation between church and state;" however, nowhere is this phrase found in the First Amendment or in the Constitution.<sup>29</sup> The phrase originated in 1802 when Thomas Jefferson wrote to a group of Baptists in Danbury, Connecticut that the purpose of the First Amendment was to keep church and state separate.<sup>30</sup> There are differing views, however, as to how much separation the Framers really intended.<sup>31</sup>

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[R]eligious liberty is the central value and animating purpose of the Religion Clauses of the First Amendment [whereas the] separation of church and state – a phrase that does not appear in the First Amendment or in the debates surrounding its adoption – is more problematic, a more contingent, ideal than is religious liberty.

*Id.* (quoting from Michael W. McConnell, *Accommodation Of Religion*, 1985 SUP. CT. REV. 1, 1).

<sup>28</sup> U.S. CONST. amend. I. This phrase contains two clauses: the first part is referred to as the "establishment clause" and the second part is referred to as the "free exercise clause." ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 967 (1997). The establishment clause seems to be directed at the government, while the free exercise clause safeguards individual liberties. *Id.* at 968. However, the two clauses are complementary and co-guarantors in protecting freedom of religious belief and actions. *Id.* While the Free Exercise Clause could also be dealt with under this issue, this Note will be limited to discussing the Establishment Clause.

<sup>29</sup> WHITEHEAD, *supra* note 13, at 89.

<sup>30</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1878), quoting from Thomas Jefferson's reply to a committee of the Danbury Baptist Association in 1802:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, – I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof', thus building a wall of separation between church and State.

*Id.*

<sup>31</sup> "Unfortunately, the men who framed the First Amendment did not explain, at least in detail, what actions they collectively believed the Establishment Clause encompassed." John E. Joiner, *A Page of History or a Volume of Logic?: Reassessing the Supreme Court's Establishment Clause Jurisprudence*, 73 DENV. U. L. REV. 507, 511 (1996). See Rodriguez, *supra* note 13, at 1164. Mr. Rodriguez inferred from the debate between the Framers concerning the adoption of a Religious Clause:

[I]t is clear that the Establishment Clause was intended to protect religion from government by preventing the establishment of a

*B. Development of Separation of Church and State in Relation to Prayer at High School Graduation Ceremonies*

The courts, as a part of the judicial system, protect the rights of citizens that are guaranteed by the United States Constitution.<sup>32</sup> The Supreme Court's early interpretation of the Establishment Clause in cases involving public schools and religion was a strict no-aid interpretation, which prohibited any policy adopted by the government that would provide a benefit or aid to religion.<sup>33</sup> The Supreme Court concluded that simply allowing religious expression within the public schools would advance religion.<sup>34</sup> On the other side of the debate, Harvard Law School Dean Erwin N. Griswold advanced the concept that "a policy of religious freedom, neutrality and tolerance does not mean that we have to give up our heritage and culture, when acting in the public sector."<sup>35</sup>

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national religion. This is a far cry from a "wall of separation" in that the framers in no way intended to exclude religion, but rather to include and protect it . . . .

*Id.*

See also III JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 726 (1970) (commenting on Framers' intent). Mr. Story stated that probably "[when the First Amendment was adopted], the general, if not universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience and the freedom of religious worship." *Id.* Compare *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) (stating that the First Amendment erected a wall between church and state), with *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (speaking of Jefferson's "wall of separation" quote, "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history . . .").

<sup>32</sup> U.S. CONST. art. III. (establishing a federal judiciary to hear cases and controversies). "[The] federal courts [are] uniquely suited for the protection of constitutional rights." CHEMERINSKY, *supra* note 28, at 33.

<sup>33</sup> FERRARA, *supra* note 23, at 60. See, e.g., William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall – A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 777 ("The separation principle . . . operated in both directions; it was meant to keep religion from entangling the state as well as to keep the churches free from the state influence that would have been the inevitable concomitant of state financial support.").

<sup>34</sup> FERRARA, *supra* note 23, at 60. Examples include the government banning students from praying or reading the Bible on the school lawn or not allowing Christian student groups to use classroom facilities during non-school hours on the same basis as other student clubs. *Id.* at 60-61.

<sup>35</sup> *Id.* at 62-63. Dean Griswold questioned:

In a country which has a great tradition of tolerance, is it not important that minorities, who have benefited so greatly from that tolerance, should be tolerant too, as long as they are not compelled to take affirmative action themselves, and nothing is done which they cannot

The first case to reach the Supreme Court dealing with the Establishment Clause and public schools was *Everson v. Board of Education*<sup>36</sup> in 1947. The Supreme Court held that the Establishment Clause of the First Amendment applied to public schools in *Everson*.<sup>37</sup> In *Everson*, the Court considered the issue of public funding for transportation of students to and from both parochial and public schools.<sup>38</sup> The Supreme Court upheld the policy as constitutional under the First Amendment.<sup>39</sup> Since the *Everson* decision, the history of the Court's precedents in dealing with the constitutionality of activities that involve public schools and religion has been a mixed path.<sup>40</sup>

The Court, for the first time, in 1962, dealt with prayer in public schools in *Engel v. Vitale*.<sup>41</sup> In *Engel*, it held that the practice of starting

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wait out, or pass respectfully by, without their own personal participation, if they do not choose to give it?

*Id.* at 62.

<sup>36</sup> 330 U.S. 1 (1947).

<sup>37</sup> *Everson*, 330 U.S. at 14-16 (concluding that the Establishment Clause binds state and local government when dealing with public schools).

<sup>38</sup> *Id.* at 18 (finding that the policy did not violate the First Amendment because it was a general program designed to help parents get their children safely to and from schools, regardless of their religion).

<sup>39</sup> *Id.*

<sup>40</sup> See generally *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that employees in a Title I program that provided remedial services on site in religiously-affiliated non-public schools to students who were educationally and economically disadvantaged did not violate the Establishment Clause); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (permitting a sign language interpreter to provide services on site in a religiously affiliated high school on the ground that since the student was the primary beneficiary, any aid that the school received was incidental); *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down the practice of a high school principal inviting a local clergy member to pray at the graduation ceremony as violating the Establishment Clause); *Wolman v. Walter*, 433 U.S. 229 (1977) (holding loan of books containing maps by state to parochial schools did not violate Establishment Clause); *Epperson v. Arkansas*, 393 U.S. 97 (1967) (finding that teaching evolution in public schools violated the First Amendment); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (striking down state-sponsored Bible readings and recitations of the Lord's prayer as violating the Establishment Clause); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that state-composed non-denominational opening prayers violated the First Amendment); *Zorach v. Clauson*, 343 U.S. 306 (1952) (finding release time programs that provided for religious instruction off campus were constitutional); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (finding in-school release time for religious purposes violated the Establishment Clause).

<sup>41</sup> 370 U.S. 421 (1962). The prayer at issue in this case was a non-denominational prayer that 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. The relevant issue in the case was not whether students were required to participate in the prayer, rather it was if there was an unconstitutional union between the government and religion. *Id.* at 430-31. The Court said that it was unconstitutional for the government to write the prayer

the school day with a non-denominational prayer violated the Constitution.<sup>42</sup> It was not until 1992 in *Lee v. Weisman*,<sup>43</sup> however, that the Court faced the issue of prayer in public school graduation ceremonies and held that clergy delivered prayer was unconstitutional.<sup>44</sup> A large majority of the American people disagreed with these two decisions of the Court in banning prayer in schools.<sup>45</sup> Despite these Supreme Court rulings, some school boards have recently found ways to circumvent the *Lee* decision and continue the practice of including prayers in high school graduation ceremonies.<sup>46</sup>

When a case is brought to challenge the constitutionality of prayer at a high school graduation ceremony, under the Establishment Clause, the lower courts are split as to what test to use.<sup>47</sup> Currently there are four different tests that have been used by the lower federal courts in such cases.<sup>48</sup> Consequently, there is disuniformity in this area of law where uniformity is necessary to guarantee consistent protection of the student rights and the rights of all involved in the graduation ceremony.<sup>49</sup>

and direct its reading within the public schools. *Id.* at 430. The Court's decision in *Engel* has been called one of its most controversial. See Joiner, *supra* note 31, at 525.

<sup>42</sup> *Engel*, 370 U.S. at 433.

<sup>43</sup> 505 U.S. 577 (1992).

<sup>44</sup> *Id.* at 583.

<sup>45</sup> ETHICS AND PUBLIC POLICY CENTER, RELIGIOUS LIBERTY IN THE SUPREME COURT: THE CASES THAT DEFINE THE DEBATE OVER CHURCH AND STATE 126 (Terry Eastland, ed. 1993) ("Polls showed that *Engel* . . . [was] opposed by large majorities of the American people."). See also Janet Reitman, *A Graduation Prayer*, SCHOLASTIC UPDATE, Sept. 7, 1998, available in 1998 WL 17440189 (criticizing the *Lee* ruling, school prayer advocates say the Supreme Court went too far in interpreting the separation of church and state and are contributing to the "moral decline" of America).

<sup>46</sup> See generally *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998), *withdrawn & vacated as moot*, 177 F.3d 789 (9th Cir. 1999) (finding that students chosen by academic ranking allowed to deliver speech of their choice at graduation, whether a prayer or not, did not violate the Establishment Clause); *Adler v. Duval County Sch. Bd.*, 851 F. Supp. 446 (M.D. Fla.), *aff'd*, 112 F.3d 1475 (11th Cir. 1994) (holding that there was no Establishment Clause violation where students were allowed to decide type of graduation speech); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992) (permitting seniors to vote on whether or not to have a prayer at graduation passed Establishment Clause and Coercion test). See, e.g., Christina Engstrom Martin, Comment, *Student-Initiated Religious Expression After Mergens and Weisman*, 61 U. CHI. L. REV. 1565, 1571 (1994) (stating that the district court in *Harris v. Joint School District No. 241* "emphasized that the Supreme Courts failure to prohibit all graduation prayer, despite recent opportunities to do so, showed that the Court would tolerate some prayer at public school ceremonies").

<sup>47</sup> See *infra* note 134.

<sup>48</sup> See *infra* notes 142-234 and accompanying text.

<sup>49</sup> See *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 282 (5th Cir. 1996). Judge Edith Jones stated in her dissent from a denial of a rehearing:

III. THE DEVELOPMENT OF THE FOUR TESTS: THE *LEMON* TEST, THE *MARSH* TEST, THE ENDORSEMENT TEST, AND THE COERCION TEST

In deciding Establishment Clause issues, the Supreme Court's precedent includes four different tests. The first test was developed in *Lemon* to deal with an education and Establishment Clause issue.<sup>50</sup> The next test was developed in *Marsh v. Chambers*<sup>51</sup> to uphold legislative prayer.<sup>52</sup> Third is the Endorsement test<sup>53</sup> which has not been used by itself to decide a graduation prayer case; however, it has been used in determining other types of Establishment Clause cases.<sup>54</sup> The final test,

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Sadly, this exercise of judicial boldness may be explained, though it cannot be justified, by the lack of guidance from the Supreme Court's Establishment Clause jurisprudence. The Court's decisions in this area more closely resemble ad hoc Delphic pronouncements than models of guiding legal principle. It is no wonder lower courts and the public are led astray. Religious liberty has invariably been the victim of the uncertainty.

*Id.*

See also Bowers, *supra* note 5, at 1455. "The problem created by [the Supreme Court's constructive abandonment] of *Lemon* concerns the lower courts that still have to apply the test in Establishment Clause cases. . . . [C]ourts bound by the *Lemon* test have misapplied it, thus warranting a clear answer regarding whether lower courts should keep applying the abandoned standard." *Id.*

<sup>50</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The *Lemon* Test sets out three elements that courts look at in deciding if a statute violates the Establishment Clause: (1) the statute must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive government entanglement with religion. *Id.* See *Madison Sch. Dist. No. 321*, 147 F.3d at 836. See also *infra* notes 57-76 and accompanying text.

<sup>51</sup> 463 U.S. 783 (1983). A "historical" analysis is used to determine the intent of the framers of the First Amendment and their view on the challenged practice. *Id.* at 787. See also *Stein*, 822 F.2d at 1409.

<sup>52</sup> See *infra* notes 77-97 and accompanying text.

<sup>53</sup> The Endorsement test analyzes whether a direct government action that endorses religion or a particular religious practice that makes adherence to religion relevant to a person's standing in the political community is invalid because it sends a message to those who do not adhere that they are outsiders. *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985). See also *Jones*, 977 F.2d at 968-70.

<sup>54</sup> See *infra* notes 98-116 and accompanying text. See, e.g., *Board of Educ. of the Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990) (applying endorsement test to find no violation, pursuant to the Equal Access Act, where public school facilities were used for meetings of religious organizations); *County of Allegheny v. ACLU of Greater Pittsburgh*, 492 U.S. 573 (1989) (finding unconstitutional the display of crèche in county court house by applying endorsement test); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-20 (1989) (holding that tax exemption for religious publications violated Establishment Clause and stating that at the very least the Establishment Clause prevents endorsement).

the Coercion test,<sup>55</sup> was developed in *Lee* to hold the school board's policy dealing with prayer at graduation unconstitutional.<sup>56</sup>

A. *The Lemon Test: Lemon v. Kurtzman*

The *Lemon* test has the longest tenure of all Establishment Clause tests. Despite the efforts to sink it, the *Lemon* test remains afloat.<sup>57</sup> In *Lemon*, the Supreme Court examined two state statutes which provided aid to religiously affiliated elementary and secondary schools.<sup>58</sup> The Supreme Court combined three principles that it had used in deciding previous cases involving the Establishment Clause to develop the *Lemon* test.<sup>59</sup> The *Lemon* test has three prongs and if a challenged practice or law under the Establishment Clause fails to meet any one of these prongs, it is unconstitutional.<sup>60</sup>

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<sup>55</sup> "[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . ." *Lee*, 505 U.S. at 577, 587; see also *ACLU of New Jersey v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1480 (3d Cir. 1996).

<sup>56</sup> See *infra* notes 117-41 and accompanying text. See also *Lee*, 505 U.S. at 587. The Court stated that it did not have to re-visit the *Lemon* test used in previous Establishment Clause cases because the government involvement in this case was so pervasive, "to the point of creating a state-sponsored and state-directed religious exercise in a public school." *Id.*

<sup>57</sup> Ralph D. Mawdsley, *Student Choice and Graduation Prayer: Division Among the Circuits*, 129 ED. LAW. REP. 553, 555 (1998).

<sup>58</sup> *Lemon*, 403 U.S. at 606. Pennsylvania adopted a statutory program that provided nonpublic elementary and secondary schools financial support by reimbursing the school for the cost of textbooks, teachers' salaries, and instructional materials in designated secular subjects. *Id.* Rhode Island adopted a statute where the State paid teachers in nonpublic elementary schools a supplement of 15% of their annual salary directly. *Id.* at 607. The Court stated that state aid had been given to church-related educational facilities under both statutes. *Id.*

<sup>59</sup> *Id.* at 612. The Court explained that through its history in dealing with the Establishment Clause three tests could be distinguished:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

*Id.* at 612-13.

<sup>60</sup> *CHEMERINSKY*, *supra* note 28, at 986 ("A law is unconstitutional if it fails any prong of the *Lemon* test."). See also *McCormell*, *supra* note 5, at 46 ("If a law or practice violates any one of [the three *Lemon*] criteria, it is deemed unconstitutional.").

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The first prong states that the statute must have a secular legislative purpose.<sup>61</sup> The purpose of keeping government from acting to advance religion is the very essence of the Establishment Clause and the rationale for the first prong.<sup>62</sup> Although the first prong requires the government to articulate a secular purpose for its actions, if the actions happen to coincide with religion, the action will not be defeated.<sup>63</sup> To pass the first prong, however, the secular purpose the government puts forth must be sincere and not a sham.<sup>64</sup> The first prong plays a vital role in Establishment Clause jurisprudence; it reminds the government to remain neutral in its actions.<sup>65</sup> In the *Lemon* case, the Court determined that both of the statutes at issue had secular purposes and, therefore, passed the first prong of the test.<sup>66</sup>

In articulating the second prong of the test, the Court stated that the statute's principle or primary effect must be one that neither "advances nor inhibits religion."<sup>67</sup> For a government activity to pass the second prong of *Lemon*, its essential effect must be secular and, if there is a non-

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<sup>61</sup> *Lemon*, 403 U.S. at 612. See, e.g., *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-36 (1987) (finding an exemption for religious organizations from Title VII's prohibition against discrimination in employment based on religion passed the first prong of *Lemon* because its permissible purpose was to relieve government interference with religious organizations defining and carrying out their religious missions).

<sup>62</sup> CHEMERINSKY, *supra* note 28, at 988.

<sup>63</sup> *Lemon*, 403 U.S. at 614. The Court discussed its prior holdings:

Our prior holdings do not call for total separation between church and state; total separation between church and state is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.... [Examples of necessary and permissible contacts are] [f]ire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws.

*Id.*

<sup>64</sup> *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.")

<sup>65</sup> "[The secular purpose requirement] reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share." *Wallace v. Jaffree*, 472 U.S. 38, 75-76 (1985).

<sup>66</sup> The statutes were intended to enhance the quality of the secular education in all schools. *Lemon*, 403 U.S. at 613.

<sup>67</sup> *Id.* at 612. See also *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) ("The effect prong [of *Lemon*] asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer... should render the challenged practice invalid.")

secular effect, it must be indirect, incidental, and remote.<sup>68</sup> The statutes in the present case were found by the Court to pass the second prong of the test.<sup>69</sup>

The third prong stated that the statute must not foster an excessive government entanglement with religion.<sup>70</sup> A practice or law violates the third prong when it requires a "comprehensive, discriminating, and continuing state surveillance."<sup>71</sup> The Supreme Court found that the two state statutes in *Lemon* created excessive entanglement between the government and religion and, thus, failed the third prong.<sup>72</sup> Even though the statutes passed the first and second prongs of the test, since they failed the third prong, they were struck down as violating the Establishment Clause.<sup>73</sup>

The *Lemon* test is supported by Supreme Court Justices that take a strict separationist approach to the Establishment Clause.<sup>74</sup> Justice Breyer and Justice Ginsburg, proponents of the strict separationist approach, have recently demonstrated that they will not vote to abolish the *Lemon* test.<sup>75</sup> Although the *Lemon* test framework was in place in

<sup>68</sup> *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 783-84 n.39 (1973).

<sup>69</sup> *Lemon*, 403 U.S. at 613. The Court looked into the legislative purposes for the statutes and found nothing that would lead to an intent on the part of the legislatures to advance religion. *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 619. Prof. Bodensteiner explains that prohibited entanglement can take on more than one form:

Such entanglement might take the form of a close working or supervisory relationship between church and state; government turning traditional government power over to religious bodies; government action or aid that leads to religiously motivated political divisiveness; government regulation, particularly in the employment relationship, which leads to litigation seeking exemptions for religious organizations; and government inquiry, through courts or agencies, into religious beliefs or doctrine.

Bodensteiner, *supra* note 8, at 411.

<sup>72</sup> *Lemon*, 403 U.S. at 614.

<sup>73</sup> *Id.* at 611.

<sup>74</sup> CHEMERINSKY, *supra* note 28, at 986. Mr. Chemerinsky explains "strict separationist" as "[t]he government should be, as much as possible, secular; religion should be entirely in the private realm of society." *Id.* at 977. See also *Everson v. Board of Educ.*, 330 U.S. 1, 31-32 (1947) ("The [First] Amendment's purpose . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.").

<sup>75</sup> See Erwin Chemerinsky, *Free Speech or Religious Freedom: Revisiting the Establishment Clause*, TRIAL, Dec. 1995, at 16. "Two cases this year – *Rosenberger v. Rector and Visitors*

1983 to deal with Establishment Clause cases, the Court adopted another approach in deciding the Constitutionality of opening a state legislative session with prayer. When the Court decided *Marsh v. Chambers*,<sup>76</sup> it did not use the *Lemon* test. Instead, the Court relied on a long historical background of allowing the challenged practice and found the government sponsored practice constitutional.

*B. The Marsh Test: Marsh v. Chambers*

In *Marsh*, a state legislator challenged the practice in the Nebraska Legislature of opening each of its sessions with a prayer.<sup>77</sup> A minister, chosen by the Executive Board of the Legislative Council and paid from a public fund, delivered the prayers.<sup>78</sup> The legislator asserted that the practice violated the Establishment Clause of the First Amendment and sought an injunction to stop the practice.<sup>79</sup> The district court held that the practice of an opening prayer did not violate the Establishment Clause.<sup>80</sup> It did hold, however, that the fact that the chaplain was paid from a public fund did violate the Establishment Clause.<sup>81</sup> The Eighth Circuit did not divide the issue and analyzed the practice as a whole.<sup>82</sup> Applying the *Lemon* test, it found that the practice violated all three elements of the test.<sup>83</sup> The Supreme Court, however, reversed the Eighth Circuit's ruling.<sup>84</sup>

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of the Univ. of Virginia, 515 U.S. 819 (1995) and Capitol Square Review and Advisory Board v.] Pinette, [515 U.S. 753, 772-83 (1995)] – clearly demonstrate that Breyer and Ginsburg will not vote to discard the *Lemon* test nor adopt the conservative justices, approach to the Establishment Clause.” *Id.*

<sup>76</sup> 463 U.S. 783 (1983).

<sup>77</sup> *Id.* at 784. Ernest Chambers was the legislator who challenged the policy. *Id.* at 785. Mr. Chambers also was a taxpayer of the State of Nebraska. *Id.*

<sup>78</sup> *Id.* Robert E. Palmer, a Presbyterian minister, had served as the legislative chaplain since 1965. *Id.* Mr. Palmer received \$319.75 per month for each month that the legislature was in session. *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See *Chambers v. Marsh*, 504 F. Supp. 585, 588 (D. Neb. 1980).

<sup>81</sup> *Id.* at 592.

<sup>82</sup> *Chambers v. Marsh*, 675 F.2d 228, 233. (8th Cir. 1982) (“Parsing out [the] elements [would lead to] an incongruous result . . .”).

<sup>83</sup> The purpose and primary effect of selecting the same minister for 16 years and publishing his prayers was to promote a particular religious expression; use of state money for compensation and publication led to entanglement. *Id.* at 234-35.

<sup>84</sup> See *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

The Supreme Court did not use the *Lemon* test to analyze the issue. Instead, it carved out an exception for legislative prayer.<sup>85</sup> The Court looked to the intent of the drafters of the First Amendment and how they thought the Establishment Clause applied to practices of Congress.<sup>86</sup> The fact that the First Congress adopted a policy of selecting a chaplain to open each session with a prayer was dispositive.<sup>87</sup> The Court stated that the history of over 200 years of opening legislative sessions with a prayer can leave no doubt that the practice has become a part of the "fabric of our society."<sup>88</sup>

Justice Brennan dissented in this case because he felt the practice of legislative prayer violated the Establishment Clause under the *Lemon* test.<sup>89</sup> Justice Brennan suggested that every analysis under Establishment Clause doctrine must start with consideration of the *Lemon* test.<sup>90</sup> Under *Lemon*, the challenged practice would fail all three prongs.<sup>91</sup> Justice Brennan concluded that the practice of legislative prayer had no secular purpose, its primary effect was religious, and it clearly led to excessive entanglement between the State and religion.<sup>92</sup>

Another approach used to analyze cases dealing with an Establishment Clause issue is the "neutrality" theory.<sup>93</sup> Under the neutrality theory the *Lemon* test will be used on occasion; however, Justices will place greater emphasis on the purpose or effect prong and

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<sup>85</sup> *Id.* at 793. "This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." *Id.* at 791. Justice Brennan, in his dissent, said that the Court did not disguise the fact that it did not analyze the Nebraska practice under any of the formal tests of traditional Establishment Clause jurisprudence. *Id.* at 796.

<sup>86</sup> *Id.* at 790.

<sup>87</sup> *Id.* at 787-88. "The opening of sessions of legislative . . . bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id.* at 786.

<sup>88</sup> *Id.* at 792.

<sup>89</sup> *Marsh*, 463 U.S. at 796-99. "I must begin by demonstrating what should be obvious: that, if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause." *Id.*

<sup>90</sup> *Id.* at 797.

<sup>91</sup> *Id.* at 797-99.

<sup>92</sup> *Id.* Justice Brennan said, "I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." *Id.* at 800-01.

<sup>93</sup> CHIMERINSKY, *supra* note 28, at 978.

state whether it is a symbolic endorsement of religion.<sup>94</sup> This theory proposes that the government should not encourage or discourage religious observance or nonobservance, belief or disbelief, practice or non-practice.<sup>95</sup> Justice O'Connor, the biggest proponent of this approach, developed the Endorsement test in her concurring opinion in *Lynch v. Donnelly*<sup>96</sup> to evaluate the neutrality of government action.<sup>97</sup>

C. *The Endorsement Test: Justice O'Connor's Concurrence in Lynch v. Donnelly*

In *Lynch*, the Supreme Court decided whether a municipality that included a Nativity scene in its annual Christmas display violated the Establishment Clause of the First Amendment.<sup>98</sup> The majority declared its unwillingness to be confined to a single test in analyzing all types of Establishment Clause cases.<sup>99</sup> The Court, however, did use the *Lemon* test to determine that the inclusion of the Nativity scene did not violate the Establishment Clause.<sup>100</sup>

Justice O'Connor, in her concurring opinion, proposed a new approach for analyzing Establishment Clause cases that would have reached the same conclusion the majority did.<sup>101</sup> Justice O'Connor's new

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<sup>94</sup> *Id.* at 986-87.

<sup>95</sup> Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990).

<sup>96</sup> 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

<sup>97</sup> CHIMERINSKY, *supra* note 28, at 979.

<sup>98</sup> *Lynch*, 465 U.S. at 670. Every year, the City of Pawtucket, Rhode Island, in cooperation with the downtown merchants association, put up a holiday season Christmas display. *Id.* at 671. The display included a Santa Clause house, reindeer and Santa's sleigh, carolers, clown, elephant, teddy bear, Christmas tree, a large banner that read "Seasons Greetings" and a crèche (a nativity scene). *Id.* All of the items in the display are owned by the City of Pawtucket. *Id.*

<sup>99</sup> *Id.* at 679. The Court explained:

In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed. The Establishment clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application . . . . The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

*Id.* at 678-79 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

<sup>100</sup> *Id.* at 687. "The Court has made it abundantly clear, however, that not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Id.* at 683.

<sup>101</sup> *Id.* at 687.

approach is referred to as the Endorsement test.<sup>102</sup> Justice O'Connor expressed an apparent lack of relationship between the three parts of the *Lemon* test and the Establishment Clause principles.<sup>103</sup> O'Connor's "New" Endorsement test concentrated on the endorsement or disapproval of religion, and institutional entanglement, to clarify the *Lemon* test.<sup>104</sup> Justice O'Connor suggested that the Establishment Clause prohibits the government from making a person's standing in the political community in any way relevant to religion.<sup>105</sup> The government could violate the prohibition against endorsement in one of two ways. The first is by excessive entanglement with religious institutions.<sup>106</sup> The second, and more direct infringement on the Establishment Clause, is by government disapproval or endorsement of religion.<sup>107</sup> If the government endorses religion, it sends a message to adherents that they are preferred members of the political community, along with a message to non-adherents that they are not full members of the political community.<sup>108</sup> Thus, adherents are made to feel that they are insiders, while non-adherents feel as though they are outsiders.<sup>109</sup>

In a recent Establishment Clause case, dealing with the placement of a religious symbol, Justice O'Connor further explained her Endorsement test, and included the reasonable observer standard in analyzing the issue before the Court.<sup>110</sup> Justice O'Connor said that the Endorsement test is "applied from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share."<sup>111</sup> The reasonable observer will know about the history of the

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<sup>102</sup> See Rodriguez, *supra* note 13, at 1173 ("The Court's strongest proponent of the endorsement test . . . has been Justice O'Connor.).

<sup>103</sup> *Lynch*, 465 U.S. at 688-89.

<sup>104</sup> *Id.* at 689.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 687-88. "[Excessive entanglement] may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by non-adherents of the religion, and foster the creation of political constituencies defined along religious lines." *Id.*

<sup>107</sup> *Id.* at 688.

<sup>108</sup> *Lynch*, 465 U.S. at 687-88. If government disapproves of religion, then it sends the opposite message. *Id.* at 688.

<sup>109</sup> *Id.* at 687-88.

<sup>110</sup> *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 772-83, 779-80 (1995) (O'Connor, J., concurring) (finding that a large Latin cross erected by the Ku Klux Klan in a park across the street from the court house did not violate the Establishment Clause under the Endorsement test).

<sup>111</sup> *Id.* at 780.

community, the forum where the display will appear and how the public place of display has been used in the past.<sup>112</sup>

Another approach to analyzing Establishment Clause cases is the "accommodation" theory.<sup>113</sup> In *Lee v. Weisman*,<sup>114</sup> the Justices who favor an accommodationist approach to Establishment Clause cases developed another test.<sup>115</sup> The new test focused on coercion and what constitutes government coercion.<sup>116</sup>

#### D. The Coercion Test: *Lee v. Weisman*

In *Lee*, the Supreme Court examined the issue of whether the school board's policy of selecting a local clergy member to pray during the high school graduation ceremony violated the Establishment Clause.<sup>117</sup> The district court held that the petitioners' practice of including prayer in the high school graduation ceremony violated the second prong of the *Lemon* test, thus violating the Establishment Clause.<sup>118</sup> The First Circuit affirmed the district court's decision and adopted its opinion using the *Lemon* test analysis.<sup>119</sup> However, Justice Kennedy, writing for the

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<sup>112</sup> *Id.* But see *Pinette*, 515 U.S. at 797 (Stevens, J., dissenting). Justice Stevens argued that Justice O'Connor's "reasonable person comes off as a well-schooled jurist, a being finer than the tort-law model . . . . [T]his enhanced tort-law standard is singularly out of place in the Establishment Clause context. It strips of constitutional protection every reasonable person whose knowledge happens to fall below some 'ideal' standard." *Id.* at 800 n.5.

<sup>113</sup> "Under this view, the Court should interpret the establishment clause to recognize the importance of religion in society and accommodate its presence in government. Specifically, under the accommodation approach the government violates the establishment clause only if it literally establishes a church or coerces religious participation." CHEMERINSKY, *supra* note 28, at 981.

<sup>114</sup> 505 U.S. 577 (1992).

<sup>115</sup> The four Justices are: Scalia, White, Thomas, and Chief Justice Rehnquist. CHEMERINSKY, *supra* note 28, at 981-82. Under the accommodation approach the Establishment Clause should be interpreted to acknowledge how important religion is in America and accommodate its presence in government. *Id.* at 981.

<sup>116</sup> See *id.* at 981 ("[T]he Establishment Clause . . . guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise . . . .") (quoting *Lee*, 505 U.S. at 587).

<sup>117</sup> *Lee*, 505 U.S. at 580.

<sup>118</sup> *Lee v. Weisman*, 728 F. Supp. 68, 71 (D.R.I. 1990). The Providence School Committee and the Superintendent of Schools permit principals to invite members of the clergy to give invocations and benedictions at the high school graduation ceremony. *Lee*, 505 U.S. at 580. After a clergy member had accepted the invitation, they received a pamphlet entitled "Guidelines for Civic Occasions" to help them prepare the prayers. *Id.* at 581. The pamphlet was put together by the National Conference of Christians and Jews. *Id.* The purpose of the pamphlet was to help the clergy member compose prayers with inclusiveness and sensitivity in mind. *Id.*

<sup>119</sup> *Lee v. Weisman*, 908 F.2d 1090, 1090 (1st Cir. 1990).

Court,<sup>120</sup> did not revisit the *Lemon* test but instead developed the Coercion test in deciding the case.<sup>121</sup> Kennedy stated that, at a minimum, the Constitution guarantees freedom from government coercion to aid or engage in religion.<sup>122</sup>

Even though students were not required to attend the graduation ceremony to receive their diploma, Justice Kennedy stated that graduation is such an important time in a person's life that students would not want to miss it.<sup>123</sup> Kennedy said that if students were put in the position of choosing between going to their graduation ceremony

<sup>120</sup> Justice Kennedy delivered the opinion of the Court. *Lee*, 505 U.S. at 580. Justice Blackmun, in a concurring opinion joined by Justice Stevens and Justice O'Connor, wrote that there can be a violation of the Establishment Clause without coercion. *Id.* at 604. Justice Souter, in a concurring opinion joined by Justice Stevens and Justice O'Connor, wrote that coercion can be sufficient to find a violation of the Establishment Clause, but it is not necessary; symbolic government endorsement for religion is also a violation of the Clause. *Id.* at 619-20. Justice Scalia, in a dissenting opinion joined by Chief Justice Rehnquist, Justice White, and Justice Thomas, wrote that coercion should only be found when the law requires engagement in religious practices and punishes failures to do so. *Id.*

<sup>121</sup> *Id.* at 586-87. The Court explained that "[w]e can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation of petitioners and amicus the United States to reconsider our decision in *Lemon v. Kurtzman*." *Id.*

<sup>122</sup> *Id.* at 587. "[The] government may not coerce anyone to support or participate in religion or its exercise, or otherwise act 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 (1983)). The Court gave six examples of realistic situations that the Establishment Clause prohibits:

- (1) Neither a state nor the Federal Government can set up a church; (2) neither can pass laws which aid one religion, aid all religions, or prefer one religion over another; (3) neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion; (4) no person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance; (5) 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; and (6) neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

*Id.* at 601 n.2.

<sup>123</sup> *Id.* at 595. If a student did not attend graduation because there would be a prayer delivered during the ceremony, that student would be forfeiting all of the intangible benefits that go along with graduation. *Id.*

Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.

*Id.*

and being subjected to the dilemma of participating in the prayer or protesting it, it would be a violation of the Establishment Clause.<sup>124</sup> By the principal inviting the clergy member to give the prayer and providing the clergy member with the guidelines for the prayer, the state was playing an integral part in the inclusion of religion in the graduation ceremony.<sup>125</sup> According to Justice Kennedy, students were under subtle psychologically coercive pressure and had no alternative that would have allowed them to avoid an appearance of participation in the prayer.<sup>126</sup> The Court determined that this type of coercion, to be a part of a religious program that was designed and implemented by the government, clearly violated the Establishment Clause.<sup>127</sup>

Justice Scalia, joined by Chief Justice Rehnquist, Justice White and Justice Thomas, dissented in *Lee*.<sup>128</sup> Scalia's dissent was very critical of the opinion written by Justice Kennedy and noted that the opinion was lacking reference to historical practices that were usually included in analyzing an Establishment Clause issue.<sup>129</sup> Since the opinion lacked historical reference in making the decision to prohibit prayer at public school graduation ceremonies, Justice Scalia said that he could not join in the opinion.<sup>130</sup> He noted that prayer has been a part of government

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<sup>124</sup> *Id.* "[T]o say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme." *Id.*

<sup>125</sup> *Lee*, 505 U.S. at 588. Justice Kennedy stated:

The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.

*Id.* at 588-89.

<sup>126</sup> *Id.* at 588.

<sup>127</sup> *Id.* "No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done [in *Lee*], and it is forbidden by the Establishment Clause of the First Amendment." *Id.* at 599.

<sup>128</sup> *Id.* at 631.

<sup>129</sup> *Id.* "[T]he Establishment Clause must be construed in light of the '[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.' [T]he meaning of the Clause is to be determined by reference to historical practices and understandings." *Id.* (quoting *County of Allegheny v. ACLU of Greater Pittsburgh*, 492 U.S. 573, 657, 670 (1989) (Kennedy, J., concurring in part and dissenting in part)).

<sup>130</sup> *Lee*, 505 U.S. at 631. "Today's opinion [by Justice Kennedy] shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people." *Id.* at 632.

ceremonies from the origin of our nation and the decision reached in *Lee* does an injustice to that practice.<sup>131</sup>

The psychological coercion test Justice Kennedy adopted in his opinion also met with opposition in the dissenting opinion. The dissenting Justices did not argue with the theory that "government may not coerce anyone to support or participate in religion or its exercise;" however, the group had a problem with the coverage "of coercion beyond acts backed by threat of penalty."<sup>132</sup> Just because a student does not openly object during the prayer does not mean that the student is being coerced into joining the prayer; the student can choose to stand or sit respectfully during the prayer and not participate.<sup>133</sup>

The conflict among the circuits in their contradictory decisions and varying applications of the tests places this area of law in a state of confusion.<sup>134</sup> Justice O'Connor, in *Board of Education of Kiryas Joel Village*

<sup>131</sup> Justice Scalia noted that:

[The Court's opinion in *Lee*] with nary a mention that it is doing so — lays waste a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion . . . .

*Id.* at 631-32.

<sup>132</sup> *Id.* at 642. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Id.* at 640. "The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that [s]peech is not coercive; the listener may do as he likes." *Id.* at 642 (quoting *American Jewish Congress v. Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)). Justice Scalia also stated in his opinion:

A few citations of "[r]esearch in psychology" that have no particular bearing upon the precise issue here . . . cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing. The Court's argument that state officials have "coerced" students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.

*Id.* at 636.

<sup>133</sup> *Id.* at 637-38. Justice Scalia says it is ludicrous to say that a student who respectfully sits in silence during the prayer joined the prayer or would be perceived to have joined in the prayer. *Id.* at 637. "[S]urely 'our social conventions,' have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence." *Id.*

<sup>134</sup> See *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998) (using the *Lemon* test to find no violation of the Establishment clause and distinguishing the *Lee v. Weisman* case); *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (applying the

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*School District v. Grumet*,<sup>135</sup> explained that different issues dealing with the Establishment Clause call for different tests.<sup>136</sup> In analyzing graduation school prayer issues, using the *Lemon* test makes the most sense. The *Lemon* test arose out of an educational setting that dealt with the Establishment Clause.<sup>137</sup> Since the Supreme Court stated that its decision in *Lee* was fact specific<sup>138</sup> and the Court has not overruled *Lemon*,<sup>139</sup> the lower courts are bound by precedent to follow the *Lemon* test.<sup>140</sup> However, even though bound by Supreme Court precedent, the

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*Lemon* test and the Coercion test and finding a violation of the Establishment Clause); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996) (using *Lemon*, Coercion, and Endorsement tests to find no violation of Establishment Clause); *Goluba v. School Dist. of Ripon*, 45 F.3d 1035 (7th Cir. 1995) (using the Coercion test and following the Supreme Court's decision in *Lee v. Weisman*); *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987) (using the *Marsh* test and finding no violation of the Establishment Clause); *Adler v. Duval County Sch. Bd.*, 851 F. Supp. 446 (M.D. Fla. 1994) (using *Lemon* and distinguishing *Lee v. Weisman* to find no violation of the Establishment Clause); *Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993) (using *Lemon* and Coercion tests and finding a violation of the Establishment Clause). See also Kagan, *supra* note 8, at 629 ("The Court's decision . . . leaves lower courts, local governments and school boards with little guidance on how to interpret the Establishment Clause . . . the lack of consistent guidance from the Supreme Court leaves a void which should be filled.").

<sup>135</sup> 512 U.S. 687, 712 (1994) (O'Connor, J., concurring) (holding that New York's legislation creating a separate school district for the Satmar Hasidim was unconstitutional).

<sup>136</sup> *Id.* Justice O'Connor explained how one test for all issues will not work:

It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause . . . . [However,] the same constitutional principle may operate very differently in different contexts . . . . Experience proves that the Establishment Clause . . . cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches . . . . Cases involving government speech on religious topics seem to me to fall into a different category and to require an analysis focusing on whether the speech endorses or disapproves of religion, rather than on whether the government action is neutral with regard to religion.

*Id.* at 718, 720.

<sup>137</sup> *Lemon*, 403 U.S. at 602 (deciding the constitutionality of state aid to, or for the benefit of, nonpublic schools).

<sup>138</sup> *Lee*, 505 U.S. at 597 (emphasizing that in reaching its conclusion, the Court's inquiry was a "delicate and fact sensitive one"). See also *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (Mansmann, J. dissenting) (stating that the holding of *Lee v. Weisman* was narrowly fact-bound).

<sup>139</sup> CHEMERINSKY, *supra* note 28, at 986. "Although there have been many cases where the Court decided establishment clause cases without applying [the *Lemon*] test, it has been frequently used. While several Justices have criticized the test and called for it to be overruled, this has not occurred." *Id.*

<sup>140</sup> McConnell, *supra* note 5, at 47 ("The problem is that the Supreme Court is free to ignore its precedent when it chooses, but the lower courts are not."). See also Rashes, *supra* note 8, at 512 n.179. Rashes states that:

lower courts have used a variety of tests to decide high school graduation school prayer cases dealing with the Establishment Clause.<sup>141</sup>

#### IV. AN ANALYSIS OF LOWER COURT DECISIONS

Since the Supreme Court's decision in 1992, lower courts have split on whether the *Lee* decision applies to all situations of prayer at high school graduation ceremonies.<sup>142</sup> However, the Supreme Court has refused to grant certiorari to settle the conflict between the circuits.<sup>143</sup> Five federal appellate courts have used four different combinations of tests to make their decisions when determining challenges involving the Establishment Clause and prayer at public school graduation ceremonies.<sup>144</sup> The Ninth Circuit used the *Lemon* test when faced with a

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The Court in *Kiryas Joel* barely mentioned *Lemon*. The Court's snub of *Lemon* today (it receives only two "see also" citations, in the course of the opinion's description of Grendel's Den) is particularly noteworthy because all three courts below (who are not free to ignore Supreme Court precedent at will) relied on it, and the parties (also bound by our case law) dedicated over 80 pages of briefing to the application and continued vitality of the *Lemon* test.

*Id.* at 512 n.178.

<sup>141</sup> See *supra* note 46.

<sup>142</sup> Compare *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998) (allowing students to be chosen by academic ranking to deliver speech of their choice at graduation whether a prayer or not found not to violate Establishment Clause); and *Adler v. Duval County Sch. Bd.*, 851 F. Supp. 446 (M.D. Fla. 1994) (finding no Establishment Clause violation where students allowed to decide type of graduation speech); and *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992) (allowing seniors to vote on whether or not to have a prayer at graduation passed Establishment Clause and Coercion test), with *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (allowing senior class to vote could not be legitimized as promoting free speech rights of students and violated the Establishment Clause), and *Goluba v. School Dist. of Ripon*, 45 F.3d 1035 (7th Cir. 1995) (following the *Lee* decision).

<sup>143</sup> Two cases petitioned for certiorari and both requests were denied. See *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993); *Ingebretsen v. Jackson Public School District*, 88 F.3d 274 (5th Cir. 1996), *cert. denied sub. nom.*, *Moore v. Ingebretsen*, 519 U.S. 965 (1996). The new party name on the petition for certiorari was the Attorney General of the State of Mississippi, Mike Moore, who was a named defendant in the case. *Jones*, 977 F.2d at 963. See, e.g., Ralph D. Mawdsley & Charles J. Russo, *Supreme Court Upholds Religious Liberty: Educational Implications*, 84 EDUC. L. RPTR. 877 (1993) (inferring the Supreme Court's support for *Harris v. Joint School District No. 241* allowing student initiated and delivered prayers at graduation, since the Court failed to grant certiorari and disturb the ruling).

<sup>144</sup> See *infra* notes 142-234 and accompanying text. See, e.g., *Madison Sch. Dist. No. 321*, 147 F.3d at 832 (applying the *Lemon* test); *Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d at 1471 (applying the *Lemon* test and the Coercion test); *Adler*, 851 F. Supp. at 446 (11th Cir. 1994) (adopting the lower court's opinion which used the *Lemon* test and the Coercion test);

case dealing with prayer at a high school graduation ceremony.<sup>145</sup> The Third Circuit<sup>146</sup> and the Eleventh Circuit<sup>147</sup> analyzed their high school graduation prayer cases using both the *Lemon* test and the Coercion test. The Fifth Circuit analyzed its case dealing with graduation prayer under the *Lemon*, Coercion, and the Endorsement tests.<sup>148</sup> Finally, the Sixth Circuit used the *Marsh* test to determine the constitutionality of prayer at high school graduation.<sup>149</sup>

#### A. Lower Courts Using The *Lemon* Test

##### Ninth Circuit: *Doe v. Madison School District No. 321*

In *Doe v. Madison School District No. 321*,<sup>150</sup> the Ninth Circuit decided whether a school district's policy regarding student graduation presentations violated the Establishment Clause of the First Amendment.<sup>151</sup> The school district's policy was being challenged on its face under the Establishment Clause.<sup>152</sup> The United States District Court for the District of Idaho entered summary judgment for the school district.<sup>153</sup> On appeal, *Doe* contended that the district court erred in distinguishing the Supreme Court case of *Lee v. Weisman*; *Doe* argued that the *Lee* decision should control the case.<sup>154</sup> The Ninth Circuit

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*Ingebretsen*, 88 F.3d at 274 (applying the *Lemon*, Coercion, and Endorsement tests); *Stein*, 822 F.2d at 1406 (forgoing the *Lemon* test for the *Marsh* test).

<sup>145</sup> See *infra* notes 150-68 and accompanying text.

<sup>146</sup> See *infra* notes 169-90 and accompanying text.

<sup>147</sup> See *infra* notes 191-208 and accompanying text.

<sup>148</sup> See *infra* notes 209-24 and accompanying text.

<sup>149</sup> See *infra* notes 225-34 and accompanying text.

<sup>150</sup> 147 F.3d 832 (9th Cir. 1998), *vacated as moot*, 177 F.3d 789, 791-92 (9th Cir. 1999) (instructing District Court to dismiss complaint because the student plaintiff graduated, thus rendering the controversy moot).

<sup>151</sup> *Id.* at 833-34. The school's policy provided for four students, according to class standing, to be invited to speak at the commencement ceremony. *Id.* at 834. If the student accepts, he or she may choose to communicate a poem, song, prayer, musical presentation, reading, or any other pronouncement. *Id.* The school administration does not censor what the student will present, but the administration will advise the student on appropriate language and the student can accept or reject the advice. *Id.* This issue is different from whether a school board allowing the students to vote on inclusion of prayer in the graduation ceremony violates the Establishment Clause. *Madison Sch. Dist. No. 321*, 147 F.3d at 836 n.7. Compare *Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d at 1474 (deciding that it would violate the Establishment Clause to allow students to decide whether to include prayer in graduation by majority vote), with *Jones*, 977 F.2d at 964 (concluding that allowing students to decide by majority vote to include prayer in graduation did not violate the Establishment Clause).

<sup>152</sup> *Madison Sch. Dist. No. 321*, 147 F.3d at 833-34.

<sup>153</sup> *Doe v. Madison Sch. Dist. No. 321*, 7 F. Supp. 2d 1110, 1118 (D. Idaho 1997).

<sup>154</sup> *Madison Sch. Dist. No. 321*, 147 F.3d at 834.

disagreed with Doe and stated that *Lee* did not establish a per se rule against public high school graduation ceremonies containing religious activity.<sup>155</sup> The *Lee* decision was fact-specific and the Supreme Court emphasized that, in the *Lee* case, "[t]he degree of school involvement . . . made it clear that the graduation prayers bore the imprint of the State."<sup>156</sup>

The Ninth Circuit in *Doe* distinguished *Lee* on three points. First, a member of the clergy was not delivering the presentation; rather, students were.<sup>157</sup> Second, the student speakers were selected on neutral and secular criterion, their academic performance.<sup>158</sup> Third, the students had control over what they would recite; the school board had no power to control the content of the presentations.<sup>159</sup> These three differences vested control in the individual students and not the state; further, the school district included a printed disclaimer in all graduation programs stating that the views of the students did not reflect the views of the school district.<sup>160</sup> Therefore, the school district could not be said to be directing the performance of a religious activity.<sup>161</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> *Lee*, 505 U.S. at 590.

<sup>157</sup> *Madison Sch. Dist. No. 321*, 147 F.3d at 835.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* One of Doe's arguments was that the policy allowed the students to choose from a list what type of message they would deliver. *Id.* at 834. The list included "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement." *Id.* The court did not pay much attention to the fact that the policy specifically stated "prayer." *Id.* at 835. Since the student could choose to deliver a prayer or not, the court concluded that the "control vests in the individual students, not the State." *Id.* But see *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). Since the legislature changed a statute that allowed for one minute of silence at the beginning of the school day for meditation to include "for meditation or voluntary prayer," the statute violated the Establishment Clause because its effect was non-secular. *Id.* at 60. The Court concluded that the change in the statute was for the "sole purpose of expressing the State's endorsement of prayer . . ." *Id.* "The addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." *Id.*

<sup>160</sup> *Madison Sch. Dist. No. 321*, 147 F.3d at 835. The school district's disclaimer, in full, read:

Any presentation by participants of graduation exercises is the private expression of the individual participants and does not necessarily reflect any official position of Madison School District #321, its Board of Trustees, administration or employees or indicate the views of any other graduate.

The Board of Trustees of the Madison School District #321 recognizes that at graduation time and throughout the course of the remedial process, there will be instances when religious values, religious

After distinguishing *Lee*, the court analyzed the facts of the case under the *Lemon* test and held that the school district's policy did not violate the Establishment Clause.<sup>162</sup> The school district's policy passed the first prong of *Lemon* by having a secular purpose.<sup>163</sup> It was noted that the school district's policy included a motive to allow top students the independence to deliver an uncensored speech.<sup>164</sup> In determining that the policy passed the second prong of *Lemon*, the court reasoned that it was because the policy did not have the primary effect of advancing religion.<sup>165</sup> The court stated that, because the policy allowed the student to speak on any topic the student chooses, the policy neither advanced nor inhibited religion.<sup>166</sup> Finally, the court decided that the policy did not excessively entangle religion and the government.<sup>167</sup> The court explained that the policy on its face was neutral with respect to religion and that there would be a greater possibility of entanglement if the school district tried to eradicate all religious topics from the students' speeches.<sup>168</sup>

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practices and religious persons will have some interaction with the public schools and students. The Board of Trustees, however, does not endorse religion, but recognizes the rights of individuals to have the freedom to express their individual political, social, or religious views, for this is the essence of education.

*Id.* at 837-38.

<sup>161</sup> *Id.* Three of the five member *Lee* majority noted that "[i]f the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State." *Lee*, 505 U.S. at 630 n.8.

<sup>162</sup> *Madison Sch. Dist. No. 321*, 147 F.3d at 838.

<sup>163</sup> *Id.* at 836-37.

<sup>164</sup> *Id.* at 837.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* "[T]o have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influences." *Id.* (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 337 (1987)).

<sup>167</sup> *Madison Sch. Dist. No. 321*, 147 F.3d at 838.

<sup>168</sup> *Id.* "[S]uch an attempt would likely require the school to censor the student speeches before the ceremony and to interrupt any renegade student who autonomously initiated sectarian solemnizing." *Id.*

*B. Lower Courts Using The Lemon Test and The Coercion Test*

1. Third Circuit: *ACLU v. Black Horse Pike Regional Board of Education*

In *ACLU v. Black Horse Pike Regional Board of Education*,<sup>169</sup> the Third Circuit applied the Coercion test and the *Lemon* test and found that the challenged practice violated the Establishment Clause.<sup>170</sup> In *Black Horse Pike*, the school district had a longstanding tradition of having a non-sectarian invocation and benediction in the high school graduation ceremonies.<sup>171</sup> After the Supreme Court's decision in *Lee*,<sup>172</sup> the school board reconsidered its policy.<sup>173</sup> The school board adopted a policy that allowed the senior class to vote on whether to have a moment of reflection, a prayer, or nothing at all included in their graduation ceremony.<sup>174</sup>

The new policy adopted by the school board also required the printing of a disclaimer in the graduation programs explaining that any presentations given at the graduation ceremony did not reflect the views of anyone connected with the school other than the student presenting.<sup>175</sup> The court determined that even though the school board delegated the decision-making power to the students, the school board was not absent from control over the graduation ceremony.<sup>176</sup> The Third Circuit also determined that there was still coercive pressure present even though the students were allowed to vote on the inclusion or exclusion of prayer at the graduation ceremony.<sup>177</sup> The court considered the maturity level of high school seniors and the fact that graduation is a "once-in-a-lifetime-event" in its Coercion analysis.<sup>178</sup>

Next, the court analyzed the facts of the case under the *Lemon* test. The court recognized that the *Lemon* test had been called into question,

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<sup>169</sup> 84 F.3d 1471 (3d Cir. 1995).

<sup>170</sup> *Id.* at 1488.

<sup>171</sup> *Id.* at 1474.

<sup>172</sup> See *supra* notes 117-33 and accompanying text.

<sup>173</sup> *Black Horse Pike*, 84 F.3d at 1474-75.

<sup>174</sup> *Id.* at 1474.

<sup>175</sup> *Id.* at 1475.

<sup>176</sup> *Id.* at 1479.

<sup>177</sup> *Id.* at 1480. "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id.*

<sup>178</sup> *Black Horse Pike*, 84 F.3d at 1482.

but stated “[n]evertheless, *Lemon* remains the law of the land, and we are obligated to consider it until instructed otherwise by a majority of the Supreme Court.<sup>179</sup> The court decided that the school board’s policy of allowing the senior class to vote on whether to include prayer in their graduation ceremony violated the first two prongs of the *Lemon* test.<sup>180</sup> Thus, the school board’s policy violated the Establishment Clause.<sup>181</sup>

## 2. Eastern District of Virginia: Gearon v. Loudoun County School Board

The Fourth Circuit Court of Appeals has not heard a high school graduation prayer case. However, the Eastern District of Virginia, which is a part of the Fourth Circuit, decided *Gearon v. Loudoun County School Board*.<sup>182</sup> The school board policy allowed the students to vote on whether to include prayer at the graduation ceremony or not.<sup>183</sup> Immediately before the seniors voted on the issue, they had a mandatory class meeting where the class officers and class faculty advisors spoke.<sup>184</sup> If they decided to have a prayer, the school board policy allowed for faculty review of the messages.<sup>185</sup>

The court held that the school board violated the Establishment Clause of the First Amendment by allowing this type of student recited prayer at the graduation ceremonies.<sup>186</sup> Under the Coercion test, the court determined that the practice of the school board was coercive and

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<sup>179</sup> *Id.* at 1484.

<sup>180</sup> *Id.* at 1484-88. The court concluded that the school board’s policy did not have a secular purpose as required under the first prong of *Lemon*. *Id.* at 1484-85. The school board advanced the secular purpose of allowing students their right to freedom of speech. *Id.* at 1477. The court determined that the school board’s policy was designed to allow for the continuation of prayer at graduation and nothing more; therefore, it violated the first prong of *Lemon*. *Id.* at 1478. Under the second prong of *Lemon*, the school board’s policy would have the effect of advancing religion if the students chose to have prayer at graduation. *Id.* at 1487. Although there was no guarantee that there would be a prayer in any given year, a year that did include a prayer would be government endorsement of religion. *Id.* at 1487-88.

<sup>181</sup> *Id.* at 1488.

<sup>182</sup> 844 F. Supp. 1097 (E.D. Va. 1993). This case dealt with the Loudoun County School Board and the four high schools located in Loudoun County, Virginia. *Id.* at 1098.

<sup>183</sup> *Id.* at 1100. School officials prepared the following ballot for the seniors to use in voting on the issue: “Do we, the Senior Class . . . wish to have a non-sectarian, non-proselytizing invocation/ benediction/ prayer or inspirational message presented at graduation? Yes, I vote in favor of the above proposition. No, I vote against the above proposition.” *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* At three of the schools, the principal or a faculty member would review the speech and, at the fourth school, the principal reserved the right to review the speech.

<sup>186</sup> *Id.* at 1102.

thus was unconstitutional.<sup>187</sup> Even though the school board delegated the decision to the senior class about whether to include prayer in the graduation ceremony, the school board still offended the Establishment Clause.<sup>188</sup> The policy was also analyzed under the *Lemon* test and the court found the policy also failed this test.<sup>189</sup> The court reasoned that the graduation ceremony was still a state-sponsored event and that there was excessive state entanglement with religion.<sup>190</sup>

### 3. The Eleventh Circuit: *Adler v. Duval County School Board*

In *Adler v. Duval County School Board*,<sup>191</sup> the Eleventh Circuit found that the policy of allowing students to vote on whether to have unrestricted student led messages at the opening and closing of the graduation ceremony facially violated the Establishment Clause under both the *Lemon* test and the Coercion test of *Lee*.<sup>192</sup> Initially, the court examined the graduation policy under the two dominant factors of *Lee* that show a constitutional violation: "(1) the state's control of the graduation ceremonies; and (2) the student's coerced participation in the graduation ceremonies."<sup>193</sup>

In analyzing the graduation policy under the first element, the court determined that the Duval County school system developed the graduation policy at issue to circumvent the *Lee* decision and continue to

<sup>187</sup> *Gearon*, 844 F. Supp. at 1099. "[A] constitutional violation inherently occurs when, in a secondary school graduation setting, a prayer is offered, regardless of who makes the decision that the prayer will be given and who authorizes the actual wording of the remarks." *Id.* at 1099.

<sup>188</sup> *Id.* at 1097. "The notion that a person's constitutional rights may be subject to a majority vote is itself anathema." *Id.* at 1100. Black's Law Dictionary defines anathema as: "An ecclesiastical punishment by which a person is separated from the body of the church, and forbidden all intercourse with the members of the same. It differs from excommunication, which simply forbids the person excommunicated from going into the church receiving Communion." BLACK'S LAW DICTIONARY 84 (6th ed. 1990). Webster's Dictionary defines anathema as: "(1) A formal ecclesiastical ban, curse, or excommunication. (2) A vehement denunciation: curse. (3) One that is cursed or damned. (4) One that is greatly detested." WEBSTER'S II NEW COLLEGE DICTIONARY 41 (2d ed. 1995).

<sup>189</sup> *Gearon*, 844 F. Supp. at 1099-1100. The court concluded that, even if the challenged practice was not inherently coercive, the facts show an excessive entanglement between church and state; thus, the practice failed the third prong of the *Lemon* test. *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> 174 F.3d 1236 (11th Cir. 1999).

<sup>192</sup> *Id.* at 1251. The Supreme Court's failure to apply the *Lemon* test led some courts to speculate on the stability of *Lemon* after *Lee*. *Id.* at 1242. However, in *Lamb's Chapel*, the Court specifically declared that *Lemon* has not been overruled. *Id.* Therefore, the court felt it was appropriate to analyze the facts under both *Lemon* and the *Lee* coercion tests. *Id.*

<sup>193</sup> *Id.* at 1243.

allow prayer at graduation.<sup>194</sup> Furthermore, even though the students were allowed to vote for students to deliver uncensored speeches, the school system continued to exercise enormous control over the graduation ceremony.<sup>195</sup> The court reasoned that, because the school exerted so much control over the ceremony, it met the state control factor of *Lee*.<sup>196</sup>

The court then decided that the Duval County graduation policy was coercive and thus satisfied the second dominant factor of *Lee*.<sup>197</sup> The students were told by the school system to stand and remain silent during the messages delivered at graduation; this was determined coercive by the court.<sup>198</sup> In addition, the student speakers were elected by a majority vote.<sup>199</sup> Therefore, the students and audience were aware that the views expressed were of the majority and they were under even greater pressure to participate.<sup>200</sup> All in all, the graduation policy of Duval County was coercive.

Next, the court examined the graduation policy under the *Lemon* test. The first question the court asked was "whether [the Duval County school system's] purpose [was] to endorse or disapprove of religion."<sup>201</sup> The court reasoned that, since the county developed the graduation policy to allow prayers at graduation ceremonies, its purpose was to

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<sup>194</sup> *Id.* at 1244. The court found that "the school system believed it could give a 'wink and a nod' to controlling Establishment Clause jurisprudence through attempting to delegate to the majority/ plurality vote of students what it could not do on its own - permit and sponsor sectarian and proselytizing prayer at graduation ceremonies." *Id.* at 1246.

<sup>195</sup> *Id.* (stating that the school system "rented the facilities for the graduation; told the graduating students what they should wear; decided when the graduating students and audience could sit and stand; decided the sequence of events at the graduation; and designed and printed the program for the ceremonies").

<sup>196</sup> *Adler*, 174 F.3d at 1248. Additionally, the court concluded that the students who were elected to deliver the message were state actors for Establishment Clause purposes. *Id.* at 1246. "When the state permits private . . . individuals to exercise governmental functions, the . . . individual then must be subject to constitutional limits." *Id.* (citing *Evans v. Newton*, 382 U.S. 296, 299 (1966)).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* The court reasoned that since the school system worked the system to allow prayer at graduation and then required the students to stand for the prayers, this violated the Establishment Clause. *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ." *Id.* (quoting *Lee*, 505 U.S. at 587).

<sup>201</sup> *Adler*, 174 F.3d at 1249 (quoting *Wallace*, 472 U.S. at 56).

promote religion.<sup>202</sup> Therefore, the graduation policy did not pass the first prong of *Lemon*.<sup>203</sup>

Even though the graduation policy failed the first prong of *Lemon* and thus violated the Establishment Clause,<sup>204</sup> the court went on to decide whether the policy could pass the second prong of *Lemon*.<sup>205</sup> The primary effect prong of *Lemon* requires the court to ask from a reasonable observers perspective "whether, irrespective of [the Duval County school system's] actual purpose, the practice under review in fact [conveyed] a message of endorsement or disapproval [of religion]." <sup>206</sup> Again, the graduation policy failed the test. The court reasoned that a reasonable observer would realize the graduation policy's primary effect was to permit prayer at graduation ceremonies.<sup>207</sup> Since the graduation policy failed the first two prongs, the court did not examine the policy under the third prong of *Lemon* dealing with entanglement.<sup>208</sup>

### C. Lower Courts Using The Lemon Test, The Coercion Test, and the Endorsement Test

#### The 5th Circuit: Jones v. Clear Creek Independent School District and Ingebretsen v. Jackson Public School District

In *Jones v. Clear Creek Independent School District*,<sup>209</sup> the Fifth Circuit originally held that the practice of the school district did not violate the Establishment Clause under the *Lemon* test.<sup>210</sup> The Supreme Court granted certiorari, vacated the judgment, and remanded it to the Fifth

<sup>202</sup> *Id.* (holding "that the policy, both on its face and based upon the history surrounding its inception, has an actual purpose to permit prayer – including sectarian and proselytizing prayer – at graduation ceremonies"). The Court of Appeals also criticized the District Court for failing to follow *Jager v. Douglas County School District*, 862 F.2d 824, 829-30 (11th Cir. 1989) (dictating that "when a public school policy's actual purpose is religious – even intrinsically religious – the policy violated the secular purpose requirement under *Lemon*").

<sup>203</sup> *Id.* at 1250.

<sup>204</sup> See *supra* note 60 and accompanying text.

<sup>205</sup> *Adler*, 174 F.3d at 1250-51.

<sup>206</sup> *Id.* at 1250.

<sup>207</sup> *Id.* at 1251 ("A reasonable observer at a graduation ceremony would believe that the 'Graduation Prayer' policy conveys an endorsement of prayer – as the schools in the Duval County school system did openly prior to [the *Lee* decision in] 1992 – which advances religion.").

<sup>208</sup> *Id.*

<sup>209</sup> 977 F.2d 963 (5th Cir. 1992).

<sup>210</sup> *Id.* at 964-65. The policy of the school district was to allow the senior class to choose whether or not to have a prayer at graduation, and what student would be invited to give the non-sectarian, non-proselytizing invocation. *Id.*

Circuit Court of Appeals for further consideration in light of the Supreme Court's decision in *Lee*.<sup>211</sup> After the Fifth Circuit Court of Appeals reconsidered the case, the court held that the *Lee* decision did not render the school district's policy unconstitutional.<sup>212</sup>

In reconsidering the case, the Fifth Circuit used three separate tests to determine the constitutionality of the school district's policy.<sup>213</sup> Since the lower courts are bound by Supreme Court precedent, the Fifth Circuit applied *Lemon*.<sup>214</sup> The court stated that the school district's policy passed all three prongs of the *Lemon* test.<sup>215</sup> The policy had the secular purpose and the primary effect of solemnizing the graduation ceremony, and the policy kept the school district free from involvement with religious institutions.<sup>216</sup>

The next test the court analyzed was O'Connor's Endorsement test.<sup>217</sup> The court determined that since the school district allowed the students to choose whether or not to have an invocation during graduation and to select the content of the invocation, the school district did not unconstitutionally endorse religion.<sup>218</sup> Finally, the court examined the Coercion test that had been developed in *Lee*. The Fifth Circuit explained that the *Lee* Court separated unconstitutional government coercion into three identifiable parts: "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors."<sup>219</sup> The court did not find impermissible coercion under any of the three parts of the Coercion test.<sup>220</sup>

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<sup>211</sup> 505 U.S. 1215 (1992). See also *supra* notes 117-33 and accompanying text.

<sup>212</sup> *Jones*, 977 F.2d at 965.

<sup>213</sup> *Id.* at 966. "To fully reconsider this case in light of *Lee*, we reanalyze the [School district's policy] under all . . . tests that the Court has stated are relevant." *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 966-68.

<sup>216</sup> *Id.*

<sup>217</sup> *Jones*, 977 F.2d at 968. "From the [Supreme] Court's various pronouncements, we understand government to unconstitutionally endorse religion when a reasonable person would view the challenged government action as a disapproval of her contrary religious choices." *Id.*

<sup>218</sup> *Id.* at 969. "[A] graduating high school senior who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer will understand that any religious references are the result of student, not government, choice." *Id.*

<sup>219</sup> *Id.* at 970.

<sup>220</sup> *Id.* at 971. The court stated that "the coercive effect of any prayer permitted by the [School district's policy] is more analogous to the innocuous 'God save the United States and this Honorable Court' stated by and to adults than the government-mandated message

The Fifth Circuit had another opportunity to examine a graduation school prayer issue in *Ingebretsen v. Jackson Public School District*.<sup>221</sup> The court followed its precedent set in *Jones* and held that student initiated, non-sectarian, and non-proselytizing prayer at graduation ceremonies is valid under the Establishment Clause.<sup>222</sup> Additionally, the Fifth Circuit recently clarified its position on Establishment Clause jurisprudence in *Doe v. Santa Fe Independent School District*.<sup>223</sup> The court determined that if a graduation policy did not require that the invocations and benediction be non-sectarian and non-proselytizing, then the policy would be found to violate the Establishment Clause.<sup>224</sup>

#### D. Lower Courts Using The Marsh Test

##### The Sixth Circuit: *Stein v. Plainwell Community Schools*

The question that the Sixth Circuit in *Stein v. Plainwell Community Schools*<sup>225</sup> resolved was what kind of prayer, if any, the Establishment Clause permits the public schools to use in graduation ceremonies.<sup>226</sup> The district court used the *Lemon* test in determining that a non-sectarian and non-proselytizing invocation and benediction in a high school graduation ceremony would not violate the Establishment Clause.<sup>227</sup> The circuit court stated, however, that the graduation ceremony is analogous to the legislative and judicial sessions referred to in *Marsh* and should be guided by the same standards.<sup>228</sup> A prayer at a ceremonial

delivered to young people from religious authority that the [Supreme] Court considered in *Lee*." *Id.*

<sup>221</sup> 88 F.3d 274 (5th Cir. 1996), *cert. denied*, 519 U.S. 965 (1996). At issue in this case was a state statute that permitted public school students to initiate non-proselytizing and non-sectarian prayer at varied compulsory and non-compulsory school events. *Id.* at 277. The court invalidated everything in the School Prayer Statute except the allowance of prayer at graduation ceremonies. *Id.* at 280.

<sup>222</sup> *Id.* at 280. "To the extent the School Prayer Statute allows students to choose to pray at high school graduation to solemnize that once-in-a-lifetime event, we find it constitutionally sound under *Jones II*." *Id.*

<sup>223</sup> 168 F.3d 806 (5th Cir. 1999).

<sup>224</sup> *Id.* at 816-17. The court affirmed the lower court's ruling that the words non-proselytizing and non-sectarian must be included in the policy to be constitutional. *Id.* at 824.

<sup>225</sup> 822 F.2d 1406 (6th Cir. 1987).

<sup>226</sup> *Id.* at 1407.

<sup>227</sup> *Stein v. Plainwell Community Sch.*, 610 F. Supp. 43, 46 (W.D. Mich. 1985).

<sup>228</sup> *Stein*, 822 F.2d at 1409. The court reasoned that prayers at a graduation ceremony serve the "solemnizing" function Justice O'Connor described in her concurrence in *Lynch*:

[S]uch governmental "acknowledgments" of religion as legislative prayers of the type approved in *Marsh v. Chambers*, government declaration of Thanksgiving as a public holiday, printing of "In God

occasion is different than in a classroom setting and presents less chance for peer pressure or religious indoctrination.<sup>229</sup> The Court in *Marsh* distinguished between the coercive effect of a legislative prayer and a classroom prayer.<sup>230</sup> Even though children attend graduation ceremonies, their parents' presence and the public nature of the event act as buffers against religious coercion.<sup>231</sup> The court held that as long as the invocation and benediction recited at the graduation ceremony do not "symbolically place the government's seal of approval on one religious view – the Christian view" and instead are "civil" in their content, the prayers do not violate the First Amendment.<sup>232</sup> In *Stein*, the circuit court decided that the invocation and benediction delivered at the graduation ceremony crossed the line between permissible "civil" content and impermissible "religious" views.<sup>233</sup> Since, language of Christian theology was used, the court determined that the *Marsh* test was not met and the Establishment Clause was violated.<sup>234</sup>

The preceding section shows the lack of uniformity in this area of Establishment Clause jurisprudence. The lower courts are bound by precedent to follow the misguided lead of the Supreme Court. The Court should rely on one test in determining a graduation prayer case under the Establishment Clause: the *Lemon* test. By using the *Lemon* test

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We Trust" on coins, and opening court sessions with "God save the United States and this honorable court" . . . serve . . . the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.

*Id.* (quoting *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring)).

<sup>229</sup> *Id.* ("[U]nlike classroom prayer, ceremonial invocations and benedictions present less opportunity for religious indoctrination or peer pressure. The potential for coercion in the prayer opportunity was one of the distinctions employed by the Court in *Marsh* to separate legislative prayer from classroom prayer.").

<sup>230</sup> *Id.* See also *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>231</sup> *Stein*, 822 F. 2d at 1409.

<sup>232</sup> *Id.* at 1410. "If a prayer is nonsectarian and nondenominational, it does not cross [the] boundary of putting the state's imprint on religion." *Id.* (Milburn, J., concurring).

<sup>233</sup> *Id.* at 1409-10.

The court stated that so long as the invocation or benediction on these public occasions does not go beyond 'the American civil religion', so long as it preserves the substance of the principle of equal liberty of conscience, no violation of the Establishment Clause occurs under the reasoning of *Marsh* . . . . The invocations and benedictions delivered here do not pass the *Marsh* test. They are framed and phrased so that they 'symbolically place the government's seal of approval on one religious view'—the Christian view.

*Id.*

<sup>234</sup> *Id.* at 1410. The name "Jesus as Savior" was used in some of the prayers. *Id.*

and narrowing the scope of the entanglement prong, the Supreme Court will give the lower courts the guidance necessary to develop uniformity in determining issues dealing with this difficult area of the law. Section V revisits the story of Pat and Tammy Faye from Section I and analyzes their situation under the *Lemon* test.<sup>235</sup>

#### V. PROPOSED JUDICIAL APPROACH TO ANALYZING HIGH SCHOOL GRADUATION PRAYER CASES

*"Rumors of Lemon's death have been, in Mark Twain's words, 'greatly exaggerated'."*<sup>236</sup>

This Note advocates that the *Lemon* test is still viable and should be the only test used in determining the constitutionality of high school graduation prayer cases under the Establishment Clause. It provides a framework to use that, when applied consistently and narrowly, will result in government neutrality dealing with respect to religion.<sup>237</sup> All courts should follow the *Lemon* test in analyzing cases that involve prayer at high school graduation ceremonies. To refresh, the test consists of three simple elements: (1) the challenged practice must have a secular purpose; (2) its primary or essential effect must be secular; and, (3) it must not support an excessive government entanglement with religion.<sup>238</sup> If the challenged practice fails any one of the three elements, it violates the Establishment Clause; if the challenged practice passes all three elements, then the practice passes constitutional muster under the Establishment Clause.

Since Pat and Tammy Faye are on opposite sides of the graduation prayer issue, one of them is not going to be happy on graduation day. To expand the hypothetical, the school board decided not to sponsor a prayer at graduation this year. The school board also decided not to delegate the decision, of whether or not to have a prayer, to the senior class. Instead, the school board adopted a policy that would allow the principal to grant the top two academic scholars of the senior class the privilege of giving presentations during the graduation ceremony. The

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<sup>235</sup> See *supra* Section I.

<sup>236</sup> Kagan, *supra* note 8, at 633. See, e.g., JOHN BARTLETT, FAMILIAR QUOTATIONS 616 (Christopher Morley & Louella D. Everett eds., 12th ed. 1949).

<sup>237</sup> Kagan, *supra* note 8, at 650. "The three-part test set forth in *Lemon v. Kurtzman* provides a useful blueprint if narrowly and consistently applied to maximize governmental neutrality among religions and between religion and irreligion." *Id.*

<sup>238</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). See *supra* notes 57-73 and accompanying text.

principal will not review the presentations beforehand, but will be available for questions and advice if the students ask. The principal will also give the students a list to choose from of the type of presentations that can be given at the graduation ceremony. The list includes presenting a poem, musical presentation, reading, song, or prayer.

Pat and Tammy Faye happen to be the top two scholars in their class and are both asked to speak at the graduation ceremony. They both accept the invitation and begin working on their respective presentations. Tammy Faye plans on reading a short story and a poem<sup>239</sup> for her presentation, but she is distressed about the fact that Pat is planning on giving a prayer for his presentation.<sup>240</sup> Tammy Faye files a suit against the school board seeking an injunction that will prevent Pat from presenting a prayer at graduation.

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<sup>239</sup> The contents of Tammy Faye's presentation: I would like to share with you a story my grandfather told me when I started high school: An old man walked along the beach throwing starfish which had been stranded by the outgoing tide back into the ocean. There were hundreds of them to return to the water and obviously he couldn't begin to accomplish that task. A cynical young person came along and asked in a most arrogant manner, "What possible difference do you think you can make for all those starfish?" The old man stooped down, picked up another and, as he tossed it into the water, he replied in a quiet, confident tone, "For this one it makes all the difference in the world." My grandfather also gave me some advice that I would like to share with you this afternoon: "Look to this day. For yesterday is but a dream, and tomorrow is only a vision. But today well lived, makes yesterday a dream of happiness and every tomorrow a vision of hope. Look well therefore to this day!" Thank you, congratulations and good luck to the Class of 1999. (The author of this Note compiled this presentation from different well-known stories and does not claim original authorship.)

<sup>240</sup> Pat plans on reading a prayer that had been delivered by a student at Park View High School in 1993:

Dear Heavenly Father,

We thank you for the blessings you have bestowed upon us which have brought us together to celebrate this wonderful occasion. We thank you for our families, our teachers, and our friends who have helped us to grow physically, intellectually, and spiritually. As we move on to another phase in our lives, we humbly ask that you grant us the ability to meet each challenge and opportunity we may encounter with strength, courage, and wisdom. Help us to spread your light wherever our paths may lead us and help us to always treat our fellow man with kindness and love. Amen.

See *Gearon*, 844 F. Supp. at 1101.

Initially, the court will look to Supreme Court Establishment Clause precedent to determine which standard to follow. First, the court decides not to use the historical analysis test set forth in *Marsh*.<sup>241</sup> In deciding *Marsh*, the Supreme Court did not explain why it abandoned the *Lemon* test; however, it has been suggested by commentators that the Court wanted to uphold the practice but could not do so under *Lemon*, so the test was not used.<sup>242</sup> Although the practice of allowing prayers at high school graduation ceremonies has a historical tradition, this ceremonial exception is not the proper test to use in this case.<sup>243</sup> The difference between the legislative prayer at issue in *Marsh* and prayer at graduation is that at the time of the adoption of the First Amendment, churches, and not the government, founded schools.<sup>244</sup>

Next, the court decides not to use the Endorsement test<sup>245</sup> in the present case. The main reason not to use the Endorsement test is that it is an unworkable test for the situation. The Endorsement test's primary purpose is to protect people from "direct government action endorsing religion or a particular religious practice."<sup>246</sup> The *Lemon* test is a strict

<sup>241</sup> See *supra* notes 77-92 and accompanying text.

<sup>242</sup> Bodensteiner, *supra* note 8, at 412. Prof. Bodensteiner suggests that if the Court used the *Lemon* test it would have found the practice of allowing prayer to open the legislative sessions unconstitutional. *Id.* He also points out that a historical approach in interpreting constitutional provisions is not always a good idea. *Id.* He reasons by analogy a historical approach to the thirteenth and fourteenth amendments. *Id.* When the thirteenth and fourteenth amendments were passed in the 1860s, there were a number of racially discriminatory practices in place. *Id.* Prof. Bodensteiner questions: "Should the Court say today that because the framers of these Reconstruction amendments were aware of the practices, they could not have viewed such practices existing as violating the thirteenth and fourteenth amendments?" *Id.* The answer is no. *Id.* See also Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988). Prof. McConnell states "[t]he Supreme Court offered no theory whatsoever in *Marsh* . . . . So far as one can tell from the Court's opinion, there is simply an exception from the establishment clause for legislative chaplains." *Id.* at 363.

<sup>243</sup> "I would point out that we can take judicial notice that invocations and benedictions at public school commencements have been a traditional practice since the beginning of the public schools in this country." Stein v. Plainwell Community Schs., 822 F.2d 1406, 1410 (6th Cir. 1987) (Milburn, C.J., concurring).

<sup>244</sup> LYNN ET AL., *supra* note 20, at 7. Mr. Lynn discusses that the earliest public schools were founded by the Protestant church and that being able to read the Bible was a necessary skill. *Id.*

<sup>245</sup> See *supra* notes 98-112 and accompanying text.

<sup>246</sup> Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring). Justice O'Connor stated: "The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude

separationist approach, whereas the Endorsement test is more "religion friendly."<sup>247</sup> If the courts would abandon the *Lemon* test for the Endorsement test, the government would be sending a signal that it was endorsing religion.<sup>248</sup> Because the Establishment Clause is designed to protect from this type of endorsement, it would not be logical to use this test.<sup>249</sup>

In the only Supreme Court case to deal with a type of graduation prayer, the Coercion test was developed and used.<sup>250</sup> The Coercion test, however, is not the proper test to use in this case. The first reason is that the *Lee* decision was very fact specific and can be distinguished from the present fact pattern.<sup>251</sup> The second reason not to use the Coercion test is that if courts were to follow the coercion theory, they would be drastically changing the existing attitudes about the role of government and the nature of religion.<sup>252</sup> Opponents of the coercion theory argue

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government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id.* at 70.

<sup>247</sup> See, e.g., Rodriguez, *supra* note 13, at 1176-77.

<sup>248</sup> *Id.* Rodriguez reasons by analogy to make this argument. *Id.* at 1178-79 (using *Reitman v. Mulkey*, 387 U.S. 369, 378-79 (1967)). In *Reitman*, the Court addressed the repeal of a California anti-discrimination statute and its effects. *Id.* at 1179. The Court held that by changing the law from prohibiting discrimination completely to a view that was neutral would send a message to people that the government was endorsing discrimination. *Id.* Applying this reasoning, if the Court abandons *Lemon* for the Endorsement test, it will send a message to people that it endorses religion. *Id.*

<sup>249</sup> See Gey, *supra* note 5, at 480. Explaining that Justice O'Connor seems to have contradictory views in her Endorsement test:

The real problem with the endorsement test is that Justice O'Connor has attempted to construct an Establishment Clause standard that points in two directions at once. She recognizes, and tries to respect, the long constitutional tradition of separating church and state. At the same time, however, she approves a certain level of state benefits to religion, provided that the benefits do not go too far.

*Id.*

Justice Kennedy has also voiced concern about the Endorsement test. *County of Allegheny v. ACLU Greater of Pittsburgh*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). He says that the open-ended nature of the endorsement approach "threatens to trivialize constitutional adjudication" and create a "jurisprudence of minutiae." *Id.*

<sup>250</sup> See *supra* notes 117-33 and accompanying text.

<sup>251</sup> See *supra* note 138 and accompanying text. The pertinent facts of the hypothetical case are that: the prayer was given by a student; the student was picked on neutral criteria – academic performance; and, the state actor had no part in composing the presentation. However, in *Lee*, a clergy member was chosen by the school principal to deliver an invocation and benediction during the graduation ceremony. See *supra* note 118 and accompanying text.

<sup>252</sup> Gey, *supra* note 5, at 465. Prof. Gey states that:

that the test will allow government activities that would normally be found unconstitutional because of religious endorsement, to be constitutional.<sup>253</sup> The Coercion test would abandon the separationist theory, which has been the foundation for the Supreme Court's Establishment Clause jurisprudence for an Establishment Clause standard based only on the protection of religious liberty.<sup>254</sup> The separation of church and state is key to preserving religious liberty.<sup>255</sup>

Therefore, to preserve the integrity of separation of church and state, the *Lemon* test, is the most ideal test to employ.<sup>256</sup> To begin the court's analysis under the *Lemon* test the court must first look to the purpose of the school board's policy concerning student presentations at the graduation ceremony. The school board's stated purpose for allowing

Under an Establishment Clause jurisprudence that is guided exclusively by the coercion standard, however, religion becomes a legitimate matter of collective governmental concern, limited only by the flexible condition that the political and religious majority may not use its control of government to heavy-handedly. Under this standard, theocratic government policies would no longer automatically violate the Constitution.

*Id.*

<sup>253</sup> In *County of Allegheny* Justice O'Connor expressed her concern with a test that only prohibits coercion:

An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization . . . but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.

*County of Allegheny*, 492 U.S. at 627-28 (1989) (O'Connor, J., concurring and in part concurring in the judgment).

Justice O'Connor's statement was made before the Court used the Coercion test to find the practice of the school board in *Lee* unconstitutional. However, Justice O'Connor joined Justice Blackmun concurring in the *Lee* decision and stated:

Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion. But it is not enough that the government restrain from compelling religious practices: It must not engage in them either. The Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion.

*Lee*, 505 U.S. at 604 (Blackmun, J., & O'Connor, J., concurring).

<sup>254</sup> Gey, *supra* note 5, at 482.

<sup>255</sup> *Id.* at 494.

<sup>256</sup> See *supra* notes 57-75 and accompanying text.

the top two students to make presentations at graduation is to honor them for their achievement. The school board also stated that the presentations given by the students would serve to solemnize the event. Even though a student may choose to give a prayer as its presentation, the school board argues that its policy has a secular purpose.

The list of appropriate presentations includes four types based on form (poem, musical presentation, reading, song) and only one type based on content (prayer). The fact that the list includes only one specific reference to a content based type of presentation, prayer, shows that the school board is still trying to include religion in the ceremony. By singling out prayer as an acceptable presentation, the school board is informing the students that it supports prayer. A position of neutrality is required when dealing with religion and by guiding the speaker to think about prayer over a secular message the school board has violated this requirement.<sup>257</sup> Hence, the policy fails the first prong of the *Lemon* test.

Even though the school board's policy has failed the first prong and thus violates the Establishment Clause, for purposes of this Note, the court next will analyze what effect the policy has overall. Under the second prong of *Lemon* the court needs to examine the school board policy as a whole, not just the section that might raise impermissible religious implications. The school board's decision to not sponsor a prayer at graduation and to not delegate the decision to the students seems to keep the school board out of a situation in which it would be promoting religion; either explicitly or implicitly. However, for the same reason the policy failed the first prong, the policy does have an effect that advances religion. If the school board had only included the four forms of presentations and left out the prayer choice, it would be a different analysis. Yet, the policy does reference religion and implicitly promotes religion. Therefore, the policy fails the second prong of the *Lemon* test.

Again, for purposes of this Note, the court will analyze the policy under the third prong of *Lemon* and determine if the school board's policy excessively entangles the government with religion. Upon first glance, it would seem that the policy would pass this prong. The principal picks the students based on their grades, a neutral criteria, and allows the students to choose what they want to present. The principal will not see the content of the presentations unless the students choose to ask the principal for advice or help. However, if a student chooses to

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<sup>257</sup> See *supra* note 159.

deliver a prayer and the student seeks advice from the principal, there will be entanglement between the state actor and religion. Additionally, one can safely assume that if a student chose to give a reading about how to effectively obtain drugs after graduating from high school, the principal would find out about it from the student body because they would be talking about the speech. The principal would have an opportunity to put a stop to it before graduation day.<sup>258</sup>

The problem with reviewing the student's presentation before it is delivered is a "catch-22." On the one hand, if the principal does review the remarks, there is clearly entanglement between state and religion if the remark is a prayer. On the other hand, if the principal does not review the remarks, he could be accused of "an abdication of responsibility."<sup>259</sup> Considering there is a chance for entanglement between government and religion, the policy fails the third prong of the *Lemon* test. As a result, the school board's policy is found to violate the Establishment Clause of the First Amendment because it does not have a secular purpose, its affect is to promote religion, and it harbors entanglement between government and religion. The court concludes that Tammy Faye's request for an injunction prohibiting any type of prayer to be delivered at the high school graduation ceremony should be granted.

## VI. CONCLUSION

The *Lemon* test, despite its criticisms, should be applied to cases dealing with prayer at high school graduation ceremonies. The Establishment Clause was designed to protect citizens from government

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<sup>258</sup> *But see* Paul Rolly & Joann Jacobsen-Wells, *Arrest Him? No, They Didn't Have A Prayer*, SALT LAKE TRIB., June 10, 1998, at D1. The newspaper article describes the following prayer at a graduation ceremony:

When a Bingham High School student scheduled to speak at graduation last week said a prayer, some thought they had witnessed a crime . . . .

What was I supposed to do, tackle him?" said Principal Ray Jensen.

Doug Bates, attorney for the State Office of Education, said if the school sanctions the prayer, it violates constitutional church-state separation provision. But students have a free-speech right to pray if they choose to.

*Id.*

<sup>259</sup> *Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097, 1100 n.5 (E.D. Va. 1993). Black's Law Dictionary defines "abdication" as: "[t]he act of renouncing or abandoning privileges or duties, [especially] those connected with high office." BLACK'S LAW DICTIONARY 1 (pocket ed. 1996).

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involvement in religious activities. The *Lemon* test is the best protection available to continue the separation of church and state. Religion is a private matter and should be kept a private matter.<sup>260</sup> The *Lemon* test, properly applied, will protect each individual's religious beliefs or non-beliefs and will keep Jefferson's wall of separation high.

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<sup>260</sup> "Because the Framers of the Establishment Clause understood that 'religion is too personal, too sacred, too holy to permit its "unhallowed perversion" by civil [authorities], ... the Clause demands that government play no role in this effort.'" *Lynch v. Donnelly*, 465 U.S. 668, 725 (1984) (Brennan, J., dissenting).

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