

## THE COERCION TEST: ON PRAYER, OFFENSE, AND DOCTRINAL INCULCATION

MARK STRASSER\*

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### INTRODUCTION

Several different tests have been proposed to determine whether a state practice violates the Establishment Clause, including the *Lemon* test, the endorsement test, and the coercion test. While no test yet commands the consistent support of members of the Court, it is clear that several members of

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\* Trustees Professor of Law, Capital University Law School, Columbus, Ohio. I would like to thank Professor Vincent Samar for his helpful comments on an earlier version of this article.

the Court favor some version of the coercion test. Interpretation and evaluation of that test are rather difficult, however, because Court members differ greatly both about what kind of coercion triggers the relevant protections and about what the test is designed to prevent. As described by Justice Kennedy, the test might preclude a whole range of practices that would result in an individual being psychologically pressured against her will to participate in or to attend a state-sponsored event in which a religious ceremony takes place, while the test described by Justices Scalia and Thomas would preclude substantially less. The great disparity in views both about the reach and the proper application of the coercion test has caused utter confusion in the lower courts—courts have reached diametrically opposed conclusions about the constitutionality of relevantly similar school setting practices.

Part I of this Article discusses pre-*Lee v. Weisman*<sup>1</sup> cases in which different Justices discuss whether or in what ways coercion must be shown to support a finding that the Establishment Clause has been violated. Part II discusses *Lee*, the case in which the test was adopted, and applications of *Lee* in some of the circuits. Part III discusses *Santa Fe Independent School District v. Doe*,<sup>2</sup> where the Court applied and possibly refined the coercion test, and application of that possible refinement in the circuits. The Article concludes by highlighting some of the ways in which the Court's jurisprudence has created unnecessary difficulty and confusion and by noting that until members of the Court can reach much more of a consensus about what the coercion test is designed to prevent and what kind of coercion is constitutionally proscribed, the chaos and confusion in the jurisprudence and in the lower courts will only increase.

#### I. COERCION AND THE ESTABLISHMENT CLAUSE

The Supreme Court long ago explained that a state practice might violate Establishment Clause guarantees even absent a showing of direct state coercion. However, members of the Court have very different understandings of the relationship between coercion and Establishment Clause guarantees, both with respect to whether the existence of coercion is a necessary rather than a sufficient condition to trigger Establishment Clause guarantees and even with respect to the kind of coercion that is relevant for constitutional purposes. With those disagreements remaining unresolved, it is no wonder that the jurisprudence preceding *Lee* provided no clear analysis regarding the relationship between coercion and Establishment Clause guarantees.

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1. 505 U.S. 577 (1992).

2. 530 U.S. 290 (2000).

A. *Engel's Rejection of the Need to Show Coercion?*

Almost fifty years ago, the Court in *Engel v. Vitale* discussed whether a state practice might violate Establishment Clause guarantees even absent a showing of state coercion.<sup>3</sup> The Court made clear that it could, although there has been some debate about whether the Court was merely suggesting that Establishment Clause protections could be triggered even absent *direct* state coercion or, instead, was suggesting that such protections could be triggered absent any state coercion at all.

At issue in *Engel* was the required daily recitation in New York public schools of a non-denominational prayer composed by the regents themselves.<sup>4</sup> The Court struck down the practice,<sup>5</sup> noting that “the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”<sup>6</sup> Yet, the Constitution’s prohibiting states from composing official prayers to be recited at state functions does not impose much of a limitation on the states, and the important issue for purposes of understanding the coercion test involves determining what else *Engel* and other cases have to say about the constraints imposed by the Establishment Clause.<sup>7</sup>

Suppose that the state had not composed the prayer but, instead, had merely encouraged the daily recitation of a nondenominational prayer in the classroom.<sup>8</sup> Even so, the *Engel* Court suggested that the state would have been

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

4. *Id.* at 422.

The respondent Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under state law, directed the School District’s principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”

*Id.*

5. *Id.* at 424 (“We think that by using its public school system to encourage recitation of the Regents’ prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause.”).

6. *Id.* at 425.

7. The Establishment Clause has been incorporated against the states through the Fourteenth Amendment. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (“The First Amendment, as made applicable to the states by the Fourteenth, commands that a state ‘shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’” (citing *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943))).

8. *Cf. Engel*, 370 U.S. at 436 (“It is true that New York’s establishment of its Regents’ prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others.”).

overstepping the limitations imposed by the Establishment Clause,<sup>9</sup> explaining that “government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.”<sup>10</sup> Thus, the Court suggested, the state would not have been allowed to require the recitation of a prayer at a state-sponsored event, even had the prayer been composed by a private citizen rather than the regents, themselves.

The difficulty with the New York program was *not* that students were being forced to recite the prayer or even to remain in the room while it was recited, since they had the option of absenting themselves from the room while the prayer was being recited.<sup>11</sup> The *Engel* Court explained that the Establishment Clause “does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”<sup>12</sup> Yet, merely because *direct* governmental compulsion need not be shown does not mean that Establishment Clause guarantees can be violated even absent a showing of *any* compulsion at all. Instead, the *Engel* Court may merely have meant that although it is necessary to show some sort of governmental compulsion, a showing of *indirect* compulsion will suffice.

The New York practice imposed some pressure on the students to participate: “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”<sup>13</sup> By requiring the recitation of a prayer, the state placed non-adherents in a difficult position—either they could leave and risk the potentially adverse consequences that might result from refusing to remain in the room while the prayer was recited, e.g., ostracism by peers, or they could remain in the room and be forced to confront the fact that their religious beliefs did not coincide with those endorsed by the state. Yet, after noting that the New York program indirectly coerced students to accept prevailing religious views, the Court failed to explain whether that coercion was necessary or, instead, sufficient to show that constitutional guarantees had been violated.

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9. *Id.* at 424 (“We think that by using its public school system to encourage recitation of the Regents’ prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause.”).

10. *Id.* at 430.

11. *See id.* (“[T]he program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room . . .”).

12. *Id.*

13. *Engel*, 370 U.S. at 431.

The *Engel* Court's discussion of the purposes behind the Establishment Clause might be interpreted to support either of two competing positions: (1) the State cannot be shown to have violated Establishment Clause guarantees unless there is proof of at least indirect coercion, or (2) the State may be shown to have violated Establishment Clause guarantees even absent proof of either direct or indirect coercion. For example, after suggesting that one of the goals of the Establishment Clause was to prevent the imposition of this indirect pressure on non-adherents, the Court explained that "the purposes underlying the Establishment Clause go much further than that."<sup>14</sup> But the Court did not make clear whether those further purposes were totally divorced from preventing religious coercion or, instead, could all be understood in terms of the negative effects associated with forcing individuals to subscribe to religious orthodoxy.

Consider the point that the Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion,"<sup>15</sup> because "whenever government . . . allie[s] itself with one particular form of religion, the inevitable result [is] that it incur[s] the hatred, disrespect and even contempt of those [holding] contrary beliefs."<sup>16</sup> It is simply unclear whether these feelings of contempt and disrespect arise from the mere fact that the state has endorsed particular religious views or, instead, from the state's imposing pressure on its citizens to adopt those views. By the same token, the Founders' "awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand"<sup>17</sup> speaks to a recognition that the government endorsement of religion can lead to state pressure to adhere to religious orthodoxy. But if the result to be avoided is religious persecution and not government endorsement of particular religious views per se, then the Constitution's precluding both direct and indirect coercion would seem to do all of the necessary work to achieve the desired goal.

Nonetheless, the *Engel* Court implied that the Establishment Clause was designed to do more than prevent governmental coercion. When suggesting that "government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance,"<sup>18</sup> the Court was not solely focused on coercion. Rather, it was suggesting that the Constitution reserves religious functions for the people or, perhaps, members of the clergy, and that the state is simply not to get involved

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14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 432.

18. *Engel*, 370 U.S. at 435.

in religion, much less coerce people to adopt or reject particular religious views.

It might seem that the danger posed by the short, nondenominational prayer at issue in *Engel* was so trivial as to pose no real danger. Yet that view was rejected, because the Court feared that permitting this incursion on religious liberty might permit much more serious incursions in the future.<sup>19</sup> Still, it was unclear what kind of incursions the Court was envisioning—more coercive measures, e.g., the imposition of sanctions on those who were unwilling to recite a nondenominational prayer, or more sectarian, albeit non-coercive practices, e.g., state-sponsored prayers invoking the name of a particular religious figure.<sup>20</sup>

After focusing on the coercive aspect of the practice at issue, Justice Douglas noted that a variety of other state practices imposed that same sort of indirect religious coercion:

It is said that the element of coercion is inherent in the giving of this prayer. If that is true here, it is also true of the prayer with which this Court is convened, and of those that open the Congress. Few adults, let alone children, would leave our courtroom or the Senate or the House while those prayers are being given. Every such audience is in a sense a “captive” audience.<sup>21</sup>

When making this point, he was arguing that *all* of these practices offended constitutional guarantees.<sup>22</sup> His point at least suggests that in many cases involving alleged violations of Establishment Clause guarantees, the

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19. *See id.* at 436.

To those who may subscribe to the view that because the Regents’ official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment: “(I)t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?”

*Id.* (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 185–86 (Gaillard Hunt Ed., (1900)).

20. *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 42 (2004) (O’Connor, J., concurring) (“The Pledge . . . does not refer to a nation ‘under Jesus’ or ‘under Vishnu,’ but instead acknowledges religion in a general way: a simple reference to a generic ‘God.’”); *McCreary County v. ACLU*, 545 U.S. 844, 897 (2005) (Scalia, J., dissenting) (“*All* of the actions of Washington and the First Congress upon which I have relied, virtually all Thanksgiving Proclamations throughout our history, and *all* the other examples of our Government’s favoring religion that I have cited, have invoked God, but not Jesus Christ.”).

21. *Engel*, 370 U.S. at 441–42 (Douglas, J., concurring).

22. *Id.* at 437 (“I think it is an unconstitutional undertaking whatever form it takes.”).

requirement that there be proof of indirect coercion may not pose much of a bar.<sup>23</sup> If indirect coercion is interpreted rather broadly and, for example, occurs whenever religious activities take place at state-sponsored events, the relevant question in many cases will not be whether there was indirect coercion but, instead, whether something in addition to coercion must be shown in order for the Court to find that Establishment Clause guarantees have been violated.

Given that the state itself had composed the prayer for which daily recitation in the public schools was mandated, there were several different bases upon which the *Engel* Court could rest the practice's unconstitutionality. That said, it should not be thought that the *Engel* decision was unanimous. In his dissenting opinion, Justice Stewart not only suggested that permitting but not requiring students to pray did not constitute an establishment of religion, but also suggested that denying "the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation."<sup>24</sup> Justice Stewart thereby foreshadowed a different argument that would be offered with some frequency in the context of prayer in schools, namely, that some students fervently wish to have such prayers and that by denying those students such an opportunity the state seemed to be denying them something that they valued rather highly.<sup>25</sup>

#### B. *Schempp on Coercion*

In *School District of Abington Township v. Schempp*,<sup>26</sup> the Court considered the constitutionality of a Pennsylvania law requiring the reading of Bible verses at the beginning of each school day.<sup>27</sup> As was true in *Engel*, the law at issue in *Schempp* provided that children could be excused from the reading.<sup>28</sup> As was also true in *Engel*, the Court struck down the law as a

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23. Justice Douglas may have been using a different albeit related criterion of unconstitutionality. *See id.* ("The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financing. Nevertheless, I think it is an unconstitutional undertaking whatever form it takes.").

24. *Id.* at 445 (Stewart, J., dissenting).

25. *Cf. Lee v. Weisman*, 505 U.S. 577, 645 (Scalia, J., dissenting).

Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations."

*Id.*

26. 374 U.S. 203 (1963).

27. *Id.* at 205.

28. *See id.*

violation of religious guarantees.<sup>29</sup> The *Schempp* Court reaffirmed that it was not necessary to make a showing of coercion under the Establishment Clause, noting that the “distinction between the two [Religion] clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.”<sup>30</sup>

It might seem that by unequivocally stating that coercion was not an element of Establishment Clause analysis, the *Schempp* Court made clear what the *Engel* Court had left uncertain. Yet, one might argue that implicit in the *Schempp* discussion of coercion was the term “direct.”<sup>31</sup> After all, pressure and coercion were discussed in *Schempp*, at least in that the Court mentioned that the father had not sought to have his children excused from these exercises because he had feared that his doing so would adversely affect his children’s relationships with their teachers and with the other students.<sup>32</sup> Thus, *Schempp* might be thought compatible with an interpretation of Establishment Clause jurisprudence suggesting that there must be at least indirect coercion in order for the relevant guarantees to be triggered. However, such a reading would also imply a very relaxed standard for determining what would constitute indirect coercion, because the only coercion mentioned in *Schempp* is the *possibility* that students or teachers might react negatively were the children to absent themselves from the classroom during the daily prayer recitation.

### C. Wallace and the Coerciveness of Prayer

Any discussion of the coerciveness of prayer in the classroom setting should include *Wallace v. Jaffree*,<sup>33</sup> which involved a challenge to an Alabama statute authorizing “a period of silence ‘for meditation or voluntary prayer.’”<sup>34</sup> Ishmael Jaffree had challenged a Mobile County Public School practice of

29. *See id.* at 224.

30. *See id.* at 223; *see also* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973).

The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause. In *School District of Abington Township v. Schempp*, . . . it was contended that Bible recitations in public schools did not violate the Establishment Clause because participation in such exercises was not coerced. The Court rejected that argument, noting that while proof of coercion might provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment Clause.

*Nyquist*, 413 U.S. at 786 (citing *Schempp*, 374 U.S. at 222–23).

31. *Cf.* *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 660–61 (1989) (Kennedy, J., concurring in part and dissenting in part) (“some of our recent cases reject the view that coercion is the sole touchstone of an Establishment Clause violation . . . [which] may be true if by ‘coercion’ is meant *direct* coercion . . .”).

32. *Schempp*, 374 U.S. at 208.

33. 472 U.S. 38 (1985).

34. *Id.* at 40.



maintaining regular religious prayer services, alleging that: “teachers had ‘on a daily’ basis led their classes in saying certain prayers in unison,”<sup>35</sup> his children had been subjected to “various acts of religious indoctrination,”<sup>36</sup> and his children had been “exposed to ostracism from their peer group class members if they did not participate.”<sup>37</sup>

The Court struck down the law at issue because its enactment “was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose.”<sup>38</sup> Because the state already had a statute permitting meditation, the Court viewed the new statute, which permitted meditation *or prayer*, as an attempt to return prayer to the public schools.<sup>39</sup>

*Wallace* is of interest, at least in part, because several members of the Court stated or implied that the constitutional difficulty was not prayer in school per se, but some of the other features of the case.<sup>40</sup> For example, the *Wallace* Court distinguished what was before it from the state’s “merely protecting every student’s right to engage in voluntary prayer during an appropriate moment of silence during the schoolday.”<sup>41</sup> The Court did not explore why a student praying during the moment of silence was permissible, although in her concurrence in the judgment Justice O’Connor offered several ways to distinguish between state-sponsored prayer and the state instituting a moment of silence during which students might pray or reflect.<sup>42</sup>

She began her analysis by explaining how both *Engel* and *Schempp* might be understood in terms of indirect coercion by the State. In both of those cases, “a student who did not share the religious beliefs expressed in the course of the exercise was left with the choice of participating, thereby compromising the nonadherent’s beliefs, or withdrawing, thereby calling attention to his or her nonconformity.”<sup>43</sup> Justice O’Connor contrasted the constitutionally problematic scenarios presented in *Engel* and *Schempp* with a scenario where

35. *Id.* at 42.

36. *Id.*

37. *Id.*

38. *Wallace*, 472 U.S. at 56.

39. *See id.* at 59.

40. *Id.*; *see also id.* at 62 (Powell, J., concurring) (“I agree fully with Justice O’Connor’s assertion that some moment-of-silence statutes may be constitutional.”); *Id.* at 67 (O’Connor, J., concurring in the judgment) (“Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the schoolday.”).

41. *Id.* at 59.

42. *Id.* at 72 (O’Connor, J., concurring in the judgment).

43. *Wallace*, 472 U.S. at 72 (O’Connor, J., concurring in the judgment). *But see* Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451, 456 (1995) (“In both *Engel v. Vitale* and *Abington Township School District v. Schempp*, the Court . . . answer[ed] question (b) with a clear ‘No’—proof of coercion is not necessary for an Establishment Clause claim.”).

the state has merely set aside a moment of silence during the day. For example, “a moment of silence is not inherently religious,”<sup>44</sup> since that time can be used for non-religious reflection or meditation. Further, an individual taking part in a moment of silence need not thereby compromise her beliefs, because “a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others.”<sup>45</sup> For these kinds of reasons among others, Justice O’Connor believed that the state’s providing an opportunity for prayer during a moment of silence was constitutionally distinguishable from the state’s implementing a policy whereby prayers were periodically offered.<sup>46</sup>

There is no small irony in Justice O’Connor’s having explicated *Engel* and *Schempp* in terms of state coercion. In a subsequent opinion, in which Justice Kennedy suggested that the Court’s Establishment Clause jurisprudence was best understood in terms of a coercion theory,<sup>47</sup> Justice O’Connor implied that he had mischaracterized the jurisprudence.<sup>48</sup> Yet, her characterization of *Engel* and *Schempp* makes Justice Kennedy’s analysis of Establishment Clause jurisprudence much more plausible.

#### D. *The Indirect Coercion Theory of Establishment Clause Jurisprudence*

The first sustained defense of a coercion theory of Establishment Clause jurisprudence was offered by Justice Kennedy in his concurrence and dissent in *County of Allegheny v. American Civil Liberties Union*.<sup>49</sup> At issue in *Allegheny* were two recurring holiday displays: (1) a crèche that was placed on the Grand Staircase of the Allegheny County Courthouse, and (2) a menorah placed next to both a Christmas tree and a sign saluting liberty outside of the City-County Building.<sup>50</sup> The Court announced the test that it would use to determine whether the Establishment Clause had been violated, namely,

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

45. *Id.*

46. *See id.* at 73 (“By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period.”).

47. *See County of Allegheny v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573, 655–79 (1989) (Kennedy, J., concurring in part and dissenting in part).

48. *See id.* at 627–28 (O’Connor, J., concurring in part and concurring in the judgment).

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.

*Id.*

49. *Id.* at 659 (Kennedy, J., concurring in part and dissenting in part).

50. *Id.* at 578 (majority opinion).

whether the “display of the crèche and the menorah, in their ‘respective particular physical settings,’ has the effect of endorsing or disapproving religious beliefs.”<sup>51</sup> The Court then held that the display of the crèche was unconstitutional,<sup>52</sup> but that the display involving the menorah, Christmas tree, and sign passed constitutional muster.<sup>53</sup>

In his concurring and dissenting opinion, Justice Kennedy offered his understanding of the limitations imposed by the Establishment Clause: “government may not coerce anyone to support or participate in any religion or its exercise; and it may not . . . give direct benefits to religion in such a degree that it in fact ‘establishes a [state] religion or religious faith, or tends to do so.’”<sup>54</sup> He went on to explain that these conditions were not unrelated, since it would be difficult to “establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.”<sup>55</sup> Thus, Justice Kennedy suggests, coercion broadly construed explains the limitations imposed on the states by the Establishment Clause.

The plausibility of his account depends heavily upon how “coercion” is spelled out, and Justice Kennedy tried to flesh out its meaning. After noting that the Court had “invalidated actions that further the interests of religion through the coercive power of government,”<sup>56</sup> he offered examples such as “compelling or coercing participation or attendance at a religious activity,”<sup>57</sup> “requiring religious oaths to obtain government office or benefits,”<sup>58</sup> and “delegating government power to religious groups.”<sup>59</sup> Each of these examples referred to a case that had been decided by the Court, and so it seemed that Justice Kennedy’s interpretation at least reflected the then-current jurisprudence.

Yet, when citing to these cases, Justice Kennedy did not delineate which were decided as Establishment Clause cases and which were decided as free

51. *Id.* at 597.

52. *Allegheny*, 492 U.S. at 602 (“The display of the crèche in this context, therefore, must be permanently enjoined.”).

53. *See id.* at 617–18 (“In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.”).

54. *Id.* at 659 (Kennedy, J., concurring in part and dissenting in part) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

55. *Id.* at 659–60.

56. *Id.* at 660.

57. *Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring in part and dissenting in part) (citing *Engel v. Vitale*, 370 U.S. 421 (1962)).

58. *Id.* (citing *Torcaso v. Watkins*, 367 U.S. 488 (1961)).

59. *Id.* (citing *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982)).

exercise cases. Consider, for example, *Torcaso v. Watkins*,<sup>60</sup> where a state constitutional provision requiring “declaration of belief in God as a qualification for office”<sup>61</sup> was at issue. The Court made quite clear that religious coercion is impermissible—“neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’”<sup>62</sup> But the Maryland oath requirement was unconstitutional because it was a violation of free exercise guarantees.<sup>63</sup> While Justice Kennedy was correct to cite *Torcaso* for the proposition that religious coercion is constitutionally impermissible, *Torcaso* does not support a coercion analysis of the Establishment Clause.

Justice Kennedy also cited *Larkin v. Grendel’s Den*,<sup>64</sup> which involved a Massachusetts law vesting in church governing bodies the power to “veto applications for liquor licenses within a 500-foot radius of the church.”<sup>65</sup> The Court struck down the law for several reasons, including that “the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred,”<sup>66</sup> which would make the statute have “a ‘primary’ and ‘principal’ effect of advancing religion.”<sup>67</sup> The Court also noted that “the core rationale underlying the Establishment Clause is preventing ‘a fusion of governmental and religious functions.’”<sup>68</sup> Yet, there was no mention of coercion in the *Larkin* opinion. The closest that the Court came to doing so was to note that the “churches’ power under the statute is standardless,”<sup>69</sup> and to hypothesize that the granted power could “be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith.”<sup>70</sup> However, after noting how the power could be abused, the Court quickly pointed out that it would “assume that churches would act in good faith in their exercise of the statutory power.”<sup>71</sup> Thus, although *Larkin* was an Establishment Clause case, coercion did not play any role in the rationale behind the Court’s decision to

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60. 367 U.S. 488 (1961).

61. *See id.* at 489.

62. *Id.* at 495 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)).

63. *Id.* at 496 (“This Maryland religious test for public office unconstitutionally invades the appellant’s freedom of belief and religion and therefore cannot be enforced against him.”).

64. 459 U.S. 116 (1982).

65. *Id.* at 117.

66. *Id.* at 125–26.

67. *Id.* at 126 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

68. *Id.* (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963)).

69. *Larkin*, 459 U.S. at 125.

70. *Id.*

71. *Id.* (citing *Lemon*, 403 U.S. at 618–19).

strike down the law at issue. There was at most a hint of the potential for coercion, and the Court dismissed that possibility as not being credible.

*Engel* was cited by Justice Kennedy for the proposition that the state could not compel attendance at a religious activity.<sup>72</sup> However, he failed to note that no one had been compelled to do anything in *Engel*,<sup>73</sup> and thus *Engel* “is a slim reed upon which to rest that absolute proposition.”<sup>74</sup>

After discussing these cases, Justice Kennedy made a somewhat misleading claim: “The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses.”<sup>75</sup> Although it might seem that by talking about both the Establishment Clause and the Free Exercise Clause he is not forced to differentiate between the cases and discuss which were decided on which grounds, that is not correct. He is suggesting that *the* object of *each* of the Clauses is to assure freedom of worship without government interference or oppression, but none of the cases suggests that. Further, while the cases do suggest that the Free Exercise Clause is designed to secure that goal, they do not suggest that the purpose of the Establishment Clause can or should be similarly described.

Certainly, *Engel* discusses the importance of preventing religious persecution by the state, and it suggests that there is a positive correlation between state endorsement of particular religious views on the one hand and religious persecution on the other. However, the focus there is not on freedom of worship per se but, instead, on preventing the state from preferring some religious views over others. Thus, protestations to the contrary notwithstanding, freedom of worship without government interference or oppression does not seem to be the purpose of each of the clauses. Indeed, if the two different clauses had the same object, it is not at all clear why both of them would be needed.<sup>76</sup> Regrettably, Justice Kennedy implies that in his view there is no need for both clauses when he suggests, “Barring all attempts to aid religion through government coercion goes far toward attainment of this object

72. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring in part and dissenting in part) (citing *Engel v. Vitale*, 370 U.S. 421 (1962)).

73. *See supra* note 11 and accompanying text (noting that children would neither have to participate in the exercise nor even be present for it). *But see supra* note 13 and accompanying text (suggesting that putting the state’s power and prestige behind the prayer was at least indirectly coercive).

74. *See United States v. Mandujano*, 425 U.S. 564, 586 (1976).

75. *Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring in part and dissenting in part).

76. *See id.* at 628 (O’Connor, J., concurring in part and concurring in the judgment) (“To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy.”).

[i.e., freedom of worship],”<sup>77</sup> as if the protection of religion would not diminish even were there a constitutional amendment effecting a repeal of the Establishment Clause.

Justice Kennedy understood that in different cases the Court had rejected his suggestion that “coercion is the sole touchstone of an Establishment Clause violation,”<sup>78</sup> but he tried to limit the force of those cases by distinguishing among types of coercion. There is no constitutional requirement that coercion be shown “if by ‘coercion’ is meant *direct* coercion in the classic sense of an establishment of religion that the Framers knew.”<sup>79</sup> However,

coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. . . . [F]or example, . . . the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall.<sup>80</sup>

Thus, he suggested, some kinds of indirect aid to religion are so extreme that they would violate Establishment Clause guarantees.

Yet, Justice Kennedy’s example of the Latin cross on top of city hall was not particularly helpful, precisely because it was so extreme. He explained that the display would be coercive because “such an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.”<sup>81</sup> Yet, suppose instead that the Ten Commandments had been placed on the roof of city hall. Would that be permissible because it was not an obvious effort to proselytize on behalf of *one*

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77. *Id.* at 660 (Kennedy, J., concurring in part and dissenting in part).

78. *Id.*

79. *Id.* at 660–61.

80. *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part).

81. *Id.*

particular religion?<sup>82</sup> Would it matter were the cross not placed on city hall but instead placed elsewhere on state property?<sup>83</sup>

Justice Kennedy announced that “[s]peech may coerce in some circumstances,”<sup>84</sup> although he was not particularly helpful in distinguishing between coercive and noncoercive speech. While he noted that “where the government’s act of recognition or accommodation is passive and symbolic, . . . any intangible benefit to religion is unlikely to present a realistic risk of establishment,”<sup>85</sup> he did not seem to appreciate that such a point undercuts the coerciveness of the year-round display that he thought paradigmatically represented an Establishment Clause violation.

The position outlined by Justice Kennedy was even more difficult to understand when he suggested that “[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal,”<sup>86</sup> because he had just characterized a passive display as itself coercive. While he obviously does not think that all passive or symbolic displays are coercive, he never explained why the hypothesized, passive display on top of city hall would be coercive whereas other state displays favoring particular religious views would not be.

Justice Kennedy disagreed with the *Allegheny* Court that the state-sponsored display of the crèche violated the Establishment Clause. After all,

82. Cf. *McCreary County v. ACLU*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).

The three most popular religions in the United States—Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic. See U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2004–2005, p. 55 (124th ed. 2004) (Table No. 67). All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life.

*Id.*; see also Mark Strasser, *Thou Shalt Not?*, 6 U. MD. L.J. RACE RELIG. GENDER & CLASS 439, 476 (2006) (“Would it matter, for example, if a large Latin cross and a Star of David were permanently erected on the roof of city hall, since it would then not be the case that the state was trying to proselytize on behalf of a particular religion?”). Justice Kennedy did not join this part of Justice Scalia’s dissent. See *McCreary*, 545 U.S. at 885 (Scalia, J., dissenting) (“Justice Scalia, with whom the Chief Justice and Justice Thomas join, and with whom Justice Kennedy joins as to Parts II and III, dissenting.”).

83. See Jason Marques, Note, *To Bear a Cross: The Establishment Clause, Historic Preservation, and Eminent Domain Intersect at the Mt. Soledad Veterans Memorial*, 59 FLA. L. REV. 829, 855 (2007) (“The federal circuits . . . have frequently considered governmental sponsorship of Latin crosses on public land. In the great majority of federal decisions, displays of crosses on public land have been declared unconstitutional.”). But see *Allegheny*, 492 U.S. at 666 (Kennedy, J., concurring in part and dissenting in part) (“The fact that the crèche and menorah are both located on government property, even at the very seat of government, is likewise inconsequential.”).

84. *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part).

85. *Id.* at 662.

86. *Id.*

he noted, “Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.”<sup>87</sup> But the same might have been said to the passersby who disagreed with the message conveyed by a cross permanently erected above city hall.

One might distinguish between the hypothesized permanent city hall display and the seasonal display at issue in *Allegheny* by noting that in one case but not in the other there is *no* religious display during some portion of the year. However, such a distinction would require an analysis of how much of the year the state might display religious objects without crossing the relevant constitutional line. Justice Kennedy suggested that a city might violate Establishment Clause guarantees if it “chose to recognize, through religious displays, every significant Christian holiday while ignoring the holidays of all other faiths.”<sup>88</sup> Yet, this too would require an analysis of whether exhibiting displays at most but *not all* significant holidays of one religion would violate constitutional requirements.<sup>89</sup> By the same token, an analysis might be required regarding how many non-Christian displays would be required to avoid the charge that the state was seeking to endorse one particular religion.<sup>90</sup>

Justice Kennedy does not spell out the coercion test sufficiently clearly to know what it permits and what it does not, although Justice O’Connor warned in her *Allegheny* concurrence that 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.<sup>91</sup>

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87. *Id.* at 664.

88. *Id.* at 664 n.3.

89. *Allegheny*, 492 U.S. at 607 (“But, for Justice Kennedy, would it be enough of a preference for Christianity if that city each year displayed a crèche for 40 days during the Christmas season and a cross for 40 days during Lent (and never the symbols of other religions)?”).

90. *Cf. id.*

If one wished to be “uncharitable” to Justice Kennedy, . . . one could say that his methodology requires counting the number of days during which the government displays Christian symbols and subtracting from this the number of days during which non-Christian symbols are displayed, divided by the number of different non-Christian religions represented in these displays, and then somehow factoring into this equation the prominence of the display’s location and the degree to which each symbol possesses an inherently proselytizing quality.

*Id.*

91. *Id.* at 627–28 (O’Connor, J., concurring in part and concurring in the judgment).



Justice O'Connor's warning is well-taken insofar as coercion is defined relatively narrowly. However, if "coercion" is broadly construed, then it is not at all clear that the coercion test is less protective than other tests.<sup>92</sup> Regrettably, one of the points of disagreement among members of the Court involves how broadly the term should be construed, as was demonstrated in the very decision in which the Court adopted the coercion test as a standard to determine whether Establishment Clause guarantees have been violated.

## II. THE COERCION TEST IS ADOPTED AS A CONSTITUTIONAL STANDARD

While the Court in various decisions had at least suggested that Establishment Clause guarantees could be violated even absent state coercion, the Court in *Lee v. Weisman* nonetheless adopted the coercion test as a constitutional standard for evaluating challenges under the Establishment Clause.<sup>93</sup> *Lee* has not been particularly helpful for lower courts because there were so many respects in which the practice at issue was described as coercive. Because the Court failed to specify whether the Establishment Clause only precluded a state's engaging in all of these coercive practices or, instead, a state's engaging in any or, perhaps, some of them, lower courts have had great difficulty in offering a coherent account of *Lee*, even in the context of challenges to school prayer.

### A. *Lee and the Coercion Test*

*Lee* was unusual in several respects. Members of the Court could not agree about a variety of basic issues including what constitutes religious coercion by the state and whether a showing of such coercion was a necessary or sufficient condition for a finding that Establishment Clause guarantees had been violated. Nonetheless, several courts have referred to the *Lee* coercion test,<sup>94</sup> and it seems generally accepted that such a test was adopted and applied in *Lee*.<sup>95</sup>

92. A separate question is whether spelling out both Establishment and Free Exercise Clause guarantees in terms of coercion would obviate the need to have both Clauses. See *supra* notes 75–76 and accompanying text.

93. *Lee v. Weisman*, 505 U.S. 577, 578 (1992).

94. See *Wynne v. Great Falls, S.C.*, 376 F.3d 292, 302 n.8 (4th Cir. 2004) (discussing the *Lee* coercion test); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 63 (2d Cir. 2001) (discussing the "coercion test set out in *Lee v. Weisman*"); *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 469 (5th Cir. 2001) (referring to the "coercion test of *Lee v. Weisman*").

95. See Kristi L. Bowman, *An Empirical Study of Evolution, Creationism, and Intelligent Design Instruction in Public Schools*, 36 J.L. & EDUC. 301, 314 (2007) (explaining that "the 'coercion test' appeared to constitute the basis for the Court's 1992 decision in *Lee v. Weisman*"); Nicholas A. Schuneman, *One Nation, Under . . . the Watchmaker?: Intelligent Design and the Establishment Clause*, 22 BYU J. PUB. L. 179, 219 (2007) (discussing "the coercion test of *Lee v. Weisman*"); Christopher D. Tomlinson, *Changing the Rules of Establishment Clause Litigation:*

*Lee* involved a challenge to a school policy in which local members of the clergy were invited to give invocations and benedictions at public school graduations.<sup>96</sup> The Court noted that “the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one.”<sup>97</sup> It then tried to explain why that was so. The Court first explained the numerous ways in which the state had been implicated. For example, a “school official, the principal, decided that an invocation and a benediction should be given,”<sup>98</sup> which “from a constitutional perspective [was] . . . as if a state statute decreed that the prayers must occur.”<sup>99</sup> Further, that same state actor had chosen “the religious participant, here a rabbi, and that choice [was] also attributable to the State.”<sup>100</sup> Finally, the principal had provided the rabbi with a “copy of the ‘Guidelines for Civic Occasions,’ and advised him that his prayers should be nonsectarian.”<sup>101</sup> By doing so, “the principal directed and controlled the content of the prayers.”<sup>102</sup>

Not only did the Court construe the case as involving state-sponsorship of prayer that the state itself had a hand in directing and controlling,<sup>103</sup> but the

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*An Alternative to the Public Expression of Religion Act*, 61 VAND. L. REV. 261, 271 (2008) (“The Court adopted the Coercion Test in *Lee v. Weisman*.”); William Trunk, *The Scourge of Contextualism: Ceremonial Deism and the Establishment Clause*, 49 B.C. L. REV. 571, 578 (2008) (“[I]n 1992, in *Lee v. Weisman*, Justice Kennedy invoked what has come to be known as the ‘coercion test’ to strike down a nonsectarian prayer at a public school graduation.”); Maya Anderson, Note, *The Constitutionality of Faith-Based Prison Programs: A Real World Analysis Based in New Mexico*, 37 N.M. L. REV. 487, 501 (2007) (discussing “the introduction of the coercion test in *Lee v. Weisman*”); Richard R.W. Fields, Comment, *Perks for Prisoners Who Pray: Using the Coercion Test to Decide Establishment Clause Challenges to Faith-Based Prison Units*, 2005 U. CHI. LEGAL F. 541, 558 (“The modern coercion test is rooted in Justice Kennedy’s dissent in *Allegheny County*. However, it was not applied in a majority opinion until *Lee v. Weisman*.”); Marques, *supra* note 83, at 848 n.123 (“In *Lee v. Weisman* . . . the Court applied Justice Kennedy’s coercion test in the context of school prayer.”); Tyson Radley O’Connell, Note, *How Did the Ten Commandments End on Both Sides of the Wall of Separation Between Church and State? The Contradicting Opinions of Van Orden v. Perry and McCreary v. ACLU*, 69 MONT. L. REV. 263, 265 (2008) (“The Court applied the coercion test in *Lee v. Weisman*.”); Brian Wheeler, Note, *The Pledge of Allegiance in the Classroom and the Court: An Epic Struggle over the Meaning of the Establishment Clause of the First Amendment*, 2008 B.Y.U. EDUC. & L.J. 281, 290 (“The third test used by the Court in its Establishment Clause jurisprudence is the coercion test from *Lee v. Weisman*.”).

96. *Lee*, 505 U.S. at 577.

97. *Id.* at 586–87.

98. *Id.* at 587.

99. *Id.*

100. *Id.*

101. *Lee*, 505 U.S. at 588.

102. *Id.*

103. *Id.* at 586 (“State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools.”). *But see id.* at 640 (Scalia, J.,

Court also discussed further elements making the school policy constitutionally suspect. For example, after noting that attendance at the graduation was voluntary,<sup>104</sup> the Court nonetheless suggested that students' "attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory."<sup>105</sup> Because attendance at the activity was obligatory in the relevant sense, the students were being coerced into attending a state-run exercise during which prayers would be offered.<sup>106</sup>

The Court did not impute bad motivation to the state, accepting that "the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony."<sup>107</sup> However, the Court noted that this did not settle the issue:

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.<sup>108</sup>

By characterizing this as an attempt to make the address non-offensive to *most* students, the Court implied that the state was imposing prayers on some, however few, for whom this would be most unwelcome. By requiring attendance at an event at which there would be unwelcome prayers, the state was proselytizing and, perhaps, engaging in some form of religious coercion.

Noting that the "First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State,"<sup>109</sup> the Court explained that school officials are not permitted to "assist in composing prayers as an incident to a formal exercise for their students."<sup>110</sup> This prohibition is especially stringent when younger children are involved, because "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."<sup>111</sup> These concerns are greater still when prayers are

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dissenting) ("The Court identifies nothing in the record remotely suggesting that school officials have ever drafted, edited, screened, or censored graduation prayers, or that Rabbi Gutterman was a mouthpiece of the school officials.").

104. *Id.* at 586 ("[T]he school district does not require attendance as a condition for receipt of the diploma.").

105. *Id.*

106. *Lee*, 505 U.S. at 587.

107. *Id.* at 588.

108. *Id.* at 588–89.

109. *Id.* at 589.

110. *Id.* at 590 (citing *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

111. *Lee*, 505 U.S. at 592.

involved, because such “exercises in public schools carry a particular risk of indirect coercion.”<sup>112</sup>

There are at least two different ways to understand the constitutional concerns implicated here, depending upon whether one emphasizes the state’s role in the *composition* of the prayers or, instead, in assuring that (possibly young) children will be present at an exercise where the prayers will be offered. If the focus is only on the former, then it should not matter whether prayers are offered at a state-sponsored exercise as long as the state does not have a role in composing or providing guidelines for the prayers.<sup>113</sup>

But if there are heightened concerns involving the freedom of conscience of young children, especially when prayers are being offered at a public school exercise, then state practices should not be immunized from review merely because the state does not shape the prayers that will be offered at compulsory public functions. The coercive pressure on children in primary and secondary schools is present regardless of who authored the prayers. If the goal is to prevent the imposition of such coercion rather than merely to prevent students from being involuntarily exposed to state-authored prayers, then prayer at public school functions must be scrutinized whether or not the state has a hand in fashioning what the children will hear.

The *Lee* Court was not implying that the state intended to coerce individuals into adopting particular religious beliefs.<sup>114</sup> Nor was the Court implying that most individuals would perceive the exercise as coercive.<sup>115</sup> However, the Court suggested, those were not the relevant issues to consider; instead, the prayer exercises should be examined from the perspective of the dissenter. From that person’s point of view, standing during an invocation or benediction might not simply be characterized as standing in respectful silence; it might instead be thought to signify much more: “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.”<sup>116</sup> The dissenter would feel coerced, both in that she might feel that she could not leave and in that she might feel forced to stand

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112. *Id.*

113. *But see supra* notes 8–10 and accompanying text (discussing the broader interpretation suggested by *Engel*).

114. *See supra* note 104 and accompanying text.

115. *Cf. Lee*, 505 U.S. at 589.

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint.

*Id.*

116. *Id.* at 592.

during the prayer. Further, she might not feel as if she were merely getting out of her seat as a sign of respect but, instead, as if she were thereby being forced to signify her support of or participation in the religious exercise.

The Court explained that “the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction.”<sup>117</sup> Here, the Court’s focus is on the state’s control of the graduation ceremony as a whole rather than on its influence with respect to the contents of the invocation and benediction. Further, the Court did not minimize the degree to which the ceremony would be experienced as coercive, since this “pressure, though subtle and indirect, can be as real as any overt compulsion.”<sup>118</sup>

By offering this analysis, the Court seemed to be making two distinct points: (1) The *type* of pressure qualified for constitutional purposes; and (2) the *amount* of pressure sufficed for constitutional purposes. First, Justice Kennedy suggested in his *Allegheny* dissent that coercion could be “more or less subtle,”<sup>119</sup> and the way that he read the previous case law to be compatible with his interpretation of the Establishment Clause jurisprudence required, for example, that both *Engel* and *Schempp* had involved coercion,<sup>120</sup> even though in both of those cases the students had not been required to be present for the religious presentations. While the *Engel* and *Schempp* context might be differentiated from that of *Lee* in that the former involved an instructional and the latter a ceremonial setting,<sup>121</sup> they all involved a kind of psychological coercion to be present at a state-sponsored school activity.

Second, while the Court has never offered a detailed analysis of how much pressure must be exerted in order for Establishment Clause guarantees to be violated, it would be unsurprising for a member of the Court to suggest that the coercion, if any, in a particular case was *de minimis* and hence not enough to violate constitutional guarantees.<sup>122</sup> For example, Justice Scalia noted in his

117. *Id.* at 593.

118. *Id.*

119. *Allegheny*, 492 U.S. at 659.

120. *Contra* Greene, *supra* note 43, at 458 (“[A]fter *Engel* and *Schempp*, teacher-led prayer in public schools was unconstitutional, not because of coercion (psychological or otherwise), but because of the structural claim that government may not prescribe and lead prayer.”).

121. *See Lee*, 505 U.S. at 643 (Scalia, J., dissenting) (“*Engel* and *Schempp* do not constitute an exception to the rule, distilled from historical practice, that public ceremonies may include prayer . . . ; rather, they simply do not fall within the scope of the rule (for the obvious reason that school instruction is not a public ceremony).”).

122. *Cf. Mitchell v. Helms*, 530 U.S. 793, 835 (2000) (“We are unwilling to elevate scattered *de minimis* statutory violations, discovered and remedied by the relevant authorities themselves prior to any litigation, to such a level as to convert an otherwise unobjectionable parishwide program into a law that has the effect of advancing religion.”); *id.* at 849 (O’Connor, J., concurring in the judgment) (“Although respondents claim that Chapter 2 aid has been diverted to

*Lee* dissent that there was “nothing in the record to indicate that failure of attending students to take part in the invocation or benediction was subject to any penalty or discipline.”<sup>123</sup> Such a point might have been directed both to the type and to the amount of pressure that had been imposed.<sup>124</sup> He clearly believed that the amount was *de minimis*, having described the ceremony as a “minimal inconvenience”<sup>125</sup> for dissenters.<sup>126</sup>

The *Lee* Court recognized that many of the students did not feel at all pressured to participate in this ceremony; on the contrary, they welcomed the prayer and might have felt that the ceremony would be incomplete without some kind of acknowledgment of the divine.<sup>127</sup> The Court further recognized that many of those preferring not to have an invocation and benediction included in the ceremony nonetheless did not feel compromised by standing while others took part in the prayer.<sup>128</sup> However, the Court did not focus on those who had no objections to the practice but, instead, on the individual who had strong reservations about participating in such an exercise: “But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to *pray* in a manner her conscience will not allow, the injury is no less real.”<sup>129</sup>

Yet, the state was not forcing anyone to pray. For example, no one was monitoring the students to make sure that they said, “Amen,” or engaged in other symbolic behavior that might be construed as participating in prayer.<sup>130</sup> Rather, the dissenter was merely being pressured to stand. The Court understood this point, but noted that “for many, if not most, of the students at

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religious instruction, that evidence is *de minimis*.”). *But see* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 38, 36–37 (2004) (O’Connor, J., concurring in the judgment) (“There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them.”).

123. *Lee*, 505 U.S. at 642 (Scalia, J., dissenting).

124. *Cf. id.* at 642–43 (“To characterize the ‘subtle coercive pressures,’ . . . allegedly present here as the ‘practical’ equivalent of the legal sanctions in *Barnette* is . . . well, let me just say it is not a ‘delicate and fact-sensitive’ analysis.” (citing *Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943))).

125. *Id.* at 646.

126. *Cf. Chaudhuri v. Tennessee*, 130 F.3d 232, 237 (6th Cir. 1997) (“If these prayers ‘endorsed’ religion, the endorsement was indirect, remote, and incidental—and a *de minimis* religious gesture does not, by itself, create an Establishment Clause problem.”).

127. *See Lee*, 505 U.S. at 595–96 (“What for many of Deborah’s classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State.”).

128. *Id.* at 593 (majority opinion).

129. *Id.* (emphasis added).

130. *See id.* at 637 (Scalia, J., dissenting) (“[T]he very linchpin of the Court’s opinion— is almost as intriguing for what it does not say as for what it says. It does not say, for example, that students are psychologically coerced to bow their heads, place their hands in a Dürer-like prayer position, pay attention to the prayers, utter ‘Amen,’ or in fact pray.”).

the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer."<sup>131</sup> Because that was so, the dissenter's act of standing would be indistinguishable from the standing and participation performed by most of the other students.

While correct that an external observer might not be able to distinguish between what the dissenter and the non-dissenter were doing during the invocation and benediction, the Court overstates the point when suggesting that the dissenter was being forced to pray.<sup>132</sup> *She* would know that she was standing and not praying. Further, even were a speaker to intone, "Let us bow our heads and pray," and even were the dissenter to bow her head, she would still know that she was not praying, although she might be pretending to do so.<sup>133</sup> It would not be reasonable for a dissenter to have suggested that she had been forced to pray, at least if prayer is a kind of internal activity.

Nonetheless, pressuring individuals to appear to be praying violates constitutional guarantees. That is not because the individual would think that she was praying when in fact she was only standing there with head bowed. Instead, it would be for other reasons,<sup>134</sup> including that individuals cannot be forced by the state to articulate particular positions. As the Court explained in *West Virginia State Board of Education v. Barnette*,<sup>135</sup> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>136</sup>

The *Lee* Court explained that it would be of "little comfort to a dissenter . . . to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation."<sup>137</sup> Basically, the Court believed it unimportant for these purposes to distinguish between (1) actually praying, and (2) being viewed as praying: "What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the

131. *Id.* at 593 (majority opinion).

132. *But see* Larry R. Thaxton, Comment, *Silence Begets Religion: Bown v. Gwinnett County Sch. Dist. and the Unconstitutionality of Moments of Silence in Public Schools*, 57 OHIO ST. L.J. 1399, 1438 (1996) ("The mere act of remaining silent for a minute while giving others the opportunity to pray, in essence, forces the dissenter to participate in religion.").

133. *Cf.* Lee Ann Rabe, *A Rose by Any Other Name: School Prayer Redefined as a Moment of Silence Is Still Unconstitutional*, 82 DENV. U. L. REV. 57, 77 (2004) ("Peer pressure from these students will make those who choose not to pray uncomfortable and may force them into doing something they would rather not—pray or, at least, pretend to pray.").

134. For a discussion of why this should not only be understood as a forced speech case, see *infra* note 138 and accompanying text.

135. 319 U.S. 624 (1943).

136. *Id.* at 642.

137. *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

group exercise signified her own participation or approval of it.”<sup>138</sup> While the Court understood that some who did not wish to participate might nonetheless not have been averse to being viewed as participating,<sup>139</sup> others might have found it quite offensive.

Suppose, however, that standing did not signify participation, perhaps because those who participated would not only stand but would also bow their heads.<sup>140</sup> Or, perhaps included in the program was a disclaimer specifically noting that those who stood during the invocation and benediction should not be assumed to be participating.<sup>141</sup> The question would be whether the policy would still violate constitutional guarantees. By implying that public graduation invocations or benedictions should be analyzed as forced speech cases, the Court suggests that there are ways to remove the constitutional taint without omitting the invocation or benediction. Yet, someone who felt psychologically coerced because of the inclusion of an invocation or benediction in a public school graduation ceremony would likely still feel coerced by such practices, even were there a note in the program suggesting that an individual’s standing quietly during the invocation or benediction did not signify agreement or participation. If the constitutional evil is state facilitation of religious coercion, then the difficulty is not removed by a simple notation in the program.

Although the Court mentioned that Deborah Weisman attended her graduation,<sup>142</sup> the Court does not mention what she did during the graduation. Suppose, for example, that she had remained seated during the invocation and benediction. No one could have mistaken her actions as involving participation or approval of the invocation and benediction.<sup>143</sup> Would there

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138. *Id.*

139. *Id.* (“And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do.”).

140. *Id.* at 638 (Scalia, J., dissenting)

It is fanciful enough to say that “a reasonable dissenter,” standing head erect in a class of bowed heads, “could believe that the group exercise signified her own participation or approval of it.” It is beyond the absurd to say that she could entertain such a belief while pointedly declining to rise.

*Id.*

141. *See id.* at 644–45

Given the odd basis for the Court’s decision, . . . [a]ll that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so.

*Id.*

142. *See Lee*, 505 U.S. at 584 (majority opinion) (“Deborah and her family attended the graduation, where the prayers were recited.”).

143. *See id.* at 637 (Scalia, J., dissenting) (“The Court’s notion that a student who simply *sits* in ‘respectful silence’ during the invocation and benediction (when all others are standing) has



then have been no harm to her? Would the only harm have been to those who had unwillingly stood and “participated?”

The Court noted that Deborah was enrolled in high school and would likely have to confront the same choice during her high school graduation that she had been forced to make during her middle school graduation.<sup>144</sup> But the Court’s analysis suggests that it is not the fact that there will be an invocation and benediction that is relevant; rather, the constitutional injury lies in her being pressured to stand and unwillingly signify her approval of the prayers. But if that is the injury, then what she did during her middle school graduation would at least seem relevant to the constitutional inquiry.

Certainly, some on the Court believed that the emphasis should not have been on whether the student’s standing constituted participation. For example, while arguing that the student’s being pressured to participate in a state-sponsored religious activity was a sufficient condition for its constitutional invalidity,<sup>145</sup> Justice Blackmun also suggested in his concurring opinion that the state’s taking a religious position was constitutionally objectionable whether or not dissenters were forced to participate.<sup>146</sup> Given that Justices O’Connor and Stevens joined Justice’s Blackmun’s concurring opinion,<sup>147</sup> and given Justice Blackmun’s express denial that coercion had to be shown if a state practice was to be struck down on Establishment Clause grounds,<sup>148</sup> it might seem surprising that *Lee* stands for the proposition that some form of the coercion test best captures the Establishment Clause guarantees.<sup>149</sup> Indeed, the other Justice signing onto Justice Kennedy’s opinion, Justice Souter, also made

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somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous.”).

144. *Id.* at 584 (majority opinion) (“Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation.”).

145. *Id.* at 604 (Blackmun, J., concurring) (“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.”).

146. *Id.* at 606 (“The mixing of government and religion can be a threat to free government, even if no one is forced to participate. When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs.”).

147. *See Lee*, 505 U.S. at 599 (Blackmun, J., concurring).

148. *Id.* at 604 (“The Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion.”).

149. Compare Mary Jean Dolan, *Government-Sponsored Chaplains and Crisis: Walking the Fine Line in Disaster Response and Daily Life*, 35 HASTINGS CONST. L.Q. 505, 538 (2008) (“The coercion test represents the rock-bottom value underlying the Establishment Clause.”), with Anthony Barone Kolenc, “*Mr. Scalia’s Neighborhood’: A Home for Minority Religions?*,” 81 ST. JOHN’S L. REV. 819, 833 (2007) (“Conventional wisdom assumes that the most likely *Lemon* replacement under the new majority will be the ‘coercion’ test . . .”).

clear in his concurring opinion (joined by Justices Stevens and O'Connor)<sup>150</sup> that coercion was not a necessary element of an Establishment Clause violation.<sup>151</sup>

Nonetheless, these Justices did write or sign onto concurring opinions rather than, for example, opinions that were concurring in part or only concurring in the judgment.<sup>152</sup> Further, a different way of counting the *Lee* opinions seems to yield a majority view about coercion. Justice Scalia in his dissent, joined by Chief Justice Rehnquist and Justices Thomas and White,<sup>153</sup> argued that a more restricted notion of coercion should be the constitutional standard.<sup>154</sup> Thus, Justice Kennedy plus the dissenting Justices seem together to suggest that proof of coercion is a necessary element of an Establishment Clause claim.

The *Lee* majority suggested that the graduation prayers placed dissenters in an unenviable position: "participating, with all that implies, or protesting."<sup>155</sup> While refusing to comment whether imposing such a forced choice on adults violated the Constitution,<sup>156</sup> the Court suggested that the Constitution did preclude the imposition of such a choice on students in primary and secondary schools.<sup>157</sup> Individuals of that age are more subject to peer pressure than are older individuals, and thus the Court presumably felt that such pressure constituted sufficient coercion as to be constitutionally cognizable.<sup>158</sup>

150. *Lee*, 505 U.S. at 609 (Souter, J., concurring).

151. *Id.* at 619 ("Our precedents may not always have drawn perfectly straight lines. They simply cannot, however, support the position that a showing of coercion is necessary to a successful Establishment Clause claim."); see also Greene, *supra* note 43, at 460.

I say that Justice Kennedy is alone among the five-Justice majority in deeming coercion a necessary predicate for an Establishment Clause claim (absent an established state religion), because the Justices joining Justice Kennedy's majority opinion—Justices Blackmun, Stevens, O'Connor, and Souter—wrote and joined separate opinions to stress that for them, coercion was not necessary to an Establishment Clause claim. Green, *supra* note 43, at 460.

152. See *Lee*, 505 U.S. at 599 (Blackmun, J., concurring) (Justices Stevens and O'Connor joining); *id.* at 609 (Souter, J., concurring) (Justices Stevens and O'Connor joining).

153. See *id.* at 631 (Scalia, J., dissenting).

154. See *id.* at 640 ("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."); see also *id.* at 641 (Scalia, J., dissenting) (suggesting that the standard be "an establishment coerced by force of law").

155. *Id.* at 593 (majority opinion).

156. *Id.* ("We do not address whether that choice is acceptable if the affected citizens are mature adults.").

157. *Lee*, 505 U.S. at 593 ("We think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.").

158. *Id.* ("Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.").

*Lee* would have been much easier to understand and apply if the Court had made clear whether the constitutional difficulty was that dissenters were being compelled to participate in a religious exercise<sup>159</sup> or, instead, that they were being subjected to prayer at a public ceremony.<sup>160</sup> To the extent that it was the latter, it would have been helpful had the Court made clear whether the state's having had a hand in the composition of the prayer was the constitutional difficulty, rather than, for example, the state's having had a hand in assuring attendance at a public function at which prayers would be offered.

The *Lee* Court understood that dissenting students could simply not attend the ceremony and avoid being subjected to the unwanted choice of appearing to participate on the one hand or objecting on the other.<sup>161</sup> However, the Court refused to characterize skipping the graduation as a viable option,<sup>162</sup> at least in part, because of the importance of the occasion.<sup>163</sup>

The occasion's importance and the relative ease with which the respective prayers might be avoided distinguished *Lee* from a previous case, *Marsh v.*

159. *See id.* at 594 ("The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise.").

160. *See id.*

But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same reason, we think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights.

*Id.*

161. *See id.* at 594–95.

162. *See Lee*, 505 U.S. at 595.

And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. 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.*

163. *See id.* ("The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail.").

*Chambers*,<sup>164</sup> where the Court had upheld the Nebraska Legislature's practice of beginning sessions with a prayer.<sup>165</sup> The "atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend."<sup>166</sup> Thus, the Court implied, nothing would be signified by one's leaving the chamber before the legislative prayer was offered, whereas one's leaving before the graduation invocation or benediction would signify dissent.<sup>167</sup>

The Court also distinguished the two cases by emphasizing the ages of those who might be forced to make a difficult choice, noting:

We do not address whether that choice [i.e., being forced to choose between protesting or unwillingly participating in a religious exercise] is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.<sup>168</sup>

There are various ways to read *Lee*. Perhaps it is suggesting that the coercion test determines whether the Establishment Clause has been violated, although the standard advocated by Justice Kennedy is much broader than the standard articulated by Justice Scalia.<sup>169</sup> On the other hand, most members of the *Lee* majority argued that the Establishment Clause could be violated even absent proof of coercion.<sup>170</sup> Thus, *Lee* might be read as offering either a necessary or a sufficient condition for a finding that the Establishment Clause has been violated.

164. 463 U.S. 783 (1983).

165. *See id.* at 793–94.

166. *Lee*, 505 U.S. at 597 (citing *Marsh*, 463 U.S. at 792).

167. A student might come late to the graduation and leave early, thereby missing the invocation and benediction, but even forcing the student to do this would be to exact too high a price. *See id.* at 596 ("To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high.").

168. *Id.* at 593. The Court did not seem to appreciate that grade school children sometimes go on field trips to see legislatures in session. *See, e.g.*, H.R. 1707, 80th Leg., Reg. Sess. (Tex. 2007), available at <http://www.capitol.state.tx.us/tlodocs/80R/billtext/pdf/HR01707I.pdf> (passing a house resolution welcoming third graders visiting state capitol in Texas); S.Res. 771, 80th Leg., Reg. Sess. (Tex. 2007) available at <http://www.capitol.state.tx.us/tlodocs/80R/billtext/pdf/R00771F.pdf> (passing a senate resolution welcoming first graders who were visiting state capitol in Texas).

169. *See* Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 504 (2002) ("The choice of the word 'coercion' as a title is probably unfortunate because Justice Kennedy defined the term much more broadly than is usually done, allowing that the coercion required for an Establishment Clause violation may take a variety of 'more or less subtle' forms.").

170. *See supra* text accompanying note 148.

An additional confusing aspect of *Lee* is that the Court discussed numerous respects in which the state was implicated in the creation and presentation of the benediction and invocation. It also discussed the various ways in which dissenting students were being coerced into participating in or witnessing a religious activity at a state-sponsored event. However, the Court did not offer any guidance with respect to which of the state practices at issue sufficed for a finding of unconstitutionality. But this meant that some courts might view *Lee* as precluding a wide range of practices, whereas other courts would view *Lee* as precluding only those practices that mirrored the Providence policies and procedures. As was eminently foreseeable, very different interpretations of *Lee* would be offered in the circuits, resulting in relevantly similar cases being decided differently.

*Lee* left a number of issues unresolved. For example, one issue is whether the same rules respecting religious coercion apply if the students attending the public function are older, e.g., are in college. *Lee* also failed to determine whether the individuals who are the focus of concern at a graduation are the students or, instead, all who might reasonably be expected to attend. A different issue that was raised but not decided involved what the state could do, if anything, to immunize itself from the charge that it was responsible for the offering of a prayer at a public function. Would the state immunize school prayer from constitutional challenge if the state played no role in the composition of the benediction? Or would the state's coercing attendance at a school event at which it was known that a prayer would be offered suffice for a showing that Establishment Clause guarantees had been violated?

#### B. Coercion and Age

One issued raised but not decided in *Lee* was whether religiously coercive school settings violated the Establishment Clause only when schoolchildren were involved.<sup>171</sup> The *Lee* Court had explicitly distinguished *Marsh* by noting that the legislative prayer at issue there would be heard by adults rather than children,<sup>172</sup> and thus *Lee* might be thought inapplicable if older dissenting students were attending a public function at which prayers were offered.<sup>173</sup>

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171. See *supra* text accompanying notes 164–68.

172. See *supra* text accompanying note 166.

173. See, e.g., *Mellen v. Bunting*, 327 F.3d 355, 366 (4th Cir. 2003) (“In construing the Establishment Clause, the Court has made clear that a state is prohibited from sponsoring prayer in its elementary and secondary schools. That said, the Court has never directly addressed whether the Establishment Clause forbids state-sponsored prayer at a public college or university.”).

### 1. *Tanford*

At issue in *Tanford v. Brand*<sup>174</sup> was an Establishment Clause challenge to an Indiana University practice of including a nonsectarian invocation and benediction at the school's commencement ceremony.<sup>175</sup> There were several plaintiffs, including one professor and several students, each of whom thought that having a prayer at a state university commencement was inappropriate, offensive, or at least discomfort-producing.<sup>176</sup> Although one of the plaintiffs testified that he viewed such a prayer as an attempt to proselytize,<sup>177</sup> no one claimed that his or her religious beliefs would be changed as a result of hearing these prayers.<sup>178</sup>

Kimberly MacDonald, one of the students challenging the ceremony, had attended the commencement ceremony when she had received her undergraduate degree, although she had been "uncomfortable in participating in a service led by someone of a different faith."<sup>179</sup> She was unsure whether she would attend the ceremony when receiving her graduate degree,<sup>180</sup> at least in part, because she "would be bothered if her daughter saw a religious figure on the stage with the University president or giving a prayer."<sup>181</sup> She knew that there was no requirement that she attend the ceremony.<sup>182</sup>

The Seventh Circuit distinguished *Lee* by noting that during the Indiana ceremony "there was no coercion—real or otherwise—to participate. Many

174. 104 F.3d 982 (7th Cir. 1997).

175. See *id.* at 983 ("The ceremony consisted of the national anthem, a nonsectarian invocation, . . . the singing of the University's song, and a nonsectarian benediction.").

176. See *id.* at 984 ("In 1988 or 1989, [Professor Tanford] wrote the student newspaper urging the faculty and University community generally to boycott graduations because of the 'inappropriateness of having prayer.'"); *id.* ("Third-year law student MacDonald . . . stated that her conscience would be offended if there were an invocation and benediction in 1995."); *id.* ("[Plaintiff Suess] . . . is of the Jewish faith and stated that he was offended by the giving of a nonsectarian invocation and benediction because it is a form of proselytizing although he said it would not have any effect on his personal religious beliefs."); *id.* ("Urbanski was an undergraduate plaintiff [who] . . . [o]pposes graduation prayer because he believes there should be a separation between church and state in a public institution. Prayer makes him uncomfortable.").

177. See *id.* at 984 (discussing plaintiff Suess's reaction to the prayers).

178. *Id.* (noting that "the Commencement Ceremony would not affect the religious beliefs of those in attendance"); see also *id.* (noting Suess's testimony that the ceremony "would not have any effect on his personal religious beliefs"); *id.* (noting Urbanski's testimony that his "beliefs would not be impacted by the ceremony"); *id.* (noting that MacDonald testified that she "would be bothered if her daughter saw a religious figure on the stage with the University president or giving a prayer," although there is no record of her saying that she feared her daughter's religious beliefs would be altered by the prayers).

179. *Tanford*, 104 F.3d at 984.

180. *Id.* (explaining that she "was uncertain whether she would attend if there were an invocation and benediction").

181. *Id.*

182. *Id.*

students chose not to attend the stadium exercises. Others left during the invocation, then returned and exited before the benediction.”<sup>183</sup> Still others remained seated during these orations.<sup>184</sup> Certainly, the *Lee* Court had suggested that *one* of the reasons that the Providence practice violated constitutional guarantees was that it pressured dissenting students to participate or, at least, signify approval by standing respectfully during the invocation and benediction.<sup>185</sup> Yet, the *Lee* Court had also implied that the Providence practice suffered from other constitutional infirmities as well. For example, even bracketing whether individuals would feel compelled to *participate*, the state was engaging in problematic behavior by arranging to have a nonsectarian prayer offered at a state-sponsored event that some individuals would feel compelled to *attend*.<sup>186</sup>

The *Tanford* court’s noting that some students chose not to attend the ceremony<sup>187</sup> simply did not speak to whether others felt compelled to attend. The court itself seemed to recognize the possibility that some attendees did not favor the prayer recitation when noting that some attendees absented themselves from the ceremony and that others remained seated while these prayers were offered.<sup>188</sup> Yet, insofar as *Lee* suggests that the state should not impose prayers on the unwilling at a public function, the fact that these people did not in addition feel forced to signify their approval of the prayers would hardly immunize the prayers from constitutional invalidation.

One of the confusing aspects of *Lee* is illustrated in *Tanford*. While the *Lee* Court made clear that the difficulty posed by the Providence policy was that students were being subjected to religious coercion,<sup>189</sup> the Court failed to identify which of the coercive practices were constitutionally problematic, and it also failed to indicate which of the possible remedial steps would or even might be constitutionally adequate. The Court implied that certain considerations were important but then failed to discuss some of the facts that would have been relevant had these considerations in fact been constitutionally significant. For example, the *Lee* Court did not mention how many of the graduating students attended the ceremony. Nor did the Court seem concerned about how many had involuntarily stood during the benediction and invocation or even whether the plaintiff had stood. By not focusing on these factors, the Court might have been taken to mean that these issues were relatively unimportant, e.g., because an individual could not be forced to choose between

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183. *Id.* at 985.

184. *Tanford*, 104 F.3d at 985.

185. *See supra* text accompanying note 137.

186. *See Lee*, 505 U.S. at 588–89.

187. *Tanford*, 104 F.3d at 985.

188. *Id.*

189. *See Lee*, 505 U.S. at 593.

attending the graduation and avoiding unwanted prayers. Or, the Court might have thought them important and simply assumed, for example, that the plaintiff had unwillingly stood. But then the question would be whether there would have been no constitutional violation had no one felt compelled to signify approval of a practice of which she did not approve.

*Engel* involved indirect coercion because the state put its seal of endorsement behind a particular nonsectarian prayer.<sup>190</sup> If that were the kind of coercion making the practice in *Lee* unconstitutional, then focusing on whether Deborah Weisman felt coerced into falsely signifying approval was misleading, because the Providence practice would have been unconstitutional even had there been no danger that her standing respectfully would be misinterpreted. However, if the real difficulty were that she was forced to express a position with which she disagreed, then the Indiana ceremony at issue in *Tanford* would not have involved forced speech.

The *Lee* Court suggested that “in our society and in our culture high school graduation is one of life’s most significant occasions.”<sup>191</sup> Yet, for at least some of those graduating from college or whose family members are graduating from college, college graduation is as significant as or more significant than high school graduation. Some individuals feel more compelled to attend their own college graduation or that of a family member than they do the same person’s high school graduation.

Individuals could attend their high school graduations without being present for the invocation and benediction, but the *Lee* Court implied that the Constitution forbade states from imposing such a choice: “It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”<sup>192</sup> However, one could not tell from the *Lee* opinion whether presenting such a choice was prohibited because so few students would take advantage of it or, instead, because the state was precluded from imposing such a choice regardless of how many would exercise that option. One infers that the Seventh Circuit adopted the former interpretation—the *Tanford* court implied that there was no constitutional difficulty posed by the Indiana practice, because students could stay or leave as they chose *and* could stand or sit as they chose.<sup>193</sup> It is a testament to the *Lee* Court’s failure to make clear what was driving the jurisprudence that it was allegedly explicating that one cannot tell whether the Seventh Circuit followed the *Lee* rationale or instead ignored it.

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190. See *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

191. *Lee*, 505 U.S. at 595.

192. *Id.* at 596.

193. See *supra* text accompanying note 183.



The Seventh Circuit noted that the district court “found *Lee* to be inapplicable because these plaintiffs are adults rather than younger students requiring special solicitude,”<sup>194</sup> and it agreed that *Lee* did not require invalidation of the Indiana ceremony, at least in part, because of the age of those attending.<sup>195</sup> Yet, the *Lee* Court had recognized that graduations often involve family celebrations: “Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect.”<sup>196</sup> Families might involve the graduate’s parents, siblings, children, and extended family, among others. When the graduation is from college or professional school, it would be even more likely that the graduate would have his or her children attending, as was illustrated in *Tanford* when one of the plaintiffs discussed her discomfort with having her child present for the religious exercise.<sup>197</sup> Yet, this means that the constitutional concerns implicated when impressionable young people are present at a graduation are still implicated in the college and post-graduate setting, even if the children present are not themselves graduating but instead are the children, nephews and nieces, or any other family member of the graduates.

The *Lee* Court downplayed the importance of the *number* of young and impressionable individuals who might be affected by a benediction or invocation, suggesting instead that the fact that *most* individuals would not be offended by an invocation would not immunize that prayer, given that there still might be *some* who would be offended or improperly influenced. Nonetheless, the Court did not explain whether it had some minimum number of objectors in mind that would trigger the constitutional protections.<sup>198</sup> The Court seemed to recognize the issue: “We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation.”<sup>199</sup> However, the Court neither addressed nor even seemed interested in how many were adversely affected by the Providence ceremony.

It is simply unclear whether the Court would say, for example, that including a benediction and invocation coerced those who were graduating but did not coerce family members who were attending. While recognizing that graduations are important for family members too,<sup>200</sup> the Court never explored

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194. *Tanford v. Brand*, 104 F.3d 982, 985 (7th Cir. 1997).

195. See *infra* text accompanying note 201.

196. *Lee*, 505 U.S. at 595.

197. See *supra* text accompanying note 181.

198. See *Lee*, 505 U.S. at 593.

199. *Id.* at 597.

200. See *id.* at 595 (“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

whether there were constitutional implications if some of the invited guests had qualms about the prayers. However, given the likelihood that there would be impressionable children present at graduations either because they were graduating or because they had a family member who was graduating, the *Lee* Court's comments about the importance of not indoctrinating impressionable youth would seem to have implications for many kinds of graduations.

Arguably, it might seem more of a burden for a graduating student than a guest with a small child to leave before the benediction could be offered. Perhaps the Court was thinking that the departure of a graduate before a prayer would be so obvious that it would signify disagreement, whereas a parent in the audience who left with a small child at such a time might be thought to be trying to find a bathroom rather than signifying disagreement. Or, perhaps the Court was suggesting that the state should not have a hand in religiously educating impressionable young children whether they were there as guests or graduates. The former but not the latter interpretation would offer support for *Tanford*, given the likelihood that there were children in the audience during the invocation and benediction.

The Seventh Circuit focused on the graduates and seemed convinced that *Lee* did not require a different result, at least in part because of the ages of those graduating.<sup>201</sup> It is simply unclear whether that court would have reached a different result had it also considered the ages of some of the guests, although there is reason to think that the court would have reached the same result anyway. For example, the court commented, "[r]ather than being a violation of the Establishment Clause, [the invocation and benediction involved] 'a tolerable acknowledgment of beliefs widely held among the people of this country.'"<sup>202</sup> Yet, presumably, a mere acknowledgment of beliefs is permissible even when much younger individuals are involved. Further, the *Tanford* court believed that there was no constitutional problem posed "by virtue of the University's selection of a cleric or its instruction to the cleric that his or her remarks should be unifying and uplifting,"<sup>203</sup> whereas *Lee* had implied that the state attempt to ensure that the prayer would be

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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.").

201. See *Tanford v. Brand*, 104 F.3d 982, 985–86 (7th Cir. 1997).

[T]he mature stadium attendees were voluntarily present and free to ignore the cleric's remarks. Most remained seated. Under these facts, in which the special concerns underlying the Supreme Court's decision in *Lee* are absent, the district court correctly determined that *Lee* does not require the challenged practices to be struck down.

*Id.*; see also *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) ("University students . . . are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality of religion.").

202. *Tanford*, 104 F.3d at 986 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

203. *Id.*

inoffensive to most was constitutionally problematic.<sup>204</sup> The *Tanford* court chose not to address how the addresses at issue there were any different from the addresses at issue in *Lee*, where the latter were obviously not viewed as mere acknowledgments. That said, however, the Court denied certiorari when *Tanford* was appealed,<sup>205</sup> which at the very least means that the Court refused to take advantage of an opportunity to make the jurisprudence much clearer.

## 2. *Chaudhuri*

*Chaudhuri v. Tennessee*<sup>206</sup> involved a different challenge to graduation practices. In this case, Dilip Chaudhuri, a tenured professor, challenged the Tennessee State University practice of having a nonsectarian prayer or moment of silence at graduation.<sup>207</sup> The university provided minimal guidelines with respect to the contents of the prayers.<sup>208</sup>

One of the points at issue was the degree to which the plaintiff was being coerced to attend the graduation. He thought that he was required to attend university functions, even where prayer might be offered.<sup>209</sup> However, the University said that he was mistaken,<sup>210</sup> and that faculty participation was encouraged but not required.<sup>211</sup> Further, the University made clear that no one had ever been penalized for failing to attend a graduation.<sup>212</sup>

Yet, when the Sixth Circuit was analyzing Chaudhuri's claim of coercion, the court did not address whether he had had a reasonable belief that he would be penalized for nonattendance.<sup>213</sup> Given the lack of discussion in *Lee* regarding whether anyone *actually* misconstrued Weisman's silently standing

204. *Lee*, 505 U.S. at 588.

205. *Tanford v. Brand*, 522 U.S. 814 (1997).

206. 130 F.3d 232 (6th Cir. 1997).

207. *Id.* at 233 ("The question presented here is whether a nonsectarian prayer or moment of silence at a public university function violates the First Amendment.").

208. *Id.* at 234 ("Such prayers were also offered by local religious leaders at the invitation of TSU. The university did not review the prayers in advance and did not provide any guidelines for content, other than to request that the prayers be nonsectarian and that references to Jesus Christ be omitted.").

209. *Id.* at 234–35 ("Dr. Chaudhuri asserted that as a TSU faculty member he was required to attend university functions at which prayers were offered. His performance evaluations were based in part on a 'university service' component, and he maintained that this included participation in university events.").

210. *Id.* at 235 ("The defendants responded that Dr. Chaudhuri was not required to attend the functions in question and did not receive lower scores for absenting himself.").

211. *Chaudhuri*, 130 F.3d at 235 ("Faculty members were encouraged to attend certain university-wide events, according to the defendants, but were not required to do so. Attendance was not monitored.").

212. *Id.* ("The defendants represent that no employee of TSU—including Dr. Chaudhuri—has suffered any adverse consequences for failing to attend a university function of the sort with which we are concerned in this case.").

213. *See id.* at 238–239.

during the benediction as approval,<sup>214</sup> and *Lee*'s emphasis on the reasonable views of the dissenter,<sup>215</sup> a discussion of whether Chaudhuri's belief was reasonable was warranted. For example, suppose that the University had never made clear that attendance was not required, and that the dissenters had wrongly but reasonably believed that it was. In that case, that no one was penalized for failing to attend might not mean very much, because it may have been that only those with very good excuses ever missed graduation.<sup>216</sup>

*Chaudhuri* highlights why *Lee*'s discussion of coercion needed to be more focused. The *Chaudhuri* court noted that there was no risk that Chaudhuri's religious views would be altered as a result of being present during these prayers.<sup>217</sup> Yet, much of the *Lee* Court's focus was on the offense rather than on the likelihood of a change in belief, and the steadfastness of the individual's beliefs might be positively correlated with offense if his beliefs were being contradicted by the prayer being offered. Insofar as *Lee* counsels against state promotion of religious views that contradict the beliefs of some of those present, *Lee* counsels against the constitutionality of the Tennessee State University practice.

Citing *Lee*, the Sixth Circuit noted that Chaudhuri "may have found the prayers offensive, but that reaction, in and of itself, does not make them unconstitutional."<sup>218</sup> Regrettably, the court did not elaborate on what further would have been required or even would have sufficed for the prayer practice to be struck down. Would it have mattered if the prayer had been more sectarian?<sup>219</sup> If so, would that have been because there would then be a greater likelihood that more people would be offended or, instead, because the degree to which a particular individual would have felt offended would likely have been greater? The passage cited in *Lee*—"People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation"<sup>220</sup>—had been immediately preceded by the Court's noting, "[w]e do not hold that every state action implicating religion is

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214. *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

215. *Id.*

216. *Cf. Habel v. Indus. Dev. Auth.*, 400 S.E.2d 516, 519 (Va. 1991) ("The testimony of witnesses that some of these [attendance] policies were not enforced . . . has little value because the instances of nonenforcement were not publicized to students or faculty.").

217. *Chaudhuri*, 130 F.3d at 239 ("There was absolutely no risk that Dr. Chaudhuri—or any other unwilling adult listener—would be indoctrinated by exposure to the prayers.").

218. *Id.* (citing *Lee*, 505 U.S. at 597 ("People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation.")).

219. *Cf. Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 373 (6th Cir. 1999) ("On numerous occasions, the prayers offered by the invited clergy member made specific reference to Jesus by name.").

220. *Lee*, 505 U.S. at 597.

invalid if *one or a few* citizens find it offensive.”<sup>221</sup> When both sentences are read together, the Court is suggesting that one person’s feeling offense may not render a practice unconstitutional, but that several people feeling offense might. Thus, the *Lee* Court does not suggest that offense is irrelevant but merely that one individual’s feeling offended may not be, without more, enough to justify invalidation of a particular practice.

Yet, even the qualification that one person’s being offended may not suffice for a finding of an Establishment Clause violation should be understood in light of the context in which it was offered. The *Lee* Court did not name any other student in addition to Deborah who had been offended by the practice at issue. Instead, the Court either assumed that they existed or that the offense to one student sufficed.<sup>222</sup> Yet, it seems reasonable to assume that there were several dissenting individuals among the faculty, graduating students, and guests (including children) attending the Tennessee State University graduation.

One of the reasons that the *Lee* Court worried about coercing younger children to attend primary and secondary school graduations where there would be graduation prayers<sup>223</sup> was the fear that students would thereby have their religious beliefs changed.<sup>224</sup> Were that the sole rationale, however, then it should not have mattered whether the young person was sitting quietly in her seat or, instead, was being asked to stand to signify her approval of something that she did not believe. Rather, the focus should simply have been on whether the dissenting child had been coerced into being present at a state function where prayers would be offered. Further, if the relevant issue is that government should not be shaping religious beliefs, then there should have been little or no analysis of whether dissenters would feel offense. Individuals can feel offended even when there is no likelihood that the offending practice will cause a change of belief.<sup>225</sup> Indeed, there was no discussion whatsoever of whether Deborah Weisman’s religious beliefs were likely to be changed by being exposed to the invocation and benediction.

Not only might someone feel offended by prayers having no likelihood of changing her beliefs, but prayers might not cause offense even if they did have some likelihood of changing particular religious beliefs. The very impressionable child, for example, who may be quite open and have no fixed

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221. *Id.* (emphasis added).

222. That the Court assumed that offense to one student sufficed is evident in their holding that “the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause.” *Id.* at 598.

223. *See id.* at 592.

224. *See supra* text accompanying notes 114–17.

225. *See supra* text accompanying note 178 (noting that none of the plaintiffs in *Tanford* had suggested that the offending prayers would result in a change of belief).

opinions on a particular subject, would seem less likely to take offense were particular religious views presented even if there was a significant likelihood that exposure to those views would result in a change in religious beliefs.

If the focus of concern was that children should not be coerced into signifying something that they do not believe, then the *Lee* Court should not have emphasized how impressionable young children are. The state's forcing someone to communicate something in which she does not believe is problematic, even if she is not at all impressionable and is steadfast in her religious beliefs.

Some of the *Lee* analysis did not focus on whether the person was being coerced into communicating something that she did not believe, but, instead, on her being coerced into attending a state-sponsored event where she would be confronted by an unwelcome, religious message.<sup>226</sup> But this is problematic for both children and adults. If Chaudhuri's belief that he was required to attend was reasonable, even if mistaken, then at least part of the *Lee* analysis suggests that the Tennessee State University practice violated constitutional guarantees. The nonsectarian prayers that were offered privileged certain religious views over others, and Chaudhuri did not subscribe to the religious views contained in the prayer that he heard.<sup>227</sup>

Presumably, the *Lee* Court mentioned these different aspects of the case because it believed that they *all* were problematic. Yet, the Court never said that each of these state practices was precluded by the Establishment Clause. Nor did the Court identify which element or combination of elements, if present, would suffice for invalidation under the Establishment Clause. But by failing to do so, the Court left lower courts with wide discretion to uphold state practices as long as one of the offending features in *Lee* was not present.

In a subsequent case in the Sixth Circuit, *Coles* ex rel. *Coles v. Cleveland Board of Education*,<sup>228</sup> the court examined whether prayers beginning board of education meetings violated constitutional guarantees.<sup>229</sup> The policy was challenged by a high school student<sup>230</sup> and a teacher.<sup>231</sup> The student "was 'shocked and surprised' to hear a prayer at the opening of the board meeting,"<sup>232</sup> and the teacher felt "humiliated, demeaned and physically coerced into attending and participating in [the] prayers,"<sup>233</sup> although there was no testimony by either plaintiff that the prayers were likely to cause a change in

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226. See *Lee*, 505 U.S. at 588–89.

227. Chaudhuri v. Tennessee, 130 F.3d 232, 237 (6th Cir. 1997) ("The prayers did, to be sure, evoke a monotheistic tradition not shared by Hindus such as Dr. Chaudhuri.").

228. 171 F.3d 369 (6th Cir. 1999).

229. *Id.*

230. *Id.* at 374.

231. *Id.*

232. *Id.*

233. *Coles*, 171 F.3d at 374.

religious belief.<sup>234</sup> The teacher testified that he had to go to the board of education meeting early to make sure that he would get a seat and for that reason could not wait outside until after the prayer had been offered.<sup>235</sup> The court at least implied that this pressure to get a seat sufficed to establish why he was compelled to be present for the religious activities whose exercise he found offensive.<sup>236</sup>

The *Coles* court noted that younger children might be present at the meetings, such as those wishing to challenge a disciplinary action,<sup>237</sup> and that at least one student sat on the board to offer board members a “student’s perspective.”<sup>238</sup> The court offered its understanding of the prevailing jurisprudence: “two overriding principles can be discerned. The first is that ‘coercion’ of impressionable young minds is to be avoided, and the second is that the endorsement of religion is prohibited in the public schools context.”<sup>239</sup>

This analysis of the jurisprudence suggests that the Establishment Clause bars *both* coercing young minds and endorsing religion in the public schools. Thus, the *Coles* court believed coercion sufficient but not necessary for a finding of an Establishment Clause violation. Further, when interpreting the first prohibition, the court seemed to downplay the need to show that several children were being coerced before a violation would be found, noting that “the heightened review given to school-sponsored prayer does not turn on any particular children-to-adults ratio, above which prayers are prohibited, but below which they are constitutionally permissible.”<sup>240</sup> The *Coles* court instead implied that the important consideration was the fact that young minds were being religiously influenced rather than that some threshold number of children had been influenced.

Presumably, there were some, perhaps many, children attending the graduation ceremony at Tennessee State University, and if the presence of children at a state event including prayer is enough to invalidate the prayer, then one might have expected that the *Coles* court would have decided the case involving Dilip Chaudhuri differently. *Chaudhuri* and *Coles* are in tension

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234. *Id.*

235. *Id.*

236. The teacher, Gene Tracy, objected to the inclusion of prayer. *Id.* On one occasion, the board president responded to the objection by noting, “I want you to know, sir, that we have Christians within this organization. We have Christians that participate in the schools and I feel that the moment that you kick prayer out of the school, the Lord walks out of the school.” *Id.*

237. *Id.* at 383.

238. *Coles*, 171 F.3d at 383.

239. *Id.* at 379.

240. *Id.* at 382.

with each other. Surprisingly, although they were decided within two years of each other and in the same circuit, *Coles* does not even mention *Chaudhuri*.<sup>241</sup>

### C. Student Initiation

One of the issues raised in *Chaudhuri* was whether the state could be held responsible when some members of the audience spontaneously broke out in prayer during a moment of silence.<sup>242</sup> The University claimed to have had no advance knowledge of what would happen.<sup>243</sup> When the same “spontaneous” event occurred at the next graduation,<sup>244</sup> the University again denied complicity.<sup>245</sup> The *Chaudhuri* court suggested that the University had no obligation to prevent such private expressions.<sup>246</sup>

Suppose that those private expressions of religion would be attributable to the state when they occurred the second, third, or fourth time if the University failed to take any preventive action. Even so, it is not at all clear that the *Chaudhuri* court would have found that the practice failed to pass muster. After all, there had been no coercion involved—neither to attend<sup>247</sup> nor to participate in the ceremony.<sup>248</sup> Further, the court characterized the case as whether the Establishment Clause was violated by exposing an adult to a prayer that he found offensive,<sup>249</sup> and the court did not believe such exposure constitutionally problematic.<sup>250</sup>

241. *Chaudhuri* was issued Nov. 18, 1997. See *Chaudhuri v. Tennessee*, 130 F.3d 232, 232 (6th Cir. 1997). *Coles* was issued March 18, 1999. See *Coles*, 171 F.3d at 369.

242. *Chaudhuri*, 130 F.3d at 235

The program for the May graduation exercises included a moment of silence. On reaching that point in the program, the speaker asked everyone to rise and remain silent. The moment that followed proved less than silent. Someone, or a group of people, began to recite the Lord’s Prayer aloud. Many audience members joined in—spontaneously, by all accounts—and loud applause followed.

*Id.*

243. *Id.* (“TSU officials say they had no advance knowledge of what was going to happen.”).

244. *Id.* (“Summer graduation exercises were scheduled for early August of 1993. . . . When Dr. Jones asked the audience to stand for a moment of silence, a portion of the audience again recited the Lord’s Prayer.”).

245. *Id.* (“TSU officials denied complicity in this incident as well.”).

246. *Id.* at 237 (“The Establishment Clause does not require TSU to silence an audience of private citizens.”).

247. *Chaudhuri*, 130 F.3d at 239 (“Faculty attendance at TSU functions is encouraged but not mandatory. TSU has represented without contradiction that it does not monitor faculty attendance at the university events in question and that no faculty member has ever been penalized for non-attendance.”).

248. *Id.* (“Even if Dr. Chaudhuri had been obliged to attend these events, moreover, he would not have had to participate in the prayers or pay any attention to them.”).

249. See *id.*

250. *Id.*



The *Chaudhuri* analysis might have been more complicated had this been a primary or secondary school graduation. However, as long as there is no state action when, for example, the prayers are initiated by a private party, even primary and secondary school graduations including prayer might seem immunized from constitutional review. Courts in the different circuits have been forced to analyze a related issue, namely, whether student-initiated prayer at graduations is attributable to the state and thus should be examined in light of Establishment Clause guarantees.

### 1. *Jones I* and *II*

In *Jones v. Clear Creek Independent School District (Jones I)*,<sup>251</sup> the Fifth Circuit considered a challenge to a school district's permitting high school graduation ceremonies to include invocations and benedictions that had been composed and delivered by members of the graduating class.<sup>252</sup> Some of these invocations had been overtly sectarian,<sup>253</sup> although three weeks prior to trial the Clear Creek Board of Trustees had adopted a resolution specifying that: (1) the decision about whether to have an invocation or benediction at graduation would be left to the graduating seniors, "with the advice and counsel of the senior class principal,"<sup>254</sup> (2) should the graduates decide to have an invocation and benediction, those addresses would be given by a student volunteer;<sup>255</sup> (3) the invocation and benediction would be "nonsectarian" and "nonproselytizing."<sup>256</sup>

The court noted that "Clear Creek [i]ndisputably controls its commencement programs,"<sup>257</sup> so the policy was not immunized from Establishment Clause review.<sup>258</sup> The court then analyzed the policy in terms of the *Lemon* test.<sup>259</sup> Finding that the inclusion of a benediction and invocation solemnified the occasion, the court held that the purpose prong of *Lemon* was

251. 930 F.2d 416 (5th Cir. 1991), *vacated*, 505 U.S. 1215 (1992).

252. *Id.* at 417.

253. *Id.* ("Pre-1986 Clear Lake graduation invocations included overt references to Christianity. Clear Lake's 1986 graduation invocation mentioned 'Lord,' 'Gospel,' 'Amen,' and God's omnipotence.").

254. *Id.*

255. *Id.*

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

257. *Id.* at 418. See also *supra* notes 117–18 and accompanying text (discussing *Lee*'s focus on the school's control of the graduation ceremonies more generally).

258. *Jones I*, 930 F.2d at 418. ("The Resolution does not escape Establishment Clause scrutiny by only passively limiting students' free choice of graduation speech content.").

259. *Id.* at 419–23 ("The writer of this opinion is inclined to the opinion that present Supreme Court decisions require that the Resolution satisfy *Lemon*.").

satisfied.<sup>260</sup> The court rejected that the effect prong was violated, reasoning that “the students affected by the Resolution are the least impressionable people receiving special protection from religious inferences under the Supreme Court’s school prayer decisions.”<sup>261</sup> After all, the court noted, the “graduation ceremony lies on the threshold of high school students’ transitions into adulthood, when religious sensibilities hardly constitute impressionable blank slates.”<sup>262</sup> Finally, the court reasoned that there was no excessive entanglement, noting that Clear Creek “seeks to solemnize its graduation ceremonies in a manner most acceptable to all attendees, and in doing so may constitutionally pre-screen proposed invocations for sectarianism and proselytization.”<sup>263</sup>

The opinion was vacated and remanded for reconsideration in light of *Lee*.<sup>264</sup> In *Jones II*,<sup>265</sup> the Fifth Circuit again considered whether the high school graduation practice violated constitutional guarantees, rejecting that *Lee* invalidated the local practice.<sup>266</sup> The court read *Lee* as confirming that solemnization was a secular purpose,<sup>267</sup> and it reasoned that an invocation or benediction could only “advance religion by increasing religious conviction among graduation attendees, which means attracting new believers or increasing the faith of the faithful.”<sup>268</sup> Because the prayers were to be nonsectarian and nonproselytizing, the court did not believe that there was a substantial likelihood that the prayers would result in a change in religious views.<sup>269</sup> The Fifth Circuit did not offer much discussion of whether its interpretation of “advancing religion” comported well with the kinds of Establishment Clause limitations recognized by the Court in the past. For

260. *Id.* at 419–21 (“Because Clear Creek has a secular purpose for allowing invocations at its graduations, we agree with the district court that the Resolution satisfies *Lemon*’s first prong as a matter of law.”).

261. *Id.* at 421.

262. *Id.*

263. *Jones I*, 930 F.2d at 423.

264. *See Jones v. Clear Creek Indep. Sch. Dist.*, 505 U.S. 1215 (1992) (“The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Lee v. Weisman*.”).

265. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992).

266. *Id.* at 965 (“Upon reconsideration, we hold that *Lee* does not render Clear Creek’s invocation policy unconstitutional, and again affirm the district court’s summary judgment in Clear Creek’s favor.”).

267. *Id.* at 967 (“[W]e take the *Lee* Court to agree with our holding in *Jones I* that a law may pass *Lemon*’s secular-purpose test by solemnizing public occasions, yet still be stricken as an unconstitutional establishment under another test mandated by the Court.” (citing *Jones I*, 930 F.2d at 420)).

268. *Id.*

269. *Id.* (“Its requirement that any invocation be nonsectarian and nonproselytizing minimizes any such advancement of religion.”).

example, the prayer at issue in *Engel*<sup>270</sup> did not seem likely to promote conversion or to increase the faith of the faithful, and the Court nonetheless suggested that this kind of religious activity<sup>271</sup> implicated Establishment Clause concerns. So, too, the prayers at issue in *Lee*<sup>272</sup> did not seem likely to result in conversions or increases in faith.

It is of course true that the New York and Providence practices were distinguishable in some ways from the Clear Creek practice. The regents had designed the prayer in *Engel*, although the New York practice would have been prohibited even had the prayer been composed by a private individual.<sup>273</sup>

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

271. *Id.* at 424 (“There can, of course, be no doubt that New York’s program of daily classroom invocation of God’s blessings as prescribed in the Regents’ prayer is a religious activity.”).

272. *See Lee v. Weisman*, 505 U.S. 577, 581–82 (1992) (holding that the prayers given at the public school graduation ceremony were religious exercises in which students could not be compelled to participate). The prayers at issue in *Lee* were as follows:

#### INVOCATION

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

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

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

AMEN

#### BENEDICTION

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

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

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

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

AMEN

*Id.*

273. *See supra* notes 8–10 and accompanying text.

While the prayer in *Lee* had been written by the Rabbi, he had nonetheless been given guidelines.<sup>274</sup> That said, however, *Clear Creek* had also imposed the requirement that the oration be nonsectarian and non-proselytizing.<sup>275</sup> While the practice at issue in *Jones II* is distinguishable from the practices at issue in *Engel* and *Lee* because the former would have permitted but not required a prayer whereas both of the latter required prayer,<sup>276</sup> that difference does not speak to whether the prayers at issue would advance religion in the sense claimed to be relevant by the *Jones II* court.

The *Jones II* court read *Lee* to stand for the proposition that unconstitutional coercion exists when the states direct religious activity and, further, require objectors to participate.<sup>277</sup> The court noted that the resolution shifted the decision about whether to have an invocation from the state to the students<sup>278</sup> and, by the same token, shifted the choice of speaker away from the state.<sup>279</sup> Further, because the state did not offer a booklet to the speaker but instead merely directed that the oration be nonsectarian and non-proselytizing, the state had less control over the content of the benediction than had been true in *Lee*.<sup>280</sup>

Consider a dissenting student who is deciding whether to attend the Clear Creek graduation. She knows that a benediction and invocation will be offered as a result of the student vote. At least one question is whether she would feel less coerced than, say, Deborah Weisman. The *Jones II* court reasoned:

We think that the graduation prayers permitted by the Resolution place less psychological pressure on students than the prayers at issue in *Lee* because all students, *after having participated in the decision of whether prayers will be given*, are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy.<sup>281</sup>

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274. *Lee*, 505 U.S. at 588.

275. *Jones I*, 930 F.2d 416, 417 (5th Cir. 1991), *vacated*, 505 U.S. 1215 (1992).

276. *Jones II*, 977 F.2d 963, 968 (5th Cir. 1992) (“Unlike the policy at issue in *Lee*, it does not mandate a prayer. The Resolution does not even mandate an invocation; it merely permits one if the seniors so choose.”).

277. *Id.* at 970 (“*Lee* identifies unconstitutional coercion when (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors.”).

278. *Id.* (“The Resolution requires that the state *not* decide whether an invocation will occur; it respects the graduating class’s choice on the matter.”).

279. *Id.* at 971 (“In contrast, the Resolution explicitly precludes anyone but a student volunteer from delivering Clear Creek’s invocations. Moreover, the Resolution says nothing of government involvement in the selection of the person who delivers any invocation.”).

280. *See id.* (“[T]he Resolution imposes two one-word restrictions ‘nonsectarian and nonproselytizing’ which enhance solemnization and minimize advancement of religion, instead of a pamphlet full of invocation suggestions.”).

281. *Jones II*, 977 F.3d at 971.

Yet, a student who was asked to stand for the benediction or invocation might feel even more pressure knowing that the prayer had been chosen through a popular vote. In addition, the student would know that the state stood behind the prayer, at least in the sense that the state had officially adopted a policy whereby the majority could choose to have a prayer, minority wishes to the contrary notwithstanding. According to the *Jones II* court, the Constitution permits the state to indirectly facilitate prayer at graduation ceremonies by delegating the decision to the student body: “The practical result of our decision, viewed in light of *Lee*, is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies.”<sup>282</sup>

Suppose that the Clear Creek School District had good reason to believe that students would choose to have prayers at their graduation if given the opportunity to do so. Permitting the majority to impose its will on the minority violates at least the spirit of *Lee*. For example, the *Lee* Court rejected the legitimacy of the Providence high school’s producing a “prayer acceptable to most persons . . . [when it would] be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.”<sup>283</sup> While the school policy at issue in *Jones II* would make the prayer acceptable to many, it was nonetheless true that the prayer would be part of a formal religious exercise which students would feel pressure to attend. If including the nonsectarian prayer at issue in *Lee* put dissenting students in a difficult position and forced them to make choices that they should not be forced to make, the same was true in *Jones II*.

It is an empirical question whether the purpose behind the adoption of the Clear Creek policy was to make it possible for the school to continue to have prayers included in the graduation ceremony. However, the fact that the policy was adopted shortly before the trial was to begin<sup>284</sup> suggests that the district was engaging in tactical legal maneuvers so that a practice could be continued that otherwise would have to be stopped.<sup>285</sup>

282. *Id.* at 972.

283. *Lee v. Weisman*, 505 U.S. 577, 588–89 (1992) (emphasis added).

284. *See supra* notes 253–56 and accompanying text.

285. *See McCreary County v. ACLU*, 545 U.S. 844, 850–51 (2005) (“We hold that the counties’ manifest objective may be dispositive of the constitutional enquiry, and that the development of the presentation should be considered when determining its purpose.”); *cf. id.* at 850.

Executives of two counties posted a version of the Ten Commandments on the walls of their courthouses. After suits were filed charging violations of the Establishment Clause, the legislative body of each county adopted a resolution calling for a more extensive exhibit meant to show that the Commandments are Kentucky’s ‘precedent legal code.’ The result in each instance was a modified display of the Commandments surrounded by texts containing religious references as their sole common element. After changing

From the dissenting student's perspective, the Providence and Clear Creek graduations might seem equally coercive. Or, perhaps, the Clear Creek graduation would seem even more coercive because the prayers might have been inferred to have the stamp of approval of both the district and the majority of the graduating student body. Further, the *Lee* Court emphasized the view of the reasonable dissenting student,<sup>286</sup> and it would have been reasonable for the dissenting student to have believed her views in conflict with those of the state and those of the majority of the student body. Nonetheless, the *Jones II* court offered a possible reading of *Lee*. It simply was not possible to tell whether *Lee* would have been decided the same way if the Providence policy had permitted students to vote on whether to have an invocation and benediction. Further, when *Jones II* was appealed, the Court declined the opportunity to make clear the respects, if any, in which that court had misapprehended the relevant jurisprudence.<sup>287</sup>

## 2. *Black Horse*

*Jones II* might be contrasted with a Third Circuit decision, *American Civil Liberties Union v. Black Horse Pike Regional Board of Education*.<sup>288</sup> At issue in *Black Horse* was a school board policy permitting graduating students to decide whether their graduation would include: (1) prayer, (2) a moment of silence or reflection, or (3) neither.<sup>289</sup> When prayer received the most votes, the senior class officers chose the person who would deliver the prayer from among the students volunteering to do so.<sup>290</sup> The ACLU challenged the policy shortly thereafter.<sup>291</sup>

The Third Circuit noted that an "impermissible practice can not be transformed into a constitutionally acceptable one by putting a democratic

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counsel, the counties revised the exhibits again by eliminating some documents, expanding the text set out in another, and adding some new ones.

*Id.* at 850 (citation omitted).

286. See *supra* note 116 and accompanying text (discussing *Lee*'s focus on the perspective of the reasonable dissenter).

287. The Court denied certiorari when the *Jones II* opinion was appealed. See *Jones v. Clear Creek Indep. Sch. Dist.*, 508 U.S. 967 (1993). Such a denial is not equivalent to an affirmance. See *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 525 U.S. 943 (1998) (Stevens, J.) ("As I have pointed out on more than one occasion, the denial of a petition for a writ of certiorari is not a ruling on the merits."). Nonetheless, the point remains that the Court did not take the opportunity to correct any possible mistakes.

288. *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996).

289. *Id.* at 1475 ("The vote was taken the next day and produced the following results: 128 students voted for prayer, 120 for reflection/moment of silence, and 20 voted to have neither.").

290. *Id.*

291. The vote was taken on June 4, 1993, and the complaint was filed on June 18, 1993. See *id.*

process to an improper use,”<sup>292</sup> suggesting that the school district’s having permitted the students to vote on whether to have a graduation prayer would not immunize that practice from constitutional review. The court understood that the policy before it differed from the policy at issue in *Lee* in that the state had not mandated a prayer but instead had merely permitted the students to vote whether to have a prayer,<sup>293</sup> although the court also noted that the state still played a significant role in the graduation.<sup>294</sup> Further, the court emphasized that the reason that the students were able to vote on whether they would have a prayer at graduation was that the school had permitted them to do so.<sup>295</sup>

Taking its cue from *Lee*, the *Black Horse* court noted that the dissenting student would feel coerced at the Highland Regional High School graduation,<sup>296</sup> just as she had in *Lee*.<sup>297</sup> The Highland graduation would be supervised and controlled by the state,<sup>298</sup> just as had been true in *Lee*.<sup>299</sup> Indeed, the Third Circuit suggested that one factor made the Highland graduation policy even more constitutionally objectionable than the Providence graduation, namely, the *lack* of control over the content of the prayer, which could be quite sectarian and proselytizing.<sup>300</sup> The court cited with approval an analysis offered by a sister court: “We cannot allow the school district’s

292. *Id.* at 1477.

293. *Black Horse*, 84 F.3d at 1479 (“It is, of course, true that the state’s entanglement with the graduation prayer in *Lee* was more obvious, pronounced, and intrusive than the School District’s involvement here.”).

294. *Id.* (“Graduation at Highland Regional High School, like graduation at nearly any other school, is a school sponsored event. School officials decide the sequence of events and the order of speakers on the program, and ceremonies are typically held on school property at no cost to the students.”).

295. *Id.* (“Delegation of one aspect of the ceremony to a plurality of students does not constitute the absence of school officials’ control over the graduation. Students decided the question of prayer at graduation only because school officials agreed to let them decide that one question. Although the delegation here may appear to many to be no more than a neutral means of deciding whether prayer should be included in the graduation, it does not insulate the School Board from the reach of the First Amendment.”).

296. This was the name of the high school at issue. *See id.* at 1475.

297. *Id.* at 1480 (“We find no difference whatsoever between the coercion in *Lee* and the coercion here.”).

298. *See Black Horse*, 84 F.3d at 1478 (discussing the “control the administration retained over student speech at graduation”).

299. *See Lee v. Weisman*, 505 U.S. 577, 593 (1992) (discussing “the school district’s supervision and control of a high school graduation ceremony”).

300. *Black Horse*, 84 F.3d at 1484–85 (“Version D permits a student to give a sectarian, proselytizing address. If a student were to decide to give such an address after a student referendum ‘authorized’ verbal prayer, the administration could not halt it without violating its own policy. If this were to occur, a proselytizing prayer (perhaps even degrading other religions) would be delivered in a forum controlled by the School Board.”).

delegate to make decisions that the school district cannot make. When the senior class is given plenary power over a state-sponsored, state-controlled event such as high school graduation, it is just as constrained by the Constitution as the state would be.”<sup>301</sup>

While the *Black Horse* majority struck down the policy,<sup>302</sup> the *Black Horse* dissent should not be ignored.<sup>303</sup> Judge Mansmann in dissent argued that *Lee* did “not preclude such student directed, composed and delivered prayer as an integral segment of the graduation ceremony, where there is not, by policy, virtually any school administration or faculty involvement.”<sup>304</sup> Indeed, she went so far as to suggest that “none of the decisions made by the graduating class concerning graduation prayer can be attributed to the state and the Establishment Clause is therefore not even implicated.”<sup>305</sup> While the majority had worried about the prospect of sectarian speech, she seemed to believe that possibility was a virtue of the *Black Horse* policy<sup>306</sup> because that would mean that the state was imposing even fewer limitations on the speech.<sup>307</sup> Finally, the dissent distinguished between the coercion felt by Weisman and the coercion that would be felt by the student who attended the Highland graduation:

There could not be any confusion on the part of the reasonable graduating senior, who has been made aware of the senior class poll and has been invited to participate, with regard to whether the result of that poll represents an official opinion of the state or the will of the senior class.<sup>308</sup>

Here, Judge Mansmann is not focused on whether the dissenting student feels coerced but on whether the student can reasonably feel coerced by the state. Further, she suggests that it would not be reasonable for the dissenting student to feel coerced by the state merely because the state had made it

301. *Id.* at 1483 (citing *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 455 (9th Cir. 1994), *vacated*, 515 U.S. 1154 (1995)).

302. *Id.* at 1474 (“For the reasons that follow we hold that this policy is inconsistent with the First Amendment of the United States Constitution. Accordingly, we will affirm, but modify, the permanent injunction issued by the district court.”).

303. *See id.* at 1489–97 (Mansmann, J., dissenting).

304. *See id.*

305. *Black Horse*, 84 F.3d at 1490 (Mansmann, J., dissenting).

306. *Id.* at 1492 (“By contrast, *Black Horse*’s policy for prayer at graduation ceremonies is more liberal in that it extends the scope of its toleration to include even sectarian prayer, if the graduates so choose.”).

307. *See id.* at 1475 (majority opinion) (“On June 9, Edward Ross, a member of the senior class, approached Principal Palatucci and requested that a representative from the ACLU also be permitted to speak at the graduation to discuss safe sex and condom distribution. Principal Palatucci denied Ross’ request explaining that the time constraints of the ceremony would not permit a keynote speaker, and that the topic requested was not generally one discussed at graduation ceremonies.”).

308. *Id.* at 1492 (Mansmann, J., dissenting).



possible for the majority to vote for a sectarian, proselytizing prayer, although she never explains why that is so. But for the district's permitting the students to vote on whether to have a prayer, there would not have been a significant likelihood that she would be subjected to unwelcome prayer at her graduation.

It might be argued that coercion should not be attributed to the state simply by virtue of the state's having authorized the students to vote. Were coercion attributable to the state merely because the state made prayer possible, then the state would seem to be responsible for the prayers said aloud during the moment of silence at the Tennessee State University graduation, even when that had never happened before. Perhaps there should be some foreseeability threshold, for example, that there was a significant chance that there would be prayer or, perhaps, that prayer would be more likely than not included within the graduation ceremony. However, no rationale was offered by the *Black Horse* dissent to explain why it would be reasonable to attribute coercion to the state when the state had required prayer but not reasonable merely because the state had adopted a policy whereby prayer was merely likely or, perhaps, very likely to occur.<sup>309</sup>

One final point might be made about *Black Horse*. While the majority decision captured the spirit of *Lee* more than *Jones II* did, the *Black Horse* dissent may prove to be a more accurate reflection of the position that the Court will ultimately take on this matter, if only because Supreme Court Justice Alito, who was then on the Third Circuit, joined Judge Mansmann's dissent.<sup>310</sup>

### 3. *Doe*

At issue in *Doe v. Madison School District (Doe I)*<sup>311</sup> was a school policy permitting a minimum of four students to speak at commencement.<sup>312</sup> The students would be selected on the basis of class standing<sup>313</sup> and could "choose to deliver 'an address, poem, reading, song, musical presentation, prayer, or any other pronouncement.'"<sup>314</sup> The school would not "censor any presentation or require any content."<sup>315</sup> It might offer advice about the appropriate language to be used for the occasion, but that advice could be rejected.<sup>316</sup>

309. See also *infra* notes 406–08 and accompanying text (offering an example of what presumably would qualify as a sufficiently high probability to warrant imputation to the state).

310. See *Black Horse*, 84 F.3d at 1489 (Mansmann, J. dissenting).

311. *Doe v. Madison Sch. Dist. No. 321 (Doe I)*, 147 F.3d 832 (9th Cir. 1998), *reh'g granted, and opinion withdrawn*, 165 F.3d 1265 (9th Cir. 1999).

312. See *id.* at 834.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Doe I*, 147 F.3d at 834.

The plaintiff had challenged the policy on behalf of herself and her child as a violation of the Establishment Clause,<sup>317</sup> claiming that “by allowing students to inject prayers and religious songs into the graduation program—the policy perpetuates a long-standing practice of officially sanctioned religious graduation ceremonies.”<sup>318</sup> The Ninth Circuit understood that by permitting prayers the school district might be placing students in a coercive situation,<sup>319</sup> but it reasoned that the school’s having no control over the content of the oration made the case distinguishable from *Lee*.<sup>320</sup> The court noted:

First, students—not clergy—deliver the presentations. Second, these student-speakers are selected by academic performance, a purely neutral and secular criterion. Third, once chosen, these individual students have autonomy over content; the school does not require the recitation of a prayer, but rather leaves it up to the student whether to deliver “an address, poem, reading, song, musical presentation, prayer, or any other pronouncement.”<sup>321</sup>

For support, the *Doe I* court pointed to Justice Souter’s *Lee* concurrence where he noted:

If 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.<sup>322</sup>

Yet, Justice Souter does not say that there could *not* be a finding of endorsement in his hypothetical scenario, but merely that it would be more difficult to so find. A number of factors might be relevant when deciding whether there had been endorsement, e.g., whether this policy had been implemented so that a longstanding practice of having at least one prayer at graduation ceremonies could be maintained.<sup>323</sup>

Suppose that Justice Souter’s hypothetical is modified and, in a particular year, all four of the students offered prayers. Disclaimer in the program notwithstanding,<sup>324</sup> this might not only feel coercive but also might reasonably be viewed as a state endorsement of religion.

317. *Id.*

318. *Id.*

319. *Id.* at 835 (“[O]ne of these facts—the pressures on a student to attend graduation and to conform with her peers—may well be present here.”).

320. *Id.* (“[T]he other fact—the significant control exerted by the school on the religious contents of the graduation program—is missing.”).

321. *Doe I*, 147 F.3d at 835.

322. *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring)).

323. See *Doe v. Madison Sch. Dist. No. 321 (Doe II)*, 177 F.3d 789, 792 (9th Cir. 1999) (“On November 16, 1990, two families filed this action alleging that defendants’ longstanding policy of sponsoring prayers at their high school’s graduation ceremonies violated the Establishment Clause of the First Amendment.”).

324. See *Doe I*, 147 F.3d at 837–38.

The *Doe I* opinion was withdrawn and replaced with a later opinion, *Doe II*,<sup>325</sup> holding that the plaintiff did not have standing<sup>326</sup> and mooted the decision below.<sup>327</sup> However, variations of the problem posed in *Doe I* and *Doe II* came up in the circuits and continued to come up until the Court addressed how student elections of speakers should be handled in *Santa Fe Independent School District v. Doe*.<sup>328</sup> In spite of this, *Santa Fe*, like *Lee* before it, probably raised as many questions as it answered.

### III. THE COERCION TEST REFINED

The *Santa Fe* Court made clear that a school's permitting student elections to determine whether there would be a prayer at a state-sponsored event would not immunize the practice from review.<sup>329</sup> However, the Court did not make clear what additional actions or non-actions by the state would preclude a finding that the offering of a prayer at a public function violated Establishment Clause guarantees. These and other issues have been left to the lower courts to figure out, resulting in the foreseeably confusing and confused jurisprudence that governs the law in this area.

#### A. Santa Fe

At issue in *Santa Fe* was a high school policy authorizing two student elections, the first to determine whether there would be messages, statements, or invocations at football games and the second, if necessary, to determine the identity of the orator.<sup>330</sup> The specific question before the Court was whether the local policy permitting student-initiated and student-led prayers at football games violated constitutional guarantees.<sup>331</sup> In concluding that the policy violated the Establishment Clause,<sup>332</sup> the Court suggested that the principles articulated in *Lee* governed the case,<sup>333</sup> as if those principles were clear.

325. See *Doe II*, 177 F.3d at 789.

326. *Id.* at 799 ("In conclusion, the student-plaintiff's graduation mooted the requests for injunctive and declaratory relief, and no mootness exception applies.").

327. *Id.* ("Following the established practice in the federal system and pursuant to 28 U.S.C. § 2106, we vacate the district court's decision and direct the district court to dismiss the complaint.").

328. 530 U.S. 290 (2000).

329. See *id.* at 317.

330. See *id.* at 297–98.

331. *Id.* at 301 ("We granted the District's petition for certiorari, limited to the following question: Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.").

332. See *id.*

333. *Santa Fe*, 530 U.S. at 302 ("[O]ur analysis is properly guided by the principles that we endorsed in *Lee*.").

However, a brief examination of the post-*Lee* student prayer cases in the circuits reveals that those principles were far from transparent.<sup>334</sup>

The first question addressed by the *Santa Fe* Court was whether the speech at issue was public or private.<sup>335</sup> The Court noted that the invocations were authorized by the school policy and took place at a state-sponsored event on state property.<sup>336</sup> Further, one person would be chosen to deliver the message or invocation for the entire season,<sup>337</sup> and that message was regulated with respect to subject matter and content.<sup>338</sup> The Court explained that the “alleged ‘circuit-breaker’ mechanism of the dual elections and student speaker do not turn public speech into private speech.”<sup>339</sup> The Court also noted that this mechanism would not immunize the school policy from constitutional review when students were coerced into being present for unwelcome religious messages.<sup>340</sup>

The Court analogized *Santa Fe* to *Lee* in a few different respects. For example, while the school district had argued in *Lee* that its requiring nonsectarian prayers minimized the message’s coercive effect,<sup>341</sup> the *Lee* Court responded that protecting the sensibilities of most people would not minimize and might even aggravate the dissenters’ feelings of isolation and affront.<sup>342</sup> So, too, the *Santa Fe* Court reasoned, while *one* student being chosen as the speaker at each of the football games “might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.”<sup>343</sup>

Of course, it was not as if the stated criterion for election involved the contents of the prayers or even whether the speaker would offer prayers. Instead, individuals might be chosen based on popularity, grades, or oratory skills.<sup>344</sup> However, the Court examined the context in which this election took

334. *See supra* Part II.B–C.

335. *Santa Fe*, 530 U.S. at 302.

336. *Id.* (“[I]nvocations are authorized by a government policy and take place on government property at government-sponsored school-related events.”).

337. *Id.* at 303.

338. *Id.* (noting that the message was “subject to particular regulations that confine [its] content and topic”).

339. *Id.* at 310.

340. *Santa Fe*, 530 U.S. at 310 (“[T]hese mechanisms do not insulate the school from the coercive element of the final message.”).

341. *See id.* at 305 (“[I]ts policy of endorsing only ‘. . . nonsectarian’ prayer . . . minimized the intrusion on the audience as a whole.”).

342. *See id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 595 (1992)) (“[S]uch a majoritarian policy ‘does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.’”).

343. *Id.*

344. *See id.* at 321 (Rehnquist, C.J., dissenting) (“It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity.”).

place—first, there was a decision about whether there would be an invocation or message, and second, assuming that the first vote yielded a positive response, an election to determine who would deliver the oration—and concluded that “the policy, by its terms, invites and encourages religious messages.”<sup>345</sup>

One of the noteworthy aspects of the *Santa Fe* opinion was the way that it addressed the regulations regarding content and topic. The message was “to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.”<sup>346</sup> But, the Court noted, “[a] religious message is the most obvious method of solemnizing an event.”<sup>347</sup> Further, because the term “invocation” had always been used in the past to refer to a religious message,<sup>348</sup> the Court reasoned that the policy encouraged and was understood by the students to encourage a religious message.<sup>349</sup> Indeed, the Court noted that it was not clear “what type of message would be both appropriately ‘solemnizing’ under the District’s policy and yet nonreligious.”<sup>350</sup>

Thus, *Santa Fe* was similar to *Lee* in that a religious message would be delivered and in that attendees were being coerced into attending. While accepting that the pressure to attend a football game was not as great as the pressure to attend a graduation ceremony,<sup>351</sup> the *Santa Fe* Court noted that there were some students—such as cheerleaders, band members, and members of the football team—who had to attend.<sup>352</sup> Even bracketing those for whom attendance was required, the Court suggested that to “assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is ‘formalistic in the extreme.’”<sup>353</sup> For at least some students, “the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one [and the] Constitution, moreover, demands that the school may not force this difficult choice upon these students.”<sup>354</sup>

Suppose, however, that the choice to attend a football game was viewed as purely voluntary. Even so, the Court reasoned, “the delivery of a pregame

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345. *Santa Fe*, 530 U.S. at 306.

346. *Id.*

347. *Id.*

348. *Id.* at 307.

349. *Id.* (“[T]he expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy.”).

350. *Santa Fe*, 530 U.S. at 309.

351. *Id.* at 311.

352. *Id.*

353. *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 595 (1992)).

354. *Id.* at 312.

prayer has the improper effect of coercing those present to participate in an act of religious worship.”<sup>355</sup> The Court refused to “turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.”<sup>356</sup>

Part of what drove this decision may have been that there had already been allegations of proselytizing, and so it might have seemed eminently reasonable to expect that this mechanism would be used to engage in similar activity.<sup>357</sup> Yet, the *Santa Fe* Court did not rely on this factor, instead offering what might be viewed as a relatively forgiving standard for what would qualify as being too coercive. After all, in *Santa Fe*, the students chose the speaker, whereas in *Lee* the speaker had been chosen by the school administration. In *Doe*, the policy limitations on the content of the oration were designed to promote allegedly secular goals, whereas in *Lee* the policy limitations were to promote non-sectarianism, which nonetheless might be characterized as promoting religion over non-religion.<sup>358</sup>

*Santa Fe* at least seemed to clear up some of the questions raised in *Lee*. For example, *Santa Fe* suggests that it is not necessary to show that the state is promoting certain religious views over others (e.g., nonsectarian rather than sectarian) for the state’s having had a hand in the content of an oration to trigger Establishment Clause guarantees. However, it is unclear whether a state’s refusing to even speak to the content of an oration would immunize it from an Establishment Clause challenge. On the one hand, it seems less plausible to argue that the state caused a religious message to be delivered if the state provided no content guidelines. On the other hand, the state’s refusal to take an oversight role, especially where there was reason to believe that a religious message would be delivered, might be thought to contribute to the

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355. *Santa Fe*, 530 U.S. at 312.

356. *Id.* at 315.

357. *Id.* at 295.

Respondents commenced this action in April 1995 and moved for a temporary restraining order to prevent the District from violating the Establishment Clause at the imminent graduation exercises. In their complaint the Does alleged that the District had engaged in several proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises. They also alleged that the District allowed students to read Christian invocations and benedictions from the stage at graduation ceremonies, and to deliver overtly Christian prayers over the public address system at home football games.

*Id.*

358. See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”). But see *McCreary County v. ACLU*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) (discussing “the demonstrably false principle that the government cannot favor religion over irreligion”).

degree to which the message delivered at a state-sponsored event might feel coercive.

The *Lee* Court recognized that the state guidelines had involved “a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony,”<sup>359</sup> and at least one of the purposes behind the adoption of the Establishment Clause was the reduction or prevention of religious strife.<sup>360</sup> Yet, interpreting the Establishment Clause to encourage states to have a hands-off policy might have the perverse result that the Clause would make it more likely that there would be sectarian flashpoints for religious animosity.<sup>361</sup>

The *Santa Fe* Court explained that the district could not disassociate itself from the message’s religious content,<sup>362</sup> rejecting the district’s claim that it had “adopted a ‘hands-off’ approach” to the pregame message.<sup>363</sup> The Court instead suggested that an examination of the context revealed that the “policy involve[d] both perceived and actual endorsement of religion.”<sup>364</sup> The Court’s willingness to consider the realities of the situation (whether the policy was understood by the students to be a way of promoting prayer, even if the policy was structured in such a way as to give the district cover) suggests that the Court will look behind the policies adopted by school boards. *Santa Fe* might be read to suggest that the Constitution does not permit the state to avoid

359. *Lee v. Weisman*, 505 U.S. 577, 588 (1992).

360. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 725 (2002) (Breyer, J., dissenting) (“In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife.”); *Lee*, 505 U.S. at 646 (Scalia, J., dissenting) (“The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife.”); *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring in the result) (recognizing that “a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife”); *Walz v. Tax Comm’n*, 397 U.S. 664, 694 (1970) (Harlan, J., concurring) (“Preliminarily, I think it relevant to face up to the fact that it is far easier to agree on the purpose that underlies the First Amendment’s Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application. What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.”); *Bd. of Educ. v. Allen*, 392 U.S. 236, 254 (1968) (Black, J., dissenting) (“The First Amendment’s prohibition against governmental establishment of religion was written on the assumption that state aid to religion and religious schools generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aids is to that extent a tyranny.”).

361. *See supra* notes 306–07 and accompanying text (discussing the *Black Horse* dissenting view that the school’s permitting a student to offer an address with sectarian content was preferable for Establishment Clause purposes).

362. *Santa Fe v. Indep. Sch. Dist.*, 530 U.S. 290, 305 (2000) (rejecting that the District had “divorce[d] itself from the religious content in the invocations”).

363. *Id.*

364. *Id.*

Establishment Clause guarantees by adopting policies that foreseeably and actually result in students praying before large audiences at either public football games or graduations, even if those prayers are composed by individual students.

Yet, *Santa Fe* might not be read so broadly. There were various reasons to believe that the state was trying to promote prayer. For example, at one point the district adopted a policy permitting only nonsectarian and non-proselytizing prayer,<sup>365</sup> but then subsequently removed that restriction.<sup>366</sup> As if realizing that removal of this provision might make the policy more constitutionally vulnerable, the district also added a provision suggesting that if the latter policy were struck down, the former would automatically become effective.<sup>367</sup>

The Court has not heard another case subsequent to *Santa Fe* in which the coercion test was used. This has forced lower courts to interpret the current standard in light of *Lee* and *Santa Fe*. As might not be surprising, the lower courts have come up with remarkably different conclusions about what the coercion test permits and prohibits.

#### B. Adler

*Adler v. Duval County School Board (Adler I)*<sup>368</sup> illustrates one possible reading of the effect or non-effect of *Santa Fe*. The Eleventh Circuit decision involving school prayer was handed down before *Santa Fe* and then was vacated for reconsideration in light of that decision.<sup>369</sup> The Eleventh Circuit's reaffirmance of its prior decision in *Adler II*<sup>370</sup> suggests that *Santa Fe* may have been less helpful than might originally have been supposed.

At issue in *Adler* was whether a school policy permitting an elected graduating student to deliver an unrestricted message violated Establishment Clause guarantees.<sup>371</sup> Emphasizing the importance of the distinction between

365. *Id.* at 295–96.

366. *Id.* at 297.

367. *See Santa Fe*, 530 U.S. at 297.

368. 206 F.3d 1070 (11th Cir. 2000), *vacated*, 531 U.S. 801 (2000), *reinstated*, 250 F.3d 1330 (11th Cir. 2001).

369. *Adler v. Duval County Sch. Bd.*, 531 U.S. 801, 801 (2000) (“Judgment vacated, and case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Santa Fe Indep. Sch. Dist. v. Doe*.” (citation omitted)).

370. *See Adler v. Duval County Sch. Bd. (Adler II)*, 250 F.3d 1330, 1342 (11th Cir. 2001) (“opinion and judgment reinstated”).

371. *Adler I*, 206 F.3d at 1073 (“The central issue presented is whether the Duval County school system’s policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies is facially violative of the Establishment Clause.”).



public and private speech,<sup>372</sup> the Eleventh Circuit suggested in *Adler I* that the “absence of state involvement in each of the central decisions—whether a graduation message will be delivered, who may speak, and what the content of the speech may be—insulates the School Board’s policy from constitutional infirmity on its face.”<sup>373</sup>

The court compared what was before it with what had been at issue in *Lee*, noting that the state had “clearly directed a formal religious exercise—albeit in the form of a nonsectarian prayer—under such circumstances as to oblige the participation of many who objected.”<sup>374</sup> In contrast, the Duval County School Board policy did not direct or establish anything. Indeed, the “School Board and its agents have no control over who will draft the message (if there be any message at all) or what its content may be.”<sup>375</sup>

The *Adler I* court did not characterize attendance at the graduation as voluntary.<sup>376</sup> Rather, the court suggested that the “focus must be on whether the state has endorsed the message in an appreciable manner, which, when combined with the inherent nature of the graduation ceremony, obliges students to participate in a religious exercise.”<sup>377</sup>

Yet, the Eleventh Circuit left out some information that at least might have seemed relevant. For example, it did not mention that up until the time that the policy went into effect, graduations had begun and ended with a prayer.<sup>378</sup> Further, the policy specified that these messages were to be no longer than two minutes,<sup>379</sup> a length of time well-suited for offering a prayer,<sup>380</sup> although that time might of course be used for something other than a prayer.<sup>381</sup>

372. *Id.* at 1074 (“Establishment Clause jurisprudence calls for the difficult task of separating a student’s *private* message, which may be religious in character, from a state-sponsored religious message, protecting the former and prohibiting the latter.”).

373. *Id.* at 1075.

374. *Id.*

375. *Id.* at 1076.

376. *Adler I*, 206 F.3d at 1083 (“[w]e do not quarrel with the Court’s suggestion in *Lee* that students feel compelled to attend graduation”) (citing *Lee v. Weisman*, 505 U.S. 577, 593–97 (1992)).

377. *Id.* (citing *Lee*, 505 U.S. at 594).

378. *Id.* at 1092 (Kravitch, J., dissenting) (“Until the year the policy went into effect, Duval County high school graduations had opened and closed with a prayer.”).

379. *Id.* (“The policy also dictates that the opening and closing messages last no more than two minutes, further limiting the types of speech possible.”).

380. See *Adler II*, 250 F.3d 1330, 1350 (11th Cir. 2001) (Carnes, J., dissenting) (“[T]he board’s mandate that the student ‘message’ be no longer than two minutes comports nicely with the length of a good, short prayer.”).

381. See *Adler I*, 206 F.3d at 1083 (“While ten of the graduation messages delivered pursuant to the policy involved some sort of religious content, the other seven Duval County graduations either had no student message or a wholly secular message.”).

It might nonetheless be thought that there would be a telling difference between a student message and a religious oration offered by a clergyperson. For the latter, one might well be expected to stand, but for the former, one might well be sitting. Yet, as the *Adler I* dissent points out, the audience might well be expected to stand during the student's remarks.<sup>382</sup> In short, the experience for non-adherents in a Duval County high school graduation would, in many important respects, be identical to the experience in the *Lee* graduation. Indeed, with no limits imposed on the content of the oration in the Duval County high school graduation, it would be unsurprising were students to be standing during sectarian prayers, increasing the discomfort or offense for nonbelievers.

*Adler I* was vacated and remanded by the Supreme Court for further consideration in light of *Santa Fe*.<sup>383</sup> The Eleventh Circuit reconsidered the case<sup>384</sup> but reached the same conclusion as it had before.<sup>385</sup> This time, the Court denied certiorari.<sup>386</sup>

On remand, the *Adler II* court distinguished between the "message" that was at issue<sup>387</sup> and the "statement or invocation" at issue in *Santa Fe*,<sup>388</sup> although it is not at all clear why that difference was telling.<sup>389</sup> Indeed, as recognized by the *Adler II* court,<sup>390</sup> the policy at issue in *Santa Fe* had referred to statements, messages, or invocations.<sup>391</sup>

The *Adler II* court explained that the message that would be articulated at the graduation would be private and could not reasonably be attributed to the state.<sup>392</sup> This was an important finding, for it in effect immunized the oration

382. *Id.* at 1097 (Kravitch, J., dissenting) ("Often, students are required to remain silent or even stand for the ceremonies' opening and closing messages.").

383. *See Adler v. Duval County Sch. Bd.*, 531 U.S. 801, 801 (2000).

384. *See Adler II*, 250 F.3d at 1330.

385. *Id.* at 1332 ("Having carefully reviewed the Supreme Court's opinion, and considered supplemental briefs from the parties and amici, we conclude that *Santa Fe* does not alter our previous en banc decision, and accordingly we reinstate that decision and the judgment in favor of Duval County.").

386. *Adler v. Duval County Sch. Bd.*, 534 U.S. 1065, 1065 (2001).

387. *See Adler II*, 250 F.3d at 1338.

388. *See id.* at 1336.

389. *See id.* at 1344 (Kravitch, J., dissenting) ("A second distinction is that the *Santa Fe* policy allowed students to vote whether to have a 'statement or invocation,' whereas the Duval policy allows students to vote whether to have a 'message.' This too is a distinction without a difference.").

390. *See id.* at 1335.

391. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 298 (2000) ("The final policy (October policy) is essentially the same as the August policy, though it omits the word 'prayer' from its title, and refers to 'messages' and 'statements' as well as 'invocations.' It is the validity of that policy that is before us.").

392. *See Adler II*, 250 F.3d at 1337.

from an Establishment Clause challenge. Yet, *Santa Fe* had expressly rejected that the student election mechanism could immunize the state from the coercive effect of having a prayer at a state-sponsored event,<sup>393</sup> and the lack of oversight with respect to the content of the oration at the Duval County high school graduation might make that speech especially offensive to dissenting students and guests. Surprisingly, the *Adler II* court concluded that no reasonable person could attribute the graduation prayer to the state, when members of the *Adler II* dissent had done so<sup>394</sup> and the Supreme Court had done so in *Santa Fe* in which a similarly non-restrictive policy was at issue.<sup>395</sup>

The *Adler II* court emphasized that there were *three* secular purposes served by the school policy at issue.<sup>396</sup> One of these purposes was to solemnize the event, although, as the *Adler II* court explained,<sup>397</sup> the *Santa Fe* Court had worried that a religious message would be the most obvious way to solemnize an event.<sup>398</sup> Yet, the *Adler II* court failed to mention two points: (1) *Santa Fe* had involved other allegedly secular goals, since the message was to “solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition,”<sup>399</sup> and (2) the other goals articulated in *Adler*<sup>400</sup> were to (a) afford “graduating students an opportunity to direct their own graduation ceremony by selecting a student speaker to express a message,”<sup>401</sup> and (b) permit “student freedom of expression, whether the content of the expression takes a secular or religious form.”<sup>402</sup> None of these goals speaks at all to the substance of the oration. Thus, the only goal articulated in *Adler* relevant to substance is to solemnify, which suggests a religious theme. In contrast, some of the goals in *Santa Fe*

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Under the Duval County policy, if the senior class elects to have a message, the student elected to give that message is totally free and autonomous to say whatever he or she desires, without review or censorship by agents of the state or, for that matter, the student body. No reasonable person attending a graduation could view that wholly unregulated message as one imposed by the state.

*Id.*

393. See *supra* notes 339–40 and accompanying text.

394. See *Adler II*, 250 F.3d at 1343–44 (Kravitch, J., dissenting).

395. See *supra* notes 362–63 and accompanying text.

396. *Adler II*, 250 F.3d at 1342 (“[W]e identified *three* genuine secular purposes driving the policy; permitting solemnization of this seminal education experience is only one of those purposes.”).

397. See *id.* at 1337–38.

398. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000).

399. See *id.* at 306.

400. The *Adler II* court simply referred to the goals that were listed in the *Adler I* opinion. See *Adler II*, 250 F.3d at 1342 (citing *Adler I*, 206 F.3d 1070, 1085 (11th Cir. 2000)).

401. *Adler I*, 206 F.3d at 1085.

402. *Id.*

implicating substance, e.g., promoting good sportsmanship and safety, did not suggest religion at all.

If one were asked to choose between the *Santa Fe* and *Duval* policies with respect to which of the two policies was more likely designed to promote prayer, one would likely have chosen the latter. Not only does it specifically authorize religious speech when discussing the allegedly secular goal of promoting student expression,<sup>403</sup> something that *Wallace* counsels against doing,<sup>404</sup> but the policy memo had itself been entitled, “Graduation Prayers.”<sup>405</sup>

The *Adler II* court noted that not every graduation under the policy included a religious message—only ten out of seventeen had done so.<sup>406</sup> Of course, that is still a significant percentage,<sup>407</sup> and it was the state’s adoption of the policy at issue that permitted a religious message in so many of the graduations.<sup>408</sup>

Arguably, the Eleventh Circuit simply ignored *Santa Fe* when reconsidering its opinion.<sup>409</sup> Nonetheless, the Court refused to grant certiorari to make clear the respects in which *Adler II* may have misunderstood the opinion,<sup>410</sup> and *Adler II* offers an understanding of Establishment Clause guarantees that some on the Court presumably share.<sup>411</sup> Further, as had been true in *Lee*, the *Santa Fe* Court did not make clear in its opinion which elements were necessary or sufficient for a finding of an Establishment Clause violation, and there were respects in which the cases before the *Santa Fe* Court and the *Adler II* court differed. As would be expected, the *Santa Fe* Court’s lack of specificity on these issues has resulted in other courts offering a much different understanding of the relevant constitutional guarantees.

403. See *supra* note 402 and accompanying text.

404. See *supra* notes 33–39 and accompanying text (discussing the difficulties posed for an Alabama statute creating a moment of silence for meditation or prayer).

405. See *Adler II*, 250 F.3d at 1345 (Kravitch, J., dissenting).

406. See *id.* at 1339 (“[I]n seven of the 17 instances reflected in the record, students voted for no message at all or for a student speaker who subsequently delivered an entirely secular message.”) (citing *Adler I*, 206 F.3d at 1083–84).

407. *Id.* at 1349 (Carnes, J., dissenting) (“Sixty percent is not perfection, but it is close enough for government work, and Duval County’s ‘Graduation Prayers’ policy is government work.”).

408. See *id.* at 1346 (Kravitch, J., dissenting) (“[T]he very terms of the Duval policy belie any purpose other than that of increasing the probability that graduation ceremonies will include prayer.”).

409. See *id.* at 1344 (“Although the policy at issue in *Santa Fe* and the Duval policy are not identical, their few distinctions are without significant differences, such that the Supreme Court’s opinion in *Santa Fe* compels the conclusion that the Duval policy also facially violates the Establishment Clause.”).

410. See *Adler v. Duval County Sch. Bd.*, 534 U.S. 1065, 1065 (2001).

411. See *supra* note 310 and accompanying text (noting that then-Judge Alito signed the *Black Horse* dissent).

### C. *The Ninth Circuit*

In *Cole v. Oroville Union High School District*,<sup>412</sup> the Ninth Circuit examined a case in which it was claimed that the district had denied the freedom of speech rights of two students when those students had not been permitted to give sectarian speeches at their graduation.<sup>413</sup> Per local policy, all student speeches (including the “spiritual invocation”<sup>414</sup>) were to be reviewed by the principal to make sure that they were neither offensive nor denominational.<sup>415</sup> When the two students, Cole and Niemeyer, submitted their planned addresses, the principal rejected them as too sectarian.<sup>416</sup>

The *Cole* court rejected the claim that district officials abridged the students’ rights to freedom of speech,<sup>417</sup> reading *Lee* and *Santa Fe* to say that the Establishment Clause requires school officials to prohibit sectarian orations at graduation ceremonies.<sup>418</sup> The Ninth Circuit rejected the notion that the orations would have been private speech because:

the District authorized an invocation as part of the graduation ceremony held on District property, allowed only a student selected by a vote of his classmates to give an invocation and no doubt would have used a microphone or public address system to amplify the invocation to the audience at the graduation ceremony.<sup>419</sup>

The court also worried that inclusion of a proselytizing speech at a graduation would have been coercive.<sup>420</sup>

In *Lassonde v. Pleasanton Unified School District*,<sup>421</sup> the Ninth Circuit again considered whether a district had erred in censoring a high school graduation speech that would have been sectarian and proselytizing.<sup>422</sup> The school rejected the suggestion that the school simply provide a disclaimer

412. 228 F.3d 1092 (9th Cir. 2000). While the opinion was submitted on June 12, 2000, one week before *Santa Fe* was decided, the Ninth Circuit opinion was not filed until October 2, 2000. See *id.* and *Santa Fe Indep. Sch. Dist. v. Doe*, 520 U.S. 290, 290 (2000).

413. *Cole*, 228 F.3d at 1095.

414. See *id.* at 1096.

415. *Id.*

416. See *id.*

417. *Id.* at 1101.

418. *Cole*, 228 F.3d at 1101 (“[T]he District’s refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was necessary to avoid violating the Establishment Clause under the principles applied in *Santa Fe Independent School District v. Doe*, and *Lee v. Weisman*.” (citations omitted)).

419. *Id.* at 1102.

420. See *id.* at 1104 (“Including Niemeyer’s sectarian, proselytizing speech as part of the graduation ceremony also would have constituted District coercion of attendance and participation in a religious practice because proselytizing, no less than prayer, is a religious practice.”).

421. 320 F.3d 979 (9th Cir. 2003).

422. See *id.* at 980.

saying that the views articulated did not represent the district's view.<sup>423</sup> Eventually, a compromise was reached whereby the proselytizing passages would be deleted from the speech but would be included in written copies that would be handed out just outside the graduation ceremony site.<sup>424</sup> The *Lassonde* court found *Cole* controlling.<sup>425</sup> The court further explained that even with a disclaimer, "permitting a proselytizing speech at a public school's graduation ceremony would amount to coerced participation in a religious practice."<sup>426</sup>

The Ninth Circuit reads *Santa Fe* to require school officials to assure that graduation speeches are neither sectarian nor proselytizing, even if the students giving these speeches are selected on the basis of secular criteria. In contrast, the Eleventh Circuit suggests that *Santa Fe* imposes no such requirement on school officials and that students selected on the basis of secular criteria have free rein to give as sectarian and proselytizing an address as they wish, as long as the state had no part in affecting the content of the message.<sup>427</sup>

One of the issues dividing the circuits before *Santa Fe* was the role played by age in analyses of state-sponsored events where prayers were offered. As should be no surprise, *Santa Fe* offered no clarification on that point, and there is as much confusion as ever about the appropriate analysis of that issue. A Fourth Circuit case illustrates some of the points in contention.

#### D. Mellen

At issue in *Mellen v. Bunting*<sup>428</sup> was whether a state-operated military college (Virginia Military Institute) could have a daily supper prayer composed by a state official.<sup>429</sup> The Fourth Circuit Court of Appeals considered whether *Marsh*'s approval of legislative prayer implied that daily supper prayers were also constitutionally permissible.<sup>430</sup> Because "the supper prayer [did] not share *Marsh*'s 'unique history'""<sup>431</sup> and because the *Allegheny* Court had implied that *Marsh* should be construed narrowly,<sup>432</sup> the *Mellen* Court rejected that *Marsh* controlled here.<sup>433</sup>

423. *Id.* at 981.

424. *See id.* at 981–82.

425. *Id.* at 983.

426. *Lassonde*, 320 F.3d at 984.

427. *See supra* notes 347–91 and accompanying text.

428. 327 F.3d 355 (4th Cir. 2003).

429. *See id.* at 360, 369 (noting that plaintiffs emphasized that "the supper prayer is composed by a state official (the VMI Post Chaplain) and that it is delivered on a daily basis at mealtime").

430. *See id.* at 369–70.

431. *Id.* at 370.

432. *See id.* at 369 ("The Supreme Court has since emphasized that *Marsh* is applicable only in narrow circumstances."); *see also* County of Allegheny v. ACLU, Greater Pittsburgh Chapter,

That *Marsh* did not control meant that the practice at issue *might* be unconstitutional. In its analysis of whether Establishment Clause guarantees had been violated, the *Mellen* court applied the coercion test,<sup>434</sup> reading *Lee* and *Santa Fe* to stand for the proposition that “school officials may not, consistent with the Establishment Clause, compel students to participate in a religious activity.”<sup>435</sup>

To determine whether students were being compelled to take part in a religious exercise, the court had to address at least two issues: (1) whether the practice at issue was a religious activity or exercise, and (2) whether students were being compelled to participate in that exercise. The court did not spend long on the first issue. While the prayers were nondenominational or, at least, cross-denominational,<sup>436</sup> they were nonetheless prayers, notwithstanding the defendant’s argument at trial that the prayer was “merely a segment of a non-religious ceremony.”<sup>437</sup> The district court rejected that the practice at issue could be understood as secular,<sup>438</sup> and the Fourth Circuit was similarly unpersuaded.<sup>439</sup> The Court of Appeals did not suggest that VMI was trying to

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492 U.S. 573, 602 (1989) (“In *Marsh*, the Court relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights.”).

433. *Mellen*, 327 F.3d at 370.

434. *Id.* (noting that coercion has become a predominant concern in school prayer cases).

435. *Id.* at 371.

436. See *Mellen v. Bunting*, 181 F. Supp. 2d 619, 621 (W.D. Va. 2002), *rev’d in part*, 327 F.3d 355 (4th Cir. 2003).

In this case, Defendant has established the practice of offering a daily, mealtime prayer for the purpose of assisting the Institute’s cadets in developing their “spiritual dimension” by establishing in them “the habit of regular spiritual reflection” and by “exposing them” to a type of prayer commonly embraced by followers of the monotheistic faiths of Judaism, Christianity, and Islam.

*Id.*; see also *Mellen*, 327 F.3d at 362.

[T]he Post Chaplain, Colonel James S. Park, has composed a separate supper prayer for each day. Depending on the day, the prayer begins with “Almighty God,” “O God,” “Father God,” “Heavenly Father,” or “Sovereign God.” As the district court recognized, “[e]ach day’s prayer is dedicated to giving thanks or asking for God’s blessing.” The court also observed that “a prayer may thank God for the Institute, ask for God’s blessing on the Corps, or give thanks for the love and support of family and friends,” and that “each day’s prayer ends with the following invocation: ‘Now O God, we receive this food and share this meal together with thanksgiving. Amen.’”

*Id.* (citations omitted).

437. *Mellen*, 181 F. Supp. 2d at 623.

438. See *id.* at 629 (“Simply put, drafting a prayer to conform with generic, religious norms does not make that prayer ‘secular.’”).

439. See *Mellen*, 327 F.3d at 373. “Indeed, we have emphasized that ‘an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* test.’” *Id.* (citing *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991)). “And we have also recognized the obvious,

privilege one religion but instead suggested that the school was prohibited from trying to promote religion over non-religion.<sup>440</sup>

The analysis regarding whether the students were being coerced into attending or participating in these religious exercises was more extensive. The *Mellen* court noted that upperclassmen were not required to eat at the mess hall,<sup>441</sup> and thus it was not as if they would be punished were they not to eat there. However, the dining options for upperclassmen were rather limited, and the meals at the mess hall were pre-paid.<sup>442</sup> The court concluded that although the meals might technically be called voluntary, such a technicality could not save the policy from constitutional invalidation.<sup>443</sup> Indeed, the court suggested that even were attendance more voluntary, the policy still would not have passed muster.<sup>444</sup> Nonetheless, it might be noted, compliance did not involve bowing heads or reciting prayers but merely standing silently.<sup>445</sup>

At least one issue was whether it should matter that those attending the meals were adults rather than schoolchildren,<sup>446</sup> although *Mellen* presented unusual circumstances in that “VMI’s adversative method of education,” which emphasized the “detailed regulation of conduct,”<sup>447</sup> made the cadets “uniquely susceptible to coercion.”<sup>448</sup> The *Mellen* court concluded that “[b]ecause of VMI’s coercive atmosphere, the Establishment Clause precludes school officials from sponsoring an official prayer, even for mature adults.”<sup>449</sup>

The *Mellen* district court suggested that the state was engaging in “religious indoctrination,”<sup>450</sup> which would be especially worrisome in a school

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that recitation of a prayer ‘is undeniably religious and has, by its nature, both a religious purpose and effect.’” *Id.* (citing *Hall v. Bradshaw*, 630 F.2d 1018, 1020 (4th Cir. 1980)).

440. *Id.* at 375.

441. *See id.* at 361 n.3 (“Cadets (other than rats) do not technically have to eat in the mess hall”). “Rats” are first year students. *See id.* at 361 (discussing VMI “entering cadets (known as ‘rats’)”).

442. *See id.* at 361–62 n.3 (“Cadets (other than rats) do not technically have to eat in the mess hall, but the meals in the mess hall have been pre-paid, and a cadet’s only other food options are vending machines, eating with faculty, or ordering pizza.”).

443. *Id.* at 372 (“The technical ‘voluntariness’ of the supper prayer does not save it from its constitutional infirmities.”).

444. *See Mellen*, 327 F.3d at 372 n.9 (“Even if dining in the mess hall was truly voluntary, the First Amendment prohibits General Bunting from requiring religious objectors to alienate themselves from the VMI community in order to avoid a religious practice.”) (citing *Lee v. Weisman*, 505 U.S. 577, 596 (1992)).

445. *Id.* at 362.

446. *Id.* at 371 (“General Bunting . . . insists that VMI’s cadets are mature adults, who will not feel coerced to participate in the supper prayer.”).

447. *Id.*

448. *Id.*

449. *Mellen*, 327 F.3d at 371–72.

450. *Mellen v. Bunting*, 181 F. Supp. 2d 619, 629 (W.D. Va. 2002).



using the “adversative method,”<sup>451</sup> because the state might be thought to be attempting to instill particular religious views in vulnerable individuals. However, the district court also suggested that even if one bracketed the worries about religious indoctrination, the Establishment Clause bars the religious coercion of both children and adults.<sup>452</sup>

The Fourth Circuit did not directly address whether religious coercion of adults as well as of children is barred. In response to the claim that the cadets were mature adults who would not feel coerced to participate in the religious activity,<sup>453</sup> the court noted that the cadets were uniquely susceptible because of the adversative system,<sup>454</sup> which involved “a rigorous and punishing system of indoctrination.”<sup>455</sup> The court also suggested that because “VMI’s cadets are plainly coerced into participating in a religious exercise . . . the Establishment Clause precludes school officials from sponsoring an official prayer, even for mature adults.”<sup>456</sup>

The Fourth Circuit seemed to suggest that it was the coerced participation rather than the possible modification in belief that constituted the constitutional infraction so that, for example, there was no need to discuss the likelihood that the prayer would alter the cadets’ religious views. Nonetheless, it was not entirely clear whether the Fourth Circuit was striking the policy because it might inculcate religious beliefs or, instead, might be offensive to those with different beliefs.

By suggesting that the coercion of the cadets constituted the constitutional offense, the court was suggesting that adults as well as children are protected from coercion. Yet, it was unclear whether that was so because the adversative method was making the adults comparable to children for these purposes or, perhaps, merely because the adversative method ratcheted up the pressure so that it was reasonable to believe that even adults would succumb to this amount of pressure and thus would be forcibly exposed to unwanted religious activity.

The Fourth Circuit’s *Mellen* opinion captures the *Lee-Santa Fe* jurisprudence in at least two respects. Not only did the court reach the right

451. *Id.* at 622 (noting the “‘adversative method,’ which emphasizes physical rigor, mental stress, absence of privacy, detailed regulation of behavior, and indoctrination of a strict moral code”).

452. *See id.* at 634 (“These cases do not, as Defendant suggests, create one Establishment Clause standard for children and a separate one for their parents. The protections afforded by the First Amendment are the same, regardless of the citizen’s status as a minor or an adult.”).

453. *Mellen*, 327 F.3d at 371 (“[Defendant] insists that VMI’s cadets are mature adults, who will not feel coerced to participate in the supper prayer.”).

454. *Id.* (“Although VMI’s cadets are not children, in VMI’s educational system they are uniquely susceptible to coercion.”).

455. *Id.* at 361.

456. *Id.* at 371–72.

result, but it discussed the relevant kinds of considerations without giving any indication about which of these elements drove the decision. For example, it is simply unclear whether a different state university could compose and require prayers at meals covered by a pre-paid plan.

#### CONCLUSION

Part of the difficulty in understanding the proper approach in the school prayer cases is that *Lee* and *Santa Fe* both emphasize the importance of making case-by-case determinations,<sup>457</sup> and both fail to make clear what is either necessary or sufficient for a finding that the Establishment Clause has been violated (beyond the particular facts before the Court). The Court has thus given the circuits great latitude in deciding when school prayer violates constitutional guarantees.

While the Court has offered broad outlines of what is prohibited (e.g., the state cannot itself compose a prayer to be recited at a graduation involving primary or secondary school students), the circuits are reaching contradictory conclusions about what is permitted and what is not. The Eleventh Circuit believes student elections go very far in immunizing sectarian orations at high school graduations as long as school authorities impose no restrictions on the content of the speeches, whereas the Ninth Circuit suggests that the Establishment Clause requires that such orations be nonsectarian and non-proselytizing.

While it is clear that the age of those hearing the orations is relevant, the Court has not made clear why this is so. If it is because young children are more likely to have their religious views changed, then the Court should not focus on whether such children are coerced into appearing to pray or actually praying. Rather, the Court should simply suggest that the state should not facilitate the presence of prayer where young children are present. If age is relevant because children are more likely to succumb to pressure to signify what they do not believe, then the discussion of the malleability of children is misplaced. Rather, the Court should simply focus on forced speech issues.

Regardless of why age is important, the Court should explain which group is the proper focus of concern. The Court never explains, for example, whether at a graduation the constitutional focus is on the dissenting graduates who are being unwillingly subjected to prayer or, instead, on all dissenting

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457. *Lee v. Weisman*, 505 U.S. 577, 598 (1992) (“Our jurisprudence in this area is of necessity one of line-drawing.”); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) (“Whether a government activity violates the Establishment Clause is ‘in large part a legal question to be answered on the basis of judicial interpretation of social facts. . . . Every government practice must be judged in its unique circumstances. . . .’” (citing *Lynch v. Donnelly*, 465 U.S. 668, 693–94 (1984) (O’Connor, J., concurring))).

individuals who might reasonably feel pressured to attend, including employees and friends and family of the graduates, young and old.

The Court focuses on offense but does not explain how many or what kind of people must be offended for Establishment Clause guarantees to have been violated. Both adults and children might be offended if their religious convictions are being challenged at a public graduation, and the Court never explains why offense to children is more constitutionally problematic than offense to adults. Nonetheless, the Court does not focus on the religious offense to adults, even though there presumably would have been adults who might have felt offended by the prayers at both the graduation ceremony at issue in *Lee* and the pre-game address at issue in *Santa Fe*.

The Court focuses on coercion but never explains whether the coercion at issue is to *attend* the event or *participate* in the prayer. For example, in both *Lee* and *Santa Fe*, the Court does not even discuss whether the plaintiffs had “participated,” and one simply cannot tell whether this was an oversight or instead meant that the coerced attendance was the constitutionally significant feature of the cases.

Much of the prayer jurisprudence involves state participation in the composition or presentation of prayers at school ceremonies. But the Court never explains whether a truly “hands-off” policy immunizes the state. Nor does the Court explain or even suggest what the state should or must do if it is not to have prayer imputed to it.

Perhaps all of these factors are relevant. Even if that is so, the Court should explain whether the presence of one, some, or all is either necessary or sufficient for a finding of a violation of Establishment Clause guarantees. Circuits are left with so much discretion that the jurisprudence cannot help but lay in hopeless disarray.

The Court’s willingness to consider context is to be applauded. Nonetheless, the Court must offer clearer guidelines with respect to what the Establishment Clause prohibits and permits. As currently described, it is impossible to know whether the coercion test is very forgiving, very demanding, or somewhere in between. Nor is it clear whether coercion is a necessary or a sufficient condition for a finding that Establishment Clause guarantees have been violated. The lack of clarity on these issues has led to an intolerably high level of confusion and disagreement in the circuits, which will only be intensified unless the Court is much clearer about both what the test permits and what it is designed to discourage. In a nation with so many religions represented in the public schools, it is simply unconscionable for the Court to offer such a confused and confusing jurisprudence with respect to prayer at state-sponsored events.

