Indiana Law Review

Volume 27 1993 Number 2

CASE NOTE

Is Justice Kennedy the Supreme Court's Lone Advocate for the Coercion Element in Establishment Clause Jurisprudence? An Analysis of *Lee v. Weisman*

Timothy C. Caress*

Introduction

The issue of invocations and benedictions[1] at public school graduations involves two contrary ideologies of Establishment Clause jurisprudence. Graduation prayer is a traditional practice that occurs in the special context of the public schools. This practice is best explained by the fact that, historically, education was a sectarian exercise.[2] Although the Supreme Court has tended to afford traditional practices great deference, it has applied the Establishment Clause with contrary rigor in public school cases.

The First Amendment was added to the Constitution as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say.[3] It was doubtless the belief in this guarantee that caused people to leave the officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could pray when they pleased, to the God of their faith, and

* J.D. Candidate, 1994, Indiana University School of Law—Indianapolis; B.A., 1991, Indiana University.

1. "Prayers" will be used throughout this Note to refer to invocations and benedictions collectively.

2. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 238 n.7 (1963) (Brennan, J., concurring).

3. Engel v. Vitale, 370 U.S. 421, 429 (1962).

in the language they chose.[4] Therefore, the Establishment Clause of the First Amendment represents a protection fundamental to the ideals upon which the United States Constitution was founded: precisely, that each American shall be free to worship or not worship as he or she desires.

The Supreme Court has applied heightened scrutiny in Establishment Clause cases where the setting is public schools. The rationale for this intense scrutiny was illustrated almost fifty years ago:

> [It] is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.[5]

This Note examines the recent Supreme Court decision in *Lee v. Weisman*,[6] which held that invocations and benedictions at a public school graduation ceremony violated the Establishment Clause. Part I of this Note discusses the historical development of Establishment Clause jurisprudence and gives an overview of various approaches the Supreme Court has embraced in resolving Establishment Clause cases. Part II treats the facts and reasoning of *Lee v. Weisman*. It focuses on Justice Kennedy's application of the "coercion" test in the majority opinion and compares his test with the two concurring and the dissenting opinions. It also discusses the "coercion" test's probable effect on future Establishment Clause analysis. Finally, Part III concludes that the coercion element is the central issue in Establishment Clause inquiry, and attention directed to it will keep the protection granted by the First Amendment in appropriate historical context.

I. History and Development of Establishment Clause Jurisprudence

The Establishment Clause has long been the subject of vigorous debate over its meaning and scope of applicability. The First Amendment provides in relevant part, "Congress shall make no law respecting an establishment of religion. . . ."[7] Although the Clause is apparently straightforward and easily understood, its exact meaning has in fact

---

4. *Id.* at 434.

5. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 231 (1948).

6. 112 S. Ct. 2649 (1992).

7. U.S. Const. Amend. I. The remainder of the First Amendment's Religion Clause provides, "or prohibiting the free exercise thereof; . . . ." However, the focus of this Note is strictly confined to the establishment of religion clause and does not attempt to address the related free exercise of religion clause.

proved to be difficult to determine; consequently, numerous competing approaches have surfaced over the years. Justice Black captured the complexity of the problem in *Everson v. Board of Education*,[8] where he wrote:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and State."[9]

The height of Jefferson's "wall of separation" has varied over time and was even disputed in the *Everson* case.[10] Not surprisingly, the height of the wall continues to be the basis of intense debate even for the present Court.

As noted in the introduction, the Court has applied heightened scrutiny in its review of Establishment Clause cases involving public schools. In the early public school cases, the Court built a high "wall of separation."[11] However, more recently, the Court has found the "wall of separation" to be an inadequate basis for constitutional analysis.[12] Therefore, the Court has sporadically embraced various approaches other than the "wall of separation" to determine Establishment Clause cases. However, the Court remains deeply divided as to the proper approach.

A. The Lemon Test

In *Lemon v. Kurtzman*,[13] the Court established a three-prong test that a practice must satisfy to pass Establishment Clause scrutiny. First,

---

8. 330 U.S. 1 (1947).

9. *Id.* at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 168 (1878)).

10. *Id.* at 18. Justice Black found that a New Jersey program to reimburse parents for their children's public transportation costs passed Establishment Clause muster, notwithstanding that some children attended catholic schools. *Id.* However, Justice Rutledge contended that the Framers originally intended the Establishment Clause "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.* at 31-32 (Rutledge, J., dissenting).

11. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (holding classroom prayer and scripture recitation violated the protection afforded by the Establishment Clause).

12. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("[s]ome relationship between government and religious organizations is inevitable.").

13. 403 U.S. 602 (1971).

the practice must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the practice must not foster an excessive government entanglement with religion.[14] The *Lemon* test, if applied even-handedly, is a very strict approach and almost invariably leads to the conclusion that the challenged government interaction is unconstitutional. However, because of its hostility toward religion and the Court's failure to apply it even-handedly, the *Lemon* test has been severely criticized.[15] In fact, the *Lemon* test may no longer command support by a majority of the current Supreme Court.[16]

B. Modifications of the Lemon Test

1. Dropping the "Purpose" and "Entanglement" Prongs.—Some members of the Court have proposed modifying the *Lemon* test by eliminating the first prong, the requirement of a secular purpose, and by eliminating the third prong, excessive government entanglement. Chief Justice Rehnquist and Justice Scalia have urged that the "purpose" prong be dropped because: (1) it is not possible to determine legislative purpose;[17] and (2) the Court has not clearly defined the requirement of secular purpose.[18] Further, other members of the Court have blamed the "entanglement" prong for the inconsistent results of the Court's establishment rulings.[19] Although the Court has proposed dropping these

---

14. *Id.* at 612-13. The *Lemon* court cited Board of Education v. Allen, 392 U.S. 236, 243 (1968) as the source of the "purpose" and "effect" prongs of the three-part test. The "entanglement" prong came from Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). For a discussion regarding other cases which also served as the basis for the *Lemon* test, *see* Wallace v. Jaffree, 472 U.S. 38, 108-09 (1984) (Rehnquist, J., dissenting).

15. *See* Edwards v. Aguillard, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting); Aguilar v. Felton, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); *Wallace*, 472 U.S. at 108-13 (Rehnquist, J., dissenting); Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736, 768-69 (1976) (White, J., concurring in judgment); Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 956 (1989). In fact, *Lemon* test disapproval is nearly universal: "[P]eople who disagree about nearly everything else in law agree that establishment doctrine is seriously, perhaps distinctively, defective." *See also* Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337 (1986); Michael W. McConnell, *The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?*, 32 CATH. LAW. 187 (1988).

16. *See* Lee v. Weisman, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., dissenting) ("The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, . . . and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision.").

17. *Edwards*, 482 U.S. at 636-39.

18. *Id.* at 613-19.

19. *See, e.g.*, *Aguilar*, 473 U.S. at 430 (O'Connor, J., dissenting).

two prongs of *Lemon*, it has not explicitly done so in the resolution of an Establishment Clause case.

2. The Endorsement Test.—A more prominent alternative to the traditional *Lemon* test is the "endorsement" test. This test was first presented in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*.[20] This shift in Establishment Clause analysis is essentially a clarification of the *Lemon* test rather than a new test[21] because it asks not whether an action advances religion, but whether the action conveys a message that the state endorses religion through the action.[22] The endorsement test has received some support by the Court since *Lynch*;[23] however, it, too, has failed to command support by a majority of the Court with any regularity or predictability.

3. The Marsh Exception.—Another alternative to the *Lemon* test was employed by a majority of the Court in the resolution of *Marsh v. Chambers*.[24] In that case, the Court determined whether an opening prayer at state legislative sessions by a state employed clergyman violated the Establishment Clause. The Court ignored the *Lemon* test and found the prayer to be a tolerable acknowledgement of religion and not a step toward an establishment of religion.[25] The linchpin of the Court's analysis seemed to be the unique history of legislative prayer.[26] Therefore, at

---

20. 465 U.S. 668, 687 (1984).

21. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U. L. Rev. 1113, 1147 (1988).

22. *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring). The primary consideration seems to be when the government has put its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. As was stated in *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring):

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

23. Grand Rapids School Dist. v. Ball, 473 U.S. 373, 389-90 (1985); Board of Educ. v. Mergens, 110 S. Ct. 2356, 2371-72 (1990); Edwards v. Aguillar, 482 U.S. 578, 587 (1987); County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989).

24. 463 U.S. 783 (1983).

25. *Id.* at 792.

26. The Court stated:

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

Id. at 790.

least in *Marsh*, the Court was willing to relax the heightened scrutiny normally applied in Establishment Clause cases in favor of deferring to longstanding legislative practices. However, the precedential value of *Marsh* is uncertain as the Court has not extended its reasoning to any other Establishment Clause cases.

4. The Coercion Test.—Another possible successor to the *Lemon* test is the "coercion" test, which was recently advocated in the *County of Allegheny v. ACLU* case.[27] As explained by Justice Kennedy:

> Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefit to religion in such a degree that it in fact "establishes a [state] religion or religious faith or tends to do so."[28]

This test would permit the state to "endorse" religion, but it would prohibit actions that further the interests of religion through the coercive power of government.[29] As such, the coercion test would direct attention toward the actual effects of an action, rather than toward appearances; however, a discussion of the coercion test will be further developed in Part II of this Note.

II. *Lee v. Weisman*

A. Factual Background

The dispute in Lee v. Weisman[30] arose because principals of public middle and high schools in Providence, Rhode Island, were permitted to invite members of the clergy to give invocations and benedictions at their schools' graduation ceremonies. Mr. Lee, a middle school principal, invited Rabbi Gutterman to offer such prayers at the graduation ceremony for Deborah Weisman's class. Further, Mr. Lee gave Rabbi Gutterman a pamphlet entitled "Guidelines for Civic Occasions," which contained guidelines for the composition of public prayers at civic ceremonies. It also advised that the prayers should be nonsectarian. Mr. Weisman, Deborah's father, filed a motion for a temporary restraining order to prohibit school officials from including a prayer in the graduation ceremony.[31] The motion was denied and Rabbi Gutterman recited the prayers as scheduled.[32] Subsequently, Mr. Weisman sought a permanent injunc-

---

27. 109 S. Ct. 3086 (Kennedy, J., concurring in part and dissenting in part).
28. *Id.* at 3136 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).
29. *Id.*
30. *Id.* at 2652.
31. *Id.* at 2654.

tion barring Mr. Lee, as well as other public school officials, from inviting clergy to recite prayers at future graduations. The District Court granted Mr. Weisman's request for a permanent injunction, which prevented the use of prayer at graduation ceremonies in the Providence public schools.[33] Thereafter, the First Circuit Court of Appeals affirmed the District Court's decision.[34]

B. Justice Kennedy's Majority Opinion[35]

Justice Kennedy wrote for the majority and determined that the recitation of the invocation and benediction did violate the Establishment Clause. Kennedy found it unnecessary to reconsider the Court's decision in *Lemon v. Kurtzman*[36] because he found the cases dealing with prayer in public schools to be controlling precedent.[37]

---

32. The Invocation was as follows:

God of the Free, Hope of the Brave:

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

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

For the political process of America in which all its citizens may participate, for its court system where all 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.

The Benediction was as follows:

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 all of us: To do justly, to love mercy, to walk humbly.

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

Amen.

Id. at 2652-53.

33. Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990).

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

35. Justice Kennedy's majority opinion was joined by Blackmun, Stevens, O'Connor and Souter, J.J.

36. 403 U.S. 602 (1971).

37. *Lee*, 112 S. Ct. at 2655.

Justice Kennedy's resolution of the case was firmly rooted in the principles of the "coercion" test. His majority opinion stated:

> It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in any way which "establishes a [state] religion or religious faith, or tends to do so. . . . The State's involvement in the school prayers challenged today violates these central principles.[38]

However, before embarking on a full discussion of Kennedy's application of the "coercion" test in *Lee*, it is helpful to review generally the history of coercion as an essential element in Establishment Clause analysis and to note Justice Kennedy's modifications of the traditional interpretation of the coercion element.

1. History of the Coercion Element and Kennedy's Modifications.— The concern regarding religious coercion was deeply entrenched in the discussions of the First Amendment draftsmen. James Madison, the principal draftsman of the First Amendment's Religion Clauses, viewed the element of coercion as the essence of the Establishment Clause.[39] Additional support for the coercion element is found in Justice Souter's concurrence in *Lee*, where he stated that "[t]he Framers adopted the Religion Clauses in response to a long tradition of coercive state support for religion."[40]

The "coercion" test allows for some interaction between government and religion, although the height of the "wall of separation" is determined by the effects of a practice or action. Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits the government some latitude in recognizing and accommodating the role religion plays in our society.[41] The amount

---

38. *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

39. In the debates concerning the wording of the First Amendment, Madison stated that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 ANNALS OF CONG. 730 (1984) (Aug. 15, 1789). Madison further stated that he "believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 731.

40. *Lee*, 112 S. Ct. at 2673.

41. County of Allegheny v. ACLU, 109 S. Ct. 3086, 3135 (1989) (Kennedy, J., concurring in part and dissenting in part). In *County of Allegheny*, this notion of permissible accommodation was supported by the following:

> It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that

of permissible latitude is not clearly defined; however, it is apparent that traditional practices receive expanded latitude regarding interaction with the religious sphere. As Justice Kennedy has stated: "Non-coercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage."[42] This deference to traditional practices is further evidenced by the reasoning that a test for implementing the protections of the Establishment Clause should not invalidate longstanding traditions.[43]

The discussion above reflects the element of coercion generally; however, it does little to give any substance to what coercion means and how it is to be determined in a particular case. Strict interpretation of coercion would require "direct" coercion mandated by law.[44] However, Justice Kennedy has modified the strict interpretation of the coercion element. He would include within the definition "indirect" as well as "direct" coercion.[45] "Direct" coercion may be defined as government action that forbids or compels a certain behavior; "indirect" coercion is government action that merely makes noncompliance more difficult or expensive.

Justice Kennedy also maintains that "[s]peech may coerce in some circumstances, ..."[46] He explains this modification by stating that he

---

> noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.
>
> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion.

Id. at 3136 (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring, joined by Harlan, J.)). The idea of permissible accommodation has received considerable support. *See, e.g.*, Wallace v. Jaffree, 472 U.S. at 113 (Rehnquist, J., dissenting).

42. *County of Allegheny*, 109 S. Ct. at 3138.

43. *Id.* at 3142.

44. For a more expanded discussion on the traditional interpretation of coercion, *see infra* notes 86-88 and accompanying text.

45. *County of Allegheny*, 109 S. Ct. at 3137 ("But 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.").

46. *Id.* As Chief Justice Burger wrote for the Court in *Walz*:

> The general principle deducible from the First Amendment and all that has been said by the court is this: that we will not tolerate either governmentally

would forbid government actions that would place the government's weight behind an obvious effort to proselytize on behalf of a religion.[47] Therefore, while Kennedy agrees with the traditional understanding of the "direct" coercion element, he has properly expanded the concept to include "indirect" coercion, thereby recognizing less obvious forms of religious coercion.

2. Kennedy's "Coercion" Test Applied to Lee v. Weisman.—Justice Kennedy's majority opinion is founded on two interlocking principles: first, the prayers were directed and controlled by the government and, second, the students' attendance at the graduation ceremony was not voluntary.[48] These two factual findings combine to produce a situation that fails the "coercion" test; therefore, the recitation of prayers is an unacceptable practice in violation of the Establishment Clause. These two findings, the government's direction and control of the prayers and involuntary student attendance, are discussed separately below.

Admittedly, the graduation prayers did not directly coerce the students to participate. However, this traditional interpretation was of little consequence for Justice Kennedy. He dismissed the rigid understanding of "direct" coercion when he stated:

> The undeniable fact is 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. This pressure, though subtle and indirect, can be as real as any overt compulsion.[49]

Therefore, this pressure to conform "put school-age children who objected in an untenable position."[50] While Justice Kennedy acknowledged that many people who have no desire to join a prayer have little objection to standing as a sign of respect, he insightfully recognized that:

> [F]or 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.

---

established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without interference.

Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

47. *Id. See also supra* note 45 (Although Kennedy used the term "symbolic" actions, it seems rather certain that speech is meant to be included within the meaning of this statement.).

48. Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992).

49. *Id.* at 2658.

50. *Id.* at 2657.

> There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer.[51]

By so finding these prayers to be, in effect, "indirect" coercion, Justice Kennedy has prudently broadened the concept of coercion to include actions that are no less coercive than actions that directly mandate compulsion. He has prudently identified that coercion is present where "a reasonable dissenter . . . could believe that the group exercise signified her own participation or approval of it."[52]

Justice Kennedy's reasoning also relied heavily on the notion that the students' "attendance and participation in the state-sponsored religious activity are, in a fair and real sense, obligatory, though the school district does not require attendance as a condition for receipt of the diploma."[53] Again, Kennedy astutely expanded upon the traditional concept of voluntariness to recognize the importance of attending one's graduation ceremony.[54] He explained that "[e]veryone knows that in our society and in our culture high school graduation is one of life's most significant occasions."[55] He further clarified his determination that attendance was not voluntary by stating:

> 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.[56]

Justice Kennedy's application of the concept of coercion to the *Lee* case persuasively demonstrates its utility in Establishment Clause cases. Focusing on the coercion element keeps Jefferson's "wall of separation" at an appropriate level within historical context. By demanding a form of coercion be present in a government action before a finding of an Establishment Clause violation,[57] the government is afforded some flex-

---

51. *Id.* at 2658 (Justice Kennedy also recognized that it is of little comfort to the dissenter to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation.).

52. *Id.*

53. *Id.* at 2655.

54. *Id.* at 2659 (Kennedy reasoned that attendance was, in effect, not voluntary, evidenced by his seemingly obvious conclusion: "Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.").

55. *Id.*

56. *Id.* A strict interpretation of "voluntary" would mean that attendance was voluntary so long as the school did not officially require attendance or penalize an absent student.

57. Justice Kennedy noted the "coercion" test demands just that—coercion. He

ibility and latitude to accommodate religion and recognize its importance to a large portion of the American population.

C. Justice Blackmun's Concurring Opinion[58]

Justice Blackmun's concurrence in *Lee* demonstrates that he would prefer a much higher "wall of separation" than would Justice Kennedy. He found the prayers to be an unconstitutional violation of the Establishment Clause on the premise that "[n]either a State nor the Federal Government can pass laws which aid one religion, aid all religions, or prefer one religion over another."[59] "Neither a State nor the Federal Government, openly or secretly, can participate in the affairs of any religious organization and vice versa."[60] He concluded that "[t]he Amendment's purpose . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[61] Armed

---

stated: "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." *Id.* at 2661. He acknowledged that Establishment Clause jurisprudence necessarily involves linedrawing in determining when a dissenter's rights of religious freedom are infringed by the state:

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

Id. (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 308 (1963)).

58. Justice Blackmun's concurring opinion was joined by Stevens and O'Connor, J.J.

59. *Lee*, 112 S. Ct. at 2662.

60. *Id.*

61. *Id.* (quoting Everson v. Board of Educ., 330 U.S. at 31-32). Subsequently in *Lee*, Justice Blackmun expanded on this concept:

> We have believed that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is a fusion between religion and the political regime. We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular. And we have believed that these were the animating principles behind the adoption of the Establishment Clause.

Id. at 2667. Actually, this broad interpretation of separation of religion from politics has, naturally, received support from even the ardent conservatives on the Court. In reference to the Establishment Clause, Justice Rehnquist wrote in his dissent in Engel v. Vitale:

> They knew rather that it was written to quiet well-justified fears which

with this misconception, Blackmun readily applied a test patently balanced in favor of finding an Establishment Clause violation.

In his analysis of the facts of *Lee v. Weisman*, Justice Blackmun applied the maligned *Lemon* test. Not surprisingly, he determined that the prayers did not satisfy the religiously-hostile *Lemon* test; accordingly, Blackmun concluded that they were violative of the Establishment Clause.[62]

Although apparently unnecessary to his resolution of the case, Justice Blackmun also addressed the necessity of coercion in Establishment Clause analysis. He concluded that "[o]ur decisions have gone beyond prohibiting coercion, however, because the Court has recognized that 'the fullest possible scope of religious liberty' entails more than freedom from coercion."[63] Accordingly, Blackmun's sole disagreement with Justice Kennedy's reasoning is that Kennedy requires that coercion be present and Blackmun does not.[64] Blackmun stated that "[a]lthough our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient."[65] "Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion."[66] Therefore, Kennedy's narrower coercion analysis conveniently fits within Blackmun's broad ban on religious activity of any kind where the government is involved; in essence, Kennedy's "coercion" analysis is merely a subset of Blackmun's understanding of the Establishment Clause.

> nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to.

370 U.S. 421, 435 (1962). Therefore, Blackmun's recognition of this broad separation of church and state principle is surely universally agreed upon; however, Justice Blackmun errs in applying it as dispositive, black letter law instead of properly using it as a guiding principle.

62. *Id.* at 2664 (Although not couched in the terms of the three-prong *Lemon* test, Blackmun stated that he was applying the *Lemon* test to the *Lee* facts. He found the prayers to be a religious activity. Further, he found the government to be promoting and advancing religion because the government essentially composed the prayers by selecting the clergyman, having the prayer read at a school function and by pressuring students to attend and participate in the prayer.).

63. *Id.* at 2665 (quoting Abington School Dist. v. Schempp, 374 U.S. at 305 (Goldberg, J., concurring)).

64. This distinction between the two justices is exemplified by Blackmun: "To that end, our cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform." *Id.* at 2667.

65. *Id.* at 2664.

66. *Id.*

The weakness of Justice Blackmun's discordance of coercion as a necessary element stems from the fact that he fails to recognize "indirect" coercion as distinct from "direct" coercion. Justice Kennedy exposed Blackmun's misconception in his dissent in *County of Allegheny v. ACLU*,[67] where he explained that some recent cases have rejected the view that coercion is the sole touchstone of an Establishment Clause violation; however, those cases fail to distinguish between "direct" and "indirect" coercion.[68] Therefore, the precedent upon which Blackmun rests his reasoning is unpersuasive because those cases dealt only with "direct" coercion and were silent with respect to "indirect" coercion. When the coercion element is properly understood to encompass both "direct" and "indirect" forms of coercion, the cases that Blackmun cites as authority for his proposition that coercion is not an essential element embody little more than illusory precedent.

D. Justice Souter's Concurring Opinion[69]

Justice Souter's concurring opinion dealt primarily with two issues: first, whether the Establishment Clause applies to governmental practices that do not favor one religion over another, and, second, whether coercion of religious conformity is a necessary element of an Establishment Clause violation.[70]

In the resolution of his first issue, Justice Souter relied on what he considered to be long-standing precedent; namely, that "the Establishment Clause forbids not only state practices that 'aid one religion . . . or prefer one religion over another,' but also those that 'aid all religions.'"[71] Therefore, Souter, like Justice Blackmun, maintains that the Establishment Clause forbids government practices that favor religion broadly, regardless of whether any particular religious denomination or denominations is specifically favored.[72]

However, more troubling is Justice Souter's determination that coercion is not an essential element for an Establishment Clause violation. While acknowledging that the argument in favor of the coercion element has considerable viability, Souter dismisses it on the basis that "[o]ur

---

67. 109 S. Ct. 3086 (1989).

68. *Id.* at 3137. Justice Kennedy accurately pointed out that "direct" coercion need not always be shown to establish an Establishment Clause violation; however, "indirect" coercion, although not identified or discussed as such, has been present in the cases that Blackmun relies on for his assertion.

69. Justice Souter's concurring opinion was joined by Stevens and O'Connor, J.J.

70. *Lee*, 112 S. Ct. at 2667.

71. *Id.* (quoting Everson v. Board of Educ., 330 U.S. 1, 15 (1947)).

72. *See* Engel v. Vitale, 370 U.S. 421 (1962) and Wallace v. Jaffree, 472 U.S. 38 (1984) for support of this reasoning.

precedents . . . simply cannot . . . support the position that a showing of coercion is necessary to a successful Establishment Clause claim."[73] Seemingly then, Justice Souter joins Justice Blackmun aboard the same misguided vessel of precedent in dismissing coercion as an essential element of an Establishment Clause violation.

Souter also dismisses coercion as a necessary element of an Establishment Clause violation on the reasoning that to find otherwise would be inconsistent with the wording of the First Amendment. He supported such an interpretation by stating:

> While [Justice Kennedy] insist[s] that the prohibition extends only to the "coercive" features and incidents of establishment, [he] cannot easily square that claim with the constitutional text. The First Amendment forbids not just laws "respecting an establishment of religion," but also those "prohibiting the free

---

73. *Lee*, 112 S. Ct. at 2672. Justice Souter relies heavily on the following cases for support that any endorsement or promoting of religion by a government practice is sufficient for an Establishment Clause violation, regardless of whether coercion is found to exist:

County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989) (The prominent display of a nativity scene on public property, without contesting the dissent's observation that the creche coerced no one into accepting or supporting whatever message it proclaimed, was forbidden by the Court because it was found to be an unconstitutional state endorsement of Christianity.);

Wallace, 472 U.S. at 61 (The Court struck down a state law requiring a moment of silence in public classrooms not because the state coerced students to participate in prayer, but because the manner of its enactment "convey[ed] a message of state approval of prayer activities in the public schools.");

Engel, 370 U.S. at 431 ("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. But the purposes underlying the Establishment Clause go much further than that.");

Epperson v. Arkansas, 393 U.S. 97 (1968) (The Court invalidated a state law that barred the teaching of Darwin's theory of evolution because, even though the statute obviously did not coerce anyone to support religion or participate in any religious practice, it was enacted for a singularly religious purpose.);

Edwards v. Aguillard, 482 U.S. at 593 (statute requiring instruction in "creation science . . . endorses religion in violation of the First Amendment");

School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985) (The Court invalidated a program whereby the state sent public school teachers to parochial schools to instruct students on ostensibly nonreligious matters. While the scheme clearly did not coerce anyone to receive or subsidize religious instruction, it was held invalid because, among other things, "[t]he symbolic union of church and state inherent in the [program] threatens to convey a message of state support for religion to students and to the general public.");

Texas Monthly v. Bullock, 489 U.S. 1, 17 (1989) (plurality opinion) (tax exemption benefitting only religious publications "effectively endorses religious belief.") (Blackmun, J., concurring in judgment) (exemption unconstitutional because state "engaged in preferential support for the communication of religious messages.").

> exercise thereof." Yet laws that coerce nonadherents to "support or participate in any religion or its exercise,"[74] would virtually by definition violate their right to religious free exercise. Thus, a literal application of the coercion test would render the Establishment Clause a virtual nullity. . . .[75]

Rather than the "coercion" test, Souter advocates that the dispositive inquiry is whether a government practice endorses or promotes religion generally. He stated "[t]his principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community."[76]

Applying this principle to *Lee*, Justice Souter found, without reference to coercion, that the public school officials, who were armed with the State's authority, conveyed an endorsement of religion to their students; therefore, the prayers were in violation of the Establishment Clause.[77]

Souter's endorsement inquiry, without regard to or discussion of the element of coercion, is flawed in two ways. First, Souter's reliance on precedent for the proposition that coercion is not a necessary element of an Establishment Clause violation is unpersuasive. The *Engel* case[78] is the genesis of the precedential line of cases that Souter relies on; however, *Engel* disposed of the coercion element without precedent, without relevance to the case itself, and without explanation.[79] Second, Souter's contention that government may not favor religion at all is void of historical context and is overtly hostile toward religion in general. Similar reasoning is embodied in the principle that the Establishment Clause does not require government neutrality between religion and irreligion.[80] Justice Rehnquist illuminated the constitutional basis of this principle in *Wallace v. Jaffree* when he stated that "[n]othing in the Establishment Clause of the First Amendment, properly understood, prohibits any such generalized 'endorsement' of prayer."[81] Therefore,

---

74. *County of Allegheny*, 109 S. Ct. 3086.

75. *Lee*, 112 S. Ct. at 2676.

76. *Id.* (citing *County of Allegheny*, 109 S. Ct. at 3101).

77. *Id.* at 2678.

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

79. *See* County of Allegheny v. ACLU, 109 S. Ct. at 3137. *See also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 935-36 (1986).

80. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 106 (1984) (Rehnquist, J., dissenting); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1988); ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES (1964).

81. 472 U.S. 38, 113-14 (1984).

when viewed in the context of a proper understanding of precedent and in historical perspective, Justice Souter's contention that the element of coercion is unnecessary for an Establishment Clause violation becomes little more than empty and unpersuasive reasoning.

E. Justice Scalia's Dissenting Opinion[82]

Justice Scalia's dissenting opinion focused on two primary contentions: first, a government practice must be viewed in light of historical practices and traditions and, second, Justice Kennedy's concept of coercion is overly broad and does not comport with traditional notions of the meaning of coercion.

Scalia explained his first contention by stating that the Establishment Clause must be construed in light of the "[g]overnment policies of accommodation, acknowledgement and support for religion [that] are an accepted part of our political and cultural heritage."[83] "[T]he meaning of the Clause is to be determined by reference to historical practices and understandings."[84] He clarified this general proposition by recognizing that prayer has been a prominent part of governmental ceremonies and, even more specifically, that there has been a long tradition of invocations and benedictions at public-school graduation exercises.[85] Therefore, observing the historical tradition of graduation prayers, Justice Scalia found the prayers not in violation of the Establishment Clause.

More troublesome, however, is Scalia's failure to expand his concept of coercion detailed in his argument in support of his second contention. Justice Scalia defined coercion as follows: "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."[86] Upon applying this narrow concept of coercion to the facts of *Lee*, Scalia found no coercion present because no one was legally coerced to recite the prayers.[87] Central to this conclusion was Scalia's determination that a student's attendance at the graduation ceremony

---

82. Justice Scalia's dissenting opinion was joined by Rehnquist, C.J., White and Thomas, J.J.

83. Lee v. Weisman, 112 S. Ct. 2649, 2678 (1992) (quoting County of Allegheny v. ACLU, 109 S. Ct. 3086 (Kennedy, J., concurring in part and dissenting in part)).

84. *Id.*

85. *Id.* at 2679-80. Scalia noted that at the first public high school graduation ceremony in 1868, the students "marched in their best Sunday suits and dresses into a church hall and waited through majestic music and long prayers." *Id.* at 2680.

86. *Id.* at 2683 (emphasis omitted).

87. *Id.* at 2684.

was voluntary.[88] In sum, Scalia reasoned that no coercion was present because the students were not legally required to attend the graduation ceremony. It further appears that Justice Scalia's disposition of the case rested on the notion that the prayers were permissible because a majority of the community wished to make an expression of gratitude to God.[89]

Justice Scalia's reasoning, too, must yield to Justice Kennedy's thoughtful analysis. Although Scalia properly recognized that religious accommodation rooted in traditional practices ought not be invalidated by the Establishment Clause, he failed to distinguish between accommodation and coercion. As Justice Kennedy reasoned, government practices that are pervasive, to the point of creating state-sponsored religious exercise, are precisely the practices forbidden by the Establishment Clause; therefore, the historical tradition of such practices must yield to the protection the Clause affords.[90] Essentially, the disagreement between Scalia and Kennedy in their resolution of *Lee* rests in their understanding of the meaning of coercion; however, Justice Scalia is unrealistic and formalistic in the extreme by denying that coercion exists in the absence of official punishment or compulsion.

The power of Justice Kennedy's expanded concept of coercion is readily apparent when the concept is properly focused on the fact that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[91] It seems an inescapable conclusion that gathering a captive audience is a classic example of coercion, where the concept of voluntary participation is clearly illusory if the cost of avoiding the prayer is to miss one's graduation.

One final observation regarding Justice Scalia's dissenting opinion is that he placed considerable importance in the fact that a majority of the people wished to participate in the recitation of the prayers.[92] However, this consideration lacks any constitutional support and all persuasiveness; further, it demonstrates that Scalia's reasoning and analysis in this case may simply have been molded to reach a desired result. Justice Kennedy placed the importance of the desires of the majority of the

---

88. *Id.* Scalia found attendance voluntary because students were not penalized or disciplined for failing to attend. He distinguished this situation from the school prayer cases by noting that attendance at school is not voluntary because truancy is punishable by law.

89. *Id.* at 2686.

90. *Id.* at 2655.

91. *Id.* at 2658. *See also* Abington School Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 584 (1987); Westside Community Bd. v. Mergens, 496 U.S. at 261-62 (Kennedy, J., concurring).

92. *See supra* note 89 and accompanying text.

population in proper constitutional context when he observed that "[w]hile in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency [the minority] and rejects the balance urged upon us."[93]

Further, the government asserted that an occasion of this importance required the objector, not the majority, to take action to avoid compromising religious scruples. Kennedy responded by recognizing that the government's theory "turns conventional First Amendment analysis on its head. . . . 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 a state-sponsored religious practice."[94]

F. The Future Value of Lee and the Coercion Element

The precedential value of *Lee* in future Establishment Clause cases is dependent upon Justice Kennedy's interpretation and application of coercion. The four justices joining Kennedy's majority opinion[95] seem eager to find an Establishment Clause violation whenever the government "endorses," "promotes," or even "acknowledges" religion, regardless of the practice's effect. Conversely, the four justices dissenting in *Lee*[96] apply a narrow interpretation of coercion when determining if an Establishment Clause violation exists and, even then, may be unwilling to find a violation if the challenged practice comports with established government traditions. Therefore, the outcome of a future case is likely to turn on Justice Kennedy's analysis of the coercion element.

Justice Scalia criticized Kennedy's interpretation of coercion as being "a boundless, and boundlessly manipulable, test of psychological coercion."[97] However, this criticism is unjustified. Kennedy limited this "psychological coercion" to school-age children and did so with the support of psychology authority.[98] Further, Kennedy recognized that

---

93. *Lee*, 112 S. Ct. at 2660 (Kennedy's statement was in response to the government's contention that the prayers were permissible because they were an essential part of the ceremony for many of the people.).

94. *Id.*

95. *See supra* note 35.

96. *See supra* note 82.

97. *Lee*, 112 S. Ct. at 2679 (Scalia contended that Kennedy had not thought out the implications of the coercion test and that this new approach should, if logically applied, prohibit the recitation of the Pledge of Allegiance.).

98. *Id.* at 2659 (Kennedy noted that adolescents are often susceptible to peer pressure and cited to numerous psychology authorities: Clay Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 AM. SOCIOLOGICAL REV. 385 (June 1963); Donna Rae Clasen & B. Bradford Brown, *The Multidimensionality of Peer Pressure in Adolescence*,

claims by persons whose only complaint is that the government action offends them will not be sufficient for a violation because being offended is different than being coerced.[99] Therefore, it is evident that Kennedy is likely to be thoughtful and practical when determining whether a challenged practice crosses the line from being merely offensive or irritating to being an impermissible form of government coercion of religion.

III. Conclusion

Justice Kennedy's recognition of the centrality of coercion to Establishment Clause analysis leads to a prohibition of government action that has the effect of coercing or altering religious belief or action. Under this new approach, the Court would sustain many worthwhile, traditional practices that it is currently apt to invalidate. The focal point of the coercion test is that government may not undertake to coerce religious conformity, but it can pursue its legitimate purposes even if to do so incidentally recognizes various religions or religion generally. This approach will tolerate a more prominent place for religion in the public sphere; however, it will simultaneously guarantee religious freedom for both the majority and, especially, the minority faiths.

A "coercion" test interpretation will not forever clarify that which previously has been so blurred. The understanding of what constitutes coercion and what does not is likely to invoke considerable debate, as evidenced by Justices Kennedy and Scalia in *Lee*; however, at least attention would be directed to the core question: whether a challenged government practice has the effect of coercing religious conformity.

In *Lee*, it is indisputable that graduation prayer is a traditional, worthwhile practice. However, the fact that dissentors, even if only one student, are in a very real sense coerced to participate in the recitation of prayer and, thereby, compromise their religious values cannot be dismissed as inconsequential. This effect of religious coercion is the very evil the framers of the Establishment Clause of the First Amendment sought to strictly prohibit.

---

14 J. of Youth and Adolescence 451 (Dec. 1985); B. Bradford Brown, Donna Rae Clasen & Sue Ann Eicher, *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents* 22 Developmental Psychology 521 (July 1986)).

99. *See supra* note 57 and accompanying text.