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THE ESTABLISHMENT CLAUSE AND DEVELOPMENTAL PSYCHOLOGY: AN ANALYSIS OF PUBLIC SCHOOL GRADUATION PRAYER

INTRODUCTION

> Once when the wind was whipping the banner of a temple, the Sixth Patriarch of Zen witnessed two monks debating about it. One said the banner was moving, one said the wind was moving.
>
> They argued back and forth without attaining the principle, so the Patriarch said, "This is not the movement of the wind, nor the movement of the banner; it is the movement of your minds."
>
> The two monks were both awestruck.[1]

Americans hotly contest the constitutionality of prayer in public school commencement ceremonies.[2] In its only graduation prayer case,[3] the Supreme Court held that a rabbi's offering of a school administration-organized[4] prayer violated the First Amendment. The following summer, however, the Court denied certiorari on a Fifth Circuit case, leaving intact student-

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[1] HUI-K'AI, NOT THE WIND, NOT THE BANNER, NO BARRIER: UNLOCKING THE ZEN KOAN 141 (Thomas Cleary trans. & comm., 1993).

[2] *See, e.g.*, Michele A. Parish, *Graduation Prayer Violates the Bill of Rights*, 4 UTAH BAR J. 19 (June/July 1991), *cited in* Lee v. Weisman, 112 S. Ct. 2649, 2666 n.10 (1992) (Blackmun, J., concurring):

> Of all the issues the ACLU takes on — reproductive rights, discrimination, jail and prison conditions, abuse of kids in the public schools, police brutality, to name a few — by far the most volatile issue is that of school prayer. Aside from our efforts to abolish the death penalty, it is the only issue that elicits death threats.

See also Mark O'Keefe, *Holy Warriors: The American Center for Law and Justice Crusades for the Christian Right in Court*, STUDENT LAW., Dec. 1993, at 12:

> Most of the time, the ACLU and ACLJ are at odds over what the First Amendment means when it says government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In the graduation prayer case, for example, the two sides clashed like legal warriors in hand-to-hand combat.

[3] *Lee*, 112 S. Ct. at 2649.

[4] For convenience and at the risk of reinforcing what this paper will show to be a non-distinction, this Note will differentiate school administration-organized from student-directed public school graduation prayers.

initiated, student-led prayer at a public high school commencement.[5] Last November, the Ninth Circuit[6] held precisely the opposite of the Fifth Circuit and created a split in the circuits regarding student-directed prayer. Judging by the number of

[5] Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993) [hereinafter *Jones II*]. Although the denial of certiorari "carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review," Maryland v. Baltimore Radio Show, 338 U.S. 912, 918 (1950), clearly some graduation prayers are currently legal in Texas, Louisiana and Mississippi. *See* Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473, 1492 (S.D. Miss. 1994) (enjoining the "enforcement of the Mississippi School-Prayer Statute, 1994 MISS. LAWS ch. 609, §§ 1 to 3 (codified as amended at MISS.CODE ANN. §§ 37-13-4 & 37-13-4.1 (rev. 1990)) . . . except as to nonsectarian, nonproselytizing student-initiated voluntary prayer at high school commencement, as condoned by Jones II.")

[6] Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 1994 WL 651111 (9th Cir. 1994).

public school graduation prayer suits filed to date,[7] the Supreme Court likely will face this issue again.

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[7] *See id.* (finding student-directed public school commencement prayers unconstitutional); Friedman v. Sheldon Community Sch. Dist., 955 F.2d 802 (8th Cir. 1993) (finding taxpayers lacked standing to enjoin graduation prayer); Brody v. Spang, 957 F.2d 1108 (3d Cir. 1992) (remanding case contesting the offering of a prayer by the president of the school board at a public school graduation ceremony); *Jones II*, 977 F.2d at 963 (finding student-directed prayers constitutional); Stein v. Plainwell Community Schs., 822 F.2d 1406 (6th Cir. 1987) (analogizing the prayers to Marsh v. Chambers, 463 U.S. 783 (1983), and finding them unconstitutional under the *Marsh* test); Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) (permitting continuance of tradition of invocation and benediction in commencement ceremonies); Adler v. Duval County Sch. Bd., 851 F. Supp. 446 (M.D. Fl.), *appeal filed*, No. 93-833 Civ-J-10 (11th Cir. 1994) (finding constitutional a student-directed prayer); Oldham v. ACLU, 849 F. Supp. 611 (M.D. Tenn. 1994) (finding principal had no standing to seek declaratory relief against threat to litigate if school district permitted graduation prayers); *Ingebretsen*, 864 F. Supp. at 1473 (finding nonsectarian, nonproselytizing student-initiated voluntary prayer condoned by *Jones II*); Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993) (finding unconstitutional the offering of prayer at a high school graduation ceremony regardless of who made the decision to offer it); Griffith v. Teran, 794 F. Supp. 1054 (holding that nonsectarian and nonproselytizing prayers did not violate the Establishment Clause) (*ruled erroneous* in Griffith v. Teran, 807 F. Supp. 107 (D. Kan. 1992); Albright v. Board of Educ. of Granite Sch. Dist., 765 F. Supp. 682 (D. Utah 1991) (refusing to grant injunction for students seeking to enjoin the offering of invocations and benedictions); Lundberg v. West Monona Community Sch. Dist., 731 F. Supp. 331 (N.D. Iowa 1989) (ruling that minister saying prayers at high school graduation ceremony would violate the Establishment Clause); Doe v. Aldine Indep. Sch. Dist., 563 F. Supp. 883 (S.D. Tex. 1982) (finding recitation of a prayer at graduation ceremonies violated the Establishment Clause); Graham v. Central Community Sch. Dist., 608 F. Supp. 531 (S.D. Iowa 1985) (ruling graduation prayer unconstitutional); Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974) (denying preliminary injunction banning prayer at graduation); Wood v. Mount Lebanon Township Sch. Dist., 342 F. Supp. 1293 (W.D. Pa. 1972) (upholding prayer in graduation ceremony); Society of Separationists, Inc. v. Taggart, 862 P.2d 1339 (Utah 1993) (finding no subject matter jurisdiction in case contesting appropriation of state funds to support petition in *Lee*); Sands v. Morongo Unified Sch. Dist., 809 P.2d. 809 (Cal. 1991) (striking down a graduation prayer under the *Lemon* test articulated in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)); Bennett v. Livermore Unified Sch. Dist., 238 Cal. Rptr. 819 (1987) (striking down graduation ceremony prayer under all three prongs of the *Lemon* test); Kay v. David Douglas Sch. Dist., 719 P.2d 875 (Or. Ct. App. 1986) (same), *rev'd on other grounds*, 738 P.2d 1389 (Or.), *cert. denied*, 484 U.S. 1032 (1987); Wiest v. Mount Lebanon Township Sch. Dist., 320 A.2d 362 (Pa.) (finding public school commencement prayers constitutional), *cert. denied*, 419 U.S. 967 (1974).

A public school that permits or requires a graduation prayer violates the Establishment Clause if those in attendance perceive the school is endorsing religion.[8] In order to determine if endorsement occurs, the Court must take into account the participants' perceptive capacities.[9] However, offhand assumptions as to the impact on students of school-endorsed religious activity are inadequate; just as the monks must see through their preconceptions to ascertain accurately the nature of whatever situations they face,[10] so must the Justices look

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[8] Justice O'Connor introduced the endorsement test in Lynch v. Donnelly, 465 U.S. 668, 690-94 (1984) (O'Connor, J., concurring). In Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 390 (1985), the court noted that "an important concern of the effects test is whether the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." This test was adopted by a majority of the Court in County of Allegheny v. ACLU, 492 U.S. 573, 601 (1989) ("Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a . . . religious message.") Justice O'Connor specifically recommends use of the endorsement test in cases involving religion in public schools. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2499-500 (1994) (O'Connor, J., concurring). *See generally* Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986) (supporting the endorsement/disapproval test). *But see* Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266 (1987), for a critique of the this approach.

[9] *See* Lawrence F. Rossow & Nancy D. Rossow, *Student Initiated Religious Activity: Constitutional Argument or Psychological Inquiry*, 19 J.L. & EDUC. 207 (1990) (supporting use of social scientific research to assist in ascertaining students' capacities to perceive religious neutrality); Note, *The Constitutional Dimensions of Student-Oriented Religious Activity in Public High Schools* [hereinafter *Constitutional Dimensions*], 92 YALE L.J. 499 (1983) (applying studies from adolescent psychology to extracurricular student religious meetings); Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. REV. 364 (1983) (promoting a perception-oriented approach to determining constitutionality of school-sponsored religious activities in public schools). *But see* Christian M. Keiner, *A Critical Analysis of Continuing Establishment Clause Flux as Illustrated By* Lee v. Weisman, 112 S. Ct. 2649 (1992) *and Graduation Prayer Case Law: Can Mutual Tolerance Reconcile Dynamic Principles of Religious Diversity and Human Commonality*, 24 PAC. L.J. 401, 453-55 (1993) (questioning use of social science approach due to "elasticity" of results).

[10] As one interpreter summed up this Note's opening quotation:

beyond their unsupported assumptions as to how individuals perceive graduation prayers in order to reach decisions informed by the facts that confront them.[11]

Part I of this Note sets forth the main tests used by the courts in Establishment Clause cases and traces the key school prayer cases in order to illuminate the Court's unsupported assumptions about students' impressionabilities. Part II discusses social perspective-taking, a theory of developmental psychology that provides insight into how individuals perceive complex social phenomena, and applies its findings to the public school commencement prayer context. Part III concludes that even if a prayer were offered under optimal conditions,[12] the great majority of public school graduation attendees would perceive that the school endorses the offered prayer. Because of these perceptions, offering prayers in this setting would violate the Establishment Clause.

I. THE LEGAL CONTEXT

This section begins with an overview of the test articulated by the Supreme Court in *Lemon v. Kurtzman*[13] and addresses the current state of Establishment Clause jurisprudence. Part B of this section discusses the Court's holdings in particular public school prayer cases and notes that the Court's solicitude for the impact of religious activity on students is tied to its assumptions concerning students' age-related

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> The essential point of the story is to illustrate how we think about our thoughts and imagine we have thereby explained things. Judging by our conceptual constructions rather than by direct perceptions, we may wind up entrapped in our own points of view. We may think we are talking about realities when all we are doing is talking about what we think. As the koan says, this can be a shocking realization.

HUI-K'AI, *supra* note 1, at 142.

[11] *See* Thomas A. Schweitzer, Lee v. Weisman *and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable?*, 69 U. DET. MERCY L. REV. 113, 169-70 (noting failure to ascertain understanding of graduation ceremony audience entails the drawback of separating "judicial fact-facting from external reality and turns fact-finding into a solitary judicial exercise with no empirical component.)

[12] For example, a disclaimer by the school of its support. For a discussion of optimal circumstances, see *infra* part III.B.

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

impressionabilities. Part C of this section provides summaries of the three most recent and prominent commencement prayer cases and suggests the Court make a more informed consideration of the perceptions of those who come in contact with public school graduation prayers.

A. THE STANDARD IN ESTABLISHMENT CLAUSE CASES

In *Lemon v. Kurtzman*, the Supreme Court articulated a three-pronged test for evaluating the constitutionality of a Pennsylvania law that provided for state funds to subsidize private schools.[14] The *Lemon* Court decided that to be constitutional a law "must have a secular legislative purpose"; that "its principal or primary effect must be one that neither advances nor inhibits religion"; and that it "must not foster 'an excessive government entanglement with religion.'"[15] If a State law or activity fails to meet any of the three prongs, it violates the Establishment Clause.[16]

The Court narrowly construes the first prong, or "purpose" test, to invalidate only those laws based exclusively or almost exclusively on a religious purpose.[17] As members of the Court have recognized that prayer could serve "the legitimate secular purpose of solemnizing public occasions,"[18] a majority might

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[14] *Id.* at 612-13.

[15] *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[16] *Id.*

[17] *See* Wallace v. Jaffree, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring). *See also* Allan Gordus, Case Note, *The Establishment Clause and Prayers in Public High School Graduations:* Jones v. Clear Creek Independent School District, 47 ARK. L. REV. 653, 665-66 n.76 (1994); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 909 (1987).

[18] Allegheny County v. ACLU, 492 U.S. 573, 595 n.46 (1989) ("[It] is a form of acknowledgment of religion that 'serve[s], in the only wa[y] reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.'") (quoting Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)). The Fifth Circuit adopted this analysis in applying the first prong of the *Lemon* test to graduation prayer. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993) ("The *Lee* Court stated that the Providence school district's solemnization argument would have 'considerable force were it not for the constitutional constraints applied to state action . . . .' The Court did not question its members' previous acknowledgements that solemnization

conclude that prayer at school graduation serves such a solemnizing purpose.[19] Even if the solemnizing purpose were not explicitly set forth, the court might infer such a purpose from the ceremonial nature of the occasion. Upon finding a solemnizing purpose, the Court would rule that the purpose was permissible and that the activity passed the first prong of the *Lemon* test.

State action fails the second prong's "effect" test if it has "the direct and immediate effect of advancing religion."[20] Just as the Court would apply the endorsement test to the first prong,[21] it also added endorsement analysis to *Lemon's* second prong,[22] possibly to the extent of supplanting the second prong.[23] The effect prong, as updated by the endorsement test,

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is a legitimate secular purpose of ceremonial prayer." (quoting Lee v. Weisman, 112 S. Ct. 2649, 2660 (1992) (citing County of Allegheny v. ACLU, 492 U.S. 573, 595 n.46 (1989))); *County of Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring); Marsh v. Chambers, 463 U.S. 783 (1983) (depicting "solemnization" as the "secular purpose" behind legislative prayer); Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962). *But see* Harris v. Joint Sch. Dist. No. 241, 1994 WL 651111, *11 (9th Cir.) (finding "solemnization [through prayer] is insufficient . . . to secularize what is objectively and inherently religious."); Lee v. Weisman, 908 F.2d 1090, 1095 n.13 (1st Cir. 1990), *aff'd* 112 S. Ct. 2649 (1992) ("I am surprised that religious groups would support an argument that explicitly relegates the value of religion in our society to the merely ceremonial."); Schweitzer, *supra* note 11, at 158-59.

[19] For contrary views, see Gordus, *supra* note 17, at 669-70, which argues that application of this solemnization justification to the public school context is erroneous, and Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 61-63 (1993), which contends that civic prayer is neither secular nor for a secular purpose.

[20] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783-84 n.39 (1973).

[21] Although the Court has not struck down any laws for manifesting an unconstitutionally *endorsing* purpose, with the adoption of the endorsement test in *County of Allegheny*, 492 U.S. at 595 n.46, the Court would strike down a law that "intends to convey a message of endorsement or disapproval of religion." *Wallace*, 472 U.S. at 61 (quoting *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring)).

[22] *See supra* note 18.

[23] *See* Gordus, *supra* note 17, at 671 n.108 ("Before analyzing under the primary effects text, it should be noted that this test has been largely superseded by the endorsement test."); Simson, *supra* note 17, at 912 ("Governmental endorsement of religion is an evil because it sends a message to nonadherents that they should revise their beliefs or practices and that, if they do not, they are not full-fledged members of the political community.")

provides that the "Establishment Clause, at the very least, prohibits government from *appearing to take a position on questions of religious belief* or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[24] Since prayers at public school graduations appear to participants to be a state endorsement of religion,[25] such prayers fail the effect/endorsement test in violation of the Establishment Clause.

The third prong's "entanglement" test forbids the state from fostering "an excessive government entanglement with religion."[26] Ascertaining whether the involvement is excessive entails an examination of "the character and purposes of the institutions that are benefitted, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority."[27] This prong likely would not be implicated in a graduation prayer situation in which a school allowed students to organize and to offer the prayer but did not itself participate in the organization of the prayer.

With the exception of one case,[28] the *Lemon* test, or its

(citing *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring); Engel v. Vitale, 370 U.S. 421, 431 (1962)).

[24] County of Allegheny v. ACLU, 492 U.S. 573, 594 (1989) (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)) (emphasis added). *See also The Supreme Court, 1991 Term — Leading Cases — School Prayer*, 106 HARV. L. REV. 259 (1992) (arguing for an endorsement test that relies on an "exclusion principle").

[25] *See infra* part II.C.2.

[26] Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[27] *Id.* at 615. This prong is often the Charybdis to the effect test's Scylla, because to ensure that a government benefit does not have the effect of advancing or endorsing religion impermissibly, the government may be required to monitor the beneficiary, thereby becoming excessively entangled in the beneficiary's operations, for example:

> The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion .... To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions.... A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected.... These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Id. at 619.

[28] Marsh v. Chambers, 463 U.S. 783 (1983) (relying on the unique history

offshoot, the endorsement test, ruled the Court's Establishment Clause jurisprudence for twenty years. However, in several recent decisions[29] the Court did not rely on *Lemon*, and justices[30] and commentators[31] have speculated as to its possible dethronement. Notwithstanding its detractors, the three-pronged test has not been overruled,[32] and it remains particularly pertinent to public school graduation prayer cases.[33]

The Supreme Court did not apply the *Lemon* test in two civic prayer cases: *Marsh v. Chambers*[34] and *Lee v. Weisman*.[35] In *Marsh* the Court held that opening a session of the Nebraska legislature with a prayer given by a chaplain paid by the state was not unconstitutional, because the unique

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of legislative prayer to find no Establishment Clause violation).

[29] Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994) (striking down for failing to be religiously neutral a school district created by the State along religious lines); Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462, 2466 (1993) (finding "neutrally provide[d] benefits to a broad class of citizens defined without reference to religion" constitutionally permissible); Lee v. Weisman, 112 S. Ct. 2649 (1992) (using a coercion test to preclude the offering of a prayer at a public school graduation).

[30] *Compare* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2515 (1994) ("To replace *Lemon* with nothing is simply to announce that we are now so bold that we no longer feel the need even to pretend that our haphazard course of Establishment Clause decisions is governed by any principle.") (Scalia, J., dissenting) (joined by Rehnquist, C.J., and Thomas, J.) *with id.*, at 2494-95 (denying departure from principles of *Lemon*).

[31] *Compare* Michael S. Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993); Ronald C. Kahn, *God Save Us from the Coercion Test: Constitutive Decision-making, Polity Principles, and Religious Freedom*, 43 CASE W. RES. L. REV. 903, 1004-08 (1993) (finding *Lemon* "scattered"); *and* Suzanna Sherry, Lee v. Weisman*: Paradox Redux*, 1992 SUP. CT. REV. 123, 131 ("*Lee v. Weisman* clearly signals the death of *Lemon* . . .) *with* David O. Conkle, Lemon *Lives*, 43 CASE W. RES. L. REV. 865 (1993) *and* Ira C. Lupu, *Which Old Witch?: A Comment on Professor Paulsen's* Lemon *is Dead*, 43 CASE W. RES. L. REV. 883, 888 (1993) ("*Lemon* themes will retain significant vitality in Establishment Clause doctrine.").

[32] *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2148 n.7 (1993) (finding "this case . . . presents no occasion" to overrule the *Lemon* test).

[33] *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2499-500 (1994) (O'Connor, J., concurring) (urging use of endorsement test in "cases involving government speech on religious topics").

[34] 463 U.S. 783 (1983).

[35] 112 S. Ct. 2649 (1992).

history of legislative prayer indicated that the Framers of the Constitution intended to permit such prayers.[36] The Court found this practice to be "deeply embedded in the history and tradition of this country"[37] and noted that the objecting party "is an *adult, presumably not readily susceptible to 'religious indoctrination' . . . or peer pressure.*"[38] *Marsh* involved historical analysis and unique facts inapplicable to the public school context, and it is unlikely the Court would apply this reasoning to a public school graduation prayer case.[39]

The *Lee* Court held that school-organized prayers at high school graduation ceremonies are unconstitutional because of the potentially coercive nature of commencement prayers. The Court's "coercion" test forbids the school from obliging attendance and participation in a school-sponsored religious activity.[40] This coercive effect may not be implicated if the prayer is student-directed.[41] In *Lee* the Court expressly declined to apply the *Lemon* test, stating that "government involvement with religious activity in this case is pervasive."[42] Thus, the Court did not need to reach the endorsement issue.[43]

Although the Court may find that student-directed prayer fails *Lemon*'s purpose or entanglement test or the endorsement or coercion test, the strongest constitutional challenge to such

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[36] 463 U.S. at 786-91.

[37] *Id.* at 786.

[38] *Id.* at 792 (emphasis added). This note questions the insusceptibility of adults. *See infra* part II.C.2.

[39] *See Lee,* 112 S. Ct. at 2660-61 (distinguishing *Marsh*).

[40] *Id.* at 2655.

[41] Lower courts distinguished *Lee* on the basis that it involved school-organized prayer, as opposed to student-directed prayer. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied,* 113 S. Ct. 2950 (1993); Adler v. Duval County Sch. Bd., 851 F. Supp. 446 (M.D. Fla.), *appeal filed,* No. 93-833 Civ-J-10 (11th Cir. 1994). *But see* Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 1994 WL 651111 (9th Cir. 1994); Brody v. Spang, 957 F.2d 1108 (3d Cir. 1992); Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993); Griffith v. Teran, 794 F. Supp. 1054, *ruled erroneous* in Griffith v. Teran, 807 F. Supp. 107 (D. Kan. 1992).

[42] *Lee,* 112 S. Ct. at 2655.

[43] *See id.* at 2664 (Blackmun, J., concurring) (joined by Stevens, J. and O'Connor, J.) ("Government pressure to participate in a religious activity is an obvious indication that the government is endorsing religion."). *See also id.* at 2676-78 (Souter, J., concurring) (joined by Stevens, J. and O'Connor, J.) (finding school unconstitutionally endorsed prayers).

prayer is likely to come from *Lemon*'s second prong, the effect test, as updated by the endorsement test. The effect/endorsement test is the prevailing standard and pertains directly to the student-directed public school commencement prayer issue.

B. PSYCHOLOGICAL ASSUMPTIONS IN RELIGION-IN-PUBLIC SCHOOLS CASES

This section reviews cases in which the Supreme Court faced issues relating to the endorsement of religion in public schools. The Court's attention to the psychological impact of religious messages on participants is essential to endorsement analysis,[44] but no Supreme Court opinion in this area, until *Lee*, cited psychological studies in support of its assertions.[45] The Justices frequently expressed assumptions about the impressionability of the parties involved, but they failed to establish an empirical framework to evaluate this legitimate concern.[46] In order to ascertain the appropriate framework for

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[44] For an excellent discussion of the preeminence and appropriateness of the Court's use of perception and symbolism in Establishment Clause jurisprudence, see William P. Marshall, *"We Know It When We See It:" The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 532 (1986) ("A symbolic approach absorbs the tensions within establishment . . . in a manner in which a more 'objective' jurisprudence cannot. The question posed by the symbolic injury is whether the challenged government action is perceived as improperly endorsing religion."); *see also* Kenneth L. Karst, *The First Amendment, The Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503 (1992) (noting the central importance accorded symbolism in legal disputes regarding religion); *cf.* Barbara J. Flagg, *The Algebra of Pluralism: Subjective Experience as a Constitutional Variable*, 47 VAND. L. REV. 273, 309 (1994) ("Thus, to become a plausible approach, the 'effects' prong of Justice O'Connor's 'messages of endorsement' test must provide some means of identifying the subjective experiences that will be credited, and those that will not."). *But see* Smith, *supra* note 8 (criticizing the endorsement test and the "jurisprudence of symbolism"); Theodore C. Hirt, *"Symbolic Union" of Church and State and the "Endorsement" of Sectarian Activity: A Critique of Unwieldy Tools of Establishment Clause Jurisprudence*, 24 WAKE FOREST L. REV. 823 (1989) (same).

[45] *See infra* notes 47-66, 77 and accompanying text.

[46] Only one Supreme Court opinion specifically referenced research in developmental psychology. Although the research relied on is outdated, in his *Wisconsin v. Yoder* dissent Justice Douglas foreshadowed the approach advocated in this Note when he wrote:

> But there is nothing in this record to indicate that the moral and intellectual judgment demanded of the student by the question in this case is

evaluating these assertions, the following case summaries focus on psychological references in religion-in-public-schools cases.

1. Engel v. Vitale[47]

In the first public school prayer case decided by the Supreme Court, the Court ruled that required, daily, in-class recitation of a twenty-two word, state-written prayer was "religious activity"[48] and contrary to the First Amendment. The Court decided that mandatory prayer in school coerced children into conforming to the dominant religion:

> "The Establishment Clause . . . is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not . . . . 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.[49]

Thus, the Court assumes that the students are vulnerable to the presumed pressure.

2. Abington School District v. Schempp[50]

In this case the Court held it unconstitutional to have in a public high school mandatory, in-class daily Bible readings and recitations of the Lord's Prayer. Although students could elect not to participate,[51] the Court quoted with approval the "indirect coercive pressure" language of *Engel*.[52] The Court found

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beyond his capacity . . . . Moreover, there is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14-year-old approaches that of the adult. *See, e.g.*, J. Piaget, . . . Kohlberg, ...

406 U.S. 205, 245 n.3 (1971) (Douglas, J., dissenting) (citations omitted).

[47] 370 U.S. 421 (1962).

[48] *Id.* at 424.

[49] *Id.* at 430-31 (emphasis added).

[50] 374 U.S. 203 (1963).

[51] *Id.* at 207.

[52] *Id.* at 221 (quoting Engel v. Vitale, 370 U.S. 421, 430-31 (1962)); *See*

the exercise violated the Establishment Clause because it lacked "a secular legislative purpose and [had] a primary effect that neither advance[d] nor inhibit[ed] religion."[53]

In his concurrence, Justice Goldberg observed that:

> The pervasive religiosity and direct governmental involvement inhering in the prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, *involving young impressionable children* whose school attendance is statutorily compelled, and utilizing the prestige, power, and influence of school administration, staff, and authority . . . must fall within the interdiction of the First Amendment.[54]

Thus, in addition to the pressures on the students the Court previously noted in *Engel*, Justice Goldberg provides the first glimpse of the idea of impressionability.[55]

3. Widmar v. Vincent[56]

In *Widmar* the Supreme Court ruled that, in a university community, religious groups have the same right to use university facilities as do non-religious groups. The majority found that:

> University students are, of course, *young adults. They are less impressionable than younger students* and should be able to appreciate that the University's policy is one of neutrality toward religion . . . . The University's student handbook already notes that the University's name will not "be identified in any way

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supra note 49 and accompanying text.

[53] 374 U.S. at 222. This standard anticipates the *Lemon* test, discussed *supra* part I.A.

[54] *Id.* at 307 (Goldberg, J., concurring) (emphasis added).

[55] For a case in which a majority of the Court adopted this idea of impressionability, see Tilton v. Richardson, 403 U.S. 672, 686 (1971) ("There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination.") (citing Donald A. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II, The Nonestablishment Principle*, 81 HARV. L. REV. 513, 583 (1968)).

[56] 454 U.S. 263 (1981).

> with the aims, policies, programs, products, or opinions of any organization or its members."[57]

Thus, according to *Widmar*, college students, as adults, are not sufficiently impressionable as to believe the university endorses the religious group. The existence of a disclaimer in the student handbook facilitates the students' abilities to distinguish between student- and school-sponsored religious activities.[58]

4. Wallace v. Jaffree[59]

The *Wallace* Court used the *Lemon* test to find that an Alabama law that authorized a one-minute period of silence in all public schools "for meditation or voluntary prayer"[60] had no secular purpose.[61] The Court distinguished coercion from influence and found that even the latter violated the Establishment Clause: "That a child is offered an alternative may reduce the constraint; it does not *eliminate the operation of influence* by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates . . . ."[62] In this case Justice O'Connor first noted that intentional "convey[ance of] a message of endorsement or disapproval of religion" by the government is the only requirement for finding an Establishment Clause violation.[63] Thus, the Court clearly determines that the State may not influence, let alone coerce children with regard to prayer, and it begins to recognize that the State may not appear to favor or to disfavor religion.

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[57] *Id.* at 274 n.14 (emphasis added) (citations omitted).

[58] *See infra* part III.B.3.

[59] 472 U.S. 38 (1985).

[60] ALA. CODE § 16-1-20.1 (Supp. 1984).

[61] 472 U.S. at 56.

[62] *Id.* at 60 n.51 (emphasis added) (quoting Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 227 (1948)) (Frankfurter, J., concurring).

[63] *Id.* at 61 (quoting Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring)). For a discussion of the purpose prong of the endorsement test, see *supra* notes 17-19 and accompanying text.

5. Board of Education of the Westside Community Schools v. Mergens[64]

In *Mergens* the Court upheld the Equal Access Act,[65] which prohibits denying voluntary, student religious groups access to public secondary schools during non-instructional time:

> Noting that the [Equal Access] Act extended the decision of [*Widmar*]. . . to public secondary schools, the Court of Appeals concluded that "[a]ny constitutional attack on the [Act] must therefore be predicated on the difference between secondary school students and university students." . . . . Because "Congress considered the difference in the maturity level of secondary students and university students before passing the [Act]," the Court of Appeals held, on the basis of Congress' factfinding, that the Act did not violate the Establishment Clause. . . . We now affirm.[66]

The Court found that Congress determined[67] that secondary

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[64] 496 U.S. 226 (1990).

[65] The relevant section of the Act reads:

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

20 U.S.C. § 4071(a) (1988).

[66] 496 U.S. at 234 (citations omitted).

[67] "[The Senate Judiciary] Committee finds that students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other." S. REP. NO. 357, 98th Cong., 2d Sess. 1984 U.S.C.C.A.N. 2381. However, this committee cited only *Constitutional Dimensions*, *supra* note 9 in support of this finding. The Hearings did not include testimony from anyone who purported to be a psychologist. *Equal Access: A First Amendment Question: Hearings Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 1-294 (1983); *Hearings on the Equal Access Act: Hearings Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 1st. Sess. 1-242 (1983). In fact, most students would not apprehend this distinction. Lawrence F. Rossow & Nancy D. Rossow, Commentary, *High School Prayer Clubs: Can Students Perceive Religious Neutrality?*, 45 ED. LAW REP. 475, 480 (1988) ("[T]he findings tend to refute the position of Congress in their support

school students, like college students, can distinguish State-sponsored from student-sponsored religious activities. In this case the school did not directly confront the students with a decision of whether or not to participate in a religion-related activity.

6. *Religion-in-Public-Schools Cases Summation*

Engel and *Jaffree* stand for the proposition that elementary school children may not be confronted with religious activity or choices in the classroom. According to *Schempp*, secondary school children cannot be required to make decisions about religion in class. However, students in secondary school (*Mergens*), or college (*Widmar*), are mature enough to come into contact with religious activity at school, providing it takes place outside the classroom. In each of these cases, the Court's perception of the impact of religious activity on students in their public school plays a crucial role in its decision. The following section presents three cases in which the courts focused on coercion at the expense of the endorsement standard and thereby regressed to a substantive, rather than symbolic, standard for interpreting the Establishment Clause.

C. GRADUATION PRAYER CASES

This part of the Note discusses the Supreme Court's public school graduation prayer case,[68] and its interpretation in the Fifth[69] and Ninth[70] Circuits. In each instance, the presiding court relied on the coercion test to reach its decision. The two circuit courts also analyzed their cases under the endorsement test. This part discusses in detail these three cases and propos-

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of the Equal Access Act"); *see also infra* part II.C.2. Furthermore, this finding was in made in the context of Widmar v. Vincent, 454 U.S. 263 (1981) (involving a private gathering without school employees) (*supra* notes 56-58 and accompanying text), which differs from a public gathering that includes school officials. Gordus, *supra* note 17, at 677 ("A Religious invocation . . . is not analogous to the religious club's access under the Equal Access Act in *Mergens*.").

[68] Lee v. Weisman, 112 S. Ct. 2649 (1992).

[69] Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

[70] Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 1994 WL 651111 (9th Cir. 1994).

es that the endorsement test provides a superior means of evaluating them. It suggests that in order to make accurate assessments of the constitutionality of public school graduation prayers, courts must inform themselves about the psychological impact of these prayers on ceremony participants.

1. Lee v. Weisman[71]

The Supreme Court held by a five to four margin that an invocation and a benediction given at the commencement ceremony of the public Nathan Bishop Middle School in Providence, Rhode Island, violated the Establishment Clause of the First Amendment.[72] Over the protest of student Deborah Weisman, the school principal decided to have prayers at the ceremony, invited Rabbi Gutterman to offer them, and provided guidance as to their content.[73] The Court found that:

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[71] 112 S. Ct. 2649 (1992).

[72] *Id.* Several years prior, Deborah Weisman's sister, at her commencement, sat through an explicitly Christian prayer. The Weismans, who are Jewish, protested. This time the school selected a rabbi to give the benediction. ROBERT S. ALLEY, SCHOOL PRAYER, 211 (1994). One can only speculate what the school would have done were the Weismans Satanists or atheists. Kenneth Karst recounts an incident at a recent commencement ceremony at U.C.L.A. at which a saffron-robed Buddhist monk chanted the invocation in the Pali language: "Afterward, the letters of protest poured in; some were thoughtful and civil, and some were the ink-and-paper equivalent of enraged screams." KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER AND RELIGION 158 (1993). *Cf.* Marsh v. Chambers, 463 U.S. 783, 800 n.10 (1983) (Brennan, J., dissenting) (relating protests arising from unpopular legislative prayers).

[73] An administrator provided Rabbi Gutterman with a pamphlet drawn up by the National Conference of Christians and Jews and asked him to keep the prayers non-sectarian. 112 S. Ct. at 2655-56. Note the language of the 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.

> State Officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their 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.[74]

The majority was particularly concerned about the "subtle coercive pressures [that] exist . . . where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation."[75] The Court noted that psychological research "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."[76]

Although the Court explicitly concerned itself with one aspect of the psychological impact of group prayer — the coercion of participants — the research does not directly address the problem with graduation prayer.[77] This research suggests that in a *Mergens* situation,[78] for example, a student might feel pressure from peers to join the school's Christian Club. Howev-

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

Id. at 2652-53.

[74] *Id.* at 2655.

[75] *Id.* at 2656. For a discussion of the coercion test see *supra* note 40 and accompanying text.

[76] *Id.* at 2659.

[77] The Court cites the following research: Clay V. Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 AM. SOC. REV. 385 (1963) (arguing that adolescents' conformity to their parents' or peers' opinions depends on the content of the dilemma faced); Donna R. Clasen & B. Bradford Brown, *The Multidimensionality of Peer Pressure in Adolescence*, 14 J. YOUTH & ADOLESCENCE 451 (1985) (arguing that peer pressure tends to decrease as students move through grads 7 to 12, and it varies according to the student's social group and the content of the dilemma); B. Bradford Brown et al., *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents*, 22 DEV. PSYCHOL. 521 (1986) (arguing that although peer pressure usually is directed toward socially positive ends, it is more likely to be influential when teens engage in misconduct).

[78] *See supra* part I.B.5.

er, the coerciveness present in *Mergens* did not render the Equal Access Act unconstitutional.[79] The key factor in an Establishment Clause violation is the source of any endorsement, not whether there is coercion; unconstitutionality requires *State* involvement, regardless of peer or other pressure. The *Lee* Court acknowledged this when it observed that "[w]hat 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.*"[80] Once the State is implicated, the perceptions of those participating become paramount. Courts must use empirical evidence to ascertain whether those involved apprehend that the State endorses religion.

Although a majority of the Justices agreed a coercion test was sufficient in *Lee*, seven of the Justices questioned the general utility of the test.[81] Justice Souter's concurrence noted several cases in which the issue of coercion was not dispositive.[82] In his view, the issue was that the activities conveyed the message of State support of religion.[83] In dissent, Justice

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[79] *See id.*

[80] 112 S. Ct. at 2658 (emphasis added).

[81] Justice Souter, joined by Justices Stevens and O'Connor observed that "[o]ver the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement." *Id.* at 2671 (Souter, J., concurring). Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas referred to the psychological coercion test as an "instrument of destruction, the bulldozer of [the Court's efforts at] social engineering . . . and boundlessly manipulable." *Id.* at 2679 (Scalia, J., dissenting).

[82] *Id.* at 2672 (Souter, J., concurring) (citing County of Allegheny v. ACLU, 492 U.S. 573, 589-594, 598-602 (1989); Wallace v. Jaffree, 472 U.S. 38, 61, 67-84 (1985); Engel v. Vitale, 370 U.S. 421, 431 (1962); Epperson v. Arkansas, 393 U.S. 97 (1968); Edward v. Aguillard, 482 U.S. 578, 593 (1987); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 397 (1985); *see also* Texas Monthly v. Bullock, 489 U.S. 1, 17, 28 (1989)).

[83] Justice Souter distinguished between coercion and the appearance of state-supported religion:

> [W]ithout contesting the dissent's observation that the creche coerced no one into accepting or supporting whatever message it proclaimed, five Members of the Court found its display unconstitutional as a state endorsement of Christianity .... [County of Allegheny v. ACLU, 492 U.S. 573,] 589-594, 598-602, 109 S. Ct. at 3098-3101, 3103-3105 [(1989)] .... And in *School Dist. of Grand Rapids v. Ball* 473 U.S. 373, 105 S. Ct. 3216, 87 L. Ed. 2d 267

Scalia lambasted the majority's use of psychological research.[84] Justice Scalia argued that a "few citations of '[r]esearch in psychology' that have no particular bearing upon the precise issue here . . . cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing."[85]

Justice Scalia suggested that a school might circumvent *Lee* by announcing or inserting into the program a disclaimer "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."[86] Per *Widmar*, a disclaimer could notify participants as to the State's nonsponsorship of religion.[87] A disclaimer might assist some individuals in distinguishing school from private endorsement, but empirical evidence indicates that many people likely would not benefit from a disclaimer.[88]

It is not surprising that the *Lee* Court found that secondary school students were confronted with a religious practice in violation of the Establishment Clause when the school selected and directed the prayer.[89] However, when students initiate and deliver the prayer, the school's involvement in the support of religion decreases. This makes the following decision a closer case.

> (1985), we 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, we held it 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 of religion to students and to the general public." *Id.* at 397 . . . .

Id. (Souter, J., concurring).

[84] *See id.* at 2681-83 (Scalia, J., dissenting).

[85] *Id.* at 2681. This Note agrees that the focus on a coercive environment is misplaced and that the Court reached beyond support provided by the cited evidence. However, the use of psychological research to determine when an audience perceives state endorsement is appropriate. Expertise is available and should inform future Court decisions.

[86] *Id.* at 2685.

[87] *Supra* text accompanying note 57.

[88] *See infra* part III.B.3.

[89] *See* Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097, 1099 (E.D. Va. 1993) ("The degree of state sponsorship in *Lee* made it an 'easy' case").

2. Jones v. Clear Creek Independent School District[90]

The Supreme Court vacated *Jones*[91] and sent it to the Fifth Circuit Court of Appeals for further consideration in light of *Lee*. In *Jones II*, the Fifth Circuit reapplied the *Lemon*, endorsement, and coercion tests. Notwithstanding *Lee*, the court held the Establishment Clause not violated when public high school seniors, by majority vote, choose to have a nonsectarian, nonproselytizing, student-delivered prayer at their graduation ceremony.[92] According to the Fifth Circuit, prayer is less coercive if it is offered by a student-elected peer. The difference is that a student would be "less able to coerce participation than an authority figure from the state or clergy . . . . [The] Court [ha]s previous[ly] recogni[zed] that graduating seniors 'are less impressionable than younger students.'"[93] The *Jones II* court failed to note the irrelevancy of the question of whether graduating students generally are less impressionable than younger students to the question of whether peers or authority figures exert the greater pressure to conform.[94]

The Fifth Circuit considered the participants' perceptions when it stated that the State "unconstitutionally endorse[s] religion when a reasonable person would view the challenged government action as a disapproval of her contrary religious choices."[95] The court equated the "reasonable person" with the "graduating high school senior" when it noted that in "*Mergens* . . . a graduating high school senior who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer will understand that any religious references are the result of student, not government, choice."[96]

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[90] 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

[91] 112 S. Ct. 3020 (1992).

[92] *Jones II*, 977 F.2d at 963.

[93] *Id.* at 971 (quoting Board of Educ. of the Westside Comm. Schs. v. Mergens, 496 U.S. 226, 235-37 (1990)).

[94] In fact, the concern with authority figures seems contrary to the Supreme Court's concern in *Lee* with peer pressure. However, one of the studies cited in *Lee* noted that *parents* have greater power than do peers over a student's decision in an area in which a student perceives parents to have greater competence. Presumably, religion would fall within the parents' domain. *See* Brittain, *supra* note 77.

[95] *Jones II*, 977 F.2d at 968.

[96] *Id.* at 969. The Court then quoted *Mergens*:

Thus, in *Jones II* the Fifth Circuit determined that students are less coerced by student-directed, as opposed to school-directed prayers. It analogized its case to *Mergens*, a case in which the State at most only indirectly, that is, outside of a school-directed setting, confronted students with a religion-oriented choice: join or do not join. In a commencement ceremony, however, the confrontation is direct: pray or do not pray. Finally, the court implied that the maturity of secondary students equals that of adults. However, the ability of students or adults to perceive school sponsorship of religion is an empirical question requiring further exploration.[97]

3. Harris v. Joint School District No. 241[98]

The Ninth Circuit rejected public school graduation prayers in a factually stronger case for constitutionality than *Jones II* presented.[99] The *Harris* students purportedly made all decisions pertaining to the commencement, including whether to have it at all.[100] They decided whether they would include at their graduation a prayer, and, if so, selected who would offer it.[101] The prayer was not a part of the rehearsal, and at the ceremony, "no one [wa]s asked to participate in the prayer by standing, bowing their heads, or removing their hats."[102] Furthermore, since 1991 the commencement program carried a

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> [T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

Id. at 969 (quoting *Mergens*, 496 U.S. at 250).

[97] *See infra* part II.C.

[98] 41 F.3d 447, 1994 WL 651111 (9th Cir. 1994).

[99] 977 F.2d at 963 (*see supra* part I.C.2.).

[100] *Harris*, 1994 WL 65111 at *6.

[101] *Id.* at *5.

[102] *Id.* at *6. One might question how the school district could make these assurances, because "it is the senior students themselves, not the principal, who determine every element of their graduations." *Id.* at *5. In fact, the principal agreed that "school officials would not interfere with a graduation planned by the senior class even if the students voted to 'have the whole thing be a religious service.'" *Id.* at *6.

disclaimer that disavowed any relationship between the school district and any statements made during graduation.[103]

The court observed that "[t]he notion that a person's constitutional rights may be subject to a majority vote is . . . anathema,"[104] and that "elected officials cannot absolve themselves of a constitutional duty by delegating their responsibilities to a nongovernmental entity[, because e]ven private citizens when acting with government authority must exercise that authority constitutionally."[105] The court also refuted the school district's assertion that the school established "an open forum in which student speech is allowed on a nondiscriminatory basis."[106] The forum is not open because

> [n]o matter what message a minority of students may wish to convey, the graduation forum is closed to them. A forum that allows only selected speakers to convey an established message and forecloses a significant portion of its members from any speech at all is not open in the required sense.[107]

Notwithstanding the school district's apparent abdication of responsibility for the commencement exercise, the court held that a prayer offered at commencement would offend the Establishment Clause. Following the Supreme Court's decision in *Lee*,[108] the Ninth Circuit ruled the ceremony was coercive and found the district failed the *Lemon* test. The court determined

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[103] The disclaimer stated:

> The Board of Trustees of Joint School District No. 241 neither promotes nor endorses any statements made by any person involved in the graduation ceremony. The District endorses each person's free exercise of speech and religion and any comments or statements made during the graduation ceremony should not be considered the opinions or beliefs of the District, the Board of Trustees or the Superintendent.

Id.

[104] *Id.* at *8 (quoting Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097, 1100 (E.D. Va. 1993)).

[105] *Id.* (citing Evans v. Newton, 382 U.S. 296, 299 (1966)).

[106] *Id.* at *10.

[107] *Id. But see generally* Gregory M. McAndrew, Note, *Invocations at Graduation*, 101 YALE L.J. 663 (1991) (arguing for an Equal Access approach to public school graduation prayer).

[108] 112 S. Ct. 2649 (1992) (*see supra* part I.C.1.).

that the district materially underwrote, and had ultimate control over, the event.[109] The district materially supported the event in that it provided the building and other expenses, such as the commencement programs.[110] The district controlled the event in that the students' responsibility for it existed only because the district granted responsibility to them.[111] The court concluded that "[o]nce the requisite state involvement is shown, the case is indistinguishable from *Lee*."[112]

The *Harris* court also found the prayer violative of the *Lemon* test. The prayer failed the purpose prong[113] because its solemnization aspect "is insufficient in this case to secularize what is objectively and inherently religious."[114] Under the second prong, "the primary effect of such prayer *appears* to advance religion."[115] The court did not articulate its assumptions about the capacities of students to perceive endorsement, but it discussed the prayer's impact on them:

> The student in the religious minority is *well aware* that the school has delegated authority over the prayers to the majority of her classmates while retaining ultimate control over the school-sponsored meeting. The student is *also aware* that the effect of the delegation is that her religious views are subordinated to the majority's. While the district asserts that it 'neither promotes nor endorses' the stated views, this . . . flies in the face of what the student *knows* is occurring.[116]

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[109] *Harris*, 1994 WL 65111, at *7.

[110] *Id.*

[111] *Id.*

[112] *Id.* at *11.

[113] "A government practice . . . fails the purpose prong of *Lemon* if its purpose is to *endorse* a religious custom or viewpoint." *Id.* (quoting Kreisner v. City of San Diego, 1 F.3d 775, 781 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994)) (emphasis added); *see supra* text accompanying notes 17-19 for a discussion of this prong.

[114] Harris, 1994 WL 651111, at *11.

[115] Id. (emphasis added).

[116] *Id.* at *9 (emphasis added).

In *Harris*, the court's assumptions about the students' perceptions are correct,[117] but the split in the circuits suggests that courts might benefit by considering findings from the field of psychology that speak to the graduation prayer issue.

4. *Summary of Current Graduation Prayer Law*

According to the Fifth Circuit, whether the school or the students organize and deliver the graduation prayer determines its constitutionality. The Ninth Circuit explicitly disagreed with that assessment and held such prayers unconstitutional in either circumstance. To date, the Supreme Court has neither confirmed nor denied these interpretations.

The courts focused on the content of the message and its coerciveness and failed to consider empirically the impact of the message on its recipients. Whether graduating seniors or others involved in the commencement ceremony perceive state establishment does not depend exclusively on the extent to which the school orchestrates the prayer; state establishment also depends on the impact of that orchestration on those involved. The following section summarizes one area of developmental psychology that provides a key to understanding the basis for, and limits of, the perceptions of those faced with public school graduation prayer.

II. THE PSYCHOLOGICAL CONTEXT

This section introduces an area of psychology that is readily applicable to the public school graduation prayer context. It sets forth the fundamental tenets of the social perspective-taking branch of developmental psychology, an empirically validated theory that elucidates the stages through which individuals develop their ability to interpret their environment. This section proceeds with examples of these stages and analyzes findings that indicate that the great majority of individuals who witness a public school graduation prayer would perceive state endorsement of the prayer. It closes with a discussion of "develocracy," which is concerned with the assignment of constitutional rights according to an individual's developmental status. Due to the religious aspects of the commencement prayer and the psychological development of those who would

[117] *See infra* part II.C.2.

perceive it, public schools violate the Constitution if they permit prayers at their graduation ceremonies.

A. AN INTRODUCTION TO SOCIAL PERSPECTIVE-TAKING

Social perspective-taking is an empirically based theory in developmental psychology that charts the underlying structure of individuals' social conceptions of human nature and examines how individuals coordinate those conceptions.[118] Lawrence Kohlberg outlined the essentials of this area of psychology and described how the approach could be applied to social knowledge and to understanding the social world.[119] Although Kohlberg focused on moral development rather than on social perspective-taking,[120] the theoretical underpinning of social perspective-taking is readily adapted from Professors Colby's and Kohlberg's discussion of moral development.[121]

According to social perspective-taking theory, how an actor thinks about a social question is based on that actor's interpre-

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[118] This approach to human cognition is an outgrowth of the work of James Mark Baldwin, George Herbert Mead, and Jean Piaget:

> The hallmark of such research is an interest in describing an invariant sequence of cognitively based stages, or qualitatively distinct ways of organizing and understanding a certain domain of experience, through which all children pass. In contrast to other approaches, the emphasis is on the structure rather than on the content of thought, on universal patterns of thinking rather than on emotions or behavior.

ROBERT L. SELMAN, THE GROWTH OF INTERPERSONAL UNDERSTANDING 23 (Developmental Psychology Series, Harry Beilin, series ed., 1980). Professor Selman is associated with Harvard University's Graduate School of Education and with Boston's Judge Baker Guidance Center.

[119] *Id.* at 24.

[120] Professor Selman clarifies the distinction between his and Professor Kohlberg's approaches:

> If moral judgment stages refer to the development of progressively more adequate theories about how individuals *should* act, think, and feel with regard to one another, each level of social perspective taking might be seen as referring to the basis for a progressively more adequate theory about why and how individuals *do* think and act in relation to each other. In this sense, the constructs of moral judgment and perspective taking could be seen as overlapping.

Id. at 35 n.5 (citations omitted).

[121] "Kohlberg's model is important in social cognition and generally theoretically compatible with our own [social perspective-taking] work." *Id.* at 35.

tation of the given circumstances.[122] Social beliefs and opinions, as distinguished from the content of a particular social judgment, are learned and used via an organized or patterned structure observable in humans.[123] Individuals create meaning in the world based on their level of development; each new stage builds on the previous stage in an observable and predictable sequence.[124] Four criteria identify the cognitive stages through which each human passes:

1. Each structure (mode of thought) differs qualitatively, but all are vehicles for the same functions, e.g., intelligence.
2. Cultural factors may limit development, but what development occurs proceeds in an invariant sequence.
3. Responses to tasks manifest an underlying organization that forms a structural whole and a consistent mode of thinking.
4. Each developmental stage integrates the earlier stages.[125]

This theory of social development proposes that individuals learn to integrate increasingly complex perceptions in distinct, discernable stages throughout their cognitive lives.[126]

This research on psychological development provided the springboard for the work of Michael L. Commons, who theorizes that social cognitive development continues into adulthood.[127]

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[122] 2 ANNE COLBY & LAWRENCE KOHLBERG, THE MEASUREMENT OF MORAL JUDGMENT 1-2 (1987).

[123] *Id.* at 2.

[124] *Id.* at 5.

[125] *See* SELMAN, *supra* note 118, at 76-79; *see also* COLBY & KOHLBERG, *supra* note 122, at 6-7.

[126] One developmental psychologist explained that:

> [T]he young child comes to social experience with a set of immature but continually developing cognitive structures, which provide the means for the reinterpretation (assimilation) of social experience at a level that makes sense for the child. At the same time, relevant social experiences that do not quite make sense to the child at a particular level provide the elements for the child to change his or her own organizational structure (to accommodate) to one that is more advanced cognitively. The child is enabled thereby to interpret greater complexities of social organization.

SELMAN, *supra* note 118, at 79.

[127] "Piaget claimed that the attainment of 'formal operations' in adolescence marked the end point of development for cognitive structure. Current research, however, does not support this claim; forms of thought have been

Because Commons and other developmental psychologists[128] have studied the application of social perspective-taking to the religion-in-public-schools context, this note considers the validity of these developmental psychologies, and then applies this research specifically to graduation prayer.

B. THE VALIDITY OF SOCIAL PERSPECTIVE-TAKING

The psychology research used in this Note conforms to criteria that validate social scientific empirical studies useful to jurists: 1) critical review of the scientific community; 2) employment of valid research methods; 3) generalizability to the case at issue; and 4) support by a body of other research.[129]

First, each of the studies cited was published "in refereed journals, or in books that have professional editorial boards

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found in adulthood that are qualitatively different from those found in adolescence." Michael L. Commons et al., *A Multidomain Study of Adult Development, in* ADULT DEVELOPMENT, VOL. I: COMPARISONS AND APPLICATIONS OF DEVELOPMENTAL MODELS 33, 33 (Michael L. Commons et al. eds., 1989); *see also* John M. Rybash & Paul A. Roodin, *Making Decisions About Health-Care Problems: A Comparison of Formal and Postformal Modes of Competence, in id.* at 217, 220. *But see* DAVID MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT: A PSYCHOLEGAL ANALYSIS 90 (1989) [hereinafter CHILDREN] ("Qualitative differences between children and adults in the sophistication of their reasoning, understanding, and decision making disappear no later than age 11 or 12.").

[128] Commons, a lecturer and research associate in the Department of Psychiatry at Harvard Medical School and Massachusetts Mental Health Center, and director of the Dare Institute, coauthored an article with Joseph A. Rodriguez of Harvard University: Michael L. Commons & Joseph A. Rodriguez, *"Equal Access" Without "Establishing" Religion: The Necessity for Assessing Social Perspective-Taking Skills and Institutional Atmosphere*, 10 DEV. REV. 323 (1990). That article was in response to an article by David Moshman, a professor of educational psychology at the University of Nebraska-Lincoln. David Moshman, *Equal Access for Religion in Public Schools? An Empirical Approach to a Legal Dilemma*, 10 DEV. REV. 184 (1990) [hereinafter *Equal Access*]. Moshman replied to Commons & Rodriguez in David Moshman, *Equal Access for All Students: A Reply to Commons and Rodriguez*, 10 DEV. REV. 341 (1992) [hereinafter *Reply*].

[129] John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 499 (1986). *see also* Scott V. Carroll, Lee v. Weisman*: Amateur Psychology or an Accurate Representation of Adolescent Development, How Should Courts Evaluate Psychological Evidence*, 10 J. CONTEMP. HEALTH L. & POL'Y 513 (1994) (applying Monahan's and Walker's work to the studies cited by the majority in *Lee*).

. . . . Such a review process goes far in screening out empirical assertions unsupported by the data."[130] This "appellate review" indicates that "several disinterested social scientists, chosen largely for their own scientific accomplishments, have reviewed the research and have found it worthy of publication."[131] Thus, the research on which this Note relies survived the critical review of the scientific community.

Second, "[r]andom assignment [should be utilized to] assure[] to the maximum extent possible that the findings obtained are the result of the factor that the researcher wishes to study . . . ."[132] The studies utilized random samples.[133] Furthermore, the studies cited rely on highly correlated results on a large number of subjects.[134] Accordingly, the research adduced herein is valid.

Third, the studies are generalizable "across persons," "across settings," and "over time."[135] Developmental research has been conducted on adolescent perceptions in different environments across the world and for decades.[136] Although application of this research to graduation prayer has not been attempted, this approach has been employed in the Establishment Clause endorsement context.[137]

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[130] Monahan & Walker, *supra* note 129, at 500 (citing *Summary Report of Journal Operations: 1984*, 40 AM. PSYCHOL. 707 (1985)).

[131] *Id.*

[132] *Id.* at 505.

[133] *See, e.g.*, Patricia K. Arlin, *Cognitive Development in Adulthood: A Fifth Stage?* 11 DEV. PSYCHOL. 602, 604 (1975).

[134] *See, e.g.*, James R. Rest, *Moral Research Methodology, in* LAWRENCE KOHLBERG: CONSENSUS & CONTROVERSY 455, 466 (Sohan Modgil & Celia Modgil eds., 1986) (describing scoring procedure results in a longitudinal study of more than twenty years as "spectacular"); ANNE COLBY & LAWRENCE KOHLBERG, THE MEASUREMENT OF MORAL JUDGMENT, VOL. I: THEORETICAL FOUNDATIONS & RESEARCH VALIDATION (1987).

[135] Rest, *supra* note 134, at 506-07.

[136] *See, e.g.*, Carolyn Pope Edwards, *Cross-Cultural Research on Kohlberg's Stages: The Basis for Consensus, in* LAWRENCE KOHLBERG, *supra* note 134, at 425-26 (listing worldwide research, including longitudinal studies from the Bahamas, French Canada, Israel, Great Britain and Turkey); John Snarey et al., *The Sociomoral Development of Kibbutz Adolescents: A Longitudinal Cross-Cultural Study*, 21 DEV. PSYCHOL. 3 (1984) (citing study of Israeli kibbutz adolescents).

[137] *See, e.g.*, *Reply*, *supra* note 128; Commons & Rodriguez, *supra* note 128; *Equal Access*, note 128; Rossow & Rossow, *supra* note 67.

Fourth, the studies are supported by a body of other research.[138] Although research specifically addressing graduation school prayer would be beneficial, extrapolating the general social perspective-taking, advanced stages approach to graduation prayer is consistent with the research in this area.

In sum, although the application of developmental studies to the public school graduation prayer context is new, the validity of the research underlying the approach espoused in this section is well supported. The social perspective-taking studies used in this Note greatly illuminate the public school prayer problem, notwithstanding the need for research specifically devoted to this area.[139] As Moshman noted, "[j]udges do not have the luxury of calling for further psychological research. The question, then, is whether available evidence can provide any guidance. The alternative is for judges to rely on their intuitions or stereotypes regarding adolescents."[140] Accordingly, the following section applies the most relevant psychological research, social perspective-taking, to the graduation prayer context.

C. THE APPLICATION OF SOCIAL PERSPECTIVE-TAKING

As discussed above, social perspective-taking is based on sequential frameworks through which individuals integrate relationships and from which they draw conclusions about what they perceive.[141] "Individuals must detect how their behavior is caused and what effect it has, not only on themselves but on others."[142] As persons pass through the various stages their perspectives become less egocentric, and, if they progress suffi-

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[138] *See, e.g., id.*

[139] Rossow & Rossow, *supra* note 9, at 217 ("Turning to the psychological literature to help settle the opposing positions on student maturity is a step in the right direction. However, a review of the psychological literature is not sufficient. Social scientific research directly aimed at answering the particular question is needed."); *see also* Carroll, *supra* note 129, at 539 ("Undoubtedly, further research in adolescent social and cognitive psychology is essential before a constitutional rule of law can be predicated on the basis of mere empirical findings.")

[140] *Reply*, *supra* note 128, at 344.

[141] Commons & Rodriguez, *supra* note 128, at 331.

[142] *Id.* at 327.

ciently, they develop the ability to understand others' viewpoints and the frameworks that shape those views.[143]

This part of the Note tracks with specificity the stages through which an individual may progress. It focuses on the stages pivotal to understanding what attendees would perceive if faced with a public school graduation prayer and provides examples of court opinions that illustrate these stages. The Note then discusses the danger of "develocracy," which is the according of rights to individuals based on their developmental status. It concludes that schools violate the First Amendment if they permit public school commencement prayers.

[143] *Id.* at 331.

1. *The Social Perspective-Taking Scheme*[144]

To illustrate their findings concerning social perspective-taking, Commons and Rodriguez postulate the actions a principal might take in deciding how to assign rooms to competing student groups.[145] Although the following examples are not specifically related to religion, when read in light of the social perspective-taking scheme they shed light on the type of thinking that occurs in individuals of each stage. In each successive stage the perceiver casts a wider and finer net into the perceptual sea, thereby taking in more, and more nuanced, informa-

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[144] Commons and Rodriguez describe the stages of social perspective-taking as:

> *Preoperational 2b* (1/2): Differentiate between their own physical and psychological actions. Another's subjective state is thought to be inferable by simple physical observation.
> *Primary 3a* (2): Second-person perspective begins. See that own behavior leads to personal outcomes, or that other's behavior leads to other's outcomes. Individuals assume that other people see the world the same way as they do . . . .
> *Concrete 3b* (2/3): Perceives relationship between self and other by seeing causes for own action and how own actions affect other's behavior . . . .
> *Abstract 4a* (3): Asserts a third-person or neutral other by generalizing cause-and-effect chains of two individuals' behavior. When a neutral observer cannot determine which side in a social conflict is correct, the outcome preferred by the largest number of persons is adopted as the most neutral . . . .
> *Formal 4b* (3/4): Isolates specific causal relations in complex sets of interactions in a linear fashion. Detects the actual causal chain of command in the hierarchy as well . . . .
> *Systematic 5a* (4): See behavioral framework of other as integrated system of traits, beliefs, experiences; coordinates linear causality with hierarchical social organization; places different perspectives in hierarchy of preference . . . .
> *Metasystematic 5b* (5): Compares, contrasts, transforms, and synthesizes individuals' perspectives and understands that everyone's behavior shapes their own perspective and vice-versa . . . .
> *Paradigmatic 6a* (6): Recognizes that independently constructed perspectives are either incomplete or inconsistent, and understands the necessity of co-construction of new perspectives through dialogue and collaboration.
> Note: General stage model numbers are first; Kohlberg's and Selman's numbers are in parentheses.

Id. at 330.

[145] *Id.* at 330-39.

tion. The discussion below illustrates how, as her developmental level rose, a hypothetical principal would manifest an increased understanding of the circumstances presented, her role with respect to those circumstances, and the response she might make appropriate to those circumstances.

For example, a principal at stage 3a, with only primary perspective-taking skills, would select the group most helpful to the principal.[146] A stage 3b, "concrete" principal would try to encourage good behavior by selecting the group most helpful to other students.[147] An "abstract," stage 4a principal would attempt to decide on apparently neutral grounds and would pick the most popular club or the club with the most members.[148] In order to dissociate herself personally from the selection process, a "formal," stage 4b principal would hold an election.[149] A "systematic" (postformal) principal operating at stage 5a would attempt to remove the decision-making from other actors as well as from herself by selecting a group on a precedential (seniority) basis.[150] A principal at "metasystematic" stage 5b would use chance to determine allocation of the room in order to "recognize[] the validity of the perspective of the least preferred person."[151] A stage 6a principal might meet with representatives of the groups to facilitate a consensus among them as to how to assign the rooms.[152] Thus, as the principal progresses through each stage, she evidences an increasingly inclusive and just approach to the problem confronting her.

2. *Findings Regarding Social Perspective-Taking Skills*

According to Commons and Rodriguez, an individual must function at metasystematic stage 5b or above to discern whether or not a school establishes religion by permitting commencement prayer.[153] Their findings necessitate this, because those

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[146] *Id.* at 330.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 331.

[150] *Id.* at 333.

[151] *Id.* at 330.

[152] *Id.*

[153] *Cf. id.* at 329 (discussing the stage necessary to perceive an establish-

involved must be capable of "taking other individuals' perspectives on the conflict,"[154] rather than considering the prayer offeror only as "part of a system of actions and events."[155] In other words, the perceiver must be able to distinguish the person from the program. Justice O'Connor's endorsement approach exemplifies the 5b perspective and evidences regard for the individual notwithstanding the prevailing cultural ethos. The endorsement test is sensitive to the "perspective of the least preferred person"[156] in that it precludes "making adherence to a religion relevant in any way to a person's standing in the political community."[157] Because individuals at stage 5b evidence "a highly sophisticated moral orientation that is rare, even in adults,"[158] the great majority of those present at a public school graduation that included prayer would perceive that the school endorsed the prayer.

With sufficient specific training, an individual operating at systematic stage 5a also would be able to detect the source of an establishment of religion.[159] However, not even fifty percent of the *adult* population ever reaches this stage.[160] Justice Scalia's dissent in *Lee*, in which he argues that "cultural heritage" and "historical practices" should be dispositive,[161] exem-

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ment of religion in an equal access case).

[154] *Id.*

[155] *Id.* at 334 (describing someone at systematic stage 5a).

[156] *Id.* at 330.

[157] Allegheny County v. ACLU, 492 U.S. 573, 594 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

[158] CHILDREN, *supra* note 127, at 82; *see also* JOHN M. RYBASH ET AL., ADULT COGNITION AND AGING: DEVELOPMENTAL CHANGES IN PROCESSING, KNOWING AND THINKING 49 (Pergamon Gen'l Psychol. Series No. 139, 1986) ("Richard and Commons (1984) found that few undergraduate students displayed metasystematic thinking, whereas most graduate students did.").

[159] Commons & Rodriguez, *supra* note 128, at 333 (citing Arlin, *supra* note 133, at 606 (proposing "problem-finding" stage that evidences "creative thought, the envisioning of new questions, and the discovery of new heuristics in adult thought)). *Cf. Equal Access*, *supra* note 128, at 191 (contending that something as simple as a sign explaining that the prayer is student- and not school-orchestrated might be sufficient to dispel mature students' confusion about the voluntariness of the activity.

[160] *See* Arlin, *supra* note 133, at 605 ("[I]t has been widely demonstrated that only 50% of the adult population even attains the Piagetian stage of formal operational thinking, the problem-solving stage.").

[161] Lee v. Weisman, 112 S. Ct. 2649, 2678 (1992) (Scalia, J., dissenting).

plifies stage 5a reasoning. One who operates at this stage "is disposed to turn over the matter to a power other than the actors involved . . . to the society, so to speak, deciding the matter on basis of precedent that preserves the social order. . . . '[F]irst come, first served.'"[162] This method has the effect of excluding each interest that was not first in line, and therefore it is not neutral. Thus, even with specific instruction in discerning religious establishment, an individual at stage 5a would perceive the school endorsed the prayer if the prayer were allowed in accordance with the *Lee* minority's "first come, first [and only] served" Establishment Clause test.

Formal stage 4b is the highest stage at which most high school students operate.[163] This is "the modal stage of the adult population and the stage at which informed decision-making seems to begin. About [one-third] of the adult population reasons at . . . Stage 4b."[164] Moshman found that beginning at approximately ages ten to twelve individuals often display mature reasoning and that differences from adult reasoning could usually be easily eliminated.[165] Although "some students [at Stage 4b] are prepared to detect whether

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[162] Commons & Rodriguez, *supra* note 128, at 333.

[163] *Id.* at 331.

[164] *Id.* at 333. *Cf.* Lawrence Kohlberg & Carol Gilligan, *The Adolescent as a Philospher: The Discovery of the Self in a Postconventional World*, 100 DAEDALUS 1051, 1065 (1971) (reporting that only 45% of the adolescents tested reached formal operations in moral (versus social perspective-taking) development by age 15).

[165] *Equal Access*, *supra* note 128, at 188. However, Moshman tested propositional (logical) reasoning abilities, not social perspective-taking, therefore his research is less suited to the task of gauging perspectives on the complex, socially-embedded dilemma posed by graduation prayer. Commons & Rodriguez, *supra* note 128, at 329. Moshman does not dispute that assessment, *Reply*, *supra* note 128, at 344, and he agrees that development in adults often reaches levels beyond those typical of adolescents. *Id.* at 345.

Selman's research indicates early maturity, consistent with Moshman's findings, but Selman's work predates most of the studies on adult substages. Approximate ages of typical perspective-taking stage-dwellers are as follows:

Level	Concepts of Persons and Relations	Ages
[1]	Undifferentiated and Egocentric	3 to 6
[2]	Differentiated and Subjective	5 to 9
[3]	Self-Reflective/Second-person and Reciprocal	7 to 12
[4]	Third-person and Mutual Perspective Taking	10 to 15
[5]	In-depth and Societal-Symbolic	12 to Adult

SELMAN, *supra* note 118, at 37-40.

religion has been established . . . if so directed,"[166] they would detect establishment if the method for selecting the solemnization were non-neutral.[167] The court in *Jones II*[168] sanctioned school administrators who, consistently with stage 4b reasoning, apparently attempted to "disassociate themselves personally from deciding a social conflict . . . [but] refer[red] the matter over to an authority other than the self to make the decision. . . . [by] 'holding an election.'"[169] Because basing a decision to have prayer on an election would have the effect of excluding the participants who are not in the majority, even trained students would perceive school endorsement under the *Lee* minority's or *Jones II* majority's approach. Neither approach is neutral.

Thus, students below the high school age and operating at stages below 4b would not be able to understand, even with explanation, that even a random method[170] for selecting a prayer at a school ceremony was not a school endorsement of the prayer offered.[171] No one disputes that "elementary school students would not comprehend the abstract distinction between voluntary and school-endorsed activities and might fail to fully grasp it even if it were carefully explained."[172] Thus, unless officials refuse to allow children or less developmentally mature teenagers, especially unescorted ones, to witness the graduation prayer,[173] the inclusion of prayer at the commencement ceremony violates the Establishment Clause.[174]

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[166] *Common & Rodriguez*, *supra* note 128, at 333.

[167] *Cf. id.* at 336 ("If enough students perform at both the abstract and formal operational stages . . . having religious clubs in an atmosphere with free speech, press, and assembly seems reasonable.") (emphasis added).

[168] 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

[169] Commons & Rodriguez, *supra* note 128, at 331.

[170] *See infra*, part III.B.2.

[171] *Cf.* Rossow & Rossow, *supra* note 67, at 480 ("Overall, these findings tend to support the position of the federal courts that high school students, unlike their college counterparts, are not able to perceive religious neutrality.").

[172] *Equal Access*, *supra* note 128, at 191.

[173] *See infra*, part III.B.4 (discussing problems with allowing such individuals to view the graduation prayer).

[174] This lowest common denominator concern - not allowing prayer because some people necessarily would perceive state endorsement - seems analogous to the concern in Free Speech jurisprudence that public discourse ought not be

3. *Develocracy*

One commentator characterized discrimination on the basis of psychological development as "develocracy."[175] Although distinguishing between children's and adults' constitutional rights is virtually (and empirically justifiably) a fact of life in the United States,[176] basing rights on developmental status raises the specter of discriminating between adults.[177] In response to this concern, Moshman calls for pegging full constitutional rights at the level of the "minimally normal adult."[178]

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relegated to the level of children. *See, e.g.*, Butler v. Michigan, 352 U.S. 380 (1957) (disallowing the banning of sales to the general public of materials with sexual content unsuitable for children). However, whereas the Speech and Religion Clauses both mandate free expression or exercise, the Speech Clause does not have an analogue to the anti-establishment requirement of the Religion Clause. Accordingly, because the State has an affirmative duty under the Establishment Clause to forbid religious discourse, even if only children would understand it to be establishing religion, constitutionality must be based on what any person reasonably likely to witness the religious speech would understand with respect to establishment. The problem with children and "too much" free speech is not per se a constitutional issue - it is arguably a moral problem.

[175] Gerhard Sonnert, *Commentary: Develocracy vs. Democracy*, 12 DEV. REV. 431, 433 (1992).

> Both Moshman and Commons and Rodriguez recommended an empirical solution to the constitutional dilemma. If and only if the students' reasoning and/or perspective-taking abilities have developed to a stage where the students understand the difference between the existence of voluntary student groups and an official endorsement of religion should religious groups be permissible in public schools. Thus, developmental stage becomes the criterion for a constitutional right.

Id. at 431.

[176] *See, e.g.*, David Moshman, *Children's Intellectual Rights: A First Amendment Analysis*, *in* CHILDREN'S INTELLECTUAL RIGHTS 25, 37 (NEW DIRECTIONS FOR CHILD DEVELOPMENT NO. 33, William Damon ed., 1986); CHILDREN, *supra* note 127, at 90; Martin R. Gardner, *The Right of Juvenile Offenders to be Punished: Some Implications of Treating Kids as Persons*, 68 NEB. L. REV. 182, 192-93 (1989) (arguing for a constitutional right for juveniles to be punished and noting that "various studies indicate that most adolescents, unlike most pre-adolescent children, possess the same moral reasoning skills as adults.").

[177] *See, e.g.*, *Equal Access*, *supra* note 128, at 189.

[178] *See id.* Moshman notes that "[i]n terms of the model Commons and Rodriguez present, for example, most adolescents are capable of formal operational reasoning and most adults rarely reason beyond that level."

However, if an adult functioning below the minimally normal level witnessed a randomly selected graduation prayer and perceived, even with instruction or disclaimer to the contrary, school endorsement of religion, then it still would be constitutionally impermissible for that adult to attend the ceremony. This would be true even though other adults who were capable of discerning neutrality would be allowed to attend. Thus, Moshman is also a develocrat, a position that few people, if any, would find acceptable.[179] The solution to develocracy is not to discriminate among attendees but to avoid sending messages that violate the Constitution.

4. *Conclusions from Psychological Research*

Individuals develop the framework necessary to perceive and to integrate complex social phenomena in distinct, progressive and observable stages.[180] Based on reliable data,[181] social perspective-taking theorists maintain that only a small minority of developmentally advanced individuals can discern without instruction the source of an establishment of religion.[182] With training, minimally mature individuals could perceive school endorsement of religion unless the graduation prayer were offered under neutral circumstances.[183] Furthermore, even with establishment-spotting instruction, adults and adolescents functioning at stages below that of a minimally normal adult, and all children, would perceive a prayer offered at a public school's graduation exercise to be an endorsement of

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Reply, *supra* note 128, at 345. Because most adolescents have minimal normal adult reasoning competence, differentiating between them and adults is inappropriate from a developmental perspective. *Id.* Commons and Rodriguez are in greater danger of endorsing develocracy, because they postulate adult stages of development and do not contend that constitutionality should be based on a "minimally normal adult." Sonnert, *supra* note 175, at 433-35.

[179] *See, e.g.*, Lee v. Weisman, 112 S. Ct. 2649, 2682 (1992) (Scalia, J., dissenting) ("Many graduating seniors, of course, are old enough to vote. Why then, does the Court treat them as though they were first-graders? Will we soon have a jurisprudence that distinguishes between mature and immature adults?").

[180] *See supra* notes 122-143 and accompanying text.

[181] *See supra* part II.B.

[182] *See supra* notes 153-158 and accompanying text.

[183] *See supra* notes 166-169 and accompanying text.

prayer by that school.[184] Because the great majority of individuals would perceive an establishment of religion within the context even of an "ideal"[185] public school commencement prayer, a school that allowed such a prayer would do so in violation of the Establishment Clause.

III. A DEVELOPMENTAL ANALYSIS OF GRADUATION PRAYER

This section discusses the unconstitutionality of prayers offered at public school commencement ceremonies and explains the actions schools can take to make the prayers less constitutionally objectionable. However, although some individuals perceive the difference between student and school endorsement of religion at these ceremonies, most do not. Therefore, only a misguided court would permit such prayers.[186]

A. GRADUATION PRAYERS VIOLATE THE ESTABLISHMENT CLAUSE

The offering of a student-directed prayer at a public school commencement ceremony would appear to most participants to endorse religion and thus violates the First Amendment.[187] Commons and Rodriguez contend that the developmental stage necessary to distinguish voluntary from State-established prayer is higher than the stage reached by the minimally normal adult.[188] Because only the rare graduation attendee would discern the distinction between the sources of the prayer,[189] courts should rule public high school commencement prayers unconstitutional.

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[184] *See supra* notes 170-174 and accompanying text.

[185] *See infra* part III.B.

[186] *See, e.g.*, Moshman, *supra* note 176, at 30 ("One might need to limit [the child's First Amendment rights] in a public school, for example, if . . . children engaged in activities that created the impression that the school had endorsed a particular religion . . . ."); CHILDREN, *supra* note 127, at 181 ("Many attempts to get more religion into public schools are, to be sure, intended to get the school to endorse, encourage, or facilitate religion. Such efforts should be scrupulously resisted. It is important to avoid even the *perception* of government support for religion.").

[187] *See supra* notes 153-164 and accompanying text.

[188] *Id.*

[189] *Supra* notes 153-158 and accompanying text.

The Supreme Court followed that course in *Lee v. Weisman*;[190] indeed, the direct State involvement with the prayer in that case should have made it an easy decision.[191] In *Jones II* the school was allowed to turn over to students the responsibility for choosing the prayer.[192] However, as the *Harris* court found, graduations are a school function.[193] Therefore, most participants would nonetheless perceive the prayer to be an endorsement of religion by the school. Because of this perception, the public school graduation prayer violates the Establishment Clause.

B. THE CIRCUMSTANCES UNDER WHICH GRADUATION PRAYERS, IF PERMITTED, WOULD BE LEAST OBJECTIONABLE

The precautions discussed below show to what unlikely lengths those involved would have to go to make public school graduation prayers less objectionable. Nevertheless, a graduation prayer that was student-directed, randomly-selected, school-disclaimed, and offered at a ceremony children could not attend would not render the prayer constitutionally permissible.[194]

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[190] *See supra* part I.C.1.

[191] *See supra* part I.B.1.

[192] *See supra* part I.B.2.

[193] *See supra* part I.B.3. *See also* Paulsen, *supra* note 31, at 838 n.155:

> But where government delegates governmental decision-making power to otherwise private individuals (as it did in *Jones*), or takes action designed to enlist private actors to carry out the government's ends (which would be unconstitutional if carried out directly by government), such subterfuges should not deprive the action of the quality of state action.

[194] *But see*, Schweitzer, *supra* note 11, at 183-85 (discussing attempts to offer such "prayers" and for a discussion of a "constitutional model" for graduation prayer); Dina F. El-Sayed, Comment, *What is the Court Trying to Establish? An Analysis of* Lee v. Weisman, 21 HASTINGS CONST. L.Q. 441, 473-76. This section does not discuss the oxymoronic "neutral" or "non-sectarian" prayer. *See* Lee v. Weisman, 112 S. Ct. 2649, 2657 (1992) ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."); *see also id.* at 2667 (Souter, J., concurring) (noting 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.'") (citing Everson v. Board of Educ., 330 U.S. 1, 15 (1947)). *But cf.* Marsh v. Chambers, 463 U.S. 783, 794-95 (declining to parse prayers that do not "proselytize or advance any one or [] disparage any other faith or belief.")

1. *Graduation Prayers Must Be Student-Directed*

Courts should require the prayers to be as removed from school endorsement as possible. For those who perceive the difference between student-directed, as opposed to school-established religious activity, courts should ensure that the prayer is in fact a voluntary student establishment. The arrangement made in *Jones II* by Clear Creek Independent School District satisfies this requirement to the extent that students decide whether there will be a prayer, who will offer it, and what it will contain.[195] One problem with this method, as observed in *Harris*, is that the school district retains ultimate control.[196] Another problem, also criticized by *Harris*[197] and discussed below, is that majority vote should not decide whether, who, or what the solemnization will be.

One difficulty with delegating the prayer selection process to students is that supervision might be required to ensure a fair selection process.[198] Such monitoring implicates the entanglement prong of the *Lemon* test[199] and therefore potential violation of the Establishment Clause.[200]

2. *The Prayers, if Offered, Must be Randomly Selected*

As suggested by the illustration of the principal at metasystematic level 5b, the nature of the prayer and who offers it should be decided by random selection.[201] Each student

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[195] *See supra* part I.B.2.

[196] *See supra* notes 109-111 and accompanying text.

[197] *See supra* notes 104-105 and accompanying text.

[198] *Cf., e.g., Reply, supra* note 128, at 342 ("in a school with an oppressive, coercive, or indoctrinative atmosphere, even 'voluntary' religious groups [prayer selection] may result in religious inculcation.") (citing Commons & Rodriguez, *supra* note 128); *see also* Commons and Rodriguez, *supra* note 128, at 324-25.

[199] *See supra* text accompanying note 27.

[200] *See* Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097, 1099 (E.D. Va. 1993) (finding principal's organization of prayer vote excessive state entanglement).

[201] *See supra* text accompanying note 151; *see also* Jager v. Douglas County Sch. Dist., 862 F.2d 824, 827 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989) (ruling unconstitutional the offering of invocations prior to football games):

could offer the solemnization proposal of his choice, thereby providing each student a chance to have his views heard.[202] This means that the majority preference would usually have its way, but it also would mean that a minority voice might sometimes be heard. This would provide the majority an opportunity to practice a tolerance typically reserved for minorities.[203]

The problem with this system, besides the possibility of "joke" proposals or pressures that could be brought to bear on those submitting proposals, is that a random selection that resulted in the selection of a minority prayer could spur the organizers to decide that solemnization was unimportant that year. They might cancel the prayer altogether, try for a re-selection, or otherwise attempt to subvert the process.[204] Not-

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> Under the terms of the equal access plan, all school clubs and organizations can designate club members to give invocations, and any student, parent or school staff member can seek to deliver an invocation. The plan specifies that the student government will *randomly select* the invocation speaker, and no ministers will be involved in selecting invocation speakers or in delivering invocations. In addition, the schools will not monitor the content of the invocations.

Id. (emphasis added).A "well-defined program for ensuring on a rotating basis that persons representative of a wide range of beliefs and ethical systems are invited to participate" was suggested by the court in Albright v. Board of Educ. of Granite Sch. Dist., 765 F. Supp. 682, 691 (D. Utah 1991).

[202] As discussed at *supra* note 167 and accompanying text, any choice for solemnization would have to include non-religious alternatives and be conducted in a free-communication social context. Commons & Rodriguez, *supra* note 128, at 325-36.

[203] *See* Lee v. Weisman, 112 S. Ct. 2649, 2686 (1992) (Scalia, J., dissenting):

> The founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration--no, an affection--for one another than voluntarily joining in prayer together, to the God whom they all worship and seek.

Presumably, a shared solemnization about what stirs any member, majority or minority, will promote these positive feelings. *But see supra* note 72.

[204] For an explanation, see Rybash & Roodin, *supra* note 127, at 222:

> [w]hile both formal and postformal thinkers may be trying to arrive at the best [prayer] alternative, they nevertheless view their task in different ways. Formal thinkers know that only a single viewpoint . . . is "true," while the other viewpoints . . . must be "false." Postformal thinkers understand that despite the fact that only one [prayer] may [be spoken], all of the viewpoints possess a certain degree of legitimacy and utility.

withstanding these precautions, a lottery selection would be the least constitutionally objectionable prayer selection system.

3. *Such Prayers, if Allowed, Must be Disclaimed*

Justice Scalia suggested that an announcement be made or a program note be included concerning the prayer.[205] However, the *Harris* court deemed the disclaimer in that case to be bordering on the disingenuous.[206]

Nevertheless, on the theory that every little bit helps, a written or verbal explanation of the selection process would be appropriate, along with a disavowal by the school of any endorsement of the religion or type of prayer selected.[207] One difficulty with a disclaimer is that the person who needs it the most might be the person least likely to understand it; for example, a child.

4. *Children May Not Attend Commencements Having Prayers*

The Supreme Court has in various Establishment Clause cases noted the different levels of impressionability characteristic of collegians, secondary school students, and elementary school students.[208] If the Court ruled it constitutional for adults and adolescents to be confronted with an apparent

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[205] Lee v. Weisman, 112 S. Ct. 2649, 2685 (Scalia, J., dissenting) (*see supra* text accompanying note 86).

[206] *See* Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 1994 WL 651111, *9 (9th Cir. 1994); *see also* Stone v. Graham, 449 U.S. 39, 41 (1981) (finding disclaimer on the Ten Commandments posted on classroom walls did not to change the religious nature of that document); Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, (1993) :

> A government disclaimer cannot so readily neutralize the establishment danger in civic prayer. When government invites civic prayer, it creates a spiritual community within a civic context. Even if government tries to distance itself from the actual content of a prayer, it still invites spiritual participation in a civic setting.

Id. at 93. *But see* Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) (noting disclaimer with approval in allowing college Christian group to use university facilities); SEN. REP. NO. 357, *supra* note 67, at 2382 (finding that "misperceptions can be met by clear disclaimers of school sponsorship.").

[207] "[A]dolescents . . . can usually grasp and apply a brief explanation." Moshman, *Equal Access*, *supra* note 128, at 191.

[208] *See supra* part I.

establishment of religion, the Court should still distinguish such persons from children, who clearly lack the capacity to discern school from student endorsement. The Court should not allow individuals lacking the developmental apparatus of even minimally normal adults, especially children younger than twelve years of age,[209] to attend a public school commencement that includes prayer.[210] One problem with this restriction is that it may exclude family and friends from the commencement. It also requires monitoring.

More palatable practically, but more egregiously violative of the Establishment Clause, would be to require that children be accompanied by an adult.[211] Although a child would not understand an accompanying adult's explanation of the prayer's possible non-endorsement nature, at least the adult would be able to help the child respond to the prayer in an appropriate fashion. The best alternative, however, is to exclude the prayer in the first place.

C. SUMMARY OF APPLICATION OF THE RESEARCH TO THE LAW

According to social perspective-taking research, most adults cannot discern that a completely student-facilitated public school commencement prayer is not a school endorsement of religion. In order to permit graduation prayer, the prayer would have to be student directed, chosen by lottery selection, and presented with disclaimers to an audience in which there were no children present. Even with such restrictions, this least constitutionally objectionable prayer still would violate the First Amendment.

CONCLUSION

The first part of this Note provided the legal background of the public school graduation prayer debate and focused on the assumptions courts made about the abilities of students and others to perceive whether and how a school establishes religion. Part II set forth theories and findings of developmental

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[209] *See* Moshman, *supra* note 176.

[210] *See* CHILDREN, *supra* note 127, at 117-18.

[211] *Cf.* Griffith v. Teran, 794 F. Supp. 1054, 1057, *ruled erroneous in* 807 F. Supp. 107 (D. Kan. 1992) (noting that "[adults' presence] may be expected to mitigate any 'coercive power' that might otherwise be present.").

psychology that defined and described individuals' progressive stages of perceiving and processing complex social phenomena, in this case, the establishment of religion. Part III contained developmentally-informed solutions to the legal dilemma posed and found that even with onerous restrictions the least objectionable offering of the prayer would violate the Constitution.

The issue of prayer in public school commencement ceremonies engenders significant emotion and prejudice and demands careful judicial attention. Rather than resolve such an important issue "on the basis of myths, stereotypes, and vague personal memories, often without distinguishing matters of empirical fact from . . . normative ideals,"[212] psychological and other social scientific research should be used to foster informed judicial decision-making. In order for the courts to resolve properly the public school graduation prayer dilemma, it is essential for them to understand its empirical dimensions and to rule accordingly. Otherwise, their decisions are just so many banners flapping in the wind.

Ted W. Harrison[†]

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[212] Moshman, *Equal Access*, *supra* note 127, at 196. (citing Gary B. Melton, *The Clashing of Symbols: Prelude to Child and Family Policy*, 42 AM. PSYCHOLOGIST, 345-354 (1987)).

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