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Can Students Do What the State Cannot Do?: The Constitutionality of Student Initiated, Sponsored, Composed and Delivered Prayers at Graduation

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CAN STUDENTS DO WHAT THE STATE CANNOT DO?: THE CONSTITUTIONALITY OF STUDENT INITIATED, SPONSORED, COMPOSED AND DELIVERED PRAYERS AT GRADUATION

INTRODUCTION

At first glance, the "religion" clauses of the United States Constitution seem contradictory.[1] The Establishment Clause of the First Amendment prohibits the enactment of laws that facilitate an establishment of religion.[2] The Free Exercise Clause of the First Amendment, in contrast, provides that Congress shall make no law "prohibiting the free exercise of religion."[3] The apparent conflict between the Establishment Clause and the Free Exercise Clause has inflamed the passions and emotions of the American people in the educational arena.[4] An area that has tested the flexi-

[1] *See* Jonathon C. Drimmer, *Hear No Evil, Speak No Evil: Duty of Public Schools to Limit Student Proposed Graduation Prayers*, 74 NEB. L. REV. 411, 416 (1995) (describing Free Exercise Clause as Establishment Clause's antithetical twin which erodes metaphorical wall); *see also* Paul L. Hicks, *The Wall Crumbles: A Look at the Establishment Clause* Rosenberger v. Rector & Visitors of the University of Virginia, 98 W. VA. L. REV. 363, 364 (1995) (acknowledging that *Rosenberger* court tore down wall of separation between church and state while recognizing conflict between Free Speech Clause and Establishment Clause).

[2] *See* U.S. CONST. amend. I (stating, in pertinent part: "Congress shall make no law respecting an establishment of religion. . ."); *see also* Drimmer, *supra* note 1, at 415 (detailing meaning of Anti-Establishment Clause); Martha M. McCarthy, *Free Speech Versus Anti-Establishment: Is There a Hierarchy of First Amendment Rights?*, 108 EDUC. L. REP. 475, 475 (1996) (discussing Establishment Clause in light of Free Exercise Clause); Michelle DiGrazia, Note, Sands v. Morongo Unified Sch. Dist.*: Graduates Will We Stand and Join in Prayer?*, 23 PAC. L.J. 1449, 1449 (1992) (stating principles of Establishment Clause); Theresa M. Serra, Note, *Invocations and Benedictions: Is the Supreme Court "Graduating" to a Marsh Analysis?*, 65 U. DET. L. REV. 769, 769 (1988) (discussing Establishment Clause principles).

[3] *See* U.S. CONST. amend. I (stating, in pertinent part: "Congress shall make no law . . . or prohibiting the free exercise thereof. . . ."; *see also* Lee v. Weisman, 505 U.S. 577, 591-92 (1992) (discussing Free Exercise Clause as protection of religion expression); Kevin E. Broyles, *Establishment of Religion and High School Graduation Ceremonies:* Lee v. Weisman, 16 HARV. J.L. & PUB. POL'Y 279, 279 (1993) (demonstrating that First Amendment contains religion clauses including Free Exercise Clause which prohibits laws that interfere with religious expression); McCarthy, *supra* note 2, at 475 (discussing Free Exercise Clause of Constitution); Serra, *supra* note 2, at 769 (defining Free Exercise Clause as means to secure religious liberty).

[4] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (striking down state aid for secular subjects taught in Catholic schools); Engel v. Vitale, 370 U.S. 421, 436 (1962) (holding that required recitation of daily prayers in schools was unconstitutional); McCollum v.

bility of this conflict is the inclusion of student sponsored prayers at graduation ceremonies.[5]

The Supreme Court's decision in *Lee v. Weisman*[6] stated that the inclusion of a nonsectarian prayer by a clergyman in an official graduation ceremony violated the Establishment Clause.[7] Initially, this was viewed as a resolution to the issue of whether prayers at graduation ceremonies should be permitted in public schools.[8] The effect of the *Lee* decision, however, was short-lived because the Court failed to address the constitutionality of student sponsored, composed and delivered prayers at graduation

Bd. of Educ., 333 U.S. 203, 231 (1948) (striking down religious instruction on public school grounds); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370, 375 (1930) (reasoning that loaning secular textbooks to students in parochial schools was constitutional); Pierce v. Society of Sister, 268 U.S. 510, 510 (1925) (ruling that parents have right to send children to religiously supported schools). *See generally* John R. Vile, *Religious Expression in High School Valedictory Addresses:* Guidy v. Calcasieu Parish Sch. Bd., 53 EDUCATION L. REP. 1051, 1052 (1989) (discussing cases involving religious expression in schools).

[5] *See Lee*, 505 U.S. at 595 (premising that high school graduations are integral part of American culture); *see also* American Civil Liberties Union v. Black Horse Pike Reg'l, 84 F.3d 1471, 1488 (3d Cir. 1996) (declaring student vote to include prayers in graduation unconstitutional); Harris v. Joint Sch. Dist., 41 F.3d 447, 459 (9th Cir. 1994) (invalidating student sponsored prayers at graduation); Jones v. Clear Creek Indep. Schs., 977 F.2d 963, 972 (5th Cir. 1992) (upholding student initiated and organized prayer in graduation ceremony); Gearon v. Loudon County Sch. Bd., 844 F.Supp. 1097, 1102 (E.D. Va. 1993) (finding student sponsored graduation prayers unconstitutional); David Schimmel, *Graduation Prayers Flunk Coercion Test: An Analysis of* Lee v. Weisman, 76 EDUC. L. REP. 913, 917 (1992) (stating that graduation's nature requires student attendance); Amy Louise Weinhaus, *The Fate of Graduation Prayers in Public School After* Lee v. Weisman, 71 WASH. U. L.Q. 957, 974 (1993) (contending that graduation is so important that its attendance is obligatory).

[6] 505 U.S. 577 (1992). *See* Broyles, *supra* note 3, at 279 (categorizing *Lee* as decision that decided issue of graduation prayers); Drimmer, *supra* note 1, at 427-29 (discussing *Lee* case that held graduation prayers unconstitutional); Norma R. Rankin and John L. Strope, Jr., *Prayer at Public School Graduation: What is a School Official to Do?*, 89 EDUC. L. REP. 1051, 1051-59 (1994) (discussing *Lee* as Supreme Court decision striking down only benediction portion of graduation ceremony); Thomas A. Schweitzer, *The Progeny of* Lee v. Weisman*: Can Student-initiated Prayer at Public School Graduations Still be Constitutional?*, 9 BYU J. PUB. L. 291, 291-93 (1995) (discussing *Lee* involving issue of constitutionality of graduation prayers in public schools); Rick A. Swanson, *Time for Change: Analyzing Graduation Invocations and Benedictions Under Religiously Neutral Principles of the Public Forum*, 26 U. MEM. L. REV. 1405, 1406-08 (1996) (discussing *Lee* case that involved invited clergy delivering prayer at graduation ceremony).

[7] *Lee*, 505 U.S. at 577.

[8] *See id.*; *see also* Broyles, *supra* note 3, at 279 (explaining how *Lee* initially resolved issue of graduation prayers yet only resolved issue to extent that school official invites clergyman to deliver prayers); Drimmer, *supra* note 1, at 427-29 (stating that *Lee* decision may not be applicable to cases of student sponsored graduation prayers); Weinhaus, *supra* note 5, at 957 (inferring that *Lee*'s resolution of constitutionality did not last long); Perry A. Zirkel, *Graduation Invocations and Benedictions: Good Faith Interpretation*, 89 EDUC. L. REP. 1061, 1064-66 (1994) (asserting that *Lee*'s holding may not be binding in cases where officials did not make the decisions on whether to include prayers in graduation ceremonies and who should deliver such prayers).

ceremonies.[9] School officials have, as a result, circumvented the fact specific ruling of *Lee* by allowing the student body to decide whether to include prayer in their graduation ceremonies.[10] The sponsored prayer issue has thus resulted in a split among the federal circuit courts.[11]

This Note asserts that student sponsored, composed and delivered prayers during graduation ceremonies in public schools are constitutional. Part I of this Note analyzes the principles and purposes of the Establishment and Free Exercise Clauses, including the various standards courts have utilize to determine when the Establishment Clause has been violated by governmental action. Part II discusses the conflict in lower court decisions that has resulted in different rulings in different circuits. Part III addresses these rulings and how they should have upheld the constitutionality of student sponsored prayers. An argument will be presented that the decisions of the lower courts are inconsistent with the principles and purposes of the Establishment Clause. Finally, this Note concludes that student sponsored prayers meet the threshold of constitutionality required under the most recent judicial standards.

[9] *See* Drimmer, *supra* note 1, at 412 (stating that courts began to find distinction with student sponsored graduation prayers after *Lee*); Rankin & Strope, *supra* note 6, at 1051 (contending *Lee* led to confusion as to whether all forms of graduation prayers are unconstitutional); Schweitzer, *supra* note 6, at 292 (stating that *Lee* narrowly tailored decision to facts of case); Weinhaus, *supra* note 5, at 957 (reasoning that *Lee* only answered question of member of clergy delivering prayer at graduation); Zirkel, *supra* note 8, at 1066 (asserting that *Lee* narrowed its decision to specific facts of case).

[10] *See, e.g., Black Horse Pike*, 84 F.3d at 1488 (striking down policy that allowed student vote to determine inclusion of graduation prayer unconstitutional); *Harris*, 41 F.3d at 459 (inclusion of student sponsored prayers in graduation ceremony was unconstitutional); *Jones*, 977 F.2d at 972 (upholding constitutionality of student initiated, organized prayers at graduation); *Gearon*, 844 F. Supp. at 1102 (declaring student sponsored graduation prayers as unconstitutional); *see also* McCarthy, *supra* note 2, at 481 (describing that school officials found creative ways to return prayers to graduation in response to *Lee*); Weinhaus, *supra* note 5, at 979 (asserting *Lee*'s narrow decision left open possibility of student selection of graduation prayers); Philip Oliss, Case Note, *Praise the Lord and Pass the Diplomas:* Harris v. Joint Sch. Dist., 64 U. CIN. L. REV. 705, 706 (1994) (discussing case where school attempted to circumvent *Lee* with inclusion of student sponsored graduation prayers).

[11] *See Black Horse Pike*, 84 F.3d at 1488. The Third Circuit struck down school policies that allowed the graduating senior class to determine whether to include prayers at their graduation ceremony because such inclusion violated the Establishment Clause. *Id.*; *see also Harris*, 41 F.3d at 459. The Ninth Circuit also struck down the use of student sponsored and voted prayers included at graduation. *Id. But see Jones*, 977 F.3d at 972. The Fifth Circuit, however, held that student sponsored prayers were not violative of the Establishment Clause and therefore were constitutional. *Id.*

I. PRINCIPLES AND PURPOSES OF THE ESTABLISHMENT CLAUSE AND THE STANDARDS EMPLOYED TO DETERMINE VIOLATION

The colonists fled to America searching for political and religious freedom.[12] The religion clauses of the First Amendment reflected the colonists' fear of governmental intervention in religion.[13]

The Establishment Clause which created a "wall" separating religion and government addressed the colonists fears.[14] The Establishment Clause, however, has a constitutional counterpart that created confusion under First Amendment jurisprudence.[15] The Free Exercise Clause breaks down the "wall" created by the Establishment Clause which safeguards an individual's religious practices from governmental interference.[16]

The courts, when confronted with the issue of religion in public schools, have required that the government be substantively neu-

[12] *See Lee*, 505 U.S. at 589 (asserting that Framers believed religious expression was too personal to be prescribed by government); *see also* Everson v. Board of Educ., 330 U.S. 1, 8-9 (1947) (noting reason why settlers came to America was to avoid religious conflicts in England); Serra, *supra* note 2, at 769 (detailing that early settlers came to America to avoid church-state conflicts in England).

[13] *See* Sands v. Morongo Unified Sch. Dist., 809 P.2d 809, 821 (Cal. 1991) (reasoning that Constitution mandates government remaining secular rather than affiliating with religious beliefs); Drimmer, *supra* note 1, at 421 (describing purpose of Bill of Rights was to withdraw certain subjects from political controversy); Vile, *supra* note 4, at 1054 (describing desirability of separation of church-state as concept reflected in Establishment Clause); Weinhaus, *supra* note 5, at 958 (contending that in order to end lingering doubt that Constitution did not adequately protect religious freedom, drafters included Free Exercise and Establishment Clauses).

[14] *See Letter from Thomas Jefferson to Danbury Baptists, Jan 1, 1802, in* 16 THE WRITINGS OF THOMAS JEFFERSON 281, 282 (1861) (using metaphoric term "wall" to describe separation between church and government); *see also Everson*, 330 U.S. at 16 (describing Establishment Clause utilizing Jefferson's "wall" metaphor); Drimmer, *supra* note 1, at 421 (stating Jefferson's metaphorical description of Establishment Clause as "wall" that separates religious activities from governmental endorsement); McCarthy, *supra* note 2, at 475 (discussing Jeffersonian metaphor of "wall" separating church and state).

[15] *See* Drimmer, *supra* note 1, at 416 (stating that Free Exercise Clause is antithetical twin that eroded protection provided by Establishment Clause). *See generally* Broyles, *supra* note 3, at 279 (asserting there is controversy and confusion about relationship between Establishment Clause and Free Exercise Clause); Weinhaus, *supra* note 5, at 958 (asserting there is conflict between two religion clauses); Serra, *supra* note 2, at 770 (contending there is obvious tension between two clauses).

[16] *See* U.S. CONST. amend. I (guaranteeing right to exercise religion free from governmental interference); *see also* Broyles, *supra* note 3, at 279 (speaking of Free Exercise Clause as mandate that prohibits laws that interfere with religious expression); Drimmer, *supra* note 1, at 416 (asserting that Free Exercise Clause allows Congress to remove otherwise neutral laws that unduly burden individual's free exercise of religion).

tral.[17] Presumably, this ensures that mandatory state sponsored school events do not contain a level of religiosity amounting to indoctrination.[18] Although the courts abide by this principle, they have allowed the intermingling of religion and education in cases regarding voluntary school events, reasoning that the risk of indoctrination is very low.[19] Courts have reasoned that the element of coercion is absent from voluntary events, since a student may choose not to attend if she believes that her beliefs would be infringed upon in some manner.[20]

A. *Standards Employed to Determine Establishment Clause Violations*

Over the years, the Supreme Court has established various tests and standards to determine whether state action violated

[17] *See Lee*, 505 U.S. at 588 (asserting that religion clauses require that religious beliefs can not be either proscribed or preserved by government); Zorach v. Clauson, 343 U.S. 306, 314 (1951) (asserting that formal neutrality prohibits state from encouraging or restricting religion and religious practices); School Dist. v. Ball, 473 U.S. 373, 387 (1985) (stating that substantive neutrality requires state to act affirmatively to ensure that religion is not encouraged); Drimmer, *supra* note 1, at 419 (stating neutrality principle is composed of formal neutrality and substantive neutrality); Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 226, 313-316 (1987) (stating that subtle contradiction between Establishment Clause and Free Exercise Clause has resulted in principal and practice of governmental neutrality); E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1204-1204 (1994) (contending that governmental neutrality prohibits government from undertaking or discussing religious practices).

[18] *See Ball*, 473 U.S. at 387 (asserting that state official must prevent religious indoctrination in schools); Drimmer, *supra* note 1, at 420 (asserting that neutrality principle requires state to ensure that state supported activity in school is free from religious indoctrination).

[19] *See Zorach*, 343 U.S. at 306 (permitting religious instruction for public school children on school grounds); Everson v. Board of Educ., 330 U.S. 1, 8-9 (1947) (upholding state aid to transport students to religious schools); *see also* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (recognizing that complete separation of church and state is impossible); Vile, *supra* note 4, at 1052 (listing cases where court has allowed religious activities in public schools). *See generally* Drimmer, *supra* note 1, at 416 (asserting that intermingling of government and religion is inevitable).

[20] *See* Engle v. Vitale, 370 U.S. 421, 421 (1962) (stating that voluntary events may include prayers because students can choose whether to attend). *See generally* Timothy S. Eckley, *Invoking the Presence of God at Public High School Graduation Ceremonies:* Graham v. Central Community Sch. Dist., 71 IOWA L. REV. 1247, 1252 (1986) (discussing courts permitting religion in voluntary school events); Ralph D. Mawdsley & Charles J. Russo, *High School Prayers at Graduation: Will the Court Pronounce the Benedictions?*, 69 EDUC. L. REP. 189, 194 (1991) (discussing court cases where voluntary school events included religious expression); Vile, *supra* note 4, at 1052 (detailing cases where inclusion of religious expression in voluntary school events was constitutional); Weinhaus, *supra* note 5, at 960-62 (discussing constitutionality of inclusion of religion in school sponsored voluntary events).

the Establishment Clause.[21] In *Lemon v. Kurtzman*,[22] the Supreme Court established a three prong test to evaluate any Establishment Clause challenge.[23] This test provides that, in order to pass judicial scrutiny, the questioned practice must: (i) have a secular purpose; (ii) neither advance nor inhibit religion; and (iii) not result in excessive entanglement of government and religion.[24] Nevertheless, the courts soon became dissatisfied with the *Lemon* test and began to look for a new standard to determine violations of the Establishment Clause.[25]

In response to the dissatisfaction with this test,[26] standards such as the "accommodation" standard[27] and the "endorsement" standard[28] were developed and found to be equally inadequate.[29]

[21] *See* Eckley, *supra* note 20, at 1247-70 (detailing *Lemon* test in Establishment Clause cases); Christian M. Keiner, *A Critical Analysis of Continuing Establishment Clause Flux as Illustrated by* Lee v. Weisman *and Graduation Prayers* , 24 PAC. L.J. 401, 408-17 (1993) (reviewing Establishment Clause standards formulated by Supreme Court); Weinhaus, *supra* note 5, at 957-969 (discussing principles governing Establishment Clause); DiGrazia, *supra* note 2, at 1452-64 (listing various tests utilized by Supreme Court in Establishment Clause violations); Serra, *supra* note 2, at 774-86 (explaining different tests developed by Supreme Court to deal with Establishment Clause cases).

[22] 403 U.S. 602 (1971).

[23] *Id.* at 612-613. *See* Lee v. Weisman, 505 U.S. 577, 584-85 (1992) (discussing *Lemon*'s establishment of three prong test to be used in Establishment Clause cases); *see also* Keiner, *supra* note 21, at 408-417 (explaining that Supreme Court established three prong *Lemon* test to determine Establishment Clause violations). *See generally* Eckley, *supra* note 20, at 1247 (detailing *Lemon* test which established three prong test to determine Establishment Clause violations); Weinhaus, *supra* note 5, at 957 (discussing *Lemon* case which struck down state aid to religious schools); Serra, *supra* note 2, at 774 (discussing *Lemon* case which involved state aid to religious schools).

[24] *See Lemon*, 403 U.S. at 612 (utilizing test to strike down state aid that was made available to secular subjects taught in private Catholic schools); *see also* Adler v. Duval County Bd., 851 F. Supp. 446, 451-456 (M.D. Fla. 1994) (discussing test developed in *Lemon*); Keiner, *supra* note 21, at 408-17 (analyzing *Lemon* test requirements for Establishment Clause issues); Weinhaus, *supra* note 5, at 957 (detailing three prong *Lemon* Test to determine Establishment Clause violations).

[25] *See* Lee v. Weisman, 505 U.S. 587-594 (1992) (establishing psychological coercion test to determine Establishment Clause violations while ignoring *Lemon* test); Lynch v. Donnelly, 465 U.S. 668, 687-692 (1984) (O'Connor, J., dissenting) (arguing that *Lemon* test must be modified in order to be operable); Marsh v. Chamers, 463 U.S. 783, 783 (1983) (utilizing historical based rationale to determine Establishment Clause violations); Eckley, *supra* note 20, at 1247 (noting lower courts utilizing tests other than *Lemon* test to determine Establishment Clause violations).

[26] *See Lynch*, 465 U.S. at 687-692 (O'Connor, J., dissenting) (proposing modification as only way *Lemon* test can be workable); *see also Wallace*, 472 U.S. at 69-70 (O'Connor, J., dissenting) (stating dissatisfaction with *Lemon* test in its original form in addition to proposing modification of *Lemon* test).

[27] *See Marsh*, 463 U.S. at 783 (establishing standard that utilizes historical based rationales to answer question of whether specific governmental action fosters preference of one religious sect over another or establishes national religion or church); *see also* Wallace v. Jaffree, 472 U.S. 38, 92-107 (1984) (Rehnquist, J., dissenting) (utilizing historical analysis instead of *Lemon* test to discount absolutist "wall" metaphor).

[28] *See Lynch*, 465 U.S. at 687-92 (O'Connor, J., dissenting) (modifying *Lemon* test to focus on determining "whether the state activity endorses or approves of religion and

As a result of the various tests created by the Supreme Court, lower courts have been in a quandry as to which test to utilize when determining Establishment Clause violations.[30]

B. *The Psychological Coercion Test:* Lee v. Weisman *and the Creation of an Additional Test to Determine Establishment Clause Violations*

The Supreme Court added to the confusion of the various tests by establishing the psychological coercion test to determine Establishment Clause violations. In *Lee v. Weisman*,[31] the principal of Nathan Bishop Middle School invited a rabbi to deliver a prayer at the graduation ceremony.[32] The parent of a graduate objected and brought suit to enjoin the school from including the prayer in the commencement exercises.[33] The Supreme Court held that a clergyman delivering prayers as part of an official graduation ceremony violated the Establishment Clause.[34] The *Lee* Court ignored the *Lemon* test and adopted a new standard called the "psychological coercion test" which asks whether the prayers carried a

whether the activity sends a message to non-adherents that they are outsiders, while sending a message to adherents that they are insiders and favored members of the political community"); *see also* Cheryl A. Hance, Rosenberger v. Rector and Visitors of the University of Virginia: *Will the Real Establishment Clause Test Stand Up?*, 5 WID. J. PUB. L. 549, 552 (1992) (describing focus of Establishment Clause pursuant to endorsement test as whether government endorses religious activity); Ellen Quinn Johnson, *School Prayer and the Constitution: Silence is Golden*, 48 MD. L. REV. 1018, 1044 (1989) (describing focus of Establishment Clause violation inquiry as degree of governmental endorsement).

[29] *See generally* American Civil Liberties Union v. Black Horse Pike, 84 F.3d 1471, 1488 (3d. Cir. 1996) (utilizing only *Lemon* test and psychological coercion test to strike down student sponsored graduation prayers); Harris v. Joint Sch. Dist., 41 F.3d 447, 459 (9th Cir. 1994) (applying *Lemon* test and *Lee*'s psychological coercion test to hold that student sponsored graduation prayers are unconstitutional); Jones v. Clear Creek Indep. Sch., 977 F.2d 963, 972 (5th Cir. 1992) (upholding constitutionality of student initiated prayers by using psychological coercion test and *Lemon* test).

[30] *See* Eckley, *supra* note 20, at 1247 (stating that lower courts have utilized different tests to determine Establishment Clause violations); Keiner, *supra* note 21, at 408-17 (noting various Establishment Clause tests utilized); Weinhaus, *supra* note 5, at 957-69 (analyzing standards governing Establishment Clause violations); DiGrazia, *supra* note 2, at 1452-64 (discussing various tests Supreme Court developed to determine Establishment Clause violations); Serra, *supra* note 2, at 774-86 (explaining that confusion of various tests led to lower courts use of different tests to determine violations of Establishment Clause).

[31] 505 U.S. 577 (1992).

[32] *See id.* at 581. "The guidelines recommend that public prayers at nonsectarian ceremonies be composed with inclusiveness and sensitivity." *Id.* Yet, they acknowledge that prayer of any kind may be inappropriate on some civic occasions. *Id.* The invited Rabbi was given a set of guidelines to ensure that prayer would be secular. *Id.*

[33] *See id.* at 581.

[34] *See id.* at 577.

particular risk of indirect coercion.[35] The psychological coercion test is premised on the Court's presumption that when a school official includes prayer in a graduation ceremony, it manifests a "subtle coercive pressure" compelling the students to participate despite their objections.[36] Although attendance at graduation is considered voluntary, the Court reasoned that the significance of the ceremony in one's life created an inherent obligatory attendance, thereby creating a high risk of coercion.[37]

As a result, *Lee* narrowly resolved the issue of the constitutionality of graduation prayers in the context of state officials "direct[ing] the performance of formal religious exercise for secondary schools."[38] The majority in *Lee* stated that the "dominant facts" of this case restrict and control the implications of the Court's decision.[39] *Lee*'s fact sensitive analysis prompted school officials and students to circumvent the decision.[40] Thus, by allowing graduating students to propose, sponsor, compose and de-

[35] *See id.* at 587-94. *See generally* Broyles, *supra* note 3, at 280-83 (stating that Justice Kennedy discussed need to reconsider *Lemon* test); Drimmer, *supra* note 1, at 428 (discussing Court's unexplained avoidance of *Lemon* in developing new test).

[36] *See Lee*, 505 U.S. at 589-93; *see also* Adler v. Duval County Sch. Educ., 851 F. Supp. 446, 456 (M.D. Fla. 1994) (allowing any type of prayer at graduation ceremonies was unconstitutional because of psychological pressure placed on students); Eric Fleetham, Lee v. Weisman*: Psychological Coercion Offends the Traditional Notions of Coercion under the Establishment Clause*, 24 U. TOL. L. REV. 725, 743 (1993) (considering accommodation of prayer as "subtle coercive pressure").

[37] *See Lee*, 505 U.S. at 595; *see also* Albright v. Board of Educ. of Granite Sch. Dist., 765 F. Supp. 682, 686 (D. Utah 1991) (describing high school graduation as unique); Steven G. Gey, *Religions Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 503 (1994) (discussing special nature of high school graduation ceremonies because it marks beginning of adulthood); Christina Engstrom Martin, *Student-Initiated Religious Expression After* Mergens *and* Weisman, 61 U. CHI. L. REV. 1565, 1579 (1994) (explaining that student attendance at graduation is obligatory because students worked hard to graduate and few would want to miss it).

[38] *Lee*, 505 U.S. at 586. *See generally* Schimmel, *supra* note 5, at 928-929 (explaining that *Lee* decision is confined to its facts); Oliss, *supra* note 10, at 705 (stating that *Lee* left questions concerning graduation prayers unanswered because of *Lee*'s specific facts).

[39] *See Lee*, 505 U.S. at 586; *see also* Weinhaus, *supra* note 5, at 974 (explaining that *Lee*'s decision was confined to its facts). *See generally* Schimmel, *supra* note 5, at 928-29 (stating that it is unclear whether *Lee* holding will offset future Establishment Clause cases); Oliss, *supra* note 10, at 705 (describing *Lee* ruling as limited to facts of school officials inviting clergy to deliver nonsectarian prayer at high school graduation).

[40] *See* American Civil Liberties Union v. Black Horse Pike, 84 F.3d 1471, 1471 (3d Cir. 1996) (involving school policy allowing students to vote on whether to include prayer in graduation ceremony in light of *Lee* decision); Harris v. Joint Sch. Dist., 41 F.3d 447, 447 (9th Cir. 1994) (involving school officials granting students' authority to decide whether to include prayer in graduation); Jones v. Clear Creek Indep. Schs., 977 F.2d 963, 963 (5th Cir. 1992) (discussing school policy allowing student initiated-organized prayer in graduation ceremony); Gearon v. Loudon County Sch. Bd., 844 F. Supp. 1097, 1097 (E.D. Va. 1993) (analyzing whether student sponsored prayers included in graduation ceremonies were constitutional).

liver these prayers at their graduation ceremonies, "the dominant facts" of *Lee* have been avoided.[41] Such actions have led to litigation concerning the constitutionality of student sponsored prayers at commencement exercises.[42]

II. Lower Court Decisions that Have Determined Whether Student Sponsored Prayers at Graduation are Violative of Establishment Clause

Since the Supreme Court in *Lee* failed to determine whether all forms of graduation prayers are constitutional, the lower courts have tackled this issue and have come to differing conclusions. In *American Civil Liberties Union v. Black Horse Pike Reg'l Bd.*,[43] the Board of Education was faced with the task of changing their traditional practice of permitting members of the clergy to deliver nonsectarian invocations and benedictions during the graduation ceremonies of local schools.[44] The Board formulated two alternative proposals to allow some form of prayer in the ceremony.[45] The senior class decided to include prayer at the commencement exercises and the student officers selected a graduating student to deliver the prayer.[46] The Third Circuit struck down the student sponsored and delivered prayer as unconstitutional, finding that the Board's decision to allow a student vote to determine the inclu-

[41] *See generally* Weinhaus, *supra* note 5, at 980 (analyzing cases involving student sponsored prayers at graduation); Oliss, *supra* note 10, at 706-07 (providing cases where student officials have allowed students to decide whether to include prayers at graduation).

[42] *See, e.g.*, *Black Horse Pike*, 84 F.3d at 1471 (concerning determination of constitutionality of student sponsored prayers in graduation ceremonies); *Harris*, 41 F.3d at 447 (determining whether student sponsored graduation prayers violate Establishment Clause); *Jones*, 977 F.2d at 963 (noting constitutionality of student sponsored prayers in graduation ceremony); Adler v. Duval County Sch. Educ., 851 F. Supp. 446, 446 (M.D. Fla. 1994) (discussing constitutionality of student initiated prayers); *Gearon*, 844 F. Supp. at 1097 (analyzing Establishment Clause implications of student sponsored prayer); Graham v. Central Community Dist. of Decantur County, 608 F. Supp. 531, 537 (S.D. Iowa 1985) (deciding constitutionality of student sponsored prayers).

[43] 84 F.3d 1471, 1488 (3d Cir. 1996).

[44] *See id.* at 1474-75. *See generally* Rankin & Strope, *supra* note 6, at 1059 (discussing facts leading to Board's decision to allow student vote to determine inclusion of prayer at graduation); Schweitzer, *supra* note 6, at 300 (stating that Board permitted students to vote on whether prayer should be delivered because of *Lee*).

[45] *See Black Horse Pike*, 84 F.3d at 1474-75. The first proposal permitted the graduating class to decide, by plurality vote, whether to include prayers in their graduation ceremony. *Id.* The alternative proposal did not allow prayers but would give the students and audience an opportunity to silently reflect on the graduation event. *Id.* The Board of Education unanimously adopted the former proposal entitled "Religion at Graduation Exercises." *Id.*

[46] *See id.* The resulting vote was 128 votes for prayer, 120 for reflection or moment of silence and 20 votes for neither prayer or reflection. *Id.*

sion of prayers was a form of Board control over the ceremony's religious content.[47] Thus, the court found little meaningful distinction between the coercion present in *Lee* and that under the facts of *Black Horse Pike*.[48]

In *Harris v. Joint Sch. Dist.*,[49] the school district delegated the decision making power of every aspect of the graduation ceremony to the students.[50] These decisions included whether to include prayer in the ceremony, and if they decided to include prayer, the decision as to who would deliver the prayer.[51] In addition to the district's long standing practice of including graduation prayer, the board of trustees included a disclaimer in the ceremonies stating that it did not endorse any statement made by anyone at the ceremony.[52] The Ninth Circuit held these actions violative of the Establishment Clause.[53]

The *Harris* majority reasoned that although the students decided the contents of the ceremony, the school officials controlled the event.[54] The court reasoned that while the ultimate decision

[47] *See id.* at 1476-78. The ACLU filed a complaint requesting that the prayers be enjoined from inclusion at graduation. *Id.*; *see also* Rankin & Strope, *supra* note 6, at 1059. The district court denied their request and held that student prayers were permitted because they did not present a high risk of coercion, which *Lee* prohibited. *Id.*; Schweitzer, *supra* note 6, at 300. The district court's decision was reversed by the court of appeals and the Board was enjoined from allowing the student sponsored prayer at the graduation ceremony. *Id.*

[48] *See Black Horse Pike*, 84 F.3d at 1480 (noting that *Lee* was indistinguishable despite issue of control since final decision vested with state actor).

[49] Harris v. Joint Sch. Dist., 41 F.3d 447 (9th Cir. 1994), *cert. granted*, 115 S. Ct. 2604 (1995), *vacated*, 62 F.3d 1233 (1995). A graduate's parent brought suit against the school in the United States District Court to enjoin the prayers from being included in the ceremony. *Id.* The district court deferred its decision until the United States Supreme Court ruled in *Lee v. Weisman*. *Id.* at 453. After the Supreme Court decided *Lee*, the district court denied the plaintiff's petition and held that student sponsored prayers did not violate the Establishment Clause. *Id.* The plaintiffs appealed to the Ninth Circuit of the Court of Appeals, which reversed the district courts decision. *Id.*

[50] *See id.* at 452.

[51] *See id.* at 452-53. The school district sent a memo to all principals within the district concerning the inclusion of prayer at the graduation ceremony. *Id.* The memo stated that the student secret vote determined whether to include invocations and benedictions in their graduation ceremony. *Id.* If the students agreed to include prayers, the students would then decide whether a minister or a student would deliver the prayer at the graduation. *Id.* If the students chose a minister, then the students would decide which minister will participate in the ceremony. *Id.* If the students, however, wanted fellow students to deliver the prayer, then the third and fourth ranked students would deliver the prayer. *Id.*

[52] *Id.* at 453.

[53] *Id.* at 454.

[54] *See id.* at 454 (stating that even though seniors had authority to decide if graduation prayer was to be included in graduation ceremony, senior did not have exclusive control over ceremony in that school officials "retain a high degree of control over contents of program") ; *see also* Drimmer, *supra* note 1, at 432 (arguing that although students had power to vote to include prayer at graduation, school officials still controlled event).

concerning the inclusion of prayers at graduation was within the hands of the students, this decision power was facilitated by school officials.[55] Consequently, the court found no difference between the school's official duty and school officials delegating their responsibility to a non-governmental entity.[56]

For additional authority, the *Harris* court relied on *Lee*'s psychological coercion test to conclude that student sponsored prayers are unconstitutional.[57] The court asserted that the obligatory nature of the ceremony coupled with the presence of state involvement resulted in the students being unduly coerced into participating in the prayers or remain respectfully silent.[58]

The *Harris* court also found that student graduation prayers are unconstitutional under the *Lemon* test, finding that no secular purpose was furthered by including prayers at a graduation ceremony.[59] The court reasoned that the primary effect of the inclusion of prayers in the ceremony was the advancement of religion.[60]

In *Jones v. Clear Creek Indep. Sch.*,[61] the board of trustees of a local school district passed a resolution which provided that the use of prayer at graduation would be at the discretion of seniors and that the prayer would be delivered by a student volunteer.[62] The Fifth Circuit upheld the constitutionality of the student sponsored prayers.[63] This court held that prayers at graduation were not psychologically coercive to the students.[64] In addition, the court held that student sponsored prayers satisfied the *Lemon*

[55] *See Harris*, 41 F.3d at 454.

[56] *See id.* at 455; *see also* Oliss, *supra* note 10, at 737 (contending that school officials in *Harris* did not "cleanse themselves of their decision making duties and responsibilities" by delegating authority to students to decide content of graduation ceremony).

[57] *See Harris*, 41 F.3d at 456; *see also* Oliss, *supra* note 10, at 738 (discussing *Harris* court's application of *Lee*'s psychological coercion test in concluding that students at graduation ceremony will feel pressure to participate in religious expression).

[58] *See Harris*, 41 F.3d at 456; *see also* Schweitzer, *supra* note 6, at 299 (detailing *Harris* court's use of psychological coercion test that led to decision that student sponsored prayer at graduation was unconstitutional because it placed undue pressure on objecting students to conform with majority of students).

[59] *Harris*, 41 F.3d at 457.

[60] *Id.*

[61] 977 F.2d 963 (5th Cir. 1992).

[62] *See id.* at 964-65. The students had a choice of whether to include prayers in the graduation ceremony. *Id.* If the students voted to include prayers, then it was also within the students' power to determine which student volunteer would deliver the prayers at the ceremony. *Id.* The students will also determine the content of the prayers. *Id.*

[63] *See Jones*, 977 F.2d at 963. This case was appealed from a district court holding that these student sponsored prayers were constitutional. *Id.*

[64] *See id.* at 972.

test.[65] It found that the primary effect of the prayers was secular and the prayers did not result in governmental endorsement or excessive entanglement with religion.[66]

The result of the Supreme Court's limitation of *Lee* was that the lower courts are split on the issue of student sponsored graduation prayers. It is asserted that the Supreme Court should resolve this split by declaring student sponsored graduation prayers constitutional based on the principles and purposes of First Amendment jurisprudence.

III. The Principles and Purposes of Establishment Clause Jurisprudence Render Student Sponsored Graduation Prayers Constitutional

The Establishment Clause should not be construed as a limitation on the protection afforded by the Free Exercise Clause.[67] The Supreme Court, in *Capitol Square Review v. Pinette*,[68] announced that the courts in *Black Horse Pike* and *Harris* failed to adhere to this principle.[69] It is submitted that if these courts abided by these principles, the student sponsored prayers would have been upheld as constitutional. In addition, according to *Jones*, student sponsored graduation prayers are able to pass both *Lee*'s psychological coercion test and the *Lemon* test.

[65] *See id.* at 966-972; *see also* Schweitzer, *supra* note 6, at 294-95 (stating that *Jones* court held that student sponsored prayers satisfied all three prongs of *Lemon* test).

[66] *See Jones*, 977 F.2d at 966-972.

[67] *See* Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2440 (1995) (stating that Establishment Clause forbids some forms of religious speech, but there are other forms of protection for certain forms of religious speech); *see also* Marion K. McDonald, Note, *Establishment Clause Challenge to Mandatory Religious Accommodation in the Workplace*, 36 Hastings L.J. 121, 132 (1984) (analyzing difference between Establishment and Free Exercise Clauses); Debra Minker, Recent Decision, *Constitutional Law-First Amendment-State University's Policy of Equal Access to Campus Facilities for all Organizations Including Those of a Religious Character Does Not Violate the Establishment of Religion Clause of the First Amendment.* Windmar v. Vincent, *454 U.S. 263 (1981)*, 32 Emory L.J. 319, 345 (1983) (discussing additional protection provided by Free Speech and Free Exercise Clauses).

[68] 115 S. Ct. 2440 (1995).

[69] *See id.* at 2440; *see also* Swanson, *supra* note 6, at 1434-35 (explaining that analysis of Establishment Clause by Court is less than crystal clear, but neutrality application in *Pinette* was not applicable in *Harris* because there was only one option for ceremony's outside speaker).

A. *Rulings in* Harris *and* Black Horse Pike *are Inconsistent with the Latest Pronouncement of the Principles and Purposes of Establishment Clause*

The Supreme Court, in *Capitol Square Review v. Pinette*, expounded the most recent pronouncement of the principles and purposes behind the Establishment Clause.[70] *Capitol Square* involved the availability of a ten acre state owned plaza for public speeches, gatherings and festivals[71] as well as unattended displays.[72] A permit was needed and several criteria had to be met in order to use this plaza.[73] The Ku Klux Klan requested permission to place a cross on the square and the board denied the application.[74] The Sixth Circuit held that the Ku Klux Klan may place their cross on Capitol Square because the cross is a religious expression that is purely private and is placed in a traditional or designated public forum.[75]

1. *Capitol Square Review* and the Importance of Free Speech in the Establishment Clause

The Supreme Court, upon review of this case, held that private religious speech, as well as secular private speech, was fully protected under the Free Speech Clause.[76] The Court discussed the significant difference between private speech utilized to endorse religion, which the Free Speech and Free Exercise Clauses protect, and government speech utilized to endorse religion, which the Establishment Clause prohibits.[77] The Court stated that the

[70] *See id.* at 2444 (discussing Court's refinement of Establishment Clause principles as needing governmental endorsement amounting to governmental speech in order to violate Establishment Clause).

[71] *See id.* at 2444.

[72] *See id.*

[73] *See id.*

[74] *See id.*

[75] *See id.* at 2450. The Ku Klux Klan filed suit seeking an injunction ordering the Board to issue the application. *Id.* at 2445. The district court issued the injunction because the Board failed to show that the cross could reasonably be construed as the state's endorsement of Christianity. *Id.* As a result, the Ku Klux Klan was permitted to erect the cross. *Id.*

[76] *Id.* at 2446. *See generally* Suzanne M. Fay, Case Note, *Capital Square Review and Advisory Bd. v. Vincent J. Pinette, Donnie A. Carr and Knights of the Ku Klux Klan*, 22 OHIO N.U. L. REV. 917, 917-19 (1996) (noting that *Capitol Review* held that private religious speech is protected under Free Speech Clause and thus is not violative of Establishment Clause).

[77] *See Capitol Square Review*, 115 S. Ct. at 2448 (stating that there is difference between government endorsement of religion and private endorsement of religion); *see also* Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226, 250 (1990) (stating that crucial difference exists between speech Establishment Clause prohibits and speech Free

Establishment Clause only applies to the words and conduct of the government.[78] The Court reasoned that the Establishment Clause was never intended to exist as a restriction on purely private religious speech, whose only connection to the State is its communication in a public forum.[79]

2. *Black Horse Pike* and *Harris* Do Not Conform with Establishment Clause Principles and Purposes

It seems that when the principles promulgated in *Capitol Square Review* are applied to the cases of *Black Horse Pike* and *Harris*, the student sponsored prayers would be constitutional. The prayers at issue in those cases were private speech because they were chosen and delivered by the students and not by the school officials or any other arm of the government.[80] The only link to a government actor was that the prayers were included in a ceremony sponsored by state officials.[81] The issue then becomes whether one should perceive the act of the students to be an act of

Exercise and Free Speech Clauses protect); Bryant W. Bishop, *Protecting Private Religious Speech in the Public Forum:* Capitol Square Review & Advisory Bd. v. Pinette, *115 S. Ct. 2440 (1995)*, 19 HARV. J.L. & PUB. POL'Y 602, 605-06 (1996) (explaining Justice Scalia's reasoning and proposition of bright line rule where "religious expression cannot violate the Establishment Clause where it is (1) purely private (2) occurs in a . . . public forum" but this distinction between private religious speech and governmental religious speech, becomes blurred once private speech is mistaken for governmental speech); Richard E. Levy, *Dueling Values: Balancing Competing Constitutional Interests in* Pinette, 5 KAN. J.L. & PUB. POL'Y 43, 43-45 (1996) (asserting that distinction remains clear when government has not fostered or encouraged mistaken perception of governmental endorsement of religion); Jay A. Sekulow & John Tuskey, *The "Center" is in the Eye of the Beholder*, 40 N.Y.L. SCH. L. REV. 945, 947-48 (1996) (contending that this endorsement standard has been used only when practice at issue was expressed by government, or when governmental action allegedly discriminated in favor of private religious activity).

[78] *See Capitol Square Review*, 115 S. Ct. at 2449; *see also* Keith A. Wilson, Note, *Thou Shalt Fund My Religious Expression: Neutrality Alone Gores the Establishment Clause in* Rosenberger v. Rector and Visitors of the University of Virginia, 16 LOY. L.A. ENT. L.J. 817, 828 (1996) (noting endorsement test applied only when government spoke or encouraged others to speak on its behalf).

[79] *Capitol Square Review*, 115 S. Ct. at 2449. *See* John F. Joiner, Note, *A Page of History or a Volume of Logic? Reassessing the Supreme Court's Establishment Clause Jurisprudence*, 73 DENV. U. L. REV. 507, 569 (1996) (describing broad level of religious freedom and sanctity of church as rationale underlying Establishment Clause).

[80] *See* American Civil Liberties Union v. Black Horse Pike Reg'l Bd., 84 F.3d 1471, 1474-75 (3d Cir. 1996) (stating that policy permitted students, not school officials, to include prayer in graduation ceremony); Harris v. Joint Sch. Dist., 41 F.3d 447, 452 (9th Cir. 1994) (permitting students to vote as to whether to include prayer at graduation ceremony); *see also* Fay, *supra* note 78, at 929 (advancing *Pinette*'s per se rule for Establishment Clause cases, while noting issue of "religious expression" remains unresolved).

[81] *See Black Horse Pike*, 84 F.3d at 1490 (Mansmann, J., dissenting) (noting that no decisions concerning graduation prayers were attributable to the state); *Harris*, 41 F.3d at 460 (Wright, J., concurring/dissenting) (discussing that state officials control every aspect of graduation except for inclusion of prayer).

the government.[82] Understandably, a reasonable person might perceive the prayers as governmental action or speech, since they were delivered in a governmental forum.[83]

The Court in *Capitol Square Review* stated, however, that the distinction between private speech and government speech will remain in tact if the government had not fostered or encouraged the misconception that private speech is religious speech.[84] The respective boards in *Black Horse Pike* and *Harris* left the decision of whether or not to include a prayer to the students, and the Board did not control or influence the vote.[85] It would thus follow that a prayer, delivered on state property in a state ceremony, would not render the prayer a governmental endorsement of religion.[86]

It is asserted that the rights of the objecting students cannot prevent the inclusion of graduation prayers simply because these students do not want to participate. The very purpose of the Establishment Clause was to protect the people from governmental impositions of religion.[87] This amendment reflected the intent of

[82] *See Capitol Square Review*, 115 S. Ct. at 2444 (discussing application of endorsement test and noting that religious expression must be attributable to government); *see also* Lamar C. Backer, *The Incarnate Word, That Old Rugged Cross and the State: On the Supreme Court's October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity as Jurisprudence*, 31 TULSA L.J. 447, 466 (1996) (analogizing *Pinette* and *Rosenberger* decisions in that both established that "intentional manipulation" constituted governmental involvement and that mere encouragement was insufficient).

[83] *See Capitol Square Review*, 115 S. Ct. at 2449 (asserting that one could conceive of case where government manipulates public forum to create impression of governmental endorsement of religion); *see also* Gregory A. Napolitano, *Constitutional Law—First Amendment—Establishment Clause—Symbolic Expression*, 34 DUQ. L. REV. 1209, 1217 (1996) (explaining rationale of *Engel v. Vitale*, where Court found indirect governmental action could violate Establishment Clause).

[84] *See Capitol Review*, 115 S. Ct. at 2448.

[85] *See Black Horse Pike*, 84 F.3d at 1474-75 (stating that school policy allowed students to decide whether to include prayers in graduation ceremony); *Harris*, 41 F.3d at 452-53 (noting that students by majority rule decided prayer content of ceremony without interference from school officials).

[86] *See* Lamb's Chapel v. Center Moriches USFD, 508 U.S. 384, 385 (1993) (explaining that occurrence of event on government property does not prove government endorsement); *see also* Widmar v. Vincent, 454 U.S. 263, 277 (1981) (stating that there cannot be content-based restrictions of religious speech, as that would be violative of First Amendment). *See generally Capitol Square Review*, 115 S. Ct. at 2446-47 (citing *Lamb's Chapel* in that even though school property was not public forum during off school hours, student's right to use school facilities for religious program should be permitted).

[87] *See* Everson v. Board. of Educ., 330 U.S. 1, 8-9 (1947) (asserting that reasons settlers came to America was to avoid religious conflicts in England); Lee v. Weisman, 505 U.S. 577, 589 (1992) (asserting that Framers believed religious expression was too personal to be prescribed by government); Serra, *supra* note 2, at 769 (establishing that early American settlers came to America to avoid church-state conflicts in England).

the Framers to prevent the tyranny of religious persecution.[88] The Framers, however, could not have intended to protect a graduating student from the risk of coercion and imposition of religion created by a fellow student's delivery of a graduation prayer.[89] Student sponsored prayers are therefore constitutional because the Establishment Clause is no more important than the graduating students' free speech and free exercise right to include prayer in the ceremony.[90]

B. *Student Sponsored Graduation Prayers Do Not Pose Risk of Coercion to Graduating Students*

Both the *Black Horse Pike* and the *Harris* decisions rely on a finding that student sponsored graduation prayers do not pass the psychological coercion test.[91] In *Jones*, however, the court found

[88] *See Everson*, 330 U.S. at 8-9 (contending that First Amendment religious clauses are embodiment of Framers fear of religious persecution); Joiner, *supra* note 81, at 511 (discussing court's propensity to rely on church and state jurisprudence of Thomas Jefferson and James Madison); *see also* Jimmy Daniels, Special Student Contribution, *The First Amendment: Has the Supreme Court Overlooked its Role as Guardian of our Freedom by Failing to Distinguish Between Real Threat and Mere Shadow?*, 46 MERCER L. REV. 1167, 1175 (1995) (raising similar question: "[I]s graduation prayer the type of establishment of religion the Framers of our Constitution intended to deter?").

[89] *See Lee*, 505 U.S. at 631-632 (Scalia, J., dissenting) (stating that it was impossible that Framers of Constitution intended Establishment Clause to prohibit prayer at graduation, as such tradition is too long-standing); *see also* Allan Gordus, Case Note, *The Establishment Clause and Prayers in Public High School Graduation:* Jones v. Clear Creek Indep. Sch. Dist., 47 ARK. L. REV. 653, 664 (1994) (stating that there was no way to determine if Framers intended Establishment Clause to apply to public school graduation ceremonies, as no public schools existed then); Marilyn Perrin, Note, Lee v. Weisman: *Unanswered Prayers*, 21 PEPP. L. REV. 207, 248 (1993) (discussing Justice Scalia's dissent in *Lee v. Weisman*, in particular discussion about Framers not intending Establishment Clause to prohibit prayer at graduation ceremonies).

[90] *See* McDonald v. Smith, 472 U.S. 479, 485 (1985) (stating that no hierarchy of First Amendment rights can be made because those rights are inseparable); Valley Forge College v. Americans United, 454 U.S. 464, 484 (1982) (stating that there is no "principled basis" by which we can create hierarchy among constitutional rights); Daniel Gordon, *Re-establishment of Religious Freedom: Developing An Alternative Model Based on State Constitutional Privacy*, 66 MISS. L.J. 127, 127-28 (1996) (asserting that both clauses must be read in harmony because if one clause is allowed to dominate, consequently, other clause will be rendered worthless); Thomas R. McCoy & Gary A. Kurtz, *A Unifying Theory: The Religion Clause of the First Amendment*, 39 VAND. L. REV. 249, 255 (1986) (contending that religion clauses should be read as "single conceptual unit"); Steve Gey, Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1485 (1981) (stating that framers intended both religion clauses to be read as unitary, correlative and co-extensive ideas that represent only different facets of some fundamental freedom—religious freedom).

[91] *See* American Civil Liberties Union v. Black Horse Pike Reg'l Bd., 84 F.3d 1471, 1480 (3d Cir. 1996) (noting that since presence at graduation is practically compelled, risk of student coercion is very high); Harris v. Joint Sch. Dist., 41 F.3d 447, 457 (9th Cir. 1994) (stating that because graduation is deemed obligatory event, students would be forced to participate in prayer portion of ceremony).

that student composed, sponsored and delivered prayers are not psychologically coercive and are constitutional.[92]

The psychological test, formulated in *Lee*, asks whether the government has directed formal religious practice or exercise in such a manner that carries a particular risk of coercing objectors to participate.[93] The absence of governmental interference in the inclusion of prayers in *Harris* and *Black Horse Pike* is similar to the facts in the *Jones* case and not *Lee*; therefore, the prayers should be deemed constitutional.[94] According to *Lee*, for psychological coercion to exist, there must have been governmental direction over formal religious exercise and coercion, where objecting students feel obliged to participate.[95]

Although the *Lee* Court could have prohibited all forms of graduation prayers, it refrained from doing so by limiting the holding to the facts of the case.[96] As in *Jones*, the school officials' direction in both *Harris* and *Black Horse Pike* were not of the same degree as the school official's invitation to a rabbi to deliver a prayer in *Lee*.[97] The boards in all three cases did not "direct the performance of formal religious exercise" because there would have been no religious exercise if not for the student vote of approval.[98] The

[92] *See* Jones v. Clear Creek Indep. Schs., 977 F.2d 963, 971 (5th Cir. 1992) (stating that this situation meets *Lee*'s psychological test in that these prayers are included by will of fellow students, who are less able to coerce their fellow students).

[93] *Lee*, 505 U.S. at 587.

[94] *See Black Horse Pike*, 84 F.3d at 1492 (Mansmann, J., dissenting) (noting that in *Lee*, school official unilaterally decided to include prayers in ceremony, while in present case students decided to include prayers); *Harris*, 41 F.3d at 452-53 (stating that ultimate decision of prayer inclusion was with students).

[95] *See Lee*, 505 U.S. at 587-94. *See generally* Broyles, *supra* note 2, at 280-283 (noting degree of governmental control that must exist to amount to psychological coercion); Drimmer, *supra* note 1, at 428 (stating there must be some governmental direction over exercise of religion in order to have psychological coercion stated in *Lee*).

[96] *See Lee*, 505 U.S. at 586 (stating that holding is limited to facts of case: school principal deciding to include prayer in graduation ceremony, inviting rabbi to deliver prayer, limiting rabbi's prayer to nonsectarian prayers); *see also* Schimmel, *supra* note 5, at 928-29 (commenting on fact specific nature of *Lee* decision and therefore may not be binding on cases involving student sponsored prayers); Weinhaus, *supra* note 5, at 979-80 (noting that *Lee* decision is confined to its facts, whereby graduation prayers that are not subject to governmental or school control may be constitutional).

[97] *See Black Horse Pike*, 84 F.3d at 1479 (contending that state's involvement in this case is not of same degree as in *Lee*); *Harris*, 41 F.3d at 452 (stating that school officials had no part in student vote); *see also* Schweitzer, *supra* note 6, at 291 (discussing cases dealing with prayer at high school graduations).

[98] *See Black Horse Pike*, 84 F.3d at 1474-1475 (explaining that school officials had no control or influence over students' vote); *Harris*, 41 F.3d at 453 (noting Board's disclaimer that statements made by anyone at graduation was not supported by Board); Jones v. Clear Creek Indep. Schs., 977 F.2d 963, 964-965 (5th Cir. 1992) (stating Board's policy that inclusion of benediction or invocation was within full discretion of students); *see also* Robert M.

students controlled the direction of the formal religious exercise since they made the decision to have a prayer.[99]

Moreover, it is asserted the participation element of the psychological coercion test is not satisfied in either *Black Horse Pike* or *Harris*. The participation element in *Lee* was that government mandated prayers at graduation ceremonies, placing unnecessary psychological coercion on the graduating student to participate in the religious observances.[100] The *Black Horse Pike* and *Harris* courts, however, utilize faulty reasoning because, as the *Jones* court asserted, the presumption that graduating high school students do not possess the requisite maturity necessary to avoid coercion and indoctrination is erroneous.[101] It is hypocritical that the law places great responsibilities on high school students,[102] while still not considering them mature enough to resist coercion from a prayer delivered by their fellow students.[103] The gradua-

O'Neil, *Who Says You Can't Pray?*, 3 VA. J. SOC. POL'Y & L. 347, 356-57 (1996) (discussing how school officials have control over graduation exercises).

99 *See Black Horse Pike*, 84 F.3d at 1490 (Mansmann, J., dissenting) (stating that none of decisions made by graduating students to include prayer in their graduation is attributable to state officials); *Harris*, 41 F.3d at 452-53 (reiterating school policy where majority of graduating students' vote decides inclusion of prayers in graduation ceremony); *see also Jones*, 977 F.3d 963, 971 (distinguishing between *Lee* facts and facts in *Jones* where court held that Clear Creek district "exercises significantly less control over the content of invocations" since it was students decision to include prayer in ceremony).

100 *Lee*, 505 U.S. at 587-594; *see also* Broyles, *supra* note 3, at 280-83 (explaining psychological coercion test developed in *Lee*); Rankin & Strope, *supra* note 6, at 1053-54 (discussing psychological coercion test); Schimmel, *supra* note 6, at 914-17 (analyzing psychological coercion test).

101 *See Jones*, 977 F.3d 963, 971 (5th Cir. 1992) (asserting graduating seniors are less impressionable than younger students because they are aware that "prayers represent the will of their peers, who are less able to coerce participation than any authority figure from state or clergy"); *see also Lee*, 505 U.S. at 639 (Scalia, J., dissenting) (stating that many graduating seniors are old enough to vote); *Black Pike Horse*, 84 F.3d at 1492 (Mansmann, J., dissenting) (stating students have right to vote). *But see Lee*, 505 U.S. at 578 (stating that school's official sponsorship of prayers results in indirect peer pressure on students to participate because adolescents are often susceptible to pressure); O'Neil, *supra* note 104, at 350 (noting that even if given opportunity to be excused, students will feel peer pressure to participate). *See generally* Zirkel, *supra* note 8, at 1065-66 (discussing adolescent susceptibility to peer pressure).

102 *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 112 (1970) (sustaining Congress' setting minimum voting age at 18).

103 *See* Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring) (reasoning that secondary school students are mature enough and likely to understand school does not endorse student speech); *Black Horse Pike*, 84 F.3d at 1482 (recognizing that *Lee* Court was not convinced of maturity level of high school students to be able to avoid compromising their religious beliefs); *Harris*, 41 F.3d at 457 (implying that high school students are immature because they are easily coerced by peer pressure); *see also* James E. Wood, Jr., *Religion and the Public Schools*, 1986 BYU L. REV. 349, 368 (1986) (discussing presumed maturity of high school students); Timothy M. Gibbons, Note, *The Equal Access Act and* Mergens*: Balancing the Religion Clauses in Pub-*

tion ceremony is not only a recognition for academic achievement, but also marks a students' passage into adulthood.[104] With this recognition, these students are given the responsibility of making their own decisions.

Justice Scalia's dissent in *Lee* states that graduation prayers are constitutional because the inclusion of prayers in graduation ceremonies are a long standing tradition.[105] This is consistent with the tradition of including Judeo-Christian symbols within America's most important institutions.[106] Our nation's currency, for example, is inscribed with the phrase "In God we Trust"[107] and our pledge of allegiance describes this nation as "one nation, under God."[108]

If the tradition of the inclusion of prayers at graduation is restricted, these other religious traditions and symbols must also be

lic Schools, 24 GA. L. REV. 1141, 1162-1163 (1990) (citing Senate Judiciary Committee's criticism of underestimation of high school students' maturity).

104 *See Lee*, 505 U.S. at 639 (Scalia, J., dissenting) (regarding graduation as transition from adolescence to young adulthood); *see also* Yvone Barlow, *Anti-DWI Groups Warn of Risks When Teens Try to Mix Alcohol with Proms, Graduation*, DALLAS MORNING NEWS, Apr. 16, 1996, at A21 (noting that leaving high school is passage into adulthood); Sara Oppenheim, *Graduation Brings Mixed Emotions*, BALTIMORE SUN, May 23, 1995, at B1 (stating that graduating seniors make passage from adolescence to adulthood); Kristi Wright, *Growing Pains-A Quiz for the Adult-Impaired*, OMAHA WORLD-HERALD, June 11, 1996, at 29 (arguing that passage from childhood to adulthood occurs officially at age 18).

105 *See Lee*, 505 U.S. at 632 (Scalia, J., dissenting) (stating graduation prayers are examples of long-standing American tradition on nonsectarian prayer in public ceremonies); *see also* Weinhaus, *supra* note 5, at 957 (describing invocation and benediction inclusion in graduation ceremonies as long standing tradition); Lisha Gayle, *Prayer Ban is Obeyed, Reluctantly*, ST. LOUIS POST- DISPATCH, June 29, 1994, at 1, (asserting graduation prayers as long-standing tradition); Susan Hill, *Prayer Ruling Gets Low Marks*, HERALD-ROCK HILL, S.C., June 26, 1992, at 3A (calling graduation prayer long-standing tradition common in local high schools).

106 *See Lee*, 505 U.S. at 632-637 (Scalia, J., dissenting) (detailing tradition of nation's practice of including prayers of thanksgiving in public ceremonies); Zorach v. Clauson, 343 U.S. 306, 313 (1952) (describing Americans as "religious people whose institutions presuppose a Supreme Being"). *See generally* 36 U.S.C. § 186 (1997) (describing our motto as "In God We Trust"); 36 U.S.C. § 172 (1997) (stating our Pledge of Allegiance describes our nation as "one nation, under God"); Vile, *supra* note 4, at 1051 (describing Americans as religious people); Serra, *supra* note 2, at 769 (describing phenomenon of "American civil religion").

107 *See* 36 U.S.C. § 186 (1997) (declaring our national motto); *see also* Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1338 (1995) (pointing out that our currency carries motto "In God We Trust"); Malla Pollack, *Prayer in Public Schools: Without Heat, How Can There Be Light*, 15 Q.L.R. 163, 188 (1995) (pointing out that "In God We Trust" was added to all paper money, coins and our national motto).

108 *See* 36 U.S.C. § 172 (1997) (designating out pledge of allegiance); *see also* Laura Underkuppler-Freund, *The Separation of the Religious and the Secular*, 36 WM. & MARY L. REV. 837, 869 (1995) (pointing out that Pledge of Allegiance has religious references in words "One Nation Under God"); Joseph R. Weisberger, *E. Plurbus Unum the American Miracle*, 34 No. 4. JUDGES' J. 30, 31 (1995) (noting that "One Nation Under God" is how founding Fathers wished for this country to remain).

restricted.[109] These symbols can be reasonably viewed as the State's endorsement and approval of a Judeo-Christian God.[110] If a prayer at graduation can offend students, then it would follow, under the *Harris* and *Black Horse Pike* rationale, that any of these symbols could run the risk of indoctrinating these students.[111]

C. *Student Sponsored Graduation Prayers Do Not Violate the* Lemon *Test*

An analysis of the psychological coercion test must be tempered by the fact that only two of the five justices concurring in *Lee* used and recognized this test.[112] The primary test used by courts is the *Lemon* test.[113]

The first prong of the *Lemon* test, that the questioned practice serve a clear secular purpose, is satisfied when the rationale of

[109] *See generally Lee*, 505 U.S. at 632-37 (Scalia, J., dissenting) (asserting that graduation prayers must be dealt with in same manner as other religious traditions in this country); Deborah K. Hepler, Feature, *The Constitutional Challenge to American Civil Religion*, 5 KAN. J.L. & PUB. POL'Y 93, 110 (1996) (contending that in *Lee*, school district argued that graduation prayers are no different from other religions proclamations).

[110] *See Lee*, 505 U.S. at 632-37 (Scalia, J., dissenting) (utilizing examples of Judeo-Christian symbols incorporated in nation's traditions to demonstrate America's Judeo-Christian tradition). *See generally* Vile, *supra* note 4, at 1051 (describing America as religious country).

[111] *See Lee*, 505 U.S. at 632-37 (Scalia, J., dissenting) (explaining that various American symbols and practices that are founded in Judeo-Christian tradition and graduation prayers must be dealt with equally).

[112] *See Lee*, 505 U.S. at 603-605 (Blackmun, J., concurring) (expressing view that "government concern of religious conformity" is not necessary element of Establishment Clause violations); *see also* Lee, 505 U.S. 618-29 (Souter, J., concurring) (declining to adopt coercion as required component of Establishment Clause violation as it undermines long-standing recognized Establishment Clause values); Jones v. Clear Creek Indep. Schs., 41 F.3d 447, 447 (1992) (utilizing *Lemon* test as well as coercion test); Schimmel, *supra* note 5, at 928 (stating *Lee* neither overruled nor endorsed *Lemon* test); Weinhaus, *supra* note 5, at 969-70 (stating that all five majority justices in *Lee* did not utilize same reasoning); Zirkel, *supra* note 8, at 1064-65 (asserting coercion test is attributed only to plurality of court).

[113] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971). The three prongs of the Lemon test are: (i) the practice must serve a clear secular purpose; (ii) the practice must have the primary effect that neither inhibits or advances religion; and (iii) the practice must not have any excessive entanglement with religion. *Id.*; *see also* Keiner, *supra* note 21, at 415. It is asserted that Establishment Clause cases must still continue to utilize *Lemon* test. *Id. See e.g.*, American Civil Liberties Union v. Black Horse Pike Reg'l Bd., 84 F.3d 1471, 1483-88 (3d Cir. 1996). The *Lemon* test should be used with the psychological coercion test to evaluate the issue of the constitutionality of student sponsored prayers. *Id.*; Harris v. Joint Sch. Dist., 41 F.3d 447, 451-52 (9th Cir. 1994). Utilizing the *Lemon* test in addition to *Lee*'s psychological test, the court determined that the student sponsored prayers were unconstitutional. *Id.*; *Jones*, 977 F.2d at 964-68. This case discusses the constitutionality of student sponsored prayers in light of both the *Lemon* test and the psychological coercion test. *Id.*; Schweitzer, *supra* note 6, at 294-95. The *Jones* court utilized the *Lemon* test as well as the coercion test. *Id.*

Jones is applied.[114] The *Jones* court held that student prayer served the secular purpose of solemnizing a very important moment in the lives of the students.[115]

The second prong is that the practice must not have a primary effect of advancing or inhibiting religion.[116] The prayers were used to neither advance nor inhibit religion because the inclusion of prayer does not imply that the state has favored religious speech over secular speech.[117] Here, the decision to include prayer was not attributable to the state.[118]

The final prong of the *Lemon* test is that the practice in question must avoid any excessive governmental entanglements with religion.[119] This final prong is also satisfied because a student's right to decide whether to include prayer refutes any excessive entanglement of government and religion.[120]

[114] *See Black Horse Pike*, 84 F.3d at 1474-75 (involving policy whereby students' majority vote will decide whether prayers will be included in graduation ceremony); Harris v. Joint Sch. Dist., 41 F.3d 447, 459 (9th Cir. 1994) (concerning district policy where students will decide graduation prayers without any interference from school officials).

[115] *See Black Horse Pike*, 84 F.3d at 1495 (Mansmann, J., dissenting) (asserting policy serves valid secular purpose of solemnizing graduation); *Harris*, 41 F.3d at 461 (Wright, J., dissenting) (stating that invocations and benedictions serve secular purpose of solemnizing public occasions); *Jones*, 977 F.2d at 966-67 (contending that prayers solemnize public ceremonies passes secular purpose prong of *Lemon* test); *see also* Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring) (stating that legitimate secular purposes of solemnizing public occasions were not government approved); Tanford v. Brand, 932 F. Supp. 1139, 1145 (S.D. Ind. 1996) (stating first prong of *Lemon* is satisfied because invocation and benediction served legitimate secular purpose of solemnizing public ceremony and continuing long university tradition).

[116] *Lemon*, 403 U.S. at 612-613.

[117] *See Black Horse Pike*, 84 F.3d at 1485 (stating that it cannot communicate message that government approves or disapproves of religious exercise); *see also* Swanson, *supra* note 6, at 1412 (noting that student participating in graduation ceremony that includes invocation delivered by another student would understand that such religious beliefs are solely those of speaking student).

[118] *See* American Civil Liberties Union v. Black Horse Pike Reg'l Bd., 84 F.3d 1471, 1493 (1996) (Mansmann, J., dissenting) (reasoning that student vote to include prayer is not attributable to state or school officials); Harris v. Joint Sch. Dist., 41 F.3d 447, 460 (9th Cir. 1994) (Wright, J., dissenting) (noting that school officials' disclaimer evinces fact that students' decision to include prayer was not attributable to school or governmental officials).

[119] Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

[120] *See Black Horse Pike*, 84 F.3d at 1496-97 (Mansmann, J., dissenting) (discussing fact that policy created total absence of governmental entanglement with religious content of graduation); Jones v. Clear Creek Indep. Schs., 977 F.2d 963, 969-70 (5th Cir. 1992) (stating that public school's use of graduation prayers can only violate Establishment Clause if school officials monitored selection of speaker and prayer content); McCarthy, *supra* note 2, at 486 (pointing out that several courts have upheld student-led and initiated graduation prayers as constitutional under Establishment Clause).

CONCLUSION

Black Horse Pike and *Harris* were incorrectly decided because student sponsored graduation prayers do not violate the Establishment Clause. The courts' opposition to graduation prayers is arbitrary and capricious as evinced by the courts' failure to settle on one test to determine Establishment Clause violations. Furthermore, courts have engaged in hypercritical interpretation by holding some American religious practices to be constitutional, while striking down student sponsored graduation prayers.

Student sponsored prayers pass the *Lemon* test, as proven by the *Jones* decision. In addition, these prayers conform with the principles and purposes of the Establishment Clause as fostered in *Capital Square Review*. Furthermore, these prayers do not pose any risk of being psychologically coercive to its audience since such prayers are delivered by fellow graduating seniors and not state actors.

It is time for the government to allow its citizens, especially its future leaders, to encounter adverse ideas and information so that they will be able to decide for themselves which ideas they wish to adopt. The time has come for the Supreme Court to resolve the issue of the constitutionality of student sponsored graduation prayers and remedy the split among circuit courts.

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