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I. INTRODUCTION

The propriety of prayer in public life has always been a difficult issue for the Court. The Founding Fathers separated church and state *via* Establishment Clause.[1] Ironically, the same week the Establishment Clause passed, the Founding Fathers voted to begin each of their Congressional sessions with prayer.[2] The exact boundaries of the church-state divide were left undefined. Today, courts still puzzle over where to draw these boundaries, especially in the area of public prayer. As our society has become more cosmopolitan, the conflict between religion and government has increased and line drawing has become even more difficult and complex.

High school graduation prayers were supposed unconstitutional after *Lee v. Weisman*.[3] However, *Weisman* did not address all of the issues, and graduation prayers are still permissible in some circuits. Through its analysis of *Harris v. School District No. 241*, this Note, in four parts, considers some of the unaddressed issues. Part II reviews the history of school and graduation prayers leading to *Weisman*. Part III summarizes the background for *Harris*. Part IV analyzes *Harris* under three tests still valid in a post-*Weisman* era. Part V concludes that under certain circumstances graduation prayers are still constitutionally permissible.

II. THE HISTORY OF GRADUATION PRAYERS

A. *The Early Cases*

Controversy over high school graduation prayers began in the early 1970s.[4] From 1972 to 1974 three cases were

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1 U.S. CONST. amend I.

2 Lynch v. Donnelly, 465 U.S. 668, 674 (1984).

3 112 S. Ct. 2649 (1992); *see, e.g.*, Griffith v. Teran, 807 F. Supp. 107, 108 (1991) (parties agreeing that a pre-*Weisman* decision denying a motion to enjoin school district from holding graduation prayers was rendered invalid by *Weisman*).

4 These cases were probably inspired by the classroom prayer cases. The

decided.[5] In each case, the lower courts upheld the practice of graduation prayers.[6] These early cases provided five arguments which have recurred in later cases.[7] First, it may be argued that offensive effects of graduation prayer can be mitigated by making graduation attendance voluntary.[8] One court buttressed this argument by pointing out that participation in the prayer may be voluntary as well.[9] Implicit in this argument is that attendance by the student is consent to the prayer.

Second, it may be argued that the state is subsidizing a religious activity if the graduation ceremony is paid for by tax monies.[10] In *Wood v. Mt. Lebanon Township School District*, the court dismissed this claim as de minimis,[11] holding that prayers are such a brief part of the ceremony that no monetary harm results from the time consumed by invocation and benediction.[12] In *Grossberg v. Deusebio*, the court took a different approach in considering the tax monies issue. The court weighed the use of student funds for the prayer against any state funds used to pay for graduation ceremonies.[13]

Third, it may be argued that the length of prayer may be weighed when determining whether Establishment Clause infringements have occurred. Along these lines, courts have

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Court held classroom prayers unconstitutional. *See, e.g.*, Abington Sch. Dist. v. Schempp. 374 U.S. 203, 229 (1963) (beginning the public school day by reading, without comment, from the Bible violated the Establishment Clause); Engel v. Vitale, 370 U.S. 421 (1962) (beginning the public school day with prayer violated the Establishment Clause because prayers were solely religious in nature and they advance a religious cause through the government); *see also* 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, 124 (1992).

5 Weist v. Mt. Lebanon Sch. Dist., 320 A.2d 362 (1974), *cert. denied*, 419 U.S. 967 (1974); Grossberg v. Deusebio, 380 F. Supp 285 (E.D. Va. 1974); Wood v. Mt. Lebanon Township Sch. Dist., 342 F. Supp. 1293 (1972).

6 *Id.*

7 *Grossberg* is the most legally developed of these early cases. It addresses all four of the factual arguments used by the early cases in upholding graduation prayer.

8 *Grossberg*, 380 F. Supp. at 287; *Wood*, 342 F. Supp. at 1294; *Weist*, 320 A.2d at 364-65 (justifying graduation prayer on the sole grounds that graduation ceremonies are voluntary).

9 *Grossberg*, 380 F. Supp. at 290.

10 *Wood*, 342 F. Supp. at 1295.

11 *Id.*.

12 *Id.*

13 *Grossberg*, 380 F. Supp. at 287.

reasoned that the prayer would "be brief, transient and subsumed in the secular degree awarding ceremony."[14]

Fourth, it may be argued that some overlap between religion and government is inevitable and that, for this reason, not every expression of religion in public life violates the Establishment Clause.[15] Along this line of reasoning, it has been suggested that courts are incapable of enjoining every technical infringement of the First Amendment.[16] Absolute separation would be impossible since government and religion must interact.[17] The government's role is one of neutrality.[18] It should neither inhibit nor encourage, but rather should permit personal choices free from state compulsion.[19]

Fifth, it may be argued that, if the graduating class through its class representatives decided to have the graduation prayer, no First Amendment violation occurred.[20] Courts have rejected this line of argument as a "symbolic washing of hands."[21] It reasoned that a "graduation ceremony for a public school class, held on public school grounds, and administered by public school personnel, at which diplomas are officially awarded by the administration, is a public school event."[22] The court, however, held that any infringements were outweighed by voluntary

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14 *Id.* at 291.

15 *Id.* at 289.

16 Weist v. Mt. Lebanon Sch. Dist., 320 A.2d 362, 365 (Penn.), *cert. denied*, 419 U.S. 967 (1974) (quoting Zorach v. Clauson, 343 U.S. 306, 312-313 (1952). (Douglas, J.). Justice Douglas's majority opinion stated that:

> Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court").

17 *Grossberg*, 380 F. Supp. at 290.

18 *Id.*

19 *Id.* (using neutrality reasoning in response to a free exercise argument raised in addition to an Establishment Clause infringement argument).

20 *Id.* at 287.

21 *Id.* at 288.

22 Id. *But see* Harris v. School Dist. No. 241, 821 F. Supp. 638, 643 (D. Idaho 1993).

attendance, the short duration of the prayer, and the overlap of religion into public life.[23]

Although these early cases cite to Supreme Court cases, they do not follow any test created by the Court. This is ironic since *Lemon v. Kurtzman* was decided almost a year before the first of these cases.[24] *Grossberg* comes the closest to following the Supreme Court by correctly recognizing the fact sensitivity of the Establishment Clause and the need to strike the proper balance.[25] Conversely, the later cases rely much more heavily on Supreme Court promulgated tests.[26]

B. The Later Cases

After the initial surge of cases in the early 1970s, no cases focused exclusively on high school graduation prayer until *Stein v. Plainwell Community School*[27] and *Graham v. Central Community School District of Decatur*[28] were decided in 1985.[29] Including these two cases, eight gradua-

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23 *Grossberg*, 380 F. Supp. at 290.

24 *Id.*

25 *Id.* at 289 ("The duty of the courts is to strike the proper balance. The area is a sensitive one, involving questions of degree." (quoting Allen v. Hickel, 424 F.2d 944, 949 (1970)); *cf.* Lee v. Weisman, 112 S. Ct. 2649, 2661 (1992).

26 Essentially two tests have been used in later cases: the three-prong *Lemon* test and the historical tradition test. The most prevalent test is *Lemon*. Every graduation prayer case after *Grossberg* uses this test somewhere in its analysis. This three-prong test requires that a governmental practice: (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoids excessive government entanglement with religion. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). However, *Lemon* has been extensively criticized by scholars, practitioners, and members of the Court. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring in the judgment) ("As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . ."); Lee v. Weisman, 112 S.Ct. 2649, 2655 (1992) (United States Attorney General in an *amicus* and the petitioner both advocate overturning *Lemon*); Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337, 340-42 (1986). While many feel the *Lemon* test is unworkable, the Court has not seen fit to overrule it directly. *Weisman*, 112 S. Ct. at 2655.

The second test is the historical-tradition test. *See* Marsh v. Chambers, 103 S.Ct. 3330, 3333 (1983) (upholding Nebraska's practice of beginning each legislative session with prayer since the practice is "deeply embedded in the history and tradition of this country"). In *Weisman*, the Court held this test was not applicable to graduation invocations and benedictions.

27 610 F. Supp. 43 (W.D. Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987).

28 608 F. Supp. 531 (S.D. Iowa 1985).

29 From 1974 to 1985, several school prayer cases were decided, but none of

tion prayer cases were decided between 1985 and 1991.[30] All eight cases used the *Lemon* test as part of their analysis. But the presence of other tests and the difficulty of applying the *Lemon* test led to a different result. This Note will center on the five cases decided in federal court.[31] These five cases were split almost evenly on whether graduation prayers were constitutional. *Jones II* and *Albright* held graduation prayers did not violate the Establishment Clause, whereas, *Graham* and *Lundberg* held the inverse. Paradoxically, *Stein* held that the invocations and benedictions violated the Establishment Clause, but then the court defined under what circumstances such prayers would be acceptable.

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these cases exclusively focused on high school graduation prayers. Given the fact sensitivity of Establishment Clause issues those cases are not discussed in this Note. *See, e.g.*, Florey v. Sioux Falls Sch. Dist., 619 F.2d 1311 (8th Cir. 1980) (holding that the school district's policy permitting observance of holidays having both secular and religious bases did not violate the Establishment Clause under the *Lemon* test); Doe v. Aldine Indep. Sch. Dist., 563 F. Supp. 883 (S.D. Tex. 1982) (holding that the practice of prayers and the singing of the school song, which referred to deity at high school assemblies and athletic contests failed all three prongs of the *Lemon* test).

In *Florey*, the school district policy was upheld by the court, which included, *inter alia*, invocations and benedictions at high school graduation. However, the court never analyzed these prayers separately. *See Florey*, 619 F.2d at 1320. The court's analysis focused on whether or not school Christmas programs violated the Establishment Clause.

Note that *Doe* is distinguishable from the graduation prayer issues since the court focused on the activities that took place during regular school hours. Any comparison to high school prayer would be overruled by Jones v. Clear Creek Indep. Sch. Dist, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

See also Schweitzer, *supra* note 4, at 124 n.50.

30 Jones v. Clear Creek Indep. Sch. Dist. 930 F.2d 416 (5th Cir. 1991), *cert. granted*, 112 S. Ct. 3020, *reh'g denied*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993); Stein v. Plainwell Community Sch., 822 F.2d 1406 (6th Cir. 1987); Albright v. Bd. of Educ. of Granite Sch. Dist., 765 F. Supp. 682, 684 (D. Utah 1991); Lundberg v. West Monona Community Sch. Dist., 731 F. Supp. 331 (N.D. Iowa 1989); Graham v. Central Community Sch. Dist. of Decatur, 608 F. Supp. 531 (S.D. Iowa 1985); Sands v. Mooring Unified Sch. Dist., 809 P.2d 809 (Cal. 1991); Bennett v. Livermore Unified Sch. Dist., 238 Cal. Rptr. 819 (Cal. Ct. App. 1987); Kay v. David Douglas Sch. Dist. No. 40, 719 P.2d 875 (Or. App. 1986).

31 State constitutions can be more restrictive than the U.S. Constitution. For this reason, it is difficult to compare these cases to federal cases. In states with constitutions more restrictive than the U.S. Constitution, state jurisprudence is controlling—federal jurisprudence is persuasive only. However, state constitutions cannot be less restrictive than the U.S. Constitution because of the Supremacy Clause. U.S. CONST. art. VI. But many of the arguments in these state cases track those made in federal cases. These three state cases invalidated school graduation prayer. Sands v. Mooring Unified Sch. Dist., 809 P.2d 809 (Cal. 1991); Bennett v. Livermore Unified Sch. Dist., 238 Cal. Rptr. 819 (Cal. Ct. App. 1987); Kay v. David Douglas Sch. Dist. No. 40, 719 P.2d 875 (Or. App. 1986).

1. Stein v. Plainwell Community School

In *Stein*, two school districts allowed prayer at graduation. One district had prayers given by students while the other had prayers given by clergy. As in the early cases, the school district argued that prayer should be upheld since attendance at graduation was voluntary. The school district also tried to distinguish classroom prayer from graduation prayer by emphasizing the infrequency of graduation prayers.

Stein took a novel approach to the issue.[32] *Stein* upheld the idea of graduation prayer under the "history and tradition" test in *Marsh v. Chambers*.[33] However, *Stein* concerned itself with the contents of prayers, prohibiting prayer that would be tantamount to saying to "parents and students: we do not recognize your religious beliefs, our beliefs are superior to yours."[34] Importantly, the court in *Stein* went on to find that the content of the prayers in question were unacceptable under *Marsh*.

In addition to its content-oriented approach, *Stein* also presents a new approach not seen in the early cases. Separationists argue that graduation prayer indoctrinates and proselytes students. The court resolves this concern by reference to parental attendance at graduation, which attendance shields students from religious coercion.[35]

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32 Before considering its novel approach, the court first goes through all three prongs of the *Lemon* test and finds that graduation prayer passes all three prongs. *Stein*, 822 F.2d at 1407-08.

33 103 S.Ct. 3330, 3333 (1983) (applying the history and tradition test promulgated in *Marsh v. Chambers* to the graduation prayer issue for the first time).

34 *Stein*, 822 F.2d at 1410. *Stein*'s approach to deciding the validity of school prayer based on content of the prayer has been criticized for two reasons. First, courts should not focus on whether the prayer contains religious words, but on whether the prayer itself is constitutionally permissible. *Id.* at 1411-12 (Wellford, J., dissenting). Second, prohibiting controversial speech before it is spoken is a prior restraint. *Id.*; *see also* Ken Jorgensen, *Making Prior Restraint an Enforcement Tool of the Establishment Clause:* Stein v. Plainwell Community Schools, 1989 B.Y.U. L. REV. 305-17 (1989).

35 *Stein*, 822 F.2d at 1409.

2. Upholding graduation prayer

Jones v. Clear Creek Independent School District[36] is one of the leading cases on school prayer and represents the current rule in the Fifth Circuit. In *Jones II*, the traditional graduation invocations and benedictions were challenged since they contained overt Christian references.[37] The court used the *Lemon* test to analyze the case. The court found that the secular purpose prong was satisfied, since prayer can be used to solemnize an event.[38] The court used the arguments of early cases to pass the primary effects test: the prayers were brief, students only experienced the prayer once in four years, and the parents' presence decreased the impact of coercion by peers or school officials.[39] Finally, no excessive entanglement was found since students offered the prayers, not clergy.[40] Having met all three prongs of the *Lemon* test, the court held the school's practice of having prayers at graduation constitutional.[41]

Although *Albright v. Board of Education of Granite School District*[42] also found that graduation prayer satisfied the *Lemon* test, one significant facial difference distinguished it from *Jones II*, *Stein*, or any of the earlier cases. School officials did not "control, regulate or preapprove [sic] the content of speech or expression by any participant."[43] Students were counseled to speak in terms that represent and respect diverse views.[44] Conversely, *Jones II* required some sort of monitoring to ensure prayers were non-proselytizing in content.[45]

In *Albright*, the school had no "police power" to ensure prayers were not proselytizing, since they could not monitor content. Students were encouraged to be sensitive to others'

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36 930 F.2d 416 (5th Cir. 1991), *cert. granted*, 112 S. Ct. 3020, *reh'g denied*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993) [hereinafter *Jones II*].

37 *Id.*

38 *Id.* at 422.

39 *Id.*

40 *Id.* (noting that the school district did not decide who gave the prayer, but it did pre-screen prayers for "sectarianism and proselytization").

41 *Id.*

42 765 F. Supp. 682, 684 (D. Utah 1991).

43 *Id.*

44 *Id.*

45 *Jones*, 977 F.2d at 964 n.1.

beliefs, and the school officials and district played a completely neutral role.[46]

3. Graduation prayer held unconstitutional

In *Graham v. Central Community School District of Decatur*[47], the district had Christian ministers give invocations and benedictions at high school graduation for over twenty years. The school board decided to continue the practice despite the plaintiff's grievances that the practice personally offended him.

Eventually, these graduation prayers were held unconstitutional on grounds that they failed the secular purpose prong and the primary effects prong of *Lemon*: "the invocation and benediction portions of the defendant's commencement exercises serve a Christian religious purpose, not a secular purpose."[48] This conclusion is "supported not only by the great weight of the evidence . . . but by the undeniable truth that prayer is inherently religious."[49] Invocations and benedictions were held to have the primary effect of advancing the Christian religion.[50] In *Graham*, the court never reached the excessive entanglement prong because its rulings on the first two prongs were dispositive.[51]

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46 The school board policy did not require benedictions or invocations, and the students had substantial input into the program. *Albright*, 765 F. Supp. at 684-85 n.4.

47 608 F. Supp. 531, 532-36 (D. Iowa 1985).

48 *Id.* at 535.

49 *Id.*; *see id.* at 535-36 (further quoting Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982), which held that

> [p]rayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people . . . . [it] is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object. . . . [t]hat it may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise).

50 *Graham*, 608 F. Supp. at 536. The court never points to which facts in the case it uses to draw this conclusion. Rather, it draws a legal conclusion by comparing the case in question to *Hall v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981). *Hall*, after analyzing printed prayers on official state maps, held that "a prayer, because it is religious, does advance religion, and the limited nature of the encroachment does not free the state from the limitations of the Establishment Clause." *Id.*

51 *Graham*, 608 F. Supp. at 536.

After finding that the *Lemon* test had not been met, the court in *Graham* considered other miscellaneous arguments to buttress its conclusion. First, it rejected the school board's use of *Lynch*, since that case "did not involve any religious exercise like prayer at a public government function."[52] The court placed great importance on the distinction between public prayer and Christmas displays. Second, the court criticized the early cases for placing too much emphasis on voluntary attendance at graduation.[53] Finally, when the school board tried to compare its prayers to those upheld in *Marsh*,[54] the court distinguished the two cases. The court considered the *Marsh* decision as "a singular Establishment Clause decision that rests on the 'unique history' of legislative prayer, and the holding of that case is clearly limited to the legislative setting."[55]

The facts in *Lundberg v. West Monona Community School District* are different from other graduation prayer cases.[56] The school board voted against including high school graduation invocations and benedictions.[57] The plaintiff, an ordained minister who was going to give the graduation prayer, sued to force the school district to reverse its decision.[58] The court held that the practice of permitting graduation prayers failed two prongs of *Lemon* for reasons similar to *Graham*.[59]

Lundberg adds two new arguments to the cumulative graduation prayer jurisprudence. First, methods other than prayer can be used to solemnize graduations.[60] This argument implies that the least offensive means should be used to solemnize graduations.[61] For example, a song or reading Shakespeare.[62]

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52 *Id.*

53 *Id.* at 536-37.

54 *Id.* at 535.

55 *Id.* at 535. The court reasons that *Lemon* is used both before and after *Marsh*, which illustrates its post-*Marsh* viability.

56 731 F. Supp. 331 (N.D. Iowa 1989).

57 *Id.* at 334-35. The primary motive for the vote was the risk of personal liability from possible suits brought under the Establishment Clause.

58 *Id.*

59 *Id.* at 341-47. The excessive entanglement prong was not analyzed because it was not argued.

60 *Id.* at 342-43.

61 *Id.*

62 *Id.*

Second, the court presents a test to deal with conflicts between constitutional rights. A balancing test should be used "to maximize . . . the overall measure of the fundamental rights created by the framers, by deciding which course of action will lead to the lesser deprivation of those rights."[63] In this case, the free speech right to have prayer must be weighed against the possible Establishment Clause infringements.[64] The court held that the school board's right to ban prayers and the Establishment Clause's impact on all the graduating seniors who would be forced to listen to prayers outweighed the free speech rights of the four plaintiffs to hear the prayer. A lesser deprivation of rights resulted in banning graduation prayers in this case.[65]

C. *Summary of* Lee v. Weisman

The split in the lower courts and the mixed applications of the *Lemon* test prompted the Supreme Court to grant certiorari to *Lee v. Weisman.* Many thought that this case would rid the courts of the *Lemon* test and clarify the law for graduation prayer cases.

1. *The facts of* Weisman

A middle school principal in Providence asked a local rabbi to give the invocation and benediction at graduation.[66] Principals in Providence, Rhode Island were permitted to invite clergymen to offer invocations and benedictions at middle and high school graduation ceremonies.[67] Invited clergy were given pamphlets, which contained guidelines for public prayers at civic occasions.[68] During the ceremony, the students sat together, apart from their families.[69] The students stood for the Pledge of Allegiance and remained standing during the Rabbi's prayer.[70] In each instance, the

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63 *Id.* at 347 (quoting Bender v. Williamsport Area Sch. Dist., 741 F.2d 538, 539 (3d Cir. 1984)).

64 *Id.*

65 *Id.* Under this analysis, the court may have come out the other way if the students had voted for invocations and benedictions, since their cumulative rights may have outweighed infringements to the plaintiffs.

66 *Id.*

67 Lee v. Weisman, 112 S. Ct. 2649, 2652-54 (1992).

68 *Id.*

69 *Id.*

70 *Id.*; *cf.* Harris v. Joint Sch. Dist. No. 241, 821 F. Supp. 638 (D. Idaho

prayer was less than a minute in length and attendance at the ceremonies was voluntary.[71]

Daniel Weisman, a student's father, brought suit in his capacity as a taxpayer and on behalf of his daughter to prohibit graduation prayers.[72] In a close decision, the Supreme Court held in a five-four decision that the prayers violated the Establishment Clause.

2. *Analysis of the Court's holdings*

Weisman promulgated a new Establishment Clause test and eliminated several graduation prayer arguments. The Court rejected the voluntary attendance, de minimis infringement, and free speech arguments and introduced the coercion test.

Under *Weisman*, the coercion test has three parts: (1) the government directs (2) a formal religious exercise (3) in such a way as to obligate the objectors either directly or indirectly to participate.[73] The Court reasoned that the principal, a state official, directed the exercise, since he selected who would give the prayer.[74] The principal also directed the prayer's content by giving the Rabbi guidelines for his prayer.[75] The Court's opinion that prayer is a religious exercise is more conclusory than analytical, and stems from the premise that prayers are inherently religious.[76] Students' coerced participation was comprised of being forced

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1993) (noting that students did not stand and that they were not forced to participate in any way).

71 *Weisman*, 112 S. Ct. at 2652-54.

72 *Id.*

73 *Id.* at 2655; *see also* Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring); Jones v. Clear Creek Indep. Sch. Dist, 930 F.2d 416 (5th Cir. 1991), *cert. granted*, 112 S. Ct. 3020, *reh'g denied*, 977 F.2d 963, 970 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

74 *Weisman*, 112 S. Ct. at 2655.

75 *Id.* at 2656.

76 *Id.* Other courts have analyzed the secular and religious purposes of prayer. *See* Lundberg v. West Monona Community Sch. Dist., 731 F. Supp. 331 (N.D. Iowa 1989); Graham v. Central Community Sch. Dist. of Decatur, 608 F. Supp. 531 (S.D. Iowa 1985). Common sense tells us that normally prayer is a religious exercise. However, the Court provides no basis, even if it is common sense, for determining how they arrived at this conclusion.

This approach does prevent those advocating prayer from trying to create fictions for justification. It is ironic that under the *Lemon* test, those seeking invocations and benedictions at special ceremonies must prove that prayer is secular. *See infra* note 144 and accompanying discussion on duality.

to stand during the prayer or at least remain respectfully silent.[77]

It is worthy to note that this coercion analysis only applied to the students and not to the adults present.[78] The Court does not answer the question of whether the rights of "mature adults" would be violated in the same circumstances.[79]

Given the opportunity to ban all graduation prayers, the Court declines. Instead, the Court reiterates the fact-sensitivity of Establishment Clause issues.[80] The Court further stated, "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive."[81] With this open door and factual-sensitivity in mind, it is important to review what arguments *Weisman* eliminated since those not eliminated may still be valid.

First, the Court rejected the voluntary attendance argument, since "graduation is one of life's most significant occasions."[82] The importance of the event is the source of the indirect coercion.[83] Individuals who normally would not participate in the formal religious exercise of prayer are forced to participate or forego attending their own graduation.[84]

Second, the Court refuses to accept that the embarrassment and intrusion caused by prayers is de minimis in character.[85] The Court rejected this argument by holding that time cannot measure the intrusion upon one's fundamental rights.[86]

Third, *Weisman* is factually distinguishable from the history and tradition test in *Marsh*. The Court reasoned that

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77 *Weisman*, 112 S. Ct. at 2658.
78 *Id.* at 2658-59.
79 *Id.*
80 *Id.* at 2661.
81 *Id.*
82 *Id.* at 2659.
83 *Id.*
84 *Id.*
85 *See* Grossberg v. Deusebio, 380 F. Supp 285, 291 (E.D. Va. 1974). *But see* Graham v. Central Community Sch. Dist. of Decatur, 608 F. Supp. 531, 533 (S.D. Iowa 1985) (rejecting the *Grossberg* analysis in favor of *Graham*'s analysis).
86 *Weisman*, 112 S. Ct. at 2659.

> [t]he considerations we have raised in objection to the invocation and benediction are in many respects similar to the arguments we considered in *Marsh*. But there are also obvious differences. The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*.[87]

Finally, the school argued that prayer is protected under the First Amendment as free speech. "[O]ur constitutional vision of a free society requires confidence in our own ability to accept or reject ideas of which we do not approve, and that prayer at a high school graduation does nothing more than offer a choice."[88] According to the Court, this argument overlooks fundamental constitutional dynamics.[89] Free speech envisions full expression even when the government participates.[90] However, the government should not be a prime participant in religious debate and expression.[91] In fact, the Establishment Clause was created to prevent such interaction.[92] There is no equivalent counterpart in free speech.[93] The Establishment Clause concern is that what might begin as tolerance of religious views may end in indoctrination and coercion policies.[94]

3. *Issues left uncertain*

The *Weisman* opinion narrowly focused on the specific facts of the case. Many questions were not answered. For example, what if the students, rather than the school dis-

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87 *Id.* at 2660.

88 *Id.* at 2657 (recognizing that, by graduation, high school seniors have been exposed to distasteful or immoral ideas).

89 *Id.*

90 *Id.* Sometimes the very objective of free speech is to persuade the government to adopt an idea or course of action. Thus, free speech exchange with the government as a participator is essential.

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.* at 2658 (further stating that "a state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed").

trict, chose to have a graduation prayer?[95] How much infringement on individual rights is caused by the school district paying for the facilities where graduation is held and where invocations and benedictions are given? Does a parent's presence at graduation have any mitigating impact? Should the *Lemon* test apply and how much weight should courts give to it in the future?[96]

III. BACKGROUND OF *HARRIS V. SCHOOL DISTRICT NO. 241*

Harris v. School District No. 241 was litigated before *Lee v. Weisman*.[97] Although the plaintiffs' and intervenors' motions for summary judgment were fully briefed and argued, the court deferred judgment pending the outcome of *Weisman*.[98] After *Weisman* the plaintiffs filed to reopen the proceedings and conduct further discovery.[99]

A. Facts of Harris

The senior class of Grangerville High School voted by written ballot to have an invocation and benediction given by a student at their graduation.[100] The school district's

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95 *See Albright*, 765 F. Supp. at 684. *Weisman*'s ambiguity leaves one to wonder about many things.

96 All five federal cases prior to *Weisman* applied the *Lemon* test. Three cases passed the test while two failed. However, there are factual differences between the cases. In both *Albright* and *Jones*, students both decided to have prayer and offered the prayer; whereas, in *Lundberg* and *Graham*, the school district decided whether or not to have the prayers.

97 Harris v. Joint Sch. Dist. No. 241, 821 F. Supp. 638 (D. Idaho 1993).

98 *Id.*

99 *Id.*

100 Defendant's Statement of Facts 2 (Apr. 23, 1993). The senior class makes decisions regarding their graduation program at class meetings. Such decisions are made with or without administrators being present. For example, the principal Judy Leuck did not attend the first meeting at which the students passed out ballots for voting. However, she did attend the second meeting, but did not handle any of the business at the meeting. *Id.* Ballots regarding the prayer issue were, however, prepared by the principal and, following the vote, were collected and stored by the school administration. Plaintiff's Reply Mem. and Statement of Uncontested Facts Supp. Summ. J. and Injunctive Relief, at 10 (Apr. 30, 1993) [hereinafter Reply].

Students make decisions by voting and "students tally any ballots passed out regarding high school graduation." *Id.* For example, senior class members decide which board members or other persons will present diplomas. Although every element of the high school graduation is not "voted on," students can choose to change any element of the traditional graduation program. For example,

policy is to remain strictly neutral regarding student initiated invocations and benedictions at graduation ceremonies.[101] The principal did not pre-approve graduation speeches or prayers. However, she did encourage those speaking and praying to write down their thoughts in order to polish their presentation.[102] The student giving the prayers did not give the principal a copy of his text.[103] In fact, when giving the prayer, he did not use a text.[104] At the graduation, no one was asked to participate in the prayers by standing, bowing heads, or removing hats.[105]

Plaintiffs, a mother suing on behalf of herself as a taxpayer and her three children who attended school in the district, sought injunctive and declaratory relief.[106] A group of Grangerville students successfully intervened. These students moved for summary judgment on the grounds that the school district was neutral, and the students' decision to have prayers did not amount to state intervention.[107]

> the students could decide that no music be played, that the national anthem not be played, that there not be a printed program, that there not be a speaker, or the students could decide to completely change the sequence of graduation and who presents diplomas. The fact that the students may not in a given year vote on each and every procedure does not in any way affect the senior class students' opportunity to decide these issues.

Id. at 10.

101 Defendant's Statement of Facts, at 4. This policy has not changed in the last 15 years. The superintendent sent a memo to all district principals in November of 1990 to reinforce the policy of neutrality. This memo did not change the way graduation was handled at Grangerville High School. The only procedure that changed in 1991 was that votes were on written ballots. Previously, they were made by straw polls, hand polls, or some other kind of polling of the senior class. This procedural change was made due to concern over possible lawsuits.

102 *Id.* at 5. *But see* Reply, at 6 (noting that "Principal Leuck admitted suggesting sensitivity and asking Heath to write his prayers down prior to graduation . . . . Class president Mike Emerson's recollection is that Leuck wanted to review the prayers prior to graduation and Leuck testified that she 'decided not to make an issue of it.'").

103 *Id.* Not writing down the prayer and not giving the principal a copy of the prayer did not prevent Mr. Heath from giving the invocation or benediction.

104 Defendant's Supplemental Bd. Opp'n Summ. J., at 14 (Apr. 23, 1993).

105 Defendant's Statement of Facts, at 5.

106 Complaint, at 2 (Apr. 11, 1991).

107 Intervenors' Supplemental Ba. Supp. Mot. Summ. J. (Apr. 8, 1993); *see also* Harris v. Joint Sch. Dist. No. 241, 821 F. Supp. 638, 638-40 (D. Idaho 1993).

B. The Court's Analysis in Harris

By focusing on the fact-sensitivity of the Establishment Clause issues, *Harris* upheld graduation prayers under the *Lemon* test.[108] The court was hard pressed to find state involvement since the school's involvement did not even begin to approach the level of *Weisman*.[109] Since the students were free to decide whether to have prayers, the mere presence of faculty and administrators did not constitute state involvement.[110] This logic helped to dismiss entanglement problems under *Lemon*. The court was also reluctant to invalidate graduation prayer in light of the decision upholding such prayers in *Jones II* and the Supreme Court's hesitation to ban graduation prayers outright in *Weisman*.[111] Besides these arguments, little else is used to support the court's opinion. The court also refers to issues of whether schools endorsed the prayer, but this concern is not sufficiently developed to effectively discuss here.[112]

IV. COMMENTARY ON *HARRIS*

This Note assumes the accuracy of the following four premises. First, two distinct tests have come out of the Court's ruling in *Weisman*: the *Lemon* test and the coercion test.[113] However, *Weisman* emphasized that each Establish-

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108 The court never specifically mentions *Lemon* or the endorsement test in its conclusion, but the language used is similar to such tests used in Defendants' brief and *Jones*.

109 *Harris*, 821 F. Supp. at 643.

110 *Id.* at 643 (quoting Bd. of Education v. Mergens, 496 U.S. 226 (1990)). *But see* Grossberg v. Deusebio, 380 F. Supp 285 (E.D. Va. 1974).

111 *Harris*, 821 F. Supp. at 643.

112 The endorsement test has never been accepted by a majority of the Court. Justice O'Connor first introduced an endorsement test in Lynch v. Donnelly, 465 U.S. 668, 688-89 (1983) (O'Connor, J., concurring) (upholding a city's practice of owning and displaying a nativity scene during the Christmas season). In *Weisman*, the majority took no opinion on the endorsement test, but the four dissenters found no endorsement on the facts of the case. *See* Lee v. Weisman, 112 S. Ct. 2649, 2683-84 (1992) (Scalia, J., dissenting); *see also* Jones v. Clear Creek Indep. Sch. Dist, 930 F.2d 416 (5th Cir. 1991), *cert. granted*, 112 S. Ct. 3020, *reh'g denied*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993). Although the *Harris* case mentions endorsement, it is unclear whether it is attempting to apply this test. *See Harris*, 821 F. Supp. at 643. However, if it is applying endorsement, it is probably following the *Jones II* analysis since this test was proposed by the defendant. *See* Defendant's Supplemental Ba. Opp'n Summ. J., at 14-16 (Apr. 23, 1993).

113 Apparently the application of *Marsh* to graduation prayer did not survive *Weisman*. Although Scalia did not want it so, the majority factually distinguished

ment Clause case is fact-sensitive.[114] Thus, neither test is controlling, though coercion has current favor. Second, assertion of the arguments specifically rejected in *Weisman* will prove dispositive against the party making the assertion. Third, only three graduation prayer cases have been decided since *Weisman*.[115] In addition, *Jones II* and *Harris* are sufficiently similar in their facts to justify comparison.[116] *Jones II* is also the only post-*Weisman* appellant decision. Fourth, the endorsement test has not been accepted by a majority of the Court, so no analysis will be necessary here.[117]

A. The Coercion Test

As previously stated, the coercion test in *Weisman* requires three prongs to establish coercion: (1) the government directs (2) a formal religious exercise (3) in such a way as to obligate the objector to participate.[118]

Marsh.

114 *Weisman*, 112 S. Ct. at 2261.

115 *See* Jones v. Clear Creek Indep. Sch. Dist, 930 F.2d 416 (5th Cir. 1991), *cert. granted*, 112 S. Ct. 3020, *reh'g denied*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993); Harris v. Joint Sch. Dist. No. 241, 821 F. Supp. 638 (D. Idaho 1993); Griffith v. Teran, 807 F. Supp. 107, 108 (1991) (omitting *Weisman* mort). *Teran* omits the *Weisman* analysis, perhaps because *Teran* commenced first—*Teran* was, however, stayed pending the outcome of *Weisman*. Subsequent to the Court's decision in *Weisman*, the parties to *Teran* agreed that the practices in question violated the Establishment Clause. Thus, there was no subsequent analysis to help us in our study.

116 In *Jones II*, the students, not the school district, chose to have prayer at graduation. A student, not a member of the clergy, was to give the prayer. These same two facts were present in *Harris*. There is one major factual difference between these two cases. The prayers in *Jones II* were reviewed by the district to ensure that they were nonsectarian. Conversely, in *Harris*, the school district remained neutral by not monitoring prayer content. While non-monitoring as in *Harris* increases a school district's neutrality, it also increases the risk of the resulting prayer being sectarian or proselytizing.

117 *See supra* note 113 and accompanying text. The endorsement test is very similar to the primary effects prong of *Lemon*. Although there are differences, an endorsement analysis under *Harris* would be redundant and not terribly meaningful.

118 Lee v. Weisman, 112 S. Ct. 2649, 2656 (1992); *see also* Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring); Jones v. Clear Creek Indep. Sch. Dist, 930 F.2d 416 (5th Cir. 1991), *cert. granted*, 112 S. Ct. 3020, *reh'g denied*, 977 F.2d 963, 966-68 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

1. Did the government direct the graduation prayer?

In *Weisman*, the principal directed the graduation prayer. He decided to have a prayer, selected the Rabbi to give the prayer, and regulated the contents of the prayer.[119] In *Harris*, plaintiffs argued that the school district and principal directed the prayer. The principal asked the student offering the prayer to put his prayers in writing and counseled him to be "sensitive."[120] The principal also prepared and stored the voting ballots used by the seniors.[121] Finally, the graduation program, which included references to the invocation and benediction, were printed in the newspaper at the principal's direction.[122]

However, the facts in *Harris* are distinguishable from those in *Weisman*. In *Weisman* the principal directed the graduation prayers. Whereas in *Harris*, the principal's involvement is clearly incidental. She had no control over the contents of the invocation and benediction. Even if she tried to exercise some degree of influence by telling the student to write down his thoughts, following her advice was not a condition to his giving the prayer. In fact, he ignored her advice and gave the prayers the way he wanted.[123]

Although the principal prepared the ballots, she did not make the decision. The senior class voted by ballot and counted the votes. The decision of whether or not there would be invocations and benedictions at graduation rested in the hands of the senior class. They could have decided not to have the prayers as prior and subsequent classes did.[124]

Absolute separation is impossible.[125] Some relationship between government and religion is inevitable. The issue is

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119 *Weisman*, 112 S. Ct. at 2652-54.

120 Plaintiff's Supplemental Mem. Supp. Injunction and Summ. J., at 3 (Apr. 9, 1993).

121 Reply, at 10.

122 *Id.*

123 Defendant's Supplemental Ba. Opp'n Summ. J., at 14 (Apr. 23, 1993).

124 The senior class voted to have school prayer at 1991 graduation. In 1990, they chose to have a musical number as a benediction rather than a prayer. The Class of 1993 voted to have a moment of silence.

125 Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (declaring that "[o]ur prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. . . . [s]ome relationship between government and religious organizations is inevitable"); *see also* Zorach v. Clauson, 343 U.S. 306, 312 (1952).

whether the government has crossed the line from tolerance of religious activity to directing the religious exercise. In *Harris*, the school district had its agent, the principal, take a strictly neutral position. They did not make any decisions regarding the contents of the invocations or benedictions. The school encouraged voting by secret ballot to reduce the peer pressure associated with hand polls. If the vote had been by hand poll, without the presence of the principal, the minority would have been subject to a greater coercive force. Claims that preparing the ballots represent direction or endorsement by the school is attenuated at best. Encouraging such a process shows sensitivity to the issue.

Once the students decided to have a graduation prayer, the district took a second step to ensure its neutrality. Since the students voted, the students had actual knowledge that they, not the district, decided to have the invocation and benediction. However, the district put a disclaimer in the program, which was published in the local newspaper, to cure any public misperception of official endorsement.[126]

2. Are invocations and benedictions formal religious exercises?

Jones II is the only case on record that purports to analyze the question of whether offering an invocation or benediction is a formal religious exercise, but the attempt is rather superfluous.[127] The court never defines "formal religious exercise." It simply reiterates the logic of the government-directs prong, and holds that the district's policy only tolerates and does not direct prayers.[128]The school district

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126 Harris v. Joint Sch. Dist. No. 241, 821 F.Supp. 638, 642 (D. Idaho 1993). The disclaimer states that:

> [t]he 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.

127 Jones v. Clear Creek Indep. Sch. Dist, 930 F.2d 416 (5th Cir. 1991), *cert. granted*, 112 S. Ct. 3020, *reh'g denied*, 977 F.2d 963, 971 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

128 *Jones*, at 963 ("Lee directed Rabbi Gutterman to pray, and the Court Characterized this as a 'formal religious observance' . . . . By contrast, the Resolution tolerates nonsectarian, mit prayer, but does not require or favor it.").

in *Harris* followed this same reasoning by claiming that they simply tolerated and did not direct the prayer.[129] However, unlike *Jones II*, the district court recognized the ambiguity of this prong. They raised concerns over how far the court would go in determining what is a formal religious exercise.

Plaintiffs claimed that *Harris* is clearly distinguishable from *Jones II* due to the religious content of the prayer.[130] Although prayers are normally considered religious,[131] this does not answer the question of whether such prayers constitute a "formal religious exercise." Arguably, this case is distinguishable from *Weisman* since a student, not an ordained member of the clergy, gave the invocation. However, this distinction poses several new questions unanswered by *Weisman*. Do student prayers count as a "formal religious exercise?" Would student invocations count if they were nonsectarian and non-proselyting?[132] There is no case law to support an argument either way.

Theoretically, Establishment Clause cases could stand or fall on whether certain activities constitute "formal religious exercises." However, analyzing whether prayer constitutes a "formal religious exercise" creates such a quagmire that courts will probably focus on the other two coercion prongs.[133]

3. *Are objectors obligated to participate?*

Harris implicitly argues that the students' age and the government's noninvolvement mitigate the coercive effect of the prayers. This approach is similar to *Jones II*.[134] The

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129 Defendant's Supplemental Ba. Opp'n Summ. J., at 17 (Apr. 23, 1993) ("The School District in this case *allows* for prayer *but does not require or favor it* given the record before this court which allows for non-prayer alternatives." (emphasis added)).

130 Reply, at 4 ("In *Jones v. Clear Creek*, a student led invocation was allowed, but the invocation was not a prayer and was nonsectarian and non-proselytizing.").

131 *See supra* note 48 and accompanying text.

132 Plaintiffs seem to imply that such prayers would count. *See* Reply, at 4.

133 *See, e.g.*, Jones v. Clear Creek Indep. Sch. Dist, 930 F.2d 416 (5th Cir. 1991), *cert. granted*, 112 S. Ct. 3020, *reh'g denied*, 977 F.2d 963, 971 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993); *see generally* Harris v. Joint Sch. Dist. No. 241, 821 F. Supp. 638, 640-42 (D. Idaho 1993).

134 *See Jones II*, 977 F.2d at 971. The court uses two arguments to mitigate the coercive effects of the prayers. First, less psychological pressure was placed on

Harris argument is supported by *Westside Community Board of Education v. Mergens*, which stated that

> there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support students' speech that it merely permits on a nondiscriminatory basis.[135]

This does not directly address the obligation to participate prong. In fact, this approach makes the participation prong dependant upon the government-directs prong. If the school directs the prayer, then the students' participation is essentially obligated. This argument is better placed with the government-directs prong and should be kept separate from the participation prong. The voluntary attendance argument would directly address the participation prong, but it did not survive *Weisman*.[136]

The argument that the students' age and maturity reduces coercion more directly addresses the participation prong. However, this argument has two major defects. First, age and maturity only move a case from sure failure to an area of uncertainty. Second, the *Weisman* Court specifically considered the age of students in determining the degree of coercion.[137] The court specifically separated secondary stu-

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the students because "*after having participated in the decision of whether prayers will be given*, [all students] are aware that any prayer represents the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy." *Id.* (emphasis added). This argument will probably fail under the Supreme Court's reasoning since the Court claims "adolescents are often susceptible to pressure from *their peers* towards conformity and that the influence is strongest in matters of social convention." Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992) (emphasis added).

Second, the court considers the students' age is relevant as to whether the prayer will have a coercive effect. Graduating seniors are "less impressionable than younger students." *Jones II*, 977 F.2d at 971.

Although there is validity to these arguments, *Jones II* focuses on the government's coercive involvement rather than on whether individuals are obligated to participate.

135 *Harris*, 821 F. Supp. at 643 (quoting Westside Community Bd. of Educ. v. Mergens 496 U.S. 226, 250 (1990)).

136 Neither *Harris* nor *Jones II* argued voluntary attendance.

137 *Weisman*, 112 S. Ct. at 2658-59, in which Justice Kennedy's majority opinion stated that:

dents as being more susceptible to pressure to participate.[138] Whether this means graduating seniors, most of whom are legally adults, are susceptible to pressure to participate is not certain since *Weisman* involved a middle school, not a high school.[139]

Although not used in either the *Jones II* or *Harris* courts, a stronger argument is that students were not obligated to participate in the prayer. "No one in attendance at graduation at Grangerville High School in 1991 was asked to participate in the invocation [or the] benediction by standing, bowing their heads or removing their hats."[140] If individuals did not actually participate, how can they claim coercion for something they did not do? Arguably, others around them may have bowed their heads, took off their hats, or folded their arms, which may have created an embarrassing environment when they did not act likewise. But does this constitute participation, if they did not follow the lead of those around them? The threshold is unclear.[141] The participation prong seems to rest on the pressure to participate rather than on any actual participation.

B. Lemon *Applied to* Harris

Every graduation prayer case, except *Weisman*, used the *Lemon* test somewhere in its analysis. Although the test has

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> Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.

Weisman focuses on whether the students were coerced to participate, not on whether the adults were coerced. This implies that the coercion standard for the adults may be different.

138 *Id. But see* Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990)) (holding that secondary students are mature enough to understand that the school does not support or endorse other students' religious speech, but merely permits it).

139 For example, the age deadline to start school in Idaho requires the child to be five years old by late August. This means that only the students whose birthdays fall in June, July, and early August will not be 18 by the time they graduate.

140 Defendant's Statement of Facts, at 5 (Apr. 23 1993).

141 In *Weisman*, standing during prayer and remaining respectfully silent were considered to be coercive. *Weisman*, 112 S. Ct. at 2658. It is unclear whether remaining respectfully silent, by itself, constitutes participation.

been criticized as unworkable and impracticable, an analysis of the graduation prayer issue would not be complete without it. To satisfy the *Lemon* test, graduation prayer must satisfy three prongs. The government practice must: (1) reflect a secular purpose; (2) have the primary effect of neither advancing nor inhibiting religion; and (3) avoid excessive governmental entanglement with religion.[142]

Most courts skim over the secular purpose prong very quickly. The issue is always the same and very simple. Does the activity have a secular purpose? Prayer serves the secular purpose of solemnizing a meeting or event. However prayer also has a religious purpose.[143] Practically speaking, resolving this prong depends on how the court decides the primary effects prong. No graduation prayer case has failed the secular purpose prong after satisfying the primary effects prong.[144] Conversely, no case failing the primary effects prong has ever satisfied the secular purpose prong.

This primary effects test prohibits the school district's policy, not the graduation prayers, from advancing or inhibiting religion.[145] For many courts this is the focus of their analysis.[146] In *Harris*, the school district's policy of remaining strictly neutral on graduation prayers passes the primary effects test.[147] The strongest argument against neutral

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142 *Weisman*, 112 S. Ct. at 2654.

143 No court in analyzing this prong has considered the dual nature of prayer. In various religions throughout the world, prayer means a variety of things. Prayer can serve both secular and religious purposes. For one person, prayer can solemnize the beginning of an important meeting; whereas, for another person, the same prayer will offer religious meaning.

Christmas celebrations illustrate this duality. *A*, *B*, and *C* tell their boss, "I am going home to celebrate Christmas." For *A* this means presents, candy, and Santa Claus (a clause not found in the First Amendment). For *B* Christmas means reading the story of Jesus and emulating him by sharing gifts with family, friends, and neighbors. For *C* Christmas means all of the above.

Classifying invocations and benedictions as being purely secular or religious is overly simplistic. The words can mean different things to different people in the same audience.

144 *See, e.g.*, Lundberg v. West Monona Community Sch. Dist., 731 F. Supp. 331, 342-345 (N.D. Iowa 1989); Graham v. Central Community Sch. Dist. of Decatur, 608 F. Supp. 531, 535-536 (S.D. Iowa 1985).

145 Both *Lundberg* and *Graham* tend to focus on the religious nature of prayers, rather than if the school district sponsored or endorsed the prayers. *See Lundberg*, 731 F. Supp. at 343-44; *Graham*, 608 F. Supp. at 536.

146 *See, e.g.*, *Lundberg*, 731 F. Supp. at 343-45; *Graham*, 608 F. Supp. at 536.

147 *See* Jones v. Clear Creek Indep. Sch. Dist, 930 F.2d 416 (5th Cir. 1991), *cert. granted*, 112 S. Ct. 3020, *reh'g denied*, 977 F.2d 963, 964 n.1 (5th Cir. 1992),

policy is that allowing prayers creates ostensible official endorsement problems.[148] The *Harris* facts mitigate ostensible endorsement with actual and constructive notice of no endorsement. First, since the students voted, they had actual knowledge of who decided to have the prayers.[149] Second, the district gave constructive notice through a disclaimer on the program, which was previously printed in the newspaper.[150] Such notice should clear up public and student misperceptions about the district's policies towards graduation prayers.

The excessive entanglement prong does not add much to the analysis above.[151] The rabbi who wrote and delivered the prayers at the direction of the principal made this prong relevant to *Weisman*. However, in *Harris* the district's neutrality policy and having prayers given by students frees the district from all involvement with religious institutions.[152]

V. CONCLUSION

The Court in *Weisman* could have banned all prayers at high school graduations. However, it chose not to do so.

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cert. denied, 113 S. Ct. 2950 (1993) (holding that the school district's policy of leaving graduation prayers to the students' discretion did not have the effect of endorsing or inhibiting religion). *But see Lundberg*, 721 F. Supp. at 335 (plaintiff suing to compel school board to include prayers at graduation); *Graham*, 608 F. Supp. at 533 (indicating that school board's decision to have prayers at commencement had the effect of advancing religion). Note that prayers were upheld where the board was neutral, but not where the board was active. Since the school district in *Harris* was neutral, it would likely pass the primary effects test.

148 The litmus test for the primary effects prong is whether the activity "could be seen as lending the imprimatur of government to a particular view of religion." For example, printing a "motorist prayer" on an official state map violated the primary effects test under this litmus test. *Graham*, 608 F. Supp. at 536.

149 Remember that the Court is concerned about the students, not the adults, being coerced by the school district. Lee v. Weisman, 112 S.Ct. 2649, 2658-59 (1992).

150 *Harris*, 821 F. Supp. at 2658-59. Constructive notice is supported by Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 270 (1990) (Marshall & Brennan, JJ., concurring in the judgment).

151 Plaintiffs in *Graham* and *Lundberg* never argued excessive entanglement. Accordingly, the courts never analyzed the issue; *cf.* Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337, 340-42 (1986) (arguing for the removal of the excessive entanglement prong).

152 *Cf.* Jones v. Clear Creek Indep. Sch. Dist, 930 F.2d 416 (5th Cir. 1991), *cert. granted*, 112 S. Ct. 3020, *reh'g denied*, 977 F.2d 963, 968 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

Instead it preferred to reiterate the importance of line drawing. *Harris* clearly is distinguishable from *Weisman*. The more important question is whether those distinctions allow *Harris* to be on the safe side of the Supreme Court's line.

Harris does not use any of the pre-*Weisman* arguments that were struck down by the Court. *Harris* passes the coercion and the *Lemon* tests promulgated by the Supreme Court. The key reasons it passed are the complete neutrality of the school district and the students' freedom to choose. *Jones II*, the only other case on record comparable to *Harris*, supports this analysis and conclusion. *Harris* is a landmark case illustrating that graduation prayers are alive and well so long as graduating seniors have a real choice in deciding whether to include prayers and who should give them.

Robert Phillips