Golden Gate University Law Review

Volume 23
Issue 2 *Notes and Comments*

Article 4

January 1993

# Lee v. Weisman: A New Age for Establishment Clause Jurisprudence?

Elizabeth Barker Brandt

# *LEE v. WEISMAN*: A NEW AGE FOR ESTABLISHMENT CLAUSE JURISPRUDENCE?*

ELIZABETH BARKER BRANDT**

## I. INTRODUCTION

The Supreme Court's most recent opinion in the area of the Establishment Clause, while purporting not to question existing precedent, injects a new standard — coercion — into the requirements for proving an Establishment Clause violation. In the majority opinion in *Lee v. Weisman*,[1] Justice Kennedy, joined by Justices Blackmun, Souter, O'Connor and Stevens, ostensibly declined to overrule *Lemon v. Kurtzman*,[2] the touchstone of the Court's modern Establishment Clause jurisprudence. Surprisingly, however, other than declining to reconsider *Lemon* and mentioning the case in the context of reviewing the holdings of the lower courts, Justice Kennedy never again cited *Lemon* in his opinion. He did not undertake an identifiable analysis or application of the three elements of the *Lemon* test.

In a concurring opinion, Justice Blackmun engaged in a traditional application of *Lemon*. Justice Souter analyzed and adopted the historical interpretation which underlies *Lemon* in a

---

* An earlier draft of this paper was presented at the annual convention of the National Organization of Legal Problems in Education in Orlando, Florida, November 20-22, 1991. In addition, a small portion of this article was previously published in Elizabeth Barker Brandt and Alan Kofoed, *Does the Camel Have His Nose in the Tent? Individual Religious Freedom v. Prayer in Public Schools*, 34 THE ADVOCATE 13 (March 1991) and has been incorporated in this article with the gracious permission of Alan Kofoed and the Idaho State Bar Association.

** Associate Professor, University of Idaho College of Law. B.A., The College of Wooster; J.D., Case Western Reserve University. I would like to thank Garry Erickson for his research assistance. I would also like to thank my colleagues, Myron Schreck and James Macdonald, for their valuable insights on the topics in this article.

1. 112 S. Ct. 2649 (1992).

2. 403 U.S. 602 (1971).

second concurring opinion. Both Justices Souter and Blackmun (and presumably Justices Stevens and O'Connor who joined them) went to varying lengths in their concurring opinions to distance themselves from the coercion standard adopted by Justice Kennedy.

Thus, despite the apparent affirmation of *Lemon* by the majority of the Court, *Lee*, at best, must be viewed in light of Kennedy's opinion as further marginalizing *Lemon* as a useful tool of Establishment Clause analysis. Instead, in the future, Justice Kennedy's coercion analysis will control the outcome of Establishment Clause cases. Justice Kennedy's majority opinion focused on the degree of involvement of state officials in fashioning the religious exercise in question[3] and the coercive aspects of state religious activities.[4]

In this article, I will first review the Court's Establishment Clause jurisprudence to date, with special attention to the issue of school prayer. Second, I will synthesize the major historical arguments driving the Court's analysis in this area. Third, I will summarize and analyze the opinions in *Lee*, their impact on existing jurisprudence and their importance for future cases in this area.

## II. U.S. SUPREME COURT STANDARD IN ESTABLISHMENT CLAUSE CASES BEFORE *LEE*

The Supreme Court first struggled with the application of the Establishment Clause to school prayer in the 1960's. In two cases, the Court held that reading officially-sanctioned prayers during the school day, whether or not composed by government officials and regardless of denominational neutrality, violated the Establishment Clause of the First Amendment, even where participation in those prayers was voluntary.[5] In *Engel v. Vitale*,[6] the Court overturned a practice of reading a prayer composed by school officials saying, "[W]e think that by using its public school system to encourage recitation of the Regents'

3. *Lee*, 112 S. Ct. at 2655-57.

4. *Id.* at 2657-61.

5. Engel v. Vitale, 370 U.S. 421 (1962); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

6. 370 U.S. 421 (1962).

prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause."[7] The *Engel* Court reasoned that, "[T]he First Amendment was added to the Constitution to serve as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayers American People can say . . . ."[8] Although it pointed to the ultimate coercive effect of government exercises of religion as a rationale for its holding, the court concluded that it was the government's adoption of a prayer that offended the First Amendment, not the coercive nature of the prayer.[9] The majority recognized that because the prayer was so "brief and general", the New York practice did not amount to a "total establishment of one particular religious sect to the exclusion of all others."[10] However, it concluded, citing the words of James Madison, that, " '[i]t is proper to take alarm at the first experiment on our liberties' . . . ."[11]

The majority's reasoning in *Engel* was based on a historical interpretation of the Establishment Clause which emphasized the writings of Jefferson and Madison surrounding the passage of the Virginia Bill for Religious Liberty,[12] as well as the Colonial opposition to the English Book of Common Prayer.[13] This reasoning falls squarely within a historical view of the First Amendment, formulated over thirty years primarily through the opinions of Justices Black and Rutledge.[14]

In *School District of Abington Township v. Schempp*,[15] the Court expanded upon the Black/Rutledge formulation of the First Amendment in striking down Pennsylvania and Maryland statutes which required, among other things, the daily reading of

---

7. *Id.* at 424.

8. *Id.* at 429.

9. *Id.* at 430.

10. *Id.* at 436.

11. *Id.* (quoting *Memorial and Remonstrance Against Religious Assessments*, IX THE WRITINGS OF JAMES MADISON 183 at 185-86, (Gaillard Hunt ed., 1910).

12. *Id.* at 427-29. For a discussion of Madison's and Jefferson's views, see *infra* notes 72-88 and accompanying text.

13. *Id.* at 425-27.

14. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1158-61 (2d ed. 1988). Borrowing from Professor Tribe, I will refer to this view of the First Amendment as the "Black/Rutledge" interpretation.

15. 374 U.S. 203 (1963).

Bible verses and recitation of the Lord's Prayer[16] in public schools. There, the Court reasoned:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert of dependency of one upon the other to the end that official support of the state or federal government would be placed behind the tenets of one or all orthodoxies. This the Establishment Clause prohibits . . . . [T]he Establishment Clause has been considered by this Court eight times in the past score of years and, . . . it has been consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.[17]

These early school prayer cases and several later cases, all adopting the Black/Rutledge formulation of the First Amendment, have together become the basis of the Court's test in evaluating whether a violation of the Establishment Clause has occurred. That test was first fully articulated in *Lemon v. Kurtzman*.[18] The three part standard formulated in *Lemon* requires that the state action "must have a secular . . . purpose; . . . its primary or principal effect must be one that neither advances nor inhibits religion . . . [and it] must not foster 'an excessive governmental entanglement'."[19] The Court has consistently applied the *Lemon* test in every Establishment Clause decision since it was adopted, with the exception of *Marsh v. Chambers*[20] and now, arguably, *Lee*.

---

16. Matthew 6:5-6.

17. *Schempp*, 374 U.S. at 222.

18. 403 U.S. 602 (1971).

19. *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 674 (1970)) (citations omitted). *Lemon* did not deal with school prayer, but instead involved a successful challenge to Pennsylvania and Rhode Island statutes which gave financial support to church sponsored schools. *Id.* at 607-11.

20. 463 U.S. 783 (1983). *But see* Larsen v. Valente, 456 U.S. 228, 252 (1982) (imply-

*Marsh* addressed the question of whether prayer at the beginning of legislative sessions violated the Establishment Clause.[21] The Supreme Court upheld the Nebraska state legislature's practice of opening legislative sessions with a prayer, led by a chaplain who was paid by the state.[22] The Court did not apply the *Lemon* test and overturned the Eighth Circuit decision which had been based on *Lemon*.[23] Instead, the Court reasoned that because the practice of prayer before the Nebraska legislative session was so embedded in the history of our country and had become a deep-seated tradition, it did not constitute an impermissible establishment of religion.[24]

Key to the Court's holding was its analysis of the history of legislative prayer in the Colonial legislatures and the Continental Congress. Chief Justice Burger, writing for the six member majority, reasoned, "[t]he opening of Legislative and other deliberative bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."[25] After analyzing the historical record regarding legislative prayer, with detailed attention to the Congressional debates surrounding the adoption of the Bill of Rights, Justice Burger concluded:

> This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged. We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation, . . . beneficial grants for higher education, . . . or tax exemptions for religious organizations.[26]

The Court limited the scope of its decision by cautioning:

---

ing that *Lemon* may not apply in cases involving questions of denominational neutrality).

21. *Marsh*, 463 U.S. at 784-85.

22. *Id.* at 795.

23. *Id.* at 786, *rev'g* 675 F.2d 228 (8th Cir. 1982).

24. *Marsh*, 463 U.S. at 786-89.

25. *Id.* at 786. *But see* North Carolina Civil Liberties Union v. Constangy, 947 F.2d 1145 (4th Cir. 1991).

26. *Marsh*, 463 U.S. at 791 (citations omitted).

> Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that clause applied to the practice authorized by the First Congress . . . .[27]

Even though the Court continued to apply the *Lemon* test after *Marsh* was decided, that test came under increasing scrutiny and criticism. In *Lynch v. Donnelly*,[28] decided the year after *Marsh*, the Court applied the *Lemon* test in holding that a creche displayed as part of a municipal Christmas celebration did not violate the Establishment Clause. Even so, the Court seemed to back away from *Lemon* in *Lynch*, indicating that while it would not view its decision-making process as mechanically limited by its decision in *Lemon*, that test was "useful" in evaluating Establishment Clause cases.[29]

In *Wallace v. Jafree*,[30] the majority followed *Lemon* in striking down an Alabama statute which authorized a moment of silence "for meditation and voluntary prayer";[31] however, Justice O'Connor suggested modifying the test in her concurring opinion[32] and Justice Rehnquist suggested abandoning the test altogether in his dissent.[33] The *Wallace* plurality applied *Lemon* in evaluating the following series of Alabama statutes: the first authorized a moment of silence for meditation; the second statute, amending the first, authorized a moment of silence "for meditation and voluntary prayer"; and the third authorized teachers to lead prayers.[34] The Court struck down the second and third statutes, concluding that the moment of silence "for meditation and voluntary prayer" violated the first part of the

---

27. *Id.* at 790.
28. 465 U.S. 668 (1984).
29. *Id.* at 679.
30. 472 U.S. 38 (1985).
31. *Id.* at 61.
32. *Id.* at 67 (O'Connor, J. concurring).
33. *Id.* at 91 (Rehnquist, J. dissenting).
34. *Id.* at 40-41, n. 1-3.

*Lemon* test requiring that the statute have a secular purpose.[35] According to the Court, that test requires that state actions be invalidated if they are "entirely motivated by a purpose to advance religion."[36] The Court examined the legislative record and determined that the legislation had no secular purpose, based on the testimony of the bill's sponsor that he saw the legislation as one step toward re-establishing prayer in public schools.

Justices Powell and O'Connor filed separate concurring opinions. Both agreed that some "moment of silence" provisions would not be unconstitutional. Quoting her earlier concurring opinion in *Lynch*, Justice O'Connor wrote:

> [R]eligious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community . . . . Under this view, Lemon's inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.[37]

O'Connor's gloss tightens the *Lemon* test by requiring that the government action actually have the affirmative purpose and effect of conveying a message endorsing religion rather than simply advancing or inhibiting religion; arguably the standard permits more room for passive governmental accommodations of religious exercise.[38]

Justice O'Connor explained that because the second and third Alabama statutes "were enacted solely to officially en-

35. *Id.* at 59-61; *see also, id.* at 76-79 (O'Connor, J. concurring).
36. *Id.* at 56.
37. *Id.* at 69 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).
38. TRIBE, *supra* note 14, at 1212-13.

courage prayer during the moment of silence," they were unconstitutional. However, she reasoned that a moment of silence was distinguishable from situations involving vocal prayer:

> A state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court views vocal prayer or Bible reading. Scholars and at least one Member of this Court have recognized the distinction and suggested that a moment of silence in public schools would be constitutional. *See* [*School District of Abington Township v. Schempp*, 374 U.S. 203 (1963)] (Brennan, J., concurring)("[T]he observance of a moment of reverent silence at the opening of class" may serve "the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government" . . . .)[39]

In order to determine if a moment of silence statute violates the Constitution, Justice O'Connor explained that the statute's "history, language and administration" should be examined through a "deferential and limited" inquiry to determine if it "operates as an endorsement of religion."[40] She concluded that, "the relevant issue is whether an objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive it as a state endorsement of prayer in public

39. *Wallace*, 472 U.S. at 72-73 (O'Connor, J., concurring)(adopted in the concurring opinion by Justice Powell at 472 U.S. at 62, n.2).

40. *Id.* at 74.

schools."[41]

In his dissenting opinion in *Wallace*, Justice Rehnquist concluded that the *Lemon* test was based on the faulty historical concept that the Establishment Clause was intended to erect a wall between church and state.[42] Instead, he argued that the "[F]ramers intended the Establishment Clause to prohibit the designation of any church as a 'national' one" and to "stop the Federal Government from asserting a preference for one religious denomination or sect over others."[43] Thus, he argued that the Establishment Clause does not require government to be neutral on questions of religion and does not prevent the state from accomplishing "legitimate secular ends through nondiscriminatory sectarian means."[44]

Despite these challenges to the *Lemon* formula, it had been consistently applied by the Court to test the validity of state action under the Establishment Clause. Most recently the Court applied *Lemon* in *Edwards v. Aguillard*,[45] *County of Allegheny v. American Civil Liberties Union*[46] and *Board of Education v. Westside Community Schools v. Mergens*.[47]

Cases such as *Wallace, County of Allegheny, Edwards* and *Mergens*, however, continued the marginalization of the *Lemon* Establishment Clause formula. The *Edwards* case tested the validity of a Louisiana statute which required that "creation science" be taught in public schools if "evolution science" is taught. Justice Scalia, joined by Justice Rehnquist, filed a strong dissent,[48] concluding that the *Lemon* Establishment Clause test should be abandoned.[49]

---

41. *Id.* at 76.
42. *Id.* at 91-113 (Rehnquist, J., dissenting).
43. *Id.* at 113.
44. *Id.*
45. 482 U.S. 578 (1987).
46. 492 U.S. 573 (1989).
47. 496 U.S. 226 (1990).
48. *Edwards*, 482 U.S. at 610 (Scalia J., dissenting).
49. *Id.* at 640 ("Abandoning *Lemon's* purpose test — a test which exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the Amendment, and, as today's decision shows, has wonderfully flexible consequences — would be a good place to start [reforming Establishment Clause doctrine].").

In *Allegheny*, Justice Kennedy filed a strong concurring and dissenting opinion which was joined by Chief Justice Rehnquist, and Justices Scalia and White.[50] In that opinion, Justice Kennedy first expressed his view that the *Lemon* formulation of the establishment test should be substantially revised.[51] He then reasoned that even if the test was not revised, the creche display at issue should have been validated under *Lemon*.[52] Justice Kennedy, relying in part on *Marsh v. Chambers*, concluded: "Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage."[53]

Justice Kennedy's reliance on *Marsh* and his approach to *Lemon* turned on his reasoning that some form of coercion should be part of an Establishment Clause violation. He stated that "[o]ur cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith or tends to do so.' "[54]

Finally, in *Mergens*, a majority of the Court held that the Federal Equal Access Act[55] did not violate the Establishment Clause by impermissibly endorsing religion.[56] However, in a concurring opinion, Justice Kennedy, joined by Justice Scalia, rejected O'Connor's endorsement gloss on *Lemon* as having "insufficient content" to be dispositive.[57] Instead, Justice Kennedy again argued that if the act did not " 'give direct benefits to religion in such a degree that it in fact established a [state] religion or religious faith or tends to do so' " and if it did not "coerce

50. *Allegheny*, 492 U.S. at 655 (Kennedy, J. dissenting).

51. *Id.* at 656 ("substantial revision of our Establishment Clause doctrine may be in order . . . .").

52. *Id.* at 655.

53. *Id.* at 662-63.

54. *Id.* at 659 (quoting *Lynch*, 456 U.S. at 678).

55. 20 U.S.C. §§4071-74 (1986).

56. *Mergens*, 496 U.S. at 249-50 (O'Connor, J., writing for the plurality, joined on this point by Rehnquist, C.J., White, J., and Blackmun, J.).

57. *Id.* at 261.

any student to participate in a religious activity", then it was permissible.[58]

## A. PHILOSOPHICAL UNDERPINNINGS OF THE ESTABLISHMENT CLAUSE DEBATE

The current debate on the meaning of the Establishment Clause illustrated by the preceding cases turns on two divergent interpretations of the framing of the Establishment Clause. This divergence and accompanying debate can only be understood by examining both the historical context in which the clause was framed and the clause's major sources.

The intent of the drafters of the First Amendment must be understood in an eighteenth century context. That context was one in which establishments of religion were common in the different colonies and in early statehood.[59] Most of Madison's and Jefferson's writings on religious freedom were composed in the context of a bitter struggle to disestablish the Anglican Church in Virginia. Even in Pennsylvania and Rhode Island, colonies known for religious tolerance, government entanglements with religion existed.[60] Simply, the Protestant or Christian religion occupied a more central role in the minds of eighteenth century Americans than it does in the minds of twentieth century Americans. As Steven Smith[61] points out, "the thinking of most eighteenth century Americans was not only pervasively religious; it was, more specifically, pervasively Protestant."[62]

---

58. *Id.* at 260 (quoting *County of Allegheny*, 492 U.S at 659 (Kennedy, J., concurring in part and dissenting in part) and *Lynch*, 465 U.S. at 678).

59. For a discussion of religious establishment in the Colonies and during early statehood see LEO PFEFFER, CHURCH, STATE AND FREEDOM 71-90, 118-19 (rev. ed. 1962).

60. *Id.*

61. Steven Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 966-67 (1989).

62. *Id.* at 966, citing Henry May's observation that "we may be able to understand [eighteenth century American] political thought better if we start where they nearly always did, with religion." HENRY MAY, THE ENLIGHTENMENT IN AMERICA xiii-xiv (1976). *See also* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 78-79 (1986) ("[Eighteenth Century Americans'] conscience as to religious freedom was firmly embedded in a Christian and Protestant world view. Colonial writers proclaimed liberty of conscience, but they grounded that liberty in the unexamined assumption that the legal systems of the time would uphold and maintain a Christian and Protestant State.")

Within this pervasively religious world view, scholars have identified three sources of thought regarding government establishment of religion upon which the Black/Rutledge interpretation of the First Amendment largely rests.[63] The first source is attributed primarily to Roger Williams. In Rhode Island, Williams and his followers developed a successful colonial model of religious tolerance during the seventeenth century.[64] Williams argued that the church needed to be protected against "worldly corruptions" which "might consume the churches if sturdy fences against the wilderness were not maintained."[65] However, Williams and his followers believed that government had an obligation to establish a favorable climate toward religion which has been characterized as "positive toleration, imposing on the state the burden of fostering a climate conducive to all religion."[66]

Although Williams obviously had no direct influence on the drafting of the First Amendment, the religious tolerance practiced in Rhode Island was an example with which the framers of the First Amendment were familiar.[67] Moreover, the example of religious tolerance established by Williams persisted at the time of the American Revolution.[68] Although familiar at the time, it is difficult to determine how much Williams and the Rhode Island model influenced the First Amendment.[69] Neither Justice Black nor Justice Rutledge explicitly relied on Williams or the Rhode Island example in their opinions in *Everson v. Board of Education*[70] which laid the groundwork for modern Establishment Clause jurisprudence. Nonetheless, the long history of tolerance in Rhode Island and, to a lesser extent in Pennsylvania, stood at the time of the revolution as a monument to the sturdy fence between civil government on the one hand and religious estab-

63. The identification of these views is borrowed from TRIBE, *supra* note 14, at 1158-61.

64. *See* PFEFFER, *supra* note 59, at 98-101.

65. PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTIONS TO THE AMERICAN REVOLUTION 89, 98 (1953).

66. TRIBE, *supra* note 14, at 1159 (citing Whitson, *American Pluralism*, THOUGHT 402 (Winter, 1962)).

67. PFEFFER, *supra* note 59, at 98-100.

68. *Id.* at 116.

69. Some historians of the first amendment do not even cite Williams as a source. *See, e.g.*, ROBERT CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1985).

70. 330 U.S. 1 (1947).

lishment on the other.[71]

The writings of Thomas Jefferson are a second and more obviously direct source of the First Amendment. Jefferson's views on religious freedom are enigmatic. Jefferson advocated church/state separation as a way of protecting the state from the church. In his view, free debate of political ideas could take place only with complete separation of state and church. Consequently Jefferson advocated a complete "wall of separation between Church and State."[72] Although Jefferson himself was not a member of Congress when the Bill of Rights was adopted, his activities in the fight for the disestablishment of the Anglican Church in Virginia laid the ground work for the debate over the First Amendment.[73] As President, Jefferson declined to offer a National Thanksgiving proclamation because of his belief that such a proclamation would violate the Establishment Clause.[74] During his presidency, however, Jefferson signed legislation providing for federal government support of a priest for certain Indians[75] and authorized federal land grants to religious groups for the purpose of spreading the Christian gospel to the Indians.[76]

The third source of traditional historical interpretations of the First Amendment is the writings of James Madison, the author of the First Amendment. Madison believed that religion and government would best function independently of each other. He thought that if the church and state were not separated, they would corrupt each other; the effect, he argued, would be "best guarded against by an entire abstinance [sic] of the Government from interference in any way whatever, beyond

---

71. *But see* CURRY, *supra* note 62, at 19-21:

> Nevertheless, the stigma of its early radicalism clung, and the colony's later penchant for issuing paper money fortified its public image of irresponsibility, with the result that what was an extraordinary experiment in religious freedom turned out to be, apart from Rhode Island itself, an idea too advanced to achieve general acceptance. Ideas of freedom of religion that would later prosper and grow in colonial America would not be derived from the example of Rhode Island.

72. Jefferson's famous quote is from a letter he wrote in 1801 in reply to an address by the Danbury Baptists Association. *See* PFEFFER, *supra* note 59, at 133.

73. *Id.* at 100-105.

74. *See* CORD, *supra* note 69 at 39-41; PFEFFER, *supra* note 59, at 265-67.

75. CORD, *supra* note 69, at 38-39.

76. *Id.* at 41.

the necessity of preserving public order, & protecting each sect against trespass on its legal rights by others."[77] Some historians have argued that in drafting the First Amendment, Madison was most concerned that the federal government be prohibited from establishing a national religion and that the government not provide discriminatory aid to one religious sect over another.[78] However, others have pointed out that at the time he joined Jefferson in the Virginia disestablishment fight, Madison advocated a complete disestablishment of church and state.[79] Despite this, he was active in establishing the Congressional chaplaincy and in making Thanksgiving proclamations while in Congress and as President.[80]

These ambiguous and conflicting strains of thought, combined with the confusing establishment practices of many of the colonies and the pervasively religious outlook of most eighteenth century Americans, provide a wild patchwork upon which to base historical interpretation of the amendment.

The prevailing traditionalist interpretation[81] of the First Amendment, formulated originally by Justices Black and Rutledge, emphasizes those aspects of Madison's and Jefferson's writings which advocate a strict separation of church and state.[82] Proponents of this view have argued that it requires a complete separation between religion and government in order not to advance religion.[83] The opinions forming the prevailing view draw

77. TRIBE, *supra* note 14, at 1159.

78. CORD, *supra* note 69, at 46.

79. *See* Madison's MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS quoted in PFEFFER, *supra* note 59, at 111-13 and CORD, *supra* note 69, at 20-23.

80. CORD, *supra* note 69, at 29-36. Madison apparently later changed his mind on the constitutionality of the Congressional Chaplaincy. *See* PFEFFER, *supra* note 59, at 248-49.

81. TRIBE, *supra* note 14, at 1159-60.

82. Black and Rutledge did not ignore the conflicting practices of religious establishment as some proponents of the revisionist view have implied. *See, e.g.*, CORD, *supra* note 69, at xiii-xiv; *Wallace*, 472 U.S. at 91-93 (Rehnquist, J., dissenting). In fact Justices Black and Rutledge both carefully examine the ambiguous historical record in reaching their interpretation. *Everson*, 330 U.S. at 8-11 (Black reviewing practices of religious persecution in the Colonies); *id.* at 13-14 (Black reviewing religious establishments in early statehood); *id.* at 33 and n.11 (Rutledge reviewing colonial religious intolerance); *Engel*, 370 U.S. at 427-28 (Black reviewing practices of colonial and state establishments).

83. *See, e.g.*, PFEFFER, *supra* note 69; Kathleen M. Sullivan, *Religion & Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

heavily on the rhetoric of Madison and Jefferson regarding the Virginia disestablishment debate and upon the imagery of Jefferson's metaphor regarding the "wall of separation".[84] In addition, they minimize the conflicting practices of religious establishment in the colonies and in Madison's and Jefferson's lives, characterizing them as "an unfortunate fact of history."[85]

In addition to this "strict separationist" view advocated by traditional scholars, Jefferson's and Madison's writings have also spawned the neutrality principals which appear from time to time in both the Black/Rutledge interpretation and the revisionist approach to the Establishment clause. Thus, some scholars have argued that the Establishment Clause requires that government be neutral on questions relating to religion.[86] This latter group focuses on those parts of Madison's writings that speak of neutrality between sects and denominations.[87] Both the neutrality and separation ideas have been important aspects of the Black/Rutledge formulation of the Establishment Clause and can be seen at various points in the Court's jurisprudence.[88] Justice Kennedy's anti-coercion standard, for example, seems to be most directly steeped in the Madisonian concepts of neutrality.

Recently revisionist historians of the First Amendment have argued that the Court has incorrectly interpreted the Williams/Jefferson/Madison sources and has miscast the history and

---

84. *Everson*, 330 U.S. at 11-14, 16 (Black, J.); *id.* at 31-32, 33-41 (Rutledge, J. dissenting); *Engel*, 370 U.S. at 427-430. In setting the terms of the debate, Rutledge reasoned in *Everson*: "But the object [of the first amendment] was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting).

85. *Engel*, 370 U.S. at 427.

86. *See Everson*, 330 U.S. at 1 (Black, J.); *id.* at 28 (Rutledge, J. dissenting). *See also* Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986). Madison's neutrality language has also been the basis of the revisionist view that the establishment clause was only intended to prevent government preference of one religion over another. *See* CORD, *supra* note 69; Rodney Smity, *Getting Off on the Wrong Foot and Back Again: A Reexamination of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569 (1984).

87. *See, e.g.*, McConnell, *supra* note 86.

88. As McConnell points out, principals of neutrality governed such early cases as Cantwell v. Conn., 310 U.S. 296 (1940); McCollum v. Bd. of Educ., 333 U.S. 203 (1948) and Zorach v. Clauson, 343 U.S. 306 (1952), while a strict separation philosophy seems to imbue cases such as *Engel*, 370 U.S. 421 (1962). *See* McConnell, *supra* note 86, at 935.

meaning of the First Amendment.[89] Rather than focusing on the rhetoric of the early disestablishment leaders, these historians focus on their actions — the existence of state establishments of religion and the ambiguities in both Madison's and Jefferson's support of religious practices in government. They argue that the Establishment Clause of the First Amendment was intended first, to protect state establishments of religion from interference by the national government; and second, to prevent the national government from establishing a national church or favoring one religious sect over another.[90] Chief Justice Rehnquist and Justice Scalia have focused on this revisionist interpretation of the Establishment Clause.[91] Former Chief Justice Burger's opinion in *Marsh* also grew out of the revisionist historiography.

## III. THE OPINIONS IN LEE

### A. THE MAJORITY OPINION

*Lee* involved a challenge to a religious invocation and benediction offered by a rabbi at a middle school graduation in Rhode Island. The school principal decided that a rabbi should deliver an invocation and a benedication at the graduation ceremony. He also provided the rabbi with a copy of the school district's "Guidelines for Civic Occasions" and suggested that the rabbi's prayers should be non-sectarian.[92]

Writing for the majority, Justice Kennedy concentrated on two aspects of the case in striking down the graduation prayer — the degree of involvement of the school officials in this particular religious activity and the impliedly coercive nature of the

89. *See, e.g.*, CORD, *supra* note 69; MICHAEL MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); Smith, *supra* note 86.

90. CORD, SUPRA note 69, at 49-50 (although Cord argues that "[no] substantial evidence suggest[s] that non-discriminatory or indirect aid to religion or to religious institutions was to come under the ban of the First Amendment"); Wallace v. Jafree, 472 U.S. at 98, 106, 113; Smith, *supra* note 86, at 592-95. For a critique of this position see Douglas Laycock, *"Nonpreferential" Aid: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986).

91. Steven Smith points out that although Rehnquist never cites Cord, his reasoning in *Wallace* is based extensively on Cord's text. Steven D. Smith, Book Review, 6 CONST. COMM. 541, n.3 (1989) (reviewing ROBERT CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION and ROUSAS JOHN RUSHDOONY, CHRISTIANITY AND STATE (1986)).

92. *Lee*, 112 S. Ct. at 2652-53.

activity.

The Court first addressed the involvement of the public officials. In condemning the school officials' efforts to facilitate the graduation prayer, Justice Kennedy relied on the language of the Court's original school prayer case, *Engel v. Vitale*,[93] reasoning that "[i]t is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no business of government to compose official prayers for any group of American people to recite as a part of a religious program carried on by the Government', . . . and that is what the school officials attempted to do."[94] Justice Kennedy rejected the school officials' argument that their good faith attempts to insure that the prayer would not be sectarian or result in divisiveness insulated the school from constitutional attack, stating:

> The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes are required to attend.[95]

Furthermore, the majority rejected the argument that the nonsectarian nature of the prayer rendered it an acceptable governmental accommodation of religion. In refusing to adopt the notion of a "civic religion" that does not offend the First Amendment, Justice Kennedy reasoned:

> If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself . . . . [T]he idea of a civic religion [must be measured] against the central meaning of the Re-

93. 370 U.S. 421 (1962).
94. 112 S. Ct. at 2656 (quoting *Engel*, 370 U.S. at 429).
95. *Id.*

> ligion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.[96]

Finally, Justice Kennedy also rejected the argument that the graduation prayer was protected by the free speech provisions of the First Amendment. He reasoned that:

> The explanation lies in the lesson of the history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. 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.[97]

After indicating that the degree of involvement of the school officials in the shaping of the religious activity was substantial, Justice Kennedy explained that the prayer was impermissible because of the potentially coercive effect it might have on school children.[98] To demonstrate the coercive nature of the prayer, Justice Kennedy first cited social science research on school children's susceptibility to peer pressure and their impressionable nature. He also reasoned that the students would feel compelled by their classmates to attend the graduation ceremony.[99] Furthermore, Justice Kennedy explained that the potentially coercive effect of the prayer would be magnified because a student would be placed by the state in the position of

---

96. *Id.* at 2656-57.

97. *Id.* at 2658.

98. *Id.* at 2658-61. Justice Kennedy observed, "[f]inding no violation under . . . [the circumstances of this prayer] 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." *Id.* at 2658-59.

99. *Id.* at 2559.

having to forego an important event such as graduation:

> [T]o say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on that point. Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary", for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.[100]

Justice Kennedy concluded his analysis of the indirect coercive nature of the school graduation prayer by writing:

> The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the objector, not the majority who must take the unilateral and private action to avoid compromising religious scruples, here by electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the state cannot require one of its citizens to forfeit his or her rights as the price of resisting conformance to state-sponsored religious practice.[101]

Justice Kennedy distinguished the graduation prayer in this

100. *Id.*
101. *Id.* at 2660.

case from *Marsh v. Chambers*,[102] the Nebraska legislative prayer case. He indicated that the opening of a legislative session presents a situation involving adults who are free to enter and leave as they wish. In contrast, Justice Kennedy pointed out that the graduation prayer presents a situation in which,

> [T]eachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students. In this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit.[103]

Justice Kennedy concluded the majority opinion by stating:

> The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.[104]

## B. JUSTICE BLACKMUN'S CONCURRING OPINION

Justice Blackmun's concurring opinion, which was joined by Justices O'Connor and Stevens, emphasized the traditional Black/Rutledge approach to evaluating Establishment Clause violations.[105] Justice Blackmun expressly rejected the coercion standard as a necessary element of the Establishment Clause violation by stating, "[a]lthough our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure

102. 463 U.S. 783 (1983).

103. *Lee*, 112 S. Ct. at 2660 (citing Bethel Sch. Dist. No. 483 v. Fraser, 478 U.S. 675 (1986)).

104. *Id.* at 2661.

105. *Id.* at 2662-64.

to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion."[106] Furthermore, in reasoning that coercion is not a necessary element of a violation, Justice Blackmun argued:

> We have believed that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is fusion between religion and the political regime. We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular. And we have believed that these were the animating principles behind the adoption of the Establishment Clause. To that end, our cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform.[107]

## C. JUSTICE SOUTER'S CONCURRING OPINION

Justice Souter also wrote a separate concurring opinion which was joined by Justices O'Connor and Stevens for the purpose of addressing two questions: first, "whether the [Establishment] Clause applies to governmental practices which do not favor one religion or denomination over others," and second, "whether state coercion of religious conformity . . . is a necessary element of an Establishment Clause violation."[108]

On the first question of the permissibility of "non-preferential" aid to religion, Justice Souter, after an independent review of the history of the Clause, concluded that:

> [W]hat we thus know of the Framer's experience underscores the observation of one prominent commentator, that confining the Establishment Clause to a prohibition on preferential aid "requires a premise that the Framers were extraordinarily bad drafters— that they believed one thing

106. *Id.* at 2664.
107. *Id.* at 2667 (quoting *Schempp*, 374 U.S. at 305).
108. *Id.*

> but adopted language that said something substantially different and that they did so after repeatedly attending to the choice of language". . . . We must presume, since there is no conclusive evidence to the contrary, that the Framer's embraced the significance of their textual judgment. Thus, on balance, history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some.[109]

Finally on the question of non-preferential aid for religion, Justice Souter reasoned that such a standard would place the court in the position of evaluating whether the particular religious practice was "ecumenical enough to pass Establishment Clause muster." Such an inquiry "invite[s] the court to engage in comparative theology," a practice surely forbidden by the First Amendment. Moreover, he indicated that the problem is not solved by saying that a state should promote religious diversity, since such a standard would involve the court in evaluating the sufficiency of the number of religions and the frequency of state-sponsored religious observance.[110]

With respect to whether coercion is a necessary element of an Establishment Clause violation, Souter concluded that both the Court's precedent and a textual interpretation of the First Amendment indicate that coercion is not a necessary element. Souter's conclusion on the coercion issue rested on three arguments. First, he reasoned that the court has consistently struck down non-coercive state practices as violations of the Establishment Clause throughout the 20th century. Second, these precedents are based on an appropriate reading of the First Amendment. Souter pointed out that because the touchstone of a violation of the Free Exercise Clause is coercion, making that standard also the key to an Establishment Clause violation would render the latter clause meaningless: " 'the distinction between the two clauses is apparent — a violation of the Free Exercise Clause is predicated on coercion while the Establishment

109. *Id.* at 2670.
110. *Id.* at 2671.

Clause violation need not be so attended.' "[111] Finally, Souter argued that the post-adoption history of the Establishment Clause is ambiguous and inconclusive on the question of non-preferential aid to religion. As he concludes:

> To be sure, the leaders of the young Republic engaged in some of the practices that separationists like Jefferson and Madison criticized. The first Congress did hire institutional chaplains, . . . and Presidents Washington and Adams unapologetically marked days of public thanksgiving and prayer, . . . . Yet in the face of the separationist dissent, those practices prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next.[112]

Finally, Justice Souter addressed the question of whether the government sponsored graduation prayer in question was a permissible accommodation of religious beliefs. He concluded that it was not. Souter reasoned that to be a permissible accommodation, a government practice must "lift a discernable burden on the free exercise of religion."[113] Because the students who wanted the prayer at graduation "had no need for the machinery of the state to affirm their beliefs,"[114] Souter concluded that the prayer in question did not lift a discernable burden on free exercise and was consequently not a permissible accommodation.

## D. JUSTICE SCALIA'S DISSENTING OPINION

Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, wrote a scathing, dissenting opinion.[115]

---

111. *Id.* at 2673 (quoting *Schempp*, 374 U.S. at 223; and citing Laycock, *supra* note 90, at 922).

112. *Id.* at 2675 (citing *Marsh*, 463 U.S. at 788 and CORD, *supra* note 69, at 53.

113. *Id.* at 2677 (citing *Allegheny County*, 492 U.S. at 601, n.51; *id.* at 631-32 (opinion of O'Connor, J.); Corporation of the Presiding Bishop of the Church of Latter-Day Saints v. Amos, 483 U.S. 327, 348, n. 8 (1987) (plurality opinion); *Wallace*, 472 U.S. at 57-58, n.45.)

114. *Id.*

115. The tone of Scalia's dissent is aptly illustrated by his opening paragraph:

> In holding that the Establishment Clause prohibits invoca-

Justice Scalia would have upheld the graduation prayer in question based on several lines of reasoning. First, he opined that ceremonial prayer at public occasions is as old as our country and is an historically established national tradition. He pointed to the tradition of legislative prayer, prayer at presidential inaugurations, national Thanksgiving proclamations and the traditional presence of prayer at graduation ceremonies.[116] Second, Justice Scalia reasoned that participation in the graduation prayer was voluntary; students could have stood in "respectful silence", without participating in the religious observance.[117] Finally, Justice Scalia argued that the government involvement in the prayer was *de minimis* because the school officials did not draft, edit, screen or censor the prayers.[118] The key to Justice Scalia's opinion is his view that voluntary, nonsectarian public prayer has become so much a party of the civic and social history of this country that it cannot be viewed as offensive to the Establishment Clause.[119]

## IV. ANALYSIS

Justice Kennedy's opinion has been haled in the press as a significant symbol that he has backed away from the "conservative precipice."[120] Others have characterized *Lee* as the continu-

---

> tions and Benedictions at public-school graduation ceremonies, the Court — with nary a mention that it is doing so — lays waste a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. As its instrument of destruction, the bulldozer of social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause What the *Durham* Rule did for the insanity defense . . . . Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.

*Id.* at 2678-79 (citations omitted).

116. *Id.* at 2679-80.

117. *Id.* at 2681-82.

118. *Id.* at 2683.

119. *Id.* at 2685-86

120. In one story a commentator is quoted as saying that in the last three years Anthony Kennedy has undergone a "sea change". *A Chaotic Court Closes its*

ation of the traditionalist (Black/Rutledge) approach to Establishment Clause jurisprudence.[121] Both of these characterizations read too much into the decision. What we should learn from *Lee*, when viewed with other recent Establishment Clause cases, is that Justice Kennedy will be the key and swing vote in these cases. Justice Kennedy's analysis under the coercion test, first announced in dissent in *Allegheny County*, will control the outcome of Establishment Clause cases, at least until the make-up of the court again changes. Although Justice Kennedy's analysis deviates from the "wall of separation" metaphor, it is squarely rooted in the traditional Madisonian antecedents of the Amendment.

Justice Kennedy's opinion in *Lee* is thoroughly consistent with his earlier approach to the Establishment Clause and does not presage a departure from his earlier analysis. Commentators who have viewed his decision as a departure from his earlier analysis have focused too much on his statements in *Allegheny County* regarding the precedential value of *Lemon*. In addition, these commentators have not paid enough attention to the substance of his earlier decisions because Justice Kennedy has consistently proposed that the coercion test replace *Lemon*.[122] Justice Kennedy's dissenting opinion in the *Allegheny County* case indicates that he has long believed that coercion is a necessary element of an Establishment Clause violation.

Although Justice Kennedy appears to be the only member of the Court persuaded by this coercion standard, it promises to be the touchstone of jurisprudence in this area until the makeup of the Court changes. When Justice Kennedy finds coercion present, he will likely side with the more moderate Justices

---

*Term—Chaotically*, CONNECTICUT LAW TRIBUNE, July 6, 1992, at p. 4. In another story, the writer noted that "[e]xhibit No. 1 in the case for Kennedy's conversion [from conservative to moderate] is *Lee v. Weisman*, . . ." *Kennedy's Constitutional Journey*, LEGAL TIMES, July 6, 1992 at p. 1.

121. *See* Eric Neisser, *Civil Liberties as Family Values*, NEW JERSEY L. J., Aug. 31, 1992 at p. 16 ("Thus the decision actually expands the protections of the controversial school prayer cases of the 1960's . . . ."); *Cancer Suit Against Cigarette Company Allowed*, NEW YORK L. J., June 25, 1992 at 1 ("The Justices refused, in their 5-4 decision, to use a school prayer dispute from Rhode Island to fashion a new interpretation of the Constitution's ban on "an establishment of religion.").

122. Kennedy's statements in earlier opinions regarding the ongoing viability of *Lemon* have been interpreted as statements that he stood in the revisionist camp of Justices Scalia and Rehnquist. *See supra* notes 50-58 and accompanying text.

(O'Connor, Stevens, Souter and Blackmun) to form a majority striking down the attempted government involvement with religion. Any governmental action rising to Justice Kennedy's tougher coercion standard would most assuredly fall within the more lenient *Lemon* test, even with Justice O'Connor's endorsement gloss. As Justice Blackmun noted in *Lee*, government coercion of religious belief would certainly be enough to form the basis of a violation under *Lemon*, even though it is not required by *Lemon*. Areas likely to be controlled by this uncomfortable marriage between Justice Kennedy and the moderates are those involving active instances of religious exercise, with little and only subtle coercion necessary, when the participants in the exercise are young people. More coercion would be required if the participants are adults. Likewise, the greater the degree of government involvement, the less coercion necessary to show a violation of the Establishment Clause.

In contrast, when Justice Kennedy finds that no coercion is involved, he is likely to side with the revisionists to uphold the governmental involvement with religion. Justice Kennedy's opinion in *Allegheny County*, indicates that, absent a distinct finding of coercion, he is not willing to apply the *Lemon* formula. In this type of situation, Justice Kennedy's more accommodationist views are likely to cause him to vote with the conservative block on the Court. Areas likely to be governed by agreement between Kennedy and the conservatives include those involving public display of religious symbols.

While Justice Kennedy's approach to Establishment Clause jurisprudence cannot be characterized as a shift for him, it does signal that to the extent historical analysis governs the outcome of Establishment Clause cases, the Madisonian framework will control over the revisionist history advocated by Justices Scalia and Rehnquist. While Kennedy's approach to the traditional test is more conservative in general, he rejects a revisionist approach to the Establishment Clause which would allow any government involvement with religion that did not tend to establish a state religion.

Although many traditionalists may not like to admit it, coercion has been an underlying theme of Establishment Clause jurisprudence throughout the reign of the Black/Rutledge his-

torical interpretation.[123] Even *Engel*, the main case cited for the proposition that non-coercive state actions can violate the Establishment Clause, relies, in part on a coercion rationale.[124] Finally, Madison's writings on religious liberty and on the Establishment Clause in particular refer consistently to the underlying theme of coercion.[125]

However, Justice Kennedy's coercion standard does not provide any more substance to the Establishment Clause test than did the endorsement gloss advocated by Justice O'Connor.[126] It is doubtful that the coercion test is so vacuous that, as Justice Scalia suggests, a disclaimer in the high school graduation program stating that silence does not signify participation in the prayer, would alleviate the constitutional objection.[127] Still the test has the problem of adopting a stilted and "non-real world"

---

123. McConnell, *supra* note 86. Professor McConnell points out:

> In *Cantwell v. Connecticut*, the Court had paraphrased the establishment clause as 'forestalling compulsion by law of the acceptance of any creed or the practice of any form of worship' and the presence or lack of compulsion, respectively, had been central to the Court's decisions in *McCollum v. Board of Education* and *Zorach v. Clauson*, which concerned release time programs in the public schools. And just one year before *Engel*, Chief Justice Warren had explained the distinction between Sunday closing laws and the release time program in *McCollum* on the basis that Sunday closing laws did not compel religious participation.

*Id.* at 934-35 (citing, in order, Cantwell v. Conn., 310 U.S. 296, 303 (1940); McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952); McGowan v. Md., 366 U.S. 420, 451-52 (1961)).

124. *Engel*, 370 U.S. at 430-31. ("This is not to say, of course, that [school prayers] do not involve coercion . . . . When the power, prestige, and financial support of the government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.") McConnell, *supra* note 86, at 935.

125. Professor McConnell documents numerous instances of Madison's references to religious coercion including Madison's comments on the committee draft of the amendment that he "apprehended the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience," and his writings in the Memorial and Remonstrance on the Virginia Bill for Religious Liberty. Professor McConnell argues that the "essence" of the Memorial and Remonstrance was the prohibition of legal compulsion to "support or participate in religious activities." McConnell, *supra* note 86, at 936-38 and authorities cited therein.

126. In *Mergens*, Justice Kennedy expressly rejected the endorsement gloss on *Lemon* as providing insufficient substance by which to gauge constitutional violations. *See supra* note 57 and accompanying text.

127. *Lee*, 112 S. Ct. at 2685 (Scalia, J., dissenting).

definition of coercion that will have to be fleshed out over many cases. Traditionally, concepts of coercion have involved some notion of compulsion,[128] or at least some more immediate pressure than the sort of indirect psychological forces identified by Kennedy in *Lee*.

In addition, as a result of Justice Kennedy's own ambivalence, the content of the coercion standard is hard to gauge. Such ambivalence is brought to the fore by Justice Kennedy's reaffirmation of the reasoning in *Marsh*, while at the same time striking down the prayer in *Lee*.[129] It is difficult to understand how the legislative prayer at issue in *Marsh* is not coercive under the standard set forth in *Lee*. Although not involving children, the degree of government involvement in the religious exercise in *Marsh* was extreme. The legislative chaplain in Nebraska was hired by the legislature and paid with public funds. Justice Kennedy's distinctions that the audience for the legislative prayer was likely to be adults and that the audience was free to come and go as it pleased, are unconvincing. State tax payers were required to support a religious exercise with which they disagreed. The involvement of the government was so extreme that it placed the imprimatur of the state on a particular form of religious exercise in *Marsh*; one that was identified with a particular denomination through the chaplain's affiliation with an organized church. Moreover, the religious exercise in *Marsh* took place in the halls of the government itself and was authorized by the highest government officials. Such an exercise is assuredly as indirectly coercive as the prayer in *Lee*.

In the end, *Lee* does little to resolve the ongoing confusion in Establishment Clause jurisprudence and may contribute to it by adding another ambiguous overlay — coercion — to the already ambiguous *Lemon* formula. What is clear after *Lee* is that Justice Kennedy's vote will be key to the immediate future in the Establishment area.

---

128. For example Black's Law Dictionary defines "coercion" as "[c]ompulsion; constraint . . . ." and defines "coerce" as "[c]ompelled to compliance; constrained to obedience, or submission in a vigorous or forceful manner." BLACK'S LAW DICTIONARY 324 (rev. 4th ed. 1968).

129. 112 S. Ct. at 2660-61.