ACLU v. Black Horse Pike Regional Board of Education: The Black Sheep of Graduation Prayer Cases

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Comment

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The Black Horse school district routinely allowed prayer at senior high school graduation ceremonies until a 1992 Supreme Court decision cast the constitutionality of such prayers in doubt. In hopes of comporting with the requirements of the Establishment Clause, the school board adopted a new policy in 1993. This policy allowed prayer at graduation ceremonies only if a majority of the students attending the ceremonies decided to include such prayer by popular vote. In June of 1993, the graduating class of Highland Regional High School voted to include a prayer in its graduation ceremony. Shortly before graduation, Edward Ross, a member of the senior class, sought to enjoin the school from allowing the religious exercise, claim-

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1. The original policy of the Black Horse school district was to allow local clergy “on a rotating basis” to give an invocation and benediction. ACLU v. Black Horse Pike Reg’l Bd. of Educ., 84 F.3d 1471, 1474 (3d Cir. 1996).

2. See Lee v. Weisman, 505 U.S. 577 (1992) (striking down a graduation school prayer where participation was coerced by state power).

3. The resolution, termed Policy IKFD, was the fourth version to be proposed to the board and sought to remove school board involvement in the prayer. See Black Horse, 84 F.3d at 1475.

4. The senior class officers conducted the vote and the ballot included a choice of prayer, a moment of silence, or nothing at all. See id. Additionally, if the class elected to have a prayer, a student volunteer, rather than a clergy or staff member, would lead the invocation. See id. The policy also gave students control over the type of prayer to be given, and required a disclaimer on the graduation programs explaining that the student-delivered prayer did not represent the views of the school administration or the other students. See id.

5. Although no option received a vote by the majority of students, the senior class officers declared prayer to be the “winner” because a plurality voted for a version of “prayer.” The class officers then selected a student volunteer to deliver the prayer. See id.
ing that the public prayer would violate his Establishment Clause rights. Although the district court denied a preliminary injunction, the Third Circuit Court of Appeals granted Ross an emergency appeal and enjoined the graduation prayer. On remand, the district court permanently enjoined prayer activities at graduation in the Black Horse district. The Third Circuit later upheld this decision on appeal and declared that the Black Horse prayer policy violated the Establishment Clause of the United States Constitution.

The issue in Black Horse required the court to interpret the federal Establishment Clause, an area of jurisprudence that has been controversial from its inception. Responding to a 1992 Supreme Court decision which prohibited state-controlled graduation prayer, many school districts have sought to keep prayer a part of their graduation ceremonies by allowing student-initiated religious exercise. The Third Circuit is now the third court of appeals to decide the issue of student-initiated graduation prayer, with conflicting decisions resulting at both the appellate and district court levels. With the many varying approaches that have developed over this issue, it is likely that the Supreme Court will revisit graduation prayer cases in the near future.

This Comment will discuss Establishment Clause jurisprudence in the context of the decision in Black Horse. Part I will outline the history of the Establishment Clause and show the increasing confusion that has arisen in this area of constitutional interpretation. Part II will describe the holding in Black Horse and detail the Third Circuit's application of the new coercion test developed by the Supreme Court in recent Establishment Clause cases. This Part will also provide guidance for lower courts by determining which interpretation of the coercion doctrine best comports with normative conceptions of the Establishment Clause. Finally, this Comment will conclude that student-initiated prayer policies are constitutional

6. This student first requested that a member of the ACLU be allowed to speak about safe sex at graduation but the principal told Ross that the time constraints of the ceremony "would not permit a keynote speaker, and that the topic requested was not generally one discussed at graduation ceremonies." Id. The student also filed a complaint based on the New Jersey Constitution. See id. at 1476.
7. See id. The School Board moved to vacate this injunction, but the request was denied. See id.
8. See id.
9. See id. at 1488.
so long as they lack state control and do not use government power to compel the participation of students in a religious exercise.

I. BACKGROUND

A. THE EARLY YEARS: ORIGINAL PURPOSE AND INTENT

James Madison originally proposed the Religion Clauses of the First Amendment as a means to prevent the newly-formed federal government from establishing a national religion.10 The Religion Clauses were the precursors to the modern versions of both the Establishment Clause and the Free Exercise Clause. From their inception, the wording of these two constitutional guarantees seemed to encompass an impossible contradiction: the Free Exercise Clause appears to place an affirmative duty on the government to prevent any state action that would burden religious practice, while the Establishment Clause has been interpreted to prohibit any and all government involvement with religion.11 Thus, the dictates of the Es-

10. Madison's original draft stated that "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." John E. Joiner, Note, A Page of History or a Volume of Logic?: Reassessing the Supreme Court's Establishment Clause Jurisprudence, 73 DENV. U. L. REV. 507, 509 (1996) (citing ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 17 (1990); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 7 (1982); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 9 (1986)). Evidence suggests that Madison proposed this amendment in response to states' concerns that the federal government would infringe states' power to regulate religious affairs even though such power had not been abdicated by the states. Thus, the Religion Clauses were developed as an affirmative limitation on the new powers of the federal government. See Akhil Reed Amar, Some Notes on the Establishment Clause, 2 ROGER WILLIAMS U. L. REV. 1, 11 (1996); see also Michael A. Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 NOTRE DAME L. REV. 311, 317 (1986) (noting that the Establishment Clause was adopted "to address federalism concerns").

11. Evidence of this tension can be seen in two Supreme Court religion cases. The Supreme Court has declared that states cannot withhold unemployment benefits from workers who refuse to take a job which requires them to work on their religious day, see Sherbert v. Verner, 374 U.S. 398, 409 (1963), while it has also held that states must grant an exception to general education requirements if the exception is the least restrictive way to prevent interference with religious freedom, see Wisconsin v. Yoder, 406 U.S. 205, 236 (1972).
tablishment Clause make the state unable to take the action necessary to ensure the guarantees provided by the Free Exercise Clause for fear that it will be seen as "establishing" a religion. Due to the inherent tension between these two clauses, interpretation of the Establishment Clause has always been the subject of intense debate. While some scholars argue that the framers developed the clause in order to provide a strict "wall of separation" between church and state, others claim that the clause was only meant to prevent the establishment of a national religion. Those espousing the latter view believe government may support religion in the abstract, as long as particular sects are not preferred over others. Evidence indicates that the framers most strongly supported the idea that the Establishment Clause did not forbid all interaction between church and state because government and religion were inexorably intertwined at the time of the proposed amendment. Indeed, Madison and Jefferson's official actions during

12. Thomas Jefferson first developed this famous metaphor when replying by letter to the Danbury Baptist Association: Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinion,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson). Many members of the Supreme Court have adopted the theory that an impenetrable wall must be erected between church and state. Justice Frankfurter wrote, "Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped." Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).


14. Joseph Story, a prominent Establishment Clause scholar, advocates an even stronger position by arguing that Christianity was such a "universal sentiment" at the time of the First Amendment's inception that any movement requiring a separation of church and state "would have created universal disapprobation." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874 (2d ed. 1851).

15. During the time of the amendment's ratification and for years afterward, religious taxes were levied in several states, the common law made blasphemy a crime, and Sunday closing laws existed which prohibited the operation of a business on the Sabbath. See Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27
their presidencies support this view given that they both allowed the use of government funds to support religious entities.\textsuperscript{16}

The Court's first interpretations of the Establishment Clause seemed to adopt views consistent with the framers', suggesting that the clause simply prohibited the establishment of a national religion.\textsuperscript{17} In its early cases, the Court upheld a federal grant to the Catholic church for the operation of a hospital,\textsuperscript{18} allowed funds generated by Native American treaties to

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\textsuperscript{16} These funds were mainly used to subsidize religious schools established for Native Americans. See Farber et al., supra note 13, at 741 (citing Robert L. Cord, Separation of Church and State (1982)).

\textsuperscript{17} See, e.g., Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370, 375 (1930) (finding that appropriating state funds to purchase non-religious textbooks at sectarian schools does not violate the Establishment Clause); Arver v. United States, 245 U.S. 366, 389-90 (1918) (rejecting the argument that the religious exemptions to the draft laws violate the Establishment Clause). At least one scholar has noted that the Court's goal during the first 150 years of Establishment Clause litigation "was to safeguard religion as government made efforts to encroach upon it." John M. Flynn, Note, Constitutional Law—Accommodation of Religion—The Answer to the Invocation Dilemma—Jager v. Douglas County School District, 24 Wake Forest L. Rev. 1045, 1052 (1989). During this period, the Court upheld interaction between the church and state largely based on the theory that such action was supported by America's longstanding "religious tradition." Id.

\textsuperscript{18} See Bradfield v. Roberts, 175 U.S. 291, 299 (1899). This case was the first case involving the Establishment Clause to reach the Supreme Court. The Court upheld the grant based on the theory that since the money was to be used for the secular purpose of hospital operation, the grant of funds fell within the parameters of permissible government action. See id.; see also Jeffrey W. Stiltner, Note, Rethinking the Wall of Separation: Zobrest v. Catalina
subsidize Catholic schools, and approved of land grants and monetary aid to support churches and missionary schools.

However, as the nation evolved, states began to distance themselves from involvement in religious affairs. Blasphemy laws disappeared, as did Sunday closing laws and other traditional forms of government religious association. Towards the middle of the nineteenth century, state governments began to abandon their position as guardians of religious observance and took a more neutral role in religious affairs. In fact, many states began writing the Establishment Clause into their own constitutions, thus making state involvement with religion unconstitutional for the first time. While several religious adherents objected to this movement, the general trend toward separation of church and state had begun.


20. See id. The Court approved of these grants due to the fact that the Native Americans would use the schools. See id. at 79. Additionally, the Court noted that the Native Americans had relinquished the land in question to the federal government. See id. at 80. Consequently, the Court reasoned that the money and land used for religious purposes was the Native Americans’ and was not attributable to the federal government, thus allowing it to satisfy the requirements of the Establishment Clause. See id.; see also Lash, supra note 15, at 1098 n.47 (discussing the potential problem of government power over religion in land grants to Native Americans for the erection of churches and missionary schools).


22. See id. at 1117. Lash demonstrates that this separation between church and state governments ironically coincided with one of the more religious eras of our country. He posits that this separation is attributable to “the fragmentation of Protestant denominations and the incentive of religious minorities to put a nonestablishment spin on the . . . Establishment Clause.” Id. at 1118.

23. See id. at 1133. Lash cites as an example the Iowa Constitution, which effectively copied the Establishment Clause from the federal Constitution (while substituting the words “General Assembly” for “Congress”). The Establishment Clause as originally adopted did not prevent any state government involvement with religion. In fact, many scholars claim that several states refused to ratify the Constitution until a clause protecting the states’ traditional right to establish laws favorable to religion was included. See id. at 1089-91.

24. See, e.g., id. at 1131-32. According to Lash, several religious organizations objected to the “divorce of Christianity from the law of the land,” id. at 1131, and even attempted to pass a constitutional amendment which overtly declared the country’s belief in God and the formation of a Christian government. See id. at 1132 (citing 3 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 584-85 (1950)).
B. THE MODERN ERA OF ESTABLISHMENT CLAUSE JURISPRUDENCE

The shift to secular state governments that began in the 1940s drastically accelerated in the modern era. With the landmark decision of *Everson v. Board of Education* in 1947, the Supreme Court incorporated the Establishment Clause into the Fourteenth Amendment's Due Process guarantees, making the clause applicable to state governments for the first time. The *Everson* Court also held that the Establishment Clause required government neutrality toward religion, rather than hostility or support. In *Everson*, the Court began to reverse the accommodationist trend evidenced in earlier cases and stressed the importance of completely separating religion and government by embracing Jefferson's "wall of separation" metaphor.

*Everson* thus marked the advent of an era in which the Court "shifted... its focus... from safeguarding religion in

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25. 330 U.S. 1 (1947) (upholding the reimbursement of transportation expenses to parents of parochial school children by a municipal school district).

26. See id. at 15.

27. Thus, just as fire and police services are extended to all institutions, regardless of their religious nature, so too, could the state provide equally for transportation of all students to school. See id. at 17. Justice Black, writing for the Court, stated:

That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

*Id.* at 18. Justice Black believed that refusing to help with transportation expenses for parochial students, while those attending public school were assured free transportation, could discourage parents from sending their children to private schools. See id. at 17. He felt that this measure did not result in a contribution of money to the parochial schools, see id. at 18, nor did it support them. Rather, the program merely served the common interest of transporting all children, regardless of which school they attended, "safely and expeditiously to and from accredited schools," and thus did not violate the dictates of the Establishment Clause. *Id.* at 18.

Bila writes that a neutrality standard prevents not only the favoring of one religious sect over another but also a general preference for religion over non-religion. See Bila, supra note 15, at 1549. Neutrality also prevents the establishment of a state religion, but still allows religious establishments to receive government aid that is distributed on a neutral basis. See id. Aside from these distinctions, the Court has struggled with what types of actions indicate neutrality rather than preference or hostility. See id. at 1549-50.

28. See supra note 17 and accompanying text.

29. 330 U.S. at 18.
the public realm to removing religion from the public realm.”

Unfortunately, the Court could not seem to articulate a test which would reliably separate permissible government interaction with religion from unconstitutional government involvement. Instead, the Court engaged in a long series of ad hoc, fact-specific analyses that produced illogical and contradictory results. Thus, twenty years after Everson, little progress had been made in clarifying Establishment Clause jurisprudence. The relatively easy and unifying principles that had emerged from early Establishment Clause jurisprudence had eroded into a guessing game for legislatures and judges.

C. THE ADVENT OF THE FIRST ESTABLISHMENT CLAUSE TEST

In an attempt to clarify the Everson-era cases, the Court adopted its first comprehensive test for adjudication of Establishment Clause issues in 1971, with its decision in Lemon v. Kurtzman. While striking down two statutes involving state aid to parochial schools, the Lemon Court noted that there

30. Stiltner, supra note 18, at 831 (citing Flynn, supra note 17, at 1054). According to Stiltner, from the period of ratification of the clause until the Everson decision, “the Court’s concern was to protect religion from government intrusion.” Id. at 831. However, after Everson, a trend of separationism seemed to permeate the Court’s decisions.


32. During this era the Court declared that a state could loan secular textbooks to students attending parochial schools, see Board of Educ. v. Allen, 392 U.S. 236, 248 (1968), and upheld laws requiring businesses to close on Sundays, see McGowan v. Maryland, 366 U.S. 420, 453 (1961). The Court also prevented voluntary prayers, see Engel v. Vitale, 370 U.S. 421, 436 (1962), and religious classes, see Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 212 (1948), from being held in public schools, but approved of students’ release during the school day for religious instruction held off school grounds, see Zorach v. Clauson, 343 U.S. 306, 315 (1952). In fact, in practice the Court’s adoption of the neutrality principle began to evidence a belief that government could not even indirectly support religion, but instead required hostility toward religion rather than mere separation.

33. The Court stated in Lemon v. Kurtzman “that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.” 403 U.S. 602, 612 (1971).

34. Id. at 612-13.

35. Before the Court were two state statutes, one from Pennsylvania and the other from Rhode Island. The Pennsylvania law allowed the state to pay nongovernment schools, including those of a parochial nature, a portion of their expenses for teachers’ salaries and various other secular expenses. See id. at 609. The Rhode Island statute supplemented the salaries of teachers in private schools by fifteen percent if they taught secular courses. See id. at 607;
were “three main evils against which the Establishment
Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’” The Court then articulated a three-part test to evaluate government action: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”

In applying the Lemon test to the Pennsylvania and Rhode Island statutes, the Court first determined that the statutes did have a legitimate legislative purpose because they ensured a minimum standard of secular education in all schools within state boundaries. The Court struck down the statutes after declaring that both created excessive entanglement between government and religion by requiring extensive government monitoring to ensure that only secular purposes were being advanced with state money.

Although Lemon seemed to reconcile Everson’s emphasis on neutrality and separateness, and to offer a clear approach to Establishment Clause cases, the Lemon test proved troublesome in its application. Under Lemon, the Court handed down


36. 403 U.S. at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

37. Id. at 612. According to some scholars’ analysis of cases subsequently decided under the Lemon doctrine, government actions which have “a reasonable secular purpose, even if it also has a substantial, or even primary, religious purpose,” will be deemed constitutional. Michael D. Lieder, Religious Pluralism and Education in Historical Perspective: A Critique of the Supreme Court’s Establishment Clause Jurisprudence, 22 WAKE FOREST L. REV. 813, 824 (1987).

38. 403 U.S. at 612 (citations omitted). Stiltner explains that statutes which merely provide inconsequential advantages to religion, but do not have the advancement of religion as their main purpose, will survive attack under this prong, because “‘[s]ome relationship between government and religious organizations is inevitable.’” Stiltner, supra note 18, at 833 (quoting Lemon, 403 U.S. at 614).

39. 403 U.S. at 613. The Court declared in Lemon that these three test have been “gleaned” from previous Establishment Clause cases. Id. at 612.

40. See id. at 613.

41. See id. at 618. Justice Brennan, writing for the majority, stated that the operation of these statutes would require state involvement in the schools’ accounting procedures and curriculum offerings. See id. at 621.

42. See Stiltner, supra note 18, at 831.
results just as contradictory and illogical as those following *Everson*.\(^{43}\) In fact, several cases involving application of the *Lemon* test seemed to contradict rulings from the *Everson* period.\(^{44}\) Although *Lemon* seemed to provide clear guidelines, it became apparent that in practice the test was unworkable.

D. *LEMON BEGINS TO SOUR*

Scholars, practitioners and members of the Court soon began to express their dissatisfaction with *Lemon*.\(^{45}\) However,
rather than overrule the unworkable Lemon doctrine, the Court simply began to move away from using the Lemon test. In 1981, the Court started to redefine subtly various prongs of the Lemon test, providing the first evidence that support for the test was declining.\textsuperscript{46} The Court’s most noticeable departure appeared around 1990, when the Court conspicuously reworded the application of Lemon and indicated that it was more of a signpost than a test.\textsuperscript{47} This result can be seen in purpose, provided little protection because any sectarian purpose usually has at least some corollary secular purpose that can be maintained, thus allowing it to pass review. See, e.g., Stiltner, supra note 18, at 833. Scholars have also claimed that this prong is irrelevant given the second prong of the test. These theorists claim that any "governmental action... undertaken for a religious purpose... will usually also have the effect of advancing religion... [thus making it] unconstitutional under the second Lemon principle." Robert A. Sedler, Understanding the Establishment Clause: The Perspective of Constitutional Litigation, 43 WAYNE L. REV. 1317, 1345 (1997).

The second prong of the Lemon test, requiring that government action neither inhibit nor advance religion, has been criticized on separate grounds. Scholars argue that the particular effects of a given state action are not often readily apparent and will therefore depend on the Court’s subjective value judgments. See Stiltner, supra note 18, at 833; Sedler, supra, at 1348. Furthermore, it has been argued that many state laws can advance both secular and religious purposes simultaneously. See Sedler, supra, at 1348. Therefore, striking down a law that advances an important secular purpose simply because it also advances religion seems to take the Establishment Clause beyond its original intent.

The most vociferous criticism has been aimed at the third prong. The "excessive entanglement prong" seems to be defined simply by cases that have come before it, with no static principles or rules to determine when government and religious interaction has reached the point of excessiveness. See, e.g., Stiltner, supra note 18, at 835 (citing Aguilar v. Felton, 473 U.S. 402, 420-21 (1985) (Rehnquist, C.J., dissenting) (claiming that the third prong is a "Catch 22 paradox of its own creation, whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause entanglement").


47. Thomas Marvan Skousen states that "the Court had relegated the Lemon test back to its role as ‘no more than a helpful signpost’ in dealing with Establishment Clause challenges." Thomas Marvan Skousen, Comment and Note, The Lemon in Smith v. Mobile County: Protecting Pluralism and General Education, 1997 BYU EDUC. & L.J. 69, 80 (1997); see also Paulsen, supra note 46, at 817. In County of Allegheny v. ACLU, Justice Blackmun wrote: "In Lemon v. Kurtzman... the Court sought to refine these principles by focusing on three ‘tests’ for determining whether a government practice violates the Establishment Clause... This trilogy of tests has been applied regularly in the Court’s later Establishment Clause cases." 492 U.S. 573, 592 (1989). As Professor Paulsen points out, "the Allegheny majority did not affirm Lemon as the appropriate test. It merely noted the historical fact that Lemon has been ‘applied regularly.’" Paulsen, supra note 46, at 814-15.
County of Allegheny v. ACLU\textsuperscript{48} and in Board of Education v. Mergens,\textsuperscript{49} both cases in which the lead opinion mentioned Lemon, but failed to garner the support of a majority of Justices.

The use of Lemon appeared to have reached an end in 1992, with the decision set forth in Lee v. Weisman.\textsuperscript{50} Lee involved the constitutionality of a religious invocation and prayer at a high school graduation ceremony. In striking down the school's incorporation of the prayer into the ceremony, the majority opinion, written by Justice Kennedy, completely ignored the Lemon test.\textsuperscript{51} In fact, Justice Scalia noted that Kennedy's deliberate decision to leave Lemon out signaled the Court's belief in its interment.\textsuperscript{52}

By focusing on the elementary objectives of the Establishment Clause and using "minimum constitutional guarantees" as the basis for his opinion, Kennedy was able to develop a two-pronged coercion test to analyze the constitutionality of the

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  \item \textsuperscript{48} 492 U.S. 573 (1989) (determining that a nativity scene placed inside a county courthouse was unconstitutional, while a menorah outside a government building was not). The case produced five separate opinions, with the main opinion, written by Justice Blackmun, producing majority support in only two sections. See Paulsen, supra note 46, at 814. Several members of the Court seemed to apply an endorsement test developed by Justice O'Connor, see id. at 815 and infra note 62 and accompanying text, while others seemed to support a test devised by Justice Kennedy in the dissent which stated:

\begin{quote}
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.
\end{quote}

492 U.S. at 817 (citations omitted).

49. 496 U.S. 226, 253 (1990) (upholding the constitutionality of the Equal Access Act, which permits religious groups to meet on public facilities on the same basis as secular groups). In this case, Lemon also failed to command a majority of the Justices. See id. The lead opinion, written by Justice O'Connor, "applied Lemon . . . without embracing it." Paulsen, supra note 46, at 818. As Professor Paulsen writes: "[T]he doctrinal significance of Mergens was the absence of a majority of the Court willing to apply Lemon even when it would make no difference to the outcome." Id. at 819. Rehnquist, White, Kennedy and Scalia seemed to remain supportive of Kennedy's coercive test. See id.; infra note 54 and accompanying text.


51. See id. at 586.

52. Justice Scalia declared: "The Court today demonstrates the irrelevance of Lemon by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision." Id. at 644 (Scalia, J., dissenting) (citations omitted).
prayer at issue.\textsuperscript{53} Justice Kennedy stated that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise" or authorize the establishment of a national religion.\textsuperscript{54} Applying these principles, Kennedy declared that undisputed conceptions of the Establishment Clause guaranteed the students in \textit{Lee} freedom from religious exercise mandated by the coercive power of the state. Therefore, the case could be decided without visiting the controversial questions "dividing [the Court] in recent cases."\textsuperscript{55} In fact, Justice Kennedy believed the \textit{Lee} policy was in such flagrant violation of the Constitution that the Court could invalidate it simply by looking at "controlling precedent," rather than determining the full scope of permissible government action under the Establishment Clause.\textsuperscript{56} "Reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured"\textsuperscript{57} would not be necessary. Justice Kennedy's avoidance of the \textit{Lemon} test, coupled with his evasion of controversial Establishment Clause issues, subtly illustrates the Court's belief that \textit{Lemon} is no longer applicable. However, it also demonstrates the Court's inability to agree on the new cohesive framework that will replace \textit{Lemon} as the baseline for Establishment Clause jurisprudence.

\textsuperscript{53} Justice Kennedy stated that:
These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to religious exercise, their attendance and participation in the state sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma. \textit{Lee}, 505 U.S. at 586, quoted in ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1479 (3d Cir. 1996).

\textsuperscript{54} 505 U.S. at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)). Professor Paulsen asserts that this test is simply a version of the coercion test he originally adopted in \textit{Allegheny}. See Paulsen, \textit{supra} note 46, at 822. Although Justices Scalia, Rehnquist, White and Thomas dissented from Justice Kennedy's opinion, their differences seem to be over Kennedy's inclusion of social pressure as coercion rather than the coercion test itself. See id. at 825.

\textsuperscript{55} 505 U.S. at 586.

\textsuperscript{56} \textit{Id}.

\textsuperscript{57} \textit{Id}. at 587.
E. ABANDONMENT OF LEMON LEADS TO CONFUSION AND INCONSISTENCY

Although Lee appeared to represent a new direction in Establishment Clause cases, the Supreme Court has still not explicitly overruled Lemon, nor has it developed a new, comprehensive doctrine that would aid lower courts in deciding the wide range of issues that arise under the Establishment Clause. The Court has taken relatively few religion cases in recent years, with no clear pattern emerging. The outcome in each case seems extremely uncertain, and as a consequence, anomalous results have occurred. These recent cases have upheld the entrance of public employees into private schools for the first time, struck down a separate school district made up solely of members of a culturally distinct religious sect, and approved the use of public space for religious messages on the same access policies of those allowed to use the space for non-religious messages. The demise of Lemon, therefore, has led

58. Michael McConnell, a leading Establishment Clause scholar, asserts that the Court has finally understood "that its rigorously separationist picture of the intention and actions of the Founding Fathers was seriously misleading as a matter of history." McConnell, supra note 15, at 933.

59. See Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993). This case involved the district providing a publicly funded sign-language interpreter for a deaf child attending a private school. See id. at 4. The Court noted that the placement of the district employee at the parochial school was dependent on the choice of the parents and stated that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." Id. at 18.

60. See Board of Educ. v. Grumet, 512 U.S. 687, 710 (1994). Here, the school board had established a special district for a religious sect that had objected to sending its children with special education needs to secular schools. See id. at 690. The Justices did not seem to conform to any one test in striking down the district, but did seem to feel that the religious sect was impermissibly benefited by creation of the special district. See Sedler, supra note 45, at 1331.

61. See Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995); Rosenberger v. Rector of the University of Virginia, 515 U.S. 819, 846 (1995). In Capitol Square, the Court upheld the placement of a Latin cross on a statehouse plaza based on the theory of equal access for all displays. 515 U.S. at 770. The seven-to-two decision set forth two differing rationales. Justices O'Connor, Souter, and Breyer retained the use of a test set forth in Allegheny. See id. at 783-94. It allowed the symbol as long as an outside objector would not feel the state was sponsoring religious symbols. In this case, since other symbols were permitted, such a purpose could not be attributable to the state. See Sedler, supra note 45, at 1334. Justices Scalia, Kennedy, Thomas, and Rehnquist upheld the display based on a new per se
to even more confusion over the Establishment Clause. Each Justice seems to favor a particular test, with no one test garnering majority support.\textsuperscript{62}

rule that “so long as the display was sponsored by a private entity and took place in a public forum open to all on equal terms, there could be no governmental endorsement of religion.” \textit{Id.} at 1333-34; \textit{see also} \textit{Joiner}, \textit{supra} note 10, at 540.

\textit{Rosenberger} upheld the payment of university funds to student organizations with a religious focus, when all other campus groups had been awarded such funds. The Court upheld the decision by a five-to-four majority, finding that to refuse to make funds available only to religious organizations was a form of viewpoint discrimination. \textit{See id.} at 845-46. Because the funds benefited all organizations neutrally, religion was not impermissibly advanced. \textit{See id.} at 843-44.

\textit{62.} Chief Justice Rehnquist appears to support a test that returns to historical roots because he believes the Court has “misplaced reliance on Thomas Jefferson’s notion of a ‘wall of separation’ between church and state.” \textit{Stiltner, supra} note 18, at 838-39. Rehnquist would instead prefer a test that makes the Establishment Clause simply a limitation on the government’s ability to establish a national religion or prefer one religious sect over another. \textit{See id.} at 839. Rehnquist states: “nothing in the Establishment Clause requires the government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.” \textit{Id.} at 839-40 (quoting \textit{Wallace v. Jaffree}, 472 U.S. 38, 113 (1985) (Rehnquist, C.J., dissenting)).

Justice Scalia has preliminarily supported Justice Rehnquist’s idea of historical underpinnings and similarly places much faith in tradition. \textit{See id.} at 840. His test, however, like Kennedy’s, places emphasis on preventing any government coercion of religion. \textit{See id.} Although Kennedy and Scalia seem to disagree about what exactly constitutes coercion, this test would uphold any state involvement with religion that does not coerce religious participation. \textit{See Lee,} 505 U.S. at 631-46 (Scalia, J., dissenting); \textit{supra} note 54 and accompanying text. Scalia takes a much narrower view of coercion, limiting it to the more traditional forms of religious oppression namely, “coercion of religious orthodoxy and... financial support by force of law and threat of penalty.” 505 U.S. at 640. Kennedy, however, would include social pressure or compulsion as impermissible government coercion. \textit{See id.} at 593; \textit{see also} \textit{Stiltner, supra} note 18, at 841. Kennedy feels that “absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.” \textit{Stiltner, supra} note 18, at 841 (quoting \textit{Allegheny}, 492 U.S. at 662).

O’Connor has advanced yet another test that is, in effect, a “refinement” of \textit{Lemon}. Known as the “Endorsement Test,” this revision prevents any message that would convey a government endorsement of religion, and also prevents excessive entanglement. \textit{See id.} at 840-41. O’Connor collapses the first two prongs of \textit{Lemon} into one inquiry in which she asks “whether government’s purpose is to endorse religion and whether the statute actually conveys a message of endorsement.” \textit{Id.} at 841. She continues to utilize the third prong of \textit{Lemon} as it was originally developed. \textit{See id.} This test has gained the support of various other members of the Court and seemed to be used by a majority in \textit{Wallace}. \textit{See id.}
The Supreme Court's failure to provide cohesive and consistent Establishment Clause jurisprudence has left lower courts mired in uncertainty. Unsure of whether Lemon is still applicable, most courts have continued to use the test, waiting for a definitive answer from the Supreme Court. This confusion has most noticeably arisen when the issues of public education and religious expression are intertwined.

In particular, the issue of school prayer at public graduation ceremonies became controversial almost immediately following the Lee decision. After Lee, the Supreme Court remanded Jones v. Clear Creek Independent School District, which was awaiting certiorari, to the circuit court for decision in accordance with Lee. In Jones, the Fifth Circuit was faced with a school board "resolution" which allowed senior class members to choose student volunteers to deliver a "nonsectarian" invocation at graduation. Noting with some irreverence that the Supreme Court has failed to develop a cohesive approach to the Establishment Clause in recent years, the Fifth Circuit applied the Lee analysis and determined that the Clear Creek "resolution" was constitutional. The Fifth Circuit declared that because the students, rather than the school, had voted to hold an invocation at their graduation ceremony, the prayers in Jones were distinguishable from Lee. The court also emphasized that the students' participation in the decision whether to include an invocation in the ceremony diminished any coercive effect that arose from "psychological pressure."

Finally, the court declared that the Clear Creek resolution was

63. 977 F.2d 963 (5th Cir. 1992).
64. See id. at 964.
65. See id. at 966 ("Nevertheless it is neither our object nor our place to opine whether the Court's Establishment Clause jurisprudence is good, fair or useful."). The Fifth Circuit also noted that "in the time between Lemon and Lee, the Court has used five tests to determine whether public schools' involvement with religion violates the Establishment Clause." Id.
66. See id. at 972. The court also determined the policy to be constitutional under the Lemon test and the endorsement test.
67. See id. The court stated that "[t]he practical result of our decision, viewed in light of Lee, is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies." Id. On the second appeal to the Supreme Court, certiorari was denied. See Jones v. Clear Creek Indep. Sch. Dist., 508 U.S. 967 (1993).
68. 977 F.2d at 971.
directed at graduating seniors who are much "less impressionable than younger students," making the coercive effect of the invocation similar to other "innocuous" religious references that pervade our government.69

After the Fifth Circuit's decision, it appeared that graduation prayer would remain constitutional under the newly-minted Lee analysis as long as the choice to include religious expression was left solely to students. However, shortly after Jones, the Ninth Circuit weighed in with a contrary position. In Harris v. Joint School District No. 241,70 the Court of Appeals concluded that even though students voted on the prayer at issue, the administration's involvement was closely intertwined with administration of the prayer, therefore raising it to the level of coercion observed in Lee.71 Most significantly, the Ninth Circuit noted that although the decision to include prayer was given to students, "ultimate[ ] control[ ]" of the graduation was vested in the school officials.72 Furthermore, the court noted that students were allowed to decide whether an invocation should be included in their ceremony only because the state delegated its authority and allowed such a decision.73 Accordingly, the court noted that school administration could not avoid the constraints of the Establishment Clause simply by allowing students to make an unconstitu-

69. Id. (quoting Board of Educ. v. Mergens, 496 U.S. 226, 235 (1990)). The Fifth Circuit cited the Supreme Court's opening, "God save the United States and this Honorable Court," and determined that these references to religion lack any attempt to coerce religious orthodoxy. Id.

70. 41 F.3d 447 (9th Cir. 1993).

71. See id. at 459. In rejecting the constitutionality of such prayers, the court claimed that the state retained ultimate control over the prayers because the state had delegated decisionmaking power to the students. The court also said that "[s]tudents are obligated to attend and participate in graduation prayers, either by bowing their heads or maintain[ing] a respectful silence, at Grangeville High graduation as at the high school commencement discussed in Lee." Thomas A. Schweitzer, The Progeny of Lee v. Weisman: Can Student-Invited Prayer at Public School Graduations Still Be Constitutional?, 9 BYU J. PUB. L. 291, 299 (1995) (citing Harris, 41 F.3d at 457). Harris was ultimately vacated as moot by the Supreme Court. See Harris v. Joint Sch. Dist. No. 241, 515 U.S. 1154, 1154-55 (1995).

72. Harris, 41 F.3d at 454. The court noted that the school retained authority over the "precise contents of the program, the speeches, the timing, the movements, the dress and the decorum of the students." Id. (citing Lee, 505 U.S. at 597). The court also noted the fact that the school provides the funds necessary to hold commencement. See id.

73. See id.
The Ninth Circuit held that these factors combined to make the policy in Harris a coercive religious exercise and thus unconstitutional under Lee.

Although the Ninth and Fifth circuits have taken opposing positions on the issue of student-initiated graduation prayer, they are not alone. Many district courts have also come up with conflicting decisions on similar fact patterns.

II. THE THIRD CIRCUIT JOINS THE FRAY:
ACLU V. BLACK HORSE PIKE REGIONAL BOARD OF EDUCATION

In the spring of 1993, the Black Horse School District adopted a program, known as Policy IKFD, which allowed student prayer at graduation ceremonies only if a majority of the senior class desired such a prayer. The policy allowed students to vote for a prayer at graduation, a moment of silence, or for "nothing at all." Senior class member Edward Ross protested Policy IKFD, after his class voted to include prayer in their upcoming graduation ceremony. Ross, along with the

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74. See id. at 455. The court stated that "elected officials cannot absolve themselves of a constitutional duty by delegating their responsibilities to a non-governmental entity." Id.


76. The school district began to reexamine its policy of including prayer in graduation ceremonies after the decision in Lee v. Weisman. See ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1474 (3d. Cir. 1996). The Superintendent of Schools developed Policy IKFD in an effort to conform with Lee and submitted his proposal to the board for approval. See id. The first version of the policy, Version A, prohibited any type of prayer at the ceremonies. See id. The Board did not approve this policy and directed school officials to develop a policy that would conform with both Lee and Jones v. Clear Creek Independent School District, which had recently held student-initiated prayer to be constitutional. See id. at 1474-75. The administration developed two further versions of Policy IKFD for board approval. See id. at 1475. The first, version D, allowed students to decide if prayer should be allowed at graduation and also allowed students to determine "the nature of any such prayer." Id. The second version, which was rejected by the Board, prohibited prayer but did allow for a moment of silence. See id. After receiving approval by a group of student representatives, the Board unanimously adopted Version D. See id.

77. Black Horse, 84 F.3d at 1474.

78. See id. at 1475-76. Shortly before graduation, the principal detailed the operation of the new policy to the students during a morning address
ACLU, sought to enjoin the prayer on the grounds that the policy was unconstitutional.79

The Third Circuit dismissed the school board's argument that the prayer policy was intended to protect the free speech rights of its students.80 The court declared that although Policy IKFD allowed every student input on the decision whether to have prayer at graduation, the program sacrificed the rights of the minority at the expense of the majority—a result prohibited by the First Amendment.81 The Third Circuit held that graduation was not a public forum that provided for a multiplicity of views.82 As a result, the court determined that Policy IKFD did not in fact support free speech.83

The Third Circuit then analyzed the Black Horse policy under the doctrine of *Lee v. Weisman*. The majority found that the state exercised impermissible control over the religious component of the ceremony because the commencement was held on school property and state officials retained complete power over the sequence of the graduation program.84 Additionally, the court held that the students' participation in the decision to include prayer did not distinguish this case from *Lee* because students only voted on the school prayer because the school officials agreed to delegate this authority to them.85 The Third Circuit then declared that the policy also failed the

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79. See Black Horse, 84 F.3d at 1476.
80. See id. at 1477.
81. See id.
82. See id. at 1478. The circuit court dismissed the school board's reliance on free speech rights, stating that graduation was not a public forum. See id. The court relied in part on the board's refusal to allow the safe sex speech, and declared, therefore, that Policy IKFD could not legitimately be interpreted as a promotion of the students' free speech rights. See id. at 1477-78.
83. See id. at 1478.
84. See id.
85. See id. at 1479. The court quoted *Lee* in stating that the "school officials necessarily 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." *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 597 (1992)).
second prong of the *Lee* test because it coerced students into participating in the religious exercise.\(^8\) In making this determination, the court adopted the rationale expressed by Justice Kennedy in *Lee* and declared attendance at high school graduation to be an involuntary choice.\(^8\) The court declared that the school's control of the ceremony, coupled with the peer pressure emanating from others in the audience, forced students into either standing and/or remaining silent during the prayer.\(^8\) According to the Third Circuit, this result constituted coerced participation in the religious exercise because the seniors had no other way to express their disagreement with the prayer.\(^8\) Finding the Black Horse Policy to have failed both prongs of the *Lee* test, the court declared the policy unconstitutional under the Establishment Clause.

The Black Horse court then examined the policy undergirding the *Lemon* test. Although the court noted that *Lemon* was of questionable value, it stated that the test was precedential authority, thereby mandating its application absent an explicit overruling by the Supreme Court.\(^9\) The Third Circuit rejected the idea that the prayer was necessary to serve a solemnizing function and thus found that Policy IKFD did not have a secular purpose as required by the first prong of *Lemon*. Further, the court was not convinced that the free speech rights of the students took precedence in this area.\(^9\) The court also found the policy to violate the second prong of the *Lemon* test because it impermissibly endorsed religion by conveying the message that religion is preferred over non-religion.\(^9\)

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86. See id. at 1480.
87. See id.
88. See id.
89. See id. According to the court, "[t]his pressure, though subtle and indirect, can be as real as any overt compulsion." *Id.* (quoting *Lee*, 505 U.S. at 592-93). In making this finding the court noted its disagreement with a recent Fifth Circuit decision that had declared a similar policy constitutional based on the fact that graduation was a once in a lifetime event with mature students who were less immune to coercion. *See id.* at 1482. Instead, the court embraced the rationale of the Ninth Circuit, which declared that "school officials cannot divest themselves of constitutional responsibility by allowing students to make crucial decisions." *Id.* at 1483 (quoting *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 455 (9th Cir. 1994)).
90. See id. at 1484.
91. See id. The court declared that, although prayer has been approved by the Supreme Court as a means of solemnizing legislative sessions, this purpose could not be used to save the Black Horse policy. *See id.* at 1485.
92. The court stated that although the "disclaimer that is required by
III. STUDENT-INITIATED PRAYER: NON-COERCIVE AND CONSTITUTIONAL

Considering the current status of Establishment Clause jurisprudence,\textsuperscript{93} one can hardly blame the \textit{Black Horse} court for its confused approach. However, the \textit{Black Horse} court did have an advantage that many other courts deciding Establishment Clause controversies lack: the Supreme Court had already decided a similar issue of graduation prayer, and in so doing laid down a new framework for interpreting this particular Establishment Clause controversy.\textsuperscript{94} With its landmark decision in \textit{Lee v. Weisman}, the Court provided a mandate for lower courts to follow in graduation prayer cases. Unfortunately, the \textit{Black Horse} majority extended the methodology employed by the Supreme Court and unnecessarily utilized the \textit{Lemon} test in its analysis of Black Horse's graduation ceremony. Additionally, by failing to adopt the most sensible definition of coercion, the Third Circuit misinterpreted \textit{Lee} and erroneously declared the Black Horse program unconstitutional.

A. APPLICATION OF THE \textit{LEMON} DOCTRINE CONTRADICTS SUPREME COURT PRECEDENT

The Third Circuit erred when it applied a \textit{Lemon} analysis to the school district's graduation prayer policy.\textsuperscript{95} Although the

\begin{quote}
Version D does weigh in favor of the Board's position under a \textit{Lemon} analysis... it does not weigh so heavily as to neutralize the counterweight of the advantage the policy gives religious speech over secular speech." \textit{Id.} at 1487. The court declined to analyze whether the policy failed the third prong of the \textit{Lemon} test, which prohibits excessive government entanglement with religion, because it considered the fact that the prayer program failed the first two prongs of the test sufficient to declare the policy unconstitutional. \textit{See id.} at 1488.

93. Various scholars have described the Supreme Court's Establishment Clause jurisprudence as a veritable mass of inconsistency and confusion. One prominent professor even went so far as to say:

the Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices.


\end{quote}
Supreme Court has never explicitly overruled the Lemon test, its informal demise has been noted by both scholars and several members of the Court. The inapplicability of this test to graduation prayer cases can hardly be disputed given that a majority of Justices failed to utilize the test in Lee. Writing for a majority of the Court in Lee, Justice Kennedy announced that analysis under the Lemon test was completely unnecessary. Rather, he felt the case could be decided simply by examining the basic limitations on coercive government action that have evolved from previous Establishment Clause jurisprudence. The Black Horse court should have followed the Supreme Court's example and declined to apply the Lemon test; instead, the court should have utilized the coercion test as the sole basis of its decision.

B. THE COERCION TEST IS THE CORRECT ANALYTICAL TOOL FOR DECIDING GRADUATION PRAYER CONTROVERSIES

The coercion test involves the intersection of two distinct ideas: (1) state control of a religious exercise and (2) coerced participation in the exercise. Not only is this test controlling

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96. See supra notes 47-53 and accompanying text.

97. 505 U.S. at 577. In fact, only one justice even mentioned the application of the Lemon standards—Justice Blackmun, in his concurring opinion, wrote that the Court has relied on Lemon standards since 1971, but he then failed to apply the test to the issue at hand. See id. at 603-04 (Blackmun, J., concurring).

98. See id. at 586-87.

99. See supra notes 53-57 and accompanying text (detailing Kennedy's belief that this level of coercion is enough to constitute government establishment of religion without redefining the current decisional framework).

100. However, even if Lemon were to apply, the Black Horse dissent argued that such a program could be found constitutional under Lemon. Judge Mansmann, writing for the dissent, found that the program had three separate secular purposes: free speech protection, solemnization of the ceremony, and encouraging responsible citizenship. See Black Horse, 84 F.3d at 1494 (Mansmann, J., dissenting) (discussing the education of students about the "effects of current constitutional jurisprudence on their public behavior"). He also believed that the policy did not endorse religion because it was "as hospitable to religion as it [was] to irreligion." Id. at 1496. Finally, he found that excessive government entanglement was avoided since the policy appeared to involve a "virtual total absence of administrative entanglement of any sort." Id. at 1497. This notion of a lack of entanglement is supported by the fact that the students themselves conducted a vote and were responsible for choosing volunteers to lead the vote while school officials were conspicuously absent during the whole procedure.

101. See id. at 1479. The Black Horse court derived these two prongs directly from Justice Kennedy's opinion in Lee. See supra note 53 and accompa-
for lower courts by virtue of its application in *Lee v. Weisman*, it is also the most historically accurate test for Establishment Clause jurisprudence because it fulfills the normative aspirations that the Framers intended to embody in the First Amendment.¹⁰²

Modern Supreme Court jurisprudence has limited the guarantees afforded all citizens under the First Amendment by interpreting the religion clauses to contain protections that are inherently contradictory.¹⁰³ Since the nonestablishment principle prohibits any government special treatment for, or involvement with, religious institutions, application of the Establishment Clause has been read to prohibit many of the religious accommodations guaranteed by the Free Exercise provision.¹⁰⁴ However, interpretation of the Establishment Clause through a coercion analysis resolves this tension.¹⁰⁵ By allowing government action that is neutral toward religion, rather than mandating the total evisceration of church and state, the Supreme Court will ameliorate the unnecessary and unintended hostility toward religion that has resulted from its jurisprudence. This approach will also reverse the separationist trend that has pervaded Establishment Clause jurisprudence in modern times.¹⁰⁶

Under a coercion interpretation of the Establishment Clause, government may be connected with religious exercises as long as it does not use its power to compel participation in such exercises or display an attitude that seems to favor relig-

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¹⁰² See infra notes 110-17 and accompanying text.

¹⁰³ See, e.g., Joiner, supra note 10, at 507; Paulsen, supra note 46, at 795.

¹⁰⁴ Examples of this tension can be seen by examining cases decided under the Free Exercise Clause. In *Sherbert v. Verner*, for example, the Supreme Court held that special religious exemptions are sometimes required by the Free Exercise Clause. 374 U.S. 398, 408-10 (1963). The Court found that unemployment compensation must not be barred to those whose religion for-bids work on Saturdays, see id. at 409-10, a result that seems to support religion and thus violate the Establishment Clause.

¹⁰⁵ See infra notes 106-09 and accompanying text.

¹⁰⁶ See supra note 30 and accompanying text; McConnell, supra note 93, at 189.
ion over non-religion. By focusing on limiting government's coercive powers in the area of religious expression, this approach resolves the inherent tension that currently exists with the Free Exercise Clause. The Free Exercise provision guarantees everyone the right to religious worship, while the Establishment Clause prevents the government from establishing a preferred or mandatory religion. Under this view, "[t]he Establishment Clause prohibits the use of the coercive power of the state to prescribe religious exercise; [while] the Free Exercise Clause prohibits the use of government compulsion to prescribe religious exercise." Historical evidence of the Framers' intentions supports this interpretation of the clause. James Madison, who originally proposed the First Amendment, stated that the clauses meant only 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." Furthermore, this interpretation is supported by actions of the federal government in the period surrounding the adoption of the Bill of Rights. Government, far from being strictly secular, was involved in many different aspects of religion. However, it drew the line by avoiding the use of its power to coerce religious exercise. Reading the Establishment Clause to re-

108. According to Professor Paulsen, this interpretation places the two clauses in direct complement to each other and "protect[s] a single central liberty—religious freedom—from two different angles." Paulsen, supra note 46, at 798.
109. Id. (emphasis added).
110. Professor McConnell writes that "[i]f Madison's explanations to the First Congress are any guide, compulsion is not just an element, it is the essence of an establishment." McConnell, supra note 15, at 937.
111. Bila, supra note 15, at 1544 (citation omitted) (quoting 1 ANNALS OF CONG. 731 (J. Gales ed., 1834)).
112. For example, the use of military chaplains, legislative prayer sessions, and Presidential Thanksgiving proclamations all evidence the intertwining relationship between the church and state. See supra note 15 and accompanying text.
113. Professor McConnell writes that the aforementioned actions by the framers "are much easier to understand if one sees religious coercion as the fundamental evil against which the clause is directed." McConnell, supra note 15, at 939. Indeed, the idea of the Establishment Clause came primarily as a response to nationalized churches and forced support of religion in the European countries the framers had deserted. Bila notes in her article that the religion clauses were a direct effort by the framers to prevent the coercive re-
quire strict separationism in effect requires the government to be hostile to the concept of religion, an idea that contradicts the notions of liberty and freedom the Framers were attempting to promote. A majority of Supreme Court justices have recognized this dichotomy and have therefore endorsed the coercion test for use in Establishment Clause cases.

C. APPLICATION OF THE COERCION TEST RESULTS IN A FINDING OF CONSTITUTIONALITY FOR THE BLACK HORSE PROGRAM

Using the coercion test, an Establishment Clause violation occurs in the context of graduation prayer only when a state religious orthodoxy that European governments had engaged in for centuries. See Bila, supra note 15, at 1543. Many state governments had begun to favor particular religious sects in the tradition of European monarchies and many early colonists felt that result should be prevented. See id. at 543; see also McConnell, supra note 15, at 939.

114. Many school districts have distanced themselves from any form of religious expression, fearing that such a connection would be perceived as a government endorsement of religion. However, this position of strict separation can also be seen to coerce students toward belief in an atheist viewpoint since it conveys to students that religion is inappropriate or unnecessary to civilian life. See Daniel N. McPherson, Student-Initiated Religious Expression in the Public Schools: The Need for a Wider Opening in the Schoolhouse Gate, 30 CREIGHTON L. REV. 393, 420 (1997).

115. Professor McConnell writes that "virtually the entire spectrum of opinion at the time of the adoption of the First Amendment expected the citizens to draw upon religion as a principal source of moral guidance for both their private and their public lives." McConnell, supra note 93, at 191. According to McConnell, the Establishment Clause merely sought to ensure freedom to pursue whatever religious "guidance" they preferred without government interference or preference for a particular sect. See id. The idea that government would completely ignore religion seems contrary to the ideals of a time when religion was one of the primary influences on society. President Adams said that "our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Joiner, supra note 10, at 569 (citation omitted).

116. Although four justices dissented from Kennedy's majority opinion in Lee, they seemed to disagree not with the use of the coercion test itself, but rather with Kennedy's inclusion of indirect social pressure in the definition of coercion. See Lee v. Weisman, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting). Justice Scalia, who was joined by Justices Rehnquist, White, and Thomas, wrote, "while I have no quarrel with the Court's general proposition that the Establishment Clause 'guarantees that government may not coerce anyone to support or participate in religion or its exercise,' I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty." Id. (citation omitted). In fact, Justice Rehnquist wrote as early as 1985 that the religion clauses "primarily seek to prevent coerced religious adherence and to guarantee the free exercise of one's chosen religious beliefs." Bila, supra note 15, at 1535 (citing Wallace v. Jaffree, 472 U.S. 38, 50 (1985)).
controls a religious exercise and (2) uses this control to compel participation by citizens. Although the Black Horse court correctly identified the major tenets of the test, it incorrectly applied the test by attributing coercive action to the state rather than to private individuals. In doing so, the court erroneously declared the program unconstitutional.

1. State Control of the Graduation Prayer

In Lee, the Court found that state control of the graduation prayer made the religious exercise an unconstitutional violation of the Establishment Clause.117 However, several facts distinguish Black Horse from Lee and lead to the conclusion that the state in Black Horse was only a neutral actor in the religious prayer, rather than a controlling entity enforcing religious orthodoxy.

In Lee, the school principal chose whether to include a prayer, who would give the prayer, and what would be the general content of the prayer.118 In contrast, the Black Horse program purposely avoided all state control of the program. The choice of whether or not to have prayer, a moment of silence, or neither of these options, was left entirely to a student vote.119 Additionally, in Black Horse, a similar group of students selected student volunteers to give the prayer, and a disclaimer was printed on the graduation programs stating that the religious exercise did not reflect the beliefs of the school board, staff, or other students.120

Therefore, unlike the program in Lee, the administration (i.e., the state) did not have any control over the process at issue in Black Horse. Although the board proposed the program allowing the vote, the decision accurately reflected students' wishes, negating any allegation that it was a purely semantic exercise.121 Rather, the board simply tried to accommodate a desire held by a large portion of the community to include a re-

117. See Lee, 505 U.S at 577.
118. See id. at 587.
120. See id.
121. In fact, the district court judge emphasized that he had earlier suspected that the policy was simply an attempt by the school board to favor particular religious beliefs. However, the evidence indicated that the policy was truly motivated by a desire to accommodate student wishes and was not simply a "sham" to cover religious preferences. See id. at 1491 n.2.
religious element in the graduation ceremony, a significant event in the lives of many students.\textsuperscript{122} This desire was evidenced by the "longstanding tradition" of including nonsectarian invocation and benediction in previous ceremonies without any protest. If this desire was now absent, as indicated by a majority vote, the prayer would not be held, regardless of the school board's wishes. The state made its position on the prayer clear—it did not support or discourage religious expression, but simply stood by as a neutral observer. This concept of neutrality is exactly what the Framers intended when they proposed the Establishment Clause.\textsuperscript{123} To require the state to prevent such a religious exercise would in effect mandate state hostility toward religion—a result in tension with the Free Exercise Clause.\textsuperscript{124} Therefore, by remaining neutral and removing itself from control of the prayer, the Black Horse program clears the first prong of the coercion test.

2. Coerced Participation in the Graduation Exercise

To pass the coercion test set forth in \textit{Lee}, a graduation prayer must not only remove state control of the religious exercise, but it must also lack any coercive state action that would compel student participation in the exercise.\textsuperscript{125} In \textit{Lee}, the Justices espoused two competing definitions of government coercion, leaving lower courts with the job of deciding which view most accurately reflects the spirit of the Establishment Clause.\textsuperscript{126} In \textit{Lee}, a fractured majority struck down the specific graduation prayer policy based on the perceived indirect social coercion that it believed would force students to stand and/or remain silent.\textsuperscript{127} The majority stated that these circumstances constituted coercion under the Establishment Clause because this peer pressure could itself be construed to require participation.\textsuperscript{128} The dissent in \textit{Lee}, led by Justice Scalia, offered a
more normative interpretation of the coercion doctrine. As Justice Scalia viewed it, his interpretation would relieve state entities of responsibility for the actions of private citizens.\textsuperscript{129} The Justices in this group believed that a definition of coercion which attributed indirect social pressure to official government action went beyond the bounds of the Establishment Clause.\textsuperscript{130}

According to the dissent, government coercion should be interpreted to include only those instances in which "legal sanction[s] . . . or . . . a condition of some other right, benefit or privilege, [directly] require[s] individuals" to participate in religious exercise.\textsuperscript{131} Using this definition, ambiguous social pressure by members of society will not be defined as official coercion since it is not directly attributable to the government.\textsuperscript{132} This idea fully recognizes the fact that mature, graduating seniors will be able to acknowledge the distinctions between government action and indirect social pressure.\textsuperscript{133} Be-

\begin{itemize}
  \item \textsuperscript{129} Justice Scalia emphasized that standing at a public ceremony is simply a measure of respect: "surely our social conventions have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence." \textit{Id.} at 637 (Scalia, J., dissenting).
  \item \textsuperscript{130} \textit{See}, e.g., McPherson, \textit{supra} note 114, at 419. Many scholars also believe that as long as students are not forced to participate in or to accept religious beliefs which they do not support, respectful accommodation while others engage in such practices cannot constitute an Establishment Clause violation. \textit{See id.; see also} Paulsen, \textit{supra} note 46, at 798-99. While Professor Paulsen does not believe that social pressure should be attributed to the government, he believes that attendance at the graduation ceremony is compelled and therefore that government has coerced participation in a religious exercise even if students are not "forced to further participate in particular acts of religious worship." Paulsen, \textit{supra} note 46, at 798-99. In effect, Professor Paulsen sees mere attendance as constituting a religious exercise, but rejects the idea that standing and remaining silent constitutes participation. \textit{See id.} at 799, 841-42.
  \item \textsuperscript{131} Paulsen, \textit{supra} note 46, at 797.
  \item \textsuperscript{132} \textit{See} Paulsen, \textit{supra} note 46, at 847 (stating that "private pressure to conform does not constitute state action").
  \item \textsuperscript{133} \textit{See}, e.g., Kimberly T. Morgan, Note, \textit{Can Students Do What the State Cannot Do?: The Constitutionality of Student Initiated, Sponsored, Composed and Delivered Prayers at Graduation}, 12 St. John's J. Legal Comment 273, 290 (1996). Morgan states that graduation is traditionally seen as "a student's passage into adulthood" at which time they become full members of society with all its inherent responsibilities and privileges. \textit{Id.} at 290-91. Requiring students to become mature adults and take full responsibility for their actions while simultaneously doubting their ability to resist peer pressure re-
cause graduating high school students are expected to have reached a point at which they can take full adult responsibility for their lives, part of such responsibility should include the ability to discern government action from the coercive pressure of their classmates. By defining coercion to include indirect social pressure, the Court insults our country's young people by failing to credit them with the ability to make intelligent observations and distinctions.

The majority's holding in Lee—that a government benefit was conditioned upon coerced participation in prayer by virtue of the indirect social pressure to stand and remain silent—defies the normal conception of government coercion. While there may be some social pressure to remain silent, this pressure cannot be attributed to the government. In no other area of constitutional law has the government evidenced its willingness to accept responsibility for the actions of the civic majority. Instead, the government has always steadfastly maintained that it is not responsible for the conduct of private citizens and has refused to take action against civilian indi-

garding religion seems illogical and contradictory. See id. at 290-91.

134. Some courts have also embraced this reasoning. In Jones v. Clear Creek Independent School District, the court wrote, "We also consider the age of the graduating seniors relevant to the determination of whether prayers ... can coerce these young people into participating in a religious exercise." 977 F.2d 963, 971 (5th Cir. 1992). According to the Jones court, high school graduates are mature enough to make a distinction between neutral and coercive government action. See id.

135. According to McPherson, many courts that were faced with the issue of school graduation prayer before Lee determined that no coercion was present by virtue of the fact that attendance at graduation ceremonies is completely voluntary. Therefore, participation in religious exercises at such ceremonies could not be considered compelled, because a student who did not want to participate could either boycott the event or simply remain silent. See McPherson, supra note 114, at 416. In Lee the majority foreclosed this reasoning, stating that it "lack[ed] all persuasion." 505 U.S. 577, 595 (1992). According to Justice Kennedy, a high school student has no real choice but to attend a high school graduation ceremony because it is "one of life's most significant occasions," and "absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." Id. at 595.

136. Webster's defines "coerce" as "to restrain or dominate by force; to compel to an act or choice; or to bring about by force or threat"; and uses "force" as a synonym to the word, clearly emphasizing that indirect pressure is not considered part of coercion. WEBSTER'S COLLEGIATE DICTIONARY 222 (10th ed. 1993).
individuals for instances of segregation, discrimination, or even free speech restrictions.\textsuperscript{137}

The majority in \textit{Lee} also expressed concern that coercion implicitly existed at the graduation ceremonies because the students had no effective way to express their disagreement with the religious content of the ceremony, short of boycotting or foregoing the event.\textsuperscript{138} However, it is unlikely that mere attendance at a graduation ceremony and silence during a prayer will be perceived as evidence of participation in the religious exercise by other students or the audience. Rather, a mature student will discern that these actions do not necessarily indicate participation in or support of a religious exercise, but instead constitute a simple showing of respect for the religious beliefs of peers.\textsuperscript{139} Furthermore, a student who wishes to protest the prayer can remain seated during the prayer. Such action, although silent, clearly announces the student's protest to all those everyone in the graduating class and the audience. A student who remains seated can in no way be considered to be participating, much less coerced, into observance of a religious exercise.

In \textit{Black Horse}, the school district went to great pains to reinforce this impression by ensuring that everyone in the audience knew that some of the graduating seniors did not sanction or wish to participate in the prayer. Various disclaimers printed on the graduation program disavowed the State's support of the prayer, and explicitly indicated that not all stu-

\textsuperscript{137} In today's society for example, private discrimination is still permitted by private schools, country clubs, etc., as are restrictions on speech that are made by non-governmental actors.

\textsuperscript{138} 505 U.S. at 596-98.

\textsuperscript{139} McPherson notes that while religious expression may make some students "uncomfortable... [s]chools... cannot ensure the comfort of every student in every circumstance." McPherson, supra note 114, at 420 (citations omitted). Seeking to make students "comfortable" also does not appear to be a valid rationale for separationism—prohibiting expression might make religious students just as "uncomfortable" as their atheist counterparts would be if such expression were allowed. See id. at 420-21. One must also question a school system that "shelter[s]... from any ideas that might conflict with their previously-held beliefs." Id. at 421. The very concept of public education is to expose students to various intellectual concepts that have been previously unknown to them. By exposing students to new ideas, we challenge students and encourage the intellectual growth that makes them capable of responsible participation as adults in contemporary society. For this reason, "it is important that students of all religious beliefs and those of no religious beliefs, be given equal opportunity to express themselves." Id.
students supported the prayer. These protections should be sufficient to allow a student in the Black Horse district to accommodate the religious exercise of the majority without having his mere presence interpreted as coerced state participation in a peripheral religious activity. The concerns of the majority in Lee are unwarranted because there is no evidence suggesting that attendance alone causes students to feel state compulsion or coercion to participate, or even to be perceived by others as participating.

If the Supreme Court defined coercion to include only direct government pressure to participate in religious exercises, it would use the term in a way that most closely fits its everyday meaning. As members of society we are often subject to peer pressure, which we all must learn to distinguish from official government action. The government cannot and should not be made responsible for the private actions of its citizens. Lower courts should interpret the coercion element of this new doctrine in accordance with Justice Scalia’s definition of coercion and resist the urge to include indirect or imagined peer pressure to conform. According to this definition, the prayer at issue in Black Horse will be constitutional because it is simply a private expression of religious belief desired by the chosen community, with participation uncontrolled and unrelated to any government force or compulsion.

3. Accommodation of the Majority, not a Dictatorship by the Minority, Best Fulfills the Normative Aspirations of Our Democratic System

Some opponents of graduation prayer argue that allowing student-initiated invocations at commencement allows a tyranny of the majority to sacrifice the rights of the minority. However, under the Lee analysis, a minority of students are able to prevent religious observance by the majority, therefore allowing a small group to control the fate of many. This type of “minority dictatorship” is antithetical to our nation’s basic ideals of democracy. Accommodation of majority beliefs, on the other hand, embodies fundamental principles of our democratic system.

In the instance of a majority vote, a few individuals are asked to accommodate the religious views of the community.

140. See ACLU v. Black Horse Reg’l Bd. of Educ., 84 F.3d 1471, 1475 (3d Cir. 1996).
Those who disagree with the views of the general community are free to express their dissatisfaction by remaining silent and/or seated during the prayer. Their participation is not coerced by government power, nor even required by those around them. Therefore, the program does not result in a tyranny of the majority, but is simply a reflection of important community values. As long as members of the minority are not forced to adopt or embrace the preferences of the majority, they suffer no intrusion on their civil rights. When the opposite result is allowed to occur, however, a chosen few are able to stymie the wishes of a great many. This outcome reflects not a democracy, but rather a monarchy or dictatorship, forms of government the Framers wished to prohibit under our Constitution. Our nation is founded on a tradition that allows the majority view to prevail as long as the minority is permitted to respectfully dissent.

The Black Horse program carefully removed all aspects of state control from the decision to include prayer in the graduation ceremony. Additionally, there was no direct government pressure to participate in the prayer, nor even a requirement that a student stand or remain silent. Students who did not wish to participate in the prayer were free to do so, and their attendance at the ceremony was neither explicitly nor implicitly conditioned on participation in the religious exercise. Rather, the program simply sought to accommodate the observance of religious beliefs held by a large portion of the community. Therefore, the Black Horse program fulfills the normative aspirations of the Framers and should have been declared constitutional by the Third Circuit.

CONCLUSION

The Supreme Court has provided little guidance for lower courts in determining the outcome of Establishment Clause challenges. Therefore, lower courts must carefully examine Supreme Court precedent and follow changing interpretations of the Court to ensure consistent results. Because the Supreme Court has expressly used a coercion test when deciding issues of graduation prayer, circuit courts should only utilize this test when deciding similar issues. Under this test, state action passes constitutional muster if the state does not control or coerce participation in a religious exercise.

The Black Horse court failed to follow the Supreme Court's analysis and erroneously utilized the Lemon test when it ana-
alyzed the Black Horse prayer policy. The court also erred in its application of the coercion test when it attributed private social pressure to the school board. Had the court applied the definition of coercion embraced by the dissent in *Lee*, it would have correctly identified the conduct that the Framers sought to prohibit under the Establishment Clause and declared the Black Horse program constitutional.