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IN THE WAKE OF *LEE V. WEISMAN*: THE FUTURE OF SCHOOL GRADUATION PRAYER IS UNCERTAIN AT BEST

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I. INTRODUCTION

One often hears the cliché, "as long as there are tests, there will be prayer in school." It might also be said, "as long as there are public schools, school prayer will be litigated."[1] Nearly four decades after the United States Supreme Court first held that school prayer violated the Establishment Clause,[2] the Court recently ruled on the constitutionality of prayer in schools,[3] while it has left other school prayer cases still pending.[4] These pending cases are factually different from the first school prayer cases; the question will be whether those factual differences create constitutional distinctions. After analyzing numerous school prayer court decisions, this article suggests that the Supreme Court decision in *Lee v. Weisman*[5] provides no guidance, or at best, inadequate guidance determining the constitutionality of prayer given by students at school functions.

Thirty years after the Supreme Court in *Engel* held that school prayer violates the Establishment Clause, the Court in

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1. The validity of prayer in schools has been litigated for more than a century. *See e.g.*, Pfeiffer v. Board of Education City of Detroit, 118 Mich. 560, 77 N.W. 250 (1898).

2. Engel v. Vitale, 370 U.S. 421 (1962).

3. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). While this article will not attempt to analyze *Santa Fe* in depth, *Santa Fe* is relevant both for the similarity of facts and the Court's holding. In particular, the Court held "[o]ur analysis is properly guided by the principles in *Lee*."

4. *E.g.*, Adler v. Duval County Sch. Bd., 206 F. 3d 1070 (11th Cir. 2000) (en banc) *cert granted*, judgement vacated by Adler v. Duval County Sch. Bd., 121 S.Ct. 31 (2000), and Chandler v. Sieglman, ___ F3d ___, 2000 WL 1557134 (11th Cir. 2000).

5. 505 U.S. 577 (1992).

Lee v. Weisman[6] held that graduation prayer, a particular subset of school prayer, also violates the Establishment Clause. In the years between *Engel* and *Lee* both the state and federal courts reviewed a variety of different circumstances in which prayer was sought to be presented at school functions.[7] On the other hand, some courts were requested to force a school to permit prayer.[8] These lower courts were evenly split as to whether prayer at graduation violated the Constitution. The lower court cases dealt with a wide variety of factual scenarios. *Lee*, for instance, dealt with the simplest of the post-*Engel* graduation prayer cases.[9] There, the Court ignored the twenty year-old standard for Establishment Clause jurisprudence articulated *Lemon v. Kurtzman*.[10] *Lemon* mandated that, in order to avoid culpability under the Establishment Clause, "[f]irst 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 entanglement with religion.'"[11] In addition to ignoring

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6. 505 U.S. 577 (1992).

7. *See* Kay v. David Douglas Sch. Dist. No. 401, 719 P.2d 875 (1986) [hereinafter Kay I]; Stein v. Plainwell Community Sch., 610 F. Supp. 43 (W.D. Mich. 1985) [hereinafter Stein I], *rev'd* Stein v. Plainwell Community Sch.,822 F.2d 1406 (6th Cir. 1987) [hereinafter Stein II]; Bennett v. Livermore Unified Sch, Dist., 238 Cal. Rptr. 819 (1987); Lundberg v. West Monona Community Sch. Dist., 731 F. Supp. 331 (N.D. Iowa 1989); Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990) [hereinafter Weisman I], *aff'd*, Weisman v. Lee 908 F.2d 1990, *aff'd sub nom,* Weisman v. Lee [hereinafter Weisman I]; Sands v. Morongo Unified Sch. Dist., 262 Cal. Rptr. 452 (1989) [hereinafter Sands I], *rev'd* Sands v. Morongo Unified Sch. Dist. 809 P.2d 809, (en banc) (*reh'g denied*), (1991) [hereinafter Sands II]; Albright v. Bd. of Educ. of Granite Sch. Dist., 765 F. Supp. 692 (D. Utah 1991); Griffin v. Teran, 794 F. Supp. 1054, (D. Kan. 1992); Guidry v. Broussard, 897 F.2d 181 (5th Cir. 1990); Wood v. Mt. Lebanon Township Sch. Dist., 342 F. Supp. 1293 (W.D. Pa. 1972); Wiest v. Mt. Lebanon Sch. Dist., 320 A.2d 362 (Pa. 1974); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1995) *cert. denied,* 508 U.S. 967, (1993); Gearon v. Loudon County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993); Lemke v. Black, 376 F. Supp. 87 (E.D. Wis. 1974); Doe v. Aldine Indep. Sch. Dist. 563 F. Supp. 883 (S.D. Tex. 1982); Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist. 669 F.2d 1038 (5th Cir. 1982); Graham v. Cent. Community Sch. Dist. of Decatur County, 608 F. Supp. 531, 533 (S.D. Iowa 1985); Brody ex rel Sugzdinis v. Spang, 957 F.2d 1108 (3d Cir. 1992); Jager v. Douglas County Sch. Dist., 862 F.2d 824, 831, *cert. denied*,490 U.S. 1090 (1989).

8. *See e.g., Lundberg*, 731 F. Supp. At 331; *Guidry*, 897 F.2d at 181.

9. Other cases also dealt with facts which were essentially indistinguishable from those in *Lee*. *See e.g., Sands II*, 809 P.2d at 809.

10. 403 U.S. 602 (1971). The heart of the *Lemon* test was first set forth in School Dist. of Abington v. Schempp, 374 U.S. 203 (1963).

11. *Lemon,* 403 U.S. at 612 (citing Board. of Educ. v. Allen, 392 U.S. 236 (1968)); Walz v. Tax Comm'n. 397 U.S. 664 (1970).

Lemon, the Court in *Lee* also ignored its prior school prayer jurisprudence found in *Engel* and *Abington*. In deciding *Lee*, the Court either failed to answer the difficult graduation prayer questions raised in the thirty years after *Engel*, or answered the questions without referring to any of the factual circumstances related to these difficult graduation prayer questions. At the same time, the Court eroded the barriers against school prayer erected in *Engel* and *Abington*.

School prayer, in its most basic meaning, refers to a school-sponsored prayer.[12] *Engel* and *Abington* did not deal with complex problems concerning prayer during school hours or during school functions. Rather, they dealt with a more fundamental perplexity: whether or not a school-sponsored prayer was valid. Since the prayers involved in *Engel* and *Abington* were during school hours and on school property, and were both chosen and given by school officials, they were undeniably school-sponsored prayers. After *Engel* and *Abington*, the Court's focus shifted from school-sponsored prayer to prayer given at school functions, such as graduation.

Much of the Court's failure to address the constitutionality of prayers given at school functions relates to the lower courts' use of the test set forth in *Lemon*. While following *Lemon*'s precedent by lower courts was certainly understandable, the language in *Lemon* caused these courts to ask misguided questions. Instead of looking to *Lemon*, the lower courts should look to *Engel* as the framework for their decisions. Although *Engel* may not have provided easy answers to all issues, it provided the lower courts with a better framework for answering the Establishment Clause questions raised in *Lee* and similar cases.

The discussion that follows first reviews the arguments and responses to *Engel v. Vitale*[13] and *School District of Abington v. Schempp*[14] (hereinafter referred to as *Abington*). This paper will then examine the post-*Engel* graduation cases showing the variety of different factual distinctions in the pre-*Lee* graduation prayer cases. It will also address the variety of legal questions raised and the manner in which lower courts answered

12. "School prayer," a deceptively simple phrase, could connote "prayer during school," "prayer in school," or "prayer on school property." These variations of school prayer have been addressed to some degree in a number of other cases and are beyond the purview of this article.

13. 370 U.S. 421 (1962).

14. 374 U.S. 203 (1963).

them. This article further suggests that the *Lemon* test was not the best or most appropriate test to use in articulating Establishment Clause jurisprudence. Moreover, this article will demonstrate that while the *Lee* opinion has more ties to *Engel* than *Lemon*, it nevertheless weakens the standards in *Engel*. Finally, unanswered questions by the *Lee* decision will be addressed.

II. SCHOOL PRAYER: A REVIEW OF *ENGEL* AND *ABINGTON*

The Supreme Court decided its first school prayer cases, *Engel* and *Abington,* only one year apart. These opinions are not reliant on the facts involved, but instead focus on the philosophical foundations of the Establishment Clause. *Engel* clearly holds that an official school-sponsored prayer program violates the Constitution.[15] However, *Abington* confuses the question of whether the school prayer program at issue is distinguishable from the official prayer that was invalidated in *Engel*.[16]

A. Engel v. Vital[17]

In the 1950s, the State Board of Regents for the State of New York composed a prayer known as the Regents' prayer,[18] and recommended that this prayer be recited in class.[19] Complying with the recommendation, the Board of Education of Union Free District No. 9 "directed the School District's principal to cause the [Regents'] prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day."[20] The trial court modified the policy by ordering that those who

15. *See Engel,* 370 U.S. at 430.

16. *See Abington*, 374 U.S. at 203. Ironically, Justice Brennan's concurrence exceeds 70 pages in the United States Reporter and yet in one sentence demonstrates the simplicity of the *Abington* case in light of *Engel*. "Unless Engel v. Vitale is to be overruled, or we are to engage in wholly disingenuous distinction, we cannot sustain these practices." *Id.* at 266-67 (Brennan, J., concurring).

17. 370 U.S. 421 (1962).

18. *Id.* at 423. The prayer read as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents our teachers and our Country." *Id.*

19. *Id.* at 422. This prayer was included in the Regents' "Statement on Moral and Spiritual Training in the Schools." *Id.*

20. *Id.* at 441. Apparently, teachers lead and joined in the prayer, although that is not clearly set out in the majority opinion. *Id.* (Douglas, J., concurring).

objected be relieved from the duty of participation and further, that the objectors not be discriminated against in any way.[21]

Without significant discussion of the facts, the Court held that the Regents' prayer violated the Establishment Clause, "because that prayer was composed by governmental officials as part of a governmental program to further religious beliefs."[22] Where Justice Black did choose to discuss the facts at issue, he consistently echoed the concern over governmental creation or involvement in prayer. Justice Black noted, for example, that the State of New York "encourage[d] recitation of the Regents' prayer;"[23] that the school board "directed the . . . principal to cause the [Regents'] prayer to be said aloud by each class;"[24] and that "each separate government in this country should stay out of the business of writing or sanctioning official prayers."[25] Such governmental activities easily infringed upon whatever protections were constructed by the Establishment Clause. Justice Black further stated that:

> [T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government.[26]

He summarized his view by using language akin to that of the Establishment Clause, concluding "that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer."[27]

The Court never established a test to determine the validity of the New York prayer. Instead, the court found certain facts to be of constitutional import. These facts essentially answered the constitutional question of whether the policy at issue was one that "establishe[d] a religious belief."[28] The Court found such an establishment existed and thus did not need to ponder the more difficult question of whether the policy was one "respecting the Establishment of Religion."

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21. *Engle*, 370 U.S. at 423-24 n.2.
22. *Id.* at 425.
23. *Id.* at 424.
24. *Id.* at 422.
25. *Id.* at 435.
26. *Id.* at 425.
27. *Engle*, 370 U.S.at 430.
28. *Id.*

The Court's decision revolved around government actions clearly demonstrating governmental support for a particular religious belief. Due to his limited use of the facts at hand, Justice Black did not state which facts were the most significant in reaching his outcome, or which facts could be changed without a change in the result.

New York made two arguments in order to avoid a holding that the prayer violated the Establishment Clause. The Court simply dismissed New York's argument that the prayer was constitutionally permissible because it was nondenominational.[29] New York's second argument, which merited, or at least earned, more discussion was that the prayer was valid because the program "[did] not require all pupils to recite the prayer but permit[ted] those who wish[ed] to do so to remain silent or be excused from the room."[30] This argument intimated that no one was coerced to pray. The Court summarily rejected this argument by stating, "[t]he Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not."[31] No governmental body may establish a church or a religion. Put another way, the Court held that the Government's constitutional sin is not forgiven simply because no one is forced to join in the established religion; government and religion may not create a voluntary partnership.[32] The "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[33]

The Court added that although there was no direct coercion

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29. *Id.* The Court gave no explanation why it was constitutionally irrelevant that the prayer was nondenominational or nonsectarian. The relevance of this issue, however, has been debated by a number of courts in a variety of different circumstances. *See* Bell v. Little Axe Indep. Sch. Dist. No. 70 of Cleveland County, 766 F.2d 1391, 1403 (1985) (Under the primary effect prong of the *Lemon* test "it is irrelevant that a practice may be nondenominational or non-sectarian . . ."); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 967 (1991) ("The nonsectarian nature of a prayer remains relevant to the extent to which a prayer advances religion.").

30. *Id.* The issue of coercion was debated by courts in both the graduation prayer context as well as other contexts. This issue became central in Justice Kennedy's opinion in *Lee*.

31. *Engel*, 370 U.S. 421, 430.

32. *Id.* at 431.

33. *Id.* at 431.

to join in the prayer, the possibility of indirect coercion was not thereby eliminated by the voluntary participation element.[34] According to the Court, "prescribing a particular form of religious belief" inherently involves coercion of non-observing individuals.[35] Once the government places its "power, prestige and financial support" behind a religious belief, the government "plain[ly]," albeit indirectly, coerces "religious minorities to conform to the prevailing officially approved religion."[36]

Justice Douglas concurred with Justice Black's opinion in *Engel*, and although Justice Douglas' concurrence did not specifically refer to the coercion inherent in government support of religion, he did find an inherent violation of the Establishment Clause in instances where any government funds are used in support of religious exercises.[37] Justice Douglas stated that the issue presented was "an extremely narrow one."[38] The question, according to Justice Douglas, was whether New York violated the Establishment Clause when it financed a religious exercise.[39] According to Justice Douglas's analysis, a teacher who leads the prayer does so while "on the public payroll" in a "governmental institution." Therefore, the state is financing a religious exercise.[40] Any such financing, no matter how minuscule, violates the Establishment Clause.[41]

Justice Stewart dissented in *Engel*, and that dissent is significant because of his "choice" discussions that included his emphasis on the "voluntariness" of the prayer.[42] Justice Stewart felt that New York merely "permit[ted, rather than forced] school children to say this simple prayer."[43] He ignored the presence of the teacher and focused instead on the choices made by the students to say the prayer. Justice Stewart could not "see how an 'official religion' is established by letting those

34. *Id.* at 430-31.

35. *Id.* at 431.

36. *Id.* Of note is that the coercion the court referred to is inherent in the existence of governmental sponsorship. This is very different from the coercion Justice Kennedy referred to in *Lee*. In *Lee*, the coercion was the social pressure to attend graduation.

37. *Id.* at 441 (Douglas, J., concurring).

38. *Id.* at 439.

39. *Id.*

40. *Id.* at 441-442.

41. *Id.*

42. *Id.* at 445.

43. *Id.* (Stewart, J., dissenting).

who want to say a prayer say it."[44] Over the next three decades, courts commonly reviewed this question of student choice and its significance within the graduation context.

In the end, *Engel* answered this very fact-based constitutional question by prohibiting the creation of any official prayers to be said in schools as part of a state prayer program. *Engel* did not define a "state prayer program" nor did it set forth a test to determine what the Court would consider a "state prayer program." *Engel* also failed to create a test for determining when or how a prayer becomes an "official prayer." However, since each question was answered, the Court perhaps may have felt that setting forth such tests was unnecessary. In *Engel*, the state clearly and admittedly defined an "official prayer." The state also clearly paid an employee to say a prayer.

In addition, while the Court did not address Justice Stewart's voluntariness argument, the Court implicitly rejected it. According to the Court's discussion of inherent coercion, it would be expected that the government's support of the prayer would coerce students to "voluntarily" join the prayer. Additionally, the Court also explicitly rejected the argument that a prayer might be constitutionally valid if it were a "nondenominational" prayer.

B. School District of Abington v. Schempp[45]

The year after *Engel*, the Court encountered what should have been a very simple school prayer question, at least when viewed in light of its predecessor.[46] The facts in *Abington v. Schempp* are merely superficially different from those in *Engel*. Rather than composing a Regents' prayer as New York did in *Engel*, the State in *Abington* "requir[ed] the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison."[47] In other words, the State did not draft the prayer, it selected the prayer. As stated by Justice Goldberg in his concurring opinion, "[t]hat [the State] has selected, rather than

44. *Id.*

45. 374 U.S. 203.

46. *Id.*

47. *Id.* at 223. Ironically, the prayer in *Abington* was significantly more religious in the traditional sense, as the prayer belonged to an existing religion.

written, a particular devotional liturgy seems to me to be without constitutional import."[48] The significance was that, once again, the State required the saying of religious prayer which, viewed in light of *Engel*, was clearly prohibited.

The required prayer recitation just as in *Engel* was also not ameliorated by an opt out provision. The Court rejected the argument that the exercises were permissible because the students could "absent themselves upon parental request."[49] In rejecting the argument, the Court cited *Engel*,[50] holding that the Establishment Clause "is violated by the enactment of laws which establish an official religion, whether those laws operate directly to coerce non-observing individuals or not."[51] The fact that the government required reading the Bible, even if individuals could choose not to listen, clearly established a state official religious exercise. Just as it had in *Engel*, the Court rejected the notion that an Establishment Clause violation turned on coercion.

The fact that the government required the saying of religious prayers also necessitated the rejection of the State's argument. Again focusing on the State's actions, the Court rejected the argument that prohibiting the prayer would violate the Free Exercise rights of the majority of students who had demonstrated their wish to pray.[52] What the State's argument ignored, and what the Court focused on, was that the students did not demonstrate their desire to pray in class until the State had mandated prayer. The Court noted that the Free Exercise Clause "has never meant that a majority could use the machinery of the State to practice its beliefs."[53] Again, the Court recognized that where the State requires a religious exercise, that exercise is not an individual's exercise protected by the Free Exercise Clause, but rather a religious practice established by the State. The fact that a majority may consent to that establishment does not in any way lessen the violation. Indeed, a significant purpose of the Bill of Rights is to prevent such consent from being used to eliminate rights of individuals.[54] The

48. *Id.* at 307 (Goldberg, J., concurring).
49. *Id.* at 224-25.
50. *Id.*
51. *Engel*, 370 U.S. at 430.
52. *Abington*, 374 U.S. at 225-26.
53. *Id.* at 226.
54. *See* Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1948) ("The very

State has at least raised a valid Free Exercise question if the State refused to prohibit students from spontaneously praying before class and without any support or encouragement from any employee or agent of the State. Free Exercise does not, however, occur when the majority "consents" to the establishment of religion by the State.

In another effort to distract the Court, the State "insisted that unless these religious exercises are permitted a 'religion of secularism' is established in the schools."[55] Instead of agreeing with the State, the Court held that when a State requires religious exercises, it violates the First Amendment command "that the government maintain strict neutrality, neither aiding nor opposing religion."[56] The Court's position was that the Court does not establish a "religion of secularism" by prohibiting the State from establishing a religion.

It is frivolous to argue that the judiciary establishes a "religion of secularism" whenever it prevents a legislative or executive establishment of religion. Similarly, any effort to distinguish the facts in *Abington* from those in *Engel* would also be mundane. The State argued that the Supreme Court erred in *Engel* because it failed to consider its arguments. In particular, the argument followed that the goal in requiring prayer was to provide moral leadership and inspiration to all children.[57] In essence, the State argued that the prayer had "secular purposes," including "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."[58] The Court's first response was that the State had previously conceded that the exercise was sectarian.[59] Second, the Court noted that *The Bible* is an "instrument of religion."[60] Finally,

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purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); *Abington*, 374 U.S. at 225 (The religious neutrality of the Religion Clauses, "does not permit a state to require religious exercises even with the consent of the majority of those affected."); Haney v. County Bd. of Educ. of Sevier County, 410 F.2d 920, 925 (8th Cir. 1969) ("The very origin of the Bill of Rights draws its history from [the] early concept that even the many must give way to certain fundamental rights of the few.").

55. *Abington*, 374 U.S. at 225.

56. *Id.*

57. *Id.*

58. *Id.* at 223.

59. *Id.*

60. *Id.* at 224.

the religious character of the exercise is evident because as an alternative to reading *The King James Bible*, the Catholic Douay Version could be read.[61] The inescapable conclusion followed that the laws at issue "require religious exercises."[62] Requiring religious exercises, the Court held, was clearly a "breach of neutrality" under the Religion Clauses.[63]

The Court's discussion of the State's purposes followed its earlier discussion of the test to be applied to evaluate an Establishment Clause claim: "What is the purpose and primary effect of the enactment?"[64] The Court then restated the question in a form which later became two-thirds of the *Lemon v. Kurtzman* test, holding "that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[65] The Court failed to discuss the application of the test, or the meaning of the words used in its test. Rather than suggest how the test was to be applied, the Court discussed the State's argument as to its purpose, but did not really tie the test to the discussion.

The State argued that it had a purpose to promote values. Rather than hold that the subjective desire of the State was irrelevant, the Court engaged in constitutional fact-finding. It found that based on the facts surrounding the prayer, the State did not, in fact, have a secular purpose.[66]

This discussion of purpose clouded an otherwise simple case. In both *Abington* and *Engel* the State demanded that school children say a prayer. Perhaps looking at it in a more favorable light due to opt-outs, it could be said that the State chose prayer as its preferred speech. Once it had been determined that prayer was preferred speech, establishment in violation of the First Amendment was demonstrated. *Engel* took this approach. While the court in *Abington* discussed the problem in a similar way, it diverted attention from the approach by enveloping the discussion into its analysis of purpose. The Court further diverted focus by its approach to the State's pur-

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61. *Id.*

62. *Id.*

63. *Id.* at 225.

64. *Id.* at 222.

65. *Id.* For the first time in the context of an Establishment Clause case, the Court uses the term "test."

66. *Id.* at 224.

pose argument. Rather than hold that purpose was irrelevant when the State adopted a policy to say a prayer, the Court determined that the State could not have had the purpose claimed.

About a decade after *Abington*, the Supreme Court decided *Lemon v. Kurtzman*,[67] cementing into Establishment Clause jurisprudence the questions of purpose and effect.[68] The *Lemon* case added as part of the specific test the question of entanglement.[69] Because of *Lemon*, the straightforward approach to the Establishment Clause taken in *Engel* was abandoned by most of the graduation prayer cases to be decided between *Engel* and *Lee*.

III. GRADUATION PRAYER, FROM *ENGEL* TO *LEE*

*A. Early Post-*Engel*/Pre-*Lee *Graduation Prayer Cases*

1. Wood v. Lebanon Township School District[70]

The first post-*Engel*[71] case to review the validity of a graduation prayer expressly distinguished *Engel*. It concluded that the graduation prayer at issue did not violate the Establishment Clause.[72] The district court made two significant distinctions from *Engel* and *Abington*. First, contrary to the implicit coercion argument articulated by the Supreme Court in *Engel* and *Abington*, the district court held that no coercion element was present there; that is, no one was required to attend the graduation ceremony in order to receive a diploma. In this distinction, the district court recognized that "the Establishment Clause [may be] violated even though there is no di-

67. 403 U.S. 602 (1971).

68. *Id.*

69. *Id.* at 612-13.

70. Wood v. Mt. Lebanon Township Sch. Dist., 342 F. Supp. 1293 (W.D. Pa. 1972).

71. In 1964, the Supreme Court had the opportunity to review the constitutionality of a religious baccalaureate program conducted by Florida Schools, but chose not to do so for procedural reasons. Chamberlin v. Dade County, Bd. of Pub. Instruction, 377 U.S. 402 (1964).

72. *Wood*, 342 F. Supp. at 1293. The courts did not discuss who invited the clergy, or what the clergy was told to say. The court simply noted that a member of the clergy, not paid by the school, intended to give both an invocation and benediction.

rect government compulsion,"[73] but nevertheless distinguished the prayer in *Engel* from the graduation prayer here, by rationalizing that the *Engel* prayer "was thrust upon students through the use of the public school system."[74]

The lack of compulsion to attend supported the court's second distinction from *Engel*. The court concluded that the graduation prayer was not invalid because it was not an "official prayer."[75] First, because no one was compelled to attend, the ceremony was "stripped" of "any semblance of governmental establishment or condemnation."[76] Second, the prayer was not considered an "official prayer" because a clergy member was proffering it.[77] Finally, the court noted that at the time the suit was filed, it was uncertain what the prayer's content would be.[78] Therefore, if the government did not know what was to be said, the government could not be the sponsor.[79]

In support of it's finding, the district court also compared the graduation prayer to some traditional rituals, which at least appeared to be allowable under the Establishment Clause. The court cited Justice Douglas's concurrence in *Engel* for support, which it believed to signify approval for opening prayers in the Supreme Court, the United States Senate, and the United States House of Representatives.[80] Finally, almost

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73. *Id.* at 1295.

74. *Id.* While the district court did not make its point clearly, it held that *Engel* was different as the students were compelled to attend classes where the "voluntary" prayers were said. In the case under review, the students were not even compelled to attend the ceremony.

75. *Id.* at 1294.

76. *Id.* at 1295.

77. *Id.*

78. *Id.* at 1294.

79. *Id.* For purposes of this paper, the logic of the analysis is not of significance. Each of these lower court opinions is significant for the issues raised, the approaches taken and the results given. The point of the article is to show the variety of issues raised by prayer at graduation and how the Supreme Court ultimately ducked them.

80. *Id.* As it turns out, the Supreme Court upheld the constitutionality of prayer before the Nebraska State Legislature. *See* Marsh v. Chambers, 463 U.S. 783 (1983). Almost certainly the same prayer would be upheld in the United States Senate and the United States House of Representatives. On the other hand, the transfer from legislative prayer to graduation prayer is not easily acceptable. The Supreme Court ultimately rejected such an analogy in *Lee*. This argument is also akin to the "ceremonial deism" argument used in other contexts. *See* Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (footnote omitted) ("I would suggest that such practices as the designation of 'In God We Trust' as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood, in Dean Rostow's apt phrase, as a form of 'ceremonial deism,' protected from Establishment Clause scrutiny

as an afterthought, the district court looked at the purpose of the government's action and held that even if there were some religiosity, "the ceremony to be held is primarily secular."[81]

2. Wiest v. Mt. Lebanon School District[82]

Two years later, in *Wiest v. Mt. Lebanon School District*, the purpose and effect tests (the first two prongs from the *Lemon* test) became the focus of the Pennsylvania Supreme Court's decision upholding the constitutionality of essentially the same graduation prayers in the same school district sued in *Wood*.[83] Although the court unanimously upheld the constitutionality of the policy, no more than three justices agreed upon any one approach. Virtually all arguments made had also been made previously by the district court in *Wood*. The Pennsylvania Supreme Court, as did the court in *Wood*, first found "that attendance at the graduation ceremonies was purely voluntary" and that the plaintiffs would not be coerced into violating their religious beliefs.[84] The plurality then concluded that because the graduation was a "public ritual," "the purpose or primary effect of the resolution providing for an invocation and benediction" was not to advance religion.[85] The court did not explain why public religious rituals did not violate the Establishment Clause; rather, it simply found that public rituals did not have the purpose or effect of advancing or inhibiting religion.[86]

While the plurality did not rely on *Lemon*, it did rely on *Abington*.[87] One concurrence made extensive efforts to distinguish *Abington*.[88] The concurrence found that the graduation

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chiefly because they have lost through rote repetition any significant religious content."). Essentially, "ceremonial deism" refers to deity references made so often that the religious meaning has been destroyed. For an interesting discussion of why "ceremonial deism" makes no sense, see Judge Manion's concurring opinion in Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992) (Manion, J., concurring).

81. *Id.* While the court did not cite to *Abington* or *Lemon* as to the basis for considering purpose, its purpose analysis is substantially similar to that made by courts that apply the purpose prong of the *Lemon* test.

82. 320 A.2d 362 (Pa. 1974).

83. *Id.*

84. *Id.* at 365.

85. *Id.* at 366.

86. *Id.* at 365-66.

87. *Id.* at 365.

88. *Id.* at 368-69 (Pomeroy, J., concurring). The other concurring opinions essentially determined that the case was not ripe because it was not certain what exactly

prayer was constitutionally distinguishable as it was a one-time occurrence, and not part of the curriculum or the normal routine of school.[89] Essentially the concurrence found that if there was a violation it was of "*de minimus stature*" [sic].[90]

3. Grossberg v. Deusebio[91]

The third and last of the early graduation prayer cases, *Grossberg v. Deusebio*, presented the first significant factual distinction.[92] In this case, the school officials did not make the decision to have a graduation prayer, instead the decision was made by class representatives who acted on behalf of the senior class.[93] Graduating classes had made this same decision in previous years. Furthermore, the entire cost of the graduation, except the cost of the diplomas, was borne by the senior class.[94] As the court characterized it, the State attempted a symbolic washing of hands.[95] However, the district court rejected the idea that school officials could purge themselves "of their responsibility."[96] This responsibility was apparently tied to the court's earlier statement of law: "[a] graduation ceremony for a public school class, held on public school grounds, and administered by public school personnel, at which diplomas are officially awarded by the administration, is a public school event."[97]

Despite the facts that appear to imply that the students could choose not to have a graduation, the court held that graduations are and must be school events.[98] The court did not provide any evidence that the school somehow controlled the decisions made by the students. Its rationale was that all decisions related to school events were ultimately school decisions.

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would be said at graduation.

89. *Id.* at 369.

90. *Id.* As with many of the graduation prayer cases, this opinion seemingly omits clear delineation of purpose or effect.

91. Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974).

92. *Id.*

93. *Id.* at 287. Plainly stated, the decision of whether or not to have prayer at graduation was not made by the school board, principal, teacher or any other person employed by the school.

94. *Id.*

95. *Id.* at 288.

96. *Id.*

97. *Id.*

98. *Id.*

Thus, students who made the decision to hold a graduation prayer acted on behalf of or as agents for the school.

Surprisingly, after holding that the school was responsible for the graduation, the court concluded that the prayer said at graduation did not violate the Establishment Clause.[99] The court, although it did not specifically cite to *Lemon*, based its decision on its three-pronged test. As to effect, the court was "not convinced that the primary effect of the invocation will be either doctrinal dissemination or a manifestation of governmental affinity for religion."[100] This conclusion was based on the commonplace nature of invocations throughout our history[101] and, essentially, a *de minimus* injury analysis.[102]

As for purpose, the court looked at the purpose for having graduation, not the purpose for having a prayer at graduation.[103] Once the court viewed the question of the ceremony's purpose, it was easy to conclude that the ceremony's primary purpose did not advance or inhibit religion. The primary purpose of graduation is both ceremonial and to "award . . . honors and diplomas."[104]

The court did not specifically discuss entanglement, but in a conclusory manner held that the school board was not "so enmeshed in religious affairs as to warrant this Court's intervention."[105] Throughout the opinion, the court downplayed the length of the prayer, calling the time a "few moments"[106] and a "brief period."[107] Apparently, the brevity gave the court sufficient reason to find no significant "enmeshment." While the court did not use the language, it essentially called the violation *de minimus*, just as some of the state court justices did in *Wiest*.

In each of these three early cases, the courts found graduation prayer constitutionally permissible. The holdings were all based on either explicit or implicit efforts to find constitutional significance to factual differences between graduation prayer

99. *Id.* at 290.
100. *Id.*
101. *Id.* at 289.
102. *Id.* at 289.
103. *Id.*
104. *Id.*
105. *Id.* at 290.
106. *Id.* at 289.
107. *Id.* at 290.

and a school's prayer declared invalid in *Engel* and *Abington*. The facts that arguably make a constitutional difference are: (1) the government does not require attendance at graduation; (2) graduation is a one time event; (3) prayer is not said by an employee of the state; (4) students voted to have a graduation; and (5) students voted to have a prayer.

These factual distinctions provided the foundation for a variety of legal arguments over the next two decades. Very few new arguments would be made, and most would likely focus on these factual differences. One major permutation of graduation prayer not discussed in the very early cases is prayer offered by a student.[108]

*B. Later Post-*Engel*/Pre-*Lee *Graduation Cases*

Although there were no more reported graduation prayer cases during the 1970s, there were related cases addressing the meshing of religion and education. For example, in 1974 the District Court for the Eastern District of Wisconsin enjoined holding a graduation at a Roman Catholic Church.[109] A year earlier the District Court for the Eastern District of Arkansas rejected an Establishment Clause challenge to baccalaureate services finding that the plaintiffs had not sufficiently proven a violation with their stipulation.[110] Not until 1982, twenty years after *Engel*, did a court hold that graduation prayer violated the Establishment Clause.[111]

1. Doe v. Aldine Independent School District[112]

The first graduation prayer decision to specifically apply the *Lemon* test was *Doe v. Aldine Independent School District*. The *Doe* case is significantly different from most of the pre-*Lee*

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108. Student prayer decisions are the source for many of the post-*Lee* high school graduation prayer cases. *See* American Civil Liberties Union v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3rd Cir. 1996) (en banc); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1995), *cert. denied*, 508 U.S. 967 (1993); Gearon v. Loudon County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993).

109. Lemke v. Black, 376 F. Supp. 87 (E.D. Wis. 1974).

110. Goodwin v. Cross County Sch. Dist., 394 F. Supp. 417 (E.D. Ark. 1973). Plaintiffs stipulated to the existence of baccalaureate services. While plaintiffs almost certainly assumed the court would take judicial notice of the religious nature of the services, the court instead demanded proof of what would be said. *Id.*

111. Doe v. Aldine Independent School District, 563 F. Supp. 883 (S.D. Tex. 1982).

112. *Id.*

graduation prayer cases because it involved singing a school prayer at all extra-curricular school events, including graduation. Regularly, the principal, or another school official would initiate the singing or recitation of the prayer.[113] No one was required to participate.[114] In defending the policy, the government relied on the *Lemon* test to argue that the prayer had "the clear secular purpose of instilling 'in the students a sense of school spirit or pride . . . [which] has a beneficial effect on the student body and contributes to an increase in morale, and concomitantly lessens disciplinary problems'."[115] The court, relying on Justice Brennan's concurrence in *Abington*,[116] noted that "when a non-religious purpose may be promoted through non-religious means, a state may not employ religious ones."[117] Whenever a purpose can be achieved through nonreligious means and religious means were used, the court concluded, that the original purpose is religious and in violation of the Establishment Clause.[118] This holding eliminates many governmental actions that previously have been upheld by the Supreme Court. For example, a crèche or a Menorah (or other religious symbol) could never be placed on public property pursuant to the lower court's holding.[119] Indeed, this holding would eliminate all religious art in public museums. Technically, if the objective of a museum is to elevate the human spirit, that objective can be achieved without displaying religious art. This rationale, is typical of that used by the courts declaring graduation prayer invalid. Courts cite to Justice Brennan's *Abington* opinion and hold that anything able to be accomplished with a prayer could be accomplished without one.

With regard to effect, the court again followed *Engel* holding that "voluntariness is not relevant to a first amendment inquiry."[120] The court noted that both the principal and the choir

113. *Id.* at 885.

114. *Id.* at 884-85. It is, of course, exceedingly difficult to find a case after the early 1960s in which the government has defended a government decision to directly compel recitation of a prayer. Despite the Supreme Court's unequivocal statements in *Engel* and *Abington* that coercion is irrelevant, governments have defended (and after *Lee* continue to defend) prayer because no one is coerced into participating.

115. *Id.* at 886.

116. *Abington*, 374 U.S. at 280-281 (Brennan, J., concurring).

117. *Doe*, 563 F. Supp. at 886.

118. *Id.*

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

120. *Doe*, 563 F. Supp. at 887.

director often initiated recitations or singing the school prayer.[121] In addition, the recitation took place at school events on school property. These events were "an integral part of the school's extracurricular program and as such provide a powerful incentive for students to attend."[122] The combined effect of these factors demonstrates that the impact of the school's activities "might create in a student's mind the impression that the State's attitude toward religion lacks neutrality."[123] The conclusion was clear to the court that the State's primary purpose was to advance religion.

In *Doe v. Aldine*, the court's application of the effect test most closely parallels the Supreme Court's *Engel* decision. Had it not been for *Lemon*, the court could have cited *Engel* and concluded that the school had, based on the facts clearly demonstrated, established prayer as a State-sponsored activity. Indeed, the only factual difference between *Engel* and *Doe* was that the "voluntary" prayer was said only during "voluntary" activities, and in *Engel* the "voluntary" prayer was said during required activities. Nothing in *Engel* indicates that this distinction serves any constitutional purpose.

The Court stated that the school officials' supervision over the singing and praying constituted entanglement.[124] Since the prayer occurred on supervised school property there was excessive entanglement. In so concluding, the court relied on *Lubbock Civil Liberties Union v. Lubbock Independent School District*[125] which was overruled by *Board of Education v Mergens,*[126] and more recently by *Agostini v. Felton.*[127] Finally, the court rejected the claims that students had Free Exercise rights by noting that the activity was "not an independent, unofficial invocation of God's help by the students, but was rather an initiated, encouraged, and supervised regular practice that occurs on school property during extracurricular events as part of the school's program."[128]

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121. *Id.*

122. *Id.* This approach very much mirrors the Supreme Court's discussion in *Engel* of the inherent coerciveness of government-sponsored prayer. The Supreme Court's coercion discussion in *Lee* is also quite similar.

123. *Id.*

124. *Id.*

125. 669 F.2d 1038 (5th Cir.1982).

126. 496 U.S. 226 (1990).

127. 521 U.S. 203 (1997).

128. *Doe*, 563 F. Supp. at 888. This argument parallels *Abington*. There is no claim

2. Graham v. Central Community School District of Decater County[129]

In *Graham*, a minister "conduct[ed] the invocation and benediction" and had "complete control" over the content of the messages.[130] While the court was not certain what would be said, every previous benediction and invocation before the court's decision had been Christian.[131] The court assumed that the benediction and invocation would be religious in nature.

The court nominally applied the *Lemon* test, and held that the purpose of a prayer at graduation was religious because prayer, by its nature, is religious. The court also determined that the effect of prayer is to advance religion because the apparent purpose of prayer is to advance religion.[132] The court did not consider entanglement.[133]

The essential assumption made by the court[134] was that the prayer belonged to the school. Once that assumption was made, the court narrowed its focus to the prayer itself, rather than the function of graduation. As virtually every school does in attempting to defend graduation prayer, Decater County asserted that graduation had a laudable purpose, which the prayer assisted in achieving.[135] The court ignored this argument and answered the simple question concerning what the purpose of religious prayer really was. This became the typical approach to the problem over the next few years.

C. The Last Six Years Before Lee

From 1986 through 1990, nine courts reviewed graduation prayers,[136] and the only two decisions upholding graduation

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to free choice and Free Exercise after the government has already established the prayer as preferred by the government.

129. 608 F.Supp. 531 (S.D. Iowa 1985).

130. *Id.*

131. *Id.*

132. *Id.* at 535-536.

133. *Id.* at 536. The court also rejected the argument that the students had a Free Exercise right to pray and that this right would be infringed upon by prohibiting prayer at graduation.

134. This is not to suggest that the assumption was incorrect or should not have been made.

135. *Id.* at 534.

136. *Kay*,719 P.2d at 875; *Stein I*, 610 F. Supp. at 43; *Bennett*, 238 Cal. Rptr. At 819; Lundberg, 731 F. Supp. at 331; *Weisman I*, 728 F. Supp. at 68; *Sands I*, 262 Cal. Rptr. at 452.

prayer[137] were reversed.[138] In the final year and a half before *Lee*, another seven graduation prayer cases were decided.[139] In three out of those seven, the courts upheld the graduation prayer.[140] In *Sands II*, the California Supreme Court voted 5-2 with six opinions, only three of which clearly argued that graduation prayer was always invalid.[141] In *Weisman* and *Weisman II*, the lower courts declared graduation prayer invalid.[142] In the seventh decision, the lower court held that prayer at graduation was always invalid. Eventually, the circuit court sent the case back for a determination of whether the graduation ceremony might be considered a limited public forum, which fact might permit prayer.[143]

While these courts disagreed over the validity of graduation prayer, they agreed on the proper test, each applying the *Lemon* test. For the most part these courts also agreed on the proper way to apply the *Lemon* test. The outcomes were often different, due to the variety of facts involved in each case. *Lee* reflected one fact pattern the courts uniformly agreed was invalid. In *Lee*-type cases, the school, through its principal or school board, invited a minister to give a prayer, invariably referred to as an invocation or benediction, at graduation. No unappealed decision of any court after 1980, upheld the constitutionality of graduation prayer under those circumstances.

1. Weisman v. Lee I & II

The District Court for the District of Rhode Island, the trial court in *Lee*, declared graduation prayers given by an invited minister invalid after applying the second prong of the *Lemon* test.[144] The court held that the policy had an effect of advancing religion.[145] As that finding alone invalidated the policy, the

137. *Stein I*, 610 F. Supp. at 43; *Sands I*, 262 Cal. Rptr. at 452.

138. *Stein II*, 822 F.2d at 1406; *Sands II*, 809 P.2d at 809.

139. *Sands II*, 809 P.2d at 809; Albright v. Bd.of Educ. of Granite Sch. Dist. 765 F. Supp. 692 (D. Utah 1991); Griffin v. Teran, 794 F. Supp. 1054, (D. Kan. 1992); *Jones I*, 930 F.2d at 416; *Weisman I*, 728 F. Supp. at 98; *Weisman II*, 908 F.2d at 1990; Brody v. Spang, 957 F.2d 1108 (3d Cir. 1992).

140. *Jones I*, 930 F.2d at 416; *Albright*, 765 F. Supp. at 692; *Griffin*, 794 F. Supp. at 1054.

141. *Sands II*, 809 P.2d at 809.

142. *Weisman I*, 728 F. Supp. at 98; *Weisman II*, 908 F.2d at 1990.

143. *Brody*, 957 F.2d at 1108.

144. *Weisman I*, 728 F. Supp. at 68.

145. *Id.* at 72.

court did not consider the first or third prongs. According to the court, "a state action advances or inhibits religion," when "the action creates an identification of the state with a religion, or with religion in general."[146] Without explaining its rationale, the court simply concluded that "the benediction and invocation advance religion by creating an identification of school with a deity, and therefore religion."[147] Far from being a "pellucid opinion" as suggested by the circuit court on review,[148] the district court simply determined that prayer added to school plus an important occasion equates a "symbolic union" of church and state.[149] The court further held that another method to conclude whether the government creates an unconstitutional effect is to determine whether the governmental action endorses religion.[150] According to the court in *Weisman I*, the school "in effect endorsed religion by authorizing an appeal to a deity in public school graduation ceremonies."[151] A prayer at graduation conveys a preference for religion which, in effect, endorses religion. Interestingly, at the conclusion of the opinion, the court turned back to *Engel* stating, "if students cannot be led in prayer on all of those other days, prayer on graduation day is also inappropriate . . ."[152]

In addition to reviewing the *Lemon* test, the district court rejected the defense made by the school that the prayers were permissible under *Marsh v. Chambers*.[153] According to the district court, "[t]he *Marsh* holding was narrowly limited to the unique situation of legislative prayer."[154] This approach to *Marsh* is one typically taken by those courts holding that graduation prayer violates the Establishment Clause.

On appeal, the First Circuit adopted the trial court's opinion. One judge added a concurring opinion applying the first

146. *Id.* at 71.

147. *Id.* at 72.

148. *Weisman II*, 908 F.2d at 1090.

149. *Weisman I*, 728 F. Supp. at 72. Under this simple formulation, a moment of silence by anyone, whether or not speaking at the ceremony, would also violate the Establishment Clause. While this is not likely what the court meant, this certainly falls within the words used.

150. *Id.*

151. *Id.*

152. *Id.* at 74.

153. 463 U.S. 783 (1983).

154. *Weisman I*, 728 F. Supp. at 74.

and third prongs of the *Lemon* test,[155] and yet another dissented.[156] In applying the purpose test, the concurring judge essentially held that prayer could only have a religious purpose.[157] As for entanglement, the concurring judge found that because the school suggested the type of prayer, the school engaged in excessive entanglement.[158]

2. Bennett v. Livermore Unified School District[159]

The analysis of each part of the *Lemon* test in *Lee I* and *Lee II* is similar to the analysis in prior graduation prayer cases. Two California courts of appeal came to opposite conclusions on the validity of graduation prayer. In *Bennett v. Livermore Unified School District,* the court provided a superficial analysis of *Lemon* and graduation prayer. To the court, quite simply, "the primary purpose of a religious invocation is religious."[160] Both the purpose and effect of the court's analysis were essentially tautological, e.g., "[t]he practice of including a religious invocation in a graduation ceremony conveys a message of endorsement of the particular creed represented in the invocation, and of religion in general."[161] Per the issue of entanglement, the court attacks a common problem with graduation prayers. As in *Lee,* school officials would allow prayer/invocations/benedictions only if they were nonsectarian. In order to prevent sectarian prayers, the school had to monitor these prayers, thereby, according to the court, entangling the school with religion.[162]

In *Bennett,* the decision to include a religious invocation was made by the high school's graduation committee.[163] To the *Bennett* court, how the prayer came to be included in the cere-

155. *Weisman II,* 908 F. 2d at 1094-1095 (Bownes, J., concurring).

156. *Id.* at 1097 (Campbell, J., dissenting).

157. *Id.* at 1095 (Bownes, J., concurring). This approach is typical. A prayer has obvious religious purpose. Once the judge looks to the "effect" of prayer, it is virtually inevitable that the judge would conclude that the effect is religious.

158. *Id.*

159. 238 Cal. Rptr. 819 (1987).

160. *Id.* at 823.

161. *Id.* at 823-824.

162. *Id.* The school admitted and the court agreed that if any prayer were allowed, it would be "necessary to oversee the student's choice of ceremony to ensure" that the ceremony remained nonsectarian.

163. *Id.* at 821. The makeup of the committee is not clear. However, from the way the opinion is written, it appears to be a committee of students.

mony was irrelevant. The court found the ceremony to be an "administrative act" as a matter of fact and law.[164] It easily followed from this finding that the marriage of religion and an administrative act violated the Establishment Clause.

3. Sands v. Morongo Unified School District (Sands I)[165]

In the second California case, *Sands I*, a number of different methods for selecting speakers was at issue. In one case the class president selected the speakers, but the principal made the final decision. In another, a student committee selected the speakers.[166] Before applying the *Lemon* test, the court noted the widely divergent results in graduation prayer cases.

As to purpose, the *Sands I* court disagreed with the *Bennett* court's tautological conclusion that prayer is religious and therefore the purpose is religious. The court noted that "to '[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation . . .'"[167]

The correct question, the court asserted, is "whether the religious activity is being used for a secular purpose."[168] A secular purpose need not be exclusive and can be joined with a religious purpose.[169] The proper view of a graduation prayer is in the context of the graduation ceremony, the purpose of which is "wholly secular."[170] This, the court implied, is analogous to the Supreme Court's decision in *County of Allegheny*[171] where the Supreme Court looked at the "context" of the religious symbols on public property to determine whether their presence violated the Establishment Clause.[172] The invocation in context of the entire ceremony simply "sets a formal or solemn tone."[173] The conclusion was that the prayer, therefore, served a secular

164. *Id.*

165. 262 Cal. Rptr. 452 (1989).

166. *Id.* at 454-55.

167. *Id.* at 459 (quoting from Lynch v. Donnelly, 465 U.S. 668, 680 (1984)).

168. *Id.*

169. *Id.*

170. *Id.*

171. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

172. It is interesting to note how similar this context "test" is to the obscenity test in Miller v. California, 413 U.S. 15 (1973), wherein the court suggests that the question as to whether a work is obscene is not the import of a passage or photo taken out of context but the work "taken as a whole."

173. *Sands I*, 262 Cal. Rptr. at 459.

purpose of adding "dignity and decorum."[174]

As to effect, the *Sands I* court again considered the prayer in context. The effect of the prayer mirrored the purpose. The effect was to "set a solemn tone" and any religious effect was "remote and incidental."[175] Important to the court was that the graduation prayer was a one-time occurrence. It "did not concur in a 'repetitive or pedagogical context,' and was not part of a program of 'calculated indoctrination'."[176] The court based its conclusion of such excessive governmental entanglement on essentially these same factors.

Curiously, the court concluded its Establishment Clause analysis by "emphasiz[ing] that we find only nonsectarian invocations and benedictions constitutional."[177] The court provided no clarification as to why the statement was accurate or made sense. There is little logic to holding that "prayer" which offends the atheist is valid but that prayer that offends a person of another sect is not.[178]

4. Sands v. Morongo Unified School District (Sands II)[179]

Sands II reversed *Sands I.* In *Sands II,* the California Supreme Court essentially agreed with the lower court, holding that a state must be "certain" that no one "advance the religious mission of his or her churches in the public school setting."[180] Interestingly enough, the court of appeals' requirement, with which the California Supreme Court agreed, provided part of the basis for the California Supreme Court's decision to reverse *Sands I.* The court in *Sands II* reasoned that the only way to assure that a prayer is acceptable, i.e., nonsectarian, would be for the government/school to evaluate

174. *Id.*

175. *Id.* at 461.

176. *Id.* (quoting from Grossberg v. Deusebio, 380 F. Supp. at 288-89 (E.D. Va. 1974)). While not expressly distinguishing graduation prayer from school prayer in *Engel,* the court is, in effect, making that distinction.

177. *Id.*

178. In spirit, this holding is akin to the *Bennett* holding that even if prayer were allowed, entanglement would follow in order to keep the prayer from favoring one sect.

179. 809 P. 2d 809 (1991).

180. *Id.* at 818 (quoting from Aguilar v. Felton, 473 U.S. 402, 410-11 (internal quotations omitted)). The court softened this overly broad statement, implying, by reference to the Supreme Court's decision in Bd. of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226 (1990), that it may be permissible under some circumstances for students to advance a religious mission among each other.

the content of admittedly religious speech.[181] This monitoring was precisely the type of entanglement prohibited by the Establishment Clause. "To allow preventive monitoring by the state of the content of religious speech inevitably leads to gradual official development of what is acceptable public prayer."[182] The California Supreme Court thus concluded that the graduation prayers at issue violated the entanglement prong of the *Lemon* test.[183]

The *Sands II* court also held that the graduation prayers violated the effect prong of the *Lemon* test.[184] This conclusion was based upon the fact that graduation is a school event.[185] The court stated that "when a religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school-owned facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation."[186] According to the opinion, "inclusion of graduation prayers in an official ceremony" signifies approval of both "the practice of prayer and the prayer's religious content. The message of sponsorship is unavoidable."[187] Put another way, prayer at graduation "produces a 'symbolic union' of state and religion."[188] Again, graduation plus prayer equals Establishment Clause violation. According to the court, the conclusion is inescapable that prayer at graduation has the effect of advancing religion and therefore violates the second prong of the *Lemon* test.

The plurality's analysis of the *Lemon* test does not rely on the school's promotion of the religious ceremonies. Instead, the plurality's opinion is in the passive tense. Without stating who was responsible for the prayers being said at graduation, the court stated that the effect of prayer plus graduation violates the Establishment Clause. This approach can be distinguished

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181. *Id.*

182. *Id.*

183. Again, this is a typical but illogical approach. Prayer is prayer whether it specifically is sectarian or not.

184. *Sands II*, 809 P.2d at 813.

185. *Id.* at 814-15.

186. *Id.* at 815 (quoting from Jager v. Douglas County Sch. Dist., 862 F.2d 824, 831, *cert. denied*, 490 U.S. 1090 (1989)).

187. *Id.* at 814 n. 5.

188. *Id.* at 815 (quoting from Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 392 (1985)).

from the plurality's rejection of the State's argument that it was merely accommodating religion.[189]

The plurality noted, "[t]here is no free exercise right for government officials to include prayers in a public school ceremony."[190] The plurality distinguished student speech recognizing that "in this case school officials do promote, lead, and participate in the religious ceremonies . . ."[191] The government officials, as the plurality notes, were active participants in assuring the presence of prayer. Prayer did not find its way into the ceremonies all by itself. Although the plurality's discussion of the *Lemon* test does not in anyway make this clear, the question of whether graduation could be or is a public forum was explicitly discussed.

5. Lundberg v. West Monona Community School District[192]

For reasons similar to those given by both the *Sands II* plurality and the *Weisman I and II* courts, the federal district court, in *Lundberg v. West Monona Community School District*, rejected a claim that a school board should be required to allow a minister to speak at graduation.[193] The *Lundberg* court held that allowing an invocation or benediction would violate the purpose and effect prongs of the *Lemon* test. Therefore, the court would not order the school board to allow a minister to give a prayer.[194] The significance of *Lundberg* lies not in the court's decision, but in the arguments raised by the plaintiffs. The students in *Lundberg* argued that graduation is a public forum and therefore the government could not discriminate against religious speech.[195] While not using the term, the court essentially found graduation to be a type of non-public forum where "speech is subject to the greatest amount of government restrictions."[196] Relying on *Hazelwood School District v. Kuhlmeier*,[197] the court concluded that the school had simply and

189. The plurality also rejected the state's argument based on Marsh v. Chambers. *See Sands II*, 809 P.2d at 819-20.

190. *Sands II*, 809 P.2d at 816.

191. *Id.* at n.7.

192. 731 F. Supp. 331 (N.D. Iowa 1989).

193. *Id.*

194. *Id.* at 342-45.

195. *Id.* at 336.

196. *Id.* at 337.

197. 484 U.S. 260 (1988). The Supreme Court found that a school did not possess

validly "banned certain subject matter from graduation ceremonies (i.e., religion) believing such a subject is inappropriate at a school activity."[198]

As to whether the school could create a public forum wherein religious speech would be permissible, the court was contradictory. The court held "that while the school could have, it did not create the graduation ceremony 'for the purpose of providing a forum for expressive activity'."[199] The court noted earlier that graduation prayer must always be a non-public forum. While the court did not use the word "always," its rationale at first blush appears to indicate such:

> The court finds that a high school graduation ceremony falls within the third forum, that in which the public's right to free speech is subject to the greatest amount of government restrictions. The evidence at the hearing established that the West Monona Community School District organizes, authorizes, and sponsors the Onawa High School commencement program. The event is conducted on school property using school facilities, which event school employees carry out. The school sets the program for the commencement ceremony, having the sole discretion to dictate its content. While the school cannot dictate the actual words spoken, the school does retain control over the type of speech admissible at the ceremony.[200]

The court then concluded: "It is altogether fitting and proper that the school have the power to control what occurs at a graduation of its seniors."[201]

While these comments appear to foreclose the possibility of the creation of a public forum at graduation, they must be taken in the context of the case presented. The plaintiffs in *Lundberg* were comprised of students and a minister who were asking the court "to force the School Board to provide a stage upon which plaintiffs may express their views concerning relig-

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all the attributes of a traditional public forum. For example, the school did not violate the First Amendment by its failure to print two pages in the school newspaper that included the names of two students involved in a controversial issue. It was not unreasonable because of the need to protect the privacy of the individuals in the article. *Id.*

198. *Lundberg*, 731 F. Supp. at 338.

199. *Id.* at 337 (quoting Correlius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 778, 805 (1985)).

200. *Id.* at 337.

201. *Id.*

ion."[202] In light of the law concerning a public forum, it is certainly an unremarkable conclusion that a school (the state) cannot be required to create a public forum.[203] The court's conclusion that a school ceremony is not a public forum unless the school wants it to be is also unremarkable.[204]

The *Lundberg* case is interesting, however, because of the plaintiff's efforts to prove the existence of a public forum and because of the court's conclusion. As mentioned, the court appears to conclude that a public forum could be created, but then uses words that appear to foreclose the possibility. Also, the court assumed without any significant discussion that "[e]ven if the court were to hold that a high school graduation ceremony constitutes a public forum, the School Board would still have the right to ban prayer at the graduation ceremony because it has a compelling state interest in not violating the Establishment Clause of the First Amendment."[205] The idea that the government can easily and at any time prohibit religious speech at a public forum has been soundly rejected.[206] The court secondly concludes that if permitted, the speech which plaintiffs claim a right to exercise would be school-sponsored."[207] Although this conclusion has not been soundly rejected, it does appear to prohibit any effort to show how one graduation might be different from another. This is also shown by the court's third conclusion, "[g]raduation ceremonies have never served as forums for public debate or discussions, or as a forum through which to allow varying groups to voice their views. Schools hold graduation ceremonies for the very limited secular purposes—to congratulate graduates of the high school."[208] These conclusions demonstrate that the court found that all graduations are indistinguishable. In sum, the court held that schools could possibly create a public forum at graduation but

202. *Id.* at 339 (footnote omitted).

203. *See* Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998) ("The government does not create a [designated] public forum by inaction or by permitting limited discourse . . .").

204. *Id.*

205. *Lundberg*, 731 F. Supp. at 339 n.8.

206. *See* Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819 (1995). This is not to say that the State may not ever have grounds to reject religious speech in a public forum. It cannot be simply concluded that religious speech may be rejected because of the fear of an Establishment Clause violation.

207. *Lundberg*, 731 F. Supp. at 339 n.7.

208. *Id.* at 339.

that all graduations are the same. The court added that the *Lundberg* graduation was not a public forum, so it can be concluded that graduations can never be public forums. These holdings were all made under circumstances when it was clear that the school did not want to nor attempt to grant students (or any one else) a freedom to speak. As it turned out, *Lundberg* dealt only very superficially with the Establishment Clause.

6. Griffith v. Teran[209]

The question of student speech and the creation (or not) of a forum in relation to the Establishment Clause was more seriously considered in those cases where the school did grant speech rights to students.

For example, in *Griffith v Teran,*[210] students were selected to speak at graduation by school officials from "a diverse cross-section of the student body" and "without regard to religious beliefs or preferences."[211] The court did not clearly explain how students were selected, but those selected were "counseled only to speak in non-sectarian, non-doctrinal, and non-proselytizing terms."[212] Furthermore, an atheistic or agnostic point of view would "be consistent with the purpose of these portions of the graduation program."[213] The court found this program to be consistent with all three prongs of the *Lemon* test: (1) The purpose of the invocations was to solemnize the occasion; (2) The primary effect of these invocations is not to endorse religion, because invocations at public ceremonies have "passed into 'the American civil religion';"[214] and (3) There is no "excessive entanglement," where the students composed the prayer subject only to a review by the principal for sectarianism or proselytization."[215]

As to the purpose prong, the court focused on the purpose of the invocation and not the graduation ceremony. However, as to purpose, the court emphasized one of the most confusing as-

209. 794 F.Supp. 1054 (D. Kan. 1992).
210. *Id.*
211. *Id.* at 1055.
212. *Id.*
213. *Id.* at 1056.
214. *Id.* at 1059, (quoting *Stein II,* 822 F.2d at 1409).
215. *Id.*

pects of the *Lemon* purpose prong.[216] "The first prong of the *Lemon* test . . . requires that state action have 'a' secular purpose. It does not require that the purpose be only secular."[217]

In this case it was easy for the court to conclude that a secular purpose of the prayer was to solemnize the occasion.[218]

As to effect, the court, without citing it, essentially followed its reasoning in *Marsh*.[219] The court found that non-sectarian prayer under certain circumstances is so entrenched in the nation's history as to have become part of a civil religion of "ceremonial deism."[220] The court refused to enjoin the graduation prayer.

7. Stein v. Plainwell Community Schools (I and II)[221]

In *Stein I*,[222] the district court applied the *Lemon* test, and in *Stein II*[223] the circuit court applied the *Marsh* test. The graduation ceremonies at issue varied with the schools. The students in some schools selected a minister to give an invocation and benediction. While these speeches were not reviewed, the minister was instructed to keep them "nondenominational."[224] In other schools, students were selected to give both commencement addresses and the invocation and benediction. However, the "administration in no way attempt[ed] to monitor the content of [the student] presentation."[225] As for the student messages, the district court applied *Lemon* and held that the secular purpose for the speeches was to "provide some form of solemn opening and closing" for graduation.[226] The second purpose was to permit the students to plan or participate in the ceremonies without control by the school.[227] The court then

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216. As these courts demonstrate, "purpose" is confusing in the first place as to what to focus on.

217. *Griffith*, 794 F. Supp. at 1058-59 (citation omitted).

218. *Id.* at 1059. Prayer invariably has a religious purpose. *See* Karen B. v. Treen, 653 F. 2d 897 (5th Cir. 1981). By the same token, prayer could almost always be found to have some higher secular purpose.

219. Marsh v. Chambers, 463 U.S. 783 (1983).

220. *Id.* The court's entanglement discussion was a one sentence conclusion.

221. *Stein I*, 610 F. Supp. at 43; *Stein II*, 822 F.2d at 1406.

222. *Stein I*, 610 F. Supp. at 43.

223. *Stein II*, 822 F.2d at 1406.

224. *Stein I*, 610 F. Supp. at 45.

225. *Id.*

226. *Id.* at 48.

227. *Id.*

gave six reasons why there was no unconstitutional effect: (1) graduation is voluntary; (2) "the school itself is not composing a prayer;"[228](3) there is no daily indoctrination; (4) the audience is older; (5) graduation is not part of the educational program; and (6) the speakers do not proselytize.[229] The court found that there was no entanglement because this was a once a year program.[230]

The circuit court of appeals reversed, holding that the *Marsh* test, not the *Lemon* test was appropriate. The court remanded the case for the district court to enter an order requiring that the invocations be nonsectarian and nonproselytizing.[231] Only if that were true could the prayers be "'civil' invocations or benedictions"[232] or be part of "the American civil religion" which the court in *Stein II* found to be approved in *Marsh v. Chambers*.[233] According to the circuit court, graduation prayers would be permissible as long as they were non-denominational.

8. Jones v. Clear Creek Independent School District[234]

The most important pre-*Lee* case was *Jones I*,[235] in which the Clear Creek Independent School District adopted the following policy:

> 1. The use of an invocation and/or benediction at high school graduation exercise shall rest with the discretion of the graduating senior class, with the advice and counsel of the senior class principal; 2. The invocation and benediction, if used, shall be given by a student volunteer; and 3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytiz-

228. *Id.* at 49.

229. *Id.* at 49-50.

230. *Id.* at 50.

231. *Stein II*, 822 F.2d at 1410.

232. *Id.*

233. *Id.* at 1409.

234. 930 F.2d 416 (5th Cir. 1991). Here, graduating seniors and parents brought suit against the school district to enjoin them from permitting invocations and benedictions at a high school graduation ceremony. The Supreme Court ultimately remanded to the 5th Circuit.

235. *Id.* at 417. As will be discussed later, its importance lies in the fact that it was also the first graduation prayer case to be reviewed after *Lee*. Because the Fifth Circuit upheld the constitutionality of student-led prayer after the Supreme Court's decision in *Lee*, it caused graduation prayer policies and cases to focus on the "student prayer" or "voluntary prayer" approach.

ing in nature.[236]

Applying *Lemon*, the Fifth Circuit Court of Appeals upheld the constitutionality of this policy.

As to purpose, the court held that the secular purpose of the prayer was to solemnize the graduation ceremonies.[237] In so holding, the court relied on and quoted from Justice O'Connor's concurring opinion in *Lynch*, that "'government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purpose of solemnizing public occasions'."[238]

Beyond holding that a prayer has a secular purpose at graduation, the circuit court found that prayer was the only way to accomplish the secular purpose of solemnization:

> But to say that the Resolution employs a 'religious means' is to confuse purpose and effect analysis under *Lemon*. Unlike the laws at issue in *Lubbock* and *Treen*, the resolution takes no position on whether a proposed invocation references a deity, and only seeks to limit sectarianism and proselytization. The Resolution does not employ an obviously religious means to solemnize Clear Creek graduation ceremonies. Moreover, *we are unaware of an exclusively secular equivalent for Clear Creek's solemnization choice* (emphasis added).[239]

Before reviewing the purpose of the policy, the court held that the policy need not have had "exclusively secular objective[s]."[240] A purpose is invalid, the court held, only if a policy had no secular purpose or the purpose suggested is a sham.[241] Given that the court had held that prayer was essential to the accomplishment of the solemnization purpose, the court easily found the policy to be valid under its understanding of the *Lemon* purpose prong.[242]

As to the effect prong, the court "focus[ed] on an invocation's effect in the context of an entire graduation ceremony."[243]

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236. *Id.*

237. *Id.* at 420.

238. *Id.* at 420 (quoting Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)).

239. *Id.*

240. *Id.* at 419.

241. *Id.* at n.2.

242. Once again, this court's approach demonstrates the difficulty of the *Lemon* test. This court looked to the "purpose" of the policy. This is slightly different than the purpose of the prayer or the purpose of the graduation.

243. *Jones I*, 930 F.2d at 421 n.161 (related to the *Miller* obscenity test). This con-

The context, much the same "context" relied upon in *Stein I*, was: (1) the invocation was brief; (2) the invocation was only once in four years; (3) the invocation audience was older and included parents; (4) the invocation was denominatively neutral; and (5) the state action was "passive," merely "facilitating" the invocation.[244] The court used the passive nature of the schools involvement to distinguish the Clear Creek prayer at graduation from the school prayer prohibited in *Engel*.[245] According to the circuit court, Clear Creek "facilitates invocations, but it leaves their existence and reference to a deity, to the discretion of each graduating class and student volunteer."[246] The circuit court emphasized that the effects question focused on what the "government itself [does] through its own activities and influence."[247]

The circuit court also found no entanglement. First, the ceremony occurs only once and consequently, the school does not continuously oversee secular activities.[248] Second, the policy excluded sectarian speeches, which eliminated any entanglement with religious organizations. Entanglement was, according to the court, "impossible."[249]

The U.S. District Court for the District of Utah followed *Jones I* in *Albright v. Board of Education of Granite School District*.[250] The actual decision denying a preliminary injunction involved the Alpine School District.

> The policy of the District [was] to permit prayer on a voluntary, non-discriminatory basis, at the request of the graduating class, with 'participating students selected on the basis of scholastic achievement, without regard to religious affiliation, preference or belief. Such students [were] counseled only to speak in non sectarian, non doctrinal and non proselytizing

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text approach is also similar to that taken in the crèche cases. *See* County of Allegheny v. American Civil Liberties Union 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

244. *Jones*, 930 F.2d at 422.

245. *Id.*

246. *Id.*

247. *Id.* (quoting from Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

248. *Id.* at 422-23. Furthermore, any oversight and review that occurred, would occur prior to the graduation ceremony. At the time of the ceremony, no such oversight occurred or could occur.

249. *Id.* at 423.

250. 765 F. Supp. 682, 684 (D. Utah 1991).

terms so as to represent and respect diverse views.'[251]

The court noted that the facts in *Jones I* were "similar" and followed the reasoning in *Jones I* with regard to the application of the *Lemon* test.[252]

The district court in *Albright* also looked to *Marsh* in upholding the validity of the policy.[253] Indeed, the court predicted that the Supreme Court would apply *Marsh* to graduation prayer and uphold its validity.[254] The district court consequently upheld the prayer at issue under what it termed the "Ceremonial Occasion Exception."[255] Finally, the court noted the importance of the fact that the student's speeches were not reviewed and monitored.[256]

9. Brody v. Spang[257] *and* Guidry v. Broussard[258]

The last two *Lee* graduation prayer cases of interest are *Brody v. Spang* and *Guidry v. Broussard*. *Brody* is significant not for the court's decision on prayer, but for its lengthy discussion of creating a public forum at graduation. Likewise, *Guidry* is not important for the specific result, but for the question raised by the plaintiff.

In *Brody*, the plaintiffs filed suit against Dowington High School alleging that "inclusion of religious benedictions and invocations at graduation ceremonies" violated the Establishment Clause.[259] The court does not clearly state who gave the prayers or under whose direction or guidance. The school immediately settled the case the day it was filed. The settlement included the following restriction:

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251. *Id.* at 684 (footnote omitted).

252. *Id.* at 688.

253. *See e.g.*, *Albright*, 765 F. Supp. 682.

254. *Id.* at 689.

255. *Id.* at 688-89. The district court rejected the argument that the "ceremonial occasion exception" was limited to legislative prayer.

256. *Albright*, 765 F. Supp. at 688-89. This court also found it to be of constitutional significance that the prayer was directed to be nonsectarian and nonproselytizing. This court, like others, essentially found that excluding atheists was constitutionally valid, but that a sectarian prayer, which excludes atheists and those with other beliefs might be invalid.

257. 957 F.2d 1108 (3d Cir. 1992).

258. 897 F.2d 181 (5th Cir. 1990).

259. *Brody*, 957 F.2d at 1111. The court's use of the phrase "inclusion of religious benedictions," is typical. The passive language merely says that prayers were given at graduation. The phrase does not say how the prayers were solicited for graduation. It eliminates responsibility and notes only existence. *Id.*

> Defendants, their successors, agents, employees and those acting by their invitation shall not pray, proselytize with respect to religion, or engage in any religious ceremony or activity during the annual commencement exercises or any other official event at the Dowington Senior High School. Except with respect to students invited to speak at graduation, nothing in this agreement shall be interpreted to restrict any student's first amendment rights.[260]

As the court noted later, this restriction, on its face, prohibited students who were invited to speak at graduation from speaking in religious terms, even if such prohibition limited these students' First Amendment rights.[261] In response to this order, another group of students sought to intervene in order to protect the First Amendment rights of student speakers at graduation.

The intervening students[262] argued that graduation was a public forum, and consequently that those students who the school invited to speak could not be prohibited from giving religious speeches. The court gave reasons why it thought that graduation could not be a public forum. Interestingly, the court then remanded the case for a determination of whether the school created a public forum after expressly holding that it was at least possible for a school to make graduation a public forum.[263]

> If, for example, school officials have authorized students to choose which of them will speak, and have permitted these speakers to select their own topics, including controversial subject matters, then officials may have created a limited public forum. Not only would such a practice demonstrate an intent to foster public discourse, but it would also avoid attaching the imprimaturs of the school to the views expressed in students' speeches.[264]

The court essentially took the standards for determining what makes a public forum and applied them specifically to graduation.

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260. *Id.* at 1112 n.2.

261. *Id.* at 1117 ("[T]his consent decree provision, on its face, clearly permits an infringement of otherwise existing First Amendment rights of students.").

262. These students were not granted the right to intervene by the district court, and the circuit court remanded the case for a determination whether intervention should be granted. For the purpose of this discussion, these students were intervenors.

263. *Brody*, 957 F.2d at 1120.

264. *Id.*

The court's analysis of the forum question revolved around demonstrating (1) the intent of the school and (2) "the extent of the use" of the forum granted.[265] These issues were to be considered in light of, and not to be determined by, the persons allowed to speak. The school could create a limited public forum by limiting "the pool of potential graduation speakers" to a small group of people such as "members of the school community" and granting "'indiscriminate use'" of the forum to that limited pool.[266] This discussion is premised on the principle that student speech and school speech is not the same.

This distinction also provided the basis of the plaintiff's claims in *Guidry*.[267] Guidry was valedictorian of her high school and as such had the right to speak at her graduation. She wanted to give a religious speech, but the principal forbade it. She claimed that her First Amendment rights were violated. The Fifth Circuit Court of Appeals dismissed the case for mootness and thereby avoided the constitutional questions.

The holding, analysis, and rationale of *Guidry* are of no particular significance.[268] However, this case highlights the vast factual differences in the graduation prayer cases. They run from the valedictorian, who is invited to speak but prohibited from praying,[269] to the school principal, who invites a rabbi to give a prayer but only a particular kind of prayer.[270] At the same time, the plaintiff in *Guidry* presents, as perhaps no other plaintiff does, the contrast between the desires of a private citizen, who has at least a qualified right to speak at graduation, and the school. This highlights the argument that private speech and government speech are not the same.

IV. POST *LEE* ISSUES

The Supreme Court granted certiorari in both *Lee v. Weis-*

265. *Id.* at 1117.

266. *Id.* at 1120, (quoting Hazelwood v. Kuhlmeier, 484 U.S. 260, 267 (1988)).

267. *Guidry*, 897 F.2d 181 (5th Cir. 1990).

268. *Guidry* is one of several graduation prayer cases in which the court dismissed the case for mootness or standing. *See also* Adler v. Duval County Sch. Bd., 112 F.3d 1475 (11th Cir. 1997); Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789 (9th Cir. 1999); Harris v. Joint Sch. Dist. No. 241, 821 F. Supp. 638 (D. Idaho 1993) *aff'd in part, rev'd in part*, 41 F.3d 447 (9th Cir. 1994), *cert. granted, judgment vacated by* Joint Sch. Dist. No. 241 v. Harris, 515 U.S. 1154 (1995).

269. *Guidry*, 897 F.2d 181 (5th Cir. 1990).

270. Lee v. Weisman, 505 U.S. 577 (1992).

man[271] and *Jones v. Clear Creek Independent School District.*[272] In *Lee*, the Court ruled that the graduation prayers at issue violated the Establishment Clause. Rather than ruling on the merits in *Jones*, the Court vacated the Fifth Circuit's order in light of *Lee*.[273] However, having granted certiorari in both cases the court could have answered many, if not most, of the questions raised by lower courts in the prior two decades. Instead, the Court reviewed the easiest factual question and answered it in a fashion that provided few answers for the questions raised by the courts below. In addition to leaving questions open, the Court raised questions that had not been raised before.

A. The Choice: The Lemon Analysis or the Marsh Analysis

In one of the earliest cases,[274] *Stein II* was the only court that did not consider the constitutionality of prayer at graduation pursuant to the either *Lemon* test[275] or at least two prongs therein; instead, it chose to apply *Marsh*.[276]

The circuit court in *Stein II* held that *Marsh* permitted the existence of a civil religion where (1) the religion was nonsectarian, and nonproselytizing[277] and (2) the practice is rooted in common practice, tradition or history.[278] However, the Supreme Court expressly rejected the application of *Marsh* to high school graduations.[279]

In so doing the Court opened the door for arguing that government-created prayer is constitutional "where adults are free to enter and leave with little comment and for any number of

271. 505 U.S. 577 (1992).

272. 505 U.S. 1215 (1992).

273. *Id.*

274. *Wood*, 342 F. Supp. 1293 (W.D. Pa. 1972).

275. *Weisman I*, 728 F. Supp. at 68; *Weisman II*, 908 F.2d at 1090; *Sands I*, 262 Cal. Rptr. at 452; *Sands II*, 809 P.2d at 809; *Albright*, 765 F. Supp. at 682; *Bennett*, 193 Cal. App. 3d at 1012; *Doe*, 563 F. Supp. at 883; *Graham*, 608 F. Supp. at 531; *Griffith*, 794 F. Supp. at 1054; *Jones*, 505 U.S. at 1215; *Kay*, 719 P.2d at 875; *Lundberg*, 731 F. Supp. at 331; *Stein I*, 610 F. Supp. at 43.

276. *Wiest*, 320 A.2d at 362; *Grossberg*, 380 F. Supp. at 285. As discussed earlier, these cases did not mention *Lemon* but relied on two parts of the *Lemon* test.

277. *Id.* at 1409.

278. *Id.* at 1408-09. While the circuit court did not expressly refer to common practice, it did note the existence of prayer at "thousands of public graduation exercises annually."

279. *Lee*, 505 U.S. at 597.

reasons."[280] The Court emphasized this distinction between adults and children throughout the rest of the opinion.[281] For example, the Court did "not address" the question of whether the choices given to primary and secondary school children under the facts presented would be "acceptable if the affected citizens [were] mature adults."[282] The Court also noted "that adolescents are often susceptible to pressure from their peers toward conformity."[283]

While the Court expressly rejected *Marsh*, at least as to high school graduations, it did not expressly rely on *Lemon*, thereby inviting immediate suggestions that *Lemon* was dead.[284] Failure to rely on *Lemon* was particularly interesting in the *Lee* case. Because almost every lower court had applied it, the Court clearly had a foundation from which to apply the *Lemon* test in its own fashion. More than one court had found that graduation prayers, similar to those reviewed in *Lee*, violated each part of the *Lemon* test. Finally, Justice Blackmun, in concurrence, essentially applied the effect prong of the *Lemon* test.[285]

Having rejected *Marsh* and ignored *Lemon*, the Court could have turned to *Engel* or *Abington*, or both, but it did not.[286] While the Court did not ignore its school prayer cases, it did not use them as the cases that created the appropriate Establishment Clause test. Instead, the Court used a coercion test. Throughout its opinion, the Court emphasized that the plaintiff was coerced, forced, or pressured into joining in the prayer.[287]

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280. *Id.*

281. *Id.* at 593.

282. *Id.*

283. *Id.*

284. *Lee*, 505 U.S. at 644 (Scalia, J., dissenting) ("The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it . . . and the interment of that case may be the one happy by-product of the Court's otherwise lamentable decision."). As it turns out, not only was Scalia's prediction of interment premature, he was one of five votes to give Justice O'Connor the majority needed to resurrect/rewrite the *Lemon* test in Agostini v. Felton 521 U.S. 203 (1997). Of course, given *Lemon's* checkered past, this too, may be at best temporary.

285. *Id.* at 603-604 (Blackmun, J., concurring).

286. How those cases, *Engel* in particular, may have aided the Court is discussed later.

287. *Lee*, 505 U.S. at 587, 592-595, 597.

B. Voluntariness

In finding coercion, the court rejected the argument based upon voluntary attendance made in and accepted by a number of courts in pre-*Lee* graduation prayer cases.[288] The Supreme Court rejected the idea of voluntariness holding that peer pressure made attendance essentially mandatory.[289] The Court held:

> [a]ttendance 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 her youth and all her high school years.[290]

Because students were "forced" to be at graduation, the Court easily concluded that they were "forced" to be part of, and subjected to, religious activities.[291]

In *Lee*, the school argued that even if this was a technical violation, the courts should not prohibit graduation prayer because the violation was *de minimis*.[292] Similarly, lower courts had argued that the prayer was valid because of the context of graduation.[293] Some courts had noted that the prayer was only a few minutes of an entire ceremony,[294] and graduation occurred only once per year.[295] The Court, while not discussing

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288. *Grossberg*, 380 F. Supp. 285; *Wiest*, 320 A.2d 362; *Wood*, 342 F. Supp. 1293.

289. *Lee*, 505 U.S. at 594-95.

290. *Id.* at 595. This conclusion is founded on the irrefutable "[e]veryone knows . . ." *Id.* According to the Court, what "[e]veryone knows" is that "high school graduation is one of life's most significant occasions." Presumably this is not accurate for the millions of people who do not graduate from high school, nor is it likely to be true for those students who skip high school graduation. This finding takes judicial notice to a new level. The Court found as fact that all people feel the same way about a general event. Presumably, the Court can also make assumptions (i.e., findings) about people's views toward birth, marriage, and death. Indeed, the Court does make those kind of assumptions. Perhaps what is most incredible about the Court's finding is its prefatory phrase "everyone knows." Not only is the phrase incredibly informal, it implies weakness. It is almost a personal attack on those who would dare disagree. The only thing missing explicitly (and almost in the opinion implicitly) is: "[d]on't you know anything, everyone knows . . ." *Id.*

291. *Id.* at 593, 596.

292. *Id.* at 594.

293. Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416, 421 (5th Cir. 1991) *vacated and remanded*, 505 U.S. 1215 (1992).

294. *Stein I*, 610 F. Supp. 43, 49.

295. *Id.*

each of these arguments, clearly dismissed them saying, "[t]he embarrassment and intrusion of the religious exercise cannot be refuted by arguing that these prayers . . . are of a *de minimis* character."[296]

C. Ceremonial Deism

Lower courts have also argued that prayer is not prayer if it is part of our "civic religion."[297] Under this argument, a prayer becomes acceptable if it is rendered so often that it loses its religious connotations. Courts proffered the phrase, "In God We Trust," as well as the opening prayer before the courts, to support their thinking.[298] One of the requirements for inclusion in the civic religion, however, is that the prayer be nonsectarian and nonproselytizing.[299] The *Lemon* test encouraged these holdings. The courts held that the purpose and effect of these prayers was not to advance religion because they were not advancing "a" religion. The prayers were simply setting a solemn or respectful tone.

The *Lee* Court rejected the ceremonial deism argument.[300] To suggest that the prayers had no religious meaning the Court held, "would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority."[301] The Court even turned around the suggestion that nonsectarian prayer might be more acceptable. The Court said that while the number of persons offended or injured by nonsectarian prayer might be fewer, for some "their sense of isolation and affront" might actually increase.[302] A prayer, then, is a prayer, whether it is short or long or whether it is sectarian or nonsectarian. At best, this conclusion held true in *Lee*.

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296. *Lee*, 505 U.S. at 594.

297. This "civic religion" has been used in one court to uphold saying the Pledge of Allegiance in school.

298. *See* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 602 (1989).

299. *Id.*

300. *Id.* Various justices have argued in favor of the validity of ceremonial deism in other contexts.

301. *Lee*, 505 U S. at 594.

302. *Id.*

D. Coercion

In declaring the graduation prayer to be unconstitutional, the Court in *Lee* emphasized the narrowness of its decision.[303] Although the Court found that tremendous social coercion often "requires" high school students to attend graduation ceremonies, the Court conceded that adults might be different.[304] The Court's express notation of this distinction invites arguments that the distinction makes a constitutional difference. This is particularly true due to the Court's conclusion that the social coercion of the high school students to join religious activities is why those state-sponsored religious activities are invalid. The argument to be made is that state sponsored religious activities are acceptable where people are not coerced to conform.[305]

The irony of this coercion distinction is that no court that considered graduation prayer prior to the Supreme Court's decision in *Lee* had held that prayers were acceptable because they were voluntary.[306] Indeed, they cited to *Engel* or *Abington* for the proposition that voluntariness was irrelevant. Consequently, the Court reinvigorated an argument that the Court killed and buried thirty years earlier.

E. Lemon *Purpose Test*

The Court also created confusion by not applying the *Lemon* test.[307] More importantly, the Court abdicated, or at least shirked, its responsibility to explain *Lemon*. Except for the first few graduation prayer cases, the lower courts had consistently declared graduation prayer invalid where the school had chosen the speaker and chosen to have a prayer. The disagreements arose as the facts changed so that the school had less input into the choice to have a prayer. The more important disagreements were how to properly apply *Lemon*, in particular, how to apply the *Lemon* test to purpose and effect.

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303. *Id.* at 586. The Court began its opinion stating, "[t]hese dominant facts mark and control the confines of our decision . . ."

304. *Id.* at 593.

305. This argument has not only been made but accepted by at least one court with regard to graduation at state colleges. *See* Chaudhuri v. Tennessee, 130 F.3d 232 (1997).

306. While some courts noted the voluntariness of attendance, no court has held that coercion was necessary to prove an Establishment Clause violation.

307. As noted earlier this invited Justice Scalia's premature speculation that *Lemon* might be dead.

With regard to purpose and effect, the courts have debated over whether to look at the purpose and effect of the graduation or of the prayer. Some courts have held that the question is what was the purpose and effect of graduation. They asked whether the graduation ceremony had the purpose or effect of endorsing or approving religion. Other courts focused on the prayer itself, asking what is the purpose of prayer. The courts almost invariably took a tautological approach to reach opposite results, each reasonable in light of two reasonable readings of *Lemon*.

Some courts noted that *Lemon* merely requires a secular purpose. Those courts concluded that graduation prayers always had the similar purpose of solemnizing an event. The conclusion is obvious and almost tautological. Indeed, it is very reasonable that all religion has, and most religious activities have, a secular purpose. Without extensive philosophical discussion, it is at least reasonable to argue that a secular purpose could invariably include, inspiration to greatness, peace, happiness or morality. By the same token, prayer is by necessity always religious, because it is only religious prayer which is subject to Establishment Clause restrictions. Consequently, other courts simply conclude the purpose and effect of prayer is always religious. Instead of making any effort to shed light on these problems, the Court ignored them, thereby passing on a chance to provide enlightenment concerning a test which has been difficult to apply.

The final irony of the *Lemon* purpose test is that one of the Court's first cases to use the test was *Abington*.[308] The school had argued that it could lead students in prayer if the purpose were "the promotion of moral values, the contradiction to the materialistic trends of our institutions and the teaching of literature."[309] Rather than simply reject this position as irrelevant the Court found that the purpose of the school prayer was religious and helped spawn the confusion in the area of graduation prayer, which it did little to clear up in *Lee*.

F. Government Speech / Private Speech

Besides relying on coercion as a reason to declare graduation prayer invalid, the Court's opinion in *Lee* also parallels

308. *See Abington v. Schempp*, 374 U.S. 203 (1963).

309. *Id.* at 223.

Engel in other respects. There, the Court summarized the *Engel* holding as follows: "[i]t is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government'."[310] The most common questions courts asked about graduation included whether graduation was a "religious program carried on by the government,"[311] and whether graduation prayer was an official prayer. Indeed, the first court to address these questions directly, in *Wood v. Mt. Lebanon Township School District*, distinguished prayer in classrooms from graduation prayer saying, "in the present case we do not have what amounts to official prayer, nor does it constitute a religious program."[312]

Some courts suggested that because the prayer occurred only one time, it was not part of a prayer program and therefore permissible. Because these courts used the Lemon test, they did not usually reference *Engel* or *Abington* directly. Instead, they attempted to distinguish the facts of these cases. Some suggested distinctions were that (1) graduation was not part of the regular curriculum; (2) attendance was not mandatory; (3) no money was spent for the prayer per se; (4) the schools did not have a regular program of indoctrination. Like many other courts, the Supreme Court in *Lee* also rejected these positions.

In *Lee*, the Court refused to distinguish *Engel*. Instead, the Court focused on the state's action and held that the prayer was a state prayer program. Under *Engel* and *Abington*, that would be enough to find a constitutional violation. The Court needed to go no further from holding that graduation is part of the entire school program. The holdings of *Abington* and *Engel* easily encompassed a holding that graduation is an official school event and that official prayer at such an event violated the constitution.[313]

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310. *Lee*, 505 U.S. at 588 (quoting from Engel, 370 U.S. at 425).

311. *Id.*

312. Wood v. Mt. Lebanon Township Sch. Dist., 342 F. Supp. 1293, 1294 (W.D. Pa. 1972).

313. As discussed earlier, the Court significantly weakened the strength of the *Engel* protections by discussing coercion as a separate element of the solution. The correct understanding of the Establishment Clause is that coercion is inherent wherever the government engages in religious exercises. *See Engel*, 370 U. S. 421; *Abington*, 374 U. S. 203.

The final attempt to distinguish *Engel* and *Abington*, again in the *Lemon* context, related to the question of whether the graduation prayer was "official." In *Engel*, New York adopted a program requiring daily participation in classroom prayers. In *Abington*, a Pennsylvania statute required students to read from *The Bible*. In other words, the State used prayers composed by someone else. In *Lee*, a third party was asked to compose a prayer and told what kind of prayer to compose. Here, the Court relied on *Engel's* "cornerstone principle."[314] Throughout the opinion, the Court emphasized that the government may not compose official prayers nor ask others to do so on its behalf. The Court wrote: "our precedents do not permit school officials to assist in composing prayers"[315] and "the principal directed and controlled the content of the prayers."[316] Once the Court found that the school had essentially composed the prayer, *Lee* became indistinguishable from *Engel* and *Abington*.

The Court's emphasis on state involvement in the composition of the prayer accomplished more than showing the similarities between *Lee*, *Engel* and *Abington*. At the beginning of the Court's analysis, it notes, "[t]hese dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise . . ."[317] The Court then noted that "government involvement with religious activity in this case is pervasive."[318] Other significant facts were that the State decided to have a prayer, decided who would say it and directed that it conform to certain principles.[319] The government may not "undertake" for itself, the court said, the "task" of composing nonsectarian prayer, which seeks to advance "community and purpose."[320] In the end, the Court notes that its "Establishment Clause jurisprudence remains a delicate and fact-sensitive one."[321]

These statements alone invite efforts to distinguish facts. However, these statements are not the only invitation in *Lee*. The end of the opinion in particular invites efforts to distin-

314. *Lee*, 505 U.S. at 588.
315. *Id.* at 590.
316. *Id.* at 588.
317. *Id.* at 586.
318. *Id.* at 587.
319. *Id.*
320. *Id.* at 589.
321. *Id.* at 597.

guish prayer created by the state from other prayer at graduation. The opinion contains three passages that strongly suggest that religion is not to be banished from ever coming into contact with the State. Furthermore, it also suggests that being offended, even deeply offended, by religious practices at any particular time does not mean the religious activity violates the First Amendment. The Court stated:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity.
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> * * *
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> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow. *School Dist. of Abington v. Schempp*, *supra*, 374 U.S., at 308, 83 S. Ct.., at 1616 (Goldberg, J., concurring).[322]

These two passages are perhaps oblique invitations to distinguish *Lee*. Their significance was greatly enhanced by the Court's last passage, which clearly indicated that the result would not necessarily be the same if the facts were different.

> A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.
>
> ***
>
> We recognize that, at graduation time and throughout the course of the education process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. *See Board of Education of Westside Community Schools v. Mergens,* 496 U.S. 226, 110 S. Ct. 2356, 110 L. Ed.2d 191

322. *Id.* at 598.

(1990). But these matters, often questions of accommodation of religion, are not before us.[323]

Particularly significant to this passage is the Court's citation to *Mergens*.[324] In *Mergens*, the Supreme Court upheld the constitutionality of the Equal Access Act.[325] The plurality's opinion in *Mergens* turned on distinguishing government speech from "private speech."[326] With regard to government speech, religious expression is almost, if not completely, prohibited.[327] This is particularly true if it is part of a religious exercise.[328] With regard to private speech, the government must be neutral.[329] Not only does *Mergens* hold that private religious speech may be allowed when the same speech by the government is prohibited, it does so in the context of public schools.

In the last quoted passages from *Lee*,[330] the Supreme Court ties together a number of principles not necessary to the disposition of *Lee*: (1) State action implicating religion is not necessarily invalid; (2) a religious practice, even one implicating state action, is not invalid simply because some are offended or even forced into social isolation; (3) the Court will "distinguish between real threat and mere shadow;"[331] (4) private speech can be protected religious expression, even in schools; and (5) at graduation time, "religious practices . . . will have some interaction with the public schools and their students."[332]

How these principles might be written or rewritten is not of particular significance. What is important is the question which is clearly left open, indeed invited. While the question could be written other ways, one way of stating the question is: whether and under what circumstances the First Amendment prohibits a student from saying a prayer at graduation. If *Lee* clearly left any question regarding graduation prayer unanswered, that was it. The Court focused significantly on the fact

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323. *Id.* at 598-99.

324. Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226 (1990).

325. *Id.*; *See* 20 U.S.C.A. Sec. 4071(a).

326. *Id.* at 228.

327. *Id.*

328. *Engel*, 370 U. S. 421.

329. *Mergens*, 496 U.S. at 228-229.

330. *Lee*, 505 U.S. at 598, 599.

331. *Lee*, 505 U.S. at 598 (quoting *Abington*, 374 U.S. at 308 (Goldberg, J., concurring)).

332. *Id.* at 598-99.

that the principal chose to have a prayer, chose a religious person to say the prayer and directed the content of the prayer. The Court then gratuitously discussed the constitutional protection of private/student religious activities in both the school and graduation context.

Even if these discussions were not an invitation to distinguish student prayers at graduation, they certainly provide sufficient material to make a good faith argument that student prayers are constitutionally distinguishable from those solicited by the principal in *Lee*.

The fact that this question is left open is further supported by the Supreme Court's grant of certiorari in a student-speech graduation prayer case which was later remanded in light of *Lee*.[333] Clearly, the Court was aware of the arguments distinguishing government speech from private/student speech at graduation. Just as clearly, the Court did not attempt to answer the question. And finally, the Court went out of its way to distinguish government speech from private speech. Given that our jurisprudence is based on factual distinctions, the Court could hardly have made a more obvious invitation to argue that student prayer at graduation is constitutionally different from the school's prayer at graduation.[334]

V. CONCLUSION

Lee rejected *Marsh*, ignored *Lemon* and weakened *Engel*. The court was presented with the problem of how to apply *Lemon* and refused to provide guidance. The Court followed *Engel's* principle that the government may not engage in religious exercises but gratuitously added that such might not be the case where adults are not coerced to conform. Finally, the Court invited schools to defend student prayers at graduation.

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333. *See* Jones v. Clear Creek Indep. Sch. Dist., 505 U.S. 1215 (1992).

334. As it turned out, this distinction between student prayer and government prayer was the focus of much of the Court's decision in *Santa Fe*, 120 S. Ct. at 2275. The Court rejected Santa Fe's argument that the prayer at issue was private prayer, but again implied that a prayer at school functions might be private prayer. The Court noted, "[t]hese invocations are authorized by a government policy and take place on government property at government-sponsored school related events." *Id.* at 2266. The next sentence undercut the significance of those facts saying, "of course, not every message delivered under such circumstances is the government's own." *Id.* The clear implication remains that prayer, as private prayer, might be constitutionally permissible even at public school ceremonies.

The Court should have held *Lemon* to be irrelevant with regard to religious exercises. It also should have followed *Engel* and simply held that the government cannot create prayers and prayer programs by asking others to create the prayers for the government. This would prohibit prayers by ministers, students or anyone else, if the prayers had been requested or urged by the government.