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Souring on *Lemon*: The Supreme Court's Establishment Clause Doctrine in Transition

by Roald Y. Mykkeltvedt*

I. INTRODUCTION

In his opinion for the Court in the landmark case of *Everson v. Board of Education*,[1] Justice Black held that the Establishment Clause of the First Amendment erected a high and impregnable "wall of separation" between church and state.[2] Relying primarily on the writings of James Madison and Thomas Jefferson to discern the intentions of the framers, Justice Black maintained that, at the very least, the establishment proscription meant that

> [n]either a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.[3]

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

2. *Id.* at 16.

3. *Id. Everson* not only introduced the basic standard that the Court would apply in subsequent cases arising under the Establishment Clause; it also demonstrated how easily that standard could be applied to justify diametrically different outcomes. Thus, five members of the Court held that the practice at issue, the public funding of transportation for parochial school children, was intended to promote the public safety and, therefore, a constitutional exercise of the state's police power. *Id.* at 18. Four justices, however, disagreed, concluding in Justice Jackson's words, that "the undertones of the [majority] opinion, advocating complete and uncompromising separation of Church from State, seem utterly discor-

Ultimately, the Court developed a tripartite test, based on *Everson's* strict separationist standard, to apply in cases arising under the Establishment Clause. Formally proclaimed in the case of *Lemon v. Kurtzman*,[4] that test stipulated that to comport with the establishment prohibition a governmental action must (1) have a secular purpose, (2) have "a principal or primary effect . . . that neither advances nor inhibits religion," and (3) "not foster an 'excessive government entanglement with religion.' "[5]

Neither the "wall of separation" concept nor the *Lemon* test has enjoyed universal acceptance among the justices.[6] Indeed, only one year after the decision in *Everson* Justice Reed advanced compelling arguments in support of an accommodationist construction of the Establishment Clause. Dissenting in the case of *McCollum v. Board of Education*,[7] he observed that from the outset of our history under the Constitution Congress had acted to aid religion in a wide variety of ways—for example, by authorizing legislative prayer and by providing for chaplains to minister to the spiritual needs of the members of the armed services.[8] This persuaded Justice Reed that the Establishment Clause could not be regarded as imposing "an absolute prohibition against every conceivable situation

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dant with its conclusion yielding support to their commingling in educational matters." *Id.* at 19 (Jackson, J., dissenting).

4. 403 U.S. 602 (1971).

5. *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). Following *Everson* the Court routinely disposed of cases concerning alleged violations of the Establishment Clause by applying a two part test which required that a governmental action (1) have a secular purpose and (2) a principal or primary effect that did not promote or restrict religion. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963); Board of Educ. v. Allen, 392 U.S. 236, 243 (1968). The excessive entanglement prong of the *Lemon* test was formally adopted in the case of Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

6. Referring to the "wall of separation" metaphor, for example, Justice Reed protested that a "rule of law should not be drawn from a figure of speech." McCollum v. Board of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting). Subsequently, Justice Stewart complained that in adjudicating Establishment Clause cases, "the Court's task . . . is not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation.' " Engle v. Vitale, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting). Alluding to the *Lemon* test, Justice Rehnquist stated: "If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it." Wallace v. Jaffree, 472 U.S. 38; 112 (1985) (Rehnquist, J., dissenting). Finally, Justice Kennedy concluded that: "Substantial revision of our Establishment Clause doctrine may be in order . . . ." County of Allegheny v. ACLU, 492 U.S. 573, 656 (1989) (Kennedy, J., joined by Rehnquist, C.J., White, J., and Scalia, J., concurring in part and dissenting in part).

7. 333 U.S. 203 (1948).

8. *Id.* at 253-54. Justice Reed also noted that cadets and midshipman attending the national military and naval academies, were at that time actually *required* by federal regulations to attend church services on Sunday. *Id.* at 254-55.

where [church and state] may work together, any more than the other provisions of the First Amendment—free speech and free press—are absolutes."[9] While he agreed that the Court must strike down governmental actions which clearly "tend to the establishment of a church or interfere with the free exercise of religion," he averred that the justices "cannot be too cautious in upsetting practices embedded in our society by many years of experience . . . . Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the [Establishment Clause] that conflicts with accepted habits of our people."[10] In Justice Reed's view, "the history of past practices is determinative of the meaning of a constitutional clause," and, with respect to the establishment proscription, history demonstrated that the framers had no intention of banning every friendly gesture between church and state.[11]

Since *McCollum* the Court has evinced a schizoid approach to Establishment Clause cases, moving erratically between the strict separationist standard promulgated in *Everson* and the accommodationist theory advocated by Justice Reed.[12] Attempting to obfuscate its unprincipled disposition of such cases, the Court has almost invariably purported to be adher-

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9. *Id.* at 256.

10. *Id.*

11. *Id.*

12. In *McCollum* the Court held that a released time program under which public school students with parental approval could receive religious instruction in school classrooms during the school day violated the establishment prohibition. *Id.* at 212. Only four years later, however, in the case of Zorach v. Clausen, 343 U.S. 306 (1952), the Court upheld a released time program under which public school students with parental approval could receive religious instruction during the school day in off-campus locations. *Id.* at 315. Dissenting in *Zorach*, Justice Jackson fulminated: "The distinction attempted between [*McCollum*] and [*Zorach*] is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity [in *McCollum*]." *Id.* at 325 (Jackson, J., dissenting).

More recently, in Mueller v. Allen, 463 U.S. 388 (1983), the Court approved a Minnesota law which provided that parents of elementary and secondary school students could deduct up to $700 from their state income taxes to offset the cost of tuition, textbooks, and other school-related expenses. *Id.* at 403-04. Since public education was essentially free, however, the parents of children who attended private schools were the principal beneficiaries of the act. And, as Justice Marshall noted in dissent, "over 90% of the children attending tuition-charging schools in Minnesota are enrolled in sectarian schools." *Id.* at 411 (Marshall, J., dissenting). Nevertheless, a five member majority myopically held that the law did not have the primary effect of promoting religion. 463 U.S. at 396.

In Wallace v. Jaffree, 472 U.S. 38 (1985), however, the Court held that an Alabama law authorizing public school teachers to ask their students to observe a moment of silence for "meditation or voluntary prayer" at the outset of each school day violated the purpose prong of the *Lemon* test. *Id.* at 56. To maintain that such an innocuous practice could possibly tend to establish religion, Chief Justice Burger protested in dissent, "borders on, if it does not trespass into, the ridiculous." *Id.* at 89.

ing to the *Everson* rationale even when issuing accommodationist decisions.[13]

Although occasionally upholding governmental actions promoting religious interests in other settings, the Court has been diligent in maintaining the wall of separation between church and state in the public schools. Thus, during the last decade the Court has invalidated state legislation authorizing the mere posting of copies of the Ten Commandments in public school classrooms;[14] it has prohibited the employment of parochial school teachers to teach secular subjects in the public schools;[15] it has forbade the teaching of scientific creationism in the public schools;[16] and it has disallowed legislation authorizing public school teachers to ask their students to observe a moment of silence for meditation or prayer.[17]

Seeking to explain the Court's adamant refusal to approve any governmental action that could be construed as endorsing religion in the public schools, Justice Brennan once noted that

> [f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary . . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.[18]

Until very recently, the Court appeared committed to applying the strict separationist standard not only in the classroom, but to any activity associated with the public schools. In *Widmar v. Vincent*,[19] for example, the Court invalidated a Missouri law that prohibited student religious groups from meeting in state university buildings or on the grounds of such public institutions.[20] Since the university allowed other student

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13. Even in *Zorach*, the Court specifically stated that "[w]e follow the *McCollum* case"—a case decided on the basis of *Everson*'s strict separationist standard. *Zorach*, 343 U.S. at 315. Indeed, the only instance in which the Court has failed to invoke *Everson* or *Lemon* as authority for its decision in an Establishment Clause case is Marsh v. Chambers, 463 U.S. 783 (1983). There, the Court determined that legislative prayer was not subject to scrutiny under the *Lemon* test because the practice had been expressly approved by the same Congress that proposed the First Amendment to the states. *Id.* at 790.

14. Stone v. Graham, 449 U.S. 39 (1980).

15. Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985).

16. Edwards v. Aguillard, 482 U.S. 578 (1987).

17. Wallace v. Jaffree, 472 U.S. 38 (1985).

18. *Edwards*, 482 U.S. at 583.

19. 454 U.S. 263 (1981).

20. *Id.* at 277.

groups to use its facilities, the Court reasoned, the regulation at issue would discriminate against religious groups, thereby violating the "fundamental principle that a state regulation of speech should be content-neutral."[21] Writing for the *Widmar* majority, however, Justice Powell implied that public school authorities could not allow elementary and secondary students to use school facilities for religious meetings—that such a practice might be regarded as an impermissible endorsement of religion.[22] Thus, he addressed the establishment issue raised in *Widmar* by arguing that "[u]niversity students are, of course, young adults. They are *less impressionable than younger students* and should be able to appreciate that the University's policy is one of neutrality [not endorsement] toward religion."[23]

Further underscoring its commitment to the separationist doctrine in matters pertaining to the public schools, the Court recently let stand a decision by the Eleventh Circuit Court of Appeals that proscribed invocations prior to public high school football games.[24] In *Jager v. Douglas County School District*,[25] the appellate court had determined that such ceremonial prayer violated both the purpose and primary effect prongs of *Lemon's* tripartite test.[26] Speaking for the court in *Jager*, Judge Johnson asserted 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."[27] Furthermore, Judge Johnson stated in *dicta* that invocations at public school commencement ceremonies as well as pregame prayer would contravene the establishment prohibition.[28]

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21. *Id.*

22. *Id.* at 274 n.14.

23. *Id.* (emphasis added).

24. Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989).

25. 862 F.2d 824 (11th Cir. 1989).

26. *Id.* at 832. According to the court, the school district could achieve any of the secular purposes it claimed would be served by prayer "by requiring wholly secular inspirational speeches about sportsmanship, fair play, safety, and the values of teamwork and competition." *Id.* at 829. The fact that school authorities declined to opt for that alternative, Judge Johnson reasoned, proved that their true purpose was to promote religion. *Id.* at 829-30 n.11.

27. *Id.* at 831.

28. *Id.* at 829 n.9. Judge Johnson rejected the reasoning of the Sixth Circuit Court of Appeals which had held that graduation prayer was essentially similar to legislative prayer and, therefore, constitutional—providing it was nonsectarian and nonproselytizing. Stein v. Plainwell Community Sch., 822 F.2d 1406, 1409-10 (6th Cir. 1987). As he noted, in *Edwards* the Supreme Court had stated that

> [t]he *Lemon* test has been applied in all [Establishment Clause] cases since its adoption in 1971, except in Marsh v. Chambers, 463 U.S. 783 (1983), [in which]

It is axiomatic that the Court's refusal to grant certiorari does not prove conclusively that a majority of the justices agree with the judgment of a lower court.[29] Nevertheless, a denial of a petition for review at least suggests that a Court majority considers the decision below acceptable for the moment. As Justice Jackson commented, "[t]he fatal sentence that in real life writes finis to many causes cannot in legal theory be a complete blank."[30]

II. PORTENT OF CHANGE: *BOARD OF EDUCATION V. MERGENS*

The decision in the recent case of *Board of Education v. Mergens*[31] suggests that the Court's long-standing adherence to the strict separationist standard in the public schools is waning. At issue in *Mergens* was the constitutionality of the Equal Access Act of 1984,[32] which stipulated that public secondary schools receiving federal financial assistance and providing for a "limited open forum" could not "discriminate against . . . any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."[33] Petitioners, public school officials at Westside High School in Omaha, Nebraska, had denied student respondents' request for formal recognition of their Christian club and for permission to hold club meetings on school premises during noninstructional periods.[34] Counsel for Westside maintained that the Equal Access Act did not apply in this instance and, further, if it did apply, that the

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> the Court held that the Nebraska legislature's practice of opening a session with a prayer by a chaplain paid by the state did not violate the Establishment Clause. The Court based its conclusion in that case on the historical acceptance of the practice [by the framers of the First Amendment]. Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually non-existent at the time the Constitution was adopted.

Edwards, 482 U.S. at 583 n.4.

29. As Justice Brennan stated in a recent television interview, a denial of certiorari simply means that "the judgment we're asked to review remains undisturbed." "It does not mean," he averred, "that we agree or disagree with the result." *This Honorable Court: Part 2* (Greater Washington Educ. Telecommunication Ass'n, Inc. television broadcast, August 14, 1988). Similarly, Justice Frankfurter observed that certiorari has often been denied for a wide variety of reasons having no relation to the merits of the decisions below. Darr v. Burford, 339 U.S. 200, 227 (1949) (Frankfurter, J., dissenting).

30. Brown v. Allen, 344 U.S. 443, 543 (1950) (Jackson, J., concurring).

31. 496 U.S. 226 (1990).

32. 20 U.S.C. §§ 4071-4074 (1990).

33. 496 U.S. at 235.

34. *Id.* at 232-33. The purpose of the club, as explained to school authorities by the Christian students, was to enable the members "to read and discuss the Bible, to have fellowship, and to pray together." *Id.* at 232.

Act would contravene the Establishment Clause.[35] By an emphatic margin of eight to one, however, the Supreme Court held that the Equal Access Act obligated Westside to grant the Christian students' request and, in the process, rejected petitioners' contention that the Act as applied violated the establishment proscription.[36]

As construed by Justice O'Connor in her plurality opinion announcing the Court's decision, the Equal Access Act is triggered when a public secondary school authorizes even one "noncurriculum related student group" to hold meetings on school premises during noninstructional periods.[37] Since Westside High School had allowed such student groups as a chess club and a scuba diving club to use its facilities, it had established a "limited open forum" from which, under the terms of the Act, it could not exclude any other student groups on the bases of their expressive purposes.[38] If the Act proved to be valid, therefore, the Christian club must be accorded the same privileges as those granted to other student clubs. Justice O'Connor rather summarily concluded that the Act was valid as

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35. *Id.* at 233. The district court had ruled in favor of the Board of Education, holding that the school did not maintain the kind of "limited open forum" defined by the Equal Access Act. *Id.* It was generally agreed, the court contended, that in passing the Equal Access Act Congress sought to extend the logic of Widmar v. Vincent, 454 U.S. 263 (1981) (*see supra* note 19 and accompanying text), to the secondary schools. 496 U.S. at 233. The forum at issue in *Widmar* was open to advocacy-oriented groups such as the Young Socialist Alliance, and the Young Democrats. *Id.* at 252. In contrast, the district court found that the Westside forum included only curriculum-related clubs "tied to the educational function of the school." *Id.* at 233.

The United States Court of Appeals for the Eighth Circuit reversed the district court's ruling, holding that the Westside forum included a number of non-curriculum related clubs and, therefore, was essentially similar to the forum in *Widmar*. *Id.* at 234. The appellate court further asserted that because Congress had determined that secondary school students were sufficiently mature to understand that a school is not endorsing religion by allowing a religious club to participate in a limited open forum, the act could not be invalidated on the basis of the age differences between college and high school students. *Id.* Thus, the circuit court demonstrated a resolute commitment to the principle of judicial self-restraint.

36. 496 U.S. at 253. Since it determined that the Equal Access Act was constitutional and that the school board had violated that Act, the Court decided it would be unnecessary to consider claims by the respondents that the board's action contravened both the free speech and free exercise clauses as well. *Id.*

37. *Id.* at 236. Consulting the legislative history of the Equal Access Act, Justice O'Connor determined that it was intended in part as a response to two lower court decisions (Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038 (1982), and Brandon v. Guilderland Bd. of Educ., 635 F.2d 971 (1980)) which had held that to allow religious clubs to conduct meetings on public school property would violate the establishment prohibition. 496 U.S. at 239. Justice O'Connor concluded, therefore, that to achieve the purpose of the Act, it would be appropriate to interpret the term "noncurriculum related student group" broadly, as meaning "any student group that does not *directly* relate to the body of courses offered by the school." *Id.*

38. 496 U.S. at 245-46.

applied to Westside High School, finding the Act compatible with all three prongs of the *Lemon* test.[39]

According to Justice O'Connor, the stated purpose of the Equal Access Act is to prevent public secondary schools from discriminating against religious and other forms of expression.[40] Since that purpose is "undeniably secular," she reasoned, the Act passed muster under *Lemon's* first prong.[41] Next, addressing petitioners' principal constitutional argument, Justice O'Connor rejected the contention that the primary effect of officially sanctioning the Christian club would be to promote religion.[42] Erasing the line that the Court in *Widmar* implicitly had drawn between college and pre-college students, she proclaimed that "secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis."[43] To enhance that understanding, she noted, the Act expressly provided that school officials could not promote, lead, or participate in the meetings of student religious clubs.[44] Thus, while student peer pressure might effect a promotion of religion, "little if any risk of official state endorsement or coercion" exists for students to participate in any religious meeting.[45] Finally, she maintained, the Equal Access Act comported with the third prong of the *Lemon* test because "a denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech" at student club meetings.[46]

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39. *Id.* at 250-53.

40. *Id.* at 249.

41. *Id.*

42. *Id.* at 249-50.

43. *Id.* at 250. Elaborating on this point, Justice O'Connor appeared to adopt the position taken by the circuit court, *i.e.*, that the judgment of Congress must be dispositive. Thus, she stated:

> [w]e note that Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion . . . . Given the deference due "the duly enacted and carefully considered decision of a coequal and representative branch of our Government," . . . we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations.

Id. at 250-51 (quoting Walters v. National Ass'n of Radiation of Survivors, 473 U.S. 305, 319 (1985)).

44. *Id.* at 251.

45. *Id.*

46. *Id.* at 253. According to Justice O'Connor the only element of involvement by school officials was the Act's provision that teachers or administrators could provide "custodial oversight" in order "to ensure order and good behavior"—an arrangement that she regarded as entirely benign. *Id.*

In a concurring opinion, Justice Marshall, joined by Justice Brennan, expressed concern that the admission of a Christian club into the Westside forum would suggest an endorsement of religion in violation of *Lemon's* primary effect prong.[47] Justice Marshall observed that Westside had not recognized any other student club that advocated partisan political, theological, or philosophical viewpoints.[48] Furthermore, the school officially encouraged students to participate in its various clubs, characterizing such participation "as a vital part of the total education program [and] as a means of developing citizenship."[49] As long as the Christian club is the only advocacy-oriented group, or one of only a few allowed to participate in a forum that is promoted by school officials as consistent with its educational mission, Marshall warned, a clear message of endorsement of religion would be conveyed to the students.[50] Thus, while he was in general agreement with Justice O'Connor's interpretation of the Equal Access Act, he stressed that Westside must comply with the commands of the Constitution as well as the provisions of the statute.[51] To do so, he asserted that Westside

> . . . must fully disassociate itself from the [Christian] Club's religious speech and avoid appearing to sponsor or endorse the Club's goals. It could, for example, entirely discontinue encouraging student participation in clubs and clarify that the clubs are not instrumentally related to the school's overall mission. Or, if the school sought to continue its general endorsement of those student clubs that did not engage in controversial speech, it could do so if it affirmatively disclaimed any endorsement of the Christian Club.[52]

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47. *Id.* at 264 (Marshall, J., concurring).

48. *Id.* at 265. The fact that school policy might permit other advocacy-oriented groups to participate in the Westside forum, Marshall asserted, "does not ameliorate the appearance of school endorsement unless the invitation is accepted and the forum is transformed into a forum like that in *Widmar*." *Id.* at 266.

49. *Id.* at 267.

50. *Id.* It is rather curious that Justices Marshall and Brennan concurred in the judgment of the Court. *Id.* at 262. That judgment, as stated by Justice O'Connor, held that (1) the Equal Access Act did not contravene the Establishment Clause, and (2) Westside High School had violated the Act by not allowing the Christian club to participate in the school's limited open forum. *Id.* at 253. Justices Marshall and Brennan clearly were not entirely in agreement with the second part of the judgment. Rather, like Justice Stevens in dissent, (*see infra* notes 55-64 and accompanying text) they argued that to admit the Christian club to the Westside forum as then constituted could give the appearance of an impermissible endorsement of religion. 496 U.S. at 263. Unlike Justice Stevens, however, they chose not to dissent, opting instead to suggest "steps Westside must take to avoid appearing to endorse the Christian club's goals." *Id.* *See infra* text accompanying notes 51-52.

51. 496 U.S. at 263.

52. *Id.* at 270.

Justices Kennedy and Scalia found their colleagues' analytical approach in *Mergens* inappropriate. In a concurring opinion drafted by Justice Kennedy, they maintained that instead of applying the *Lemon* test, with what they regarded as its overly broad ban on the "endorsement" of religion, the Court should have disposed of the case on the basis of a "flexible accommodation" test first proposed by Justice Kennedy in *Allegheny County v. ACLU*.[53] Under that test, it would suffice to determine whether the Equal Access Act, as applied to Westside, violated either of the following principles: The first is that "the government cannot give direct benefits to religion to such a degree that it in fact establishes a [state] religion or religious faith, or tends to do so . . . . Second, the government cannot coerce any student to participate in a religious activity."[54] Since Justice Kennedy determined that the Equal Access Act involved no element of state coercion, either on its face or as applied to Westside High School, he concluded that the Act did not contravene the establishment prohibition.[55]

Finally, Justice Stevens, the lone dissenter in *Mergens*, argued that the legislative history of the Equal Access Act clearly revealed that Congress intended thereby to prevent content-based discrimination against speech only in the context of a forum similar to the one at issue in *Widmar v. Vincent*.[56] There, the University of Missouri had created " 'a generally

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53. *Id.* at 260; *see* 492 U.S. 573 (1989).

54. 496 U.S. at 260. After joining in Justice Kennedy's opinion in *Allegheny* Chief Justice Rehnquist and Justice White rather surprisingly chose to subscribe to Justice O'Connor's opinion in *Mergens*, upholding the circuit court's decision on the basis of the *Lemon* test. *Id.* at 229. Both Rehnquist and White have been longstanding critics of *Lemon*. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973), in which a dissenting opinion by Justice White joined by Justice Rehnquist stated: "I am quite unreconciled to the Court's decision in Lemon v. Kurtzman (1971). I thought then, and I think now, that the Court's conclusion there was not required by the First Amendment and is contrary to the long-range interests of the country." *Id.* at 820 (Rehnquist, J., dissenting). *See also* Wallace v. Jaffree, 472 U.S. 38 (1985), in which Justice Rehnquist, dissenting, provided an extensive analysis of the historical record that, he maintained, afforded conclusive proof that "the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests." *Id.* at 110. Dissenting separately in *Jaffree*, Justice White commended Justice Rehnquist's assessment of the historical record, and stated it was time for the Court to conduct "a basic reconsideration of our [Establishment Clause] precedents." *Id.* at 91. Thus, since Rehnquist and White joined in Justice Kennedy's opinion in *Allegheny*, 492 U.S. at 577, it seemed reasonable to assume that they accepted his flexible accommodation approach as being consistent with the intentions of the framers.

55. 496 U.S. at 262.

56. 454 U.S. 263 (1981). According to Justice Stevens both parties to the case as well as "every Court of Appeals to have construed the Act" agreed that Congress intended thereby to secure access for religious groups only to fora essentially similar to the forum at issue in *Widmar*. 496 U.S. at 271-72.

open forum' "[57] that included many groups "whose activities not only were unrelated to any specific courses, but also were of a kind that a state university could not properly sponsor or endorse."[58] More specifically, that forum housed numerous social, political, and economic advocacy groups such as the Young Socialist Alliance, the Women's Union, and the Young Democrats.[59] Under the terms of the Equal Access Act properly construed, therefore, its mandate most certainly would not apply unless a public secondary school had officially recognized at least one such partisan student organization.[60] Since Westside had not allowed any student club of that sort to participate in its forum, the school's decision to reject the petition of the Christian students did not constitute a violation of the Equal Access Act.[61]

While Justice Stevens based his dissent on statutory interpretation, he also expressed concern that the Act as construed by the Court would be incompatible with the Establishment Clause.[62] Under the Court's version of the Act, if a public secondary school authorized any student club not directly related to a specific course in its curriculum, it would be compelled to allow religious and other student advocacy groups to use its facilities as well. Public school officials very likely would find it difficult, if not impossible, to deny students the right to form such traditional and noncontroversial groups as cheerleading or pep clubs. Therefore, Justice Stevens reasoned, "[t]he Act, as construed by the majority, comes perilously close to an outright command to allow organized prayer, and . . . religious ceremonies . . . on school premises."[63]

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57. 496 U.S. at 273 (quoting 454 U.S. at 269).

58. *Id.*

59. *Id.*

60. *Id.* at 274.

61. *Id.* at 276. Justice Stevens argued that the term "non-curriculum related student groups" had been construed too broadly by Justice O'Connor. *Id.* at 281. According to Stevens,

> an extracurricular student organization is "non-curriculum related" if it has as its purpose (or as part of its purpose) the advocacy of partisan theological, political, or ethical views. A school that admits at least one such club has apparently made the judgment that students are better off if the student community is permitted to . . . compete along ideological lines . . . . [But] it seems absurd to presume that Westside has invoked [that] same strategy by recognizing clubs like Swimming Timing Team and Subsurfers which, though they may not correspond directly to any thing in Westside's course offerings, are no more controversial than a grilled cheese sandwich.

Id. at 276.

62. *Id.* at 285-86.

63. *Id.* at 287. Justice Stevens noted also that the act as construed by the majority would compel schools, which authorized student clubs not directly related to particular courses, to allow all sorts of controversial student groups such as "political clubs, the Ku Klux Klan, and . . . gay rights advocacy groups" to use school facilities. *Id.* at 290.

Concluding his opinion, Justice Stevens reminded his colleagues of the "special sensitivity" with which the Court heretofore had addressed the issue of religious observances in the public schools, and the rationale for its traditional determination to prevent such practices.[64] Instead of cavalierly sweeping aside Establishment Clause concerns, he protested, the Court should have ascribed greater weight to that rationale as summarized so succinctly by Justice Frankfurter in the following passage from his concurring opinion in *McCollum*: " 'The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces [such as religion] than in its schools . . . .' "[65]

III. *LEMON* CHALLENGED: JUSTICE KENNEDY'S "FLEXIBLE ACCOMMODATION" APPROACH

Mergens is significant primarily because it marked the first instance in which the Court had ruled that government could *compel* public school officials to authorize religious activities on public school campuses.[66] It is also noteworthy, however, because it precipitated a renewed effort by Justices Kennedy and Scalia to modify Establishment Clause doctrine.[67] While they were the only members of the Court in *Mergens* explicitly to challenge the validity of the *Lemon* test, several other members of the current Court have expressed dissatisfaction with that regimen in recent years. In particular, Chief Justice Rehnquist has been an outspoken critic of *Lemon*, insisting that to be consistent with the "intentions of the framers" the Establishment Clause must be construed to allow government to promote religion on a nonpreferential basis.[68] Furthermore, the Chief Justice and Justices White and O'Connor have advocated substantially attenuating, if not eliminating altogether, *Lemon's* "excessive entangle-

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64. *Id.* at 287.

65. *Id.* (quoting McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring)).

66. One might attempt to minimize the decision in *Mergens* to uphold the Equal Access Act by arguing that it reflected not so much the Court's diminishing concern to maintain the strict separationist standard in cases concerning the public schools as it did the traditional deference the justices have accorded to acts of a coequal branch of government. That argument, however, would ignore the fact that the Court could have upheld the Equal Access Act but construed it narrowly to apply only to secondary schools with fora similar to the forum at issue in *Widmar*. By failing to adopt that position, as advocated by Justice Stevens in dissent, the majority certainly did nothing to discourage speculation that it is no longer committed to preserving a high and impregnable "wall of separation" in the public schools.

67. *See supra* text accompanying notes 53 and 54.

68. *See* Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

ment" prohibition.[69] Chief Justice Rehnquist, together with Justice Scalia, has argued that *Lemon*'s "purpose" prong should be abandoned, contending that the Court is ordinarily unable to determine legislative motivation with certitude.[70]

Although opposition to the *Lemon* test appeared to be mounting within the Court, no new standard had proved sufficiently compelling to enlist the support of a majority of the justices. In *Allegheny*, however, Chief Justice Rehnquist and Justices Scalia and White embraced Justice Kennedy's "flexible accommodation" approach, thus coming within one vote of carrying the day.[71] *Allegheny* concerned the question of whether separate displays of a creche and menorah in public buildings constituted violations of the Establishment Clause.[72] Applying the *Lemon* analysis, Justice Blackmun for the Court held that since the menorah was a part of a larger display, including secular symbols such as a Christmas tree and a sign saluting liberty, it could not be reasonably regarded as an impermissible endorsement of Judaism.[73] Conversely, because the creche, including an angel with a sign praising God, was the centerpiece of a display, which did not include secular symbols of the holiday season, Justice Blackmun concluded that the exhibit had the effect of endorsing Christianity.[74]

Justice Kennedy vehemently maintained that both displays should have been allowed, arguing in essence that by reading a nonendorsement mandate into *Lemon*'s "primary effect" test, the Court had assumed a posture of hostility toward religion.[75] He recalled that Justice O'Connor originally formulated the endorsement test in her concurring opinion in

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69. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 768-69 (1976) (White, J., joined by Rehnquist, J., concurring), and Aguilar v. Felton, 473 U.S. 402, 430 (1985) (O'Connor, J., joined by Rehnquist, J., dissenting).

70. *See* Edwards v. Aguillard, 482 U.S. 578, 612 (1987) (Scalia, J., joined by Rehnquist, J., dissenting).

71. 492 U.S. at 655.

72. *Id.* at 578.

73. *Id.* at 620-21. There was no majority opinion in *Allegheny*. Justice Blackmun wrote the opinion announcing the Court's decision. *Id.* at 577. Justice Kennedy, joined by Chief Justice Rehnquist, and Justices White and Scalia, condemned the anti-endorsement gloss appended to the *Lemon* test as applied by Justice Blackmun (*see infra* notes 74-84 and accompanying text) and maintained that neither display violated the Establishment Clause. 442 U.S. at 655 (Kennedy, J., joined by Rehnquist, C.J., White, J., and Scalia, J., concurring in part and dissenting in part). Justice O'Connor concurred with the Court's decision but wrote separately in part at least to respond to Justice Kennedy's criticism of the endorsement proscription. *Id.* at 623-37 (O'Connor, J., concurring in part and concurring in judgment). Finally, Justices Brennan, Marshall, and Stevens contended that both displays contravened the Establishment Clause. *Id.* at 637-46 (Brennan, J., joined by Marshall, J., and Stevens, J., concurring in part and dissenting in part).

74. 492 U.S. at 598.

75. *Id.* at 655.

the case of *Lynch v. Donnelly*.[76] There, she had suggested a "clarification" of the Court's Establishment Clause doctrine, reasoning that, in applying *Lemon*, "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."[77] Justice Kennedy rather angrily denounced Justice O'Connor's suggestion as "a . . . most unwelcome . . . addition to our tangled Establishment Clause jurisprudence."[78] As he assessed it,

> [e]ither the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent.[79]

According to Justice Kennedy, Justice O'Connor's proposed "clarification" of the *Lemon* test had not been adopted by the Court in *Lynch* and, therefore, should not be regarded as controlling.[80] "It has never been my understanding," he protested, "that a concurring opinion . . . could take precedence over an opinion joined in its entirety by five Members of the Court."[81] And, he recalled, the majority opinion in *Lynch* stressed that to be invalidated under the primary effect prong, a governmental action

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76. *Id.* at 668-69. In Lynch v. Donnelly, 465 U.S. 668 (1984), a five member majority held that the city of Pawtucket, R.I. had not offended the Establishment Clause by including a creche as a part of a Christmas display erected annually in the city's business district. *Id.* at 687. Justices White, Powell, Rehnquist, and O'Connor joined in Chief Justice Burger's opinion for the Court, and Justice O'Connor added a separate concurring opinion. *Id.* at 670. Justice Brennan delivered a dissenting opinion in which he was joined by Justices Marshall, Blackmun, and Stevens. *Id.*

77. 465 U.S. at 692 (O'Connor, J., concurring). As explained by Justice O'Connor:

> [t]he Establishment Clause prohibits government . . . from making religion relevant in any way to a person's standing in the political community . . . . The . . . more direct infringement [of the Establishment Clause] is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Id. at 687-88. According to Justice O'Connor, by "[f]ocusing on the evil of government endorsement or disapproval of religion" the Court can apply the primary effect prong of the *Lemon* test more efficaciously. *Id.* at 691-92.

78. 492 U.S. at 668.

79. *Id.* at 674.

80. *Id.* at 668.

81. *Id.* Justice Kennedy apparently overlooked the fact that Justice O'Connor's anti-endorsement proposal was approved by the four dissenting members of the Court in *Lynch*. Thus, writing for Justices Marshall, Blackmun, and Stevens, Justice Brennan stated that Justice O'Connor had correctly identified "the central question posed in this case—whether Pawtucket has run afoul of the Establishment Clause by endorsing religion through its dis-

would have to benefit religion "in such a degree that it in fact establishes a [state] religion or religious faith, or tends to do so."[82] Furthermore, the *Lynch* majority had observed that in resolving Establishment Clause cases "no fixed, per se rule can be framed."[83] While *Lemon*'s analytical framework had been applied frequently to dispose of such cases, the Court had emphatically asserted its unwillingness "to be confined to any single test or criterion in this sensitive area."[84] Thus, in *Marsh v. Chambers*,[85] the Court had disregarded the *Lemon* test altogether in holding that a state legislature had not run afoul of the establishment proscription by employing a chaplain to open each legislative session with a prayer.[86]

Choosing to construe the *Marsh* ruling broadly (in effect, as vindication for Justice Reed's position in *McCollum*), Justice Kennedy proclaimed that it

> stands for the proposition, not that specific practices [e.g., legislative prayer] common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.[87]

Consequently, he concluded that regardless of the analytical alternative applied in an Establishment Clause case, whether it be the *Lemon* test, the *Marsh* test, or a rule yet to be formulated, the salient question that the Court must answer would be the same—that is, whether the chal-

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play of the creche." 465 U.S. at 697-98 n.3. It is apparent, therefore, that a Court majority, subscribed to Justice O'Connor's suggested "clarification" of the *Lemon* test.

82. 492 U.S. at 659.

83. 465 U.S. at 678.

84. 492 U.S. at 656 (quoting 465 U.S. at 679).

85. 463 U.S. 783 (1983).

86. *Id.* at 793. Chief Justice Burger's opinion for the Court in *Marsh* was not a paradigm of clarity. It is possible to read that opinion as applying only to legislative prayer or, more broadly, to any state sponsored acknowledgment of our religious heritage that has become a part of "the fabric of our society" as a result of long-standing custom and usage, and that does not have the effect of advancing or disparaging any particular faith. *Id.* at 792-95. The ambiguity of the opinion in *Marsh* has caused considerable confusion in the lower courts. For a more detailed discussion of this matter see Roald Y. Mykkeltvedt, *Lemon or Marsh? An Establishment Clause Conundrum*, 41 MERCER L. REV. 1131 (1990).

87. 492 U.S. at 670. In his dissenting opinion in McCollum v. Board of Educ., 333 U.S. 203 (1948), Justice Reed, the original "in-house" critic of the "wall of separation" construct, had advocated an essentially identical approach, stating that "the history of past practices is determinative of the meaning of [the Establishment Clause], not a decorous introduction to the study of its text." *Id.* at 256.

lenged governmental action provides "direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.' "[88] And, according to Justice Kennedy, that question could be answered affirmatively only if the Court were persuaded that government had *coerced* someone "to support or participate in any religion or its exercise."[89] Such a finding would be necessary to prove an Establishment Clause violation, he reasoned, because

> it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.[90]

IV. *LEE V. WEISMAN*: "FLEXIBLE ACCOMMODATION" ASCENDANT?

In *Lee v. Weisman*,[91] the Court's most recent venture into Establishment Clause jurisprudence, a narrow majority of the justices voted to ban ceremonial prayer at public school graduation exercises.[92] While the decision in *Weisman* resolved an issue that had proven to be particularly vexing to lower courts in the post-*Marsh* era,[93] the Court's opinion did not

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88. 492 U.S. at 659 (quoting 465 U.S. at 678).

89. *Id.*

90. *Id.* at 659-60. Justice Kennedy conceded the Court had previously held that a showing of coercion is not necessary to demonstrate an Establishment Clause violation. *Id.* at 660 (citing Engle v. Vitale, 370 U.S. 421, 430 (1962); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963); and Committee for Public Educ. v. Nyquist, 413 U.S. 756, 786 n.31 (1973)). As he understood the Court's position on that point, it referred only to "direct coercion in the classic sense of an establishment of religion that the Framers knew." *Id.* at 661. He maintained, however, that

> coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause *in an extreme case*. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is *per se* suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.

Id. (emphasis added).

91. 112 S. Ct. 2649 (1992).

92. *Id.* at 2661.

93. Charles Cooper, counsel for appellants, complained that the *Lemon* test had "spawned a cacophony of conflicting decisions" in the lower courts on the issue of graduation prayer. Brief for Petitioners at 11. Thus, he noted, only recently the United States Court of Appeals for the Fifth Circuit had upheld graduation prayer under *Lemon* (Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991)), while the California Supreme Court, applying the same test, had invalidated the practice. Sands v. Morongo Unified Sch. Dist., 809 P.2d 809, 810 (Cal. 1991). For a comprehensive listing of additional cases in which

address the broad doctrinal question debated in *Allegheny* and *Mergens*—that is, whether the *Lemon* test should be discarded in favor of a flexible accommodation approach.[94]

Weisman originated in Providence, Rhode Island, where city school officials traditionally had held commencement ceremonies at which local clergyman would deliver nondenominational invocations and benedictions.[95] On petition by the plaintiff, Daniel Weisman (the parent of a student enrolled in the Providence school system), a federal district court ordered the school board to terminate the practice on the ground that it constituted an endorsement of religion in violation of the primary effect prong of the *Lemon* test.[96] That order was sustained by the United States Court of Appeals for the First Circuit.[97] Judge Torruella, for the appellate tribunal, simply endorsed the "pellucid" opinion of the district court.[98] Concurring, Judge Bownes argued that the commencement prayer at issue contravened all three prongs of the *Lemon* test.[99] Finally, Judge Campbell, in dissent, maintained that graduation prayer was analogous to

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lower courts have issued conflicting rulings on the issue of graduation prayer, see Brief for Petitioners at 10 n.8.

94. 112 S. Ct. at 2655. At the outset of his opinion for the Court, Justice Kennedy announced that "we do not accept the invitation of petitioners . . . to reconsider our decision in *Lemon v. Kurtzman*." *Id.*

95. Weisman v. Lee, 728 F. Supp. 68, 69 (D.R.I. 1990).

96. *Id.* at 75. Judge Boyle for the district court, agreed to grant the relief sought by the plaintiff, but only with great reluctance. According to Judge Boyle, "an unacceptably high number of citizens who are undergoing difficult times in this country are children and young people." *Id.* In his view, "[s]chool-sponsored prayer might provide hope to sustain them, and principles to guide them in the difficult choices they confront today." *Id.* Nevertheless, he concluded that "the Constitution as the Supreme Court views it" left him no alternative but to enjoin school officials from authorizing prayer at graduation or promotion exercises. *Id.* In particular, he held that the prayers at issue created a "symbolic union" of church and state, in effect, endorsing religion in violation of the primary effect prong of the *Lemon* test. *Id.* at 72. Because the practice so clearly contravened the second part of the *Lemon* test, he reasoned, there was no need "to discuss the first and third parts of that test." *Id.* at 71.

97. 908 F.2d 1090 (1st Cir. 1990).

98. *Id.* at 1090.

99. *Id.* at 1094-95. As construed by Judge Bownes, the purpose prong of the *Lemon* test is not satisfied by a showing that a particular practice is partially motivated by secular concerns. Rather, the *primary* purpose of the practice must be secular. *Id.* at 1094. In his opinion, the challenged prayers might have served the secular purpose of solemnizing the graduation ceremonies, but their primary purpose was religious. *Id.* at 1095. He agreed with the district court's finding that the primary effect of graduation prayer was to endorse religion. *Id.* And, he argued that the excessive entanglement prong of the *Lemon* test was violated because Providence school officials selected the speakers and provided them with "guidelines" for preparing acceptable invocations and benedictions. *Id.* Indeed, since he believed that school authorities could hardly have been more entangled with the religious aspects of the graduation ceremonies, Judge Bownes found it remarkable that arguments under the entanglement prong had not been more vigorously advanced. *Id.*

legislative prayer and, therefore, was constitutional under the *Marsh* ruling—a position adopted earlier by the United States Court of Appeals for the Sixth Circuit.[100]

In his opinion for the Supreme Court affirming the lower court's ruling, Justice Kennedy, joined by Justices O'Connor, Blackmun, Souter, and Stevens, asserted that "government involvement . . . in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."[101] Justice Kennedy maintained, therefore, that *Weisman* could be decided without reconsidering the viability of the *Lemon* test.[102] In essence, he reasoned that whether the Court applied *Lemon*'s strict separationist standard or the less rigorous flexible accommodation regimen, the practice at issue could not pass constitutional muster.[103] Proponents of either rule would agree that at the very least, the state cannot "persuade or compel a student to participate in a religious exercise."[104] In this instance, as Justice Kennedy assessed it, students were effectively obliged to attend the graduation exercises, even though theoretically they could receive their diplomas in absentia. "Attendance may not be required by official decree," he argued, "yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary,' for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years."[105] Moreover, citing

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100. *Id.* at 1098. In Stein v. Plainwell Community Sch., 822 F.2d 1406 (6th Cir. 1987), the circuit court invalidated the graduation prayers at issue on the ground that they were sectarian in content. *Id.* at 1410. The court held, however, that under *Marsh*, nondenominational prayers at commencement exercises would be compatible with the Establishment Clause. *Id.* at 1409. Judge Campbell argued that *Marsh* and *Stein* "provide a reasonable basis for . . . allowing invocations and benedictions . . . provided authorities have a well-defined program for ensuring, on a rotating basis, that persons representative of a wide range of beliefs *and ethical systems* are invited to give the invocations." 908 F.2d at 1099.

101. 112 S. Ct. at 2655.

102. *Id.* In its *amicus* brief in support of the Providence school authorities, the Justice Department had explicitly urged the Court to abandon the *Lemon* test in favor of Justice Kennedy's flexible accommodation approach as formulated in his *Allegheny* opinion. Brief for the United States as Amicus Curiae Supporting Petitioners at 6-7. Similarly, petitioners argued that *Lemon* had not produced "workable doctrine" and insisted that a showing of legal coercion (not merely endorsement) was an essential element of an Establishment Clause violation. Reply Brief for the Petitioners at 6 n.8, 7.

103. 112 S. Ct. at 2655.

104. *Id.* at 2661. That such a prohibition is the minimal guarantee of the Establishment Clause, Justice Kennedy proclaimed, is simply "beyond dispute." *Id.* at 2655.

105. *Id.* at 2659. Sandra Blanding, Counsel for the respondent, presented a particularly compelling argument on this point. In her words:

> The child who objects to prayer is thus left with only one choice—not to attend his or her . . . graduation ceremony . . . . It is difficult to imagine how anyone could seriously argue that the child faced with such a choice is under no pressure

various research studies in adolescent psychology as authority, he concluded that peer pressure would very likely compel dissident students in attendance to participate in the religious aspects of the graduation ceremony by complying with a request to stand and remain silent during invocatory prayers.[106] To Justice Kennedy such compliance clearly constituted participation. Thus, he confidently asserted:

> There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the . . . prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signified mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.[107]

Finally, Justice Kennedy contended that the inherent differences between public schools and state legislatures rendered the *Marsh* ruling inapposite in *Weisman*.[108] Unlike students attending graduation ceremonies, he observed, legislators are mature adults who are less impressionable than school children and who are under no compulsion to be in attendance during invocatory prayers.[109] "Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one," he proclaimed, "and we cannot accept the parallel . . . between the facts of *Marsh* and the case now before us."[110]

In a concurring opinion, Justice Blackmun, joined by Justices Stevens, and O'Connor, pledged continuing allegiance to the *Lemon* test, complete

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to conform to the majority's notion of acceptable behavior. The message which the school and its teachers are delivering to the nonadhering child is clear:

> We have chosen to include in this all-important ceremony a prayer delivered by a religious person whom we have also chosen. This is your graduation; however, if your beliefs are offended by our choice of religion, you are free to miss your graduation. We will mail you a diploma.

Brief for the Respondent at 47.

106. 112 S. Ct. at 2658-59. Justice Kennedy was careful to note that the Court's finding of psychological coercion would not necessarily apply if those persons affected were "mature adults." *Id.* at 2659. In reply, Justice Scalia observed that high school graduation "is generally associated with the transition from adolescence to young adulthood." *Id.* at 2682. Therefore, he asked derisively, "Will we soon have a jurisprudence that distinguishes between mature and immature adults?" *Id.*

107. *Id.* at 2658.

108. *Id.* at 2660.

109. *Id.*

110. *Id.* at 2661.

with its endorsement proscription.[111] To allay any doubt as to his position, Justice Blackmun explained:

> I join the Court's opinion today because I find nothing in it inconsistent with the essential precepts of the Establishment Clause developed in our precedents . . . . Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.[112]

Certainly, one of the most significant developments arising from *Weisman* was the emergence of Justice Souter as a strong and articulate opponent of the flexible accommodation theory. Appointed in 1990 to replace Justice Brennan, a puissant proponent of the *Lemon* test, Souter had expressed some misgivings about that regimen at his confirmation hearings.[113] Furthermore, he had been nominated by President Bush, who has often professed his dissatisfaction with the Court's Establishment Clause doctrine and, in particular, with the school prayer decisions.[114] Conse-

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111. *Id.* at 2663. Justice Blackmun noted that the Court had decided thirty-one Establishment Clause cases since *Lemon* and, with the sole exception of *Marsh*, had disposed of each of those cases by applying *Lemon's* three part test. *Id.* at 2663 n.4. Furthermore, he asserted, the Court's Establishment Clause precedents (again excepting *Marsh*) prohibit government from preferring one religion over others or from preferring religion in general over irreligion. *Id.* at 2668. In his view, the graduation prayers at the Providence ceremonies were doubly deficient constitutionally. Not only did those prayers constitute a general endorsement of religion, but, by including a biblical admonition, had the effect of promoting Judeo-Christian religious beliefs over others. *Id.* at 2664 n.5. As Justice Blackmun observed, one of the challenged prayers included the statement: "We must each strive to fulfill what you require of us all, to do justly, to love mercy, to walk humbly,"—a command taken almost verbatim from the Old Testament's Book of Micah. *Id.*

112. *Id.* at 2664.

113. Responding to questions from members of the Senate Judiciary Committee as to his views on Establishment Clause cases, Souter commented that he was aware that the Court had experienced difficulty in applying the *Lemon* test. Consequently, he stated:

> The concerns that have been raised about [*Lemon*] naturally provoke a search, not only perhaps for a different test of the [Establishment Clause] standard which we think we are applying today, but a deeper re-examination about the very concept behind the [E]stablishment [C]lause. But if I were to go to the Court, I would not go with a personal agenda to foster that; neither would I go in ignorance of the difficulty which has arisen in the administration of *Kurtzman*.

Linda Greenhouse, *Supreme Court to Take Fresh Look at Disputed Church-State Boundry*, N.Y. TIMES, Mar. 19, 1991, at A13.

114. In accepting the Republican presidential nomination in 1988, George Bush stressed his respect for "old fashioned common sense" which, in his view, mandated that school children be free "to say a voluntary prayer" in the public schools. 1988 CONGRESSIONAL QUARTERLY ALMANAC 42-43A (1988). Subsequently, during an interview in March, 1991, with journalists representing various religious publications, President Bush implicitly condemned the

quently, some speculated that Justice Souter, together with Justice Thomas (appointed by President Bush to succeed Justice Marshall), would provide the votes necessary to overturn *Lemon* and give the Court's imprimatur to the flexible accommodation rule.[115] Instead, Justice Souter wrote a powerful concurring opinion in *Weisman*, generally subscribing to the *Lemon* test and to a strict separationist standard.[116]

Joined by Justices Stevens and O'Connor, Justice Souter focused his attention on two pivotal Establishment Clause issues: whether government can promote religion over irreligion, providing such action does not favor one denomination over others; and, "whether state coercion of religious conformity, over and above state endorsement of religious exercise or belief, is a necessary element of an Establishment Clause violation."[117] In essence, he concluded that while there is some historical evidence supporting the contention that the Framers favored an affirmative response to both propositions, that evidence is not sufficiently compelling to justify overturning settled Establishment Clause doctrine.[118] Indeed, his perusal

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Court's decisions in *Engle* and *Abington* by reiterating his support for voluntary prayer in the public schools. Alluding specifically to the issue raised by *Weisman*, the President asserted, "I simply do not agree that religion has no place in something like a graduation." Kim A. Lawton, *Bush Affirms Role of Religion in Public Life*, CHRISTIANITY TODAY, Apr. 29, 1991, at 38. Furthermore, he announced that he had instructed the Justice Department to intervene in *Weisman* with a view to replace the *Lemon* test with a regimen more compatible with his position on church/state matters. *Id.*

115. Thus, for example, Professor Walter Dellinger of the Duke University School of Law, speculated that "with *Weisman*, the Bush administration may finally achieve in the Supreme Court the active promotion of religion long sought by the Reagan administration in its unsuccessful campaign for a school prayer amendment to the Constitution." Walter Dellinger, *Say Amen, Or Else—Piety and the Law; The Court Revisits the School Prayer Decision*, WASH. POST, Nov. 3, 1991, at C1. More explicitly, the Atlanta Journal-Constitution stated that "the Supreme Court, with two new conservative justices on board since the last time around, seems poised to overturn the *Lemon* precedent." ATLANTA JOURNAL-CONSTITUTION, Nov. 3, 1991, at H4.

116. 112 S. Ct. at 2667. If President Bush appointed Justice Souter to the Court in part, at least, to effect *Lemon's* termination, Mr. Bush undoubtedly has come to appreciate more fully the frustration expressed by former President Truman in commenting about the performance of his judicial appointees. "[P]acking the Supreme Court simply can't be done," Truman asserted. "I've tried it and it won't work . . . . Whenever you put a man on the Supreme Court he ceases to be your friend. I'm sure of that." Harry Truman, Lecture at Columbia University, New York City (Apr. 28, 1959) *quoted in* HENRY JULIAN ABRAHAM, THE JUDICIAL PROCESS 77 (1986).

117. 112 S. Ct. at 2667.

118. *Id.* at 2668. Justice Souter effectively countered the accommodationists' central contention that the actions taken by government during the early years of our history under the Constitution should be considered dispositive as to the meaning of that document. The fact that the first Congress hired chaplains, for example, or that Presidents Washington and Adams proclaimed national days of prayer and thanksgiving, in Justice Souter's view does not prove conclusively that the authors of the First Amendment intended to allow govern-

of the historical record convinced him that the preponderance of evidence supported the Court's prevailing jurisprudence, requiring state neutrality between religion and irreligion and prohibiting state actions tending merely to endorse religion.[119]

It is beyond the scope of this Article to assess the validity of Justice Souter's extensive analysis of the Framers' intentions as revealed by the historical record—an analysis which does not differ substantially from that advanced by other separationist justices over the years from *Everson* to date.[120] Justice Souter, however, did introduce a rather surprising argument in opposition to accommodationist dogma. In effect, he resurrected the long dormant "nonsuperfluousness" doctrine, a theory of interpretation which holds that, as a general rule, no constitutional provision should be considered redundant or repetitious—that each provision must be assumed to have a separate and distinct meaning.[121] The First Amend-

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ment to promote religion over irreligion. *Id.* at 2675. Those actions were controversial, he noted, and were opposed by such important leaders as Thomas Jefferson and James Madison—men who were instrumental in securing the adoption of the First Amendment. *Id.* at 2674-75. Consequently, he concluded that "those practices prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next." *Id.* at 2675. That political expediency rather than fidelity to constitutional ideals sometimes characterized the actions of government in the Framers' era, Justice Souter observed, is illustrated most clearly by the passage of the "patently unconstitutional" Alien and Sedition Acts of 1798. *Id.* at 2676. "If the early Congress's political actions were determinative, and not merely relevant, evidence of constitutional meaning," he argued, "we would have to gut our current First Amendment doctrine to make room for political censorship." *Id.*

119. *Id.*

120. For the most comprehensive study of the historical record supporting the separationist position, see LEONARD WILLIAMS LEVY, THE ESTABLISHMENT CLAUSE (1986), one of several scholarly studies cited by Justice Souter in support of his position. 112 S. Ct. at 2669.

121. 112 S. Ct. at 2673. Justice Matthews, for the Court, first applied the nonsuperfluousness doctrine in the case of Hurtado v. California, 110 U.S. 516 (1884). In essence, he reasoned that since the Bill of Rights includes a due process guarantee together with a variety of more specific procedural and substantive rights, the Fourteenth Amendment's Due Process Clause must not be construed to encompass any of the provisions of the Bill of Rights. *Id.* at 534-35. To hold otherwise would require a finding that the framers included superfluous provisions in the Bill of Rights. *Id.* at 535-38. Since the *Hurtado* ruling, the Court has implicitly rejected the nonsuperfluousness doctrine by a series of decisions incorporating most of the rights delineated in the first eight amendments into the Fourteenth Amendment's Due Process Clause, thereby making those rights applicable to the states. For a complete account of this development, see ROALD Y. MYKKELTVEDT, THE NATIONALIZATION OF THE BILL OF RIGHTS (1983). Furthermore, in DeJonge v. Oregon, 299 U.S. 353 (1937), which produced a ruling that the First Amendment's right of assembly was an essential element of the "liberty" protected against state abridgment by the Fourteenth Amendment's Due Process Clause, the Court explicitly renounced the nonsuperfluousness doctrine. *Id.* at 364. In his opinion for the Court in *DeJonge*, Chief Justice Hughes stated that a right

ment's Free Exercise Clause, he noted, has been construed by the Court to prohibit government from compelling "affirmation of religious belief."[122] Therefore, "a literal application of the coercion test would render the Establishment Clause a virtual nullity"—a useless and redundant appendage.[123] Unless there is clear proof of a contrary intention on the part of the Framers, Justice Souter maintained, it must be assumed that the establishment proscription is more than a mere "ornament"—that it has an independent meaning distinguishing it from the Free Exercise Clause.[124] Thus, he asserted, the Court has properly concluded that " '[t]he distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.' "[125]

In a rather bitter dissenting opinion Justice Scalia, joined by Chief Justice Rehnquist, and Justices White and Thomas, implicitly assailed Justice Kennedy as a defector from his own previously proclaimed views on establishment doctrine. Justice Scalia recalled that in *Allegheny*, he had joined in Justice Kennedy's opinion proclaiming that " '[a] test for implementing the protections of the Establishment Clause that . . . would invalidate longstanding traditions cannot be a proper reading of the Clause.' "[126] It seemed evident to Justice Scalia that graduation prayer qualified as a tradition firmly embedded in our social fabric, with no greater establishment tendency than the legislative prayer validated in

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could be protected by more than one constitutional provision. *Id.* As he phrased it, "explicit mention [of a right in the Bill of Rights] does not argue exclusion elsewhere." *Id.* Certainly, Justice Souter was aware of the incorporation process, since he alluded approvingly to the incorporation of the Establishment Clause into the Fourteenth Amendment. 112 U.S. at 2672 n.4. Thus, his injection of the nonsuperfluousness doctrine into his ratiocination is, to say the least, rather curious.

122. 112 U.S. at 2673.

123. *Id.* The petitioners apparently agreed that a coercion requirement in Establishment Clause cases would mean that the establishment proscription was indeed superfluous. During oral arguments, petitioners' counsel was asked "[I]f . . . the Establishment Clause requires both noncoercion and nonsectarianism, then it wouldn't have a content different from the free exercise clause, would it?" Counsel responded, "Your Honor, I believe that is an accurate statement." Transcript of Oral Argument at 19.

124. 112 S. Ct. at 2673.

125. *Id.* (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963)).

126. *Id.* at 2678 (quoting Allegheny County v. ACLU, 492 U.S. 573, 657, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)). Justice Scalia was particularly concerned that under *Weisman's* psycho-coercion test the traditional flag salute ceremony in the public schools could be jeopardized. As he observed, "government can . . . no more coerce political orthodoxy than religious orthodoxy." *Id.* at 2682. And, it would seem to follow ineluctably that if students can be psychologically coerced to participate in graduation prayer, they can also be psychologically coerced to join in the Pledge of Allegiance. *Id.*

Marsh or the general practice of nondenominational prayer at public ceremonies.[127]

Justice Scalia conceded that public ceremonial prayer would be unconstitutional if it endorsed a particular religious creed over others.[128] Nondenominational prayer, such as that at issue in *Weisman*, however, would conflict with the establishment prohibition only if "force of law and threat of penalty" coerced attendance or participation.[129] Justice Scalia ridiculed the majority rationale that psychological coercion instigated by state officials obliged students to attend graduation exercises and to participate in the invocations and benedictions.[130] "A few citations of '[r]esearch in psychology' that have no particular bearing upon the precise issue here . . .," he fulminated, "cannot disguise the fact that the

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127. *Id.* at 2678. Justice Scalia cited the general tradition of ceremonial prayer on public occasions dating back to the founding of our republic. *Id.* He also noted that prayers were delivered at the very first public high school graduation ceremony that, he maintained, occurred in Connecticut in July, 1868—"the very month . . . that the Fourteenth Amendment (the vehicle by which the Establishment Clause has been applied against the States) was ratified . . . ." *Id.* at 2680.

128. *Id.* at 2683-84. Counsel for petitioners had argued that even sectarian prayer at graduation ceremonies would not violate the establishment prohibition if there were no effort to proselytize. Transcript of Oral Argument at 10. Indeed, counsel indicated that a state legislature would not be acting unconstitutionally if it were to adopt an official state religion, "just like [it] might pass a resolution saying the bolo tie is the State necktie," as long as there was no coercion involved. *Id.* at 13. According to newspaper accounts, Justice Scalia appeared "baffled and annoyed" by counsel's contention that sectarian preference by government should be permissible as long as government does not attempt to coerce belief. Linda Greenhouse, *Court Appears Skeptical of Argument for Prayer*, N.Y. TIMES, Nov. 7, 1991, at A14.

Justice Blackmun agreed with Justice Scalia that government may not promote one religion over others. 112 S. Ct. at 2661. Justice Blackmun, however, argued that the benediction delivered at the Providence school ceremonies promoted the Judeo-Christian religious message by including an admonition taken almost verbatim from the Old Testament. *See supra* note 111.

129. 112 S. Ct. at 2683. According to Justice Scalia, the legal coercion standard was applied in the school prayer cases (Engle v. Vitale, 370 U.S. 421 (1962), and Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963)). In those cases, he asserted, "we . . . made clear our understanding that school prayer occurs within a framework in which legal coercion to attend school (i.e., coercion under threat of penalty) provides the ultimate backdrop." 112 S. Ct. at 2684. Thus, he suggested, a decision validating nonsectarian prayer at graduation ceremonies where attendance was not legally required would not require the Court to reconsider its decisions in *Engle* and *Schempp*. *Id.*

In expressing his concern that the Pledge of Allegiance might be barred from the public schools under the psycho-coercion test applied in *Weisman*, *see supra* note 126, however, Justice Scalia ignored the fact that the flag salute ceremony would be imperiled under a legal coercion standard as well. Like the prayers at issue in *Engle* and *Schempp*, the Pledge ceremony in the public schools "occurs within a framework in which legal coercion to attend school . . . provides the ultimate backdrop." 112 S. Ct. at 2684.

130. 112 S. Ct. at 2682.

Court has gone beyond the realm where judges know what they are doing."[131] The Court's contention that students who merely maintain a "respectful silence" during invocations and benedictions would be participating in such prayers, or perceived to be doing so, impressed Justice Scalia as simply "ludicrous."[132] Indeed, as he assessed it, the majority opinion implied "that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence."[133]

Despite his profound disagreement with the decision in *Weisman*, Justice Scalia did not regard the case as an unmitigated disaster. Apparently assuming Justice Kennedy's continued adherence to flexible accommodation, Justice Scalia commented that the "one happy byproduct" of the case was the demise of the *Lemon* test.[134] While Justice Kennedy and the four dissenters might be in agreement that a showing of coercion is an essential component of an establishment violation, only the dissenting justices insisted that coercion under threat of legal penalty be demonstrated.[135] And, the difference between Justice Kennedy's concept of coercion and that favored by the other accommodationist justices was by no means inconsequential. While the legal-coercion test would provide a relatively precise standard for the Court to apply in Establishment Clause cases, Justice Scalia observed, Justice Kennedy's psycho-coercion test would be "as infinitely expandable as the reasons for psychotherapy itself."[136]

Finally, in a passage from his opinion that may prove to be wishful thinking rather than an accurate interpretation of the Court's ruling, Justice Scalia maintained that:

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131. *Id.* at 2681.

132. *Id.*

133. *Id.*

134. *Id.* at 2685. Such an assumption would appear to be eminently justified. As the author of the flexible accommodation test and a consistent critic of the Court's analytical approach to Establishment Clause cases, it hardly seems possible that Justice Kennedy could ever vote to retain *Lemon's* three pronged test.

135. *Id.* at 2678 (Scalia, J., joined by Rehnquist, C.J., White, J., and Thomas J., dissenting).

136. *Id.* Justice Scalia's concern that the Court has adopted a "psycho-coercion" test appears to be unwarranted. Only Justice Kennedy based his decision in *Weisman* on psychological coercion. The other Justices in the majority embraced *Lemon's* anti-endorsement standard and expressly rejected the view that a showing of coercion, psychological or legal, is necessary to prove an Establishment Clause violation. Thus, Justice Blackmun, joined by Justices O'Connor and Stevens, stated that while a showing of coercion is not required to prove a contravention of the establishment proscription, "it is sufficient." *Id.* at 2664. And Justice Souter, joined by Justices O'Connor and Stevens, asserted that Court precedents do not "support the position that a showing of coercion is necessary to a successful Establishment Clause Claim." *Id.* at 2672.

> [a]nother happy aspect of the case is that it is only a jurisprudential disaster and not a practical one. Given the odd basis for the Court's decision, invocations and benedictions will be able to be given at public school graduations next June, as they have been for the past century and a half, so long as school authorities make clear that any one who abstains from screaming in protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement . . . to the effect that while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so.[137]

Since the Court's opinion explicitly stated that a disclaimer such as that suggested by Justice Scalia would not suffice to satisfy Establishment Clause concerns, it is difficult to understand his rationale.[138] It is not entirely unreasonable, however, to speculate that he intended by his seemingly deliberate misreading of the majority opinion to encourage further litigation on the issue of graduation prayer. Whether or not that was his intent, his puzzling assessment of the Court's ruling virtually guarantees that the question of the constitutionality of ceremonial prayer at public school graduation exercises will confront the Court once again in the near future.

V. CONCLUSIONS

The Court's decision to grant certiorari in *Lee v. Weisman* was widely regarded as heralding the imminent disavowal of the *Lemon* test and the adoption of a less demanding standard to apply in church/state cases.[139] Certainly ample reason existed to anticipate such a development. In *Allegheny*, it should be recalled, Justice Kennedy, Chief Justice Rehnquist, and Justices Scalia and White, outspoken critics of *Lemon*, had endorsed a flexible accommodation approach that would require a showing of coercion to prove an Establishment Clause violation.[140] Subsequently, the decision in *Mergens* demonstrated that the Court was not implacably determined to maintain an impregnable wall of separation between church and state even in the public schools—a milieu in which heretofore it had rigorously applied a strict separationist criterion. And, finally, Justices

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137. *Id.* at 2685.

138. *Id. See supra* note 107 and accompanying text. It would be of little comfort to a dissenter, the Court stated, "to be told that for her the act of standing or remaining in silence signifies mere respect rather than participation. What matters is that, given our social conventions, a reasonable dissenter [at a graduation ceremony] could believe that the group exercise signified her own participation or approval of it." 112 S. Ct. at 2658.

139. *See supra* note 115.

140. 492 U.S. 573, 655 (1989) (Kennedy, J., joined by Rehnquist, C.J., Scalia, J., and White, J., concurring in the judgment in part and dissenting in part).

Brennan and Marshall, consistent supporters of the *Lemon* test, had recently been replaced by Justices Souter and Thomas, both of whom had been appointed by a president on record as an ardent opponent of the Court's prevailing Establishment Clause jurisprudence.[141] Despite such portents of change, however, the Court opted not to jettison *Lemon* forthrightly. Instead, in an extraordinarily ambiguous opinion, a narrow majority of the justices left both the *Lemon* test and flexible accommodation in limbo by holding that graduation prayer was so obviously unconstitutional that it would be unnecessary "to revisit the difficult questions dividing us in recent cases" as to the scope and meaning of the establishment proscription.[142]

The fact that *Lemon* retains even a vestige of viability appears to be largely attributable to Justice Kennedy's forbearance. If he had joined the dissenting justices on the broad doctrinal issue while rejecting their narrow definition of coercion, he could have achieved the decision he preferred and, concomitantly, the adoption of the flexible accommodation formula he had prescribed in his opinions in *Allegheny* and *Mergens*. One might reasonably speculate that he was reluctant to overturn a settled precedent by the narrowest of margins, particularly when the justices opposing *Lemon* were not in complete agreement as to the kind of coercion necessary to prove an Establishment Clause violation.[143] And, perhaps his restraint was attributable in part to anticipated changes in Court personnel. Justice Blackmun, for example, one of the four pro-*Lemon* members of the Court, has indicated that, at age 83, he may be contemplating retirement in the near future.[144] If his successor subscribes to the accom-

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141. *See supra* note 114 and accompanying text.

142. 112 S. Ct. at 2655.

143. Justice Kennedy's position might well have been predicated on a rationale similar to that articulated by Justice Holmes. "Imitation of the past, until we have a clear reason for change," Justice Holmes argued, "no more needs justification than appetite. It is a form of the inevitable to be accepted until we have a clear vision of what different things we want." OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 290 (1920). It is beginning to appear as though Justice Kennedy is somewhat more committed to *stare decisis* than the dissenting justices in *Weisman*. Thus, in Casey v. Planned Parenthood, 112 S. Ct. 2791 (1992), Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, argued that Roe v. Wade, 410 U.S. 113 (1973), "can and should be overturned" forthrightly. 112 S. Ct. at 2855. Despite having previously joined in an opinion by Chief Justice Rehnquist calling for *Roe*'s reversal, (Webster v. Reproductive Health Servs., 492 U.S. 490 (1989)), Justice Kennedy opted not to cast the decisive vote to effect that outcome in *Casey*. Instead, he joined in Justice O'Connor's opinion for the Court, which stated: "After considering the fundamental constitutional question resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of Roe v. Wade should be retained and once again reaffirmed." 112 S. Ct. at 2803.

144. In his opinion in Casey v. Planned Parenthood, 112 S. Ct. 2791 (1992) (Blackmun, J., concurring in part, and dissenting in part), Justice Blackmun observed: "I am 83 years

modationist position, the formal disavowal of the *Lemon* test could be effected by a more authoritative margin of six to three.

Whatever the reasons for Justice Kennedy's reluctance either to apply or terminate *Lemon*, his opinion in *Weisman* has added another layer to the already convoluted body of Establishment Clause case law. As Justice Scalia observed in dissent, Justice Kennedy's "psycho-coercion" test is "infinitely expandable" and could be invoked to challenge other government-sponsored practices in addition to graduation prayer.[145] Conversely, Justice Scalia's "legal coercion" test would significantly attenuate the non-endorsement principle that, in Justice Souter's words, has become "the foundation of Establishment Clause jurisprudence."[146] While *Weisman* failed to rationalize Establishment Clause doctrine, it did serve to clarify the positions of Justices Souter and Thomas on the church/state issue. Justice Souter explicitly rejected any coercion requirement whatsoever, and argued vigorously for the unadulterated endorsement standard that is now the central tenet of the *Lemon* test.[147] In sharp contrast, by subscribing to Justice Scalia's dissenting opinion, Justice Thomas signaled that he is prepared to cast the fifth, and decisive, vote necessary to overturn *Lemon* if the occasion arises.

As matters now stand, five of the justices are on record as favoring the flexible accommodation approach in Establishment Clause cases, marking the first time since *Lemon* that a Court majority has appeared to coalesce around a generally applicable alternative regimen to the three part test proclaimed in that case. Despite Justice Scalia's claim to the contrary, *Lemon* has not yet been "interred"—at least formally. Its long term survival, however, is at best problematic. Presumably, Justice Kennedy's psychological coercion concerns will not preclude his joining the four *Weisman* dissenters to overturn *Lemon* in a future Establishment Clause case not concerning students in a public school setting.

The adoption of the flexible accommodation rule clearly would diminish the tension existing between the religion clauses of the First Amendment as currently construed by the Court. In the recent case of *Employment Division v. Smith*,[148] the Court held that, contrary to the impression left by its previous opinions, the Free Exercise Clause *does not* require government to grant a religious practice exemption from com-

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old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue (abortion rights) before us today." *Id.* at 2854. That prospective confirmation hearing is likely to focus also on church/state issues, given the close and acrimonious division of the Court over the propriety of the *Lemon* test.

145. 112 S. Ct. at 2685. *See supra* note 126.

146. 112 S. Ct. at 2676.

147. *Id.* at 2667-78 (Souter, J., concurring).

148. 494 U.S. 872 (1990).

pliance with regulatory legislation if government is unable to prove that such compliance is essential to achieve a compelling public interest of the first magnitude.[149] Writing for a five member majority, Justice Scalia asserted that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[150] While not constitutionally obligated to provide for religious practice exemptions, he averred, the state has discretionary authority to do so in order to accommodate religious interests.[151] However, if a state authorized such exemptions solely to promote religion, it would violate the purpose and primary effect prongs of the *Lemon* test. Under the flexible accommodation test, on the other hand, religious practice exemptions would pass constitutional muster, unless such measures somehow were to implicate coercion to believe.

While the apparent reconciliation of Free Exercise and Establishment Clause doctrine will enable lower courts to address cases concerning church/state issues more confidently, a potentially negative consequence of that reconciliation could be the attenuation of constitutional protection for small, politically disadvantaged religious sects. Clearly, the general effect of the ruling in *Smith* in combination with the Court's tilt toward an accommodationist posture will enhance government's authority either to promote or to restrict the practice of religion. Legislative assemblies will be in a position to grant religious practice exemptions from facially neutral regulatory measures to accommodate favored mainline religions, while denying such exemptions to members of unpopular fringe religious

149. *Id.* at 890. The Court's conclusion in *Smith* that the "compelling interest" test was not intended to be generally applicable in free exercise cases, is contradicted by opinions in a host of earlier cases. Thus, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court asserted that to prevail in free exercise litigation a state must prove either that it "does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id.* at 214. Furthermore, the Court proclaimed, "[O]nly those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Id.* at 215. Since *Yoder*, the compelling interest test was applied by the Court in virtually every free exercise case that it decided. *See* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 384 (1990); Hernandez v. Commissioner, 490 U.S. 680, 699 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 140 (1987); and Thomas v. Review Bd., 450 U.S. 707, 718 (1981). In his dissenting opinion in Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), Justice Scalia, the author of the *Smith* opinion, had explicitly acknowledged the general applicability of the compelling interest test only one year prior to *Smith*. *Id.* at 38. He stated that in previous free exercise cases "we held that the Free Exercise Clause of the First Amendment required religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws." *Id.*

150. 494 U.S. at 878-79.

151. *Id.* at 890.

sects.[152] Despite this disconcerting prospect, the Court apparently has concluded that the religion clauses of the First Amendment should no longer be placed entirely "beyond the reach of majorities and . . . establish[ed] . . . as legal principles to be applied by the courts."[153] It seems evident that henceforth the Court, as presently constituted, will be decidedly more inclined to defer to the judgment of the political branches of the state and national governments in determining the permissible range of church/state interrelationships. Justice Black's "wall of separation,"[154] it appears, is in imminent danger of being reduced to little more than a porous ruin.

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152. In his *Smith* opinion, Justice Scalia readily acknowledged that such discriminatory actions could occur under the Court's new free exercise doctrine. Thus, he observed that:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id.

153. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

154. Everson v. Board of Educ., 330 U.S. 1, 16 (1947).