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***Lee v. Weisman*: No Reason To Give Thanks**

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Lee v. Weisman: No Reason To Give Thanks

For the political process of America in which all its Citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.¹

I. INTRODUCTION

In *Lee v. Weisman*,² the United States Supreme Court held that nonsectarian prayers³ delivered at public school graduation ceremonies violate the Establishment Clause⁴ of the Constitution.⁵ In reaching its decision, the Court purposefully disregarded the analytical framework established by *Lemon v. Kurtzman*,⁶ and its progeny,⁷ in favor of a coer-

1. *Lee v. Weisman*, 112 S. Ct. 2649, 2652-53 (1992). An excerpt from Rabbi Gutterman's invocation delivered at Nathan Bishop Middle School, a public school in Providence, R.I., at a graduation ceremony on June 29, 1989. One can safely say that Rabbi Gutterman had no idea his address, however inspirational, would become so prophetic in light of the subsequent litigation.

2. 112 S. Ct. 2649 (1992).

3. There is debate whether Rabbi Gutterman's prayers were in fact nonsectarian. Webster's Third New International Dictionary defines "nonsectarian" as "not restricted or dominated by a particular religious group." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1961). Justice Souter shows the sectarian nature of the prayer by stating: "Rabbi Gutterman drew his exhortation '[t]o do justly, to love mercy, to walk humbly' straight from the King James Version of Micah, ch. 6, v. 8 . . . even if Micah's thought is sufficiently generic for most believers, it still embodies a straight forwardly Theistic premise . . ." *Lee v. Weisman*, 112 S. Ct. 2649, 2671 (Souter, J., concurring). The prayer, composed in accordance with a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews, clearly encompasses only those of the Judeo-Christian faith, leaving those of other religious affiliations (including agnostics) unrepresented. *Contra*, *Weisman v. Lee*, 908 F.2d 1090, 1098 (1990) (Campbell, J. dissenting).

4. The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

5. *Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992).

6. 403 U.S. 602 (1971). The three pronged *Lemon* test provides that government violates the establishment clause when: (1) the practice has a non-secular purpose; (2) the practice has the primary effect of promoting religion; and (3) the practice fosters an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

7. *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Aguilar v. Felton*, 473 U.S. 402 (1985); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990).

cion test.⁸ In so doing, the Court's decision not only failed to solve the problems associated with the *Lemon* framework,⁹ but also left Establishment Clause jurisprudence in a greater state of disarray and uncertainty than previously had existed.¹⁰

II. FACTUAL STATEMENT¹¹

The public school system of the City of Providence, Rhode Island, permits school principals to invite members of the clergy to offer invocations and benedictions as part of the formal graduation ceremonies in its public schools. Many principals elected to include prayers as part of their graduation ceremonies. One such principal was Robert E. Lee, principal of Nathan Bishop Middle School. Lee invited Rabbi Leslie Gutterman, of the Temple Beth El in Providence, to speak at Nathan Bishop Middle School's graduation. Rabbi Gutterman accepted.¹²

In accordance with the school district's custom, Principal Lee provided Rabbi Gutterman with a pamphlet entitled "Guidelines for Civic Occasions,"¹³ prepared by the National Conference of Christians and Jews. The Guidelines recommend that speakers compose public prayers for nonsectarian civic occasions with "inclusiveness and sensitivity," none-

8. *Weisman*, 112 S. Ct. at 2655. (We can decide this case without considering *Lemon*). *Id.*

9. In recent decisions, the majority of the Supreme Court has expressed doubts about the continued viability of the *Lemon* test: *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 656 (1989) (opinion of Kennedy, J.) ("Substantial revision of our Establishment Clause doctrine may be in order"); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("pessimistic evaluation . . . of the totality of *Lemon* is particularly applicable to the 'purpose' prong."); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Renquist, J., dissenting) ("[*Lemon* is] a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results."); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (expressing "doubts about the entanglement test."); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 768 (1976) (White, J., concurring in judgement) ("I am no more reconciled now to *Lemon*, than I was when it was decided The threefold test of *Lemon* imposes unnecessary, and . . . superfluous test for establishing [an Establishment Clause violation]."); see also Henry J. Reske, *Souring on Lemon*, A.B.A. J., Feb. 1992, at 48; Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992).

10. Gene R. Nichol, *Religion and the State: Introduction*, WM. & MARY L. REV. 833, 833 (1986) (stating: "[T]he American law of church and state is far from settled. It even may be the case that . . . [the law] . . . is less certain, more torn, and more confused . . . than at any time in the past."); Michael W. McConnell, *Religious Freedom at a Crossroads*, 69 U. CHI. L. REV. 115, 115 (1992) (stating: "[A] more confused and often counterproductive mode of interpreting the First Amendment would have been difficult to devise.").

11. For a more thorough account of the facts, see Henry J. Reske, *And May God Bless: Does Prayer Belong at Graduation?*, A.B.A. J., Feb. 1992, at 46.

12. *Weisman*, 112 S. Ct. at 2652.

13. *Id.*

theless, the Guidelines acknowledge that "[p]rayer of any kind may be inappropriate on some civic occasions."¹⁴ When Principal Lee gave Rabbi Gutterman the pamphlet, he advised the Rabbi that the invocation and benediction should be nonsectarian.¹⁵

Four days before Deborah Weisman was to graduate from Nathan Bishop Middle School, Daniel Weisman, on his own behalf and on behalf of his daughter, petitioned the United States District Court for the District of Rhode Island for a temporary restraining order prohibiting school officials from including the invocation and benediction in the graduation ceremony.¹⁶ The court denied the motion for lack of time to consider it.¹⁷ Hence, Rabbi Gutterman delivered his prayers to Deborah and her classmates.¹⁸

Following the graduation, Daniel Weisman filed an amended complaint seeking a permanent injunction that barred various school officials of the Providence School System from inviting clergy to deliver graduation prayers.¹⁹ The district court evaluated the school's practice under the framework established in *Lemon v. Kurtzman*.²⁰ The three-pronged *Lemon* test provides that the government violates the establishment clause when: (1) the practice has a non-secular purpose; (2) the practice has the primary effect of promoting religion; and (3) the practice fosters an excessive entanglement with religion.²¹ The district court held that the practice of including invocations and benedictions in public school graduation ceremonies violated the second prong of the *Lemon* test.²² Therefore, the court granted Daniel Weisman's injunction without addressing the first or third prongs of the *Lemon* framework.²³

On appeal, the United States Court of Appeals for the First Circuit affirmed.²⁴ The Court of Appeals adopted the district court's opinion.²⁵ Judge Bownes joined the court, but wrote a separate concurring opinion stating that the school's practice not only violated the second prong of

14. *Id.*

15. *Id.*

16. *Id.* at 2653-54.

17. *Id.* at 2654.

18. *Id.*

19. *Id.*

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

21. *Id.*

22. *Weisman v. Lee*, 728 F. Supp. 68, 71 (D.R.I. 1990). The court decided that the invocation violated the second prong of the test by finding that it "create[d] an identification of the state with a religion, or with religion in general" and the effect of the government's action was "to endorse one religion over another, or to endorse religion in general." *Id.* at 71-72. See *supra* note 6.

23. 728 F. Supp. at 71.

24. *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990).

25. *Id.* at 1090.

the *Lemon* test, but also the other prongs of the *Lemon* framework.²⁶ Judge Campbell dissented, relying on *Marsh v. Chambers*²⁷ and *Stein v. Plainwell Community Schools*²⁸ to uphold the prayers at graduation. Judge Campbell reasoned that if the prayers were nonsectarian,²⁹ and if the school officials ensured that persons representing a wide variety of beliefs and ethical values delivered the prayers, then no violation of the Establishment Clause would exist.³⁰ Last term, the Supreme Court granted certiorari,³¹ and affirmed the court of appeals in a 5-4 decision.³²

III. DETAILS OF THE COURT'S OPINION

Justice Kennedy, writing for the Court, declined the invitation to reevaluate the *Lemon* framework;³³ rather, he opted to use a coercion test.³⁴ Since nonsectarian prayers at high school graduations were unable to meet a stricter coercion test,³⁵ Justice Kennedy declared there was no need to address the traditional *Lemon* framework.³⁶

The Court dismissed the school's "good faith attempt to recognize the common aspects of religions" since the "degree of school involvement. . . bore [a clear] imprint of the State"³⁷ and, consequently, elevated the nonsectarian prayer to a "state-sponsored religious exercise."³⁸ Therefore, the

26. *Weisman v. Lee*, 908 F.2d 1090, 1095 (1st Cir. 1990) (Bownes, J., concurring). See *supra* note 6.

27. 463 U.S. 783 (1983) (sustaining the constitutionality of prayer at the opening of state legislative sessions since long-standing traditions and historical practices "shed[] light not only on what the drafters intended the Establishment Clause to mean but also on how they thought that Clause applied.").

28. 822 F.2d 1406 (6th Cir. 1987) (relying on *Marsh v. Chambers* to uphold the constitutionality of nonsectarian prayers at high school graduation since prayers at high school graduations have a long-standing history in this country).

29. See *supra* note 3.

30. *Weisman v. Lee*, 908 F.2d 1090, 1099 (1st Cir. 1990) (Campbell, J., dissenting).

31. *Lee v. Weisman*, 112 S. Ct. 1305 (1991).

32. *Lee v. Weisman*, 112 S. Ct. 2649 (1992). Justice Kennedy writing for the court; joined by Justice Blackmun, Justice Stevens, Justice O'Connor, and Justice Souter; Justice Scalia, Chief Justice Rehnquist, Justice White and Justice Thomas, dissenting.

33. *Id.* at 2655 ("This case does not require us to revisit the difficult questions dividing us in recent cases . . . [w]e can decide the case without reconsidering the [*Lemon* standard]."). See *supra* note 8.

34. 112 S. Ct. at 2655.

35. *Id.* ("It is beyond dispute that, at a minimum, the Constitution may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). *Id.*

36. *Id.*

37. *Id.* at 2656-57.

38. *Id.* at 2658.

school's good faith attempt to accommodate members of all religious affiliations was irrelevant to the analysis.³⁹

Recognizing that protecting elementary and secondary school children from "subtle coercive pressure" has been a benchmark of Establishment Clause jurisprudence for over a quarter century,⁴⁰ the Court noted that "prayer exercises . . . carry a particular risk of indirect coercion."⁴¹ That risk, is the risk that a nonbeliever may regard a school's request to respect the religious practice of believers as "an attempt to employ the machinery of the State to enforce a religious orthodoxy."⁴² Government pressure on persons to participate in religious activities is the apex of Establishment Clause violations.⁴³

Having established the framework for the coercion analysis, the Court began to analyze the case. The Court determined that the school's control of the graduation placed not only public pressure, but also peer pressure⁴⁴ on the attending students participating at the ceremony.⁴⁵ Because of the delicate nature of the teenager's psyche, this pressure, however subtle, is "as real [to the teenage mind] as any overt compulsion."⁴⁶ Furthermore, despite the fact that most individuals would have little objection to remaining silent and standing in respect for those who wished to pray, a dissenter of high school age may reasonably perceive that he is being forced by the State to participate in the prayer.⁴⁷ Therefore, the injury is as real as traditional, overt coercion,⁴⁸ and "[i]t is of little comfort [to

39. *Id.*

40. *Id.* See *Abbington Sch. Dist. v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *Westside Community Bd. of Educ. v. Mergens*, 496 U.S. 226, 261-62 (1990) (Kennedy, J., concurring).

41. 112 S. Ct. at 2658.

42. *Id.*

43. *Lee v. Weisman*, 112 S. Ct. 2649, 2664 (1992) (Blackmun, J., concurring).

44. 112 S. Ct. at 2659. Justice Kennedy supports the proposition that peer pressure has a coercive effects on teenagers by stating that "[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention [citations omitted]." *Id.* Justice Scalia responds to this assertion by stating: "a few citations of '[r]esearch in psychology' . . . cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing." *Lee v. Weisman*, 112 S. Ct. 2649, 2681 (1992) (Scalia, J., dissenting).

45. 112 S. Ct. at 2658.

46. *Id.*

47. *Id.*

48. *Id.* The traditional coercion that is the "hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Lee v. Weisman*, 112 S. Ct. 2649, 2683 (1992) (Scalia, J., dissenting). See also Michael W. McConnell, *Coercion: the Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

those objecting] to be told that . . . the act of standing or remaining silent"⁴⁹ merely signifies respect rather than participation.⁵⁰

What matters, the Court reasoned, is not the perception that mature adults would have, but rather the perception that the high school dissenter would actually have.⁵¹ To allow graduation prayer to continue would place the dissenter "in the dilemma of participating, with all that implies, or protesting."⁵² Under the Establishment Clause, this forced choice is unacceptable since a school can "no more use social pressure to enforce orthodoxy than it may use more direct means."⁵³

In conclusion, the Court made two observations.⁵⁴ First, petitioners argument that objectors could avoid coercion by choosing not to attend the "voluntary" graduation "lacks all persuasion."⁵⁵ "[T]o say that a teenage student has a real choice not to attend . . . high school graduation is formalistic [and] extreme," the Court stated.⁵⁶ Furthermore, the Court continued, it would not let the case turn on such a small point.⁵⁷ Although attendance may not be required by "official decree," high school graduation is one of "life's most significant occasions."⁵⁸ Therefore, a student is not really free to abstain or else she must forego "those intangible benefits which have motivated the student [to labor through high school]."⁵⁹ The Constitution surely "forbids the State to exact religious conformity

49. 112 S. Ct. at 2658.

50. *Id.* Justice Scalia, obviously misreading this part of the opinion, stated:

"Given the odd basis for the Court's decision, invocations and benedictions will be able to be given . . . next June . . . so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is seemingly required is an announcement . . . to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join them, nor will be assumed, by rising, to have done so."

Lee v. Weisman, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., dissenting).

51. 112 S. Ct. at 2658.

52. *Id.* Referring to Justice Kennedy's assertion that a student standing or sitting silently would be perceived as having assented or participated in the religious activity, Justice Scalia retorts that Justice Kennedy's assertion is "nothing short of ludicrous . . . [because] surely our 'social conventions,' have not coarsened to the point that anyone who does not stand in his chair and shout obscenities can reasonably be deemed to have assented to everything that is said in his presence." *Lee v. Weisman*, 112 S. Ct. 2649, 2681 (1992) (Scalia, J., dissenting).

53. 112 S. Ct. at 2659.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

from a student as the price of attending her own high school graduation."⁶⁰

Second, the Court distinguished *Marsh v. Chambers*,⁶¹ noting that "[o]ur Establishment Clause jurisprudence remains . . . delicate and fact sensitive."⁶² Hence, the solemnity of high school graduation and the vulnerability of the teenage psyche is readily distinguishable from the opening of a legislative session.⁶³ Consequently, *Marsh* had no application to the case.

Justice Blackmun, in his concurring opinion, stated that "[a]lthough . . . proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient."⁶⁴ Continuing, Justice Blackmun made it clear that coercion is not the only way that the government can violate the Establishment Clause;⁶⁵ government also violates the Establishment Clause when it aids, fosters, or promotes religion or religious activity in any way.⁶⁶ In conclusion, Justice Blackmun firmly established that by joining the majority he had no intention of abandoning the *Lemon* framework.⁶⁷

Justice Souter, in his concurring opinion, addressed not only the issue of State coercion,⁶⁸ but also explored the issue of nonsectarian religious activities by government.⁶⁹ Addressing the issue of coercion, Justice Souter emphasized that coercion, in whatever form, is not the proper standard to apply to Establishment Clause questions.⁷⁰ Therefore, despite the fact that he joined the majority, Justice Souter stated in no uncertain

60. *Id.* at 2660.

61. 463 U.S. 783 (1983) (sustaining the constitutionality of prayer at the opening of state legislative sessions since long-standing traditions and historical practices "shed[] light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied."). *Id.* at 790.

62. *Weisman*, 112 S. Ct. at 2661.

63. *Id.* at 2660.

64. *Lee v. Weisman*, 112 S. Ct. 2649, 2664 (Blackmun, J., concurring; joined by Justice Stevens, Justice O'Connor, and Justice Souter).

65. *Id.*

66. *Id.* at 2663.

67. *Id.* at 2667. Justice Blackmun, reaffirming the validity of *Lemon* stated: "I remain convinced that our jurisprudence is not misguided, and that it requires the decision reached by the Court today." *Id.* at 2667 (Blackmun, J., dissenting).

68. *Lee v. Weisman*, 112 S. Ct. 2649, 2671 (Souter, J., concurring; joined by Justice Stevens and Justice O'Connor).

69. *Id.* at 2667.

70. *Id.* at 2673. Justice Souter, dismissing the coercion test, states: "While petitioners insist that the [Establishment Clause] extends only to the 'coercive' features and incidents of establishment, they cannot easily square that claim with the constitutional text." *Id.* at 2673 (Souter, J., dissenting).

terms that he is not prepared to disregard "existing precedent"⁷¹ for a coercion test.⁷²

Addressing the issue of nonsectarian governmental practices, Justice Souter also emphasized that the Establishment Clause prohibits "state-sponsored prayers . . . no matter how nondenominational the prayers may be."⁷³ The Establishment Clause Justice Souter continues, is "applicable no less to governmental acts favoring religion [over irreligion] than to acts favoring one religion over others."⁷⁴ Therefore, Justice Souter concluded that the practice of offering prayers at public high school graduation ceremonies is "flatly unconstitutional."⁷⁵

Justice Scalia⁷⁶ responded to the majority in a stinging dissent.⁷⁷ In his dissent, Justice Scalia admonished the majority for flatly ignoring the important role that history and traditions play in the fabric of American society.⁷⁸ In upholding the constitutionality of the school's nonsectarian graduation prayers, Justice Scalia traced the history of prayer at graduation ceremonies, and concluded that the majority created not only a "jurisprudential disaster," but also "[laid] waste [to] a tradition that is as old as public-school graduation ceremonies themselves"⁷⁹

The only common thread between Justice Scalia's opinion and the majority's opinion appears to be the adoption of the coercion concept.⁸⁰ However, the dissent uses the traditional definition of coercion which is

71. *Id.* at 2671. ("[T]he extratextual evidence of original meaning [does not] stand so unequivocally at odds with . . . existing precedent that we should fundamentally reconsider our course.").

72. *Id.*

73. *Id.* at 2667, 2671. In his analysis Justice Souter pointed out the inherent difficulty in allowing the government to engage in nonsectarian activities. "In many contexts . . . non-preferentialism requires some distinction between 'sectarian' religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster. Simply by requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible." *Id.* at 2671 (Souter, J., dissenting). Justice Souter, then continues, by pointing the deficiencies in Rabbi Gutterman's allegedly "nonsectarian" prayer. *See supra* note 3.

74. *Id.* at 2667.

75. *Id.* at 2678.

76. Joined by Chief Justice Renquist, Justice White and Justice Thomas.

77. *Lee v. Weisman*, 112 S. Ct. 2649, 2678 (1992) (Scalia, J., dissenting). Justice Scalia declared the Court's decision to be "lamentable" as well as a "jurisprudential disaster." *Id.* at 2685 (Scalia, J., dissenting). Moreover, he describes the Court's adoption of the psychological coercion test as "[an] instrument of destruction," and the "bulldozer of its social engineering." *Id.* at 2679 (Scalia, J., dissenting).

78. *Id.* at 2678-79.

79. *Id.* at 2679, 2685.

80. *Id.* at 2685.

much narrower than the majority's psychological-coercion test.⁸¹ The traditional test of coercion to which the dissent subscribes is one that is characterized by "force of law and threat of penalty."⁸² Thereby, the dissent is able to uphold the school's practice of including invocations and benedictions in graduation ceremonies since the attendance of the graduation ceremony was "utterly devoid of legal compulsion."⁸³

IV. ANALYSIS

Although the title of this article indicates the author's displeasure with the Court's decision, a comprehensive evaluation of coercion test is beyond the scope of this article.⁸⁴ Therefore, this article will only address the uncertainty that *Lee v. Weisman*⁸⁵ brings to the existing Establishment Clause jurisprudence.

Notwithstanding that six justices definitively settled the question of ceremonial prayer at high school graduations,⁸⁶ *Weisman* has the effect of leaving Establishment Clause jurisprudence more bewildering and equivocal than before. No longer can the judiciary rely on *Lemon*,⁸⁷ however controversial,⁸⁸ as the touchstone for Establishment Clause cases. Instead, a student of the law must guess which test among the three competing tests⁸⁹ might be applicable to a particular "delicate and fact-sensitive"⁹⁰ problem. The potential for increased litigation and judicial misinterpreta-

81. *Id.*

82. *Id.* at 2683 (Scalia, J., dissenting) (emphasis omitted). Justice Scalia distinguishes his view of coercion from that of the majority when he criticizes the majority for "invent[ing] a boundless, and boundlessly manipulable, test of psychological coercion." *Id.* at 2679 (Scalia, J., dissenting). Justice Scalia compared the case at bar from one in which he felt the coercion test was properly applied, using *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Barnette* the school threatened a student who refused to recite the pledge of allegiance with expulsion, incarceration in a home for criminally inclined juveniles, and threatened the child's parents with prosecution for causing delinquency. 112 S. Ct. at 2684 (Scalia, J., dissenting).

83. *Id.* at 2685.

84. See *The Supreme Court—Leading Cases*, 106 HARV. L. REV. 163, 259 (1992) (offering a comprehensive criticism of the coercion test).

85. 112 S. Ct. 2649 (1992).

86. Professor Mykkeltvedt has stated that Justice Scalia's "deliberate misreading of the majority opinion [may be] to encourage further litigation on the issue of graduation prayer." Roald Y. Mykkeltvedt, *Souring on Lemon*, 44 MERCER L. REV. 881, 906 (1993). See *supra* note 50.

87. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See *supra* note 6 and accompanying text.

88. See *supra* note 9.

89. The three competing tests are (1) the three-part test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971); (2) the historical analysis used in *Marsh v. Chambers*, 463 U.S. 783 (1983); and the coercion test in *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

90. *Weisman*, 112 S. Ct. at 2661.

tion is obvious. One needs to look no further than the problems associated with two competing standards⁹¹ to imagine the problems that this new coercion test can cause.

Scholars viewed *Weisman* as having "the potential to lead to a major change in [E]stablishment [C]lause law . . ."⁹² Little doubt exists that this prediction is accurate. However, change is not always beneficial, and the case in point serves as a perfect example. Although the decision will give law professors and constitutional scholars new fuel to fire the Establishment Clause debate,⁹³ it presents the judiciary in an unenviable dilemma. A practitioner litigating the Establishment Clause can now choose between a *Marsh*-type historical analysis,⁹⁴ a *Lemon*-type three part analysis,⁹⁵ and a *Weisman*-type "psyco-coercion" analysis.⁹⁶ Accordingly, the practitioner will select the analysis that suits his client's interests most favorably. Once the case enters the courtroom, the judge will be faced with the dilemma of choosing among the three competing standards. Depending on the persuasiveness of the attorneys, as well as the predilections of the judiciary, inconsistent decisions are sure to abound.

The Court could have decided this case without adding to the uncertainty surrounding the Establishment Clause. It could have used the *Lemon* framework to reach the same decision, or it could have dismissed *Lemon* altogether. Instead, the Court opted to announce a new test without dismissing *Lemon*. Therefore, needless litigation and confusing analyses are the only by-products springing from the *Weisman* decision.

91. In deciding the issue of graduation prayer, courts arrived at inconsistent decisions by applying both *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and the *Marsh v. Chambers*, 463 U.S. 783 (1983); *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990) (finding graduation prayer unconstitutional under *Lemon*); *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987) (upholding graduation prayer under *Marsh*); see also Roald Y. Mykkeltvedt, *Souring on Lemon*, 44 MERCER L. REV. 881, 896-97 n.93 (1993) (discussing *Jones v. Clear Creek Ind. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991); *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809 (Cal. 1991) as examples of conflicts between state and federal courts applying *Lemon* to prayers offered at public school graduations); Brief for Petitioners at 11, 112 S. Ct. 2649 (counsel for appellants complaining that *Lemon* itself had "spawned a cacophony of conflicting decisions" on the issue of graduation prayer).

92. Henry J. Reske, *And May God Bless: Does Prayer Belong at Graduation?*, A.B.A. J., Feb 1992, at 47.

93. At the time this article was written the flood gates of law review articles had just begun to open; see *The Supreme Court—Leading Cases*, 106 HARV. L. REV. 163, 259 (1992); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 157 (1992).

94. *Marsh v. Chambers*, 463 U.S. 783 (1983). See *supra* note 27.

95. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See *supra* note 6.

96. *Lee v. Weisman*, 112 S. Ct. 2649 (1992). See *supra* notes 33-83 and accompanying text.

V. CONCLUSION

"It is better the law should be certain, than that every judge should speculate upon improvements in it."⁹⁷ In *Lee v. Weisman*,⁹⁸ Deborah Weisman turned to the Supreme Court trusting the Court to confer a just decision. Likewise, the American jurist turned to the Supreme Court trusting that the Court would end the ambiguities that plagued Establishment Clause jurisprudence. Unfortunately, only Deborah Weisman received the answer she sought.

The Supreme Court had an opportunity to clarify the Establishment Clause in *Weisman*; instead, the Court issued an opinion which served only to further convolute the law. One only hopes that next time the Court will finally clear the ambivalence currently associated with the Establishment Clause.

WILLIAM JONATHAN MARTIN II

97. SIMON JAMES & CHANTAL STEBBINGS, A DICTIONARY OF LEGAL QUOTATIONS, at 8 (1987) (quoting Lord Hardwicke L.C. (1690-1764), *Wallace v. Tyrone* (1753) Dick. 244 at 245).

98. 112 S. Ct. 2649 (1992).

