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JUSTICE KENNEDY AND THE ESTABLISHMENT CLAUSE: THE SUPREME COURT TRIES THE COERCION TEST

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For over twenty years, the prevailing test to determine whether challenged laws or practices violate the Establishment Clause has been the three pronged inquiry established in *Lemon v. Kurtzman*.[1] While deceptively innocuous on its face, the *Lemon* test has yielded inconsistent results, and its application by the Court has been erratic. The Court's judgments are consequently incapable of being reconciled on any basis.[2] As a result, judges and commentators have been calling for change.[3] As Professor Jesse H. Choper points out, there have been two major changes in church-state doctrine over the past few years.[4]

First, there has been a change concerning the use of the Free Exercise Clause to gain exemptions to government-regulated conduct. In *Employment Division v. Smith*,[5] the Court held that as long as a government regulation is applied equally, and the regulation does not target a particular religion, there is no constitutional right to a special exemption from the regulation. Reli-

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1. 403 U.S. 602, 612-13 (1971). "First, the [practice] must have a secular . . . purpose; second, its principal or primary effect must be one that neither advances not inhibits religion." *Id.* (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)). Finally, "the practice must not foster 'an excessive entanglement with religion.' " *Id.* (citing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

2. For example, a provision for therapeutic and diagnostic health services to parochial school pupils by public employees is invalid if provided in the parochial school (Meek v. Pittenger, 421 U.S. 349 (1975)), but not if offered at a neutral site, even if in a mobile unit adjacent to the parochial school (Wolman v. Walter, 433 U.S. 229 (1977)). Also, reimbursement to parochial schools for the expense of administering teacher-prepared tests required by state law is invalid (Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973)), but the state may reimburse parochial schools for the expense of administering state prepared tests (Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980)). Finally, the state may pay for the cost of bus transportation to parochial schools (Everson v. Board of Educ. of Ewing Township, 330 U.S. 1 (1947)), but the state is forbidden to pay for field trip transportation visits "to governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students" (Wolman v. Walter, 433 U.S. 229, 252 (1977)).

3. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part) ("substantial revision of our Establishment Clause doctrine may be in order").

4. Constitutional Law Conference, 60 U.S.L.W. 2253 (1991).

5. 494 U.S. 872 (1990).

gious practices can be regulated, provided the regulation is applied evenly.[6]

Another change involves the focus courts should take in determining whether government aid to parochial schools and other church-related entities violates the Establishment Clause. In *Bowen v. Kendrick*,[7] Justices Kennedy and Scalia said government-aid cases should focus on the purpose of the aid, not the recipient. Previously, the Court drew a distinction between aid going to the school, and aid going to parents (i.e., tax benefits).

While the *Lemon* test had been receding a good deal, and the Court seemed to be changing its church-state doctrine with respect to the Establishment Clause, the problem was that a majority of Justices had not coalesced around an alternative. Two competing tests had emerged: endorsement of a religious belief or coercion of a religious exercise by the government.

Justice O'Connor's test is the "endorsement" approach: a violation of the Establishment Clause depends on whether the reasonable observer would perceive the government action as an endorsement of religious belief. Her test proscribes "[d]irect government action endorsing religion or a particular religious practice . . . because it sends the 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."[8] Her position in *Board of Education of Westside Community Schools v. Mergens*,[9] for example, was that merely permitting religious groups to use the classrooms is not government endorsement if the school permits a broad spectrum of other groups to use them as well.

Another approach offered to replace the *Lemon* test is the "coercion test" which Justice Kennedy has proposed. Under this test, the Establishment Clause contains "two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not . . . give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.' "[10] This approach has

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6. *Id.* at 880-81, 890. At issue in *Smith* was whether Native Americans had a constitutional right to use peyote, a hallucinogenic drug the State of Oregon had outlawed. *Id.* at 874. Respondents were two Native Americans who had ingested peyote during a ceremony with the Native American Church in violation of the Oregon statute. *Id.* Because the statute was applied in a non-discriminatory fashion, the Court held that the prohibition against ingesting peyote was constitutional. *Id.* at 890.

7. 487 U.S. 589 (1988).

8. Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984)).

9. 496 U.S. 226 (1990) (holding, in an action by high school students against school district to require it to give equal access to student Christian club, that the Equal Access Act does not violate the Establishment Clause).

10. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)); *see* American Jewish Congress v. City of Chicago, 827 F.2d 137 (7th Cir. 1987) (Easterbrook, J., dissenting) (calling for a change in Establishment Clause jurisprudence to a coercion test). Justice Kennedy's formulation of the coercion test seems to draw heavily from the dis-

the virtue of returning to the historic purposes of the Establishment Clause—to protect religious liberty.

Justice Kennedy's Establishment Clause philosophy is characterized by the contradiction between a desire to stay within the separationist/neutrality framework of *Lemon*[11] and the permissibility of symbolic governmental accommodations—with denominational neutrality—which recognizes "the central role religion plays in our society."[12] In his first Establishment Clause opinion, Justice Kennedy stated that he had not expressly "adopted" the *Lemon* test as a "primary guide in this difficult area."[13] He did, however, apply *Lemon* with "proper sensitivity to our traditions"[14] to reinterpret and adapt the primary effect prong, limiting it to prohibiting the government from "coerc[ing] anyone to support or participate in any religion or its exercise."[15] In his opinion, the *Lemon* test fails to distinguish those actions which coerce religious belief from those that accommodate exercising one's faith. As a result, Justice Kennedy interprets *Lemon* as having the effect of being hostile to religious expressions that do not coerce.[16]

In *County of Allegheny v. American Civil Liberties Union*,[17] the Court declined the government's request to relax *per se* rules. It ruled against the display of a creche in the county courthouse, but approved the display of both a large menorah and a Christmas tree outside a city-county building. The basis of the Court's ruling was that the Christmas tree-menorah display celebrated a secular theme of diversity, whereas the creche was a strictly religious display.[18]

While expressing doubts about the *Lemon* test, Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, strongly attacked endorsement as an opaque guideline, impartial in name but hostile in fact. Endorsement review, according to Justice Kennedy, trivializes the First Amendment, converts the Court into a "national theology board,"[19] and sends a message that popular religions are "least-favored faiths."[20] Justice Kennedy contends that in order to reconcile the central role of religion in our

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senting opinion of Judge Easterbrook. *See id.* at 135-40.

11. *Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in part and dissenting in part) (where action was brought against county and city to challenge constitutionality of creche in county courthouse and Chanukah menorah outside city and county building as violations of the Establishment Clause, the Court ruled (1) creche display violated Establishment Clause, and (2) menorah display next to Christmas tree did not have unconstitutional effect of endorsing Christian and Jewish faiths).

12. *Id.* at 657.

13. *Id.* at 655.

14. *Id.* at 656.

15. *Id.* at 659.

16. *Id.*

17. 492 U.S. 573 (1989).

18. *Id.* at 601-02, 615, 619-21.

19. *Id.* at 678 (Kennedy, J., concurring in part and dissenting in part).

20. *Id.* at 677.

society with our "pervasive public sector," and to relieve courts from micromanagement, the border between accommodation and establishment should be delimited by two principles: government may neither coerce religious exercise, nor directly benefit religion "in such a degree that it in fact establishes a religion or religious faith, or tends to do so."[21] Official proselytizing on behalf of religion should be the primary concern.[22]

In *Allegheny*, Justice Kennedy began with the proposition that the government may participate in celebrations of religious holidays by "installing or permitting festive displays"[23] of some sort. Justice Kennedy then reasoned that: "[if] government is to participate in its citizens' celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspect would . . . signal not neutrality but a pervasive intent to insulate government from all things religious."[24]

Justice Kennedy's implied baseline for evaluating the neutrality of the display is the way in which the holiday is celebrated in the private sphere, with no governmental influence, with nativity scenes as well as Santa Clauses. Implicitly, Justice Kennedy suggests that a wholly secular governmental display would deviate from this baseline by emphasizing secular elements while extracting religious elements. In other words, secularism is not neutrality.

Justice Kennedy's use of *Marsh v. Chambers*[25] in his *Allegheny* opinion provides insight into his views about an historical standard. He stated that "[n]oncoercive governmental action within the realm of flexible accommodation or passive acknowledgement of existing symbols"[26] is constitutional. The same standard applies to "practices that are accepted in our national heritage."[27]

Justice O'Connor, while rejecting the nativity scene, voted to uphold the menorah. She explained that "[a] reasonable observer would . . . appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens."[28] Her position is not incompatible with Justice Kennedy's, since each recognizes that religious symbols do not always exclude or stigmatize nonadherents; in some contexts they can

21. *Id.* at 659.
22. *Id.* at 659-60.
23. *Id.* at 663.
24. *Id.* at 663-64.
25. 463 U.S. 783 (1983) (Nebraska State Legislature's practice of opening each of its sessions with a prayer offered by a chaplain paid out of public funds was upheld as constitutional).
26. *Allegheny*, 492 U.S. at 662 (Kennedy, J., concurring in part and dissenting in part).
27. *Id.* at 663.
28. *Id.* at 635-36 (O'Connor, J., concurring).

"send [ ] a message of pluralism and freedom to choose one's own beliefs."[29]

Like Justice Kennedy's analysis of the nativity scene, Justice O'Connor's defense of the menorah display suggests that under some circumstances, the inclusion of religious elements is preferable to a wholly secular display because a secular display could not communicate the message of "tolerance of different choices in matters of religious belief."[30] Just as Justice Kennedy took issue with the proposition that total secularism not is equivalent to neutrality, Justice O'Connor implicitly recognized that secularism is not equivalent to pluralism.

If there is a difference between the two Justices' approaches, it seems that Justice O'Connor is more concerned about neutrality among different religions,[31] while Justice Kennedy focuses on neutrality between religion and nonreligion. As to that difference, a combination would seem to be the best view. The key issue between the two Justices is the social function that the challenged symbol serves in the life of the community. If the function is to promote a particular view by stigmatizing or excluding nonadherents, neither Justice Kennedy nor Justice O'Connor would permit the symbol. If the function is simply one of celebration, and if all significant elements in the community including other religions are welcome to use public property for appropriate celebrations of their own, both Justice Kennedy and Justice O'Connor would permit the display.

The concept of coercion is based on the distinction between persuasion and force. If a missionary or Jehovah's Witness knocks on one's door to proselytize, one might say that his actions are annoying, but one could not say that his actions were coercive. This same idea can be applied to governmental speech. John Locke, for example, maintained that the government's freedom to use persuasion in matters of religion is no more constricted than the private citizen's:

> It may be indeed alleged, that the magistrate may make use of arguments, and thereby draw the heterodox into the way of truth, and procure their salvation. I grant it; but this is common to him with other men. In teaching, instructing, and redressing the erroneous by reason, he may certainly do what becomes any good man to do. . . . But it is one thing to persuade, another to command; one thing to press with arguments, another with penalties.[32]

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29. *Id.* at 634.

30. *Id.* at 636.

31. *See, e.g., id.* at 627-28 (criticizing Justice Kennedy's coercion test on the ground that it "fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs").

32. John Locke, *A Letter Concerning Toleration*, *in* 5 JOHN LOCKE, THE WORKS OF JOHN LOCKE 11

Explicitly rejecting this Lockean position, Justice Kennedy stated that by "coercion" he does *not* mean "*direct* coercion in the classic sense of an establishment of religion that the Framers knew."[33] However, by departing from the classic definition of an establishment of religion, Justice Kennedy's argument falters in his attempt to invoke the Framer's view that coercion was an element of establishment. To be complete, Justice Kennedy's argument requires an intermediate step that transposes the Framers' conception of coercion into a conception that is true to their purposes, but is still usable today.

There are three ways in which Justice Kennedy's conception of coercion seems to differ from the Framer's original interpretation. First, he would include within the definition of coercion both "indirect" and "direct" coercion.[34] "Direct" coercion includes government action that makes compliance with one's religious tenets more difficult or expensive, as well as "tax in aid of religion or a test oath."[35]

The second way in which Justice Kennedy expands upon the classic conception is that coercion does not forbid all aid to religion using tax-generated resources.[36] In this respect, Justice Kennedy's version of the coercion test gives more latitude to government action than the strict coercion test. There is coercion when the government taxes a citizen and uses the money to support a religious ministry. However, when the government funds a broad array of nonprofit social welfare organizations, both secular and religious, the courts should not conclude that funding a religious social welfare ministry on equal terms is an establishment of religion. This is so even though the coercive nature of taxation is identical to the taxpayer. The concept of coercion is simply not enough to distinguish between permitted and forbidden uses of tax resources.

While ruling out the extreme "no-aid" position, however, Justice Kennedy has not supplied an alternative standard. He states that government cannot "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.' "[37] This leaves unanswered the question of which circumstances confer a government "benefit" or "tend" to establish a state religion. Indeed, Justice Kennedy's statement implies that this is a question of degree, determined by the amount of the aid, rather than a question of kind, based on the structure of incentives created by government action. The problem with Justice Kennedy's rationale is that tax exemptions are worth billions of dollars, but they do not violate the Estab-

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(Baldwin, 12th ed. 1824); *see also* John Locke, *The Second Treatise of Government* ch. 18, ¶ 208, *in* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 307, 452 (1960).

33. *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part).

34. *Id.*

35. *Id.*

36. *See* Bowen v. Kendrick, 487 U.S. 589, 624 (1988) (Kennedy, J., concurring).

37. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part).

lishment Clause so long as they do not favor religious charities over nonreligious charities. Yet a $100 grant to a church to hire a minister would undoubtedly violate the Establishment Clause.

Finally, in the sharpest break from the classic conception of coercion, Justice Kennedy maintains that "[s]peech may coerce in some circumstances."[38] He explains that "[s]ymbolic recognition or accommodation of religious faith may violate the Clause in an extreme case,"[39] and that he would oppose symbolic government actions that "would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion."[40]

After Justice Kennedy made this concession, however, little difference remained between his coercion-proselytization test and Justice O'Connor's endorsement test.[41] In *Allegheny*, the creche menorah case, the two Justices reached somewhat different conclusions with their dueling standards.[42] One may question whether the differing conclusions resulted from the differences in their legal standards or whether they simply perceived the symbols in different ways.

The two tests have their unmistakable differences. The difference between the endorsement and coercion tests

> may be understood as a disagreement over the aspect of the modern state with which the Establishment Clause should be most concerned. The endorsement test focuses on the "prestige" of government, or the special influence government has when it "speaks." This standard bars the state from "advancing" religion by engaging in practices that "convey a message of endorsement or disapproval [of religion]." The "coercion" test, in contrast, emphasizes the "power" of the state. This test prohibits "actions that further the interests of religion through the coercive power of government."[43]

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38. *Id.* at 661.

39. *Id.*

40. *Id.*

41. The doctrinal differences between the two camps might not be as wide as they appear. While rejecting as dictum the statement in Engel v. Vitale, 370 U.S. 421, 430 (1962), that coercion is not required to find an Establishment Clause violation, Justice Kennedy indicated that the prayer struck down in *Engel* "was unquestionably coercive in an indirect manner, . . . " *Allegheny*, 492 U.S. at 661 n.1.

42. 492 U.S. at 626-27 (O'Connor, J., concurring), *id.* at 664-65 (Kennedy, J., concurring in part and dissenting in part). *But see* Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226 (1990), and Lee v. Weisman, 112 S. Ct. 2649 (1992), in which the two Justices each applied their own tests but reached the same conclusion.

43. Gregory M. McAndrew, *Invocations at Graduation*, 101 YALE L.J. 663, 679 n.115 (1991) (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) and *Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring in part and dissenting in part)).

Justice Kennedy objects to Justice O'Connor's endorsement test for two reasons. First, he argues that the endorsement test, under which "government speech about religion is *per se* suspect," is unduly rigid and inconsistent with the Court's precedents.[44] The endorsement test would require the separation of all religious symbolism from government, otherwise how one views or designates religion would determine what views government can support. Second, Justice Kennedy is rather skeptical about the endorsement test's inquiry of whether the state has "spoken about religion" since the concept of endorsement "has insufficient content to be dispositive."[45] The endorsement test is unworkable because it is impossible for government to take a position which does not endorse some ethical belief system.[46] For example, under the endorsement test, Thomas Jefferson's *Bill for Establishing Religious Freedom* would be an Establishment Clause violation.[47] The government under this analysis must choose either absolute separationism or complete accommodation to create a definite, clear rule. Unlike the *Mergens* plurality, Justice Kennedy thought it "inevitable that a public school 'endorse' [the] religious club, in the common-sense use of the term. . . ."[48]

The emphasis on the "coercion" of individuals rather than on the "speech" of the state is reflected in Justice Kennedy's analysis of *Engel v. Vitale*.[49] The state-composed prayer at issue in *Engel* is perhaps the classic example of the "government speech about religion" that the endorsement test prohibits. Justice Kennedy agrees that "[s]peech may coerce in some circumstances,"[50] and he cites *Engel* as an extreme case where "[s]ymbolic recognition or accommodation of religious faith may violate the [Establishment] Clause."[51] In contrast to the indirect coercion involved in symbolic recognition, which appears to be a matter of degree, the prohibition of direct coercion seems categorical. For example, Justice Kennedy explains that *Engel* may also be understood to forbid "compelling or coercing participation or attendance at a religious activity."[52] This shift from endorsement to coercion validates many practices where the state speaks but does not coerce. For example, Justice Kennedy argued in *Allegheny* that the creche was valid because "[n]o one was compelled to observe or participate in any religious ceremony or activity."[53]

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44. *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part).
45. *Mergens*, 496 U.S. at 261 (Kennedy, J., concurring).
46. *Allegheny*, 492 U.S. at 675 (Kennedy, J., concurring in part and dissenting in part).
47. American Jewish Congress v. City of Chicago, 827 F.2d 120, 136 (7th Cir. 1987) (Easterbrook, J., dissenting).
48. *Mergens*, 496 U.S. at 261 (Kennedy, J., concurring).
49. 370 U.S. 421 (1962).
50. *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part).
51. *Id.* at 661 n.1.
52. *Id.* at 660.
53. *Id.* at 664.

But what about those cases where the state coerces but does not speak, such as graduation prayer? The endorsement test would permit these activities because it is possible for a school to avoid the appearance of endorsing religious speech. Justice Kennedy, however, focuses on coercion and believes school endorsement in these cases is "inevitable." If, as his statements in *Allegheny* suggest, compelling students to "attend" or "observe," as opposed to "participate in," a "religious activity" is sufficient to invalidate a practice, it is difficult to see how graduation prayer may be permissible. Most students feel compelled to "attend" graduation, where they will "observe" the unquestionably "religious activity" of prayer.[54]

Justice Kennedy stated in *Mergens* that the coercion test refers only to coercing participation.[55] At the same time, however, his opinion in *Mergens* also contained strong indications that coerced attendance may be sufficient to invalidate a practice, either on its own or because "attendance" itself may constitute "participation." He asserted that the Equal Access Act was valid because there was no evidence that "enforcement of the statute will result in the coercion of any student to participate in a religious activity."[56] But his supporting argument seems to go beyond this statement: "The Act does not authorize school authorities to require, or even to encourage, students to become members of a religious club *or to attend a club's meetings*."[57] The implied sufficiency of "attendance" was seemingly made explicit soon after. Justice Kennedy explained that the Act did not violate the rights of school officials because "the Act does not compel any school employee to participate in, *or to attend*, a club's meetings *or activities*."[58]

If the Establishment Clause bars the state from coercing students to attend as well as participate in a religious club's activities and meetings, it is unclear how the Equal Access Act could survive scrutiny under the coercion test. Students are compelled by state law to attend school, and one of the primary activities of religious clubs granted access under the Act appears to be proselytizing other students during the school day. The school district stressed the potential for daily proselytizing of a "captive audience" by "student evangelists" under the Act.[59] Justice Kennedy, however, in contrast to the other Justices who wrote in *Mergens*, was curiously silent on the broad access granted to religious clubs under the Act. This silence might be explained by the secondary importance of this issue in *Mergens*. Clues about Justice Kennedy's unwillingness to stay within the *Lemon* framework may be

54. Justice Kennedy uses this argument as an important part of his *Lee v. Weisman* decision. *See infra* notes 61-74 and accompanying text.

55. *See Mergens*, 496 U.S. at 259-61 (Kennedy, J., concurring).

56. *Id.* at 261.

57. *Id.* (emphasis added).

58. *Id.* (emphasis added).

59. *Id.* at 249.

evident in his concurrence in *Mergens*. Justice Kennedy maintained his coercion standard without mentioning or citing *Lemon*.[60] This omission, although appearing trivial, provides some evidence that Justice Kennedy was moving away from the *Lemon* test and toward a standard more accommodating to traditional practices.[61]

At any rate, the graduation prayer issue in the recent decision *Lee v. Weisman*[62] provided the Court with an opportunity for clarification of the coercion test, since it presented the combination of student religious speech and state compulsion. For the first time, Justice Kennedy's coercion test formed the majority opinion. In that case, a public school student and her father sought to prevent inclusion of invocations and benedictions at the graduation ceremonies of public middle and high schools in Providence, Rhode Island.[63] It was held that the school could not provide for "nonsectarian" prayer to be given by a Rabbi selected by the school. After outlining the facts of the case, Justice Kennedy acknowledged that there are "difficult questions" that divide the Court concerning government accommodation of religious practice. Nevertheless, the Court does "not accept the invitation" of the Justice Department and the Providence Schools to reexamine prior Establishment Clause holdings since "we can decide this case without" doing so.[64] Instead, Justice Kennedy noted that this decision was based on the "dominant facts" of the case: State officials directing religious exercises at secondary school graduations.[65]

Despite differences among the Justices, Justice Kennedy noted that all agreed, at a minimum, that "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[66] After a discussion of the "troubling" aspects of state involvement with school prayer, Justice Kennedy explained why the government cannot be involved with prayers. He explained that the Religion Clauses are not just designed to protect the nonbeliever, but also equally important "to protect religion from

60. *Id.* at 258-62.

61. The *Lemon* test relies heavily on exacting judicial review under both Religion Clauses to protect religious minorities and secularists, who are presumably unable to protect their interests politically. Relaxing judicial scrutiny under both guarantees, as Justice Kennedy favors, defers substantially to political processes and benefits mainstream religions. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1132-47 (1990).

62. 112 S. Ct. 2649 (1992).

63. *Id.* at 2652.

64. *Id.* at 2655-62. Intervening as amicus in *Lee* even before review was granted, the Bush administration asked the Court to replace the "rigid doctrinal framework" of *Lemon* with Justice Kennedy's proposed alternative in *County of Allegheny v. ACLU*: direct aid to or coercion of individual participation in religion. Lyle Denniston, *Supreme Court Approaches Major Decision on Public Prayer*, BALTI. SUN, Mar. 11, 1991, at A3.

65. *Lee*, 112 S. Ct. at 2655.

66. *Id.*

government interference."[67]

Justice Kennedy then discussed why the Court is especially concerned with "protecting freedom of conscience from subtle coercive pressure" in the public schools where "prayer exercises . . . carry a particular risk of indirect coercion."[68] In this case, the school's supervision of the graduation "places public pressure as well as peer pressure"[69] on students to stand during the invocation and benediction. Although this pressure is subtle and indirect, Justice Kennedy concluded that it "can be as real as any overt compulsion."[70] Moreover, for many of the students, "the act of standing or remaining silent was an expression of participation in the Rabbi's prayer."[71] To find no constitutional violation under these circumstances "would place objectors in the dilemma of participating . . . or protesting."[72] Justice Kennedy writes that the state may not place students in this position because "the government may no more use social pressure to enforce orthodoxy than it may use more direct means."[73] The fact that many people feel graduation prayers are important does not permit the state "to exact religious conformity from a student as the price of attending her own graduation."[74]

Justice Kennedy next addressed the dissent's contention that since the graduation ceremony was voluntary, there was no coercion. This argument, Justice Kennedy replied, "lacks all persuasion" because,

> Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. . . . Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. . . . Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.[75]

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67. *Id.* at 2656-57.
68. *Id.* at 2658.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 2659.
74. *Id.* at 2660.
75. *Id.* at 2659. Justice Kennedy's statement in *Lee* echoed the courts in Lemke v. Black, 376 F. Supp. 87 (E.D. Wis. 1974) and Bennett v. Livermore Unified, 193 Cal. App. 3d 1012, 1020, 238 Cal. Rptr. 819, 824 (Cal. Ct. App. 1987), which concluded that it is harsh to dismiss a graduating student's conscience-based objections to religious ceremonies at such an important event in her life as graduation with the observation that attendance is voluntary and not required to get a diploma.

Justice Scalia, in a scathing dissent, began by quoting Justice Kennedy's *Allegheny* opinion which would lead one to believe Justice Kennedy would join Justice Scalia in voting to permit graduation prayers. In *Allegheny*, Justice Kennedy had written that the Establishment Clause must be interpreted in light of "government policies of accommodation, acknowledgment, and support for religion that are an accepted part of our political and cultural heritage,"[76] and any interpretation that "would invalidate longstanding traditions cannot be a proper reading of the Clause."[77] Thus, Justice Scalia uses Justice Kennedy's prior opinion against him. He continued with a disparaging comment about Justice Kennedy's apparent switch of judicial positions, noting that the majority opinion shows why the Constitution "cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people."[78] He further disagreed with Justice Kennedy by arguing that there was no coercion "by force of law and threat of penalty."[79] Students could have refused to attend the ceremony.

Justice Scalia did, however, applaud Justice Kennedy and the majority for demonstrating the "irrelevance" of the *Lemon* test by ignoring it.[80] "The internment of that case," he wrote, "may be the one happy byproduct of the Court's otherwise lamentable decision."[81]

The coercion test, in contrast to Justice O'Connor's endorsement test, would eliminate claims by persons whose only complaint is that the government action irritates or offends them. Being irritated is not the same as being influenced or proselytized by government action.[82] Thus, the coercion test is slightly more narrow than the endorsement test.

Perhaps the most serious objection to the coercion test is that it addresses cases of symbolic action only. It does not provide reliable guidance for the vastly more important cases in which government action actually affects the practice of religion. For example, the test provides no guidance in cases which involve government funding of social welfare and educational activities of religious and nonreligious private organizations. The coercion test is useless in these cases because they all involve government coercion of some sort. To the extent that the coercion test overemphasizes the symbolic cases,

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76. *Lee*, 112 S. Ct. at 2678 (Scalia, J., dissenting) (citing *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part and dissenting in part)).

77. *Id.*

78. *Id.* at 2679.

79. *Id.* at 2683.

80. *Id.* at 2685.

81. *Id.*

82. The general rule is that plaintiffs who suffer no personal injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees" lack standing to sue. Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 485 (1982).

it hampers comprehensiveness.

But, as Professor Choper believes, Justice Kennedy succeeded in accomplishing three objectives in *Lee*: first, to put the *Lemon* test to rest; second, to signal that the Court had accepted his coercion test; and third, to hold that the graduation prayer violated the Establishment Clause.[83] Professor Choper also believes that Justice Kennedy did not, as Justice Scalia argued, abandon the coercion test he laid down in *Allegheny* because he made clear that some measure of subtle coercion will suffice to establish coercion.[84] In *Lee*, it was the peer group pressure that sufficed for Justice Kennedy's coercion test.[85]

Finally, according to Professor Choper, *Lee* signals that the coercion test has been accepted by the Court over Justice O'Connor's endorsement test.[86] Thus, while the conservatives "lost the battle" in *Lee* by failing to uphold the prayer, they "won the war" because there are now five votes for the coercion test. Professor Choper favors the Justice Kennedy approach, which he finds to be in tune with the original function of the Religion Clauses—to protect religious liberty.[87]

Establishment Clause decisions have been in disarray for many years, and *Lemon*'s three-prong test has been a large part of the problem.[88] Even proponents of the *Lemon* test fail to defend it on its merits. Rather, they rely on *stare decisis* and plea with those who dislike the idea of eradicating judicial precedent.[89] The confusion and inconsistency with the Religion Clauses may be receding, thanks to Justice Kennedy and the *Lee* majority. With any luck, *Lee v. Weisman* will be yet another changing point in the Supreme Court history books, much as *Brown v. Board of Education*[90] overruled *Plessy v. Ferguson*[91] and *Erie Railroad v. Tompkins*[92] overruled *Swift v. Tyson*.[93] The "coercion" test can be a possible safeguard of religious liberty

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83. Constitutional Law Conference, 61 U.S.L.W. 2237, 2240 (1992). However, the Court has since resurrected the *Lemon* test, much to Justice Scalia's consternation, in Lambs Chapel Ctr. v. Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993).

84. *Constitutional Law Conference*, 61 U.S.L.W. at 2240.

85. *Lee*, 112 S. Ct. at 2658.

86. *Constitutional Law Conference*, 61 U.S.L.W. at 2240.

87. *Id.*

88. Thomas A. Schweitzer, Lee v. Weisman *and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable?*, 69 U. DET. MERCY L. REV. 113, 209 (1992).

89. At the conclusion of an article which describes the chaos and confusion caused by the *Lemon* test, Professor Esbeck (unpersuasively) defends it by hiding behind the proverb, "[b]etter to live with the devil we do know, than the devil we [do not]." Carl H. Esbeck, *The* Lemon *Test: Should It Be Retained, Reformulated, or Rejected?*, 4 NOTRE DAME J.L ETHICS & PUB. POL'Y 513, 548 (1989).

90. 347 U.S. 483 (1954).

91. 163 U.S. 537 (1869).

92. 304 U.S. 64 (1938).

93. 41 U.S. (16 Pet.) 1 (1842).

and the right of free exercise of religion, rather than just another undermining viewpoint.