Lemon is Dead

Michael Stokes Paulsen

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Michael Stokes Paulsen, Lemon is Dead, 43 Case W. Res. L. Rev. 795 (1993)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol43/iss3/8

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
LEMON IS DEAD

Michael Stokes Paulsen*

I. INTRODUCTION

In Lee v. Weisman,1 the Supreme Court struck down as unconstitutional the Providence, Rhode Island school committee’s practice of allowing school principals to invite clergy to give non-denominational invocations and benedictions at graduation and promotion exercises at the Providence public schools. Surprising a good many, the Court rejected the school committee’s position—supported by the U.S. Department of Justice as amicus curiae—that such prayers do not violate the Establishment Clause of the First Amendment. The Court also declined “the invitation of [the school committee] and amicus the United States to reconsider [its] decision in Lemon v. Kurtzman.”2 Lemon, of course, was the case that announced the much-maligned three-part “Lemon test” for assessing a statute’s constitutionality under the Establishment Clause.3

* Associate Professor of Law, University of Minnesota Law School.

This paper was originally presented at a symposium on “Religion and the Public Schools after Lee v. Weisman” sponsored by Case Western Reserve University School of Law and the Case Western Reserve Law Review on November 13, 1992. I would like to thank the participants in that symposium for their helpful critiques. I would also like to thank Kim Colby, Chup Lupu, Michael McConnell, Phil Seligman, Suzanna Sherry, and Barry Feld for their valuable comments on earlier drafts of this paper. None of these persons should be blamed for its ideas or errors.


2. Id. at 2655 (1992); see Lemon v. Kurtzman, 403 U.S. 602 (1971).

3. The Establishment Clause of the First Amendment provides: “Congress shall make no law respecting the establishment of religion...” U.S. CONST., amend. I. The Lemon test requires that a statute or policy, to be upheld against Establishment Clause challenge, (1) have a secular legislative purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster excessive entanglement with religion. 403 U.S. at 612-13. I have been among those that have criticized the Lemon test. See Michael A. Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 NOTRE DAME L. REV. 311.
I suppose law professors should be reluctant to admit such things, but a colleague and I had placed a wager on the fate of the *Lemon* test in *Weisman*. She insisted that the Court would repudiate *Lemon*. The votes were there, she said, the justices were itching to overrule *Lemon*, and the school district, backed by the Solicitor General, had squarely asked for such a ruling as the primary basis on which it was seeking reversal. I predicted that the Court would not scrap *Lemon*, at least not in the *Weisman* case. The “coercion test” proposed by the school district and the Solicitor General as the replacement for *Lemon* might not get the school district as far as it needed to go, there being at least some element of compulsion in requiring students to attend a religious worship ceremony (albeit a brief and theologically empty one) as the price of admission to their own graduation. Some of the justices forming the probable majority for the “coercion” test — Scalia and Kennedy were my picks — might agree that *Lemon* should be squeezed in favor of coercion but find commencement prayer coercive. Others, like Chief Justice Rehnquist, might uphold commencement prayer as noncoercive. Still others might prefer to uphold the prayer but duck the doctrinal issue, much as the Court had done in upholding legislative chaplaincies in *Marsh v. Chambers*, in 1983.

Given this probable split in the ranks, it seemed unlikely that the *Lemon* test would be overruled, since there was unlikely to be agreement as to how any new principle would be applied. My best guess was that the Court would find some way to uphold the prayer, but not scrap *Lemon*, and that there would be no opinion of the Court commanding majority support — a fairly frequent phenomenon in recent Establishment Clause cases.

---

(1986). For further criticism of *Lemon*, see discussion infra, part II.A.

4. Cf. *Rose v. Giamatti*, 721 F. Supp. 906 (S.D. Ohio 1989). *Rose* was a fight over whether a former professional baseball star and then-Manager of the Cincinnati Reds could be banned from baseball for life for (allegedly) betting on baseball games, including (allegedly) his own team. To my knowledge, there is no similar rule preventing law professors from betting on Supreme Court cases.


My colleague and I were both wrong. The Court, by a 5-4 majority, struck down the prayer. Justice Kennedy wrote the majority opinion, joined by justices Blackmun, Stevens, O'Connor, and Souter. The bet, however, was on the fate of Lemon, not the fate of commencement prayer and on this point I was the clear winner. To the victor go the spoils, and in early fall, my colleague presented me with a six-pack of “Pete’s Wicked Ale” (which I have since consumed).

It is therefore with some sheepishness and a good deal of chagrin that I must now announce that my colleague was right after all: Lemon is dead. My proposition in this article is that the Court has indeed interred the Lemon test and replaced it with a coercion test, albeit one of uncertain parameters and an uncertain future. I do not mourn Lemon’s passing. There was much that was dreadfully wrong with Lemon during its approximately twenty-year life and we are better off without it. I come not to praise Lemon, but to bury it.

I also come to encourage its doctrinal successor. I believe that the coercion principle, properly understood, is the best single test of when government action violates the Establishment Clause. The Establishment Clause of the First Amendment is about direct and indirect forms of government compulsion in matters of religious exercise. The principle may be summarized as follows: Government may not, through direct legal sanction (or threat thereof) or as a condition of some other right, benefit, or privilege, require individuals to engage in acts of religious exercise, worship, expression or affirmation, nor may it require individuals to attend or give their direct and personal financial support to a church or religious body or ministry.

\[\text{infra at notes 70-96 and accompanying text.}\]

8. Id.
9. That, however, is a different question from whether I must now disgorge my ill-gotten gains.
10. It is not my chief purpose here to defend “coercion” as a matter of doctrine and original meaning. I have argued elsewhere the correctness of the coercion standard as a doctrinal matter, as focusing on the “effects” with which the Establishment Clause legitimately is concerned. Paulsen, supra note 3, at 335-36. The historical case for the correctness of the coercion standard has been well made by several scholars and judges. See infra note 115. I will not repeat those arguments in this article, other than to respond to particular points of contention raised in the Weisman opinions. See infra note 171 (responding to the objection of Justice Souter and others that a coercion standard would render the Establishment Clause redundant of the Free Exercise Clause) and 115
In forbidding government coercion to engage in religious activity, the Establishment Clause is the perfect complement to the Free Exercise Clause, which also prohibits direct and indirect forms of government compulsion in matters of religious exercise. The two clauses protect a single central liberty — religious freedom — from two different angles. The Establishment Clause prohibits the use of the coercive power of the state to *prescribe* religious exercise; the Free Exercise Clause prohibits the use of government compulsion to *proscribe* religious exercise.\(^{11}\)

But the coercion principle is not properly understood — at least not by the new majority that appears to embrace the coercion concept in principle. Indeed, none of the justices writing in *Weisman* correctly articulated and applied a coherent conception of coercion. The majority opinion of Justice Kennedy seems to suggest that, in certain contexts, social pressure to engage in religious practice — private action — may give rise to an Establishment Clause violation, if government has provided the context or setting in which such social pressure occurs. This confusion of private action and state action replicates Kennedy’s error (again writing for the majority) in the Court’s important state action decision the previous Term in *Edmonson v. Leesville Concrete Co.*\(^{12}\) In *Edmonson*, this erosion of the line between state action and private action produced an arguably salutary outcome: the elimination of race-based peremptory challenges by private attorneys in civil jury selection.\(^{13}\) But transplanted to the First Amendment context, this analytic error is unqualifiedly dangerous in its implication — contrary to nearly a dozen precedents — that speech by private parties that occurs on public property or in a state-created forum may be imputed to the government and, on that basis, regulated or banned. Contrary to the confused approach of the *Weisman* majority, it must be made clear that the forbidden coercion is *government* coercion — state action, not private action — lest the Establish-

---

11. I have set forth this thesis at greater length elsewhere. Paulsen, *supra* note 3. In that article, I treated the Establishment Clause as stating a principle of equal protection of the free exercise of religion from the coercive power of the state.


13. *Id.* at 2087.
ment Clause be perverted into a sword of suppression of private religious expression and evangelism that occurs on public property and lest private expression generally be deprived of constitutional protection whenever it occurs in a forum maintained or sanctioned by the state.

Contrary to the views of the four dissenters, however — all of whom embraced coercion as the proper test — the majority's analytic error does not mean that the result in *Weisman* itself is erroneous. Shorn of its undue reliance on social psychology, the majority's application of the coercion principle to invalidate the practice of giving commencement prayers at public school graduations is essentially correct: government compelled, induced, or strongly encouraged attendance at a religious worship ceremony, even an ostensibly "nonsectarian" or *de minimis* one, violates the Establishment Clause, whether or not one is forced further to participate in particular acts of religious worship.

If refined to avoid interference with the free speech rights of private actors, the coercion principle marks a reasonably clear line between constitutionally unacceptable government promotion of religious exercise in the public schools and constitutionally acceptable (indeed, sometimes constitutionally required) government accommodation of private religious speech and exercise. Moreover, the coercion principle, properly understood, also makes clear that government provision of benefits to private religious schools on the same (or less favorable) terms as funding or benefits are made available to public schools does not violate the Establishment Clause. Indeed, such aid poses no serious Establishment Clause issue. *Lemon*, of course, was a case of this type, wrongly striking down state programs providing limited, compensatory financial assistance to private, including religious, schools.\(^\text{14}\) *Lemon* is truly dead — its result, as well as the three-part test. Though the outcome in *Weisman* will be regarded by some as unfortunate, the real news of *Weisman* is the expiration of *Lemon* and restoration of sanity (it may be hoped) to Establishment Clause jurisprudence, to the end that true religious liberty and equality is served. In this regard, the death of *Lemon* is an occasion for dancing in the streets: Let the joyous word be spread, *Lemon v. Kurtzman* at last is dead!

Part II of this essay charts the demise of *Lemon* as foreshad-

owed by cases preceding Weisman and as the inevitable consequence of the test's inherent flaws. Part III.A explains and interprets Weisman, setting forth how Weisman repudiates Lemon and establishes a majority for "coercion" as the new test of constitutionality under the Establishment Clause. Part III.B explores the divisions within the new coercion majority, responds to the Weisman dissenters' criticism of its application to invalidate commencement prayer, and suggests a number of clarifying refinements. Finally, part IV addresses the specific topic of this symposium — religion and the schools after Weisman — by exploring the implications of a refined coercion standard for other issues of religious activity in public schools and for the issue of using public funds to support private religious schools.

II. THE LONG ILLNESS AND EVENTUAL DEATH OF LEMON

A. The Nature of the Illness

For many years, Lemon had been the subject of sharp criticism from legal commentators and even sharper criticism from members of the Court. The criticism was well deserved. Each of Lemon's three "prongs" for evaluating the constitutionality of government action challenged under the Establishment Clause — (1) that the law or conduct have a "secular purpose"; (2) that it have a "primary effect" that "neither advances nor inhibits" religion; and (3) that it not foster "excessive entanglement" of the state with religion — had some major analytic flaw or ambiguity. In addition, packaging the test as one in which all three requirements must be satisfied compounded these problems by cumulating


them. Finally, the ambiguity of the test left the Court leeway to interpret each prong in varying ways, producing a bewildering patchwork of decisions as the justices engaged in a tug-of-war over the interpretation of the test. Not all of the resulting decisions were wrong, of course, but they certainly lacked doctrinal coherence.18

The difficulty begins with first premises. Much of the Lemon framework seemed to assume that the Establishment Clause imposes a constitutional disability on religion — that it is an “anti-religion” counterweight to the “pro-religion” Free Exercise Clause rather than a protection of religious liberty.19 The “secular purpose” prong was sometimes read to reflect this erroneous assumption. It misleadingly implied (and many courts thus held) that laws motivated by a desire to promote religious freedom or to accommodate religious practice automatically constitute an establishment of religion.20 The result was frequently a reading of the Establishment Clause that required functional hostility, or indifference to religion by treating the promotion of religious freedom — as distinguished from the promotion of religion — as an improper government motivation. This produced a head-on confrontation with the Free Exercise Clause: The Establishment Clause was construed to forbid government from deliberately taking action that the Free Exercise Clause seemed to require government to take,21 produc-

17. Id. at 612.

18. For collections of the foolish inconsistencies among the cases, see Paulsen, supra note 3 at 315-17 (“This scatter-pattern of decisions is the combined product of the tripartite Lemon test and the Court’s occasional desire to provide an escape from the straightjacket that an honest application of Lemon would force upon society in its attempts to accommodate religion.”). See also Wallace v. Jaffree, 472 U.S. at 110-11 (Rehnquist, J., dissenting); John H. Garvey, Another Way of Looking at School Aid, 1985 SUP. CR. REV. 61, 67 (1985) (showing, in table form, how almost identical fact patterns have produced opposite results under the Lemon test).


20. See Paulsen, supra note 3 at 339 & n.122 (citing, as an illustration, Caldor, Inc. v. Thornton, 464 A.2d 785, 793 (1983), aff’d, 472 U.S. 703 (1985)) (where the Supreme Court of Connecticut “found that the statute in question failed the purpose prong because ‘[t]he unmistakable purpose of such a provision is to allow those persons who wish to worship on a particular day the freedom to do so.’”). See also McConnell, supra note 15, at 128-29.

21. Compare Caldor, Inc. v. Thornton, 472 U.S. 703 (1985) (striking down on Establishment Clause grounds a law requiring employers to permit Sabbatarians to designate their sabbath as their required day off each week) with Sherbert v. Verner, 374 U.S. 398 (1963) (Free Exercise Clause requires that state provide unemployment compensation to persons who are unavailable for work because of Sabbath observance requirements of their religion) and Frazee v. Illinois Dep’t of Employment Sec., 489 U.S. 829 (1989) (finding
ing an untenable reading of the religion clauses as contradictory in principle.\textsuperscript{22} 

Still worse, the "secular purpose" prong was often understood to render susceptible to Establishment Clause challenge laws motivated by religious convictions but not otherwise distinctively "religious" in character.\textsuperscript{23} Some of these challenges were unsuccessful, 

\begin{itemize}
\item a violation of the Free Exercise Clause where unemployment benefits were denied because appellant refused temporary work that would require him to work on Sunday and Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (finding a Free Exercise Clause violation where the State denied unemployment benefits to a woman fired for refusing to work on her Sabbath day). \textit{See also} Thomas v. Review Bd., 450 U.S. 707, 726 (1981) (Rehnquist, J., dissenting) ("If Indiana were to legislate what the Court today requires — an unemployment compensation law which permitted benefits to be granted to those persons who quit their jobs for religious reasons — the statute would 'plainly' violate the Establishment Clause as interpreted in \textit{Lemon} ").
\item 22. For an argument that the perceived "tension" within the Religion Clauses is an inappropriate premise for their interpretation, see Paulsen, \textit{supra} note 3, at 313, 323-25 (framers should not be understood to have written a self-contradictory provision; religion clauses should be understood as complementary prohibitions). Accord McConnell, \textit{supra} note 15, at 117-18. \textit{See also} LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §14-2, at 1156 (2d ed. 1988). Some scholars defend the idea that the Religion Clauses in fact are internally contradictory, and that a satisfactory reading of one necessarily results in the unsatisfactory subordination of the other. \textit{See} Sherry, \textit{supra} note 19, at 124-25.
\item The conflict between \textit{Lemon} and the Free Exercise Clause was reduced somewhat, but certainly not eliminated, by the Court's narrowing of its reading of the Free Exercise Clause's protections in \textit{Employment Division v. Smith}, 494 U.S. 872 (1990). \textit{Smith} severely constricted the scope of the Free Exercise Clause's mandatory protection of religious exercise from government interference, but correspondingly broadened the (theoretical) scope of the permissive protection of religious freedom by governments. \textit{Id.} at 890. The purpose prong of the \textit{Lemon} test, if construed to prohibit government acts promoting religious freedom, theoretically prohibits both mandatory free exercise accommodation and permissive ones. As a consequence of \textit{Smith}, \textit{Lemon} would create more conflicts in the second category and fewer in the first. For salient criticism of \textit{Smith}, see Douglas Laycock, \textit{The Remnants of Free Exercise}, 1990 SUP. CT. REV. 1; Michael W. McConnell, \textit{Free Exercise Revisionism and the Smith Decision}, 57 U. CHI. L. REV. 1109 (1990).
\item 23. The worst offender is Justice Stevens. \textit{See} Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (Stevens, J., concurring and dissenting) (consistency of a statutory declaration with religious doctrine sufficient to invalidate it under Establishment Clause). Justice Blackmun also displays hostility toward the influence of religious values in lawmaking. \textit{See} Bowers v. Hardwick, 478 U.S. 186, 211-12 (1986) (Blackmun, J., dissenting) (equating religious values with religious "intolerance" that must be treated as suspect as racial animus). The Court as a whole has consistently rejected the argument that a law violates the Establishment Clause when it is simply consistent with religion. The "purpose" test came to be understood to invalidate only laws motivated \textit{wholly} by a desire to \textit{promote} religion, not laws intended to accommodate the free exercise of religion or laws that reflect underlying religious or moral values. \textit{See} Bowen v. Kendrick, 487 U.S. 589, 604 n.8 (1988) (noting that there was "no reason to conclude that the AFLA serves an impermissible religious purpose simply because some of the goals of the statute coincide with the beliefs of certain religious organizations"); Harms v. McRae, 448 U.S. 297, 319-20 (1980) (religious purpose alone does not make the law invalid); McGowan v. Mary-
as in the challenge to the Hyde Amendment restricting government funding for abortion.\textsuperscript{24} But other challenges succeeded in invalidating laws simply because of the supposed religious motivations underlying their public support.\textsuperscript{25} Some of these laws might have failed other "prongs" of \textit{Lemon} (and perhaps even a sensitive application of the coercion test) because they involved actual government inculcation of religion to a captive audience.\textsuperscript{26} But if a statute motivated by religion, or even intended to advance religion, is neutral in its effects on freedom of religious exercise and nonexercise, the Establishment Clause supplies no justification for outlawing it.\textsuperscript{27} The purpose prong of \textit{Lemon} thus served no legitimate function, and several illegitimate ones. A law should not be considered unconstitutional because of the religious motives of the persons favoring it.\textsuperscript{28} Still less ought it be struck down because of the religious identity or affiliation of those favoring it.\textsuperscript{29} The pur-

land, 366 U.S. 420, 442 (1961) ("[i]t is equally true that the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the nets of some or all religions.").


26. The Louisiana statute at issue in \textit{Edwards}, 482 U.S. 578, may be such a case. That law required the teaching of "creation science" — essentially a presentation of scientific evidence supporting a religious teaching — wherever Darwinian evolution was taught. A more difficult case is \textit{Stone}, 449 U.S. 39, where a Kentucky statute requiring posting of the Ten Commandments in public school classrooms was struck down under the Establishment Clause. \textit{Stone} is discussed infra at notes 196-98 and accompanying text.

27. A ban on public school teaching of a controversial secular subject matter area altogether, motivated by a desire to avoid objections on religious grounds, is not an establishment of religion. Thus, \textit{Epperson v. Arkansas}, 393 U.S. 97 (invalidating a ban on teaching evolution) would seem unjustified on the grounds given for its decision.


29. Imposition of a disability on religious persons' (or groups') participation in the political process because of their religious beliefs or identity violates the Free Exercise
pose prong too readily became the doctrinal equivalent of the *ad
hominem* fallacy — an attack on the person(s) making the argu-
ment (or statute), not on the argument (statute) itself.

It is not the motivation or identity of a law's supporters, but
the *effects* of a law that properly determine its constitutionality.
The "primary effect" prong of *Lemon* addressed this central inqui-
ry, but floundered on two points: first, it was opaque and mislead-
ing as to what constituted the forbidden object of government "ad-
vancement"; second, it ignored the question of the proper base-
line against which such effects would be measured. Put another
way, the Court never clearly came to grips with either the "effects"
yardstick or the "effects" baseline. It is not surprising that the
Court's cases under *Lemon* were so incoherent, since the Court
did not know what it was measuring or where it was starting from.

What is it that government may not "advance"? The Court at
first spoke of the effects prong in terms of laws that advanced
*religion* as opposed to the devilishly manipulable term
"nonreligion". Near the end of *Lemon*'s life, the Court recog-
nized that any law accommodating religion, by promoting religious
freedom, in a sense "advanced" religion in a way that
"nonreligion" was not similarly advanced. The Court adjusted its
interpretation of the effects prong accordingly As it stated in *Cor-
poration of Presiding Bishop v. Amos*:

---

Tennessee's exclusion of clergy from the state constitutional convention).

30. The "inhibition" part of the formula — government may neither "advance nor in-
hibit" religion — was never taken seriously. It apparently was included in the formula-
tion as a rhetorical bow to the idea of neutrality. The Supreme Court has never struck
down a law on Establishment Clause grounds because it was thought to "inhibit" religion.
Such a challenge more naturally sounds in free exercise than nonestablishment.

31. Mocking the inconsistencies in the Court's results has become a common (and
easy) sport. See *supra* note 18.

32. The first, pre-*Lemon* appearances of the word "nonreligion" were in Justice
Goldberg's concurrence in School Dist. of Abington v. Schempp, 374 U.S. 203, 205
(1963) (Goldberg, J., concurring) (religious freedom means "no [governmental] favoritism
among sects or between religion and nonreligion") and, by the full Court, in
*Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates govern-
mental neutrality between religion and religion, and between religion and nonreligion.").
The "nonreligion" idea was carried forward by the Court as part of the effects prong of
the *Lemon* test. See, e.g., School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 382
(1985) (government must "maintain a course of neutrality among religions, and between
J., concurring in judgment) (applying the religion/nonreligion distinction in finding a provi-
sion invalid on free exercise grounds). For more extensive discussion of the problems
with the "nonreligion" concept, see Paulsen, *supra* note 3, at 332-34.
A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence. As the concurring justices in Amos aptly observed, this comment confuses more than clarifies. It begs the question in all cases of government accommodation of religion (including Amos itself): does the “government itself” advance religion where it exempts religion from a burden it imposes on secular persons or entities? If the government really must be neutral as between religion and “nonreligion” — as the effects prong of Lemon asserted — the answer is no. Special treatment unconstitutionally advances religion. But that conclusion proved impossible to reconcile with the Court’s cases holding that the Free Exercise Clause sometimes requires unique accommodation of religion. Such a conclusion also left no room for permissive accommodation of religion, a result the Court came to recognize as equally unacceptable. The Court never could resolve this tension.

The second serious problem with the effects test was the Court’s repeated failure to confront the problem of selecting a realistic and consistent baseline from which to measure “advancement” (of whatever it is that may not be advanced). Does it advance religion to grant religion affirmative benefits where secular

34. Id. at 346 (Blackmun, J., concurring); id. at 347 (O’Connor, J., concurring).
38. As discussed below, the proper resolution — a resolution implicit in the “coercion” test — is that government may not use its coercive powers to advance religious exercise relative to the freedom not to exercise any religion. Religious exercise, not religion, is the correct focus. See infra text accompanying notes 45-46.
institutions are granted those same benefits (or similar but greater ones)? Lemon v. Kurtzman said yes. The program invalidated in the case that launched the "Lemon test" was one in which state governments made modest financial contributions to private, including religious, schools. Of course, government's financial support for public schools was infinitely greater. The programs in Lemon — and in a large number of subsequent cases testing its application to other forms of aid — merely made up this discrepancy in small part. Despite the implausibility of claiming that such treatment advances religion relative to nonreligion, the Court implicitly treated the baseline for the effects test as zero benefits, notwithstanding that secular entities received huge benefits.

39. Lemon v. Kurtzman, 403 U.S. 602, 607-11 (1971). The Rhode Island law the Court struck down provided for supplements to parochial school teachers' salaries for teaching subjects that were also taught in public schools. Id.

40. See, e.g., Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (finding no establishment of religion for state to provide vocational aid to student of a private Christian college); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (finding establishment of religion to offer classes to private school students in public school classrooms); Aguilar v. Felton, 473 U.S. 402, 402 (1985) (finding use of federal funds "to pay salaries of public school employees who teach in parochial schools" to be an establishment of religion); Mueller v. Allen, 463 U.S. 388, 388 (1983) (validating a tax statute allowing parents of private school students to deduct expenses of "tuition, textbooks and transportation"); Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (finding no establishment of religion to reimburse church-sponsored schools for expenses of state mandated testing); Wolman v. Walter, 433 U.S. 229 (1977) (invalidating statute providing aid to nonpublic school pupils for books, testing, health services, and transportation); Roemer v. Board of Public Works, 426 U.S. 736 (1976) (finding no establishment of religion where state funded private institutions as long as they did not award only theological degrees); Meek v. Pittenger, 421 U.S. 349 (1975) (finding establishment of religion where state provided testing and counseling to private school students and loans to private schools); Sloan v. Lemon, 413 U.S. 825 (1973) (invalidating statute that reimbursed parents for nonpublic school tuition); Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (invalidating statute providing financial aid to nonpublic schools and tuition reimbursement and tax benefits to parents of nonpublic school students); Hunt v. McNair, 413 U.S. 734 (1973) (finding no establishment of religion in state funding of a religious college where use of funds was restricted to non-religious purposes); Levitt v. Committee for Public Educ. & Religious Liberty, 413 U.S. 472 (1973) (invalidating statute reimbursing nonpublic schools for state required testing); Tilton v. Richardson, 403 U.S. 672 (1971) (finding no establishment of religion caused by federal construction grants to universities where religious use was limited).

41. Professor McConnell has argued that this choice of a baseline is incompatible with the "unconstitutional conditions" doctrine. Michael W. McConnell, Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause, 26 SAN DIEGO L. REV. 255 (1989) [hereinafter McConnell, Unconstitutional Conditions]; Michael W. McConnell, The Selective Funding Problem: Abortions and Religious Schools, 104 HARV. L. REV. 989 (1991) [hereinafter McConnell, Selective Funding].
The absurdity of this approach is highlighted by an example the Court frequently gave in opinions upholding the neutral inclusion of religion within some programs: "If the Establishment Clause barred the extension of general benefits to religious groups, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair."\(^2\) The irony (which the Court failed to note) is that this example contradicts Lemon in principle. What makes police and fire protection different from financial assistance to education? Neither benefit would be given to religion in a state of nature. If the baseline is what religion would get were there no government, then providing churches with fire protection in principle "advances" religion every bit as much as salary supplements for parochial schools, for it leaves religion better off than if there were no government. But if the baseline is the benefits the modern welfare state makes available to all similarly situated persons and groups,\(^3\) then it does not "advance" religion to make religious persons and groups eligible for benefits on the same terms as any other person or group. Still less does it advance religion to be granted a substitute, smaller benefit (as in Lemon).\(^4\)

Both of these problems are susceptible of a single answer, but it is an answer that guts the core of Lemon (at least as Lemon was often applied). The relevant comparison is not between a law’s effects on the exercise of religion and the exercise of “non-religious benefits.”


\(^{43}\) “Similarly-situatedness” not being defined by the state in terms that deprive a person or group of a constitutionally protected status or that penalize the exercise of a constitutional right. See generally, e.g., Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989); McConnell, Unconstitutional Conditions, supra note 41.

\(^{44}\) The Court sometimes avoided this problem by asking whether advancement of religion was the “primary effect” of the policy. See, e.g., Bowen v. Kendrick, 487 U.S. 589, 609-14 (1988); Lynch v. Donnelly, 465 U.S. 668, 681-82 (1984) (holding creche display not violative of Establishment Clause); Mueller v. Allen, 463 U.S. 388, 396 (1983) (holding tax deduction did not have primary effect of advancing religious purposes of parochial schools because many other deductions allowed). But “primary” is a weasel-word that the Court never gave real content. Indeed, the Court sometimes focused only on the applications to religious persons and groups of a statute providing a general benefit, and then asked whether those applications (rather than the policy as a whole) had the “primary effect” of advancing religion. See, e.g., Grand Rapids, 473 U.S. at 389-92; Committee for Public Educ. v. Nyquist, 413 U.S. 756, 773-74 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971). That, of course, is cheating, as the Court occasionally recognized. See Lynch, 465 U.S. at 680 ("Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.").
gion” (which would seem to imply that laws must be neutral in their relative effects as between religious exercise and tennis-playing, or lawn-mowing, or photography). Rather, the proper comparison is between a law’s effects on the exercise of religion and the non-exercise of religion — the freedom not to engage in the exercise of religion. A better “primary effect” prong would require that a law neither advance nor inhibit the exercise of any particular religion as against the exercise of any other religion, or as against the right not to exercise any religion.45

This standard addresses the relevant “effect” government action’s impact on freedom of religious exercise and non-exercise. It also implicitly establishes the appropriate baseline from which neutrality should be measured — religious practice absent government action. This inquiry would focus on government effects on religious conduct — on actions — not effects on “religion” as an abstract concept. This has the salutary effect of being an easier and more appropriate task for judges to perform; courts can more readily judge effects on outward and visible signs than on inward and spiritual states.46 Moreover, this inquiry makes better textual sense as well as better practical sense. If nonestablishment and free exercise are understood as correlative rather than contradictory principles, it is logical to read the clauses as mirror-image prohibitions on government prescription and proscription, respectively, of the same thing — religious exercise. As thus recast, the effects prong is properly a version of the “coercion” test: the Establishment Clause forbids government compulsion of religious exercise through means direct or indirect. But that is about all that usefully can be salvaged from Lemon.

The third prong of Lemon — “excessive entanglement” — was perhaps the most consistent object of criticism.47 It offered many

45. I have developed this “free exercise” / “free non-exercise” idea as the relevant focus of the effects prong elsewhere. Paulsen, supra note 3, at 335.

46. See id. at 336:
While the difference between a court’s competence to discern effects on religious exercise as opposed to “religion” may be subtle (indeed, effects on religious exercise may simply be a more precise expression for what is really meant by “effects on religion”), the difference between a court’s competence to weigh effects on nonexercise as opposed to “nonreligion” is enormous. The question of whether a classification threatens the freedom not to exercise any religion is answered by looking for indicia of governmental compulsion of religious exercise — indicia that are far more likely to be concrete, visible, and objective than any contrivance for measuring effects upon “nonreligion”

47. See Edward M. Gaffney, Political Divisiveness Along Religious Lines: The Entan-
problems from which to choose. First, the test belonged on the free exercise side of the coin: excessive entanglement of the state with religion is a form of burden on free religious exercise, abridging the liberty of the person or institution "entangled" with, not a means of coercing, promoting, or even endorsing religion. As such, it makes little sense to accord standing to raise an entanglement challenge to anyone but the burdened person or institution in an action under the Free Exercise Clause. Second, the test was hopelessly vague; it delegates essentially standardless discretion to judges to decide what is "excessive." Third, as employed by the Court in tandem with the primary effect prong, the entanglement prong created a damned-if-you-do-damned-if-you-don't dilemma. The very steps that government sometimes must take to assure that programs are neutral toward religion (so as to pass the effect prong) entail monitoring condemned under the entanglement prong. Finally, like the purpose prong, entanglement sometimes was construed to prohibit programs "divisive" along religious lines. The "divisiveness" variant implied that religious persons and groups could be excluded from public programs — discriminated against — if there was strong enough political opposition. The Court's more recent cases applying the entanglement prong had defanged it somewhat, but the problems with the test re-

---

48. No less than where vague statutes vest sweeping discretion in administering officials, vague doctrinal tests vest in judges too great a latitude for "discontrol, irrationality, and irregularity," causing them "to function erratically," with "[p]rejudiced, discriminatory, or overreaching exercises of authority." The quoted words are from Anthony Amsterdam's insightful article on vagueness, Anthony G. Amsterdam, The Void for Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 67, 108, 90, 80 (1960). For a recent application of the vagueness doctrine in another First Amendment context, see City of Lakewood v. Plain Dealer, 486 U.S. 750 (1988) (finding city ordinance giving mayor unfettered discretion to deny permits for newspaper racks unconstitutional).


50. See generally Gaffney, supra note 47, at 211 (noting that the "political divisiveness" aspect of the "excessive entanglement" test is troubling and dangerous).

51. See, e.g., Bowen v. Kendrick, 487 U.S. 589 (1988). Kendrick involved a challenge to a governmental direct grant program to religious and secular organizations that provided, inter alia, counseling to teens on matters related to pregnancy and sexual conduct. In a 5-4 opinion written by Chief Justice Rehnquist, the Court upheld the program, employing a much tamer Lemon test than it had previously employed. The "purpose" prong was
It is somewhat strange that the entanglement prong, with all its difficulties, lasted as long as the rest of Lemon. The explanation probably lies in the “separation of church and state” theme that has persistently dogged Establishment Clause interpretation since Jefferson’s invocation of the metaphor of a “wall of separation” in a letter to the Danbury Baptists. A prohibition on “excessive entanglement” is simply a way of restating the imprecise idea that the Establishment Clause requires an appropriate degree of “separation” of church and state. It does not clarify what that degree is, nor does it justify Jefferson’s characterization of the clause in such terms. The First Amendment does require “separation” or “non-entanglement,” but it does so as a matter of the Free Exercise Clause’s protection of religion from government intrusion on personal and institutional religious autonomy. That is, religion may be entitled to a private sphere separate and independent from government power and immune from its regulations. It never was legitimate to use the idea of separation to authorize discrimination against religion within the public sphere.

The case against Lemon began to attain critical mass during the 1980s. The Court was slow to embrace significant doctrinal change, but its decisions began to recognize the problems inherent in Lemon. A series of decisions reinterpreted “advancement” under the effect prong to more closely approximate a requirement of substantive neutrality. Widmar v. Vincent held in 1981 that students at a public university could not be excluded from the benefit of equal access to a “public forum” on the basis of their religious identity satisfied by articulation of any non-sham “secular purpose”; moreover, a purpose that religion not be excluded was held permissible. Id. at 603-04, 604 n.8. The “effects” prong was held to permit the symbolic and financial effects of direct government grants to religious organizations to perform secular government functions related to matters of the religious organizations’ doctrine and mission, so long as the grant program did not prefer religious organizations. Id. at 604-15. The “entanglement” prong was held to permit government monitoring to enforce the terms of the grant condition which forbade use of the funds for religious purposes. Id. at 615-17 (distinguishing prior cases and noting the disapproval of the entanglement prong by an apparent majority of the Court). It seems highly doubtful that the Court that decided Lemon in 1971 would have applied its test in such a manner.

The reader should be apprised that I was co-counsel for intervenor-appellant United Families of America in the Kendrick case.

or the religious content of their speech. Indeed, the First Amendment Free Speech Clause required equal access and the "effects" prong of Lemon could not reasonably be interpreted to prohibit as improper advancement of religion that which the Free Speech Clause required as a matter of content-neutrality toward private expression that occurs on public property. In 1983, in Mueller v. Allen, the Court narrowly upheld the constitutionality of a Minnesota program providing tax deductions for private elementary or secondary school tuition. In 1986, in Witters v. Washington Department of Services for the Blind the Court reversed the Washington Supreme Court's exclusion of a blind man's eligibility for vocational rehabilitation benefits. The Washington court had based its contrary conclusion on the fact that Witters desired to use his benefits to attend a religious college. In 1988, in Bowen v. Kendrick, the Court upheld against Establishment Clause challenge the inclusion of religious institutions in a grant program in which private organizations would provide counseling encouraging sexual abstinence (along with other services) to pregnant teens. Kendrick involved use of government funds to subsidize actual instruction and counseling by religious organizations — almost a direct assault on Lemon's holding. In each of these decisions, the Court found that the statute did not have a primary effect of advancing religion under the Lemon test.

Kendrick was auspicious in another respect. The Kendrick decision was the first Establishment Clause case in which Justice Kennedy participated, and his vote to uphold the program was necessary to the Court's 5-4 judgment. Kennedy quickly revealed his dissatisfaction with the Lemon test. He wrote a doctrinally significant dissent in County of Allegheny v. ACLU in 1989 (for four justices), adopting a form of the coercion test. And, of course, Kennedy wrote the majority opinion in Weisman last Term, this

54. Id. at 276. As discussed infra at note 90, the Widmar case has great implications for freedom of religious expression in public secondary schools from official suppression predicated on Establishment Clause concerns.
57. Id. at 484-85.
59. Id. at 597 ("It is undisputed that a number of grantees or subgrantees were organizations with institutional ties to religious organizations."). For a further discussion of how Kendrick applied (and weakened) the Lemon test, see supra note 51.
time over the dissent of four justices who embraced the coercion test. Kennedy has thus proven to be a key “swing” vote on Establishment Clause doctrine (sometimes seeming to swing from side to side), including the meaning of “coercion.” He is, at least for now, the pivot around whom the Court’s Establishment Clause analysis turns.61

Since 1989, with Kennedy’s Allegheny dissent, a majority of justices have gone on record as being opposed to at least some critical aspect of the Lemon test. Justice White dissented in Lemon itself and never retreated from that opposition over the course of twenty years.62 Justice Rehnquist, prior to becoming Chief Justice, railed against the Lemon test in Wallace v. Jaffree in 1985, concluding that “[i]f 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.”63 Rehnquist argued in Jaffree for a historical test that would permit broader government involvement with religion so long as government did not prefer particular sects over others.64 The same Term, Justice

61. The justice that Kennedy replaced, Lewis Powell, was also the swing vote on Establishment Clause cases, but was wedded to Lemon. Powell almost certainly would have voted the other way in Kendrick, as evidenced by his votes in a pair of cases that reverted to the “old” baseline for applying the effects test: School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), and Aguilar v. Felton, 473 U.S. 402 (1985). In both of those cases (decided the same day), the Court by 5-4 majorities struck down government programs providing on-premises remedial or supplemental education services to students at public or private (including religious) schools. In Grand Rapids, the Court relied on the “effects” prong of Lemon. Grand Rapids, 473 U.S. at 397. In Aguilar, the Court relied instead on the third prong of Lemon, the “excessive entanglement” test. Aguilar, 473 U.S. at 409.

62. See, e.g., Roemer v. Board of Public Works, 426 U.S. 736, 768 (1976) (White, J., concurring in the judgment) (“I am no more reconciled now to Lemon I than I was when it was decided.”). Justice White has applied Lemon in some cases, but only where that application upholds a challenged statute. See, e.g., Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987) (“[W]e need not reexamine Lemon as applied in this context, for the exemption involved here is in no way questionable under the Lemon analysis.”).


64. Jaffree, 472 U.S. at 106. Rehnquist, like White, has subsequently employed the Lemon test where the result was to uphold the validity of a challenged program. But this acceptance seems purely tactical, not a repudiation of his Jaffree opinion. Rehnquist has also joined dissents advancing the “coercion” test, a position not congruent with his earlier expressed “nonpreferentialist” view, but which could be construed as consistent with it. Rehnquist thus appears anxious to scrap Lemon for any viable alternative formula more closely approximating the results that would be produced by his understanding of original meaning. He is not terribly picky about the exact doctrinal formulation.
O’Connor attacked the entanglement prong in strong terms in *Aguilar v. Felton*, but broke with Rehnquist’s historical test in *Jaffree* in favor of her own “message of endorsement” approach. Justice Scalia’s dissent in *Edwards v. Aguillard* in 1987 gruesomely lampooned the “purpose” prong and left the impression that that was not all he found bitter in *Lemon*. Justice Kennedy collected these criticisms and indicated his agreement in his 1989 dissent in *Allegheny*. With *Allegheny*, then, it became clear that *Lemon* was destined for the constitutional graveyard, though it was unclear what would replace it.

B. *Allegheny* and *Mergens*: The Disease Becomes Terminal

The final stage in *Lemon*’s decline was signaled by the Court’s divided Establishment Clause holdings in *Allegheny* and in *Board of Education v. Mergens*. In neither case could a majority be mustered in support of application of the *Lemon* test. *Allegheny* was a doctrinal tram wreck. The case involved challenges to the constitutionality of seasonal displays of a nativity scene (or “creche”) on a landing in a county courthouse and a menorah outside the city-county building in Pittsburgh. *Allegheny* produced five opinions, none commanding a majority in support of the disposition of the case. Three justices (Brennan, Marshall, and Stevens) found both displays unconstitutional. Four justices (Kennedy, Rehnquist, White, and Scalia) found both displays constitutional. Two justices (Blackmun and O’Connor) found the nativity scene an unconstitutional “endorsement” of Christianity but found the menorah not to endorse Judaism. This view — rejected in principle by seven justices — became the holding of the case: the two-justice, Blackmun-O’Connor position, added to the three-justice (Brennan) position, provided a five-justice majority to strike down the creche. The two-justice position, added to the four-justice (Ken-

---

66. Id. at 430. For discussion of O’Connor’s endorsement test, see infra notes 78-84 and accompanying text.
68. Id. at 636 (Scalia, J., dissenting) (pessimistic appraisal of Lemon’s doctrinal validity “is particularly applicable to the ‘purpose’ prong ”).
69. County of Allegheny v. ACLU, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part) (collecting criticisms and suggesting that “[s]ubstantial revision of our Establishment Clause doctrine may be in order”).
70. 496 U.S. 225 (1990).
71. Allegheny, 492 U.S. at 578.
nedy) position, provided a six-justice majority to uphold the menorah.

Justice Blackmun wrote the lead opinion, which commanded majority assent for only two propositions, one doctrinal point and one point of application. Part III.A of the opinion attempted to recite the applicable principles of the Court's Establishment Clause jurisprudence. Noting "the myriad, subtle ways in which Establishment Clause values can be eroded," the Court conceded that the test of constitutionality is "not susceptible to a single verbal formulation" and so proceeded to recount the Court's "attempt[s] to encapsulate the essential precepts of the Establishment Clause." After repeating the dictum of *Everson v. Board of Education,* the Court noted: "In *Lemon v. Kurtzman* the Court sought to refine these principles by focusing on three 'tests' for determining whether a government practice violates the Establishment Clause. This trilogy of tests has been applied regularly in the Court's later Establishment Clause cases." This passage is as important for what it does not say as for what it does. The Allegheny majority did not affirm *Lemon* as the appropriate test. It merely noted the historical fact that *Lemon* has been "applied regu-

---

72. *Id.* In Section V of the opinion, the majority also agreed to reject the coercion test advanced by Justice Kennedy in his dissent.


74. *Id.*

75. 330 U.S. 1 (1947). Justice Black's majority opinion attempted, in dictum (the Court upheld the challenged practice against an Establishment Clause attack), the first comprehensive statement of the meaning of the Establishment Clause:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief in any religion. 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. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

*Id.* at 15-16.

For a critique of Black's analysis, see Paulsen, *supra* note 3, at 317-26.

76. *Allegheny,* 492 U.S. at 592 (citation omitted).
larly” Lemon is only an example of the Court’s seeking to “refine” its analysis of the Establishment Clause. This downgrading of Lemon was continued in the succeeding paragraph, in which Lemon was itself refined:

Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of “endorsing” religion, a concern that has long had a place in our Establishment Clause jurisprudence.77

The Court did not return to Lemon. The test actually applied in Allegheny was not Lemon, but O’Connor’s purported refinement (developed over a series of cases): “endorsement.”78

The second narrow point of agreement in Allegheny was that this particular nativity scene (and the opinion is very fact-specific), appearing in a prominent position in the public courthouse, constitutes a forbidden “endorsement” of Christianity. The majority fractured, of course, on the application of the endorsement test to the menorah, producing an embarrassing discussion about how religious a menorah is, and whether its somewhat-less-religious-than-the-creche nature is further sanitized by being placed in the proximity of an even-less-religious Christmas tree (the Blackmun-O’Connor view)79 or whether the menorah casts a religious taint on the Christmas tree so that they are both illegal (the Brennan-Marshall-Stevens view).80

That a test requires difficult line-drawing is not alone reason to discard it. (As we shall see, the coercion test produces some hard cases.) But “message of endorsement” is all subjective line-drawing. The basic problem with the endorsement test is that it is no test at all, but merely a label for the judge’s largely subjective impressions. As Professor McConnell has noted, “[w]hether a particular governmental action appears to endorse or disapprove reli-

77. Id.
80. Id. at 654-55.
region depends on the presuppositions of the observer. Justice O'Connor has awkwardly attempted to remedy this obvious problem by postulating a neutral "objective observer." Moreover, this observer must be one "familiar with this Court's precedents." It is doubtful whether any of the justices have met such a person — if one exists — leaving the unmistakable impression that O'Connor is talking about herself. The standard has a distinct feeling of academic unreality. A reasonable person familiar with the Court's wildly erratic precedents in this area would have a most difficult time using them as the baseline for measuring "endorsement." The "objective observer" canard is merely a cloaking device, obscuring intuitive judgments made from the individual judge's own personal perspective. There is nothing "objective" (in the sense of some standard external to the judge's own intuitions) about the inquiry. And as Allegheny illustrates, those subjective judgments can differ enormously. The endorsement test does not resemble anything that could be called "law."

83. Accord McConnell, supra note 15, at 151 ("A finding of 'endorsement' serves only to mask reliance on untutored intuition.").
84. The "endorsement" test has an even more fundamental problem than its tendency to yield unpredictable and unprincipled results: It has no basis in the text, history, or structure of the Constitution — a fact that may explain the former problem. There is virtually no evidence to support the conclusion that the founding generation understood "establishment" to mean, in its essence, "endorsement" and fairly significant evidence to the contrary. The historical evidence best supports the view that the Establishment Clause forbids government coercion in matters of religious exercise. See infra note 115 and accompanying text. The endorsement standard simply cannot be squared with this evidence of original meaning.

Moreover, the endorsement standard, like Lemon, is contrary to the structure of the First Amendment in its implications that 1) government accommodation of religious exercise is an impermissible or suspect activity (a premise inconsistent with the Free Exercise Clause) and 2) religious ideas must be given a disfavored status in the realm of government discourse and public affairs (a premise inconsistent with the Free Speech Clause's principle of content-neutrality and with the Free Exercise Clause's principle forbidding discrimination against religion). An argument that assumes (or creates) a contradiction within the Constitution — indeed, within the space of a few words of a single amendment — bears a heavy burden of justification. "Endorsement" does not come close to satisfying that burden.

For additional arguments in opposition to the endorsement test, see Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 MICH. L. REV. 266 (1987).

In 1986, shortly after O'Connor announced her proposed new approach, I wrote that the "endorsement" test was limited in its usefulness to issues of religious symbology, but that it appeared "quite apt" for such cases. Paulsen, supra note 3, at 352. I now recant
While the Allegheny plurality split over endorsement, Justice Kennedy, speaking for himself and three other justices, proposed a different test:

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact establishes a state religion or religious faith, or tends to do so. These two principles, while distinct, are not unrelated, for 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.  

The Allegheny dissenters excoriated the four partially-overlapping, partially-contradictory opinions of Justices Blackmun, O'Connor, Brennan, and Stevens and mocked the foolish result of the case. But it was the announcement of a relatively mild form of the coercion test (containing Kennedy's "proselytizing" exception) that was the significant doctrinal development of Allegheny. This test stops short of the more aggressive view that government speech can never be coercive, and recognizes that coercion can be "subtle" and indirect. The specific result in Allegheny is inherently unstable — only two justices supported it at the time. The significance of Allegheny was the presence of four solid votes for a coercion test, and the majority's inability to agree on Lemon.

---

86. Id. at 661.
87. A case decided earlier the same Term as Allegheny featured much the same lineup. Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989). Texas Monthly considered whether a statutory scheme in which religious literature was accorded a preferential tax benefit violated the Establishment Clause. Justices Brennan, Marshall, and Stevens concluded that it did. Justices Blackmun and O'Connor were again in something of a middle position — concurring in the result but not the reasoning of the majority. Scalia (writing), Rehnquist, and Kennedy dissented. Justice White, the fourth member of the Allegheny "coercion" bloc, concurred in the judgment in Texas Monthly on Press Clause grounds. For reasons explained infra at note 211, I believe Texas Monthly was correctly decided, even under a
In *Board of Education v. Mergens*, \(^88\) decided the following Term, *Lemon* again failed to command a majority *Mergens* involved a challenge to the constitutionality of the “Equal Access Act,” \(^89\) which provides that public high schools that allow voluntary, extracurricular student group meetings on school premises during noninstructional time must accommodate student religious meetings on school premises on the same terms. Justice O'Connor's lead opinion, upholding the constitutionality of the Equal Access Act as applied to permit student Bible study and prayer groups to meet in public school classrooms, applied *Lemon* (with something of an “endorsement” gloss) without embracing it. *Mergens* was sufficiently easy, even under *Lemon*, that there was no occasion for a head-on challenge. \(^90\) Equal treatment certainly connotes no specific “endorsement” of religion, does not have the primary purpose or effect of advancing religion in any preferential manner, and creates less entanglement with religion than a rule requiring government surveillance of student speech to assure that no religious content creeps into the discussion. And equal treatment plainly involves no state coercion of religious activity.

Chief Justice Rehnquist and Justice White, both of whom had joined Kennedy's *Allegheny* opinion, joined with O'Connor and Blackmun in the plurality opinion on the Establishment Clause point. But Kennedy and Scalia would not even be seen to use *Lemon* as a convenience. Kennedy’s concurrence (which Scalia joined) reasserted the primacy of coercion, but again with sensitivity to the possibility of subtle governmental coercion:

> The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity This inquiry, of course, must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw. \(^91\)

---

90. The case is very nearly controlled by Widmar v. Vincent, 454 U.S. 263 (1981), which applied the *Lemon* test to uphold “equal access” religious meetings at public universities. While distinctions can be drawn between the college and high school context, those distinctions are readily addressed and refuted within the confines of the *Lemon* framework as applied in *Widmar*.
91. *Mergens*, 496 U.S. at 261-62 (Kennedy, J., concurring in part and concurring in
Again, the doctrinal significance of Mergens was the absence of a majority of the Court willing to apply Lemon even when it would make no difference to the outcome. Counting Rehnquist and White as remaining in the coercion camp (but willing to be less doctrinaire when nothing turns on it), the Kennedy Four from Allegheny remained solid for the coercion test.

Following the completion of the 1989-90 Term, Justice William Brennan retired and was replaced by David Souter. One of the most ardent separationists on the Court had been replaced with a more moderate appointee. Though Souter’s confirmation hearings indicated a conservatism of deference to precedent, the Lemon test had been badly impaired. In the Court’s three most recent Establishment Clause decisions, Texas Monthly,92 Allegheny,93 and Mergens,94 the Lemon test had failed to command a majority. In two of those cases, the Lemon test had not been applied at all. Going back to Bowen v. Kendrick95 in 1988, the Lemon test had been sapped of much of its tang.96 By the time the First Circuit ruled against commencement prayer in Weisman, Lemon had become overripe and mushy — apparently ready for the garbage disposal.

III. Lee v Weisman

Attorneys for the Providence school committee, and for the United States, elected to go after Lemon in the petition for certiorari in Lee v. Weisman, urging the Court to uphold commencement prayer and discard the Lemon test in favor of the coercion test urged by Justice Kennedy’s Allegheny dissent.97 The school
committee's merits brief made a startling concession almost from the outset: "[W]e cannot conscientiously argue that the lower courts' application of Lemon was unreasonable."98 Instead, the school committee argued, Lemon was unreasonable.

From the standpoint of advocacy, this was probably a tactical mistake. Coercion was the right test, but Weisman was (from an advocate's standpoint) the wrong case to push for its adoption. If applied, as Kennedy had urged, "with sensitivity to the special circumstances that exist in a secondary school,"99 the coercion principle would invalidate the practice of commencement prayer. And if applied without such sensitivity, the upshot of the coercion principle is to require the overruling of the school prayer cases and, indeed, to permit government religious propagandizing in schools essentially without limitation — a step the justices could not reasonably be expected to take. The school committee probably would have been better off with Lemon.100

99. Mergens, 496 U.S. at 261 (Kennedy, J., concurring in part and concurring in the judgment).
100. I believe the Court reached the correct result in Lee v. Weisman. Ironically, however, the stronger argument for upholding the prayer might have been for counsel to work within the increasingly-malleable Lemon framework, knowing that several of the justices would be willing to go considerably further. The argument would go something like this: The purposes of the commencement invocation and benediction are not exclusively "religious", but serve legitimate secular purposes of solemnizing the occasion, and signaling the formal beginning and conclusion of a public ceremony. It is not the primary effect of the prayer to advance religion, but to serve these purposes. The prayer's brevity, relatively inoffensive content, and de facto secularism negate any inference that this prayer is designed to promote religion. Moreover, no one is compelled to participate. Nonparticipants need only maintain respectful silence — which serves the same secular purpose of solemnization. Finally, the government has minimized entanglement by not engaging in prayer itself, but by inviting a guest from the community (chosen on a rotating basis) to give the invocation and benediction. The "guidelines" given to the clergy are further attempts to minimize entanglement by avoiding the spectre of direct government control over the content of the invocation. The result urged by this reasoning would find support in numerous lower court decisions. See, e.g., Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974) (holding that the proposed invocation and benediction did not establish religion because they were brief, transient, and subsumed in a primarily secular graduation ceremony); Wood v. Mt. Lebanon Township Sch. Dist., 342 F. Supp. 1293 (W.D. Pa. 1972) (finding no Establishment or Free Exercise Clause violation where noncompulsory invocation and benediction were completely separate from all formal requirements for graduation); West v. Mt. Lebanon Sch. Dist., 320 A.2d 362 (Pa. 1974), cert. denied, 419 U.S. 967 (1974) (finding no Establishment Clause violation where noncompulsory invocation and benediction were completely separate from all formal requirements for graduation); cf. Kay v. David Douglas Sch. Dist., 738 P.2d 1389 (Or. 1987), cert. denied, 484 U.S. 1032 (1988) (finding constitutional challenge to commencement prayer nonjusticiable where
As it turned out, the Court buried both Lemon and commencement prayer. My argument in this section is that the Court was correct on both scores: the coercion principle is indeed the appropriate standard for judging establishment clause challenges; and the invalidation of government-sponsored prayer at public school promotion and graduation ceremonies is a proper application of that principle. Yet Justice Scalia's dissenting attack on Justice Kennedy's majority opinion is not altogether unfounded. There is language in Kennedy’s majority opinion that is greatly disturbing in its confusion of private and state action in considering what should count as unconstitutional coercion. And that confusion of private and state action is a point worth arguing about.

A. The Death of Lemon

It is Justice Scalia’s dissent (joined by Chief Justice Rehnquist, and Justices White and Thomas), not the majority opinion, that declares Lemon dead. Wrote Scalia: “The Court today demonstrates the irrelevance of Lemon by essentially ignoring it and the interment of that case may be the one happy byproduct of the Court’s otherwise lamentable decision.”101 One should always be wary of such declarations of doctrinal death in dissents.102 Here,
however, Justice Scalia was right. In *Weisman*, as in *Allegheny*, *Texas Monthly*, and *Mergens* in the years before, it is plain that *Lemon* no longer commands majority support. In fact, a close reading of the opinions in the case reveals that none of the justices is prepared to defend *Lemon*. It is fair to read *Weisman* as having quietly discarded the test. Early on, Kennedy’s majority opinion notes that “[t]his case does not require us to revisit the difficult questions dividing us in recent cases” concerning “the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens.”

Technically, this sentence is noncommittal. But in bridging the chasm, the *Weisman* opinion gives equal credence to both sides. *Lemon*, either in its unadulterated or its “message of endorsement” form, is not given any preferred status. Kennedy cites *Allegheny* as one such example, implying an equally authoritative (or non-authoritative) status for the prevailing and dissenting views. Kennedy then proceeds to apply the approach of the *Allegheny* dissent — coercion — as a sufficient constitutional test, at least for purposes of deciding *Weisman*. He writes, “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government 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.’”

This formulation is virtually identical to the one Kennedy set forth in *Allegheny*. In the next sentence of *Weisman*, Kennedy states chologal coercion” into “*the very linchpin of the Court’s opinion.*” *Id.* at 2681; see infra notes 131-32 and accompanying text. Scalia’s dissent is also likely disingenuous in its suggestion that all that is needed to comply with the Court’s opinion is to include a written disclaimer in the graduation program informing attendees that they need not participate in the prayer. *Id.* at 2685.

A particularly egregious example of a dissent trying to engage in rhetorical “spin” of the majority opinion is Chief Justice Rehnquist’s dissent in Planned Parenthood v. Casey, 112 S. Ct. 2791, 2855 (1992) (Rehnquist, C.J., dissenting), in which the Court reaffirmed in essential part the holding of Roe v. Wade, 410 U.S. 113 (1973), creating a right to abortion. In practical operation, there are only slight differences between the “strict scrutiny” of abortion regulations in *Roe* and the “undue burden” test of *Casey*. The Court in *Casey* made clear that it would strike down procedural obstacles that meaningfully restrict access to abortion. Rehnquist, however, asserted in dissent that *Casey* retains “the outer shell” of *Roe* but “beats a wholesale retreat from the substance of that case.” *Casey*, 112 S. Ct. at 2855. The reality is that *Casey* maintains the substance of *Roe* and makes slight alterations in the outer shell.

103. See supra notes 92-96 and accompanying text.


105. *Id.* (emphasis added) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

that this test is sufficient to decide Weisman (adversely to the school district). In the course of doing so, Kennedy upgrades the "at a minimum" statement of consensus to the status of the "central principle" of the Establishment Clause: "The State's involvement in the school prayers challenged today violates these central principles."¹⁰⁷

It is probable, given these artful formulations, that Justice Kennedy continues to believe that his Allegheny formulation is the correct one — not only a doctrinal minimum but a maximum as well — and will adhere to it in future cases. Justice Scalia's protestations to the contrary notwithstanding, there is little if anything in Kennedy's Weisman opinion that contradicts his Allegheny position or even hints at a change of mind on this issue.¹⁰⁸ Had Kennedy wished to preserve the opportunity to return to Lemon, or even to embrace Justice O'Connor's "endorsement" test, his majority opinion could well have been written that way. In Allegheny, he advanced the coercion test as part of discussion of the "effects" prong of Lemon, noting his willingness "for present purposes to remain within the Lemon framework" so long as he not "be seen as advocating, let alone adopting, that test as our primary guide in this difficult area."¹⁰⁹

¹⁰⁷. Weisman, 112 S. Ct. at 2655.

¹⁰⁸. At least this is true on the doctrinal point. Scalia charges Kennedy with inconsistency in invalidating commencement prayer when Kennedy's Allegheny opinion had argued that "'[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.'" Weisman, 112 S. Ct. at 2678 (Scalia, J., dissenting) (quoting Allegheny, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part)). I discuss this argument concerning history and tradition below. See infra notes 156-68 and accompanying text.

¹⁰⁹. Allegheny, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).
But *Lemon* is nowhere to be found as an operative test in *Weisman*. As noted above, one can see an escalation from *Allegheny* to *Mergens* in Kennedy's hostility toward *Lemon*. In *Mergens* he refused to join an opinion *upholding* a program against Establishment Clause challenge because it relied on *Lemon*. One can surmise that had the other justices in the *Weisman* majority insisted on applying *Lemon*, or the "endorsement" test (which, as we will see, seems to have been their preference), Kennedy would have written separately to strike down the prayer on different grounds (i.e., "coercion"), depriving the Court of a majority opinion.

Instead, the Court papered over those differences. That the paper is transparently thin is evidenced by the two concurrences, collectively joined by every justice in the majority — except Kennedy The concurrences advance positions going well beyond coercion in terms of what government action they would invalidate. Justice Blackmun (joined by Justices Stevens and O'Connor) set forth the principle as follows: "Government may neither *promote* nor *affiliate itself with* any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution." That principle sweeps more broadly than does non-coercion. Thus, Blackmun wrote, "[a]lthough our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient." Justice Souter (also joined by Stevens and O'Connor) also specifically rejected coercion as a limiting principle, remarking that

we could not adopt that reading without abandoning our settled law, a course that the text of the [Establishment] Clause would not readily permit. Nor does the extratextual evidence of original meaning stand so unequivocally at odds with the textual premise inherent in existing precedent that we should fundamentally reconsider our course.113

110. See infra notes 111-13 and accompanying text.
112. *Id.* at 2664 (Blackmun, J. concurring) ("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.").
113. *Id.* at 2671 (Souter, J., concurring). The historical and textual arguments for and against the coercion test are addressed below. See infra notes 115, 171.
The *only* thing that the *Weisman* majority agreed on was that the Establishment Clause prohibits *at least* government coercion to engage in religious exercise and that the challenged commencement prayer violates this principle. Kennedy, the author of the majority opinion, apparently stands alone (within that majority) in thinking that coercion is *all* that the Establishment Clause prohibits.

But the four dissenters in *Weisman* joined Kennedy in agreeing that the proper inquiry is coercion. It is clear, then, that the real *doctrinal* majority consists of Justice Kennedy and the four *Weisman* dissenters. The emergence of this new doctrinal majority is the big news of the case. If Kennedy indeed remains in the "coercion" camp, then it may be further concluded that *Weisman* has not only interred the *Lemon* test, but has replaced it with some form of coercion test.

**B. The Meaning of Coercion**

But if *Weisman* stands for the adoption of coercion as the governing standard in Establishment Clause adjudication, what exactly is meant by "coercion" and is this standard a sound interpretation of the clause? The question is a difficult one because of the split in the doctrinal majority as to how the new principle should be applied in the unique setting of religious exercises in the schools. Descriptively, the short answer is that Justice Kennedy’s position defines the present parameters of the coercion test, both in its formulation and in its application. As a matter of normative legal analysis, both Justice Kennedy’s opinion and Justice Scalia’s dissent contain serious problems: Kennedy’s opinion in its apparent conflation of private and state action constituting coercion and Scalia’s dissent in its erroneous application of the coercion principle. Can a new legal standard survive long where four justices emphatically oppose it and where the majority in support of it disagrees so sharply within itself as to the scope and application of that standard and where each sub-camp’s position is so weak?

Despite these problems, I believe the coercion approach is theoretically and historically sound. The *Weisman* Court’s various understandings of coercion, while each flawed in important respects, are perhaps not so irreconcilable with one another and with first principles of constitutional text, history, and structure as they might initially appear.

The first paragraph of section II of the Court’s opinion in *Weisman* defines and delimits the scope of the Court’s holding:
These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.\footnote{If the Court had stopped at this point there would have been little warrant for the dissent’s howling. Whatever else the coercion test might mean, if it is true to its historical justification,\footnote{It is a slight exaggeration to say that “[t]he contemporaneous evidence is all on one side,” id. at 136, the historical evidence overwhelmingly supports the coercion test. Professor Douglas Laycock of the University of Texas has made a valiant argument for the no-endorsement position in an important amicus brief filed in \textit{Weisman} on behalf of a large number of religious and secular amici favoring a strict separationist view of the Establishment Clause. Brief Amici Curiae of the American Jewish Congress, et al., \textit{Lee v. Weisman}, 112 S. Ct. 2649 (1992) (No. 90-1014) [hereinafter \textit{AJC Brief}]. Those arguments are repeated and expanded somewhat in Douglas Laycock, "Noncoercive" Support for Religion: Another False Claim about the Establishment Clause, 26 \textit{Val. U. L. Rev.} 37 (1991). Professor Laycock relies exclusively on the historical experiences of Virginia and South Carolina to support his contention that the original meaning of the Establishment Clause included the “principle that government may not aid or support religion, even by bare endorsements in toothless laws.” \textit{AJC Brief}, supra at 20. One may question the reliance on the experience of just two states, both from the south, as defining the meaning of “establishment” as understood by the continent. See Paulsen, supra note 3, at 318-20. But even acceding to Laycock’s selective use of state examples, the historical evidence on which he relies does not support his conclusion that government endorsement of religion is sufficient to constitute an “establishment.” Instead, it confirms the view that the essence of establishment is government compulsion \textit{in some form} to engage in religious practice.} if it is true to its historical justification,\footnote{If the Court had stopped at this point there would have been little warrant for the dissent’s howling. Whatever else the coercion test might mean, if it is true to its historical justification,} it
must prohibit any form of official compulsion to attend a religious worship service. Admittedly, the historical evidence is fairly clear

establishment consisted of a “bare endorsement” of the Episcopal (Anglican) Church. As Laycock recognizes, even during the period in which the establishment was made most mild, only Episcopal clergy could perform legally recognized marriage ceremonies. AJC Brief, supra at 12. Non-Anglicans could not lawfully be married (except by Anglican clergy) until 1780. This is a significant civil disability. Another significant coercive feature remained part of the law until 1784: the licensing of clergy. Id. at 11-12. The Episcopal Church also had the benefit of incorporation, to which other religious associations were not entitled as a matter of law. Id. at 12-15. To his credit, Laycock notes this contrary evidence. But he appears not to take it seriously as evidence that the Virginia establishment always retained an element of coercive authority and that non-Episcopal churches and believers were penalized by law in various important respects. Laycock certainly does not give this evidence its appropriate weight. Moreover, while many of the coercive features of the Anglican establishment had lain dormant for years after the revolution, it was the attempt to reassert those coercive features in 1784 — notably compulsory religious taxation — that prompted the disestablishment controversy. CURRY, supra at 134-51. It was the coercive features of that reassertion of authority that spurred the objections to “establishment” that constitute the Virginia experience of Madison and Jefferson. Id. at 147.

Of the South Carolina experience, Laycock notes that “[t]he one coercive element was that only established churches could obtain a corporate charter,” AJC Brief, supra at 15, but attempts to downplay it: “If non-established churches had been allowed to incorporate, and if free exercise had been extended beyond monotheists to include absolutely everybody, but the rest of Article 38 [of the South Carolina Constitution of 1778] had been retained, Protestantism would still have been the established religion of South Carolina.” Id. at 15-16. Laycock cites no authority for this proposition and his string of “ifs” leads to a most dubious conclusion indeed — that if all the coercive elements of establishment were deleted, it would still be an establishment. With all due respect, that is a little like saying that if all the walls of a house were removed, it would still be a house. One might still call it that, but the claim (like the “house”) would have little support. It seems far more probable that South Carolina’s constitutional provision served the purpose of authorizing further action by the legislature — that it provided the authority for the legislature to enact more coercive measures to implement establishment that never came to pass. This would appear consistent with the pattern in other southern states at the time, notably Georgia and Maryland. See generally CURRY, supra at 152-58; Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409, 1436 (1990) [hereinafter Origins].

In short, Laycock’s own evidence (and it seems to me the best historical argument to date against the “coercion” position) itself shows that at no time did the people of any state regard an arrangement that involved no element of compulsion or inducement to religious exercise or fidelity, or at least authority to enact such coercive measures, as an “establishment” of religion. These were not “bare endorsements.” They were endorsements plus the grant of an exclusive franchise to perform legally recognized marriages, or they were endorsements plus the exclusive right of obtaining a corporate charter. All Laycock’s evidence proves is that legal compulsion can take many forms — not just compulsory tithes and compulsory church attendance — including the direct or indirect imposition of a nonmonetary civil or social penalty for declining to participate in the established worship. It is this broad understanding of legal coercion that I believe ultimately supports the result in Lee v. Weisman. See infra notes 117-26 and accompanying text. See also supra note 100.
that the giving of public prayers on public occasions as a ceremonial-religious way of solemnizing the event, or the beginning of the day's activities, was not regarded as establishment of religion.\footnote{116} At the same time, however, the evidence is also clear that compelled attendance at a religious worship service was regarded as one of the defining characteristics (and most hated features) of religious establishments.\footnote{117} Justice Scalia thus gives up half the game when his dissent acknowledges as a feature of historical establishments that "attendance at the state church was required."\footnote{118}

The other half of the game is recognition that government induced attendance at a prayer ceremony violates this historical principle. Though the compulsion in \textit{Weisman} is in the form of a condition attached to a public benefit (the right to attend one's own or one's child's public school graduation) and the religious worship service is practically \textit{de minimis} in duration and content (two brief, theologically sterile prayers, opening and closing the ceremony),\footnote{119} \textit{Weisman} is little different in principle from laws requiring compulsory church attendance.

It must be conceded that \textit{Weisman} is a reasonably close case on its facts, standing at the intersection of the historical evidence. The coercion is fairly mild when compared to the historical practices against which the Establishment Clause was directed. The result of the government pressure is attendance at a one-time event
— a public ceremonial occasion (albeit different from the circumstances where, historically, prayers were sanctioned). A miniature worship service takes place at the event, though it is one lacking serious theological content. It is tempting to scoff at the analogy to compulsory church attendance laws.

On balance, however, Weisman is rightly decided. None of these mitigating factors distinguishes compulsory church attendance in principle. The brevity of the religious element does not distinguish it. Surely, the state could not compel attendance at a ten-minute Mass or a five-minute sermon. The Regents Prayer struck down in Engel was short. The theological vacuity of the prayer also does not alter the principle involved. The prayer in Engel was theological slush, too. If compelled attendance is sufficient to constitute establishment, it does not matter whether one is offended by the prayers or not. An established "civil religion" is still an established religion. Nor does the one-time nature of the event help in principle. It would be no less a violation of the Establishment Clause if one were forced to attend church only once. True, a person's beliefs are less likely to be overcome by a one-time prayer than by systematic inculcation or daily recitation. But on the other hand, the "special" character of the graduation event arguably heightens the impact of the religious aspect of the program. All of these factors in supposed mitigation tend to distract from principled analysis; they are not points of genuine distinction.

The real issue — and the chief bone of contention between

---

120. The prayer adopted by the State Board of Regents for daily recitation in classrooms was as follows: "'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.'" Engel v. Vitale, 370 U.S. 421, 422 (1962).

121. Moreover, the ostensibly "non-sectarian" content can cut in a number of directions. It probably makes the content of the worship — at which one's attendance is nonetheless compelled — less intensely offensive to any particular religious minority, but it does so at the probable cost of heightening the offense for those who nonetheless remain excluded: "This prayer is so generic and inoffensive that only atheist and fundamentalist kooks can complain, and we don't care about them." Compelled attendance at a Unitarian or Jeffersonian religious exercise is no less sectarian, in its own way, than compelled attendance at a distinctively Roman Catholic or evangelical protestant prayer. Even some of the supposedly nonsectarian petitions can give offense along religious lines. (I take exception to Rabbi Guttenman’s prayer of thanks for our “court system where all may seek justice.” Weisman, 112 S. Ct. at 2652. In light of certain recent Supreme Court decisions (not including Weisman), my prayer would not be one of thanks for justice but of supplication for judicial repentance from wickedness. See generally Michael S. Paulsen, Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused, 7 J. LAW & RELIGION 33 (1989).)
Kennedy and the dissenters — is whether commencement prayer involves actual compulsion. Unfortunately, neither the majority nor the dissent is very clear as to whether the object of forbidden compulsion is participation in prayer or mere attendance during the prayer. Both opinions address both issues, but the problem of compelled attendance at the prayer is treated as something of a way-station on the route to the question of compelled participation. This is where the analyses of both opinions falter.

A sufficient inquiry, as indicated above, is whether government has coerced attendance at a religious ceremony. And it is fair to say that such coercion was present in *Weisman*. One may accept Justice Scalia’s definition of coercion as limited to governmental acts backed by force or threat of penalty and yet conclude (with the majority) that a high school student’s attendance at commencement is “in a fair and real sense obligatory.” As Justice Kennedy wrote for the majority:

> [T]o 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. A school rule which excuses attendance is beside the point. 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.

122. The first paragraph of the majority’s substantive analysis states that students’ “attendance and participation” are “in a fair and real sense obligatory.” *Weisman* 112 S. Ct. at 2655 (emphasis added). The majority later characterizes the injury caused by the government’s action as “required participation in a religious exercise.” *Id.* at 2659. Noting the parties’ stipulation that attendance at graduation ceremonies is voluntary, the Court then considered whether “the option of not attending the graduation excuses any inducement or coercion in the ceremony itself.” *Id.*

The dissent also intertwines the two: “Beyond the fact, stipulated to by the parties, that attendance at graduation is voluntary, there is nothing in the record to indicate that failure of attending students to take part in the invocation or benediction was subject to any penalty or discipline.” *Id.* at 2684 (Scalia, J., dissenting) (emphasis added).

123. *Id.* at 2683 (Scalia, J., dissenting).

124. *Id.* at 2655.

125. *Id.* at 2659.
Kennedy may be waxing a tad too eloquent about high school students' fond attachment to graduation ceremonies. But assuming that attendance at this social rite of passage is an important benefit for some students (or, more likely, their parents), conditioning that benefit on attendance at the school's theologically debased worship ceremony is a form of compulsion. In a legal world with a meaningful doctrine of unconstitutional conditions, a government benefit to which one is otherwise entitled (here, the meaningful benefit to Deborah Weisman of attending her public school graduation) may not be conditioned on forfeiture of a constitutional right (here, the right not to be forced to attend a religious worship service). To the extent that graduation attendance and attendance at the prayers are "tied goods," a student (and her parents) are compelled to accept the latter as the price of the former. The majority correctly understood this: "It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." 126

126. Id. at 2660. See also supra note 115 (noting historical fact that civil benefit of legal marriage was conditioned on church membership in Virginia). The unconstitutional conditions doctrine is also the rule in Free Exercise cases. Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."). There appears no practical way to unbundle the package of "tied goods" in Weisman. It is probably easier for a student to absent herself from classroom opening exercises that include school prayer than from a small portion of a graduation ceremony, which likely would involve getting out of a long row of seats, dashing down the stadium or auditorium steps and into a hall, and precisely timing her conspicuous re-entrance. (Similar problems may attend the practice of judges giving prayers at the beginning of their courtroom sessions, for those who are required to be in court on the day in question, even if the judge allows persons to leave the room briefly. Cf., e.g., North Carolina Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145 (4th Cir. 1991) (finding Establishment Clause violation where state court judge began courtroom sessions with prayer), cert. denied, 112 S. Ct. 3027 (1992).) Professor Lupu, in his insightful and colorful comment on this article, defies me to distinguish public display of religious symbols (such as nativity scenes on public property at Christmas time) from my approach to Lee v. Weisman. Ira C. Lupu, Which Old Witch: A Comment on Professor Paulsen's Lemon is Dead, 43 CASE W. RES. L. REV. 883, 891-93 (1993). Lupu's contention that seeing a creche on the landing of a courthouse steps or in a public square is no less compelled "attendance" at a "religious worship service" strains those concepts beyond recognition. Lupu raises and rejects several possible distinctions, most of which are straw men. I rely on the one where his rebuttal is weakest: In my view, government speech is, as a general proposition, not coercive. The exceptions exist where an audience is captive in the sense that attendees are not able effectively to absent themselves from the unwanted message without incurring substantial costs (including noneconomic costs). The display of religious symbols is an instance of government speech. So long as individuals are free to walk away (or on past), turn their backs,
If the majority’s analysis had rested on the coerced attendance point alone, it would have been fine. But the majority went on to suggest that the forbidden coercion is compelled participation in the prayers. In other words, the fact that attendance was (as a practical matter) obligatory merely served to refute the school district’s defense that no one is forced to participate in the prayer because no one is required to show up in the first place. The majority felt that it still needed to show coercion to pray (or signal one’s acquiescence in the prayer), not just to attend. It is the majority’s clumsy and seemingly desperate attempt to demonstrate coerced participation in prayer that leads it way out of bounds: the majority said that non-governmental social pressure occurring in a government-provided forum could constitute coercion forbidden by the establishment clause.

The majority noted the heightened “risk of indirect coercion” in

avert their eyes or otherwise remove themselves from such symbolic speech, they are not coerced to “attend” the creche. This plainly distinguishes most instances of government religious speech through display of symbols from effectively compelled attendance at prayer ceremonies. Lupu asserts that this does not distinguish Weisman because “Deborah Weisman could have averted her eyes and plugged her ears.” Id. at 892. Lupu’s argument here has a sense of unreality to it. While Deborah Weisman could certainly have averted her eyes (indeed, many who willingly engaged in prayer no doubt closed their eyes), it is not quite so easy to plug one’s ears on short notice. Lupu’s suggestion conjures up an image of a three-year-old covering his ears and chattering loudly “I’m not listening to you! I’m not listening to you!” — hardly an unobtrusive or dignified gesture — as the equivalent of averting one’s eyes from a religious symbol. There is a big (and obvious) difference between the two. One can avert one’s eyes, and thus avoid the coercion of “captivity”, far easier from symbolic speech than from oral speech one is functionally required to attend.

Professor Myers’ challenge is more difficult: Is recitation of the Pledge of Allegiance (containing the words “under God”) a religious worship service, such that its inclusion at a public school graduation violates the Establishment Clause? Richard S. Myers, A Comment on the Death of Lemon, 43 CASE W. RES. L. REV. 903 (1993). See also Weisman, 112 S. Ct. at 2682 (Scalia, J., dissenting). Unlike religious symbols cases, the audience remains captive. But it is important to consider the religious element within the context of a fundamentally secular, political creed. Compelled or induced attendance at recitation of a secular creed may be as offensive to some as compelled attendance at a prayer. But assuming arguendo that the First Amendment does not prohibit forced attendance at such secular/political recitations, the inclusion of the two words “under God” do not themselves seem sufficient to transform a secular pledge into religious worship in the same sense that prayer is unquestionably religious. Professor Myers does not fundamentally disagree with my premise — that compelled attendance at a religious observance or exercise violates the Establishment Clause — but would simply permit a much larger “de minimus” or “context” exception, one that apparently would permit classroom prayer in public schools as part of daily opening exercises. So broad an exception threatens to swallow the rule. I find the distinction between the words “under God” in the Pledge of Allegiance and the act of praying to God, while not entirely satisfying, more persuasive and reasonable.
the public school setting and asserted as an "undeniable fact . . . that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction." "This pressure," the Court continued, "though subtle and indirect, can be as real as any overt compulsion." The majority also noted 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." Finally, the Court concluded that "government may no more use social pressure to enforce orthodoxy than it may use more direct means."

It was this discussion that provoked Justice Scalia's acerbic pen. Scalia berated the majority as having taken a "psycho-journey" into amateur psychology in order to come up with a test of "ersatz, 'peer-pressure' psycho-coercion" that treated standing up (or even remaining seated) as an act of compelled participation in the invocation and benediction.

In fairness to the majority, it is not crystal clear that the Court engaged in quite the "psycho-journey" of which they were accused. But if Scalia exaggerates, it is not by much. The quoted passages from the majority opinion are disturbing in their seeming equation of private action occurring in a state-created forum with state action. It is not clear whether the Court's holding is dependent on these remarks concerning social and psychological pressure or whether these are just-for-good-measure observations. Moreover, the Court's meaning is opaque: "public pressure" could mean government pressure (in which case the term is unexceptionable) or it could mean social pressure from private actors that occurs at a state-sponsored "public" event. The context of these passages, discussing both state action ("the school district's supervision and control of a high school graduation ceremony") and psychological pressure resulting from "social conventions" and

127. Wesman, 112 S. Ct. at 2658.
128. Id. (emphasis added).
129. Id.
130. Id. at 2659.
131. Id.
132. Id. at 2684, 2683, 2682 (Scalia, J., dissenting).
133. Id. at 2658.
“social pressure” admits of either reading. The Court seems to glide back and forth easily between private social pressure and a dissenter’s “reasonable perception that she is being forced by the State to pray”.

The proposition that government may not “use social pressure to enforce orthodoxy” is also ambiguous. “Use” implies a deliberate government strategy of deputizing private parties to exert pressure on behalf of the state. If that is what is meant — and this appears to be the better reading of a confusing passage — then the Court is correct in saying that government may not “use social pressure [i.e., employ and deploy pseudo-private actors] to enforce orthodoxy.” But if the Court means that private social pressure may be imputed to the government as unconstitutional coercion whenever it takes place in a state-created or otherwise public forum, then the Court has promulgated a dangerous and destructive dictum hostile to First Amendment values.

Social pressure can consist entirely of pure speech — the constitutionally protected expression of opinion. The social pressure to conform may come in the form of words — “hey, why aren’t you praying, heathen?” — or it may come in the form of symbolic speech such as disapproving or perplexed glances communicating essentially the same message. In either event, what the Court refers to as social pressure or peer pressure is expression protected under the First Amendment (assuming the listener has not been compelled by government to attend).

If private expression that occurs in a state-created forum constitutes state action for Establishment Clause purposes, then all of the Court’s cases protecting religious speech in public fora (on the same basis as speech of any other content) would be wrongly decided: Student religious expression could not be tolerated on public university or public high school campuses, even within fora for student expression generally, because the private speech would be attributable to the government by virtue of its creation of the forum for expression. Religious organizations could not hold

134. Id. at 2658 (emphasis added).
135. Id. at 2659.
136. Id. Compare Anderson v. Martin, 375 U.S. 399 (1964). In Anderson, Louisiana’s compulsory designation of a candidate’s race on the ballot was held to violate the Fourteenth Amendment. The result seems clearly correct, if it can fairly be inferred from the social context that the point of singling out race as the one — and only — identifying characteristic of candidates to be placed on the ballot by the state is to actively enlist private citizens to engage in racial discrimination.
religious meetings in public parks,\textsuperscript{138} or pass out tracts on public streets,\textsuperscript{139} or in airports,\textsuperscript{140} for such private religious speech — and the "coercive" effect of such evangelism\textsuperscript{141} — would be imputed to the government by virtue of its maintenance of such fora. Religious groups could not rent public facilities for their meetings or programs (on the same basis as other groups) because their speech would be transformed into state action violative of the Establishment Clause by virtue of the state furnishing (on a nondiscriminatory basis) a venue.\textsuperscript{142}

The idea that such obviously private speech could violate the Establishment Clause may strike the reader as fanciful. Yet the Establishment Clause was explicitly raised as a defense to government exclusion of private religious speech from such public fora in a great many of these cases — including as recently as 1990. Fortunately, this defense has been rejected by the Supreme Court every time it has been presented.\textsuperscript{143}


\textsuperscript{139} Contra Heffron v. ISKCON, 452 U.S. 640 (1981) (finding religious solicitation at state fair to be protected by the First Amendment); Martin v. City of Struthers, 319 U.S. 141 (1943) (door-to-door distribution of handbills advertising religious meeting); Jamson v. Texas, 318 U.S. 413 (1943) (distribution of handbills advancing religious message and promoting upcoming religious gathering in city park); Lovell v. City of Griffin, 303 U.S. 444 (1938) (distribution of religious literature).


\textsuperscript{141} For an example of religious speech on public property that involved highly "coercive," offensive speech, see, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940) (overturning conviction for playing anti-Catholic phonograph recording in public sidewalk encounters).

\textsuperscript{142} Contra Grace Bible Fellowship v. Mame Sch. Admin. Dist., 941 F.2d 45 (1st Cir. 1991); Greigore v. Centennial, 907 F.2d 1366 (3rd Cir. 1990), cert. denied, 498 U.S. 899 (1990); Concerned Women for America, Inc. v. Lafayette Cty., 883 F.2d 32 (5th Cir. 1989). The Second Circuit has recently adopted the view ridiculed in the text, but the Supreme Court has granted certiorari and will almost certainly reverse. Lamb's Chapel v. Center Moriches Free Sch., 959 F.2d 381 (2d Cir.), cert. granted, 113 S. Ct. 51 (1992) (approving school district argument that Establishment Clause precluded allowing church group to meet on school property).

\textsuperscript{143} Board of Educ. v. Mergens, 496 U.S. 226, 233 (1990); Widmar v. Vincent, 454
The threat to First Amendment values is not limited to religious speech. *Weisman*’s “social coercion” dictum would treat all speech in a public forum as state action. Under the theory of *Weisman*, such speech would not produce a constitutional violation unless it pressured others to participate in religious practices. Nonetheless, the social-pressure-equals-state-action reasoning might afford a pretext for regulation of speech content that occurs on government property, on the premise that such speech is, in effect, government speech. The messages of Cohen’s jacket, Johnson’s burning of the flag, and the musical “Hair” could be excluded from public property or facilities, in order to prevent the mistaken impression of government endorsement of its content or, for that matter, to protect others from offense.

*Weisman* is, of course, distinguishable from this parade of horribles, and it is doubtful that the Court intended such implications. Nonetheless, the “social coercion” idea of *Weisman* stands as an incoherent and dangerous dictum of uncertain consequence for the future. Justice Scalia was right to attack it, and the Court would be wise to discard it as unnecessary to the outcome in *Weisman* and as having a great potential for misunderstanding and error.

There is at least some reason to be concerned, however, that the Court will take the social coercion notion seriously. That reason is the Court’s decision the previous Term in *Edmonson v. Leesville Concrete Co.*, in which the Court — in an opinion


146. Southeastern Promotions v. Conrad, 420 U.S. 546 (1975) (invalidating as prior restraint the denial of right to use municipal theatre to show the rock musical “Hair”).

147. Regrettably, the Supreme Court has accepted this reasoning in at least one case: Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986). In *Fraser*, the Court upheld the power of school officials to discipline a student for making a class officer nominating speech loaded with sexual double entendres at a school assembly. I believe *Fraser* wrongly assumes that state officials may censor private expression that occurs in a state-created forum for expression. *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), can be read as reflecting a view similar to *Fraser*.

also written by Justice Kennedy — hugely expanded the concept of “state action” in order to embrace the actions of private attorneys exercising peremptory challenges (allegedly on the basis of race) in jury selection proceedings. Edmonson found such action attributable to the state by virtue of legislative authorization and judicial administration of the system of peremptory challenges generally. In Edmonson (unlike previous cases) no state actor had engaged in the alleged unlawful behavior of exercising peremptory challenges on racial grounds. The sole involvement of the state was the creation of a system — a forum — in which private lawyers had allegedly removed jurors because of race. As Justice O'Connor aptly observed in dissent (joined by Rehnquist and Scalia), the Court's finding of state action in a private litigant's exercise of a peremptory challenge "is based on little more than that the challenge occurs in the course of a trial." But, O'Connor argued, "[n]ot everything that happens in a courtroom is state action." She analogized the government action to providing "a stage on which private parties may act." A trial is "a forum" through which private parties resolve disputes. "The government erects the platform; it does not thereby become responsible for all that occurs upon it."  

Edmonson and Weisman are doctrinal kissing cousins. They commit the same error of confusing private action made possible by some government policy with the actions of government itself. Government does not itself engage in racial discrimination by providing a system of jury selection that permits private parties to employ peremptory challenges. Government does not engage in coercion of religious exercise wherever government action creates a forum or situation in which private individuals might influence one another's views or conduct on matters of religion. To paraphrase Justice O'Connor's observation in Edmonson, the fact that government maintains schools, parks, airport terminals, and streets no more makes social pressure in such places government coercion "than the building of roads and provision of public transportation

150. Edmonson, 111 S. Ct. at 2089 (O'Connor, J., dissenting).
151. Id.
152. Id.
153. Id.
makes state action of riding a bus."^{154}

The *Weisman* majority's excursion into psychology, peer pressure, and the imputation of private "coercion" to the state was an unnecessary diversion from the real issue in the case: governmental coercion to *attend* religious exercises, whether or not one feels further compelled (by social pressure, state pressure, or one's psyche) to participate in such exercises. Had the Court's focus remained on the problem of compelled attendance rather than the red herring of compelled participation, its decision would have been very nearly unassailable.\^{155}

There remains, finally, the problem of "tradition." It is difficult to believe that the *Weisman* dissenters would have acceded to the majority's position even if the case had focused on government

---

154. Id. at 2090.

155. There can be no real dispute that an invocation and a benediction, scheduled as part of the commencement program and delivered by a member of the clergy invited by the school district for that specific purpose, are acts of religious exercise. Compelled (or induced) attendance at such a religious program is unconstitutional.

A much different case would be presented were a guest speaker or class speaker at commencement to engage in religious expression or to invite those in attendance to join in prayer (so long as government did not choose the speaker in order to put forward a government-favored religious message before a quasi-captive audience). The government does not sponsor all that it fails to censor. *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). A school's religion-neutral invitation (obviously not the situation in *Weisman*) does not make hearing a private speaker's religious message the object of government compulsion simply because the school does not, through prior restraint, act to censor the message of such speakers. The example used by the Providence school committee of a college commencement address by Rev. Martin Luther King, Jr. that included a religious theme, Brief of Petitioners at 8, *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (No. 90-1014), is quite different from the regularized practice of inviting members of the clergy to give invocations and benedictions. In the former case, government is not requiring attendance at a religious ceremony, but is requiring attendance at an event where it does not have control over the content of what a speaker says. The Fifth Circuit's result in *Guidry v. Broussard*, would therefore seem unsound. *Guidry v. Broussard*, 897 F.2d 181 (5th Cir. 1990) (upholding censorship of high school valedictorian's statements of personal religious belief).

On the other hand, the Fifth Circuit's result in another graduation prayer case, remanded by the Supreme Court for reconsideration in light of *Weisman*, also seems 'unsound. In *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), the Fifth Circuit upheld a commencement prayer by a student where the decision whether to have such a prayer was made by majority vote of the students pursuant to a school district policy authorizing such votes and prayers. But where government delegates governmental decision-making power to otherwise private individuals (as it did in *Jones*), or takes action designed to enlist private actors to carry out the government's ends (which would be unconstitutional if carried out directly by government), such subterfuges should not deprive the action of the quality of state action. *See Anderson v. Martin*, 375 U.S. 399 (1964) (finding Louisiana's compulsory designation of a candidate's race on the ballot to be a violation of the Fourteenth Amendment).
compelled attendance at an act of state-sponsored worship and even had the "social coercion" discussion been omitted. Scalia's dissent begins with pointed quotation from Kennedy's Allegheny opinion (which Scalia had joined): "the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings," Scalia recounted. "A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause." Scalia then twists the knife: "These views of course prevent me from joining today's opinion, which is conspicuously bereft of any reference to history." The Court, Scalia writes, "lays waste a tradition as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally."

Scalia's opinion scores an excellent debating point to which Kennedy is unable to respond. The problem is that Kennedy's original statements in Allegheny were unprincipled. The assertion that a legal test must be wrong if it would invalidate longstanding traditional practices is a classic example of result-oriented reasoning. It is the legal equivalent of the method my lab partner and I used in high school chemistry: first draw the desired curve; then plot the data; if time permits, do the experiment. While history must inform constitutional interpretation, the proper historical inquiry is into the original meaning of the words used at the time. Contemporaneous practice may or may not accord with that meaning and is at best an unreliable source for original meaning, for three reasons.

First, there is a difference between a text's original meaning and original expectations concerning how that meaning would apply in certain contexts. Put another way, there is a logical

157. Id.
158. Id. at 2679.
159. Id. For an excellent short explanation of this distinction between original meaning and original intent, and the primacy of the former, see In re Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989) ("The search is not for the contents of the authors' heads but for the rules of language they used."). See also Oliver W. Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 417-19 (1899-1900) ("[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were meant to be used. We do not inquire what the legislature meant; we ask only what the statute means."). For discussion
difference between the content of a legal rule or standard and the expected consequences of that rule or standard (even though in many cases they will be congruent). A prime example is segregation and the Fourteenth Amendment. That Amendment's Equal Protection and/or Privileges or Immunities Clause states a determinate rule outlawing caste legislation. That general principle has the logical consequence of prohibiting segregation, though probably few persons expected that specific result. Second, it may not have occurred to the founding generation that familiar practices violated constitutional principles for the simple reason that the practices were so familiar. The proposition of the Declaration of Independence "that all men are created equal" certainly was not universally perceived to apply to slavery.\textsuperscript{160} Third, to allow violations of a constitutional principle to go unnoticed (or not effectively challenged) and thus acquire a precedential force that can alter the constitutional principle itself is to favor the accidental violation over the deliberate statement of principle.\textsuperscript{161} Evidence of historical practice is relevant, especially where it indicates the "course of performance" of a genuinely disputed point; and in that sense there is force to the argument that long-accepted practices should enjoy a presumption of constitutionality.\textsuperscript{162} But it is second- or third-best evidence of original meaning and should not be allowed to trump persuasive arguments from the text or even the "legislative history" of a constitutional provision.\textsuperscript{163}

The historical evidence of the original meaning of the Establishment Clause persuasively shows that the Constitution forbids all

_\textsuperscript{160} See generally Paulsen, supra note 118, at 52-62 (discussing legal arguments against the constitutionality of slavery advanced by the radical anti-slavery bar in the years preceding the Civil War based on vague "natural law" texts in the federal and state constitutions)._

_\textsuperscript{161} This, of course, is an argument against according precedents of any kind weight beyond their persuasive force. I hope to develop this proposition in a future essay._


_\textsuperscript{163} For a good general discussion of the problems with using historical analysis to decide present-day legal issues, see Powell, supra note 159._
government coercion in matters of religious exercise. If faithful application of that standard means that courts must, if called on to do so, invalidate some traditionally accepted government coercion of religious exercise — like commencement prayer — fidelity to the constitutional principle requires that they do so. (By the same token, if that standard permits traditionally repugnant but non-coercive government endorsement of religion, courts may not invalidate such actions; enforcement of tradition must be left to the ordinary political process.) The Court's justification for legislative prayer in *Marsh v. Chambers*— that such prayer is constitutional because the First Congress did it — is simply insufficient. Historical practice may be a beginning but it is not the end of constitutional interpretation. Unless some theory can explain in principled fashion how it is that a traditional practice is consistent with a constitutional principle with which it appears to conflict, it is the traditional practice, not the constitutional principle, that must give way.

So it is with commencement prayer. Scalia is wrong — and unfaithful to his own textualist, originalist premises — in thinking that the traditional nature of a practice immunizes it from constitutional challenge. Assuming that original meaning is authoritative, and that the original meaning of establishment is government compulsion to exercise religion, commencement prayer must be struck down if it involves such compulsion.

164. See supra note 115.
166. 463 U.S. 783 (1983) (holding that a legislature's practice of opening and closing sessions with a chaplain's prayer was not violative of the Establishment Clause).
167. See Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988). McConnell suggests four possible explanations for the original practice of legislative chaplaincies, none of which he finds sufficiently convincing to justify the result in *Marsh*. Id. at 363 n.4. I would suggest a fifth explanation: Government speech, without more, is not coercive. The opening of legislative sessions with prayers (technically, the only issue decided in *Marsh*) is pure speech and unlike the situation in *Weisman*, no one is actually compelled to attend or otherwise a "captive audience" for the government's speech. (*Weisman* distinguishes *Marsh* on much the same reasoning. 112 S. Ct. at 2660.) Even so, *Marsh* is at least a close case on the question of whether legislators are indirectly compelled to attend the opening ceremonies in order to do their jobs, if important legislative business immediately follows the prayer.
How close, then, was the majority’s formulation of the coercion test (before its needless excursion into social psychology) to being sound? Recall Kennedy’s statement of the facts that “mark and control the confines of our decision:”

State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.169

The critical features are (i) individuals’ attendance at a religious exercise and (ii) that their attendance is “in a fair and real sense obligatory”170. The first half of this formulation addresses the forbidden objects of government compulsion; the second half addresses what constitutes compulsion. Attendance at a religious exercise is one of the forbidden objects of government coercion. If the coercion standard is true to history, the Establishment Clause means that government may not require individuals to engage in acts of religious exercise, make religious affirmations (such as test oaths), attend worship services, or pay religious tithes or taxes. Attendance at a religious exercise is obligatory if non-attendance is penalized either by direct legal sanction (or threat thereof) or by forfeiture of some other right, benefit, or privilege. In the commencement prayer context, non-attendance at the prayer is practically impossible short of forfeiture of the privilege of attending one’s own graduation — an important (if sometimes unappreciated) public benefit.

But it is important to note what parts of the majority’s formulation are not necessary and, indeed, are affirmatively misleading. The Court’s addition of “and participation” after “attendance” went beyond what was necessary. While government-compelled participation in religious exercise is also forbidden, the Court need not have improperly stretched fact and law to find such participation in Weisman. And in its desperate attempt to find compelled participation, the majority had to warp the notion of compulsion to include

169. Weisman, 112 S. Ct. at 2655.
170. Id.
the actions of non-governmental actors. Finally, it is neither a necessary nor a sufficient condition of an Establishment Clause violation that the religious exercise at which attendance is compelled be "state-sponsored" in the sense that state personnel are the ones engaged in religious speech. Compelled attendance at a private Roman Catholic Mass is unconstitutional. Conversely, government religious expression that no one is compelled to attend, affirm, participate in, or support does not violate the Establishment Clause.

It is worth summarizing this discussion by repeating the distillation of the coercion principle that I set forth at the outset of this paper: Government may not, through direct legal sanction (or threat thereof) or as a condition of some other right, benefit, or privilege, require individuals to engage in acts of religious exercise, worship, expression or affirmation, nor may it require individuals to attend or give their direct, personal financial support to a church or religious body or ministry.

The Court has embraced coercion in theory but has not embraced this conception of it. The game is not over yet, however. By splitting as to the meaning and application of coercion, the coercion majority in Weisman has left the door open for needed refinement of the coercion test as a permanent successor to Lemon. As the next section shows, a refined coercion standard produces some important changes in results from those wrought by Lemon.

IV THE COERCION STANDARD IN APPLICATION: RELIGION IN THE SCHOOLS

The chief criticism of the coercion test is not that it is unsound as a matter of original meaning, but merely that it is inconsistent with so much of what the Court has said before and would leave the Establishment Clause with much less independent force as a constitutional limitation on government power than had previously been supposed.171 Blackmun's and Souter's Weisman concurrence—

171. Justice Souter's Weisman concurrence also makes a textual argument, following Professor Douglas Laycock, that a coercion standard would render the Establishment Clause redundant of the Free Exercise Clause. Id. at 2673 (Souter, J., concurring). See Brief Amici Curiae of the American Jewish Congress at 9, Lee v. Weisman, 112 S. Ct. 2649 (1992) (No. 90-1014) (Professor Laycock) (coercion argument "is inconsistent with the constitutional text, because it leaves no independent meaning to the Establishment Clause."); Laycock, supra note 115, at 68-69. See also Sherry, supra note 19, at 134-35.

There are at least three flaws with the "redundancy" argument. First, it is not at all clear that coercion of religious exercise "would virtually by definition violate a [non-

The better view is that the Free Exercise and Establishment Clauses both protect religious liberty from government coercion and, in that sense, are complementary provisions. \textit{See supra} notes 10-11 and accompanying text. The free exercise focus is on the use of government force to forbid or prevent religious exercise; the establishment focus is on the use of government force to require or induce religious exercise. Or, as I have stated it elsewhere, the Free Exercise Clause protects the free exercise of religion ("you can't stop me") and the Establishment Clause protects the free non-exercise of religion ("you can't make me"). Paulsen, \textit{supra} note 3, at 332-36. Thus, if government requires a Christian to attend a Jewish worship service in a way that does not require the Christian to violate any of her religious obligations as a Christian, there is no Free Exercise Clause violation. But required attendance at the Jewish worship service would still be an Establishment Clause violation.

Of course, the Establishment and Free Exercise Clauses may sometimes overlap in their protections of religious freedom, as in the case where a religious believer is required to affirm a religion contrary to her own beliefs, thus being compelled to affirm one religion (establishment) and to deny her own (free exercise). (The atheist has only the Establishment Clause complaint.) But this does not make the Establishment Clause "a virtual nullity." \textit{Weisman}, 112 S.Ct. at 1673 (Souter, J., concurring). The fact that the provisions may, in some cases, provide overlapping protection is no more a problem with the coercion reading than is the fact that the Free Speech and Free Exercise Clauses sometimes protect the same conduct. \textit{See e.g.}, Widmar v. Vincent, 454 U.S. 263, 276 (1981) (recognizing both Free Speech and Free Exercise Clause protection in a case involving availability of university facilities to campus religious groups); Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating prosecution of Jehovah's Witness who objected to New Hampshire's message of "Live Free or Die" on his license plate, on Free Exercise and Free Speech grounds); McDaniel v. Paty, 435 U.S. 618 (1978) (Brennan, J., concurring in the judgment) (finding disqualification of clergy from holding office violative of both the Establishment and Free Exercise clauses). \textit{See generally} \textit{Smith}, 494 U.S. at 881-82 (discussing so-called "hybrid" free exercise cases where a free exercise claim was also coupled with a claim of constitutional immunity under some other provision.) In short, the charge of redundancy is wholly spurious — unless one adopts (contrary to present doc-
es rely on the Court's previous statements — some dictum and some holdings — for their rejection of coercion as a sufficient standard.¹²
The coercion test is indeed a meaningful change in doctrine, working some meaningful changes in results. Each of the cases cited by Blackmun\textsuperscript{173} and Souter\textsuperscript{174}—except for the school prayer cases—would have been decided differently under the coercion test.\textsuperscript{175} Far from being regrettable, this is a major benefit of the new test. The coercion standard brings a measure of rationality to a deeply embarrassing morass of precedents.

As \textit{Weisman} illustrates, a coercion standard still leaves courts with lines to draw, hard cases to decide, and divisions as to its application. This is true of any legal test. The advantage the coercion standard has over \textit{Lemon} (in addition to being a more faithful and principled understanding of the Establishment Clause as a matter of text and history) is that it creates far fewer unnecessarily hard cases within the broad middle range of actual practice. The hard line-drawing cases it presents arise at the outer fringes of common experience—issues not likely to arise with great frequency in the real world because of near-unanimous political agreement that government ought not engage in such activities. Thus, while the coercion standard (properly understood) does not eliminate hard cases, it presents many more easy ones—and a good many more correct results—than \textit{Lemon} did. I will focus on applications of the coercion test in two related, important, and representative areas of repeated Establishment Clause controversy: religious activities in public schools and government aid to private, including religious, schools.\textsuperscript{176}


\textsuperscript{174} \textit{Id.} at 2672 (Souter, J., concurring) (citing Edwards v. Aguillard, 482 U.S. 578 (1987); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Epperson v. Arkansas, 393 U.S. 97 (1968)).

\textsuperscript{175} \textit{Wallace} is discussed infra at note 187. \textit{Edwards} and \textit{Epperson} are discussed infra at note 200. \textit{Nyquist} and \textit{Grand Rapids} both involve government funding of religious educational institutions on an equal (or less than equal) footing with secular educational institutions. I address this specific issue infra at text accompanying notes 208-11. For a discussion of the application of the coercion test to religious symbols, the issue presented in \textit{Allegheny}, see supra note 126. See also infra note 176.

\textsuperscript{176} The Court’s Establishment Clause cases can be broken down into roughly five overlapping categories: (1) public school and “public forum” cases—issues of religious activity in the public schools or taking place on public property; (2) cases involving government financial aid to religious institutions, groups or persons, typified by parochial school aid cases; (3) cases where the Free Exercise Clause has been interpreted to require special accommodation of religion—where the Court has assumed away Establishment Clause difficulties; (4) cases where the government has engaged in accommodation of
The public school context supplies several important examples. Ironically (and probably contrary to the expectations of some of its backers), the coercion test is not necessarily more sympathetic to religious activity in public schools than *Lemon*, and may even be less so.

School prayer violates either test, if "school prayer" means government-sponsored religious exercises as part of the school program in a context where the practical ability of students to absent themselves from the proceedings, or the costs visited on them for doing so, render such an opt-out a constitutionally defective alternative. Importantly, however, it is not "peer pressure" that makes an opt-out insufficient. Private pressure to conform does not constitute state action, absent government’s deliberate creation or encouragement of social pressure as a means of coercion. Rather, it is the fact that individuals are required by the government to identify and publicly declare their religious beliefs or lack thereof that is problematic, under a "First Amendment privacy" rationale. Individuals have the right to maintain the privacy of their political and religious opinions and affiliations; they may not be required to publicly identify, by word or deed, their positions. In essence, an opt-out scheme asks individuals to "raise their hands"

---

*religion or religious practice not required by the Free Exercise Clause, outside the public school context; and (5) cases involving government religious expression, outside the public school context (holiday displays, city seals, legislative prayer, "In God We Trust" and the like).*

I address here only the first two categories, which are by far the largest and most important. I believe the coercion principle is helpful in addressing the difficult cases presented in the last three categories as well. In brief, a required or permissive accommodation of religion (categories 3 and 4) is coercive only if it prefers one set of practices over another, forces dissenters to engage in religious conduct, or imposes a penalty on those who do not engage in the accommodated religious practice or activity. As to category 5, outside the public school context (and other truly "captive audience" situations, if any), government speech alone is rarely if ever coercive of religious exercise, in the sense discussed in the text. I hope to address the problem of government religious expression in depth in a future article.

177. See *supra* note 136 and accompanying text.


Professor Lupu is correct in concluding that I think it is impermissible for public school teachers to require students publicly to identify their religious affiliations or beliefs. *See Lupu, supra* note 126, at 895. It should be noted, however, that a not unproblematic implication of this position is that the remedy accorded Jehovah's Witness children in *West Va. State Bd. of Educ. v. Barnett*, 319 U.S. 624 (1943) — the freedom to *not participate* in the flag salute — is insufficient to protect the interest in First Amendment religious privacy.
and publicly identify themselves not only as dissenters, but as lacking religious belief. The cost of refusing to so identify oneself is attendance at a religious exercise. The practice, as the school prayer and Bible reading cases themselves recognized, is inescapably coercive.\textsuperscript{179}

There is a group of easy cases on the other side. Once it is recognized that the forbidden compulsion is government compulsion, it becomes clear that the Establishment Clause does not authorize — and, indeed, the Free Speech and Free Exercise Clauses do not permit — suppression of religious activity by private persons simply because their religious activity makes use of public school facilities and the public school setting. Thus, while “school prayer” or devotional exercises of the type involved in \textit{Engel} and \textit{Schempp} involve government coercion, voluntary extracurricular religious student group meetings involve no such coercion. Such meetings are not rendered suspect under the Establishment Clause by virtue of peer pressure from students or the fact that the meetings occur on school grounds.

That is the holding of \textit{Board of Education v. Mergens},\textsuperscript{180} upholding the constitutionality of the federal Equal Access Act.\textsuperscript{181} That statute provides that public schools allowing one or more voluntary and “noncurriculum related” student groups to meet on school grounds must allow student group meetings of a religious nature on the same terms.\textsuperscript{182} As discussed earlier, the plurality opinion in \textit{Mergens} upheld this statute against Establishment Clause challenge even under \textit{Lemon}, with Kennedy and Scalia concurring on the grounds that a policy of equal treatment is not even plausibly coercive. As one district court appropriately put it in an equal access case predating the \textit{Mergens} decision even under \textit{Lemon}, with Kennedy and Scalia concurring on the grounds that a policy of equal treatment is not even plausibly coercive. As one district court appropriately put it in an equal access case predating the \textit{Mergens} decision by several years: “Any advancement of religion [or, he might have added, ‘coercion’] would come from the students themselves, and this the Establishment Clause does not bar, it being a limitation on government conduct rather than on individual activity.”\textsuperscript{183}


\textsuperscript{180} 496 U.S. 226 (1990).


\textsuperscript{182} 20 U.S.C. §4071(b).

\textsuperscript{183} \textit{Bender v. Williamsport Area Sch. Dist.}, 563 F. Supp. 697, 711 (M.D. Pa. 1983) (Nealon, J.). Judge Nealon’s opinion was temporarily reversed by the Court of Appeals for the Third Circuit, but reinstated when the Supreme Court concluded (without reaching the merits) that the Third Circuit lacked jurisdiction of the appeal. 741 F.2d 538 (3d Cir.
Mergens leaves open the ancillary question of whether participation in such religious groups by teachers or adults from the community would create an Establishment Clause difficulty not otherwise present. The issue of teacher involvement — under the Equal Access Act and in a number of other situations — is more difficult than issues of voluntary student speech and association, because the private actor and state actor roles of a teacher are intertwined. The coercion standard offers a way of attempting to sort out the issues. In the Equal Access Act context, the Establishment Clause does not forbid teachers from assisting or advising student religious groups or participating in their meetings. The mere fact of teacher participation in religious meetings does not constitute state compulsion to attend them. That individual teachers may be respected as "role models" by some students (who may therefore wish to attend) no more transforms teachers' voluntary participation into state action than the popularity of student members of a religious group (and any resulting peer pressure to attend) constitutes state action.

But the coercion standard also limits the conduct of teachers:

---

184. Mergens also does not answer the question of whether school districts must allow religious student group meetings on school premises where a school has no formally recognized student club meetings. This situation arises where students meet informally in open classrooms, in the cafeteria, or on the school lawn. Plainly, these situations involve no more government coercion of religious exercise than student club meetings within a school's activity period. They would appear to be within students' constitutional free speech rights to engage in discussion with others in places where students are normally permitted to be present, whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours." Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 512-13 (1969). But see Perumal v. Saddleback Valley Unified Sch. Dist., 198 Cal. App. 3d 64 (upholding school officials' prohibition of students' distribution of flyers advertising their informal religious meetings during lunch hour on the school lawn), cert. denied, 488 U.S. 933 (1988).

185. The Equal Access Act does not forbid teacher participation, but school districts are in compliance with the Act if they limit the role of teachers to neutral monitors. 20 U.S.C. §4071(c).

186. Indeed, even if teachers receive remuneration for their participation as group advisers (and assuming that such a policy is applied to all student clubs), that does not transform student attendance attributable to an individual teacher's personal popularity into official coercion. That the state has placed an individual in a position from which he becomes a role model to others does not make all subsequent actions of that individual attributable to the coercive power of the state. Similarly, a student's desire to engage in activities outside the classroom that he or she subjectively believes will please a teacher does not transform the teacher's participation in a voluntary group into coercion. If that were the case, a public school teacher could be enjoined from attending church on the ground that students may learn of this and desire to attend church as a result.
they may not use their official positions to exert pressure on students to attend religious meetings. A teacher's speech in her official capacity as teacher, to a captive audience of students, may be regarded as coercive. So too, directive instruction on what a student is to do during a “moment of silence,” what activity a student should select to engage in during a school activity period that includes religious meetings, or whether a student should participate in released-time religious instruction, is constitutionally problematic. That does not, however, require as a matter of constitutional law a prophylactic rule invalidating the underlying activities — which otherwise are not coercive. Rather, it requires a rule prohibiting teachers from using their official positions to direct students to engage in religious activity.

Even this rule might not always be necessary. Above a certain age (and in certain contexts even at a young age), students should be able to discern the difference between a teacher's individual expression and his or her official expression — even when the expression occurs on school property and even when it occurs in the course of classroom instruction. The Eleventh Circuit's recent decision in Bishop v. Aronov is an easy case — in the opposite direction of the court's decision. In Bishop, a professor at a state university (the University of Alabama) was instructed that he could not conduct an optional class session — outside usual classroom hours and with attendance completely voluntary — on religious themes he thought related to the content of the class (which he taught without reference to such themes). The Eleventh Circuit rejected the professor's section 1983 claim for violation of his free speech and academic freedom rights on the ground that it would violate the Establishment Clause for the university to allow the professor to teach the extra class. The result, while perhaps contest-

187. This distinction might be taken to support the line drawn in Wallace v. Jaffree, 472 U.S. 38 (1985), where the Court expressed apparent approval of the constitutionality of moment-of-silence statutes in general, but disapproved Alabama's statute which specifically stated that the moment-of-silence could be used “for prayer.” Id. at 56. Absent this feature, there would be no question but that Wallace was wrongly decided. A statute making available a moment of silence during which individuals may, but need not, engage in religious activity, is noncoercive. The Court decided the case on the basis of the "purpose" prong, an approach that is criticized above. See supra notes 20-29 and accompanying text. Compare Zorach v. Clauson, 343 U.S. 306 (1952) (off-premises, released-time religious instruction programs do not violate Establishment Clause) with Weiss v. Bruno, 502 P.2d 973 (Wash. 1973) (similar program violates Washington Constitution because of manner of teacher administration prescribed by statute).

188. 926 F.2d 1066 (11th Cir. 1991), cert. denied, 112 S. Ct. 3026 (1992).
able as a matter of affirmative rights to free speech as a government employee, is certainly not required by the Establishment Clause. A university professor’s statements of his personal religious views and opinions, even if made in the course of classroom instruction (and even more clearly if they are not), cannot fairly be imputed to the state. One would hope that college students are sufficiently intelligent to realize that government does not sponsor every statement made by a professor employed by a state university. (I assure you that it is not the government of the State of Minnesota that is speaking to you here.) Apparently the University of Alabama does not think its students able to grasp the point — an observation that may say more about the university’s administrators than its students.

The issues become more difficult at lower grade levels, yet there are contexts in which even elementary school students should be expected to distinguish teacher-as-individual from teacher-as-government. Roberts v. Madigan is a case in point. In that case, the Tenth Circuit upheld a school principal’s directive that forbade a fifth-grade teacher from having a Bible on his desk and from reading it (on occasion) during “individual reading” times. (He also read Tom Sawyer and other books.) The principal’s concern, shared by the Tenth Circuit, was the Establishment Clause, which was assumed to take priority over any academic freedom, speech, or free exercise rights of the teacher.

Under the coercion test, this Establishment Clause concern would seem unjustified. If the point of “individual reading” is that students may read whatever they like — a fact of which they presumably are made aware by the exercise itself — they should also understand (and if not, they should be told) that the teacher’s choice of his own reading materials does not reflect the decision of the school or government but of an individual. Though the age of the students and the classroom setting make the case more difficult than Bishop, Rob-

189. The Supreme Court’s decision in Rust v. Sullivan can be read as support for the proposition that government may prescribe the content of the curriculum in a government-run school and forbid teachers to teach anything else. Rust v. Sullivan, 111 S. Ct. 1759 (1991) (upholding a prohibition on counselling, referring, or otherwise advocating abortion by recipients of government funds). In most state university contexts, however, professors are granted a wide berth of academic freedom. The prohibition on religious expression thus is more akin to a content-based ban on speech within a limited public forum. See Widmar v. Vincent, 454 U.S. 263 (1981).

190. 921 F.2d 1047 (10th Cir. 1990), cert. demed, 112 S. Ct. 3025 (1992).

191. Id. at 1049, 1056-58.
erts is also wrongly decided. The teacher's actions involved no state coercion to engage in religious exercise. And even if the teacher's actions could be imputed to the state, the students may still read whatever they like. Unless the teacher affirmatively urges a student to select religious material, there is no element of compulsion whatever. Example is not compulsion.192

The line sometimes drawn between on-campus and off-campus religious activity is by and large irrelevant under a coercion standard, so long as students are not a "captive audience" for the religious activity at issue. The most important consequence is in the released-time context. It is but a short step from recognizing the correctness of the Supreme Court's decision upholding the Equal Access Act in Mergens to recognizing the incorrectness of Illinois ex rel. McCollum v. Board of Education, a 45-year-old precedent in which the Court struck down a program of on-premises released-time religious instruction at public schools conducted by denominational instructors and not regular classroom teachers.193 If coercion is the standard, a genuinely elective course — even if it be a course in the doctrines and tenets of a particular religion — does not violate it. While the particular facts of McCollum may be suspect in that religious courses were the only electives offered during the released-time period (so that students' only alternative was a study hall), the principle that religious instruction may be offered as a public school elective should not be questionable. So long as a student has alternatives, the choice is not coerced. So long as students (or their parents) must affirmatively exercise such

192. See supra note 186. If it were, then students are equally "coerced" to read anything else the teacher reads — like Tom Sawyer. To single out religious material for unique censorship presents much the same constitutional problem as in Widmar v. Vincent — content-based discrimination against religious ideas in an "open forum." Widmar, 454 U.S. 263.

This same constitutional vice of singling out religion for discriminatory exclusion is presented by the Second Circuit's decision in Lamb's Chapel v. Center Moriches Union Free School District, 959 F.2d 381 (2d Cir. 1992) (religious group excluded from after-hours rental of public school facilities where other community groups are permitted to rent such facilities). The Supreme Court has granted certiorari. Lamb's Chapel v. Center Moriches Union Free School District, 113 S. Ct. 51 (1992). As this article goes to press, Lamb's Chapel has been argued and is awaiting decision. Widmar would appear to compel reversal of the Second Circuit. See infra note 142.

193. 333 U.S. 203, 209-12 (1948). Four years later, the Court upheld the constitutionality of released-time programs where the religious instruction was held off-campus. Zorach v. Clauson, 343 U.S. 306, 311-13 (1952). The alternative choice for students was again a study hall; no new classroom instruction was to take place during the released-time periods.
choice to attend religious instruction (an "opt-in") and so long as
the administration of the opt-in does not authorize teachers to
direct or influence student choice, there is none of the subtle,
"raise-your-hand-and-identify-yourself" coercion involved in the
school prayer context. The fact that instruction occurs on
school premises does not itself make attendance coerced; it is an
elective course. The fact that the state accords credit toward gradu-
ation does not make attendance at that elective "compulsory" (a
"compulsory elective" is an oxymoron); similar credit would be
given regardless of the choice made. The fact that the instruc-
tion is conducted by non-school personnel eliminates even the "role
model coercion" hypothesis. In short, McCollum is wrong in prin-
ciple and unsustainable under any fair conception of the coercion
test.

So far, the examples I have discussed have concerned the ques-
tion of when religious activity in public schools is attributable to
government compulsion rather than the choices of private actors
that the government tolerates or accommodates on the same basis
as other choices. A different question is presented where the activ-
ity in question is plainly that of the government, but either its
coercive tendency or its "religious" nature is disputed. Government
speech and public education presents a classic problem because
virtually the whole enterprise consists of government speech. May
the government engage in religious speech on the same basis as
other speech, in the context of public schools?

The paradigmatic case in the school context is Stone v. Gra-
ham. Decided by the Court under the "purpose" prong of
Lemon, Stone invalidated a Kentucky statute mandating the posting
of the Ten Commandments in public classrooms. Two things
make the case troubling. First, the Court has long conceded that

194. See supra notes 178-79 and accompanying text.
195. Even the statute in Zorach permitted "credit" (in the form of hours of religious in-
struction counting toward hours of compulsory attendance) to be given for religious cours-
es. Zorach, 343 U.S. at 308 n.1.
197. Id. at 41-43. Stone technically decided only the question of whether government
may mandate the posting of the Ten Commandments on classroom bulletin boards (where
it has singled out the Ten Commandments and no other subject or message). A differ-
ent question might be presented by a classroom teacher's decision to post the Ten Command-
might retain the academic freedom to teach creation science notwithstanding the unconsti-
tutionality of a statute mandating that it be taught whenever theories of evolution are
taught).
public school teaching "about" religion is perfectly appropriate. 198 Why teaching the Ten Commandments does not fit this category is unclear. The problem lies in the incoherence of the Court's concession: It is hard to know where "neutral" teaching "about" religion (is there such a thing?) leaves off and inculcative teaching "of" religion begins.

Second, if schoolchildren are deemed "coerced" in matters of religious exercise by the posting of the Ten Commandments — in the sense of being an indoctrinated, captive audience — it is difficult to avoid the conclusion that they are coerced in their belief structures by everything they are taught in school. It may well be that both propositions are true — that public schools are coercive in all that they teach, religious or not — but that the Establishment Clause permits government indoctrination that is "secular" in character and not government indoctrination that is "religious" in character. It does seem strange, however, to think that the First Amendment itself entails a requirement of content-discrimination in government's own speech, such that public school bulletin boards may not contain the Ten Commandments but can contain the moral code of Robert Fulghum's All I Really Need to Know I Learned in Kindergarten. 199 The Court has never owned up to the fact that all instruction conducted by government where attendance is compulsory is coercive; that indoctrination in a secular moral code or values (or lack thereof) is intuitively as problematic as indoctrination in a religious one; and that inculcation of secular values to the


199. ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN (1986). Fulghum's insights, found on many a bulletin board and refrigerator door, constitute a secular decalogue of sorts:

  Share everything.
  Play fair.
  Don't hit people.
  Put things back where you found them.
  Clean up your own mess.
  Don't take things that aren't yours.
  Say you're sorry when you hurt somebody.
  Wash your hands before you eat.
  Flush.
  Warm cookies and cold milk are good for you.
  Live a balanced life — learn some and think some and draw and paint and
  sing and dance and play and work some every day

Id. at 6-7.
exclusion of religious ones is the most problematic situation of all.200

The Free Exercise Clause, properly understood, limits the power of government to engage in "secular" indoctrination to the extent that such indoctrination contradicts or undermines a believer's religious principles. If the idea of "compulsion" in the Establishment Clause context is broad enough to include compelled exposure to government speech (as I believe it is), government compulsion in the free exercise context must be understood as broadly Mozert v. Hawkins County Board of Education,201 the celebrated Tennessee case in which parents sought to have their children excused from using a reading series that the parents maintained inculcated values inconsistent with the family's religion, should have resulted in a victory for the parents. Instead, the Sixth Circuit (with the Supreme Court denying review) decided that state-compelled "exposure" to ideas (including ideas hostile to religion) did not constitute even a cognizable "burden" on religious free exercise.202

The Mozert holding is plainly wrong. It is difficult to think of very many more direct burdens on free exercise than state-mandat-

---

200. This analysis suggests an argument for why the Court may have been wrong in Edwards, 482 U.S. 578. In Edwards, the Court struck down Louisiana's "Balanced Treatment" statute — requiring that wherever evolution is taught "scientific creationism" be taught as a competing theory of origins — as a violation of the purpose prong of the Lemon test because, the Court concluded, the purpose of requiring such balanced treatment was to counter secular instruction in Darwinian theories of origins with instruction in (or at least consistent with) religious theories of origins. Under the coercion test as formulated here, the question of legislative purpose would be bypassed in favor of an inquiry into whether the Louisiana statute provided for government instruction in religion classes for which attendance was mandatory (that is, non-electives). Arguably, even if creation science is nothing more than religious dogma (a point of genuine dispute), "balanced treatment" of competing religious and secular dogmas to explain data (as opposed to presentation of data alone), would seem one possible second-best approach to the problem of government indoctrination in compulsory classes: government should present more than one view. The real problem with the Louisiana statute, however, is that it required selective balance — it did not purport to present all possible ideological positions with respect to the question of human origins, but only two, so that the second-best solution is still bad. There are superior alternatives. One would be for government to decline to teach either (or any) dogma. On this view, the result in Epperson v. Arkansas, 393 U.S. 97 (1968), which struck down (also on "purpose" prong grounds) a state statute prohibiting the teaching of evolution, was plainly wrong. Government's decision not to inculcate anything does not involve coercion in religious dogma just because neither secular nor religious dogmas are taught. A better solution yet would be for education not to be controlled by government. See infra notes 207-08 and accompanying text.

201. 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988).

202. Id. at 1063-64.
ed reeducation in doctrines contrary to religious faith. Compulsion to violate religious conscience or to read and recite teaching mimical to religious tenets unquestionably "burdens" the free exercise of religion — just as compulsion to read and recite religious teaching burdens the freedom of non-exercise protected by the Establishment Clause. "Burden" is the Free Exercise analog to "coercion" on the Establishment Clause side. Both concepts address the problem of deciding where the protections of a constitutional provision begin. Government compulsion to abandon religious exercise burdens the free exercise of religion; government compulsion to engage in religious exercise burdens the freedom of nonexercise of religion protected by the Establishment Clause. If the two religion clauses are symmetrical protections of dual aspects of religious liberty — two sides of the same coin — then the concepts of "burden" on religious exercise and "coercion" of religious exercise must be accorded the same breadth. Were the Mozert court's notion of cognizable government compulsion applied in the Establishment Clause context, government-sponsored "exposure" to religious ideas and practices could include not only the Ten Commandments and Bible reading, but school prayer and even formal religious instruction.

The correct approach is to adopt an equally broad understanding of compulsion under both clauses: Government may not, consistent with the Establishment Clause, engage in religious indoctrination in public school classes where attendance is required. And government must, under the Free Exercise Clause, accommodate its education program to enable those who seek (on religious grounds) to avoid government's secular indoctrination a meaningful right to do so without suffering other costs.


204. The concept of "burden" on religious exercise appears to survive the Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990) (holding that a law does not prohibit the free exercise of religion within the meaning of the First Amendment where it is facially neutral with respect to religious exercise). Under Smith, government need only show a rational basis for formally neutral laws, regardless of their impact on religious exercise.


206. See supra notes 11, 171. See also Paulsen, supra note 3, at 313.

207. For a thoughtful discussion of the problem of remedies for violations of the religion clauses, including the specific problem of costs attendant to exercising the right to opt-out, see Scott J. Ward, Note, Reconceptualizing Establishment Clause Cases as Free
Importantly, if (as increasingly appears the case) the nature of public schools’ instructional program is such that maintenance of religious principles for many requires opting-out of the public school system entirely, the combination of compulsory attendance laws and the huge financial penalty placed on attendance at non-government-run schools places a strong coercive burden on religious exercise. An understanding of the coercion concept sufficiently broad to invalidate commencement prayer (because it makes attendance at a religious worship ceremony the price of attendance at one’s own or one’s child’s graduation) also renders suspect the present system of public education (because it makes either “mere exposure” to anti-religious indoctrination or the paying of private school tuition the price of a “free” public education).

208. The

Exercise Class Actions, 98 YALE L.J. 1739 (1989). See also supra note 178 (suggesting that in some contexts an opt-out right might not be sufficient).

208. Professor McConnell has suggested that it is illegitimate for government to discriminate in its funding decisions between religious and non-religious private schools, but that it may be legitimate for government to discriminate in favor of its own schools over all private schools. McConnell, Selective Funding, supra note 41, at 1034-46. McConnell offers two possible grounds in support of the latter distinction, neither of which is persuasive.

First, McConnell hypothesizes that the right to pursue a religious education might be characterized (in a manner analogous to the abortion right) as a right against outright government prohibition — as through a criminal proscription — of religious education, not a right that religious education be treated on an equal (financial) footing with government-run education. Id. at 1036. See Harris v. McRae, 448 U.S. 297 (1980) (government not required to provide financial support for abortions). McConnell suggests an analogy between the government’s right to conduct and encourage participation in a flag salute ceremony so long as it does not require participation (Board of Educ. v. Barnette, 319 U.S. 624 (1943)), and to the government’s right to create symbols of national reverence such as the flag, so long as it does not punish those whose conduct treats the flag as an object of contempt (United States v. Eichman, 496 U.S. 310 (1990)). McConnell, Selective Funding, supra note 41, at 1036. In short, the government may prefer its own ideas generally, and may back that preference with the powers to tax and spend.

However, McConnell’s own assumption is that the right of religious education is part of the Free Exercise Clause, not substantive due process id. at 991), and his earlier work powerfully establishes that government action impermissibly burdens the free exercise of religion when it places a financial penalty on it, even if the penalty is not so high as to make the religious conduct impossible. See generally McConnell, Origins, supra note 115; McConnell, supra note 22. His arguments in those articles would seem to refute his hypothesis (which he stops short of embracing) that government may favor public schools over private, including religious, schools.

McConnell’s second argument is even weaker. He suggests that even if logic otherwise would dictate that government may not financially discriminate against the right to pursue a religious education, “the federal courts should be reluctant to order so sweeping a modification in so important and long-standing a public institution as the public school system, although this does not diminish the constitutional responsibility of state legislatures to correct their policies.” McConnell, Selective Funding, supra note 41 at 1045 (footnote
unconstitutional conditions doctrine requires the conclusion, in the
one case as in the other, that governmental imposition of such a
cost on religious liberty can be highly coercive in its effects, espe-
cially on those not in a position to pay. 209

Short of the bracing conclusion that coercion in the free exer-
cise context requires equivalent governmental funding of private
religious schools, the coercion standard in the establishment context
makes clear that government funding for religious schools is at
least constitutionally permitted. Indeed, at any level of funding
below the level at which public schools are supported, the coercion
standard makes the constitutionality of such aid an easy case. As
with the Equal Access Act or a McCollum-type forum, equal treat-
ment of religion — neutral inclusion on equal terms with non-
religious institutions in a general benefit program — cannot con-
ceivably be regarded as coercive of religious choice so long as one
uses a fair baseline for measuring the effects of government action
on religion. Providing parents who wish to choose religious educa-
tion for their children with the same level of “free” education in
the form of government support “coerces” religious exercise only
in the perverse sense that absence of such equal treatment really
does involve government compulsion directed against such a
choice.

Under the coercion standard, Lemon, and the whole line of
cases restricting government aid to religious elementary and sec-
dary schools — aid invariably falling far short of the level of

senting) (citations omitted):

[If the State in Sherbert could not deny compensation to one refusing work
for religious reasons, it might be argued that a State may not deny reimburse-
ment to students who choose for religious reasons to attend parochial schools.
The argument would be that although a State need not allocate any funds to
education, once it has done so, it may not require any person to sacrifice his
religious beliefs in order to obtain an equal education. There can be little doubt
that to the extent secular education provides answers to important moral ques-
tions without reference to religion or teaches that there are no answers, a per-
son in one sense sacrifices his religious belief by attending secular schools.
government financial support for public schools — were all wrong-
ly decided.210 And that is an important and desirable implication of Lemon’s passing and the ascent of a coercion test. The death of Lemon means the removal of the primary legal barrier to correcting the serious financial penalty imposed on religious education.211


211. It is sometimes argued that the use of public funds for religious purposes, even if resulting from the individual choices of persons who receive such funds as part of a generally available social welfare program, constitutes compulsion of nonbelievers in the form of taxation. Such an argument is flawed on a number of scores. First, the logic of the argument suggests that the use of public facilities, no less than public funds, for religious purposes (by private beneficiares) "coerces" dissenting taxpayers. The argument, of course, has been rejected in the public facilities context. See, e.g., Board of Educ. v. Mergens, 496 U.S. 226 (1990) (allowing secondary school religious group to meet on public school grounds); Widmar v. Vincent, 454 U.S. 263 (1981) (allowing student religious group to use public university facilities). There is no principled basis for distinguishing the two situations. In one instance the benefit is access to a government-created forum available on an equal basis for specified purposes; in the other, the benefit is access to a government-created pool of financial resources available on an equal basis for specified purposes. The financial value of the benefit — and cost to taxpayers — might even be equivalent in some cases. There is no difference in principle between a benefit that consists of dollars and one that consists of use of a physical resource that has a monetary value.

Second, the argument that use of tax dollars to support religion constitutes coercion of taxpayers cannot be squared with the Court’s free exercise cases requiring that a monetary benefit — unemployment compensation — be provided to individuals who are forced to leave their jobs because of conflicts with religious principle or practice. See, e.g., Thomas, 450 U.S. at 716-20; id. at 724 n.2 (Rehnquist, J., dissenting); Sherbert v. Verner, 374 U.S. 398, 403-06 (1963).

The open forum cases suggest the general concluson that the use of general reve-
nues, or of a benefit (financial or otherwise) made generally available on a religion-neutral basis, does not constitute "coerced support" of religion in the sense in which the framers understood coerced financial support — that is, unique, earmarked taxes (tithes, really) by government for the special support of churches in particular. See Paulsen, supra note 3, at 335 & n.110 (criticizing the strict no-aid approach’s reliance on the Virginia disestablishment controversy as "anachronistic reasoning"). See also Michael W. McConnell, Political and Religious Disestablishment, 1986 B.Y.U. L. Rev. 405, 450-52; Ward, supra note 206, at 1751-53. In short, while taxation is a form of coercion, it does not amount to coerced support for religion in the framers’ sense of the term where religion is simply permitted to benefit from a neutral government program of general applicability on the same terms as secular beneficiaries. Coerced financial support for religion does not mean paying taxes for general, neutral government programs, the benefits of which may be used by religious persons and groups for religious purposes. Rather, coerced financial support as understood by the framers requires at least some sort of government preferential funding of religion; it is disparate distribution, not the fact of taxation, that might tend to be coercive. See Ward, supra note 206, at 1753. To conclude otherwise would be to read the Establish-
ment Clause as authorizing discrimination against religion that the Free Exercise Clause
It may take the Court some time to clear away the underbrush of two decades of adverse precedents growing out of Lemon. But an excellent case for beginning that project is Zobrest v. Catalina Foothills School District,212 pending before the Court at the time of this writing. Zobrest involves a request by parents of a severely hearing impaired boy that a school district provide a sign language interpreter for their son, pursuant to the requirements of the federal Education of the Handicapped Act213 and comparable provisions of Arizona state law214. It is not disputed that James Zobrest was eligible for such services under the statutes. The problem was that James was attending a Roman Catholic school. The school district refused to provide an interpreter on the premises of the religious school, basing their refusal solely on the Establishment Clause. The district court sided with the school district and a divided Ninth Circuit panel affirmed.215

As decided by the Ninth Circuit, Zobrest is a shameless case of discrimination against religion in violation of the Free Exercise Clause — government has conditioned eligibility for benefits that otherwise are a matter of statutory right on the plaintiffs' abandonment of their constitutional right to pursue a religious education for their child.216 Yet the Ninth Circuit’s conclusion is not without support in Supreme Court precedent. The Court’s Establishment


The concept of disparate distribution — redistributive use of the tax power in favor of religion — in my opinion explains the correctness of the outcome in Texas Monthly, Inc. v. Bullock, 498 U.S. 1 (1989), in which religious literature (and a very few other categories) were exempted from a general sales tax. Preferential financial advancement of religion amounts to a species of coerced financial support for religion. The analogy to compulsory tithes is strained to the limit in the context of tax exemptions, but the element of coercion is not eliminated where there can be discerned a clear element of financial support for religion qua religion. Religion may receive financial benefits, but there must exist some non-pretextual general category or rule of inclusion that embraces religious beneficiaries but that is capable of being expressed in non-religious terms.

212. 963 F.2d 1190 (9th Cir.), cert. granted, 113 S. Ct. 52 (1992).
215. Zobrest, 963 F.2d at 1191.
Clause decisions in *Grand Rapids* and *Aguilar* (to pick the two most recent) found an impermissible effect of advancing religion and excessive entanglement, respectively, in government programs providing on-premises supplemental and remedial educational services to needy children attending religious schools.

It is difficult to distinguish *Zobrest* from these precedents. The forbidden "advancement" of religion in *Grand Rapids* was the possibility that state-supported personnel might become involved in inculcating religious teaching — a certainty in the situation presented by *Zobrest*. The forbidden "entanglement" in *Aguilar* was the existence of regulations designed to guard against such advancement, creating a Catch-22 for any attempt to avoid violating the "effects" prong. The *Grand Rapids* Court also spoke of the "symbolic link between government and religion" created by a state-paid individual walking onto religious school premises to perform a state service — a "problem" no less present in *Zobrest*.

But if *Lemon* is dead, one would hope that *Grand Rapids* and *Aguilar* — which took the sterility and unreality of *Lemon* to its most absurd extreme — would be buried alongside it. *Zobrest* is an easy case under the coercion test, so much so that it is hard to come up with even a barely plausible argument that anyone is coerced to engage in religious practice by providing James Zobrest with a sign language interpreter.

V CONCLUSION

This article has offered two descriptive points about the Court's present Establishment Clause jurisprudence and a prescription for improvement. The descriptive points are themselves not uncontroversial. First, the *Lemon* test is dead and gone. It has not been applied by the Court as the test of constitutionality in any of

222. The "symbolic union" equals advancement of religion argument of the *Grand Rapids* Court is strikingly similar to Justice O'Connor's recasting of the effects prong as centrally concerned with whether government has conveyed a "message of endorsement" of religion. See supra notes 77-78 and accompanying text.
223. See Paulsen, supra note 3, at 359-62.
the last four major Establishment Clause cases and Weisman reveals that the test has few, if any, supporters remaining on the Court. Of course, Lemon has not yet been given a decent, formal burial by the Court and it might therefore be thought inappropriate (even vulture-like) to offer a eulogy, let alone to dance on Lemon's grave as I have done here. But the fact that the Weisman Court did not use the words "overrule" and "Lemon" in the same sentence only means that I don't have to repay the six-pack I won from my colleague — I win on a legal technicality. Beyond this, there is little that survives of Lemon.

The test may be cited, perhaps even applied in the course of upholding a statute against Establishment Clause challenge — much like the Court’s opinion in Bowen v. Kendrick 224 or the plurality opinion in Mergens.225 It is even possible that Lemon might be cited in the course of an opinion invalidating state action on Establishment Clause grounds, where it is clear (and the Court so states) that the action violates the coercion standard as well. In short, Lemon might still be given a passing nod, where nothing turns on it, either for old times’ sake or to paper over a lack of agreement on the applicable test to replace it. But I can confidently predict — indeed, I would wager a whole case of Pete's on it — that absent significant personnel changes on the Court,226 Lemon will never again be used as the sole basis for striking down government programs under the Establishment Clause.

I am less confident of my second observation — that Lemon’s replacement has arrived in the form of a “coercion” test. The divisions within The Coercion Five make the new standard unclear and unstable. Not only is Justice White leaving the Court, there is room to fear backsliding, especially by Justice Kennedy. But if backsliding occurs, the alternative standard will not be Lemon, or even “psycho-coercion”, but some unnatural marriage of the coercion test to O’Connor’s endorsement test — sort of a “coercion-by-endorsement” test that (sometimes) deems “coercive” state action

224. See supra note 51.
225. See supra notes 88-90 and accompanying text.
226. Justice White's announced retirement removes from the Court one of the Justices comprising the fractured majority in favor of some form of coercion test and, more importantly, one of Lemon's most committed and continual opponents. But if the opinions in Weisman are to be taken at face value, none of the remaining Justices defends Lemon in principle. See supra notes 103-04 and accompanying text. The intellectual respectability of the Lemon test has expired. Even with significant personnel changes, reverting to Lemon would not constitute reinvigoration of a dying test, but exhumation of a dead one.
that "endorses" religion in a sufficiently strong sense to be deemed government "proselytization." 227

The answer I have proposed — and a potential middle ground for agreement on the Court (though I would not go so far as to say a likely one) — is to embrace a broad notion of what government action may constitute coercion, but to take care to limit it to government coercion. Contrary to the Weisman dissenters, the notion of official compulsion must include government imposition of an unconstitutional condition on any civil right, entitlement or privilege. Required attendance, as a practical matter, at a religious worship service (even a small and tasteless one) as a condition of attendance at one's public school graduation is such a condition. Contrary to the Weisman majority, however, mere social pressure by private persons at a government-sponsored event or in a government-provided forum does not constitute governmental coercion. Importantly, it is neither the content of the government's speech ("endorsement") nor the conduct of non-governmental actors ("social pressure") that creates Establishment Clause difficulty; it is the exercise of the coercive power of the state to induce persons to engage in religious exercise of any kind, either directly or through imposition of a condition on other rights, benefits, or privileges.

This refined understanding of the coercion principle presently commands no votes on the Supreme Court (at least as far as Weisman reveals). It is possible, however, to read Weisman as consistent with this understanding. Its future use as a precedent could be adjusted in this direction. As the Court takes up Zobrest and other cases in the years to come, it has the opportunity to unite behind and refine the coercion principle in cases where its application is clear, and where the death of Lemon makes a difference.

227. One can hear overtones of O'Connor's "message of endorsement" theory of the Establishment Clause, with its focus on the "reasonable perceptions" of "objective observers," in portions of the Weisman opinion: The consequence of the "public pressure" of which the Court speaks is that "the dissenter of high school age [will have a] reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow" Lee v. Weisman, 112 S. Ct. 2649, 2658 (1992). The "proselytization" concept harkens back to Justice Kennedy's opinion in Allegheny County of Allegheny v. ACLU, 492 U.S. 573, 660 (1989). See supra notes 85-86 and accompanying text.