

11-1999

The Graduation Prayer Cases: Coercion By Any Other Name

Colin Delaney

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Recommended Citation

Colin Delaney, *The Graduation Prayer Cases: Coercion By Any Other Name*, 52 *Vanderbilt Law Review* 1783 (1999)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol52/iss6/10>

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NOTES

The Graduation Prayer Cases: Coercion By Any Other Name

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I. INTRODUCTION

The Supreme Court's decision in *Lee v. Weisman* held clergy-delivered invocations at public-school graduation ceremonies unconstitutional.¹ In the wake of this landmark case, school boards across the country instituted a variety of policies to avoid the establishmentarian attributes fatal to the prayers in *Lee*. Several Courts of Appeals soon heard cases involving authorities seeking to divorce themselves from speakers and speaker selection, in the apparent belief that school involvement placed the imprimatur of the state on graduation prayer. Yet two facts mark all of the situations challenged to date. First, an agent of the state, the school board, exercised governmental power in determining the process for selecting speakers. Second, members of a captive audience found themselves subject to the same pressure to participate in the prayer as was present in *Lee*, irrespective of who led the prayer and the process for selecting that person. Despite these unifying potentially unconstitutional features, post-*Lee* circuit courts have employed a wide variety of analyses² in deciding Establishment Clause challenges to graduation prayer and have issued expressly conflicting opinions in near-identical cases.³

This Note examines the major attempts to interpret and apply *Lee* to school board policies adopted in response to that case. It identifies the analytical shortcomings of each decision and reconciles their inconsistencies with *Lee* and the Supreme Court's other cases addressing public schools and the First Amendment.⁴

Part II briefly explores pre-*Lee* Establishment Clause doctrine. It explains the "coercion" analysis that dominates the *Lee* opinion. It also lays out the competing equal access principle, which carried the day in *Rosenberger v. Rector & Visitors of the University of Virginia* and has since been used to justify prayers at high school graduations.

Part III describes schools' attempts to avoid the flaws fatal to the principal's actions in *Lee* by using predetermined objective criteria or vesting the speaker-selection power in another body. It then

1. *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

2. See *ACLU v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (applying five different tests); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996) (same); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994) (same); *Jones v. Clear Creek Indep. Sch. Dist. (Jones II)*, 977 F.2d 963 (5th Cir. 1992) (same).

3. See *Black Horse Pike*, 84 F.3d at 1482-83 (criticizing *Jones II* and following *Harris*).

4. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (permitting schools to punish students for sexually suggestive speech at assemblies).

explains the critical facts underlying *Lee v. Weisman*.⁵ Finally, Part III identifies the common features of *Lee* and subsequent graduation prayer cases from the perspective of an audience member.

Part IV observes that the graduation prayer cases lie at the intersection of several First Amendment doctrines. Lower courts have balanced the coercion analysis against the equal access doctrine. While courts often use "coercion" or "forum" language, the result has too frequently turned on behind-the-scenes speaker selection criteria. In two prominent Ninth Circuit cases, for example, agent-of-the-state analysis proved fatal to student-controlled invocations in one case,⁶ while another panel held a class rank-based invitation to speak sufficiently secular to avoid establishment.⁷

This Note demonstrates that none of the decisions satisfactorily integrates all of the relevant First Amendment doctrines. For example, a largely ignored line of cases validates official supervision of student speech when schools create the forum.⁸ Moreover, this Note argues that the graduation prayer decisions to date consistently ignore the fact that the result of a board's policy choice to permit an invocation is the same no matter what method determines the speaker. Recognizing this phenomenon certifies that the graduation audience, who must listen to whomever mounts the stage, is captive to the state's speaker-selecting decisions, at whatever level they operate. Thus, graduation most closely resembles other pedagogical functions, to which courts do not apply open forum analysis. Accordingly, schools cannot deny responsibility for the content of commencement programs. The Establishment Clause restrictions present in the classroom must also control graduation ceremonies. Only such comprehensive analysis sufficiently integrates the various analytical paradigms that the Supreme Court has established. Consequently, the only graduation speaker policy consistent with the Court's dictates bars all speakers from delivering a message infused with religious content.

5. *Lee*, 505 U.S. at 586 (explaining the dominant facts of *Lee*, which set the parameters of that decision).

6. *See Harris*, 41 F.3d at 454-57.

7. *See Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 838 (9th Cir. 1998).

8. *See generally Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (allowing school principal to censor student works in school newspaper); *Fraser*, 478 U.S. 675 (sustaining school suspension of student using lewd and offensive speech in student address).

II. THE EVOLUTION OF SUPREME COURT JURISPRUDENCE ON RELIGION AND PUBLIC SCHOOLS

First among the Bill of Rights' panoply of enumerated guarantees, the Establishment Clause and the Free Exercise Clause⁹ work together to free the conscience of official interference.¹⁰ The latter clause proscribes government actions that directly interfere with individuals' ability to worship.¹¹ The former prohibits more subtle state acts that tend to establish an official religion, whether or not they overtly coerce non-adherents.¹² No official body may organize a church, participate in ecclesiastical matters, or permit a religious organization to participate in the affairs of state.¹³ The legislature may not levy a tax in support of religious activities or institutions, and the clauses forbid laws that aid a particular religion or religion in general.¹⁴ Finally, the state may not, either in fact or appearance, take sides in a religious controversy; nor may it make belief or non-belief in a particular faith relevant to an individual's participation in political life.¹⁵

A. *The Lemon Test and Beyond*

After upholding a statute authorizing public funding for transportation to parochial schools¹⁶ and striking down a law requiring public school children to recite a nonsectarian prayer,¹⁷ the United States Supreme Court fashioned a test for dealing with Establish-

9. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. The Supreme Court has interpreted the Fourteenth Amendment as incorporating the prohibitions of the First Amendment against the states. See *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1939)).

10. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730 (1871) (declaring that "[t]he structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference[;] . . . it has secured religious liberty from the invasion of the civil authority").

11. See *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

12. See *id.*; see also *Lee v. Weisman*, 505 U.S. 577, 586 (1992).

13. See *Everson*, 330 U.S. at 15-16.

14. See *id.*

15. See *Allegheny County v. ACLU*, 492 U.S. 573, 594 (1989).

16. The Court reasoned that bussing was a secular state benefit open to all pupils and that denying it to parochial school children would discriminate against religion. See *Everson*, 330 U.S. at 17.

17. The Court held that a so-called Regent's prayer resembled establishment of an official religion and that putting government resources and prestige behind an approved religious belief exerted pressure on minorities to conform. See *Engel*, 370 U.S. at 425.

ment Clause challenges in *Lemon v. Kurtzman*.¹⁸ Designed to combat the evils targeted by the Establishment Clause,¹⁹ what became known as the *Lemon* test required that laws satisfy three criteria: they must have a secular legislative purpose, their principal effect must be neither advancement nor inhibition of religion, and they must not foster excessive state entanglement with religion.²⁰ Failure to satisfy a single element of the test is fatal to the challenged law or policy.²¹ *Lemon* also made clear that bright-line rules do not fairly deal with the myriad situations where church and state intermingle.²² Each decision turns on the particular facts presented.²³

Applying the *Lemon* test in *Lynch v. Donnelly*, the Court described the substance and extent of its inquiry.²⁴ If a secular purpose²⁵ motivated the policy, or could be gleaned from the facts, the policy fulfills the purpose requirement.²⁶ Of course, a purported secular purpose must be genuine; sham rationales do not merit consideration.²⁷ While an act or law might benefit religion, its

18. The Court's decision resolved multiple cases involving similar Rhode Island and Pennsylvania statutes that supplemented salaries of parochial-school teachers who taught only secular subjects and met certain other requirements, such as being state certified and teaching in a school with lower per-pupil costs than public schools. See generally *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

19. The Court identified three main evils: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* at 612 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

20. See *id.* at 612-13 (explaining the test as a synthesis of the "cumulative criteria developed by the Court over many years").

21. Consequently, a decision holding a policy unconstitutional need not address all three elements of the test, although a decision upholding a law must consider each aspect. See *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

22. The Court noted that "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614. Moreover, "the Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

23. See, for example, *Lemon*, 403 U.S. at 619-20, where the Court held that the states' attempt to comply with the Establishment Clause by conditioning aid on pervasive restrictions itself created the forbidden entanglement.

24. See generally *Lynch*, 465 U.S. 668 (considering a city's display of a nativity scene in a private park during the Christmas holiday season).

25. The purpose need not be exclusively secular. The secular purpose element merely requires that some secular design lay behind the act in question. See *id.* at 681 n.6 (noting that many policies previously upheld by the Court would fail an exclusively secular purpose test).

26. The nativity scene in question was "sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes." *Id.* at 681.

27. Compare *Lemon*, 403 U.S. at 613 (noting that the Pennsylvania and Rhode Island statutes themselves expressed the secular purpose of improving education for all and that the

primary effect must be a *substantial* benefit to a faith, or to religion in general, in order to constitute impermissible establishment under the second prong of *Lemon*.²⁸ Finally, state involvement with religion must be extensive or prolonged to raise an entanglement concern, which is fundamentally a question of kind and degree.²⁹

The *Lynch* concurrence³⁰ proffered a refinement of the *Lemon* test that gained several adherents,³¹ though the Court has never unreservedly adopted it. The concurrence asserted that government violates the Establishment Clause by either excessively entangling itself with religious institutions³² or endorsing or disapproving of religion.³³ The concurrence subsumed the purpose prong of *Lemon* into its refinement of the effect prong: courts should consider both what the state intended to communicate by its acts and what message the conduct actually conveyed.³⁴ Under this approach, even if an act's

Court had no reason to believe the legislatures intended otherwise), *with Stone v. Graham*, 449 U.S. 39, 40-41 (1980) (per curiam) (ignoring an "avowed" secular purpose behind displaying the Ten Commandments in public school classrooms and finding its preeminent purpose "plainly religious").

28. The Court remarked that the nativity scene's effect "merely happen[ed] to coincide or harmonize with the tenets of some . . . religions." *Lynch*, 465 U.S. at 682 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). "[T]he Court has made it abundantly clear . . . that not every law that confers an indirect, remote, or incidental benefit upon [religion] is, for that reason alone, constitutionally invalid." *Id.* at 683 (internal quotations omitted). In upholding the city's sponsorship of the display, the Court deemed its beneficial effect on religion minimal and likened it to the display of religious paintings in government-supported museums. *See id.*

29. After noting that there was no administrative entanglement or other contact with church authorities regarding the display, the Court observed that there was nothing "like the comprehensive, discriminating, and continuing state surveillance or the enduring entanglement present in *Lemon*." *Id.* at 684 (internal quotations omitted).

30. *Id.* at 687-94 (O'Connor, J., concurring).

31. Five years later, the Court in *Allegheny County v. ACLU* indicated that O'Connor's analysis in *Lynch* was, at a minimum, accurate. *Allegheny County v. ACLU*, 492 U.S. 573, 593-94 (1989). In a portion of his opinion for the Court, which only Justice Stevens joined, Justice Blackmun condemned the *Lynch* majority opinion as unworkable and argued that Justice O'Connor's concurrence presented superior reasoning. *See id.* at 594-97 (Blackmun, J., writing specially).

32. The concurrence feared that this may interfere with these institutions' independence, give them access to government not enjoyed by non-adherents, and "foster the creation of political constituencies defined along religious lines." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

33. According to the concurrence, endorsement would indicate to non-adherents that they are political outsiders and cause adherents to consider themselves a favored class. *See id.* (O'Connor, J., concurring).

34. This approach involves both subjective and objective examinations of the message. *See id.* at 690 (O'Connor, J., concurring). The former examination is subjective because it asks what message the government intended to communicate by its actions in the particular case. *See id.* (O'Connor, J., concurring). The latter examination is objective because it relies on the words or deeds themselves and asks what a reasonable person observing the government's conduct would think. *See id.* (O'Connor, J., concurring).

primary purpose was advancement or inhibition of religion, the act would remain constitutionally valid as long as the practice does “not have the effect of communicating a message of government endorsement or disapproval of religion.”³⁵

In *Wallace v. Jaffree*, the Court invoked the purpose prong of the *Lemon* test to invalidate an Alabama law mandating periods of silence in schools “for meditation or voluntary prayer.”³⁶ The decision, however, indicated the critical importance of fact-intensive case-by-case analysis. Declaring it “appropriate to ask ‘whether government’s actual purpose is to endorse . . . religion,’”³⁷ the Court went beyond the statute’s text and extensively considered its legislative history.³⁸ The Court found the state’s argument that the statute merely permissibly accommodated religion³⁹ unconvincing and instead relied on statements of the bill’s sponsor indicating that his only purpose was to return voluntary prayer to public schools.⁴⁰ Based on these statements and reference to a prior moment-of-silence law, which did not mention prayer, the Court held that the statute “indicate[d] . . . the State[s] inten[tion] to characterize prayer as a favored practice” and that such an endorsement violated the requirement of government neutrality toward religion.⁴¹ The two concurring *Wallace*

35. *Id.* at 692 (O’Connor, J., concurring). Thus, the concurrence concluded that, in *Lynch*, the subjective purpose of displaying the nativity scene within the context of religiously neutral icons “was not promotion of the religious content of the [scene] but celebration of [a] public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.” *Id.* at 691 (O’Connor, J., concurring). In light of the inobtrusive holiday festivities context, the display’s surroundings secularized what objective viewers could reasonably understand to be the purpose of the display, even though its intrinsic religious significance was not neutralized. *See id.* at 692 (O’Connor, J., concurring). Accordingly, the concurrence deemed the display constitutionally sound, as it was neither intended to endorse nor in fact endorsed Christianity. *See id.* at 694 (O’Connor, J., concurring).

36. *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985) (quoting ALA. CODE § 16-1-20.1 (Supp. 1984)).

37. *Id.* at 56 (quoting *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring)).

38. *See id.* at 56-60.

39. The state sought to cast the statute as furthering the goals of the Free Exercise Clause. *See id.* at 57-58 n.45. The Court suggested that the state offered this justification only in the context of litigation. *See id.*

40. State Senator Donald Holmes inserted statements into the legislative record without apparent dissent and confirmed for the trial court the pro-religion purpose described therein. *See id.* at 56-57.

41. *Id.* at 60.

opinions confirm that a case-specific, fact-intensive inquiry laid at the heart of the Court's decision.⁴²

In its more recent jurisprudence, the Court has frequently ignored or recast the reasoning set forth in *Lemon* and the *Lynch* concurrence. The Court has "repeatedly emphasized . . . [an] unwillingness to be confined to any single test or criterion."⁴³ For instance, in *Marsh v. Chambers*—approving Nebraska's practice of putting chaplains on the public payroll and having them open legislative sessions with a prayer—the Court trumped *Lemon* with historical analysis of the Establishment Clause's meaning.⁴⁴ Most significantly for this Note's purposes, the slim *Lee v. Weisman* majority chose to resolve a graduation prayer case without "reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured,"⁴⁵ and instead crafted fresh analysis.

Given these and other departures,⁴⁶ and the fierce criticism of the test,⁴⁷ the continuing validity of *Lemon* has come into doubt.⁴⁸ Several recent dissents have vigorously criticized *Lemon* and the Court's disorderly treatment of Establishment Clause cases. Justice Scalia, concurring in *Lamb's Chapel v. Center Moriches Union Free School District*, pointed out that by the time of that 1993 decision, five then-sitting justices had personally criticized *Lemon* and a sixth had joined an opinion doing so.⁴⁹ He argued that *Lemon* survives as a judicial fig leaf because the Court can ignore the rule entirely when it

42. *Id.* at 62-67 (Powell, J., concurring) (expressing dismay at Alabama's persistent attempts to sponsor prayer in public schools); *id.* at 67-84 (O'Connor, J., concurring in judgment) (pointing out the peculiar features of the Alabama law that render it invalid and explaining why other moment-of-silence laws do not necessarily violate the Establishment Clause).

43. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (reviewing precedent demonstrating disparity in its *Lemon* test application).

44. After noting that opening legislative sessions with prayer is "deeply embedded in the history and tradition of this country," *Marsh v. Chambers*, 463 U.S. 783, 786 (1983), the Court explained that history led it to accept the interpretation of First Amendment draftsmen who, given their own practice of supporting official chaplains, "saw no real threat to the Establishment Clause arising from a practice of prayer similar to [Nebraska's]." *Id.* at 791.

45. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

46. *See, e.g., Allegheny County v. ACLU*, 492 U.S. 573, 589-94, 598-623 (1989) (analyzing an Establishment Clause question without a majority of the Court applying the *Lemon* test).

47. Chief Justice Rehnquist remarked that *Lemon* "has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results. . . ." *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting).

48. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 n.7 (1993) (recognizing Justice Scalia's admonishment to the Court for turning to *Lemon*).

49. *Lamb's Chapel*, 508 U.S. at 398-99 (Scalia, J., concurring in judgment) (listing ten non-majority opinions criticizing *Lemon*).

wishes to uphold a practice *Lemon* forbids and can invoke it to strike down a practice the Court dislikes.⁵⁰

Furthermore, Justice Scalia, among others,⁵¹ considers many of the Court's tests and guidelines too restrictive. Basing his analysis on the First Amendment's origins and history, Scalia declared that the Court has recently been too swift to strike down practices that acknowledge religion without actually establishing it.⁵² He has proposed that the Free Exercise Clause mandates government respect for religion rather than official agnosticism.⁵³ In support of this more permissive policy, Scalia pointed out that certain long-running practices acknowledging religion, such as printing "In God We Trust" on currency and opening legislative sessions with prayers, do not run afoul of the Constitution.⁵⁴ Scalia has yet to command a majority for his position, but his observation that *Lemon* presently stands on shaky ground is undoubtedly correct.

50. Justice Scalia cited cases invoking and ignoring *Lemon* and one calling it helpful. *See id.* at 399 (Scalia, J., concurring in judgment). He wrote separately because he refused to apply *Lemon* under any circumstances. *See id.* at 399-400 (Scalia, J., concurring in judgment). Dissenting in *Lee* a year earlier, Scalia wrote, "Today's opinion shows . . . why . . . our Constitution [] cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people." *Lee*, 505 U.S. at 632 (Scalia, J., dissenting).

51. Three justices joined Justice Scalia's lengthy and sweepingly critical dissent in *Lee*. *See id.* at 631. Justice Thomas joined Scalia's opinion in *Lamb's Chapel*. *Lamb's Chapel*, 508 U.S. at 397 (Scalia, J., concurring in judgment). And Justice Rehnquist, among the earliest critics of *Lemon*, agrees that at least the purpose and effect analyses "are in no way based on either the language or intent of the drafters." *Jaffree*, 472 U.S. at 108 (Rehnquist, J., dissenting).

52. For example, dissenting in *Lee*, he wrote that citizens should be free to join in prayer at public functions if they so choose. *See Lee*, 505 U.S. at 646 (Scalia, J., dissenting). Scalia further opined that to exorcise religion from all official functions "in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law." *Id.* (Scalia, J., dissenting). Additionally, he rejected the notion that the Constitution forbids official endorsement of religion in general. *See Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring in judgment).

53. Scalia reasoned that, since the Constitution itself places religion in a favored category (by specifically forbidding state interference with individuals' free exercise of their beliefs) and the Framers supported "public virtues inculcated by religion," the Court should permit a closer relationship between church and state than *Lemon* allows. *Id.* at 399-401 (Scalia, J., concurring in judgment).

54. *See Lee*, 505 U.S. at 632-36 (Scalia, J., dissenting); *cf. Lynch v. Donnelly*, 465 U.S. 668, 673-78 (1984) (noting state accommodation of religion and the permissibility of putting "In God We Trust" on money and inserting "under God" into the Pledge of Allegiance).

Despite this movement away from *Lemon* in religion cases generally, the Supreme Court has, at least until recently,⁵⁵ consistently enforced near-total separation of church and state in public schools. The Court's decisions over the last three decades, selectively applying the *Lemon* test, have furnished little guidance on the proper application of concededly difficult rules. Not surprisingly, then, the slim majority in *Lee* took an unorthodox approach to the question before it.

B. *Lee v. Weisman and the Coercion Analysis*

The majority in *Lee* expressly declined to reconsider the *Lemon* test⁵⁶ and declared that the Court need not revisit cases that lay on the cusp of establishment.⁵⁷ Instead, the Court suggested that the actions of school officials, in inviting a rabbi to deliver prayers at a public-school graduation, violated well-settled caselaw, which proscribed all forms of official religious coercion.⁵⁸ The Court set forth the two dominant facts that controlled its decision. First, "[s]tate officials direct[ed] the performance of a formal religious exercise at . . . graduation ceremonies for secondary schools."⁵⁹ Second, "attendance and participation in the state-sponsored religious activity [were] in a fair and real sense obligatory."⁶⁰ In finding the prayer unconstitutional, the Court focused on the state's control over the existence and content of the prayer, the involuntary attendance by secondary school students, and the unavailability of a meaningful method of expressing dissent.⁶¹

The Court regarded the school principal's decision to include an invocation and a benediction as tantamount to a deliberate legislative decree that prayers must be delivered at graduation

55. The Court's most recent schools cases indicate that it may be softening its stance on separation of church and school. See generally *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)); *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995) (ordering public university to fund, on the same terms as other publications, a Christian newspaper).

56. *Lee*, 505 U.S. at 587.

57. In this group, the Court included *Allegheny County v. ACLU*, 492 U.S. 573 (1989), and *Wallace v. Jaffree*, 472 U.S. 38 (1985). See *Lee*, 505 U.S. at 586.

58. See *id.* at 587 (declaring that "the Constitution guarantees that government may not coerce anyone to support or participate in religion . . . or otherwise act in a way which establishes a state religion or religious faith, or tends to do so" (internal quotations omitted)).

59. *Id.* at 586.

60. *Id.*

61. See *id.* at 586-99.

ceremonies.⁶² The Court expressed unease at the potential divisiveness of selecting a cleric to perform in the ceremony, and noted that although audience members' objections do not control the constitutionality of a policy, the unavailability of a meaningful opportunity for dissenting expression made the selection particularly unsettling.⁶³ Additionally, the Court regarded the principal's issuing guidelines for non-sectarian invocations at civic events as a method of state control over the prayer.⁶⁴ Taken together, the lack of opportunity for critics to voice dissent and the high degree of state control over the speaker and the message "made it clear that the graduation prayers bore the imprint of the State and put school-age children who objected in an untenable position."⁶⁵

Indeed, the Court focused on the effect of the prayer on the children in the audience, with this analysis consuming the better part of the opinion. Critically, the Court rejected the argument that attendance at graduation ceremonies is voluntary.⁶⁶ For the Court, contending that a teenage student, who had worked for years to reach the culturally significant celebration of commencement, had the option to absent herself from the ceremony without forfeiting her diploma was "formalistic in the extreme."⁶⁷ Forcing students to choose between forfeiting the intangible benefits of graduation or submitting to a state-directed religious presentation rendered the theoretical availability of a choice to attend legally meaningless.⁶⁸ Thus, the Court wrote, graduations are obligatory and the cleric's audience was a captive one that the state had marshaled before him.⁶⁹

The Court also discussed students' ability to express dissent while still participating in the obligatory ceremony.⁷⁰ According to the Court, the school's supervision of the ceremony placed both public and peer pressure on students to "stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt

62. *See id.* at 587.

63. *See id.* at 587-88.

64. *See id.* at 588.

65. *Id.* at 590.

66. *See id.* at 595.

67. *Id.*

68. The Court found that, for religious dissenters, the choice between religious freedom and collecting the rewards society normally confers on graduates was no choice at all. *See id.* at 595-96.

69. *See id.* at 597.

70. *See id.* at 593.

compulsion."⁷¹ Moreover, in the context of a group standing in silence during a graduation prayer, the Court found that high-school-age dissenters have no method of expressing their non-support for the exercise short of outright protestation.⁷² Since students face this dilemma in a setting of intense social and peer pressure to conform, the Court observed, they have no legally significant choice.⁷³ Ultimately, the Constitution no more allows the state to take advantage of these social pressures to exact religious conformity than it allows the state to use direct means.⁷⁴

The Court concluded that the state's act of turning over the commencement podium to a person leading a religious exercise amounted to coercing students to participate in a formal religious practice.⁷⁵ When "young graduates who object are induced to conform" to the state-sanctioned orthodoxy, the Court held, the Establishment Clause has been violated.⁷⁶

C. *Mergens, Rosenberger, and the Equal Access Principle*

Schools may create an open forum, void of *Lee's* coercion, to enable religious discussions on campus. A long line of Supreme Court cases permits otherwise establishmentarian activity when the state has created an open forum because all speakers, regardless of viewpoint have a right to equal access to the forum.⁷⁷

In *Board of Education of the Westside Community Schools v. Mergens*, the Court reviewed the federal Equal Access Act, which required certain public secondary schools to accommodate student religious groups when creating a forum open to other school groups.⁷⁸ Codifying the holding of *Widmar v. Vincent*,⁷⁹ the Act mandated equal access to school facilities during non-instructional periods for non-curriculum related groups regardless of the political or religious views of group members, provided that membership in the group is volun-

71. *Id.*

72. *See id.*

73. *See id.* at 593-94.

74. *See id.* at 594.

75. *See id.* at 597-98.

76. *Id.* at 599.

77. *See, e.g., Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent* 454 U.S. 263 (1981).

78. The Equal Access Act, 20 U.S.C. §§ 4071-4074 (1998), applied to secondary schools receiving federal assistance. *See Mergens*, 496 U.S. at 235-36.

79. *Widmar*, 454 U.S. at 275-77 (holding that when a university creates a limited open forum for student expression, it must, under the Free Speech Clause, allow religious groups to take advantage of the forum).

tary and that the state not influence the form of any religious activity.⁸⁰

The plurality⁸¹ reviewed the Act under the *Lemon* framework, which the Court had used to invalidate the university policy denying equal access in *Widmar*.⁸² Because the Act's purpose of preventing content-based discrimination against student groups neither endorsed nor disapproved of religion,⁸³ and the Act forbade entangling faculty promotion of, or participation in, meetings,⁸⁴ the critical question under the *Lemon* analysis became whether the Act's primary effect was advancement of religion. The school argued that holding "student religious meetings . . . under school aegis," while compulsory attendance laws provided "a ready-made audience for student evangelists," would prompt students to perceive official support for the meetings.⁸⁵ The plurality found three grounds for rejecting this contention. First, secondary school students could understand the distinction between government speech endorsing religion and non-discriminatory government accommodation of private speech that might be religious.⁸⁶ Second, since school officials did not actively participate in meetings and because the students held meetings outside the instructional classroom setting, where attendance is compulsory, state endorsement or coercion of belief seemed unlikely.⁸⁷ And third, since religious clubs were "merely one of many different [kinds of] student-initiated voluntary clubs, students should perceive no message of government endorsement of religion."⁸⁸

80. See Equal Access Act, 20 U.S.C. §§ 4071-74. The Court decided that freedom of speech required the school district in *Mergens* to grant religious groups equal access on statutory, rather than constitutional, grounds. *Mergens*, 496 U.S. at 247 (plurality opinion of O'Connor, J.). The Court then decided whether such access violates the Establishment Clause. See *id.* at 247-62 (opinions of the four-member plurality per O'Connor, J., and the two-member concurrence per Kennedy, J.). The latter part of the decision is no less constitutional in character than *Widmar* and *Rosenberger*.

81. Justice O'Connor announced the opinion of the Court; five other justices joined in the factual account and the statutory interpretation portion of the opinion. See *id.* at 229-30. Justices Keunedy and Scalia concurred in judgment, refusing to join the plurality's discussion of endorsement and finding no Establishment Clause violation because the law does not coerce students into participating in religious activities. See *id.* at 260-62 (Kennedy, J., concurring).

82. See *id.* at 248-52 (plurality opinion of O'Connor, J.).

83. See *id.* at 248-49 (plurality opinion of O'Connor, J.).

84. See *id.* at 252-53 (plurality opinion of O'Connor, J.).

85. *Id.* at 249 (plurality opinion of O'Connor, J.).

86. See *id.* at 250-51 (plurality opinion of O'Connor, J.).

87. See *id.* at 251 (plurality opinion of O'Connor, J.).

88. *Id.* at 252 (plurality opinion of O'Connor, J.).

The concurrence rejected the plurality's application of the *Lemon* test,⁸⁹ focusing instead on the conviction that "the government cannot coerce any student to participate in a religious activity."⁹⁰ The concurrence found that, because the Act did not require or even encourage student participation and meetings could not take place during school hours, it posed no threat of coercing students.⁹¹

Three years after *Mergens* and a year after *Lee*, the Court affirmed application of the equal access principle in *Lamb's Chapel*, even as individual justices continued their debate over the propriety of the endorsement and coercion analyses.⁹² In that case, the Court held that requiring a school district, which permitted a variety of community organizations to use its facilities after hours, to open its doors to groups with a religious perspective created no realistic danger that the public would regard the district's content-neutral accommodation of groups as endorsing religion.⁹³

In 1995, the Court faced a pointed question concerning the reach of the equal access principle. *Rosenberger v. Rector & Visitors of the University of Virginia* involved a state university's denial of

89. Kennedy's opinion never referred to the *Lemon* test and considered the endorsement test useless because the term "endorsement" has insufficient meaning to be dispositive. *See id.* at 261 (Kennedy, J., concurring).

90. *Id.* at 260 (Kennedy, J., concurring). Justice Kennedy also wrote that "direct [state] benefits to religion in such a degree that it in fact establishes a [state] religion or religious faith, or tends to do so," violate the Establishment Clause. *Id.* at 260 (Kennedy, J., concurring) (internal quotations omitted).

91. *See id.* at 260-61 (Kennedy, J., concurring). Foreshadowing the majority in *Lee*, Justice Kennedy stated that the proper test should be whether government imposes pressure on students to participate in religious activity, viewed in light of the special circumstances of "secondary school[,] where the line between voluntary and coerced participation may be difficult to draw." *Id.* at 261-62 (Kennedy, J., concurring). It should be noted that Justice Souter, concurring with the five-to-four majority in *Lee*, supported the endorsement analysis of the *Mergens* plurality opinion and declared that a coercion standard set the Establishment bar too high. *See Lee v. Weisman*, 505 U.S. 577, 618 (1992) (Souter, J., concurring). Souter regarded religious coercion as barred by the Free Exercise Clause; the spectrum of laws "respecting" an establishment of religion was necessarily broader. *See id.* at 621 (Souter, J., concurring). According to Souter, the Establishment Clause mandated neutrality toward religion, such that the state cannot favor or endorse a particular sect or religion generally. *See id.* at 627 (Souter, J., concurring).

92. *See generally* *Lamb's Chapel v. Centor Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). Three justices concurred in the judgment, writing to express their displeasure at the resurgence of the *Lemon* test and the endorsement analysis. *See id.* at 397 (Kennedy, J., concurring); *id.* at 397-401 (Scahla, J., concurring, joined by Thomas, J.). Commentators likewise kept the debate alive. *See generally* Julie Madison Angus, Note, *Life Without Lemon: The Status of Establishment Clause Jurisprudence after Rosenberger v. University of Virginia*, 17 N. ILL. U. L. REV. 123 (1996) (arguing that *Lamb's Chapel* and *Rosenberger* fouled the jurisprudential waters and that the *Lemon* test offers superior standards).

93. *See Lamb's Chapel*, 508 U.S. at 395.

funding to a student-organized Christian newspaper.⁹⁴ The Court characterized the case as involving the state creation of an open forum for student ideas.⁹⁵ It had to resolve whether funding the religious newspaper on the same terms as other student publications would violate the Establishment Clause.⁹⁶ Three facts prompted the Court to compel funding of the newspaper. First, the University had created a marketplace of ideas by making available state-collected funds to student media groups.⁹⁷ Second, denying funds only to journals with religious editorial opinions amounted to viewpoint-discrimination.⁹⁸ Third, the University had sufficiently divorced itself from the content of recognized student publications⁹⁹ to make the speech private, notwithstanding the University's facilitation of that speech.¹⁰⁰ According to the Court, funding the newspaper did not violate the Establishment Clause because state benefits were available to groups with a wide range of opinions based on neutral qualifying criteria, and there was no real likelihood that the state would either endorse or compel speech.¹⁰¹ Not surprisingly, the concurrence focused on whether the University's provision of funds would endorse the publication's religious message.¹⁰²

In an environment of decisions consistently indicating that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools,"¹⁰³ the circuit courts have attempted to apply the Supreme

94. *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 822-23 (1995).

95. *See id.* at 841-46.

96. *See id.*

97. *See id.* at 828-32.

98. *See id.*

99. "The University declares that the student groups eligible for [financial] support are not the University's agents, are not subject to its control, and are not its responsibility." *Id.* at 835. The University required groups to sign statements indicating that they did not act on behalf of the school and obligated the groups to communicate this absence of official endorsement when dealing with third parties and in all written materials. *See id.* at 823-24.

100. *See id.* at 833-35. When the school is speaking or when it has enlisted a private speaker to act in its behalf, as in traditional educational functions, the school maintains broad discretion to make content- and viewpoint-based determinations of appropriate speech. *See id.* at 833. Examples of this include selecting guest lecturers and speakers at assemblies. However, viewpoint restrictions are inappropriate where an institution "expends funds to encourage a diversity of views from private speakers." *Id.* at 834.

101. *See id.* at 840-45.

102. *See id.* at 846-52 (O'Connor, J., concurring). On the facts, it did not. *See id.* at 852 (O'Connor, J., concurring).

103. *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

Court's teachings to subtly shifting fact patterns, often with conflicting results.

III. THE DOMINANT FACTS OF THE GRADUATION PRAYER CASES

Throughout the 1990s, school districts instituted a variety of policies designed to avoid the practices that the Supreme Court held unconstitutional in *Lee v. Weisman*. Part III.A describes the facts presented in seven circuit court cases that address these policies. Part III.B highlights the similarities of these cases and indicates their congruence with what this Note considers the critical elements of *Lee*. The reasoning and outcome of the courts' decisions and their respective shortcomings appear in Part IV.

A. *The Circuit Court Cases*

School district policies designed to facilitate graduation prayer have taken on a number of characteristics. Some districts have allowed students to vote on whether they wish to have a prayer, and if so, who will deliver the prayer. Other districts, while granting students the ability to vote on whether they wish to have a prayer, have limited who may deliver prayer to members of the graduating class. In cases where a school district allows students to elect one of their own to deliver a prayer, school officials have often retained some measure of control over the content of the presentation. Still other school districts, rather than allowing a student vote to control the question, have permitted student speakers to deliver any message they choose, including a prayer.

1. When Students Vote for a Prayer

The graduation ceremony for Grangeville High School in Grangeville, Idaho, traditionally included an invocation and a benediction.¹⁰⁴ In 1990, the superintendent of Joint School District No. 241, which included Grangeville High, circulated a memorandum restating its policy on commencement prayers.¹⁰⁵ According to the policy, principals allowed seniors to control every aspect of their

104. See *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 452 (9th Cir. 1994) (indicating that prayers had taken place since at least the early 1980s).

105. See *id.* at 452-53.

graduations.¹⁰⁶ Students voted on whether they wanted an invocation and/or a benediction.¹⁰⁷ If they desired a prayer, students determined if a minister or one of their own would offer it.¹⁰⁸ If they wanted a minister, the students selected him themselves; if they wanted a classmate, the district encouraged but did not dictate electing the third- or fourth-ranking student to offer the prayer.¹⁰⁹ Senior class officers had to contact all speakers directly.¹¹⁰ School officials did not review the content of any presentations before the ceremonies.¹¹¹ As in *Lee*, attendance at graduation was not a requirement for receiving a diploma.¹¹² In short, the school board allowed, but by no means required, that commencement ceremonies include a religious presentation and left the ultimate decision to the students.

The school district took steps to make public its ostensible relinquishment of control over the ceremonies.¹¹³ Starting in 1991, commencement programs included a disclaimer indicating that the school district neither promoted nor endorsed the statements of any speaker at the ceremonies.¹¹⁴ The district also indicated that it did not consider commencement part of its educational program.¹¹⁵ Students and a parent challenged the constitutionality of this policy in *Harris v. Joint School District No. 241*.¹¹⁶

2. When Students May Elect Only One of Their Own to Pray

Until 1986, graduating seniors at Texas's Clear Lake High School offered prayers invoking the "Lord," the "Gospel," and making references to the omnipotence of a Christian "God."¹¹⁷ After students complained, the school district crafted a policy that granted graduat-

106. *See id.* at 452.

107. *See id.*

108. *See id.* at 453.

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.* at 452-53.

114. *See id.* at 453.

115. *See id.*

116. *Id.* at 448.

117. *See Jones v. Clear Creek Indep. Sch. Dist.* (Jones I), 930 F.2d 416, 417 (5th Cir. 1991), *vacated*, 505 U.S. 1215 (1992), *on remand*, (Jones II), 977 F.2d 963 (5th Cir. 1992).

ing senior classes the choice of having invocations and benedictions.¹¹⁸ The policy required that a student volunteer deliver any prayer and that the prayer be nonsectarian and nonproselytizing.¹¹⁹ Dissatisfied with the reform, graduating seniors and parents contested the constitutionality of the policy in *Jones v. Clear Creek Independent School District*.¹²⁰

Likewise, in *Ingebretsen v. Jackson Public School District*, parents, students, and taxpayers challenged a 1994 Mississippi statute that permitted "invocations, benedictions[,] or nonsectarian, nonproselytizing student-initiated voluntary prayer" at commencement ceremonies, in addition to other compulsory school functions.¹²¹

Meanwhile, a New Jersey school board had long observed the practice of permitting a rotating group of local clergy to deliver a nonsectarian invocation and benediction at its high-school graduation ceremonies.¹²² In response to *Lee*, the school board adopted a policy that, while declaring that officials could not endorse or promote prayer at school functions, allowed the senior class to vote whether to have a student-delivered prayer, a moment of silence, or nothing at all at graduation.¹²³ Printed programs would, like the policy, disclaim any inference that speakers reflected the views of school officials.¹²⁴ After a slim plurality of students voted for a prayer and volunteers stepped forward to deliver it, a graduating senior sought the Highland Regional High School principal's permission to have a member of the ACLU speak to the graduates about safe sex and condom distribution.¹²⁵ When the principal denied the request due to "time con-

118. See *Jones I*, 930 F.2d at 417. The policy required seniors to hear the "advice and counsel" of the senior class principal, a faculty member who represented the class throughout its four years. See *id.* at 417.

119. See *id.*

120. *Id.* at 418.

121. *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 277 (5th Cir. 1996) (quoting 1994 Miss. Laws ch. 609, § 1(2)). As a matter of statutory interpretation, it is unclear whether the invocations and benedictions permitted by the statute had to be delivered by students. Since the Fifth Circuit declined to reconsider *Jones II* and approved of the Mississippi statute to the extent that it allowed "students to choose to pray" at graduations, this Note considers the statute as permitting only that. *Id.* at 280.

122. See *ACLU v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1474 (3d Cir. 1996) (en banc).

123. See *id.* at 1474-75. Under the policy, such prayer could be sectarian, proselytizing, or "even degrading [to] other religions." *Id.* at 1484-85.

124. See *id.* at 1475.

125. See *id.*

straints,"¹²⁶ the student and the ACLU challenged the prayer-permitting policy in *ACLU v. Black Horse Pike Regional Board of Education*.¹²⁷

A more recent graduation prayer case involves, not surprisingly, a mosaic of several prior fact patterns: student discretion to select student speakers to deliver an invocation and benediction "as part of the graduation exercise,"¹²⁸ after the school district screened the speech for content and while it "maintained complete control over the programs and facilities during the reading of the prayers."¹²⁹ Apparently determined to introduce some sort of prayer into graduation ceremonies, the Santa Fe [Texas] Independent School District engrafted into its final policy an automatic fallback option which would add the requirement that any prayer be nonsectarian and nonproselytizing if a court found its preferred policy unconstitutional.¹³⁰ Also at issue was the school district's "Football Policy," which "provid[ed] for a student-selected, student-given brief invocation and/or message . . . during the pre-game ceremonies of home varsity football games."¹³¹ Several plaintiffs, who requested anonymity, challenged these policies, which codified longstanding practice, and other incidents and practices the Fifth Circuit described as "disturbing" in *Doe v. Santa Fe Independent School District*.¹³²

Following *Lee v. Weisman*, the Duval County [Florida] School Board instructed schools "no longer to permit prayer" at their graduation ceremonies.¹³³ Public pressure, however, prompted authorities to enact a policy consistent with *Jones II*, and students soon began voting on whether to have student-led "messages" at the beginning and end of their commencements.¹³⁴ Under this policy, only

126. *Id.* The principal was willing "to arrest any student who might attempt to speak at graduation without prior approval of the administration (even if graduates have approved). . . ." *Id.* at 1484.

127. *Id.* at 1475. For the perspective of an attorney in a similar case that did not reach the Court of Appeals, see Stephen B. Pershing, *Graduation Prayer After Lee v. Weisman: A Cautionary Tale*, 46 *MERCER L. REV.* 1097 (1995) (describing *Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993)).

128. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 811 (5th Cir. 1999).

129. *Id.* at 810.

130. *See id.* at 812.

131. *Id.* (internal quotations omitted). The football policy also included a safety clause that required presentations be nonsectarian and nonproselytizing if a court invalidated the absolute discretion granted to students in the original policy. *See id.*

132. *Id.* at 809-13.

133. *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1251 (11th Cir. 1999).

134. *See id.*

students that the majority selected could make such statements.¹³⁵ Schools retained "tremendous control" over the ceremonies.¹³⁶ In 1992, ten of seventeen graduations in the school district included prayers.¹³⁷ Students and parents sought damages and a declaratory judgment that the policy "constituted an establishment of religion and infringed on their free exercise of religion" in *Adler v. Duval County School Board*.¹³⁸

3. When a School Permits Students to Deliver a Religious Message

For seven years leading up to 1995, the high school in Rexburg, Idaho, a community with a "high concentration of Mormons," included both an invocation and a benediction in its commencement exercises.¹³⁹ When the school district changed its policy, it provided that at least four students, identified by their class standing, could address the audience at graduation in any manner they chose.¹⁴⁰ Although administrators could offer advice on the appropriate language for the occasion, they could neither proscribe nor require any subject matter or other content.¹⁴¹ While the school district appeared to have turned over all control of certain commencement speeches to graduates,¹⁴² a parent who feared retaliation from her community challenged the policy, arguing in *Doe v. Madison School District No. 321* that, by permitting students to infuse the graduation ceremony with religious speeches and songs, the policy coerced students.¹⁴³

135. *See id.* at 1250.

136. *Id.* at 1244. "[T]he individual schools and the School Board: rented the facilities for the graduation; told the graduating students what they should wear; decided when the graduating students and audience could sit and stand; decided the sequence of events at the graduation; and designed and printed the program for the ceremonies." *Id.*

137. *See id.* at 1251.

138. *Id.* at 1241.

139. *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 836 n.6 (9th Cir. 1998).

140. The policy specifically mentioned "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement." *Id.* at 834.

141. *See id.* Students were free to reject any advice offered. *See id.*

142. A formality that might go unenforced were students to launch into prolonged discussions of topics such as condom distribution, *cf.* *ACLU v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1475 (3d Cir. 1996), this Note takes the district's policy at face value and presumes no disingenuousness.

143. *Madison Sch. Dist.*, 147 F.3d at 834. The parent also argued that the policy failed the *Lemon* test. *See id.* at 836.

*B. The Critical Elements of Lee and the Common
Features of Each Fact Pattern*

Before examining the common features of the post-*Lee* circuit cases, it is helpful to distill the facts critical to the outcome of that landmark case. Commentators¹⁴⁴ and subsequent courts¹⁴⁵ have described *Lee* as establishing a “coercion test,” and rightly so, as the United States’ argument and much of the opinion turned on the extent to which the state’s actions coerced students to participate in a religious observance.¹⁴⁶ Yet the Court also described the facts and legal arguments surrounding the school principal’s editorial control over the prayers’ content, a circumstance the school districts in *Harris*, *Adler*, and *Madison*, but not *Santa Fe*, managed to avoid.¹⁴⁷

In *Lee*, the principal chose a rabbi to deliver the graduation prayers.¹⁴⁸ This choice, the Court reasoned, was attributable to the state and potentially divisive.¹⁴⁹ The Court indicated that, even worse than the principal’s control over the speaker’s identity, the principal’s decision to provide the rabbi with guidelines for nonsectarian “civic” prayers amounted to state control of the prayers’ content.¹⁵⁰ While this conclusion may be valid from the perspective of a reviewing court, the statement fails to mesh with the opinion’s subsequent extensive discussion of the condition of students in the audience, since students might not know whether their principal had advised speakers on the content of presentations.¹⁵¹ Graduates would not necessarily observe anything more than the handing over of the dais from school officials to an individual with a religious offering. Thus, while the *Lee* discussion avoided mentioning the *Lemon* test’s entanglement prong, the Court’s consideration of the extent to which state officials “directed and controlled the content of the prayers,”¹⁵² which members of

144. See, e.g., Daniel N. McPherson, *Student-Initiated Religious Expression in the Public Schools: The Need for a Wider Opening in the Schoolhouse Gate*, 30 CREIGHTON L. REV. 393, 419 (1997).

145. See, e.g., *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 814 (5th Cir. 1999); *Jones v. Clear Creek Indep. Sch. Dist. (Jones II)*, 977 F.2d 963, 966 (5th Cir. 1992).

146. See *Lee v. Weisman*, 505 U.S. 577, 587, 590-99 (1992).

147. See *supra* Part III.A.

148. *Lee*, 505 U.S. at 587.

149. See *id.*

150. *Id.* at 588.

151. *Lee* did not indicate whether students knew about their principal’s provision of the guidelines. *Id.* The presence or absence of this knowledge, in light of the long discussion of coercion, seems far from outcome-determinative.

152. *Id.* at 588.

the audience could not possibly observe themselves, seems like an overture to caselaw that the facts did not require. Accordingly, this Note regards the state's subjecting a captive audience to a religious message alone sufficient to place the imprimatur of the state on the speech, for that stands as the only state action students could observe from their seats.¹⁵³ The case turns on coercion, and from the perspective of those being coerced, any state entanglement with religion went—or at least could have gone—completely unobserved.

Ultimately, the *Lee* court found two “dominant facts” problematic: (1) state direction of prayer—comprised of speaker selection and content suggestions, and (2) coercion created by the mandatory nature of graduation and peer pressure to conform.¹⁵⁴ But the Court never indicated that both factors were required to strike down the policy or that the second factor alone would not suffice to support a finding of unconstitutionality.¹⁵⁵ And the concurrence focused its attention on the coercive aspects at work.¹⁵⁶ This Note puts aside the first factor and focuses on the second, because the Court failed to appreciate the salience of its own observations about the inescapable facts of high-school commencement ceremonies in America today: they amount to a state forum in which students attribute the entire content of the program to the state, regardless of actual involvement.¹⁵⁷

In summary, the constitutionally significant elements of the actions taken in *Lee* can be reduced to these critical facts: first, through its school, the state exercised a policy choice in providing the commencement podium to a third party for a religious presentation; second, given the cultural significance of the event and the fact that

153. Two courts have held that a school's inherent control over its graduation ceremony and its antecedent delegation of power to select a speaker is sufficient to satisfy the “first dominant fact” of *Lee* that this Note here discounts. See *ACLU v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1479-80 (3d Cir. 1996); see also *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1247-48 (11th Cir. 1999). Although as a conceptual matter the *Black Horse Pike* and *Adler* courts' reasoning is convincing, the second dominant fact of *Lee*, coercion, takes place in the open for all to observe and understand. Consequently, this Note finds the coercion analysis logically stronger and, indeed, more compelling.

154. *Lee*, 505 U.S. at 586.

155. See *id.* at 586-99.

156. See *id.* at 599-609 (Blackmun, J., concurring) (focusing on the coercive aspects and finding them alone sufficiently constitutionally unsound).

157. See *Adler*, 174 F.3d at 1248 (holding that the “policy does not dissociate student-initiated sectarian and proselytizing prayer at a school-controlled graduation ceremony from the imprint of the state under *Lee*, and that the state's endorsement of the prayer subjects it to a facial violation of the Establishment Clause”); *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 817, 822 (5th Cir. 1999) (declaring that “government imprimatur is not so easily masked” and that the inescapable circumstances of graduations “all militate against labeling such ceremonies as public fora of any type”).

graduates have already earned their right to attend, graduation speakers command a captive audience; and third, members of that captive audience have no meaningful opportunity to express dissenting beliefs.

The critical elements of the typical circuit court fact patterns are no different from those in *Lee*. The school districts, with varying degrees of success, responded to the Supreme Court's concerns about overt entanglement but failed to remove coercion from the graduation ceremonies. At the genesis of each situation, the state controlled who would speak to the assembled graduates by setting the policy that determined the speakers. The presentation a graduating student faces—and under *Lee* is coerced by—is the same, which makes the method of selecting the speaker immaterial. The cultural significance of the ceremony remains, of course, identical, as do the coercive social pressures operating on dissenters. No matter how unlimited the range of topics selected speakers may cover, not all audience members can realistically speak at the ceremony. Some will not want to take the social risk of speaking out. In any event, and most importantly, meaningful opportunities for dissent¹⁵⁸ cannot be had without turning a simple high-school graduation into a political and religious circus.¹⁵⁹ The only fact distinguishing the circuit court cases to date from *Lee* is that the state permitted, rather than requested, a religious message. As Part IV.D of this Note shows, that difference is constitutionally insignificant.

IV. THE INTERSECTION OF SEVERAL FIRST AMENDMENT DOCTRINES

A. *When Courts Selectively Employ Competing Paradigms*

Once the Supreme Court departed from strict application of the *Lemon* test, it started to selectively apply various analytical paradigms.¹⁶⁰ Faced with muddled judicial pronouncements from

158. The *Lee* court characterized the opportunity for dissent as the ability to express disapproval or, at least, non-participation. *Lee*, 505 U.S. at 593. The Court made clear that even that narrow form of dissent cannot be found in the coercive environment inherent in the state forum of graduation. *See id.* at 593-94.

159. *Cf. id.*; *Santa Fe Indep. Sch. Dist.*, 168 F.3d at 816 (holding that “permitting the uttering” of sectarian and proselytizing prayers would transform the character of “an event intended to recognize and celebrate the graduating students’ academic achievements and the commonality of their presence” and “conceivably even disrupt it”).

160. *See supra* Part II.A.

Washington, lower federal courts sometimes chose to apply all of the major tests of establishment.¹⁶¹ These courts have also employed myriad variations on the traditional analyses and their exceptions.¹⁶² From the selective application of these tests, widely differing outcomes in similar cases have come.¹⁶³

Just as *Rosenberger* laid at the intersection of the prohibition of state funding of religion and the open forum doctrine,¹⁶⁴ the recent graduation prayer cases may be seen as the confluence of the equal access principle and forbidden coercion of the conscience. Yet an examination of the larger body of Supreme Court jurisprudence on the First Amendment and the public schools reveals not only that commencement ceremonies are not open forums, but that they are in reality part—the final part—of the schools' pedagogical mission, where Establishment concerns run high and protections are great.

The remainder of this Part will address each of the various paradigms, the appropriateness of their analyses, and the conclusions each prompts. Part IV.B discusses the agency principles which dominated many early post-*Lee* decisions. While a finding of agency—that any speaker, no matter how selected or controlled speaks for the state—could quickly dispose of the graduation prayer cases, Part IV.C deals with the most persuasive counter-argument, the open forum doctrine. Part IV.D then considers the real-life implications of graduation prayer, with a special focus on the social milieu in which

161. Five major (and perhaps overlapping) tests of First Amendment validity have emerged, failure of any one of which fells a statute or policy: purpose, effect, entanglement, endorsement, and coercion. See *Jones v. Clear Creek Indep. Sch. Dist.* (*Jones II*), 977 F.2d 963, 966-72 (5th Cir. 1992). Applying all five has become common practice in religion-in-public-schools cases. See generally *ACLU v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (discussing each prong of the *Lemon* test, the endorsement analysis espoused by Justice O'Connor in *Lynch* and *Lee's* coercion analysis); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996) (same); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994) (same). But see *Santa Fe Indep. Sch. Dist.*, 168 F.3d at 814-19 (discussing all five tests and distinguishing the case sub judice from facts of *Lee* but not actually applying the coercion test); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993) (explaining its rejection of the *Lemon* test, preferring instead a "case-bound . . . fact-sensitive" approach based on analogy to Supreme Court decisions).

162. See generally *Santa Fe Indep. Sch. Dist.*, 168 F.3d at 806 (using the nonsectarian and nonproselytizing requirement it deemed central to *Jones II* in order "to dodge the outcome otherwise dictated by *Lee*"); *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998) (relying on secular selection criteria and the open-forum analysis); *Harris*, 41 F.3d 447 (rejecting *Jones II* on agency principles); *Jones II*, 977 F.3d 963 (5th Cir. 1992) (relying on absence of both religiosity and state direction of the prayers).

163. See, e.g., *Black Horse Pike*, 84 F.3d at 1482-83 (reciting the similarity of the facts before it to those present in *Jones II* and *Harris* but rejecting the reasoning of *Jones II* and finding *Harris* persuasive).

164. *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring).

speakers and listeners find themselves. As the final section of this Part demonstrates, all of the legal paradigms applicable to religious speech and establishment, when properly conceived, applied, and oriented to serve the purposes announced in *Lee*, yield a single, coherent, logically consistent result: schools have a duty to avoid graduation prayers.

B. What the School Cannot Do Itself

Following *Lee*, the legal community quickly faced a contentious debate over the ability of schools to vest students with authority they themselves could not exercise, that is, authority they did not have.¹⁶⁵ This debate came to the fore in a deep and, as yet, unresolved split between the Third, Fifth, Ninth, and Eleventh Circuits.¹⁶⁶ The discussion opened when the Fifth Circuit decided *Jones v. Clear Creek Independent School District* after the Supreme Court vacated and remanded its prior judgment.

On remand, the *Jones II* court reiterated its earlier findings of secular purpose¹⁶⁷ and want of entanglement.¹⁶⁸ As to the effects test,

165. Some commentators have argued that schools should permit graduation prayers in order to respect Free Exercise rights. See generally McPherson, *supra* note 144; Kimberly T. Morgan, Noto, *Can Students Do What the State Cannot Do?: The Constitutionality of Student Initiated, Sponsored, Composed and Delivered Prayers at Graduation*, 12 ST. JOHN'S J. LEGAL COMMENT. 273 (1996). Other commentators have reached the opposite conclusion. See generally Jessica Smith, "Student-Initiated" Prayer: Assessing the Newest Initiatives to Return Prayer to the Public Schools, 18 CAMPBELL L. REV. 303 (1996); Jonathan C. Drimmer, *Hear No Evil, Speak No Evil: The Duty of Public Schools to Limit Student-Proposed Graduation Prayers*, 74 NEB. L. REV. 411 (1995).

166. See *Doe v. Santa Fe Ind. Sch. Dist.*, 168 F.3d 806 (5th Cir 1999), *cert. granted sub nom. Santa Fe Ind. Sch. Dist. v. Doe*, No. 99-62, 1999 WL495635, at *1 (Nov. 15 1999) (granting certiorari only to resolve the question "[w]hether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause"); *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999), *vacated pending reh'g en banc, id.* at 1274 (argued Oct. 19, 1999); *Madison Sch. Dist. No. 321*, 147 F.3d 832, *vacated for mootness and lack of standing*, 177 F.3d 789 (9th Cir. 1999) (*en banc*); *Black Horse Pike*, *no petition for cert. filed*; *Ingebretsen*, 88 F.3d 274, *cert. denied sub nom. Moore v. Ingebretsen*, 519 U.S. 965 (1996); *Harris*, 41 F.3d 447, *vacated for mootness sub nom. Joint Sch. Dist. No. 241 v. Harris*, 515 U.S. 1154 (1995); *Jonss II*, 977 F.2d at 966-67, *cert. denied*, 508 U.S. 967 (1993); see also Thomas A. Schweitzer, *The Progeny of Lee v. Weisman: Can Student-Invited Prayer at Public School Graduations Still be Constitutional?*, 9 BYU J. PUB. L. 291, 306-07 (1995) (having described the analytical divides in the graduation prayer cases, opining that the Supreme Court will soon resolve the dispute).

167. *Jones H*, 977 F.2d at 966-67 (observing that nothing in *Lee* "questions [the Court's] previous acknowledgements that solemnization is a legitimate secular purpose of ceremonial prayer").

the court conceded that three statements made in support of its earlier holding had been "call[ed] into question" by *Lee*,¹⁶⁹ but found that the policy's nonsectarian and nonproselytizing requirement meant that prayers would only awaken "extant religiosity for the secular purpose of solemnization" rather than "increasing religious conviction" or attracting converts.¹⁷⁰ Comparing the school district's policy with those in *Lee* and *Mergens*,¹⁷¹ the court found no endorsement of religion primarily because students who participated in the decision whether to have an invocation would realize that any religious message was that of a private speaker—like the religious club in *Mergens*—rather than public speech of the state or its hand-picked agent—like the rabbi in *Lee*.¹⁷² Finally, the *Jones II* court held that Clear Creek's policy did not coerce students because, among other factors, students would realize that any prayer represented the will of their peers, which carries less coercive force than the actions of the state or a cleric.¹⁷³ The court recognized that its decision permit-

168. *Id.* at 967 (finding no institutional entanglement of church and state and remarking that "[w]e know of no authority that holds yearly review of unsolicited material for sectarianism and proselytization to constitute excessive entanglement").

169. *Id.* (noting that *Lee* rejected reasoning based on the age of graduating seniors, the brevity of the prayers, and the difference between the classroom and commencement settings).

170. *Id.* The court cited no authority for the proposition that "the [policy] can only advance religion by increasing religious conviction among graduation attendees, which means attracting new believers or increasing the faith of the faithful." *Id.* But see *Santa Fe Indep. Sch. Dist.*, 168 F.3d at 826-27 (Jolly, J., dissenting) (contesting the significance of the nonsectarian, nonproselytizing requirement).

171. The court observed that four justices in *Lee* considered the prayers an unconstitutional endorsement and that a plurality found no impermissible endorsement in *Mergens*. See *Jones II*, 977 F.2d at 968 (citing *Lee v. Weisman*, 505 U.S. 577, 604-09 (1992) (Blackmun, J., concurring) and *id.* at 618-19 (Souter, J., concurring)).

172. See *Jones II*, 977 F.2d at 968-69. The court held that "Clear Creek does not unconstitutionally endorse religion if it submits the decision of graduation invocation content, if any, to the majority vote of the senior class." *Id.* at 969.

173. *Id.* at 969-72. The court identified the critical elements of *Lee* as "(1) the government direct[ing] (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors." *Id.* at 970. The court found nothing in Clear Creek's policy analogous to the direction and control of prayers found in *Lee*. See *id.* at 970-71. The court also rejected a finding of religiosity by stating that "the [policy] tolerates nonsectarian, nonproselytizing prayer, but does not require or favor it." *Id.* at 971. However, the court did not explain how these standards for the prayer it permits removed religiosity, see *id.* at 971, an oversight particularly troubling in light of the court's recognition that the prayer in *Lee* was also nonsectarian and nonproselytizing. See *id.* at 965. But see *Santa Fe Indep. Sch. Dist.*, 168 F.3d at 826-27 (Jolly, J., dissenting) (disputing the significance of nonsectarian nonproselytizing requirements). And though it had previously noted that the de minimis nature of the prayers and the age of the students were immaterial under *Lee*, see *id.* at 967, the court insisted that any potential for coercion was lessened by the reduced impressionability of graduating seniors, making the situation more analogous to "innocuous" legislative invocations wherein all parties are adults. See *id.* at 971-72 (implicitly referring to, though not citing, the reasoning and holding of *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding the practice of opening legislative

ted a majority of students to do what the state could not but pursued the point no further.¹⁷⁴

Two years later, the Ninth Circuit returned the Fifth's salvo with *Harris v. Joint School District No. 241*, a decision that essentially turned on agency principles.¹⁷⁵ The court observed state involvement in part because the school paid for the graduation and officials attended and approved of it.¹⁷⁶ Critical to the court's decision, though, was the uncontested fact that seniors had authority to make decisions regarding the graduation ceremony only because the school had granted them that power.¹⁷⁷ To the court, permitting the state to vest power in private actors or the outcome of elections, and then removing constitutional restraints on that power, would defeat the purpose of placing enumerated rights beyond the whim of majorities.¹⁷⁸ Relying on Supreme Court precedent, the court held that private citizens exercising governmental authority may wield that power only within the confines of the Constitution.¹⁷⁹ As the school district could not itself deliver a prayer, neither could its delegates.¹⁸⁰

sessions with state-paid chaplains). *But see* *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1248 (11th Cir. 1999) (observing that audience members' cogent awareness that views expressed reflect those of the majority subjects them to "even greater compulsion to participate"); *id.* at 1253 (Kravitch, J., concurring) (observing that "a prayer from the lips of a popularly elected student representative is far more likely to coerce audience participation than one from a member of the clergy selected by the school principal").

174. *See Jones II*, 977 F.2d at 972.

175. *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994).

176. *See id.* at 454 (noting that "graduation is ultimately a school-controlled, school-sponsored event"). The district superintendent remarked that "[t]he graduation ceremony is the presentation by the school of diplomas representing graduation certificates to the people who have fulfilled the requirements of the high school for graduation." *Id.* (internal quotations omitted).

177. *See id.* The court cited *Collins v. Chandler Unified School District*, 644 F.2d 759, 761 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981), for the proposition that there is "no meaningful distinction between school officials acting directly and school officials merely permitting students to direct" school-sponsored events. *Harris*, 41 F.3d at 454 (internal quotations omitted).

178. *See id.* at 455. "[A] decision to the contrary would allow school boards in religious communities generally to avoid Establishment Clause concerns in the public schools. The school board could allow students to vote daily prayers and the Ten Commandments back into their classrooms." *Id.* (citing *Engle v. Vitale*, 370 U.S. 421 (1962) (banning daily prayers), and *Stone v. Graham*, 449 U.S. 39 (1980) (prohibiting the display of the Ten Commandments in classrooms)).

179. *See Harris*, 41 F.3d at 455 (citing *Evans v. Newton*, 382 U.S. 296, 299 (1966)).

180. When one recalls that the rabbi in *Lee* became a state actor by having been selected to speak and given guidelines for nonsectarian prayers by the school principal, *Lee v. Weisman*, 505 U.S. 577, 587-89 (1992), the Ninth Circuit's holding here seems little more than a statement of the obvious.

In *ACLU v. Black Horse Pike Regional Board of Education*, the Third Circuit, sitting en banc, found the reasoning of *Harris* "more persuasive" than *Jones II*.¹⁸¹ Employing the agency analysis to refute the board of education's free speech argument,¹⁸² the *Black Horse Pike* court did not mince words. It resoundingly echoed the *Harris* court and found that an otherwise impermissible practice under *Lee* cannot be cleansed by putting the choice of imposing religious doctrine to a plebiscite.¹⁸³ While the delegation appeared to be a neutral device for students to control a portion of their commencement, it could not "insulate the School Board from the reach of the First Amendment."¹⁸⁴ The court directly confronted and rejected *Jones II*'s attempts to distinguish putatively student-controlled graduation prayers from the impermissible prayers in *Lee*.¹⁸⁵

Following this criticism of the principle that students can do what schools cannot, the Fifth Circuit backtracked a few steps and supposedly clarified its *Jones II* holding with *Santa Fe*.¹⁸⁶ Bound by a strict Fifth Circuit stare decisis rule,¹⁸⁷ the court could not overturn

181. *ACLU v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1483 (3d Cir. 1996).

182. "The Board relie[d] upon the student referendum in an attempt to define the controversy as one impacting upon the students' right of free speech as opposed to a dispute over the constitutionality of prayer at a public high school graduation." *Id.* at 1477. The board's freedom of speech arguments traced the open-forum analysis. *See id.* at 1477-78. This Note addresses the particulars of this argument and the court's response in Part IV.C.

183. *See Black Horse Pike*, 84 F.3d at 1477-78. According to the court, "There should be no question that the electorate as a whole, whether by referendum or otherwise, could not order governmental action violative of the Constitution, and the government may not avoid the strictures of the Constitution by deferring to the wishes or objections of some fraction of the body politic." *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985)) (internal quotes and brackets omitted).

184. *Id.* at 1479.

185. The significance of a once-in-a-lifetime event weighed heavily against the solemnization argument (elucidated in *Jones v. Clear Creek Indep. Sch. Dist. (Jones II)*, 977 F.2d 963, 966-67 (5th Cir. 1992)) and in favor of prohibiting prayers. *See Black Horse Pike*, 84 F.3d at 1482 (citing *Lee v. Weisman*, 505 U.S. 577, 595-96 (1992)). In light of the Supreme Court's analysis in *Lee*, the age and maturity of the audience were illegitimate grounds to distinguish student-led from clergy-led prayers because maturity could not "immunize[] [students] from the coercion endemic in coerced participation." *Id.* (citing *Lee*, 505 U.S. at 593, and thus rejecting *Jones II*, 977 F.2d at 971). As in *Harris*, Black Horse Pike administrators "supervised and controlled the graduation ceremony," constituting sufficient state involvement to make the student-delivered prayers offensive to the Establishment Clause. *Id.* at 1483. As the court pointed out, "if the vitality of our fundamental liberties turned upon their ability to inspire the support of a majority, the longevity of our 'inalienable rights' would be controlled by the ebb and flow of political and social passion." *Id.*

186. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999).

187. *See id.* at 814 (citing *Hogue v. Johnson*, 131 F.3d 466, 491 (5th Cir. 1997) for the proposition that "[o]ne panel of this Court may not overrule another [absent an intervening decision to the contrary by the Supreme Court or the en banc court . . .]").

Jones II but did resolutely limit it.¹⁸⁸ The court conceded that merely putting the graduation prayer question to a student vote does not automatically remove the government's imprimatur.¹⁸⁹ The court observed that sectarian and proselytizing prayers delivered with the state's permission in an environment imbued with its authority bear the state's imprimatur and "undoubtedly convey[] a message . . . that the government endorses religion."¹⁹⁰ It then held that merely combining a student vote with a nonsectarian nonproselytizing requirement "save[s]" a prayer from constituting *Lee's* "formal religious exercise"¹⁹¹ and thus passes constitutional muster. The court held that only student prayers governed by these two requirements pass the endorsement and effects tests, but the court deftly avoided deciding whether students delivering such prayers nonetheless act as state agents.¹⁹²

Most recently, *Adler* slammed the door on the students-are-not-state-agents argument. Carefully drawing factual analogies to other graduation prayer cases¹⁹³ and citing Supreme Court authority,¹⁹⁴ the Eleventh Circuit held that an "elected student speaker's independent choice of a topic is a choice fairly attributable to the state" because constitutional controls apply when a state grants permission to individuals to exercise governmental functions.¹⁹⁵ The

188. *See id.* at 822. *Santa Fe* described *Jones II* as being a "tightly circumscribed safe harbor." *Santa Fe Indep. Sch. Dist.*, 168 F.3d at 818.

189. *See id.* at 816-19, 822.

190. *Id.* at 818.

191. *See id.* at 818, 822. The court did not explain what the nonsectarian, nonproselytizing requirement adds to the student-initiated factor that divorces the speaker from the state such that he does not act as the state's agent. If the nonsectarian, nonproselytizing requirement did not save the prayer in *Lee v. Weisman*, 505 U.S. 577, 588-90 (1992), and *Santa Fe* holds that putting the prayer to a vote does not alone avoid making the speaker an agent of the state, an explanation of why both elements together allow the prayer to survive constitutional challenge would be illuminating.

192. *See Santa Fe Indep. Sch. Dist.*, 168 F.3d at 818 (holding that, because stripping *Santa Fe's* prayer policy of the nonsectarian, nonproselytizing requirement leaves it "constitutionally deficient," the court need "not belabor the point" that a policy without those restrictions violates the coercion test).

193. *See Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1245-48 (11th Cir. 1999) (for purposes of agency analysis, distinguishing *Jones II* and analogizing to *Santa Fe* because the school board's policy permitted sectarian and proselytizing prayers; the court did not endorse the content-based analysis but made clear that its holding was consistent with Fifth Circuit precedent banning sectarian and proselytizing prayers).

194. *See id.* at 1246 (citing *Evans v. Newton*, 382 U.S. 296, 299 (1966), and *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

195. *Id.* The court concluded, "the state cannot erase its control over or endorsement of prayer at a public school graduation through delegation of one portion of the graduation

court finally held that the state's inherent control over the ceremony and its initial grant of permission so infuse the event with the state's imprint that first delegating the speech decision to students and then further delegating content decisions to the elected speaker nonetheless amounts to control sufficient to meet the state control "dominant fact" of *Lee*.¹⁹⁶

The *Harris*, *Black Horse Pike*, and *Adler* decisions (along with *Santa Fe's* view of *Jones II's* agency holding) are demonstrably consistent with the Supreme Court's leading religious-state-agent cases. Different principles control government-facilitated speech and the government's own speech.¹⁹⁷ A state's delegation of its "discretionary authority over public schools" to a definitively religious agent violates the Establishment Clause when there are no assurances that state power "will be exercised neutrally."¹⁹⁸ When a religious group participates in a public forum and the state has taken steps to avoid an agency relationship, neutrality toward religion commands opening the forum to all groups regardless of viewpoint.¹⁹⁹ Thus, neutrality

ceremony to the majority/plurality vote of students." *Id.* at 1247. The Eleventh Circuit described this action thus: "[T]he school system believed it could give a 'wink and a nod' to controlling Establishment Clause jurisprudence through attempting to delegate to the majority/plurality vote of students what it could not do on its own—permit and sponsor sectarian and proselytizing prayer at graduation ceremonies." *Id.* at 1246.

196. *Id.* at 1248. This Note, of course, rejects the significance of the state control and direction dominant fact but finds the *Adler* court's analysis persuasive in rejecting the chosen-students-are-not-state-actors argument. Viewed another way, the *Adler* analysis supports the notion that ostensibly independent student speakers, because they received the opportunity to speak from a precedent official grant, operated only as agents of the state under constructive state control. The agency analysis, then, constructively meets the "first dominant fact" of *Lee* and dispenses with the need to reject that fact as what this Note considers logical surplussage.

197. See *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 833-34 (1995) (holding that when the state "is the speaker or when it enlists private entities to convey its own message," it may discriminate against speech based on content, but when the state facilitates speech, viewpoint-discrimination is inappropriate).

198. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet (Kiryas Joel)*, 512 U.S. 687, 696-97 (1994) (opinion of Souter, J.) (striking down a delegation of discretionary power because "it lacked any effective means of guaranteeing that the delegated power would be used *exclusively* for secular, neutral, and nonideological purposes") (internal quotations omitted; emphasis added). Justice Souter relied on the Court's commands that government demonstrate "wholesome neutrality" toward religion. *Id.* at 696 (quoting *School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (internal quotations omitted); see also *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973). This delegation rule obviously applies where the prayer issue itself goes before students, who are asked to select or not select a definitively religious actor. The rule also applies to situations where the question was more open-ended, such as students voting on a brief "message" at the beginning and end of the ceremony. See *Adler*, 174 F.3d at 1246 (11th Cir. 1999).

199. See *Rosenberger*, 515 U.S. at 842.

toward religion²⁰⁰ controls any discretion that senior classes may democratically exercise unless commencement ceremonies constitute open forums.²⁰¹

C. Where Some Forums are More Open Than Others

Beginning with the *Jones II* student-choice case and continuing into the *Madison* secular-selection-criteria case, courts have employed the open forum analysis propounded in *Mergens* and *Rosenberger* to validate otherwise suspect religious speech at commencement ceremonies.²⁰² At its heart, the argument posits that the state has created an open forum sufficient to avoid an agency relationship²⁰³ and to remove any possibility of perceived official endorsement of religion through its accommodation of religious speech.²⁰⁴ In this vein, the *Jones II* court held that removing the school board from the decision to hold a prayer created an open forum.²⁰⁵ Because of the open forum

200. For an explanation of formal and substantive neutrality in relation to several cases discussed by this Note, see Drimmer, *supra* note 165, at 419-27.

201. *Kiryas Joel* turned in part upon New York state's demarcation of the political subdivision in question along religious lines. *Kiryas Joel*, 512 U.S. at 698-702. If such a factual requirement were applied to the graduation prayer cases—that is, proscribing delegation to students in communities with a history of fervent religiosity—the peculiar and constitutionally indefensible result that students in Rexberg, Idaho, *see Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 836 n.6 (9th Cir. 1998), could not vote on a benediction, while students in more diverse communities could, would arise. *Kiryas Joel* teaches that states may delegate their discretion only to “individuals whose religious identities are incidental to their receipt of civic authority.” *Kiryas Joel*, 512 U.S. at 699. Implicit in the opinion, then, is the notion that recipients of civic authority are not only bound by the same discretionary restraints as government but receive no more and no less “discretion” than the state itself had. Since the delegations in *Jones II*, *Harris*, and *Black Horse Pike* were limited to the prayer question, and *Lee* compels a single resolution to that question, the delegations were effectively meaningless.

202. *Madison Sch. Dist. No. 321*, 147 F.3d at 836, 838 (discussing *Rosenberger*-style neutrality and *Mergens*-style avoidance of entanglement); *Jones v. Clear Creek Indep. Sch. Dist.* (*Jones II*), 977 F.2d 963, 968-69 (5th Cir. 1992) (invoking the *Mergens* open forum analysis).

203. *See Widmar v. Vincent*, 454 U.S. 263, 274 (1981).

204. *See, e.g., Jones II*, 977 F.2d at 968-69 (using open forum analysis in its validation of a graduation prayer).

205. *Id.* *But see Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 821 (5th Cir. 1999) (declaring that *Jones II* found parallels with *Mergens* but did not rely on the “public forum” analysis because to do so would require removing the nonsectarian, nonproselytizing content restrictions). To the contrary, *Jones II* relied extensively on *Mergens*' open forum analysis to hold that graduation prayers did not constitute endorsement, although it never used those terms. *Jones II*, 977 F.2d at 968-69. The *Santa Fe* court's disingenuous assertion that *Jones II* did not rely on the open forum doctrine, despite analysis infused with divorcing the state from a religious message delivered by “private” parties at a state event on state grounds, resulted from the precarious dance the court had to perform. The only way to avoid overturning *Jones II* in *Santa Fe* was to rely on the nonsectarian, nonproselytizing requirement present in the *Jones II*

aspects of its holding, the *Madison* court suggested that steps taken to prohibit prayers offered by students selected on neutral criteria violated the Free Exercise rights of those students²⁰⁶ and raised entanglement concerns.²⁰⁷

The factual nuances of the *Black Horse Pike*, *Jones II*, *Adler*, *Harris*, and *Madison* cases make it difficult to generalize about what factors create an open forum. The principal in *Black Horse Pike* rejected the ACLU's request to speak on both content and limited-time grounds.²⁰⁸ The *Jones II* and *Adler* school districts permitted students to choose from a variety of solemnization methods; the districts' policies were permissive insofar as graduates would collectively decide whether an invocation would include a "supplication to a deity," lack such references, or not take place at all.²⁰⁹ In *Harris*, the school district attempted to delegate to students control over every aspect of the ceremony.²¹⁰ *Madison* involved an attempt to create a completely boundless forum, wherein the district rewarded several students for superior academic performance with the opportunity to address the commencement ceremony on whatever topic they desired.²¹¹ No matter the degree of freedom participants in these purported open forums possessed, comparing these attempts at forum-creation with the Supreme Court's equal access holdings, in light of the Court's edicts on the authority of schools to control

analysis, even though that requirement garnered less treatment than the subtle though undeniable open forum strains of the discussion.

206. *Madison Sch. Dist.*, 147 F.3d at 836. The Free Speech and Exercise Clauses apply to private speech such as that offered in an open forum. See *School Dist. v. Schempp*, 374 U.S. 203, 225-26 (1963); cf. *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 833-39 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-95 (1993) (holding religious speech protected in a government-owned and -created open forum by the Free Speech Clause and rejecting an Establishment Clause challenge).

207. *Madison Sch. Dist.*, 147 F.3d at 838.

208. *ACLU v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1475 (3d Cir. 1996). In a telling concession, the principal indicated that "any student who attempted to give an unscheduled address . . . would be arrested" even if a majority of the graduating students had previously approved the speech. *Id.* at 1479.

209. *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1238-39 (11th Cir. 1999); *Jones II*, 977 F.2d at 969.

210. *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 452-53 (9th Cir. 1994). The principal claimed to have no authority to control any aspect of the ceremony, "even if the students voted to have the whole thing be a religious service." *Id.* at 453.

211. *Madison Sch. Dist.*, 147 F.3d at 834.

student speakers,²¹² reveals a categorical inability to turn a high school graduation into an open forum.²¹³

The Supreme Court has carefully struck a precarious balance²¹⁴ between students' rights to express themselves and schools' need to focus pupils on education.²¹⁵ Except in a public forum or other uncontrolled environment, schools have power to reasonably censor speakers in order to protect the welfare of listeners.²¹⁶ The classic example of appropriate censorship, punishing a student for employing a sexually explicit metaphor in a student government nominating speech to a high school assembly, passed constitutional muster because public schools are charged with inculcating the values of republican society and establishing the parameters of civil discourse, and because the assembly was designedly part of the school's pedagogical program.²¹⁷ Schools will always have power to control student expression in order to further the educational mission.²¹⁸

To encourage liberal discourse and still maintain the ability to protect listeners, schools can create a limited open forum, in which the Court will allow discrimination as to subject matter but not as to

212. See generally *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (authorizing punishment of a student who addressed a high school assembly with indecent though not obscene language).

213. See *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 821 (5th Cir. 1999) (observing that the time, space, and other restrictions set by the school board "so shrink the pool of potential speakers and topics that the graduation ceremony cannot possibly be characterized as a public forum—limited or otherwise—at least not without fingers crossed or tongue in cheek").

214. For an argument that this "balance" is unstable and possibly misplaced, see David L. Dagley, *Trends in Judicial Analysis Since Hazelwood: Expressive Rights in the Public Schools*, 123 WEST'S ED. L. REP. 1 (1998).

215. Although students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969), "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Fraser*, 478 U.S. at 685). For a discussion of schoolchildren's constitutional freedoms, see Lisa A. Brown & Christopher Gilbert, *Understanding the Constitutional Rights of School Children*, 34 HOUS. LAW. 40 (1997).

216. See *Hazelwood Sch. Dist.*, 484 U.S. at 266-67. Officials cannot punish students "merely for expressing their personal views on the school premises—whether in the cafeteria, or on the playing field, or on the campus during the authorized hours—unless school authorities have reason to believe such expression will substantially interfere with the work of the school or impinge upon the rights of other students." *Id.* at 266 (internal quotations and citations omitted). Except in a public forum, "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." *Id.* at 267.

217. See *Fraser*, 478 U.S. at 677-78, 681-86.

218. See *Hazelwood Sch. Dist.*, 484 U.S. at 266.

viewpoint.²¹⁹ Accordingly, categorically excluding sexually suggestive speeches, or other inappropriate topics, while permitting a discussion of religious issues could save a graduation policy that tolerated prayer on a limited open forum theory.²²⁰ To limit a forum to the specific purposes for which it was designed, the state may "reserv[e] it for certain groups or for the discussion of certain topics."²²¹ Although the government creates a forum "only by intentionally opening a nontraditional forum for public discourse,"²²² once it has done so, the state must observe the boundaries it has set.²²³ State control over a *limited* open forum may only be content-based, not viewpoint-based, so as to exclude subjects from discussion, not perspectives.²²⁴

Public schools do not typify the traditional open forum.²²⁵ The town common is the archetypal state-owned public forum, as the property has been dedicated, either legally or historically, to the

219. See *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 828-30 (1995) (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) and *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 49 (1983)); see also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993); cf. *Fraser*, 478 U.S. at 684-85.

220. The Court has stated that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," *Fraser*, 478 U.S. at 683, subject, of course, to constitutional restraints on, inter alia, establishment. See *School Dist. v. Schempp*, 374 U.S. 203, 223-24 (1963).

221. *Rosenberger*, 515 U.S. at 829 (citing *Cornelius*, 473 U.S. at 806); see also *Board of Educ. v. Mergens*, 496 U.S. 226, 240-41 (1990) (finding a limited open forum for non-curriculum related student groups at a high school); *Hazelwood Sch. Dist.*, 484 U.S. at 267 (describing similar limitations); *Lamb's Chapel*, 508 U.S. at 392-94 (holding that a limited forum must allow inclusion of religious viewpoint when other viewpoints on similar issues present).

222. *Hazelwood Sch. Dist.*, 484 U.S. at 267 (internal quotations omitted). "If the facilities have [not been opened for indiscriminate use by the general public . . . or some segment of the public, but have] instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created. . . ." *Id.* (citations and internal quotations omitted). "The government does not create a public forum by inaction or by permitting *limited discourse*. . ." *Id.* (emphasis added) (quoting *Cornelius*, 473 U.S. at 802).

223. See *Rosenberger*, 515 U.S. at 829. If a speaker comes within the class of speakers to which the state opened its forum, "[i]t may impose reasonable, content-neutral time, place, and manner restrictions . . . , but it may regulate expressive *content* only if such restriction is necessary, and narrowly drawn, to serve a compelling state interest." *Capitol Square Review and Advisory Bd. v. Phinette*, 515 U.S. 753, 760-61 (1995) (citing *Perry*, 460 U.S. at 45).

224. See *Rosenberger*, 515 U.S. at 829-30. In dicta, Justice Kennedy wrote that the state could not employ viewpoint discrimination even where access to the forum is physically limited, such as if "the meeting rooms in *Lamb's Chapel* [had] been scarce," but would have to "allocate the scarce resources on some acceptable neutral principle." *Id.* at 835. The scarcity of which Justice Kennedy speaks seems not to include the ultimate scarcity: only one space in the open forum.

225. See *Hazelwood Sch. Dist.*, 484 U.S. at 267. They "do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

public for any number of uses.²²⁶ A board of education can open the schoolhouse doors after hours to a variety of groups, and doing so creates a public forum where freedom of expression is protected.²²⁷ Within the context of a university student activities fee allocation scheme, denying funding to a religious group while granting funding to other organizations that approach similar issues from a non-religious perspective violates the free speech of students attempting to participate in the open forum.²²⁸ Each of these bears the hallmark of a true forum: speakers and listeners alike enjoy “a free and robust marketplace of ideas,”²²⁹ where dissenters can present counter-arguments and, perhaps most importantly, people can choose to not listen at all.²³⁰

A significant exception to the open forum doctrine limits its application in secondary schools. In this setting, when the public perceives the imprimatur of the state in a medium that might otherwise constitute an open forum, the open forum doctrine does not apply, and state controls that would normally fail on free speech or free exercise grounds become acceptable.²³¹ In such a setting, religious

226. See, e.g., *Capitol Square Review & Advisory Board*, 515 U.S. at 757-58, 763 (holding a state-owned public square around the Ohio state house, dedicated to the public for “free discussion of public questions, or for activities of a broad public purpose,” a public forum; permission to erect displays on the land was governed by content-neutral policy of advisory board).

227. See, e.g., *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391-94 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226, 231-32, 243-46 (1990).

228. See *Rosenberger*, 515 U.S. at 845-46.

229. *Id.* at 850 (O’Connor, J., concurring) (referring to the University of Virginia’s atmosphere of contentious debate in student media); cf. *Mergens*, 496 U.S. at 252 (noting “the broad spectrum of officially recognized student clubs [and that] students are free to initiate and organize additional student clubs”). *Rosenberger* was “not the harder case where religious speech threatens to dominate the forum.” *Rosenberger*, 515 U.S. at 850-51 (O’Connor, J., concurring); cf. *Widmar v. Vincent*, 454 U.S. 263, 275 (1981) (noting that religious speech did not threaten to dominate the forum).

230. See *Widmar*, 454 U.S. at 267-68 (discussing “the capacity of a group or individual to participate in the intellectual give and take of campus debate”) (internal quotations omitted); *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 820 (5th Cir. 1999) (holding as a matter of law that the school district had not created a limited public forum in part because “a graduation ceremony comprises but a single activity which is singular in purpose, the diametric opposite of a debate or other venue for the exchange of competing viewpoints”).

231. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988) (permitting extensive official control over high-school student expression that “students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school . . . so long as [the activities] are supervised by faculty members and designed to impart particular knowledge . . .”). But see *Widmar*, 454 U.S. at 274 (observing that “an open forum in a public university . . . available to a broad class of nonreligious as well as religious speakers” does not confer any imprimatur of state approval on religious sects or practices). *Mergens* applied the logic of *Widmar* to the secondary school setting, *Mergens*, 496 U.S. at 248, but did so on facts

speech that constitutes establishment is entirely barred.²³² Whether religious speech bears the imprimatur of the state turns on the extent to which listeners perceive state endorsement of religion.²³³

Because secondary school commencements lack the salient aspects of open forums, the equal access principle is inapposite.²³⁴ While schools could theoretically dedicate their graduation ceremonies as an open forum for discourse on a variety of topics (including religion), the real-world facts of the graduation prayer cases make such a theoretical or declared dedication constitutionally infirm.²³⁵ In all cases except *Madison*, a political majority has retained control over the purported forum and, unless limited by constitutional protections, can refuse access to any viewpoint it dislikes.²³⁶ Indeed, the scope of the power delegated to students in *Jones II* and *Black Horse Pike* was

analogous to *Widmar*, i.e., non-discriminatory access to school facilities, *id.* at 248-49, and distinguishable from *Hazelwood School District*, wherein the school maintained extensive editorial control of a newspaper produced by a journalism class. *Hazelwood Sch. Dist.*, 484 U.S. at 268.

232. "[C]ompliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995). Where the open forum and establishment analyses collide, the results run to the extremes: (1) if the forum is open to the speaker, no establishment can arise and any regulation of religious speech is a viewpoint-based violation of free speech, or (2) if there is not an open forum, religious speech is attributable to the state and impermissibly establishmentarian. *See id.* at 761-70 (inter alia describing *Lamb's Chapel* and *Widmar* as "categorically reject[ing] the State's establishment clause defense" upon the Court's finding of an open forum); *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (observing that "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause").

233. *See Rosenberger*, 515 U.S. at 841-42; *cf. Capitol Square Review & Advisory Bd.*, 515 U.S. at 777 (O'Connor, J., concurring) (remarking that the Establishment Clause "imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message"). The *Rosenberger* Court noted that, in the context of the marketplace of ideas at the University of Virginia and in light of the steps the University took "to disassociate itself from the private speech" of the religious publication, "there is no real likelihood that the speech in question is being either endorsed or coerced by the State." *Rosenberger*, 515 U.S. at 841-42. Hence, the "concern that [the publication's] religious orientation would be attributed to the University is not a plausible fear." *Id.* at 841. *See also* *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1247-48 (11th Cir. 1999) (describing the connection between the state's imprimatur on speech and endorsement).

234. For an argument that an open forum was present in neither *Jones II* nor *Harris* but that schools can, by adopting secular selection criteria, create an open forum at their graduations, see Rick A. Swanson, *Time for a Change: Analyzing Graduation Invocations and Benedictions Under Religiously Neutral Principles of the Public Forum*, 26 U. MEM. L. REV. 1405 (1996).

235. *See Adler*, 174 F.3d at 1250 (citing *ACLU v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1478 (3d Cir. 1996); *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 838 (9th Cir. 1998)).

236. In *Adler*, the selected speaker did make the final topic-selection decision, *Adler*, 174 F.3d at 1239-40, but the reality of speaker selection contests teaches that anticipated (if not promised) content will play a role in voters' decisions.

exceptionally limited: discretion over a single speaker, who could offer an invocation or say nothing at all.²³⁷ These limitations are entirely inconsistent with the government activity necessary for creation of an open forum: the dedication “for indiscriminate use by . . . some segment of the public.”²³⁸ Even where a student plebiscite picked two speakers who could deliver a “message,” *Adler* held that no open forum existed because schools exercised great control over the ceremonies and only majority-favored speakers could offer statements.²³⁹ Moreover, university students selecting from a variety of student publications²⁴⁰ and secondary school students attending or abstaining from on-campus meetings of diverse student groups,²⁴¹ participate in a marketplace of ideas more open than that enjoyed by graduation audiences where, ultimately, school officials have absolute control over who may speak.²⁴² Finally, because of the precedent, overwhelming, and inescapable state control of and responsibility for the event,²⁴³ graduation speeches bear the imprimatur of the state,²⁴⁴ which removes them from the equal access analysis.

D. Who Loses When Schools Permit Graduation Prayers

The Framers designed the Establishment and Free Exercise Clauses in part to protect religious dissenters from majority oppression.²⁴⁵ *Lee v. Weisman* pursued that end by sustaining the objection of a single student to a state-sponsored religious service.²⁴⁶ Thus, to

237. The speakers did not have the option of offering an anti-religious speech. If the graduates desired such, their only option was to say nothing at all. See *Black Horse Pike*, 84 F.3d at 1475; *Jones v. Clear Creek Indep. Sch. Dist. (Jones II)*, 977 F.2d 963, 964 n.1 (5th Cir. 1992). But see *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 452 (9th Cir. 1994) (reviewing policy that ostensibly gave graduates control over every aspect of the ceremony).

238. *Hazelwood Sch. Dist.*, 484 U.S. at 267.

239. *Adler*, 174 F.3d at 1250.

240. See *supra* notes 94-100 and accompanying text (describing facts of *Rosenberger*).

241. See *supra* notes 79-80 and accompanying text (describing facts of *Mergens*).

242. See *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 820 (5th Cir. 1999) (holding that “a graduation ceremony comprises but a single activity which is singular in purpose, the diametric opposite of a debate or other venue for the exchange of competing viewpoints”).

243. See *Lee v. Weisman*, 505 U.S. 577, 592-93 (1992); see also *id.* at 629-30 (Souter, J., concurring).

244. See *Adler*, 174 F.3d at 1243-44, 1247-48; *Santa Fe Indep. Sch. Dist.*, 168 F.3d at 817.

245. See *School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (describing the design of the two clauses); *Lee*, 505 U.S. at 589, 622 (Souter, J., concurring); cf. *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985) (discussing the current interpretation of the First Amendment as protecting not merely different Christian sects but all religious beliefs and none at all).

246. *Lee*, 505 U.S. at 598-99.

properly reconcile the various First Amendment policies competing in the graduation prayer setting, a court must examine the facts from the viewpoint of a person in the audience.²⁴⁷ Observing the real life consequences of designedly sterile rules and policies crystallizes the salience of the issues and, in the graduation prayer cases, compels the result.²⁴⁸ Mere formal neutrality toward religion fails to recognize these consequences and in some cases permits coercive state action that in turn can reflect endorsement of religion.

Reviewing a policy that permitted students chosen on secular grounds to speak on any subject they chose, specifically including offering a prayer, the *Madison* court applied both the tripartite *Lemon* test and the *Lee* coercion test.²⁴⁹ Although it recognized that the school district's coercive pressures may be no less oppressive than in *Lee*, the court distinguished that case largely because this school district did not act to deliberately include a prayer or select a speaker.²⁵⁰ Because students selected on a "purely secular and neutral criterion" had final authority over whether audience members would hear a prayer, the court concluded that, unlike the principal in *Lee*, the school did not mandate a religious event.²⁵¹

247. See *ACLU v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1480 (3d Cir. 1996) (analyzing the facts from the perspective of dissenters in the audience and finding coercion despite the school's passing control to the senior class); cf. *Board of Educ. v. Mergens*, 496 U.S. 226, 235-36 (1990) (quoting and interpreting the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1998), which prohibits the state from "requir[ing] any person to participate in [religious activity in schools], or compel[ing] any [student,] school agent or employee to attend a meeting if the content of the speech at the meeting is contrary to that person's beliefs"); cf. also *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 843 (1995) (stating that "[t]he error made by . . . the dissent[] lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient").

248. For the view that prayers offered by students selected to speak by secular criteria do not violate the Establishment Clause, see Johanna Josie Raimond, Note, *The Constitutionality of Student-Led Prayer at Public School Graduation Ceremonies*, 48 VAND. L. REV. 257 (1995).

249. *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 834-38 (9th Cir. 1998). The court determined that the policy had the secular purpose of, among other things, rewarding students for academic performance. See *id.* at 836-37. Finding no entanglement on the facts, the court observed that the opposite result would foster entanglement via official censorship of speeches. See *id.* at 838. Because the policy does have the primary effect, albeit indirect, of advancing religion, this Note discusses only the effects prong of the court's analysis.

250. See *id.* at 835 (quoting *Lee* at length). The court first interpreted the portion of *Lee* concerning "state officials direct[ing] the performance of the religious exercise" as meaning that "[t]he school's selection of the speaker and provision of the guidelines were . . . tantamount to composing the prayer itself . . ." *Id.* (internal quotations omitted). The court then found three distinguishing features of the school district's policy: students (as opposed to clerics) delivered the presentations, the speakers were chosen by "academic performance," and the students have autonomy over the content. *Id.*

251. *Id.*

In addressing the effects prong of the *Lemon* test, the court examined the entirety of the district's policy on its face.²⁵² The court stressed that the policy's permissive nature eliminated the possibility that the government itself acted in a way that produced religion-advancing effects.²⁵³ The court also found that the school district moderated any pro-religious effects by expressly disclaiming official endorsement of religion and declaring the speeches "private expression."²⁵⁴ Finally, the court suggested that the state's neutral speaker-selection criterion made finding official endorsement of religion difficult²⁵⁵ and avoided placing the imprimatur of the state on religious speech.²⁵⁶

Perhaps the most revealing passages of the decision, these observations underscore the myopic nature of the court's analysis. The court's logic rests entirely on the assertion that when a policy identifies a speaker via secular criteria, and that speaker chooses to inject a religious message, the state avoids any impermissible connection with religion.²⁵⁷ This view fails to recognize the implicit statement of the Supreme Court's holding in *Lee*: the salient issue in graduation prayer cases is coercion.²⁵⁸ Policies that select student speakers on a secular basis but permit them to deliver religious messages can produce the same results on the audience at issue in *Lee*: no matter how a school selects the speakers, dissenters may be unwillingly forced to suffer a religious message as a result of the system the state establishes.²⁵⁹

252. *See id.* at 837.

253. *See id.* (holding that "[w]hile an independent student choice to read a prayer may have a religious effect, this is not the effect of the policy on its face").

254. *Id.*

255. *See id.* at 835 (quoting *Lee v. Weisman*, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring)).

256. *See id.* at 836.

257. *See id.* at 835 (applying this logic to the coercion test; the remainder of the opinion tirelessly returns to this point). The court did not address the agency principles discussed by this Note. *See supra* Part IV.B. Those principles indicate that when the state taps an individual to address an audience—no matter what arbitrary, capricious, random, discriminatory, or deliberate selection device it uses—that individual acts as an agent of the state. The court instead maintained that the speakers are autonomous individuals, *see id.* at 835-36, even while noting that "the graduation ceremony is not a public forum." *Id.* at 838. For the sake of argument, this section of this Note will assume that the graduation speaker is acting without the color of the state—a concession that serves to underscore the significance of the coercion at work in the ceremonies.

258. *Lee*, 505 U.S. at 586-87; *see also id.* at 609 (Souter, J., concurring).

259. *See Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1250 (11th Cir. 1999).

When the state has assembled an audience for purposes of delivering an already earned state benefit, then turns that involuntary audience over to a speaker and permits him to offer a prayer, the audience members have been coerced *by the state* to participate in a religious event, no matter what method of speaker selection operates behind the scenes.²⁶⁰ The school district's graduation policy comprises three acts: 1) the state, in order to confer an already earned benefit, involuntarily assembles students; 2) the state nominates a speaker and places that speaker before its captive audience; finally, 3) the speaker delivers a prayer. The first and last acts coerce audience members.²⁶¹ The Ninth Circuit concedes as much.²⁶² *Madison*, then, turns on the holding that the selection criteria, by its formally neutral nature, privatizes and cleanses the religious coercion in the last act. From the perspective of the student dissenter in the audience, whom the state has placed before the speaker, the selection criterion is unclear and of little moment.²⁶³ No doubt, the selection criterion itself is sufficiently neutral toward religion,²⁶⁴ but neutrality is not enough,²⁶⁵ for it cannot change the coercive result of speech that the state's action in devising the selection system and forswearing content control permits.²⁶⁶ The bottom line is that students still face a

260. *Cf. Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 817 (5th Cir. 1999) (holding that "government imprimatur is not so easily masked: Prayers that a school 'merely' permits will still be delivered to a government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event . . .").

261. *See Lee*, 505 U.S. at 586, 593 (obligatory attendance and practical inability of dissenting expression, respectively, constitute this coercion).

262. *See Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 835 (9th Cir. 1998) (noting that "the pressures on a student to attend graduation and to conform with her peers [] may well be present here, and thus cannot serve as a distinction [from *Lee*]").

263. *See ACLU v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1480 (3d Cir. 1996) (finding coercion despite the school's vesting control of the decision to offer a prayer in a democratic plurality of graduates, who in turn selected a student to offer the prayer); *cf. Santa Fe Indep. Sch. Dist.*, 168 F.3d at 817.

264. *See Madison Sch. Dist.*, 147 F.3d at 836.

265. *See Rosenberger v. Rector & Visitors*, 515 U.S. 819, 839 (1995) (stating that neutrality is a "significant factor" but, implicitly, not a dispositive one); *id.* at 877-78 (Souter, J., dissenting) (discussing the majority's "significant factor" statement and quoting several other cases where neutrality was present but not dispositive of an Establishment Clause challenge). *See also* Dhananjai Shivakumar, *Neutrality and the Religion Clauses*, 33 HARV. C.R.-C.L. L. REV. 505, 505 (1998) (arguing that "neutrality is an end, a substantive political ideal that . . . should not necessarily form the functional test for judging governmental actions affecting religion"); Drimmer, *supra* note 165, at 421-24.

266. *See Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1247, 1250 (11th Cir. 1999) (noting that "a reasonable student will not realize that student-elected sectarian and proselytizing prayerful messages at graduation ceremonies are divorced from state sponsorship and instead, realizing the views to be that of the majority, will feel coerced to participate in them").

choice between foregoing graduation or foregoing the right to be free from unwanted prayer. The absence of active state speaker selection simply does not make a student feel empowered to dissent.²⁶⁷

At best, the state's permissive attitude toward prayers converts the certainty of audience member coercion in *Lee* into a possibility.²⁶⁸ A realistic and well-founded possibility that one will experience coercion of the conscience, then, becomes the price of attending one's own graduation.²⁶⁹ Viewed in this light, the differences between *Lee* and *Madison* become a matter of degree. That the state had discounted the constitutional price of attendance, or made it a gamble on a third party's whim, cannot satisfy the exacting protections the Establishment Clause affords.²⁷⁰

The *Madison* court resolved only a facial challenge to the district's policy.²⁷¹ Yet its analysis—especially under the effects prong of the *Lemon* test—assumed such a formalistic view of facial challenges that the court did not consider the inevitable results of the policy.²⁷² Under the court's view, a facial challenge appraises only the literal words of the policy.²⁷³ The policy, however, produces two

267. Without meaningful opportunities for dissent, of course, an audience member involuntarily subjected to a message suffers coercion. See *Lee v. Weisman*, 505 U.S. 577, 592-94 (1992).

268. In practice, this possibility was an effective certainty, as "the high school's official commencement programs from 1988 through 1995 . . . reveal that both an Invocation and a Benediction were included as part of the school's graduation ceremony in all eight years." *Madison Sch. Dist.*, 147 F.3d at 834 n.3.

269. Cf. *Lee v. Weisman*, 505 U.S. 577, 596 (1992) (describing coercion of the conscience as the unconstitutional price of attending one's own graduation). Under an *Adler*-style policy, students would likely know beforehand whether the majority-elected speaker planned to offer a prayer. Thus, student choice can convert the possibility of coercion the school district worked so hard to create back into a certainty.

270. *But see* Drimmer, *supra* note 165, at 437-38 (arguing that the critical examination in religion-neutral selection criteria cases is not the procedures at work but the ultimate fact that prayer occurs).

271. *Madison Sch. Dist.*, 147 F.3d at 835-38.

272. Cf. *Committee for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774-80 (1973) (striking down a state law that, on its face, merely provided funds for maintenance of sectarian schools because, without provisions restricting use of funds to repair of purely secular structures, the law's "effect, inevitably, is to . . . advance the religious mission of sectarian schools").

273. See *Madison Sch. Dist.*, 147 F.3d at 837. The court concluded that because the policy does not, on its face, "mandate or direct that prayers be read," it cannot be said "that the government itself has advanced religion through its own activities and influence." *Id.* (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987)). This analysis fails to recognize that government activities may advance religion notwithstanding their permissive nature, especially in cases where the government has assembled the audience and delivered their captive attention to a speaker whom it granted unrestrained discretion to engage in any sort of religious speech.

distinct kinds of effects: the effects of its abstract existence and the inevitable consequences of putting it into practice.²⁷⁴ The effects of abstract existence include the message the policy sends to people who know about it.²⁷⁵ Being subject to the practical consequences of the policy, in contrast, requires no knowledge of the policy's content.

By considering only the effects of the policy's abstract existence, the court swept the critical holding of *Lee* under the judicial rug. It ignored the fact that whenever the school district put the policy into practice, the policy would deliver a captive audience to a speaker whom the state specifically granted absolute control over the content of his presentation.²⁷⁶ Accordingly, the policy's indisputable practical effect is that speakers will have the opportunity to lead an involuntarily assembled group of students in prayer. The existence of this opportunity to coerce the conscience, in its own right, advances religion and thus fails the *Lemon* test.²⁷⁷

When the Supreme Court has validated state actions that confer benefits on religious groups or speakers via substantively neutral standards, it has also found no possibility of advancement of religion or coercion of dissenters. Dismissing the possibility that the Equal Access Act at issue in *Mergens* might coerce students, the Court observed with satisfaction that, because meetings could not occur during instructional time, the Act did not implicate compulsory attendance or social-pressure-to-conform concerns.²⁷⁸ Critical to the *Lee* decision, the Court held that graduation ceremonies involve both compulsory attendance and social pressure to conform.²⁷⁹ Discussing the neutrality of the program in *Rosenberger*,²⁸⁰ the Court noted that

274. See *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 838-39 (1995) (declaring that "we must in each case inquire . . . into the practical details of [a] program's operation").

275. The court rightly concluded that the policy's abstract existence does not endorse or advance religion. See *Madison Sch. Dist.*, 147 F.3d at 835, 837. In contrast, a law that requires placing privately funded placards bearing the Ten Commandments in public school classrooms, see *Stone v. Graham*, 449 U.S. 39, 39-40 n.1 (1980), would, by the mere fact of its abstract existence and without its ever being put into practice, convey a message of state endorsement of religion.

276. Indeed, the policy granted specific permission to offer a prayer. See *Madison Sch. Dist.*, 147 F.3d at 834.

277. See *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1250 (11th Cir. 1999).

278. *Board of Educ. v. Mergens*, 496 U.S. 226, 251 (1990) (remarking that "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate").

279. *Lee v. Weisman*, 505 U.S. 577, 586, 593 (1992).

280. In dicta, the Court wrote that in *Rosenberger* and *Lamb's Chapel*, scarcity of resources would have required adoption of neutral criteria to determine which groups would obtain the state benefit. *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 835 (1995). The Court made that observation only after having first decided that the state had created an open forum, that

even-handed disbursement of the student activities fee did not have a hidden pro-religion agenda.²⁸¹ In *Madison*, however, the petitioner argued that the school devised the policy merely to maintain long-standing practices of including prayers in graduations.²⁸² Finally, as members of the Court have observed on several occasions, facially neutral dressing will not absolve a practice that includes other aspects invidious to the Establishment Clause.²⁸³

E. Why Schools Have a Duty to Avoid Graduation Prayers

The Supreme Court has long affirmed the ability of schools to regulate the events they organize, control, or which bear their imprimatur.²⁸⁴ Administrators may extensively regulate speech that occurs as an integral part of a school's educational mission.²⁸⁵ Speech and activities outside the traditional classroom setting may nevertheless fall within this well-regulated category if faculty members supervise it and it "impart[s] particular knowledge or skills to student participants and audiences."²⁸⁶ Educators may censor speech for a variety of purposes,²⁸⁷ and "must be able to set high standards for the student speech . . . disseminated under [the school's] auspices."²⁸⁸

speakers were not state agents, and that the speech would not result in coercion. Accordingly, this comment must be understood as advocating application of neutrality to a necessary economic decision, not as endorsing the notion that neutrality alone will justify otherwise impermissibly coercive state action.

281. *Id.* at 840. "There [was] no suggestion that the University created [the program] to advance religion or adopted some ingenious device with the purpose of aiding a religious cause." *Id.*

282. *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 837 (9th Cir. 1998); *cf. Adler*, 174 F.3d at 1250 (offering the same argument).

283. *See Rosenberger*, 515 U.S. at 839 (stating that neutrality is a "significant factor" but, implicitly, not a dispositive one); *id.* at 877-78 (Souter, J., dissenting); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (O'Connor, J., concurring in part and concurring in judgment) ("[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.") "[N]eutrality . . . does not permit a State to require a religious exercise even with the consent of the majority of those affected. . . ." *School Dist. v. Schempp*, 374 U.S. 203, 225-26 (1963).

284. *See Rosenberger*, 515 U.S. at 833-34; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988).

285. *See Hazelwood Sch. Dist.*, 484 U.S. at 271.

286. *Id.*

287. *See id.* Appropriate motivations for censorship include ensuring "that participants learn whatever lessons the activity is designed to teach, . . . and that the views of the individual speaker are not erroneously attributed to the school . . . [and to] disassociate [the school] . . . from speech that would . . . impinge upon the rights of other students." *Id.* (internal quotations and citations omitted).

288. *Id.* at 271-72.

Moreover, when speech bears the imprimatur of the state or when the school placed the speaker before the audience, settled doctrine indicates that officials must exercise control, i.e., cannot forswear responsibility for the content of speech it fosters.²⁸⁹

Because commencement exercises, like no other government-initiated gathering save the public school classroom or assembly,²⁹⁰ have such power to influence participants, courts should regard graduation as part of the regular pedagogical program and impose the same restrictions and duties that apply in the classroom environment. While a variety of courts have suggested that the same rules apply in each situation,²⁹¹ an explicit holding to that effect will clarify the law²⁹² and prevent schools from establishing creative outcome-oriented devices designed to permit conscience-coercing prayer.²⁹³

289. "At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of students." *Lee v. Weisman*, 505 U.S. 577, 597 (1992). *See also Hazelwood Sch. Dist.*, 484 U.S. at 272 (declaring that "[a] school must retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate . . . conduct . . . inconsistent with the shared values of a civilized social order, or to associate the school with any position other than neutrality on matters of political controversy") (internal quotations omitted); *cf. ACLU v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1479 (3d Cir. 1996) (observing that "[s]chool officials necessarily 'retain a high degree of control'" and that "[d]elegation of one aspect of the ceremony . . . does not constitute the absence of school officials' control over the graduation").

290. "Inherent differences between the public school system and a session of a state legislature distinguish [*Lee*] from *Marsh v. Chambers*," (upholding legislative chaplains and opening prayers). *Lee*, 505 U.S. at 596. "The atmosphere at the opening of a [legislative] session . . . where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend." *Id.* at 597; *see also Black Horse Pike*, 84 F.3d at 1480 (same); *cf. Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 456 (9th Cir. 1994) (observing that in an open forum situation like *Mergens* and *Lamb's Chapel*, "attendance at all religious as well as non-religious meetings was entirely voluntary, no religious meeting was sponsored by the school, and school officials neither encouraged nor participated in the meetings except on a custodial basis").

291. *See Lee*, 505 U.S. at 596 (observing that graduation is "an environment analogous to the classroom setting"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (stating willingness to apply the same decency standards to a high school assembly and a classroom); *Jones v. Clear Creek Indep. Sch. Dist. (Jones II)*, 977 F.2d 963, 967 (5th Cir. 1992) (reversing its prior holding that graduation and the classroom are distinguishable after the Supreme Court vacated and remanded for reconsideration in light of *Lee*).

292. For a review of the current state of the law, including *Black Horse Pike*, *Jones II*, and *Madison*, that finds unpredictability the norm, see Ralph D. Mawdsley, *Student Choice and Graduation Prayer: Division Among the Circuits*, 129 WEST'S ED. L. REP. 553 (1998). For a pre-*Madison* argument in favor of a per se ban on prayers at graduations, see Philip Oliss, Note, *Praise the Lord and Pass the Diplomas: Harris v. Joint School District No. 241*, 41 F.3d 447 (9th Cir. 1994), 64 U. CIN. L. REV. 705 (1996).

293. *See Smith*, *supra* note 165, at 305-314 (describing several student-initiated prayer policies as shams designed promote prayer); *cf. Black Horse Pike*, 84 F.3d at 1479-80 (observing that the policy stated its purpose as allowing prayers while avoiding the result of *Lee*); *Adler v.*

Realizing that—from a constitutional perspective—graduation ceremonies and the classroom are indistinguishable, courts would apply the same stringent restrictions to both situations. Designedly protective and unwilling to tolerate subterfuge, these standards prohibit states inviting privately funded religious speech into classrooms,²⁹⁴ teachers leading willing students in prayer,²⁹⁵ and schools permitting activities on campus when the school may appear to sponsor the speaker's views.²⁹⁶ Recognizing that the state holds its graduation audience captive and state-selected speakers can coerce listeners into participating in a religious exercise leads directly to a single conclusion: due to their inherent and non-delegable control over commencement exercises, schools have a duty to avoid the inclusion of prayers at all of their official educational activities.²⁹⁷

F. Reconciling the Law, Reaching a New Conclusion

Because the facts of the graduation prayer cases implicate a variety of doctrines, full treatment requires consideration of each and

Duval County Sch. Bd., 174 F.3d 1236, 1246 (11th Cir. 1999) (observing that “the school system believed it could give a ‘wink and a nod’ to controlling Establishment Clause jurisprudence . . . [and] permit and sponsor sectarian and proselytizing prayer at graduation ceremonies”).

294. See *Stone v. Graham*, 449 U.S. 39, 42 (1980).

295. See *Wallace v. Jaffree*, 472 U.S. 38, 56-61 (1985).

296. See *McCullum v. Board of Educ.*, 333 U.S. 203, 205, 209-12 (1948) (striking down a policy that permitted religious teachers to enter public schools to offer religious instruction to students); see also *Widmar v. Vincent*, 454 U.S. 263, 271-72 n.10 (1981) (discussing *McCullum*).

297. Cf. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring) (remarking that the Establishment Clause “imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message”). Many have argued that the control necessary to comply with the duty to avoid prayers advocated by this Note will give rise to entanglement forbidden by the *Lemon* test. See, e.g., *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 838 (1998) (noting the possibility of entanglement resulting from an interventionist legal rule). Although a clear policy forbidding prayers would not likely lead to impermissible entanglement, enforcing such a policy in the face of a disobedient or determined speaker could certainly raise such concerns. The Supreme Court has held that “[e]ntanglement must be ‘excessive’ before it runs afoul of the Establishment Clause.” *Agostini v. Felton*, 521 U.S. 203, 232-34 (1997) (citing and describing a case of “no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits”); cf. *Jones v. Clear Creek Indep. Sch. Dist. (Jones II)*, 977 F.2d 963, 967 (5th Cir. 1992) (noting that the court “know[s] of no authority that holds yearly review of unsolicited material for sectarianism and proselytization to constitute excessive entanglement”).

their respective interactions.²⁹⁸ The most direct analysis, agency, holds that schools cannot delegate power they do not have and imposes on state delegates—and, ultimately, graduation speakers—the same constitutional strictures as apply to the state itself. Even if one does not consider speakers state agents via the behind-the-scenes delegation process, the absence of a true open forum at graduations and the presence of the state's imprimatur on the speeches avoids equal access commands and makes speakers apparent agents in the eyes of audience members. Moreover, neutral selection criteria cannot cleanse coercive speech presented under the auspices of government where the state's compulsory assembly of an audience and subsequent surrender of censorial control created the opportunity to coerce.

Assuming involuntary attendance—the cornerstone of *Lee*—one realizes that the state commands an audience, which leads to the conclusion that graduation ceremonies are “in a fair and real sense”²⁹⁹ no different than classrooms, where severe limitations on religiosity apply, including the duty to avoid subtly coercive religious speech. While this may appear an extreme result, the Constitution has never countenanced exacting a constitutional price to enjoy a state benefit which one has already earned.³⁰⁰ While, as the majority pointed out in *Lemon*, the small steps in constitutional interpretation the Court takes one day can lead to surprising yet no less firm results in the future,³⁰¹ one must recall that *Lee*'s graduation prayer plainly “conflict[ed] with settled rules pertaining to prayer exercises for students.”³⁰²

298. For the view that the Court should approach the Establishment Clause in general with comprehensive analysis similar to that advocated by this Note, see Richard J. Ansson, Jr., *Drawing Lines in the Shifting Sand: Where Should the Establishment Wall Stand? Recent Developments in Establishment Clause Theory: Accommodation, State Action, the Public Forum, and Private Religious Speech*, 8 TEMP. POL. & CIV. RTS. L. REV. 1 (1998).

299. *Lee v. Weisman*, 505 U.S. 577, 586 (1992).

300. *See id.* at 596; *see also Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 n.2 (remarking that “the State may [not] impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees”).

301. *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971) (stating, obiter dictum, that “some steps, which when taken were thought to approach ‘the verge,’ have become platform for yet further steps”).

302. *Lee*, 505 U.S. at 587. This dicta must mean that graduation prayers involving less obvious establishment than *Lee*'s did may, when properly analyzed, run afoul of the Constitution.

V. CONCLUSION

When the state awards an individual the opportunity to address a high-school graduation ceremony, it confers a benefit, often in recognition of service to the community or academic achievement. Not generally available and extant only by official fiat, this benefit is necessarily limited to favored classes or messages. In light of these realities, and the natural presence of officialdom at the ceremonies, one cannot regard the occasion as an open forum. Accordingly, graduation speakers represent official values and are the mouthpiece of government. Neutral selection criteria—which many audience members will not comprehend—are irrelevant if those standards result in religious speech attributable to the state. Recognizing that the speaker commands a captive audience certifies this position because the benefit the state confers on speakers is actually the provision of involuntary listeners. Due to this possibility of coercion, inherent in addressing a captive audience controlled by demanding social norms and devoid a meaningful opportunity to dissent,³⁰³ the state must act to ensure that such coercion does not occur under its auspices. Only by establishing a duty to avoid religious speech at graduation ceremonies will courts safeguard the rights of religious dissenters in light of those facts which marked and controlled *Lee v. Weisman*.³⁰⁴

*Colin Delaney**

303. *See id.* at 593-94.

304. *Id.* at 586.

* I would like to thank Vanderbilt Professor Lisa Bressman for planting the idea for this Note and following through with beyond-the-call-of-duty editing, along with the ever-Socratic Vanderbilt Professor Tom McCoy, who asked enough questions to put a foundation of legal reasoning under the answer I knew was right. My editors, Austin McMullen, Jim McCray, and Alicia Griffin deserve a great deal of credit for turning a draft into something worthy of yellow binding. Finally, my family warrants immeasurable gratitude for, without prodding or resistance, letting me find my way.

