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Back to the Future with Establishment Clause Jurisprudence: Analysis and Application of Lee v. Weisman

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BACK TO THE FUTURE WITH ESTABLISHMENT CLAUSE JURISPRUDENCE: ANALYSIS AND APPLICATION OF *LEE v. WEISMAN*

I. INTRODUCTION

To many Oklahomans, there are two significant interests in life: football and God. In response to the United States Supreme Court's most recent school prayer decision, *Lee v. Weisman*,[1] many Oklahoma public school districts surprisingly punted pre-game prayers at high school football games. The Supreme Court held that a prayer offered at a public high school graduation ceremony violated the Establishment Clause of the First Amendment because students might have been indirectly coerced through peer pressure to participate in the state-sponsored invocation and benediction.[2] Consequently, the Oklahoma Superintendent of Schools warned the local school boards to discontinue pre-game prayers at football games because of the potential exposure to a lawsuit. Some communities heeded the advice and punted prayer.[3] Others huddled together and elected to continue offering pre-game prayers, hoping they are not flagged for a violation of the Establishment Clause of the

1. 112 S. Ct. 2649 (1992).

2. *Id.* at 2657.

3. At local high schools, officials announced they would no longer tolerate pre-game prayers. Local law firms representing several school districts issued memos advising their clients that under *Lee v. Weisman*, officials would be exposing the districts to potential lawsuits if the prayers were continued. Barbara Hoberock, *Prayer to be Aired For Schools to Play*, TULSA WORLD, Sept. 10, 1992, at A1. However, Sand Springs, a Tulsa suburb, continues to hold traditional pre-game student led prayers. *Id.* In Owasso, another Tulsa suburb, the football team kneeled while members of the crowd bowed their heads, continuing a long standing tradition of pre-game prayers. Kelly Kurt, *Silence of the Rams*, TULSA TRIB., Sept. 5, 1992, at A1.

The National School Board Association stated that prayer at any school sponsored event is unconstitutional. Barbara Hoberock, *Area State School Systems Prioritize Court Ruling Differently*, TULSA WORLD, Oct. 11, 1992, at D3. Under the advice of a local law firm, the Superintendent for the Broken Arrow school district issued a written policy statement explaining that "students have the right *not* to be subjected to prayers at a graduation exercise, student assembly, or other school-sponsored event." He further stated that *Lee v. Weisman* "clearly prohibits prayers at all kinds of school events . . . ." *To the Point*, ARROWPOINT (Broken Arrow Pub. Sch. Admin. Ctr., Broken Arrow, Okla.), Sept. 1992.

A spokesman for the ACLU issued a statement threatening legal action against any public school that continues to offer pre-game prayers. Wayne Greene, *ACLU Threatens to Sue Schools Over Prayers*, TULSA WORLD, Sept. 22, 1992, at A1.

First Amendment.[4]

The *Lee* Court's application of the coercion theory is contrary to school prayer precedent and is not the product of stare decisis. The court used a novel construction that replaced the historical version of the coercion analysis with a contemporary psycho-coercion analysis. The following critique does not suggest that the Court retreat from the coercion analysis employed in previous school prayer cases.[5] However, use of the psycho-coercion analysis to find a high school graduation ceremony[6] unconstitutional is inherently flawed. This flaw can be traced to the Court's unwillingness to recognize that the precedent for the coercion analysis hinged on important facts that were absent in *Lee*. The Court failed to recognize that graduating seniors are not young impressionable children susceptible to peer pressure. Additionally, the state-sponsored prayer was not part of a daily ritual of religious expression, nor was it offered in a classroom where teacher-student relationships precipitate the fear of indoctrination. Accordingly, the decision is inconsistent with school prayer precedent and, hence, circumvents the Court's policy of accommodating and validating long-standing religious traditions rooted in American heritage. Finally, this note maintains that by failing to overrule *Lemon v. Kurtzman*, confusion and contradiction in lower court

4. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

5. In Engel v. Vitale, 370 U.S. 421 (1962), the Supreme Court considered New York's program of daily prayer recitation. The prayer was composed by state officials who mandated that it be "said aloud by each class in the presence of a teacher at the beginning of each school day. . . ." *Id.* at 422. The Court struck down this practice, reasoning that this type of government sponsored religion is precisely what the Establishment Clause was designed to prohibit. *Id.* at 425. One year later the Supreme Court again ruled on the constitutionality of government sponsored prayer in the classroom. In Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963), no official composed the prayer; instead, the school was required to read verses from the Bible. *Id.* at 205. In addition, participation in these exercises was voluntary. *Id.* Nevertheless, since the program's purpose and primary effect was to aid religion, the Court found that it violated the First Amendment. *Id.* at 223.

6. The analysis in this paper assumes, as did the Court, that the prayer would be given at a high school graduation ceremony. Although the original prayer was given at the junior high school level, the Court failed to distinguish the venues.

> The record in this case is sparse in many respects, and we are unfamiliar with any fixed custom or practice at middle school graduations, referred to by the school district as "promotional exercises." We are not so constrained with reference to high schools, however. High school graduations are such an integral part of American cultural life that we can with confidence describe their customary features, confirmed by aspects of the record and by the parties' representations at oral argument.

Lee, 112 S. Ct. at 2653.

Furthermore, the Court noted that since Deborah Weisman was enrolled in Classical High School and it was evident that an invocation and benediction would be conducted at her high school graduation, she would have a live and justiciable controversy. *Id.* at 2654. Thus, the Court's decision and this article's analysis is premised on the high school graduation.

rulings are inevitable. In addition, common scenarios are set forth to illustrate how school districts may appropriately apply the *Lee* decision.

II. STATEMENT OF THE CASE

A. *Facts*

For many years the Providence School Committee permitted principals to include invocations and benedictions in graduation ceremonies.[7] The clergy delivering these prayers in recent years have included Jewish rabbis and ministers of various Christian denominations.[8] Usually, the high school graduation ceremonies are held off school grounds, while junior high school promotion ceremonies take place on school campuses.[9]

In June 1989, Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence.[10] Rabbi Leslie Gutterman of the Temple Beth El in Providence delivered the ceremony's invocation and benediction.[11] Four days before the ceremony, Weisman sought a temporary restraining order to prevent the invocation and benediction.[12] Because the district court lacked sufficient time to consider the claims, it

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7. *Id.* at 2652.
8. *Id.*
9. *Id.* at 2653.
10. *Id.* at 2652.
11. *Id.* at 2652-53. The invocation was as follows:

> God of the Free, Hope of the Brave:
>
> For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.
>
> For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled. Amen.

Id. (quoting the Agreed Statement of Facts at 22-23).
The benediction was as follows:

> O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.
>
> Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.
>
> The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.
>
> We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. Amen.

Id. at 2653. (quoting the Agreed Statement of Facts at 22-23.).
12. *Id.* at 2653-54.

denied Weisman's motion.[13] Principal Lee provided Rabbi Gutterman with *Guidelines for Civic Occasions* and "advised him that his prayers should be nonsectarian."[14] On June 29, 1989, Weisman and her family attended the graduation ceremony.[15] Subsequently, Weisman filed an amended complaint seeking for a permanent injunction barring prayers at graduation ceremonies.[16]

B. *The District and Appellate Courts' Decisions*

The district court determined that the invocation and benediction violated the Establishment Clause[17] because the practice of offering prayer in public ceremonies impermissibly "advance[d] religion by creating an identification of school with a deity,"[18] and thus, "endorsed religion in general by authorizing an appeal to a deity in public school graduation ceremonies."[19] A majority of the Court of Appeals for the First Circuit affirmed by simply endorsing the district court's opinion.[20]

C. *The Supreme Court's Decision*

In finding the ceremony unconstitutional, the Court made three determinations. First, it found that the state officials directed and controlled a performance of a religious exercise.[21] The Court explained that a high school principal who included a prayer in a graduation ceremony, chose the minister who delivered the prayer, provided the minister with guidelines, and advised the minister as to the nature of the prayer, effectively composed a state-sponsored prayer.[22] Relying on *Engel v. Vitale*,[23] the *Lee* Court declared that the government should not "compose official prayers"[24] and, therefore, found that the principal's direction and control

13. *Id.* at 2654.
14. *Id.* at 2652.
15. *Id.* at 2654.
16. *Id.*
17. Weisman v. Lee, 728 F. Supp. 68, 75 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992).
18. *Id.* at 72.
19. *Id.*
20. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992). Judge Bownes concurred separately, noting that "[a] graduation ceremony does not need a prayer to solemnize it," and concluding that the primary purpose of the prayer was solely religious. *Id.* at 1095. Therefore, the practice "offends the First Amendment even if the words of the invocation or benediction are somehow manipulated so that a deity is not mentioned." *Id.* at 1097.
21. Lee v. Weisman, 112 S. Ct. 2649, 2655-56 (1992).
22. *Id.*
23. 370 U.S. 421 (1962).
24. *Lee*, 112 S. Ct. at 2656 (quoting Engel v. Vitale, 370 U.S. 421, 425 (1962)). In *Engel*, the Court explained that "it is no part of the business of government to compose official prayers for any

of the prayer violated the Establishment Clause.[25]

As its second determination the Court found that the state mandated attendance at the graduation ceremony. The school district argued that Weisman's attendance at the graduation ceremony was voluntary and, thus, the state did not mandate participation in the religious invocation and benediction.[26] The school district further asserted that the option of not attending the event "excuse[d] any inducement."[27] However, the Court rejected this assertion because the argument was an overly formalistic interpretation of the term "voluntary."[28] The Court explained that the ceremony was of such importance that voluntary attendance was not really voluntary.[29]

As its third determination the Court found that the students may have been coerced into participating in a state-sponsored religious exercise because the adolescents were susceptible to peer pressure.[30] The Court found that a reasonable dissenter of high school age could believe that standing or remaining silent signified her own participation in or approval of the group exercise, rather than respect for it.[31] In support of this proposition, the Court relied on psychological theories which stress "the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention."[32]

The *Lee* Court also refuted the proposition that *Marsh v. Chambers*[33] would control its decision. Though it conceded there were similarities, the *Lee* Court determined that there was a significant difference between a public school forum and a legislative session.[34] The Court,

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group of the American people to recite as a part of a religious program carried on by the government." *Engel*, 370 U.S. at 425.

25. *Lee*, 112 S. Ct. at 2656.

26. *Id.* at 2659.

27. *Id.*

28. *Id.* It declared that "in our society . . . high school graduation is one of life's most significant occasions. . . . [A] student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary' . . . ." *Id.*

29. *Id.* at 2659-60 ("To say that a student must remain apart from the ceremony . . . is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high."

30. *Id.* at 2659.

31. *Id.* at 2658.

32. *Id.* at 2659.

33. 463 U.S. 783 (1983) (holding that prayers at the opening of state legislative sessions are permissible under the Establishment Clause).

34. *Lee*, 112 S. Ct. at 2660.

citing *Engel v. Vitale*[35] and *Abington School District v. Schempp*,[36] explained that in a public school forum teachers retain a "degree of control" over the students and the ceremony.[37] By contrast, legislators are not compelled to listen to religious prayers, they are free to enter and leave the sessions with little comment, and they are adults not young impressionable children.[38] Hence, legislators have other means of avoiding a state-sponsored prayer. In the graduation ceremony, "the student was left with no alternative but to submit."[39] Thus, the school compelled Weisman to participate in a religious exercise at an event "of singular importance" not only to her, but to every student.[40]

III. ANALYSIS

Crucial to the Court's decision in *Lee* was the determination that students may have been *coerced* into participation. Justice Kennedy explained that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."[41] In applying the coercion analysis to *Lee*, however, the Court demonstrated its inability to make this distinction.

A. *No Coercion*

The coercion analysis utilized in *Lee* appears to be grounded in *Engel* and *Schempp*. However, as the following analysis will demonstrate, the *Lee* Court failed to acknowledge that those cases hinged on important facts notably absent in *Lee*. The Court failed to distinguish graduating seniors from young impressionable children. The state-sponsored prayer was not part of a daily ritual of religious expression, nor was it offered in a classroom where the teacher-student relationship aroused fear of indoctrination. Therefore, the decision is inconsistent with the notion of indoctrination maintained in school prayer precedent and circumvents the Court's policy of accommodating and validating long-standing religious traditions rooted in American heritage.

35. 370 U.S. 421 (1962).
36. 374 U.S. 203 (1963).
37. *Lee*, 112 S. Ct. at 2660.
38. *Id.*
39. *Id.*
40. *Id.* at 2661.
41. *Id.* at 2661 (quoting *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring)).

1. Daily Ritual of Religious Expression

A critical question in determining if a state-sponsored prayer is permissible should be whether the prayer was offered as a daily ritual of religious expression. In *Engel* and *Schempp* the prayers and Bible readings were offered to the students every day.[42] By finding the state-sponsored prayers impermissible, the Court protected the children from a real threat of coercion. Unlike *Engel* and *Schempp*, the prayer offered in *Lee* was offered only once in a graduate's life.

Furthermore, in *Engel* and *Schempp*, the Court was concerned not only with the frequency of the prayers, but also with the degree of student involvement. The *Engel* Court focused on the *daily recitation* of the Regent's prayer in the classroom.[43] In *Schempp*, the Bible reading was "followed immediately by a *recital* in unison by the pupils of the Lord's Prayer."[44] The record in *Lee*, however, fails to disclose any encouragement of students, parents, teachers, or family members to recite the prayer. Therefore, the prayer in *Lee* should not be considered coercive.

2. Confines of the Classroom

A second critical question in determining if a state-sponsored prayer is permissible should be whether it was offered in the confines of a classroom. The analysis in *Engel* and *Schempp* dealt specifically with the coercive potential of state-sponsored religious activity conducted within the confines of the classroom combined with the teacher-student relationship. There, the prayers and Bible readings occurred in the classroom where the young students did not have their parents present to monitor the activity. In *School District of Grand Rapids v. Ball*,[45] the Court also found that the unsupervised teacher-student relationship may breed indoctrination.[46] Although the *Ball* Court did not apply a coercion analysis, it did indicate that "teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs."[47] Thus, the Court feared that the teacher-student relationship would lead to indoctrination.

42. The Regent's Prayer in *Engel* was "a part of the *daily* procedures of its public schools . . . ." Engel v. Vitale, 370 U.S. 421, 423 (1962) (emphasis added). In *Schempp*, the Bible was read "at the opening of each public school on *each school day*." Abington Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963) (emphasis added) (quoting 24 PA. CONS. STAT. § 15-1516 (1960)).

43. *Engel*, 370 U.S. at 424.

44. *Schempp*, 374 U.S. at 210 (emphasis added) (quoting *Schempp v. Abington Sch. Dist.*, 201 F. Supp. 815, 819 (E.D. Pa. 1962)).

45. 473 U.S. 373 (1985).

46. *Id.* at 397; *see* Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

47. *Ball*, 473 U.S. at 385.

The *Lee* Court distinguished the graduation ceremony from a legislative session because teachers retained a "high degree of control" over the students.[48] Yet, it failed to distinguish a classroom from a graduation ceremony. At the ceremony, students were not under the sole supervision of a single teacher; parents and family members were in attendance. Since the teachers did not retain a "high degree of control," the threat of indoctrination was absent in *Lee*.[49]

3. Young Impressionable Minds

In the past, the Court has been concerned with coercive influences on young students. In *Ball*, the Court indicated that the threat of indoctrination would be pervasive since the primary school students were "impressionable youngsters."[50] Specifically, the Court feared that young students could not distinguish between religious and secular customs, teachings, and principles.[51]

The *Lee* Court failed to recognize that the students at the graduation ceremony were not young and impressionable like the students in *Ball*. Graduating seniors are able to distinguish between religious customs, teachings, and principles. They are less impressionable and less subject to indoctrination at a high school graduation ceremony than young children in their formative years. They are mature enough to choose their religious preferences, thereby alleviating any fear of religious indoctrination. The assertion that high school seniors are susceptible to peer pressure and, thus, susceptible to the risks of indoctrination and government coercion is inconsistent with the Court's own determination that only young students are susceptible to religious indoctrination.

The *Lee* Court also failed to consider that a high school graduate may be a legal adult. A proper application of the coercion analysis protects *children* from becoming indoctrinated in religion or religious beliefs contrary to their own.[52] However, the majority of graduating seniors are adults. They are given the right to vote, are required to register for the

48. *Lee*, 112 S. Ct. at 2660.

49. *See Lee*, 112 S. Ct. at 2685 (Scalia, J., dissenting). Justice Scalia explained that:

> [O]ur school-prayer cases turn in part on the fact that the classroom is inherently an instructional setting, and daily prayer there—where parents are not present to counter "the students' emulation of teachers as role models and the children's susceptibility to peer pressure," might be thought to raise special concerns regarding state interference with the liberty of parents to direct the religious upbringing of their children . . . .

Id. at 2685 (citation omitted) (quoting Edwards v. Aguillard, 482 U.S. 578, 584 (1987)).

50. *Ball*, 473 U.S. at 385.

51. *Id.*

52. *See supra* part III.A.1.

draft, and are criminally liable as adults. Therefore, since most graduates are legal adults, the Court's assertion that they are susceptible to peer pressure similar to young children is unconvincing.

This is not the first time the Court was needed to distinguish students by age and maturity. In holding the Equal Access Act constitutional, the Court found high school students no less mature than college students.[53] In *Tilton v. Richardson*,[54] the Court found that "college students are less impressionable and less susceptible to indoctrination."[55] If high school students were included in the *Board of Education v. Mergens*[56] analysis, then graduating seniors, who are older and more mature than young students, but equally mature as college students, should clearly understand the context in which an invocation and benediction is given. Therefore, there is no threat of indoctrinating high school seniors.[57] The Court should not treat legal adults as if they were still young impressionable children.

Accordingly, the facts in *Lee* more closely resemble the facts in *Marsh*, than *Engel* or *Schempp*. In *Marsh*, Justice Kennedy explained that since an audience is comprised of *adults*, they are not coerced to participate in the prayer and, hence, are not indoctrinated. It follows that, if the students in *Lee* were adults, the prayer would have been constitutional. The question turns not on the prayer, but on a factual inquiry into the circumstances and the maturity level of the audience. Since the *Lee* Court failed to consider the maturity level of the audience, its decision is fundamentally flawed.

B. *Policy*

The *Lee* Court's analysis fails in two respects. First, the original intent of the coercion analysis embraced the notion that the government may not compel participation in religious activities by lawful sanction or threat of penalty. A coercion theory that requires a factual inquiry into psychological inducements can only lead to arbitrary results because the finders of fact differ as to what may or may not constitute impermissible psychological coercion. Second, the underlying theme in past school

53. Board of Educ. v. Mergens, 496 U.S. 226, 235 (1990) (comparing the maturity of high school students with students at the state university and finding the maturity level similar with respect to their ability to understand that speech, no less religious speech, is not coercive).

54. 403 U.S. 672 (1971).

55. *Id.* at 686.

56. 496 U.S. 226 (1990).

57. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 969-971 (1992).

prayer decisions has been the fear of indoctrination, not strict separation of church and state.

1. Legal Coercion or Psycho-Coercion?

The concept of coercion by threat of penalty is best illustrated in the Book of Daniel. King Darius of the Medo-Persian empire issued a decree that anyone who prays to any god except the king shall be thrown into the lion's den.[58] Everyone in the empire except Daniel conformed to King Darius' religious orthodoxy under the threat of lawful penalty.

The *Lee* Court's psycho-coercion analysis does not address the Framers' concern with dictated orthodoxy. They were not concerned with amorphous psychological coercion, but with "coercion of religious orthodoxy and of financial support by force of law and threat of penalty."[59] The Framers attempted to create a legal structure that would spoil any governmental attempt to coerce participation in state-sponsored religious exercises under the threat of state sanction.[60] For example, the Church of England, the official church of the Virginia colony, required all people to attend church and pay tithes to support the official Anglican ministers.[61] The "ministers were required by law to conform to the doctrine and rites of the Church of England."[62] In addition, the colonists were taxed specifically for funding church buildings.[63] Moreover, dissenters were penalized through an "array of civil disabilities."[64]

Vetoing a bill that would have incorporated the Episcopal Church the official church of the District of Columbia, James Madison objected explaining that "Congress shall make no law respecting a religious establishment."[65] Madison feared an official state church buttressed by the state's power to coerce conformity.[66] Thus, the Framers designed the Establishment Clause to prohibit actual coercion, not an ultra-subjective psycho-coercion.

Other cases have also corroborated this view. In *West Virginia Board of Education v. Barnette*,[67] the Court held that requiring of public

58. Daniel 6:7.
59. *Lee*, 112 S. Ct. at 2683 (Scalia, J., dissenting).
60. *Id.* (emphasis omitted).
61. *Id.* (citing L. LEVY, THE ESTABLISHMENT CLAUSE 3-4 (1986)).
62. *Id.*
63. *Id.*
64. *Id.* (citing L. LEVY, THE ESTABLISHMENT CLAUSE 4 (1986)).
65. James Madison, *The Civil and Religious Functions of Government*, *in* THE ANNALS OF AMERICA: 1811, at 287 (1976).
66. *Id.*
67. 319 U.S. 624 (1943).

school students to recite the Pledge of Allegiance, under the threat of expulsion, violated the coercion element inherent in the Free Exercise Clause of the First Amendment.[68] The threat of expulsion for failure to recite the Pledge was impermissible government coercion. Additionally, the *Schempp* Court found that since students are required by law to attend school, they are coerced not by psychological peer pressure but by threat of legal sanction.[69]

The *Lee* Court has therefore extended the proscriptive arm of the coercion analysis far beyond that envisioned by Madison or articulated in *Barnette*, *Engel*, and *Schempp*. Coercion has never included peer pressure. The Court has shifted from only considering governmental sanctions to also considering amorphous psychological peer pressure.

2. Separation or Indoctrination?

Justice Blackmun asserted that the Establishment Clause erected a wall of separation between church and state.[70] He argued that, "[t]he Amendment's purpose . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[71] Separationists argue that under no circumstances may government sponsor religious expression or accommodate religious beliefs. They contend that those who desire to express personal religious views must do so outside the public school forum. Yet, the original intent underlying the Establishment Clause does not embrace such a standard.

Although never expressly articulated in *Engel*, *Schempp*, or *Lee*, each decision is driven by the fear of indoctrination, not the desire to erect a strict wall of separation. Pure separation is incompatible with Establishment Clause jurisprudence; *Engel*, *Schempp*, and *Lee* would not have been decided as they were if the audience in each scenario had been composed of adults. Thus, a state-sponsored prayer in the absence of an impressionable young audience should not be prohibited. It follows that the court has rejected a strict separation analysis.

The Court prohibits state-sponsored prayers in the public school forum, not because it requires a strict separation, but rather to protect children from the threat of indoctrination. Children are easily compelled to believe whatever a teacher professes. What the teacher professes may be

68. *Id.* at 641-42.
69. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963).
70. *Lee*, 112 S. Ct. at 2662.
71. *Id.* at 2662.

diametrically opposed to the students' religious values. Since many children are schooled in an environment where parental supervision is sporadic, society protects children from the possible indoctrinating effect an unsupervised teacher's beliefs may have on them.

Future controversies should be scrutinized to determine whether the prayer indoctrinates, not whether the wall of separation has been ever so slightly breached. Religious exercises or expressions are inevitable; we are a religious people.[72] And we bring diversity to the public forum. The proposition that we must leave our religious heritage at home is unrealistic and demeaning. In the context of a civic ceremony, the Court should maintain a coercion analysis to protect susceptible individuals from governmental establishment of religion. The coercion analysis must, however, turn on the danger of indoctrination, not some fabricated notion of strict separation. If the government action produces a reasonable fear of indoctrination, then the state-sponsored activity should be prohibited; otherwise, citizens should be allowed to offer a traditional prayer at a civic ceremony. A one minute invocation or benediction offered at a civic ceremony produces neither a reasonable fear of indoctrination nor a threat of penalty.

IV. IMPLICATIONS

The Court's failure to overrule *Lemon v. Kurtzman*[73] will confuse lower courts and result in contradictory rulings. The following scenarios are set forth to illustrate how school districts may appropriately apply *Lee*.

A. *Ignoring the Lemon Test*

In order to survive *Lemon* every government action must pass a three prong test. First, every act must have a secular purpose. Second, its principal or primary effect must neither advance nor inhibit religion. Finally, it must not foster an excessive governmental entanglement with religion.[74]

The *Lee* Court refused to apply the *Lemon* test. This refusal will force lower courts to choose between *Lemon* and *Lee*. Consequently,

72. *Id.* at 2661 ("[T]here will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.") (citing Board of Educ. v. Mergens, 496 U.S. 226 (1990)).

73. Lemon v. Kurtzman, 403 U.S. 602 (1971).

74. *Id.* at 612-13.

lower court decisions will likely be outcome determinative and contradictory.

B. *Application of Lee v. Weisman to Related Scenarios.*

While many communities wish to continue offering prayers at school events,[75] they should consider the risks. State-sponsored prayers may cost the school district a substantial amount of money. If schools insist on taking up the gauntlet and offering prayers, they should do so in a manner consistent with *Lee*. In other words, if the prayer is non-state-sponsored, voluntary, or non-coercive, it should pass constitutional muster.[76]

1. Prayer At Public School Athletic Events

A state-sponsored prayer offered at a public high school football game should not be prohibited because a crucial element of *Lee* is absent. The *Lee* Court found that attendance at the graduation ceremony was non-voluntary because it was an event of singular importance to the graduates.[77] A football game, however, does not occupy the same level of importance as a graduation ceremony and is voluntary.

An additional way the school district can side step liability is to avoid another element of *Lee*. Namely, prayers should not appear to be state-sponsored. This can be accomplished by making sure the prayers are student initiated.[78]

2. Public School Baccalaureate Services

A baccalaureate service may still be conducted without violating *Lee*. To be permissible, the service should be conducted without any input from the school district, and attendance should not be required. This approach complies with *Lee* because it is non-state-sponsored and voluntary.

3. Public School Eulogies

Schools across the country frequently find themselves coping with student deaths. Fortunately, they may constitutionally sponsor eulogies. Since eulogies are not events of singular importance, like graduation ceremonies, attendance is voluntary. Therefore, a school-sponsored eulogy

75. *See supra* note 3.
76. *See supra* notes 29-30 and accompanying text.
77. Jones v. Clear Creek Indep. Sch. Dist. 977 F.2d 963, 970-72 (1992).
78. *Id.*

will not violate *Lee*.[79]

4. State University Functions

Prayers given at state college functions are constitutional since they are not coercive. In *Lee*, the Court found the prayer coercive because the impressionable students were susceptible to peer pressure. College students, though, are not as susceptible to peer pressure. Since the prayer would be non-coercive, it should not violate *Lee*.

V. CONCLUSION

The Court's extension of the coercion analysis to include a psychological inquiry is a novel, but unworkable, application of precedent. The school prayer case law developed by the Supreme Court has been based on the doctrine of legal coercion. By going back to the future and implying psychological factors to the coercion analysis, the Court has needlessly created confusion, inconsistency, and contradiction.

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79. *Id.*