1995

Hear No Evil, Speak No Evil: The Duty of Public Schools to Limit Student-Proposed Graduation Prayers

Jonathan C. Drimmer
Office of the United States Solicitor General

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol74/iss3/2

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
Jonathan C. Drimmer*

Hear No Evil, Speak No Evil: The Duty of Public Schools to Limit Student-Proposed Graduation Prayers

TABLE OF CONTENTS
I. Introduction ........................................................................ 411
II. The First Amendment in the Schools ...................................... 415
III. Interpreting "Neutrality" .................................................. 419
   A. Substantive and Formal Neutrality ................................... 419
   B. Application of Substantive Neutrality ................................. 421
   C. Religion in Schools Outside the Scope of Substantive
      Neutrality ....................................................................... 424
IV. Lee v. Weisman .................................................................... 427
V. Student-Sponsored Graduation Prayers .................................. 429
   A. Harris and Jones .............................................................. 430
   B. Facially Neutral Practices ............................................... 435
VI. Conclusion .......................................................................... 443

I. INTRODUCTION

"For some moments in life, there are no words."1

According to several surveys, almost one-half of public high school districts currently include prayer in their graduation ceremonies; in as many as three-quarters of those districts, students lead the

Copyright held by the NEBRASKA LAW REVIEW.
* Bristow Fellow, Office of the United States Solicitor General. J.D., UCLA School of Law, 1993; B.A., Stanford University, 1990. The author would like to thank Keith Kessler and Seth Galanter for reading and commenting on drafts of this Article, and Michael P. Manly, executive editor of the Nebraska Law Review. Most of all, the author thanks Allison Drimmer, for her love, support, challenging dialogues and meticulous editing skills. The views expressed in this Article are those of the author and should not be construed to reflect the opinions, positions, or understandings of the United States Government or any Department or agency therein.

1. WILLIE WONKA AND THE CHOCOLATE FACTORY (Walper Pictures 1971).
prayers.\textsuperscript{2} In \textit{Lee v. Weisman},\textsuperscript{3} the Supreme Court held that a public school graduation prayer is unconstitutional when a school official opts to include prayer in the graduation. Following \textit{Lee}, the United States Court of Appeals for the Fifth Circuit, in \textit{Jones v. Clear Creek School District},\textsuperscript{4} found a distinction where a majority of students opt for a religious invocation. A school district's permitting student-sponsored prayer, the court determined, does not breach the state's duty to guarantee religious neutrality in the schools.

In the wake of \textit{Jones},\textsuperscript{5} Pat Robertson's American Center for Law and Justice ("ACLJ") initiated an informational campaign, mailing letters to 15,000 school officials and 300,000 "concerned citizens" advising them of \textit{Jones} and asserting that student-sponsored prayer is constitutional.\textsuperscript{6} In response to the ACLJ's actions, the American Civil

\begin{enumerate}
\item 112 S. Ct. 2649 (1992).
\item 977 F.2d 963 (5th Cir. 1992), cert. denied, 113 S. Ct. 2950 (1993). In fact, the court held that the right to free speech and free exercise of religion protects the students' license to have such prayers. Id. at 969. See also Amy Louise Weinhaus, \textit{The Rate of Graduation Prayers in Public Schools After Lee v. Weisman}, 71 Wash. U. L.Q. 957, 979-80 (1993)(Lee failed to address the constitutionality of student-initiated prayer).
\item See Reske, supra note 2, at 20. See also Adler v. Duval County Sch. Bd., 851 F. Supp. 446, 448-49 (M.D. Fla. 1994)(discussing the deluge of mailed information from interest groups); \textit{Graduation Invocations}, supra note 2, at 1061 n.3. Allan Jay Sekulow, ACLJ Chief Counsel, stated that he personally spoke with repre-
Liberties Union ("ACLU") launched its own crusade. The ACLU also sent 15,000 letters to school officials, warning that Jones was decided incorrectly and that student-sponsored prayers violate the Constitution.\(^7\)

School officials, meanwhile, are caught in a religious and legal crossfire.\(^8\) To add to that atmosphere of confusion, the United States Court of Appeals for the Ninth Circuit, in Harris v. Joint School District No. 241,\(^9\) rejected the holding of Jones, concluding that student-sponsored graduation prayers violate the Establishment Clause's guarantee of the state's "wholesome neutrality" toward religion.\(^10\) Given the prominence of student-sponsored prayer in public schools, the political volatility of the issue, and the split in legal opinions,\(^11\) the

---

7. Reske, supra note 6, at 14, 16. See also Graduation Invocations, supra note 2, at 16 & n.3 (noting the ongoing conflict between the ACLU and ACLU in interpreting the constitutional status of student-sponsored graduation prayer).

8. See Reske, supra note 6, at 14. See also Barber, supra note 2, at 1250; Martha M. McCarthy, Much Ado Over Graduation Prayer, 75 Phi Delta Kappan 120 (1993) (noting that school boards and administrators are grappling with the issue of prayers at graduations).


10. School Dist. v. Schempp, 374 U.S. 203, 222 (1963). Although the Supreme Court vacated the Harris opinion as moot because the student-plaintiff graduated, the case nonetheless represents the more equitable and constitutional view regarding student-sponsored graduation prayer, as well as the line of cases holding that such prayers are unconstitutional. See, e.g., ACLU v. Blackhorse Pike Regional Bd. of Educ., No. 93-5868 (3d Cir. June 25, 1993); Gearon v. Loudon County Sch. Bd., 844 F. Supp. 877 (E.D. Va. 1993). Furthermore, the opinion is important because it reflects the views of an influential circuit court, and will be examined by other courts considering the constitutionality of student-sponsored graduation prayers regardless of its actual precedential effect.

constitutionality of student-sponsored prayers at public school graduations is likely headed for resolution in the Supreme Court.

This Article analyzes the constitutionality of student-sponsored graduation prayers in light of the Court's evolving interpretation of the Establishment Clause's requirement of state neutrality in public schools. It is not the purpose of this Article, however, to apply, or attempt to reconcile, the disparate multi-element "tests" applied by the Court, or members of the Court, to that issue. Instead, upon examining the fundamental principles underlying the Court's application of the Establishment Clause to public schools, this Article advances the theory that those principles compel schools to ensure that graduation ceremonies be free from religiosity.

Part II examines the Religion Clauses of the First Amendment, focusing on the Court's strict application of the Establishment Clause's neutrality requirement to public schools. Part III attempts to define "neutrality" as demanded by the Establishment Clause by examining the Court's application of the term in the public school context. This Part argues that the Court has demanded a "substantive" neutrality in public schools, as opposed to a "formal" neutrality. Such a formal model of neutrality would require only that the state enact neutral procedures, forbidding practices that risk infusing religiosity into mandatory school events, but permitting religion in public schools where school officials do not compel students to hear the potentially

12. Traditionally, the Court has applied the tripartite Lemon test to Establishment Clause cases. See Lemon v. Kurtzman, 403 U.S. 602 (1971). See also School Dist. v. Ball, 473 U.S. 373, 383 (1985) (Lemon has been applied in every case involving religion in schools). Under the Lemon test, to satisfy the Establishment Clause, a governmental practice must: (1) reflect a clearly secular purpose; (2) have the primary effect of neither advancing nor inhibiting religion; and (3) avoid fostering excessive government entanglement with religion. See Committee For Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973). The Court in Lee considered the Lemon framework unnecessary to assess the constitutionality of the graduation prayer, because the "pervasive" government involvement in selecting the prayer differentiated Lee from those cases involving "difficult questions" of church and state. Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992). The Court also declined to apply the "endorsement" approach, a modification of Lemon applied by a majority of Justices in County of Allegheny v. ACLU, 492 U.S. 573, 592-95 (1989). Under the endorsement test, the government violates the Establishment Clause where it intentionally promotes religion or a "reasonable observer" would believe the religious message conveyed a government endorsement or disapproval of religion. See id.; School Dist. v. Ball, 473 U.S. 379, 389 (1985). Instead, the Lee Court applied a coercion analysis which Justice Kennedy and the four dissenting Justices accepted. See Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992); id. at 2681 (Scalia, J., dissenting). See also Board of Educ. v. Mergens, 496 U.S. 226, 261-62 (1990) (Kennedy, J., concurring) (the coercion inquiry "must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw. No such coercion, however, has been shown to exist as a necessary result [in this case].").
unwanted religious messages. Part IV examines Lee's extension of the principles of substantive neutrality to school events unrelated to the classroom. Part V discusses student-sponsored prayers in light of the Court's interpretation of the Establishment Clause. This Part analyzes Harris and Jones, and argues that schools must guarantee that students do not employ otherwise facially neutral procedures to impose religious messages at graduation. The Article concludes that because graduations are school-sponsored events, bearing "the imprimatur" of the state, the school must safeguard the rights of dissident students regarding graduation prayers.

II. THE FIRST AMENDMENT IN THE SCHOOLS

The Establishment Clause of the First Amendment states, "Congress shall make no law respecting an establishment of religion." The Establishment Clause has been described as a metaphorical "wall," a term borrowed from a letter of Thomas Jefferson, that segregates religious activities from governmental endorsement. Applied to the states via the Fourteenth Amendment, the Establishment Clause demands governmental neutrality in the area of religion.

Specifically, the government may prefer neither specific denomina-
tions nor beliefs, nor religion over non-religion.\textsuperscript{18}

However, the Establishment Clause's antithetical twin, the Free
Exercise Clause,\textsuperscript{19} erodes the foundation of Jefferson's constitutional
religious "wall." The Free Exercise Clause allows, and sometimes re-
quires, Congress to remove otherwise neutral laws that unduly bur-
den an individual's ability to freely practice her religion.\textsuperscript{20} Under the
auspices of the Free Exercise Clause, moreover, the government may
acknowledge and accommodate religion and pass laws that are secular
in nature but have the coincidental effect of benefitting religion or reli-
gious worship.\textsuperscript{21}

Thus, although the unified function of these two seemingly opposed
clauses is "to prevent, as far as possible, the intrusion of either [the
church or the state] into the precincts of the other,"\textsuperscript{22} the interming-
gling of government and religion is inevitable and the Court does not
call for "total separation" of church and state.\textsuperscript{23} As a result, "far from
being a 'wall,' [the Establishment Clause] is a blurred, indistinct, and
variable barrier depending on all the circumstances of a particular re-
lationship."\textsuperscript{24} Accordingly, the Supreme Court repeatedly has at-
ttempted\textsuperscript{25} to resolve the tension between the individuals' right to
worship and the strictures preventing government from endorsing
particular religious practices\textsuperscript{26} or entangling itself in matters of
religion.\textsuperscript{27}

\begin{footnotes}
\item[18.] See County of Allegheny v. ACLU, 492 U.S. 573, 589-90, 605 n.55 (1989); School
\item[20.] U.S. CONST. amend. I. See Corporation of the Presiding Bishop v. Amos, 483 U.S.
\item[21.] See Widmar v. Vincent, 454 U.S. 263, 273-75 (1981); McGowan v. Maryland, 366
Vitale, 370 U.S. 421, 430-31 (1962); Cantwell v. Connecticut, 310 U.S. 296, 303-
04 (1940); E. Gregory Wallace, When Government Speaks Religiously, 21 FLA. ST.
\item[24.] Id.
\item[25.] See, e.g., Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970)("The Court has strug-
gled to find a neutral course between the two Religion Clauses, both of which are
cast in absolute terms, and either of which, if expanded to a logical extreme,
would tend to clash with the other... The course of constitutional neutrality in
this area cannot be an absolutely straight line."); Daniel Parish, Comment, Pri-
\item[27.] Aguilar v. Felton, 472 U.S. 402, 413 (1985); Lemon v. Kurtzman, 403 U.S. 602,
614 (1971).
\end{footnotes}
That tension has been especially prominent—perhaps more so than in any other milieu—in public education.28 In general, the Court has subjected government actions in public schools to stricter Establishment Clause scrutiny than in other contexts involving the state and religion.29 The Supreme Court's rationale for that distinction is clear:

Students in [public] institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the students susceptibility to peer pressure. Furthermore, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools..."30

An additional psychological harm caused by school prayer is the state's implicit promotion of majoritarian beliefs and the discouragement of minority religions.31 The government, by sponsoring prayer in an educational setting, counsels children that by accepting the tenets of the dominant religion, or of religion over irreligion, one becomes an insider or a part of the "social mainstream."32 In contrast, nonadherents relegate themselves to a position of societal inferiority.33 Thus, the pressure inherent in school prayer both inflicts a state-created "status harm" by alienating nonadherents,34 and in-

---


duces religious conformity in children, who are particularly susceptible to such pressures.

Against this legal and moral background, the Court has, beginning with *Everson v. Board of Education*, settled numerous controversies pitting the conflicting rights of students to pray against the rights of nonbelievers and religious minorities seeking freedom from religious doctrinization, ostracization, and perceived persecution. The "Religion Clauses" have, therefore, been interpreted in myriad educational settings, including the use of public funds for religious study and prayer; the subjects within a curriculum; the provision of school supplies, teachers, and transportation; and prayer during and after school hours, on campus and off, and even pasted on school walls. In each of these cases, the Court mandated that the state remain "neutral" with regard to religious worship; in none of these cases, however, did it explicitly define "neutrality." Thus, how the Court has applied the Establish-

---

49. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 106-07 (1968) ("[T]he State may not adopt programs or practices in its public schools or colleges which aid or oppose any religion. The prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma.").[Internal quotations omitted]; George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 Case W. Res. L. Rev. 707, 719 & n.79 (1992).
ment Clause's demand of "neutrality" to public schools must be explored.\footnote{51}

III. INTERPRETING "NEUTRALITY"

A. Substantive and Formal Neutrality

The Court's application of the principle of "neutrality" in the school context renders the term, perhaps, a misnomer.\footnote{52} Neutrality implies that the government must not only refrain from promoting or discouraging religion, in the sense of impartiality,\footnote{53} but must also refrain from intervening to protect religious dissenters from unwanted religious messages articulated by a majority of private parties.\footnote{54} Neutrality, in that sense, is equated with a passive, or "formal" impartiality.\footnote{55}

While state passivity is perhaps permissible outside the school context,\footnote{56} the special nature of schools mandates a different approach.\footnote{57}


52. \textit{See} Wallace, supra note 22, at 1196 & n.64 (discussing the difficulty of reconciling neutrality with public education). \textit{See also} Ronald Y. Mykkeltvedt, \textit{Souring on Lemon: The Supreme Court's Establishment Clause Doctrine in Transition}, 44 \textit{Mercer L. Rev.} 861, 884 (1993)("the Court has been diligent in maintaining the wall of separation between church and state in public schools.").


54. \textit{See}, e.g., \textit{Merriam-Webster's Collegiate Dictionary} 781 (10th ed. 1993)(neutral is defined as "not engaged on either side").

55. I draw the term from Justice Souter's concurrence in \textit{Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah}, 113 S. Ct. 2217, 2241 (1993)(Souter, J., concurring). Justice Souter, in turn, borrowed the phrase from Laycock, \textit{Formal, Substantive, and Disaggregated}, supra note 51, at 1000. I do not restrict the use of that term in this Article, in its application to school prayer, to that of Souter or Laycock. \textit{See also} Wallace, supra note 22, at 1194 (discussing definition of neutrality).

As the Court noted in Edwards v. Aguillard, "[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." Commentators have used the term "substantive neutrality" to describe the Establishment Clause's mandate that government interfere with religion as little as possible. Therefore, I will borrow the term "substantive neutrality" to characterize the Court's consistent demand that the state guarantee that compulsory school events remain free of religiosity and intervene where speakers intend to subject students to religious messages at obligatory school events. Thus, in contrast to the passivity associated with "formal" neutrality, "substantive" neutrality in the public schools requires an active participation by the schools to guarantee that religion remain absent from school-sponsored events.

For instance, in School District v. Schempp, the Court addressed the constitutionality of a school's broadcasting student-led prayers at the outset of each school day over the school's intercommunications system. In striking down the practice, the Court specifically found that although a majority of the students might favor such prayers, the government's guarantee of neutrality means it cannot permit a major-


59. See Laycock, Formal, Substantive, and Disaggregated, supra note 51, at 1002-06. See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2241 (Souter, J., concurring)(using the term substantive neutrality); Douglas Laycock, The Remnants of Free Exercise, 1990 SUP. CT. REV. 1, 10-11.

60. See Dent, supra note 49, at 718; Stone, supra note 57, at 828.


62. See Goodwin v. Cross County Sch. Dist. No. 7, 394 F. Supp. 417, 424 (E.D. Ark. 1973)(finding that neutrality is not equated with passivity in public schools, but an active guarantee that mandatory school events are free from religious overtones).

GRADUATION PRAYERS

ity to "use the machinery of the State to practice its beliefs." The Court quoted West Virginia Board of Education v. Barnette, stating,

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . may not be submitted to vote.

The Court did not equate the concept of neutrality, therefore, with a passive indifference that would enable a majority of students to subject a nonadherent to religious messages; instead, it held that neutrality entails an active insulation of students from religious expression in the school.

B. Application of Substantive Neutrality

The Supreme Court has not limited its use of substantive neutrality in the classroom to practices that actually infuse religion. The Court has held that where a state enacts a facially neutral policy that creates a risk that the classroom will be used to "inculcate students . . . in religious precepts," the entire scheme is unconstitutional, regardless of whether such inculcation actually transpires. Thus, a classroom prayer is unconstitutional even if students are able to avoid the religious message or no school official ultimately decides the prayer will be offered. Where a risk of religiosity in school-sponsored events exists, "the State is constitutionally compelled to assure that . . . state-supported activity is not being used for religious indoctrination."

In Stone v. Graham, the Court applied that principle to a state law that required the posting of copies of the Ten Commandments, purchased with private contributions, on the walls of each public classroom. In enjoining enforcement of the law, the Court recog-

64. Id. at 225-26.
65. 319 U.S. 624, 628 (1943).
70. The posters contained a disclaimer stating that the Ten Commandments are the fundamental source of the "legal code of Western Civilization and the common law of the United States." Id. at 40. The Court nonetheless found the Commandments—as a sacred Judeo-Christian text forbidding such practices as the using of the Lord's name in vain and mandating observance of the Sabbath—religious in nature. Id. at 41-42.
nized that the Commandments would neither be read aloud nor be a part of the school's curriculum. In fact, the Court explicitly noted that students might be unmoved by the Commandments. However, the Court held that merely by posting the text, the state might "induce the school children to read, meditate upon, perhaps to venerate and obey, the commandments." The Court held that the Constitution forbids the state from risking the provision of such influence. In dissent, then-Justice Rehnquist argued that the Commandments were a "passive" symbol, and the case involved "no compulsion" for students to follow the teachings; the majority, however, found the risk of indoctrination, while speculative, sufficiently substantial to merit striking down the law.

Similarly, in School District v. Ball, the Court considered two laws, one subsidizing nonpublic school teachers for teaching secular subjects in nonpublic schools, the other permitting full-time public school teachers to teach secular subjects in nonpublic schools. The Court found both practices unconstitutional because of the state’s failure to monitor the content of the courses for religiosity. In other words, the state failed to guarantee that the courses would be free from religious messages. Although the Court recognized there existed "no evidence of specific incidents of religious indoctrination," it found this "lack of evidence of . . . little significance." Thus, these cases demonstrate that the Court has not confined its application of substantive neutrality to school actions actually causing the infusion of religion in schools, but has employed the principle to those practices creating the risk of infusion.

The ability of students to absent themselves from religious messages in public schools does not necessarily make the practice substantively neutral. In Engel v. Vitale, for instance, the Court

71. Id. at 40.
72. Id. at 42.
73. Id.
74. Id. at 45 (Rehnquist, J., dissenting).
76. Id. at 387.
77. Id. at 388-89.
79. See Jager v. Douglas County Sch. Dist., 862 F.2d 824, 832 (11th Cir. 1989)("The Establishment Clause focuses on the constitutionality of the state action, not on the choices made by the complaining individual.").
struck down as unconstitutional a nonsectarian prayer that students voluntarily recited in class at the beginning of each school day. The Court overruled the New York Court of Appeals, which found the prayer constitutional because the state did not compel participation in the religious exercise, as students were permitted to remain silent or leave the room.81 The Court held that although students could avoid the religious messages, "[w]hen the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."82 Accordingly, students' ability to avoid religious messages does not suffice to save a school's practice from unconstitutionality.83

The Court's analysis does not change when the state delegates a decision concerning religion to a private actor. In Larkin v. Grendel's Den, Inc.,84 a state statute vested power in the governing bodies of schools and churches to prevent issuance of liquor licenses within a 500 foot radius of the church or school. In striking down the statute, the Court found that the churches' power could be "employed for explicitly religious goals," and that the statute did not necessarily provide an "effective means of guaranteeing" that the delegated power 'will be used exclusively for secular, neutral, and nonideological purposes.'85 As a result, although the authority to make the final decision rested with a private body, the Court found the scheme unconstitutional because the state failed to guarantee that the result of the transfer of authority would be "neutral."86

Recently, in Board of Education of Kiryas Joel Village School District v. Grumet,87 the Court extended the logic of Larkin to public schools. In that case, a state statute created a school district with boundaries drawn to exclusively include property owned and inhabited by the Satmar Hasidim, practitioners of a strict form of Judaism. The Satmar Hasidim, therefore, had exclusive political control over the school district. The Court found that the state had delegated its authority to a group "chosen according to a religious criterion,"88
had thereby created a "fusion of governmental and religious functions." Because the state intended to create such a fusion "on the basis of religion," the statute was unconstitutional.

Furthermore, the Court found an unconstitutional risk inherent in the potential effects of the delegation. The Court noted that in *Larkin*, the constitutional concern centered on churches using "civic power to advance the interests of religion." In *Kiryas Joel*, however, the Court found the threat to neutrality occurred at a stage "antecedent" to any religiously based decisions made by the school district, because there was no guarantee that the Satmar would use the legislative power delegated to them in a religiously neutral manner. Therefore, state delegation of decisionmaking authority must be based on "principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority," and, moreover, the state must ensure that the delegation does not create an undue risk of religious favoritism. Substantive neutrality thus prohibits not only schemes that infuse or risk infusing religion into public schools (regardless of student ability to avoid the religious expression), but also the vesting of state powers in private groups who might make educational decisions on the basis of religion.

C. Religion in Schools Outside the Scope of Substantive Neutrality

Although substantive neutrality forbids practices creating a risk of infusing religion in public schools, the Court nonetheless has found it inevitable that school and religion will interact. The Court has limited those cases permitting the intermingling of religion and public education to instances where it found no risk that nonadherent students will be subjected to religious messages. The Court found such assurances because all potential religious messages at issue in those cases occurred at strictly voluntary events that the school neither sponsored nor pressured students to attend. These cases uniformly

89. *Id.* at 2490 (quoting *Larkin v. Grendel's Den*, Inc., 459 U.S. 116, 126 (1982)).
90. *Id.* at 2489.
91. *Id.* at 2491.
92. *Id.*
93. *Id.* at 2489.
94. *Id.* at 2491-92.
involved either the mandated equal treatment of religious groups in public or limited public fora,98 or general, neutral state services applicable to all school children that gave incidental aid to religious institutions.99 Because they included safeguards preventing the risk of religiosity in compelled school events, these practices were found to be substantively neutral.

For instance, in Zorach v. Clauson,100 the Court upheld the practice of allowing public school students to receive off campus religious education during normal periods of instruction. The Court specifically noted, however, that the case involved no "religious instruction in public school classrooms"101 and created no risk that nonadherents would be subjected to unwanted religious messages. It stated:

No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any.102

The Court concluded that "[g]overnment may not . . . blend secular and sectarian education nor use secular institutions to force one or some religion on any person . . . . The Government must be neutral . . . . It may not coerce anyone to attend a church, to observe a religious holiday, or to take religious instruction."103 Thus, religion and schools need not necessarily remain entirely disengaged, so long as the state adequately protects the nonadherent from religiosity arising out of otherwise neutral practices.

Similarly, in Board of Education v. Mergens,104 the Court forbade a school from discriminating against a religious club seeking to use school facilities in a manner equal to other noncurricular clubs. The Court found that by permitting student groups to use school facilities, the school created a "limited public forum," and therefore, the Free Speech Clause prevented the school from denying the use of that facility to certain groups because of their character. In so holding, the

---

100. 343 U.S. 306 (1952).
101. Id. at 308.
102. Id. at 311.
103. Id. at 314.
Court specifically noted that the case involved meetings during “non-instructional time” that were unrelated to formal school activities. Like Zorach, this case also involved no risk that nonadherents would be subjected to unwanted religious messages.

Finally, last term the Supreme Court, in Rosenberger v. Rector and Visitors of the University of Virginia, found unconstitutional a public university’s policy of distributing student funds to student groups for use in publishing magazines and newspapers, but refusing to fund groups seeking to circulate publications with a religious orientation. The Court ruled that the university’s funding program created a limited public forum, and, as in Mergens, the school could not discriminate against religious student groups solely because of their religious perspective. However, like Mergens, the Court also noted that the university made an effort to disassociate itself from the students’ religious speech, and that no risk existed that unwilling students would be compelled to read the religious literature.

Thus, from these cases it is evident that neutral policies accommodating prayer are acceptable, so long as sufficient precautions exist to protect the nonadherent from unwanted religious influence. However, substantive neutrality, as applied throughout the Court’s decisions in school cases, dictates that, without such protections, the prayers are unconstitutional.

105. Id. at 251.
106. See id. at 261-62 (Kennedy, J., concurring); Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981); Zorach v. Clauson, 343 U.S. 306, 311-12 (1952); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 631-32 (1943). Recently, in Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993), the Court found a school district violated the right of a church to show a religiously oriented film on family values in school facilities that other civic groups used for nonreligious purposes. In dismissing the school’s Establishment Clause claim, the Court stated, “The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public...” Id. at 2148. See generally Rosemary C. Salomone, Public Forum Doctrine and the Perils of Categorical Thinking: Lessons from Lamb’s Chapel, 24 N.M. L. Rev. 1, 17 (1994) (“Lamb’s Chapel is not typically a ‘schools’ case.”).
108. See id. at 2518-19.
109. See id. at 2523.
110. See id.
111. See Goodwin v. Cross County Sch. Dist. No. 7, 394 F. Supp. 417, 426-27 (E.D. Ala. 1973)(finding unconstitutional the reading of prayers by students each day in classrooms and over school intercommunications systems, but upholding voluntary, privately sponsored baccalaureate ceremonies held in the school auditorium during non-school hours).
The Court's recent opinion in *Lee* extends the principles of substantive neutrality in public schools to school-sponsored events outside the classroom. In *Lee*, pursuant to district practice, Robert E. Lee, principal of Nathan Bishop Middle School, invited a Rabbi to speak at graduation. Lee provided the Rabbi with a pamphlet that recommended that speakers compose public prayers for secular occasions with "inclusiveness and sensitivity" and advised the Rabbi that the invocation and benediction should be nonsectarian. Daniel Weisman, the father of a graduating senior, sought a permanent injunction to bar school officials in the district from inviting religious figures to deliver graduation prayers. The district court held that the practice of including invocations and benedictions in public school graduation ceremonies had the primary effect of advancing religion and, therefore, granted the injunction. The United States Court of Appeals for the First Circuit affirmed in a split decision and adopted the district court's opinion. The Supreme Court granted certiorari and affirmed.

Justice Kennedy's majority opinion recognized that religiosity in the school context implicated "heightened" Establishment Clause concerns and noted that graduations are necessarily school-sponsored events. The Court stated that "[a]t 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 move-

---

113. See Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 165 (5th Cir. 1993) ("Lee is merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a per se rule prohibiting public-school-related or initiated religious expression or indoctrination.").
115. Id.
116. Id. The pamphlet was prepared by the National Conference of Christians and Jews.
117. Id.
118. Id. at 2654.
119. Weisman v. Lee, 908 F.2d 1095 (1st Cir. 1990). Judge Bownes concurred, finding the school's practice violated all three prongs of Lemon. Id. at 1095 (Bownes, J., concurring). Judge Campbell dissented, reasoning that if the prayers are nonsectarian and if school officials ensure that persons representing diversity of beliefs and values delivered the prayers, the Establishment Clause would not be violated. Id. at 1099 (Campbell, J., dissenting).
122. See id. at 2658, 2660. See also Dent, supra note 49, at 716-18 (noting that Establishment Clause standard differs depending upon the context).
ments, the dress, and the decorum of the students." Furthermore, the Court found that student attendance at this school-sponsored event was de facto obligatory, regardless of whether students could receive their diplomas in absentia, because of the cultural significance of a high school graduation. The Court stated:

[T]o say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. . . . Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," . . .

Therefore, a high school graduation is a school-sponsored event at which "the State has in every practical sense compelled [student] attendance."

The Court found that the inclusion of prayer at such a compulsory ceremony created a risk that state and peer pressure would likely coerce dissident students to symbolically participate by standing or maintaining a "respectful silence" during the prayer. The Court stated,

in our culture standing or remaining silent can signify adherence to a view or simple respect for those who do. . . . It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining silent signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

The Court additionally held that the prayer would remain unconstitutional even if the student's choice to remain absent was meaningfully voluntary, because a high school graduation is one of "life's most significant occasions." Thus, abstention from the ceremony would entail forbearance of one of "those intangible benefits which have motivated the student [to labor through high school]."

The Court based its rationale on a long hallowed Establishment Clause principle that "the State cannot require one of its citizens to forfeit his or her

125. Id. at 2661.
126. Id. at 2658. See also School Dist. v. Schempp, 374 U.S. 203, 226 (1963); Everson v. Board of Educ., 330 U.S. 1, 15 (1947)("The 'establishment of religion means at least this: Neither a state nor the Federal Government . . . can force nor influence a person . . . to profess a belief or disbelief in any religion."); Dent, supra note 49, at 718.
128. Id. See also Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 762 (9th Cir. 1981)(holding that school functions are too important to be missed "voluntarily" in order to avoid a religious message).
rights and benefits as the price of resisting conformance to state-sponsored religious practice." The Court further stated that "it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, here by electing to miss the graduation exercise."

Thus, although the prayers were nonsectarian, nonproselytizing and brief, the Court found the prayers unconstitutional because they were religious messages that were delivered at a compulsory, school-sponsored event. That holding is fully consonant with the Court's prior interpretations that the Establishment Clause requires substantive neutrality in public schools.

V. STUDENT-SPONSORED GRADUATION PRAYERS

Because Lee extends the Court's heightened scrutiny of religiousity in the school context to events outside the classroom, student-sponsored graduation prayers must be analyzed according to the Court's substantive neutrality principles. Factually, however, cases involving student-sponsored prayers at graduation ceremonies are uniquely different from prior school Establishment Clause cases. The prayers, by definition, are selected by students, and thus are distinguishable from Engel, where the state made the ultimate decision to have voluntary, nondenominational prayer. Nonetheless, Lee indicates that graduation ceremonies are school-sponsored events that students are compelled to attend. Mergens, then, is inapposite, because it concerned a religious club that met after school hours, that the school did not sponsor, and that students attended on a strictly voluntary basis. The anomalous nature of student-sponsored prayer thus compels a close examination using the basic principles of substantive neutrality.

Student-sponsored graduation prayers can be divided into two categories. Jones and Harris consider the constitutionality of the first: where the state specifically delegates to students the decision to have

---

130. Lee v. Weisman, 112 S. Ct. 2649, 2660 (1992). Furthermore, the Court found the brevity of the prayers was immaterial, because "the embarrassment and the intrusion of the religious exercise" causes an actual injury which "cannot be refuted by arguing that these prayers . . . are of a de minimis character." Id. at 2659. While to a majority, therefore, the prayer might seem innocuous, the Court found that "in a school context [it] may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." Id. at 2658.
131. In Griffith v. Teran, 807 F. Supp. 107, 108 (D. Kan. 1992), the court rejected a motion for summary judgment, concluding a public school's inclusion of a prayer at graduation rendered the school potentially liable for damages caused to a dissident student.
132. See Dent, supra note 49, at 715.
a graduation prayer. The second concerns facially-neutral procedures for selecting graduation speakers whose topics are void of religiously dominated messages.

A. Harris and Jones

The facts in Harris and Jones are substantially similar. In both cases, the school district submitted the question of whether the graduation ceremony would contain prayer to a student vote. In Harris the students also could choose whether a student or "minister" would deliver the prayer, while in Jones, a student volunteer would recite all blessings.

Despite the cases' factual similarities, the courts reached opposite conclusions. In Jones the court found that secular solemnization of the ceremony was the school district's intent and the prayers' primary effect, that the prayers did not advance religion, and that the student selection and delivery of them abated school entanglement in religion.

The court also found that by relinquishing control of the prayers to the students, the government minimized school sponsorship. The Court stated that the case was ultimately distinguishable from Lee where the government selected the prayer because in Jones the government allowed, but did not command, prayer. Additionally, the court found the nonadherents' presence at the ceremony did not subject them to compelling pressure to participate in a religious exercise.


134. Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 452-53 (9th Cir. 1994). The school also included a disclaimer in the graduation program stating that the Board of the Joint School District neither promoted nor endorsed any statements made in the graduation ceremony. Id.


136. In applying the Lemon test, the coercion test, and the endorsement test, the Jones opinion reflects the current confusion over the correct legal doctrine applicable in Establishment Clause cases. For discussions of that confusion, see Michael W. McConnell, Religious Freedom at a Crossroads, 69 U. Chi. L. Rev. 115, 115 (1992)("a more confused and often counterproductive mode of interpreting the First Amendment would have been difficult to devise."); Gene R. Nichol, Religion and the State: Introduction, 27 WM. & MARY L. Rev. 833, 833 (1986)("the American law of church and state is far from settled. It even may be the case that it . . . is less certain, more torn, and more confused . . . than at any time in the past.").


138. Id. at 968. Thus, the court upheld the school district resolution under the Lemon formulation.

139. Id. at 970.
because the student decision on prayers creates "less psychological pressure on students than the prayer at issue in *Lee*, because all students, after having participated in the decision of whether prayers will be given, are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy." The court concluded that "[t]he practical result of our decision, viewed in light of *Lee*, is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies." The court thus upheld the district practice.

140. Id. at 971.
141. Id. at 972. The court continued,

In *Lee*, the Court forbade schools from exacting participation in a religious exercise as the price for attending what many consider to be one of life's most important events. This case requires us to consider why so many people attach importance to graduation ceremonies. If they only seek government's recognition of student achievement, diplomas suffice. If they only seek God's recognition, a privately-sponsored baccalaureate will do. But to experience the community's recognition of student achievement, they must attend the public ceremony that other interested community members also hold so dear. By attending graduation to experience and participate in the community's display of support for the graduates, people should not be surprised to find the event affected by community standards.


In contrast, the court in *Harris* found that the ultimate school control over a graduation ceremony, including its financial backing and presentation of diplomas to students who fulfilled all school requirements, made the event school-sponsored.\(^{143}\) The court rejected the reasoning of *Jones* that the state's delegation of responsibility to the students insulated the practice from constitutional scrutiny.\(^{144}\) The court determined that students equally are obligated to attend and participate in graduation prayers as in *Lee,* "either by bowing their heads or 'maintain[ing] respectful silence.'"\(^{145}\) The court found that *Lee* was controlling, and, accordingly, rejected the practice.\(^{146}\)

When viewed in light of the Court's requirements of substantive neutrality, the opinion in *Harris* is clearly consistent with the Court's...
Establishment Clause holdings. The schools fund and ultimately control graduations, and their primary function is to publicly disburse diplomas—school certificates paid for by the state and earned on the basis of school performance. School sponsorship, as found by the Court in Lee, is thus inherent in the nature of the ceremony. Furthermore, as Lee indicated, it is coercive to place an individual in a situation where she must either participate in the prayer or publicly identify herself as a dissenter. As in Engel, the student's formal ability to abstain from the religious ritual does not mitigate the coercive nature of the practice.

Because a graduation ceremony is a school-sponsored event, the fundamental principles of school-oriented substantive neutrality apply. Recognizing that Lee precluded their selecting a graduation prayer, the school districts in Jones and Harris delegated the state's authority to students. The districts thus attempted to circumvent the Constitution by transferring the decision-making authority to a private body. Because the specific purpose of the schools' delegation was, however, to allow for the students to make a religious decision, Kiryas Joel indicates that this type of delegation is unconstitutional. As the Court in Kiryas Joel stated, "[T]he difference lies in the distinction between a government's purposeful delegation on the basis of reli-

147. See Stone, supra note 56, at 845 (stating most student-sponsored prayers will be unconstitutional). See also Paulsen, supra note 97, at 838 n.155; Millard, supra note 15, at 774-775 (criticizing Jones).
149. See Lee v. Weisman, 112 S. Ct. 2649, 2660 (1992)("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 the students."). See also Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 762 (9th Cir. 1981)(stating that the school maintains the control over school ceremonies); Grossberg v. Deusebio, 380 F. Supp. 285, 288 (E.D. Va. 1974)("A graduation ceremony for a public school class, held on public school grounds, and administered by public school personnel, at which diplomas are officially awarded by the administration, is a public school event.") Cf. Rosenberger v. Rector and Visitors of the University of Virginia, 115 S. Ct. 2510, 2523 (1995)(student publication is not state sponsored).
150. See Lee v. Weisman, 112 S. Ct. 2649, 2658 (1992); Paulsen, supra note 97, at 847-48. See also Jesse H. Choper, Religion in Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 3443 (1963); Dent, supra note 49, at 715; Stone, supra note 57, at 836; Wallace, supra note 22, at 1261 ("Rather than reducing the effects of peer pressure, the school's policy actually sanctions it by allowing a majority of students to use the machinery of the state to impose their approved religious exercise on nonadherents.").
151. See Dent, supra note 49, at 715.
gion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." Based on this analysis, the statement in Jones that "a majority of students can do what the State acting on its own cannot do" flatly contradicts the holdings in Larkin and Kiryas Joel.

Furthermore, under the rationales of Stone and Ball, the risk of religiosity resulting from a delegation of the decision on graduation prayer is unreasonably high. A specific student vote on prayer, held at the behest of the school, constitutes an implicit school suggestion that a graduation prayer would be appropriate (or at least would not be inappropriate). Although it is possible that the students would vote against the prayer, Ball indicates that the mere risk of subtle religious influence, even in a predominately secular setting, is unconstitutional. Stone similarly indicates that while it is possible the suggestion for prayer will be inconsequential, if it "ha[s] any effect at all," it will be to compel participation in prayer.

Finally, that the prayer was the result of a vote is constitutionally insignificant. As the Court stated in Schempp, a majority cannot "use the machinery of the State to practice its beliefs." By mandating that students hold an express vote on the inclusion of a graduation prayer, and by then including the prayer in the subsequent school-sponsored graduation, the state effectively allows a majority of students to use its "machinery" to impose their beliefs.

As a result, where the state purposely delegates its authority to students to vote on graduation prayer, the entire scheme should be found unconstitutional. By focusing on the technicalities of the school district's practice, the court in Jones overlooked the fundamental guidelines of substantive neutrality. By contrast, in Harris, the court

---

155. For instance, the students may elect not to have prayer or other religious worship.
accurately analyzed the plan as delegating to a majority of students the decision to inject their religious beliefs into a school-sponsored, mandatory event.

B. Facially Neutral Practices

Facially neutral practices that result in a student-sponsored graduation prayer entail the second, more difficult analysis. Such situations can arise where the students administer the entire graduation ceremony, select the speakers, or simply request a prayer without state prompting. Because the state is not involved with the selection of the religious message, the inclusion of the prayer is less attributable to a state choice than in Harris and Jones, where the state specifically asked students to vote on prayer. Additionally, the procedures themselves, neutral in appearance, do not suggest religion will be infused in a manner necessarily warranting constitutional review. Unlike Ball, which evidenced at least minimal intermingling of public schools and religion, these facially neutral procedures imply no inherent entanglement with religion.

Before analyzing the constitutionality of these content-neutral procedures for selecting speakers, it must be noted that schools constitutionally are permitted to require that graduation speeches be free from religiosity or any other contentious subject matter. In Hazelwood School District v. Kuhlmeier, a school deleted stories on divorce and pregnancy from the school paper. The Court noted that a school can prohibit students from expressing personal views on school premises where it believes that such expression will "impinge upon the rights of other students." In addition, the Court stated that the First Amendment rights of students in school are not as broad as those of adults in other settings, and "[t]he determination of what manner of speech in the classroom or in school assembly is inappropri-
ate properly rests with the school board.” In upholding the school's censorship of the stories, the Court determined that a school's right to suppress student expression at school-sponsored events was broader than its right to restrict the content of non-intrusive expression that generally occurs on school premises, because in the former situation, the school effectively supplies a forum that would otherwise not exist and is, therefore, constructively promoting the speech. The Court continued, stating,

In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Clause in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to . . . associate the school with any position other than neutrality on matters of political controversy.

Therefore, where the school wishes to avoid controversial or divisive topics, it can limit speech at school-sponsored events.

Similarly, in Bethel School District No. 403 v. Fraser, a school disciplined a student for using indecent, but not obscene, language at a school assembly. In upholding the punishment, the Court distinguished the case from the “passive expression of a political viewpoint,” because the speech in Fraser “intrude[d] . . . on the rights of other students.” The Court specifically noted that while students may express religious views, and views on other divisive subjects, outside of schools, the sensibilities of students must be taken into account at school events. The Court quoted Justice Black’s dissent in Tinker, stating that the Constitution does not compel schools to “‘surrender control of the American public school system to public school students.’”

Thus, the school can control the “style and content of student speech in school-sponsored events so long as their actions are reasonably related to legitimate pedagogical concerns.” The Court continually has recognized the “divisive” potential of religious worship

165. Id. at 267 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).
166. Id. at 270-72.
167. Id. at 272.
168. See id. at 272-73 (“a school may refuse to lend its name and resources to the dissemination of student expression”).
170. Id. at 680.
171. Id. (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508 (1969)).
172. Id. at 681.
in schools, where sects compete for representation. Schools can, therefore, surely suppress such a controversial topic at graduations.

That schools have the right to censor student speech at graduations fails to resolve whether schools are obliged constitutionally to impose restraints that prohibit religiously oriented messages obtained through procedures that are facially neutral. In contrast to the court's analysis in Jones, the proper focus in such religion-neutral procedures is not on the practices by which prayers arise, but on the fact that they have arisen. The Court in Lee, by extending substantive neutrality to graduation settings, recognized that a constitutional harm occurs when a prayer is offered at a public school graduation. The Court stated that "[t]he injury caused by the government's action... is that the State, in a school setting, in effect required participation in a religious exercise." As a result, the analysis should focus not on the "means" for selecting prayer, but on the "ends"—the fact that a prayer


176. See Guidry v. Calcasieu Parish Sch. Bd., Civ. Action No. 87-2122-LC (E.D. La. Feb. 22, 1989), aff'd sub. nom. Guidry v. Broussard, 897 F.2d 181 (5th Cir. 1989)(upholding school's right to forbid valedictorian, chosen on behalf of her grade point average, from delivering religiously oriented graduation speech); Lundberg v. West Monona Community Sch. Dist., 731 F. Supp. 331, 338 (N.D. Iowa 1989)(a school's banning of prayer is not based on content, but subject matter); Ingber, supra note 112, at 779 n.37. See also DeNooyer v. Livonia Pub. Sch., 799 F. Supp. 744, 754 (E.D. Mich. 1992)(forbidding student from showing videotape of her singing proselytizing song during show and tell). But see Memorandum Opinion and Standing Rule for Courtroom of William M. Acker, Jr., 1990 WL 126265 (N.D. Ala. Aug. 22, 1990)(forbidding use of the word "God" when court session is opened but also criticizing Lee); Laycock, Equal Access, supra note 28, at 13 (subject-matter ban is still a content-based restriction); Wallace, supra note 22, at 1199-1200 (secular discussions unintentionally disparaging religion are antireligious). Whether the school can exclude religious messages from school-sponsored events, while allowing all other forms of politically divisive speech, is a question the Court resolved this term in Rosenberger v. Rector and Visitors of the University of Virginia, 115 S. Ct. 2510 (1995). The Court held that by allowing certain types of expression, public schools are forbidden from individuating religion as a proscribed topic. However, Rosenberger concerns the use of student funds for a religiously oriented college newspaper, and thus is similar to Mergens because it involves no mandatory school events and there is no institutional school pressure on students to engage in religious worship. Additionally, the Court directed its opinion only with regard to "the University setting, where the state acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosphic tradition," a tradition not associated with high schools, where the students are less mature and less able to distinguish between school sponsorship and free speech. Id. at 2520. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986); Tanford v. Brand, 883 F. Supp. 1234, 1240-41 (S.D. Ind. 1995).

occurs at graduation. As one court has noted, "[a] constitutional violation inherently occurs when, in a secondary school graduation setting, a prayer is offered, regardless of who makes the decision that the prayer will be given." A state is normally not responsible for the action of private parties, and before requiring the state to protect individuals from harms inflicted by third-parties, the injury must be fairly attributable to the state. Although a graduation prayer causes a constitutional harm, private actors may inflict that injury.

There are several exceptions to the rule that the state is exempt from liability for failing to prevent privately inflicted harms, and these exceptions necessitate state action to prevent graduation prayer. Where the state delegates a function traditionally within the exclusive prerogative of a state to a private citizen, the individual acts with the authority of the state and is subject to the same constitutional limitations as the state acting on its own. Even if the speakers are not considered state actors, where the state restrains an individual's freedom so that the individual cannot protect herself, or otherwise makes a person more vulnerable to danger, it incurs a duty to protect that individual.

A student-sponsored graduation prayer implicates both of these exceptions, and thus must be considered state action. As noted earlier, when the state confers its authority to perform an otherwise exclusive state function to a private actor, it also must subject the actor to the same constitutional limitations that bind the state itself. For in-


180. See DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989).

181. See Rendell-Baker v. Kohn, 457 U.S. 830, 839 (1982); Paulsen, supra note 97, at 847. This inquiry is necessary regardless of whether the analysis is conducted under the Lemon test, which asks whether a government action has a primary effect of advancing religion, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1972), the endorsement test, County of Allegheny v. ACLU, 492 U.S. 573, 592-95 (1989), or the coercion analysis used by Justice Kennedy in Lee.

182. See Paulsen, supra note 97, at 798.


185. Additionally, where the state itself creates the danger of a harm by a private actor, the state is under a duty to protect. See DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 201 (1989).
stance, in *Griffin v. Maryland*, the petitioners, who were African-Americans, entered a racially exclusive amusement park. The privately owned and operated park employed a private security officer whom the sheriff had deputized. When the security guard arrested the petitioners for trespass, the Court found that the officer, vested with state power, was a state actor. The Court stated, "If an individual is possessed of state authority and purports to act under that authority, his action is state action." Because the state itself could not bar African-Americans from the amusement park, the Court found the security guard's actions violated the Constitution.

Similarly, schools traditionally have maintained the exclusive right to select speakers and control the content of graduation ceremonies and other school-sponsored events. Hence, by granting students the authority to select graduation speakers, the state bestows its official authority upon them. The students thus undertake a traditionally exclusive public function in selecting graduation speakers. Because they select the graduation speakers, their "action is
state action," and they are bound by those constitutional boundaries that confine the state. Following Lee, the precepts of substantive neutrality clearly indicate that a school's selection of a speaker to deliver a graduation prayer contravenes the Establishment Clause. Students vested with that state authority face the same restriction.

Griffin and Lee, therefore, combine to prohibit students from using delegated state authority to include religious-based messages at graduation ceremonies. Although generally a public entity is not subject to vicarious liability for the constitutional violations of individuals acting pursuant to state authority, where the school delegates to students unfettered decisionmaking authority regarding the speakers and ideas to be included in a graduation ceremony, the school is itself liable for any resulting constitutional violations.

192. Griffin v. Maryland, 378 U.S. 130, 135 (1964) ("If an individual is possessed of state authority and purports to act under that authority, his action is state action."). See also West v. Atkins, 487 U.S. 42 (1988) (delegation of state authority); United States v. Classic, 313 U.S. 299, 326 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken 'under color of' state law.").


194. See Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990).


196. See also Steven S. Cushman, Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker, 34 B.C. L. Rev. 693, 713-18 (1993) (discussing municipal liability as a result of delegations of authority). Where the school itself retains the ultimate authority to control the messages included in the graduation ceremony, the failure to review the speakers chosen by the students also renders the school liable. See Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316, 1325 (7th Cir. 1993); Mandel v. Doe, 885 F.2d 783, 794 (11th Cir. 1989); Crowder v. Sinyard, 884 F.2d 804, 829 (5th Cir. 1989), cert. denied, 496 U.S. 924 (1990); Williams v. Butler, 883 F.2d 1398, 1403 (8th Cir. 1989), cert. denied, 492 U.S. 106 (1989); Spell v. McDaniel, 824 F.2d 1380, 1386 (4th Cir. 1987); Parker v. Williams, 862 F.2d 1471, 1478 (11th Cir. 1989); Cushman, supra, at 713-18. See also Hammond v. Madera, 859 F.2d 797, 802 (9th Cir. 1988) (concerning municipal liability based on a policy-maker's ratification). Similarly, if the school exercises some discretion over the speakers, the failure to impose restrictions and guidelines on the students in selecting graduation messages can render the school liable. See Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316, 1326 (7th Cir. 1993); Jones v. Chicago, 787 F.2d 200, 204 (7th Cir. 1986) "(in situations that call for procedures, rules or regulations, the failure to make policy itself may be actionable"); Fiacco v. Rensselaer, 783 F.2d 319, 329 (2d Cir. 1986); Avery v. Burke, 660 F.2d 111, 114 (4th Cir. 1981). See also Guidry v. Coleasie Parish Sch. Bd., Civ. No. 87-2122-LC (E.D. La. Feb. 22, 1989), aff'd sub nom. Guidry v. Broussard, 897 F.2d 181 (5th Cir. 1990) (upholding school's right of forbidding valedictorian from delivering religious graduation speech); Lundberg v. West Momona Community Sch. Dist., 731 F. Supp. 331, 338 (1989) (restricting student presentation of religious messages in class).
Alternatively, in *DeShaney v. Winnebago County Department of Social Services*, the Court noted that a state's duty to protect an individual from private injuries can arise where the state has exercised physical control over the individual. Although previously the Court has only recognized this duty in circumstances involving involuntary physical confinement, mandatory school events are constructively similar restraints of freedom. The Court in *Lee* found attendance at a graduation was *de facto* mandatory because a student "is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary,'" and thus "the State has in every practical sense compelled attendance." Because students at graduation ceremonies are "captives" during a state-sponsored event, their freedom is temporarily restrained in a manner equivalent to state confinement. A student who is not "free" to skip the ceremony is, therefore, under state control.

For this reason, the "captive audience" analysis regarding state restrictions on free speech is particularly apt. An individual who "can-
not avoid the objectionable speech" is a captive, "figuratively . . . trapped [and] . . . left with no ready means of avoiding the unwanted speech." At a graduation ceremony, "children have no choice but to sit through [any prayers]. . . . If they don't like what they see or hear, they are most assuredly not free to get up and leave." Additionally, at this obligatory public event, students not only are unable to avoid harmful messages promulgated by speakers, but, according to Lee, are coerced into participating in any religious worship. Students at graduation ceremonies therefore are "captives" unable to protect themselves from potential harms.

Thus, "[a] symbolic washing of hands . . . by state officials cannot purge them of their responsibility." Merely enacting facially neutral procedures does not relieve the state of its responsibility. The danger inheres in the situation where the state itself creates the risk of harm to the dissenters. Furthermore, the state itself creates the danger of constitutional injury. Graduation ceremonies are compulsory, school-sponsored events at which students are unable to avoid religious messages. By lending the machinery of the state to a majority of students to broadcast any message suiting their whim, without restriction, the state effectively allows a majority of students to inflict constitutional harms on unwilling listeners. See Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992). If the sole source of pressure were private, the case would be difficult to distinguish from Board of Educ. v. Mergens, 496 U.S. 226 (1990).

204. See Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1167 (7th Cir. 1993); Paulsen, supra note 97, at 828. But see Cohen v. California, 403 U.S. 15, 21 (1971)(unwilling viewers can avert their eyes).
205. See Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1167 (7th Cir. 1993)("We do not expect young children to put cotton in their ears and scrunch up their eyes to avoid overtly religious messages."). See also Paulsen, supra note 97, at 842 (indicating the difficulty in avoiding the messages). But see John H. Garvey, Cover Your Ears, 43 CASE W. RES. L. Rev. 761, 768 (1993)(hearing a prayer is not coercive or a demand to participate).
206. Lee v. Weisman, 112 S. Ct. 2649, 2658 (1992). Paulsen points out that the coercion identified in Lee is not "private," as the government places individuals in a situation wherein they must either participate in the prayer or publicly identify as dissenters. Paulsen, supra note 97, at 847-48. See also Engel v. Vitale, 370 U.S. 421, 430-31 (1962). If the sole source of pressure were private, the case would be difficult to distinguish from Board of Educ. v. Mergens, 496 U.S. 226 (1990).
207. Furthermore, the state itself creates the danger of constitutional injury. Graduation ceremonies are compulsory, school-sponsored events at which students are unable to avoid religious messages. By lending the machinery of the state to a majority of students to broadcast any message suiting their whim, without restriction, the state effectively allows a majority of students to inflict constitutional harms on unwilling listeners. See Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992)(a constitutional injury occurs where the state required participation in a religious exercise); Wallace, supra note 22, at 1261. As noted by the Court in Lemon, "The [risk] inheres in the situation." Lemon v. Kurtzman, 403 U.S. 602, 617 (1971). See also School Dist. v. Ball, 473 U.S. 373, 387 (1985)(discussing the risk of indoctrination); Henderson, supra note 199, at 446 ("school personnel are expected to be able to recognize that the danger inherent in some activities or events is too risky for pupils to assume"). By holding a school-sponsored event at which attendance is compulsory, and giving students free reign to broadcast their messages of religiosity, the state constructively creates the risk of harm to the disseminators. Additionally, where facially neutral procedures exist, and the school fails to warn students of religiosity, a dissident student's lack of awareness of a forthcoming prayer enhances her vulnerability; whereas a student with foreknowledge that a graduation ceremony will contain religiosity can, at least, skip the ceremony (an option the Court in Lee deemed a Hobson's choice). See Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1170 (7th Cir. 1993)(a student without foreknowledge can take no preparatory actions).
tral procedures to choose graduation speakers cannot satisfy the state’s duty to guarantee substantive neutrality, as the constitutional harm that occurs with a graduation prayer is attributable to the state. That conclusion finds support in the Court’s sentiment in Schempp that the guarantee of substantive neutrality means the State cannot permit a majority to “use the machinery of the state to practice its beliefs” and is consonant with the principle that the religious dissenter should not be forced to endure the “embarrassment ... isolation and affront” that religiosity in the public schools produces.

VI. CONCLUSION

The Court in Lee found graduation to be one of life’s most meaningful events. To maintain the strict neutrality demanded by the Establishment Clause, school districts must not only uphold Jefferson’s “wall” but respect Daniel Weisman’s dissidence. To include prayer in such a meaningful ceremony risks alienating a religious dissenter for the sake of redundancy—to “solemnize” an already profound occasion. As noted by Kenneth Karst,

When government displays the symbols of the dominant religion—as when government displays the symbols of white supremacy—the pain is not distributed evenly. In the zero-sum game of status dominance, it is only the losers in the politics of religious division who suffer the pain of status subordination.

Student-proposed prayer resulting from a majoritarian scheme enhances this subordination by apprising the non-adherent that her religious views are insignificant. She must accept not only her minority status, but that her peers ignore her objection. If a purpose of education is to “inculcate fundamental values,” and “tolerance of divergent ... religious views” is such a value, then the school should follow its own lesson and, as the court in Harris declares, “respect the constitutional rights of others.”

212. Id. at 2659.
213. See Karst, Politics of Religion, supra note 31, at 508.
214. Karst, Politics of Religion, supra note 31, at 511. See also Wallace, supra note 22, at 1202 (“It is indeed ironic that some who protest the loudest the removal of a nativity scene from city hall never display such scenes on their own front lawns.”).