

# Invocations at Graduation

Gregory M. McAndrew

The issue of invocations<sup>1</sup> at public school graduations involves the intersection of two competing strands of Establishment Clause jurisprudence. Graduation prayer is a traditional, ceremonial practice that takes place in the special context of the public schools. While the Supreme Court has tended to treat traditional practices with great deference, it has applied the Establishment Clause with an almost reciprocal rigor in public school cases.

The Court has frequently indicated that official references to God and other governmental acknowledgments of the nation's "religious heritage" are permissible.<sup>2</sup> The validity of these practices, which blend religion and patriotism, the theological with the political, rests on their historical, ubiquitous nature.<sup>3</sup> In particular, the Court has sanctioned the use of invocations at government-sponsored events, including legislative invocations in *Marsh v. Chambers*.<sup>4</sup> Graduation prayer differs from these valid invocations only in setting.

The public school, however, is a unique setting:

[It] 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, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.<sup>5</sup>

---

1. Phrases such as "invocations" and "graduation prayer" will be used throughout this Note to refer to invocations and benedictions collectively.

2. See *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984); *id.* at 714 (Brennan, J., dissenting) (public "acknowledgment" of religion "inevitable"). For examples of valid practices, see *id.* at 676 (designation of Thanksgiving and Christmas as national holidays); *id.* at 677 (statute authorizing proclamation of National Day of Prayer); *id.* at 716 (national motto "In God We Trust" and pledge of allegiance); *School Dist. v. Schempp*, 374 U.S. 203, 213 (1963) (oaths); *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962) (national anthem); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday-closing laws).

3. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 630-31 (1989) (O'Connor, J., concurring in part and concurring in judgment); *Lynch*, 465 U.S. at 716-17 (Brennan, J., dissenting).

4. 463 U.S. 783 (1983). The invocation proclaimed at the opening of each court session ("God save the United States and this honorable Court") is clearly valid. See, e.g., *Schempp*, 374 U.S. at 213; *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Members of the Court have also sanctioned the practice of including an invocation in presidential inauguration ceremonies. *County of Allegheny*, 492 U.S. at 671 n.9 (Kennedy, J., concurring in judgment in part and dissenting in part).

5. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J.).

The Court has therefore reviewed religious practices in the public schools with greater scrutiny.<sup>6</sup> The application of apparently different standards of review has led to the seemingly anomalous result that a practice may be invalid in the public schools yet permissible in other spheres of public life.<sup>7</sup>

The Supreme Court will address graduation invocations for the first time this Term.<sup>8</sup> Three circuit courts have recently considered this issue.<sup>9</sup> These courts have adopted differing categorical approaches, viewing graduation prayer in terms of either traditional practices or the public school cases. Part I of this Note maintains that despite their split over the relevant line of precedents, all three courts join in impermissibly focusing on the content of the invocations. Part II argues that the Court's most recent school prayer decision, *Board of Education v. Mergens*,<sup>10</sup> suggests a different approach to graduation invocations. Part III argues that graduation prayer should be evaluated in terms of *Mergens*. Under this analysis, invocations, if given on an equal access basis, should be permissible.

## I. THE SPLIT AMONG THE CIRCUITS

The courts of appeals disagree on whether traditional practices or the public school cases should control the issue of graduation prayer. This split mirrors a more fundamental division on the Supreme Court regarding the Establishment Clause itself. The "*Lemon* test"<sup>11</sup> continues to command a majority of the

---

6. "The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). With two exceptions, the Court has struck down every public school practice challenged on Establishment Clause grounds. *See id.* (statute requiring teaching of "creation science" if evolution taught); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (statute providing moment of silence for "meditation or voluntary prayer"); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (statute requiring posting of Ten Commandments in classroom); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (statutory ban on teaching of evolution); *Schempp*, 374 U.S. 203 (teacher-led student recitation of prayers and reading of Bible verses selected by state); *Engel*, 370 U.S. 421 (teacher-led student recitation of state-composed prayer); *McCollum*, 333 U.S. 203 (release-time program involving religious instruction on school grounds). The two exceptions are separated by nearly 40 years. *See Board of Educ. v. Mergens*, 110 S. Ct. 2356 (1990) (extracurricular student religious clubs permitted same privileges as nonreligious clubs); *Zorach*, 343 U.S. 306 (upholding release-time program for religious instruction off school grounds).

7. *Compare Lynch*, 465 U.S. at 677 (government proclamation of National Day of Prayer permissible) with *Jaffree*, 472 U.S. at 40 (statute authorizing moment of silence for "meditation or voluntary prayer" in classroom impermissibly endorses prayer).

8. *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991).

9. *Weisman*, 908 F.2d 1090; *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989); *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987).

10. 110 S. Ct. 2356 (1990).

11. Under *Lemon*, a practice must satisfy each of the test's three prongs: "First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)) (citations omitted).

Court in the form of the "endorsement test."<sup>12</sup> The endorsement test clarifies *Lemon* by asking not whether state action "advances" religion, but whether the practice "conveys a message" that the state "endorses" religion through the practice.<sup>13</sup> Like *Lemon*, the endorsement test draws its most important elements directly from one of the Court's first public school cases.<sup>14</sup>

Justice Kennedy argues that traditional practices such as the legislative invocations approved in *Marsh v. Chambers*,<sup>15</sup> not the public school cases, should provide the foundation for Establishment Clause analysis: "Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion."<sup>16</sup> A consistent application of the endorsement test, he asserts, would invalidate many of these practices,<sup>17</sup> since "government speech about religion is *per se* suspect" under this standard.<sup>18</sup> Justice Kennedy has therefore proposed a new test based on "coercion." This test would permit the state to "endorse" religion, but would prohibit "actions that further the interests of religion through the coercive power of government."<sup>19</sup>

Graduation invocations have been reviewed by the First Circuit in *Weisman v. Lee*<sup>20</sup> and by the Sixth Circuit in *Stein v. Plainwell Community Schools*.<sup>21</sup>

12. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 592-93 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *School Dist. v. Ball*, 473 U.S. 373, 389-90 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

13. Justice O'Connor proposed the endorsement test as a "clarification" of *Lemon*. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). Under this approach, the purpose prong "asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Id.* at 690.

14. See *School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) ("The test may be stated as follows: what are the purpose and primary effect of the enactment?").

15. 463 U.S. 783 (1983). In *Marsh*, the Court upheld the widespread practice of beginning legislative sessions with an invocation delivered by a legislative chaplain. The Court did not apply the *Lemon* test in the case. Instead, the Court emphasized the practice's "unambiguous and unbroken history of more than 200 years." *Id.* at 792. The Court indicated that the first Congress passed a law providing for the payment of legislative chaplains just three days before it approved the final language of the Bill of Rights. *Id.* at 788. The Court took this as compelling evidence that the drafters of the Establishment Clause did not intend to bar legislative invocations. *Id.* at 790.

16. *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part).

17. *Id.*; see also *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) ("[I]f the Court were to judge legislative prayer through the unsentimental eye of our settled [*Lemon*] doctrine, it would have to strike it down as a clear violation of the Establishment Clause.").

18. *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part).

19. *Id.* at 660.

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith or tends to do so." *Id.* at 659 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)); see also *Board of Educ. v. Mergens*, 110 S. Ct. 2356, 2377 (1990) (Kennedy, J., concurring).

20. 908 F.2d 1090 (1st Cir.), *aff'g* 728 F. Supp. 68 (D.R.I. 1990), *cert. granted*, 111 S. Ct. 1305 (1991). The majority opinion of the appellate court simply affirmed the lower court's decision, stating: "We are in agreement with the sound and pellucid opinion of the district court and see no reason to elaborate

The Eleventh Circuit considered the analogous practice of invocations before high school football games in *Jager v. Douglas County School District*.<sup>22</sup> The *Stein* court analyzed the case in terms of *Marsh v. Chambers*,<sup>23</sup> arguing that graduation invocations, despite their public school setting, should be considered under the same standards as legislative invocations. The *Stein* court held that *Marsh* permits "nonsectarian" graduation prayers.<sup>24</sup> For the *Jager* and *Weisman* courts, however, the public school setting was decisive. Asserting that *Marsh's* approval of the same practice in a different context was irrelevant, these courts treated graduation like "every other school day"<sup>25</sup> and reviewed the invocations under the *Lemon* test.<sup>26</sup> They held that *all* prayers at public school events violate the Establishment Clause.

In *Engel v. Vitale*<sup>27</sup> and *School District v. Schempp*,<sup>28</sup> the Court held that schools may not authorize student recitation of prayers either composed or selected by the state. The *Engel* Court declared that "each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."<sup>29</sup> In *Marsh*, Justice Brennan in dissent argued that *Engel* and *Schempp* "hang over this [case] like a reproachful set of parents."<sup>30</sup> Given *Stein's* reliance on *Marsh*, it is not surprising that the court's sanction of nonsectarian graduation prayer appears plainly inconsistent with *Engel*. What is perhaps surprising is that the holdings in *Jager* and *Weisman*, cases decisively rejecting *Marsh* in favor of the Court's public school cases, are equally contrary to *Engel's* dictates.

---

further." *Id.* For this reason, this Note will focus on the district court's opinion. References to the "*Weisman* court" will be to this opinion.

21. 822 F.2d 1406 (6th Cir. 1987). Two additional cases have been decided more recently. *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991) (invocations valid), *petition for cert. filed*, 60 U.S.L.W. 3215 (U.S. Aug. 20, 1991) (No. 91-310); *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809 (Cal. 1991) (invocations invalid), *petition for cert. filed*, 60 U.S.L.W. 3316 (U.S. Sept. 20, 1991) (No. 91-477). In addition, the Second Circuit has upheld graduation invocations in dictum. *Brandon v. Board of Educ.*, 635 F.2d 971, 979 (2d Cir. 1980) ("[W]here a clergyman briefly appears at a yearly high school graduation ceremony, no image of official state approval [of religion] is created."), *cert. denied*, 454 U.S. 1123 (1981).

22. 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989).

23. 463 U.S. 783 (1983).

24. 822 F.2d at 1409.

25. *Weisman*, 728 F. Supp. at 74; *see also Jager*, 862 F.2d at 829 & n.9.

26. While the two courts referred to the endorsement test, their opinions seem to have been guided by the traditional *Lemon* analysis. *See Jager*, 862 F.2d at 829, 831; *Weisman*, 728 F. Supp. at 72-74.

27. 370 U.S. 421 (1962).

28. 374 U.S. 203 (1963).

29. *Engel*, 370 U.S. at 435.

30. *Marsh*, 463 U.S. at 806 (Brennan, J., dissenting); *see also Engel*, 370 U.S. at 425 ("[I]t is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." (emphasis added)). *But see Schempp*, 374 U.S. at 213 (sanctioning legislative invocations in dictum).

### A. *Stein v. Plainwell Community Schools*

In *Stein*,<sup>31</sup> two students challenged the inclusion of invocations in graduation ceremonies at two public high schools.<sup>32</sup> Student volunteers gave the invocation and benediction at one school. At the other school, a Lutheran minister selected by students gave the invocation and benediction. No school officials at either school were involved in selecting speakers or in composing invocations.<sup>33</sup>

The *Stein* court held that *Marsh v. Chambers*<sup>34</sup> governed the case because graduation invocations are more analogous to judicial and legislative invocations than to the practices reviewed in the school prayer cases. The court argued that it would not be "consistent" to ban graduation invocations "while sanctioning the tradition of invocations for judges, legislators and public officials."<sup>35</sup> The *Stein* court read *Marsh* as sanctioning "nonsectarian" invocations in any public setting.<sup>36</sup> Applying this standard, the court struck down the challenged invocations because they "employ[ed] the language of Christian theology and prayer."<sup>37</sup> This sectarian language violated the Establishment Clause because it "'symbolically place[d] the government's [] seal of approval on one religious view'—the Christian view."<sup>38</sup>

The *Stein* court held that *Marsh* permits only nonsectarian invocations. While the court offered no explicit definition of "nonsectarian," its opinion provides guidelines for the composition of appropriate invocations. The court invalidated the prayers at issue because they contained references to "Christ" and "Jesus."<sup>39</sup> The court was silent, however, on other religious references in the prayers, such as "Heavenly Father," "Lord," and "Divine Master";<sup>40</sup> these words were apparently sufficiently nonsectarian. The court's citation of certain phrases and omission of others thus conveys an outline for constitutionally acceptable graduation prayer.

The *Stein* court's holding is in direct conflict with *Engel v. Vitale*.<sup>41</sup> *Stein*'s sanction and necessary definition of "nonsectarian" prayer plainly violates *Engel*'s mandate that government "stay out of the business of writing

---

31. 822 F.2d 1406 (6th Cir. 1987).

32. *Id.* at 1407.

33. *Id.* at 1407 & n.2.

34. 463 U.S. 783 (1983).

35. 822 F.2d at 1409.

36. *Id.* This reading of *Marsh* has been criticized by both judges and commentators. See *infra* note 42.

37. 822 F.2d at 1410.

38. *Id.* (second alteration made, but not indicated, in original) (quoting *Marsh*, 463 U.S. at 792).

39. 822 F.2d at 1407 n.2, 1410.

40. See *id.* at 1407 nn.1-2.

41. 370 U.S. 421 (1962).

or sanctioning official prayers."<sup>42</sup> In addition, *Stein* requires school officials to assume control over the composition of invocations in order to ensure "nonsectarian" content. School composition of prayers seems clearly invalid under *Engel*.<sup>43</sup> The only possible reconciliation of *Stein* and *Engel* places schools in a strange position: students may offer state-composed prayers at graduation, but may not recite them during the school day.<sup>44</sup> Such a reconciliation might preserve *Engel's* particular holding, but it clearly eviscerates the decision's rationale.

---

42. 370 U.S. at 435; see also *Weisman v. Lee*, 728 F. Supp. 68, 75 (D.R.I.) ("Neither the legislative, nor the executive, nor the judicial branch may define acceptable prayer."), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991); Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1661 (1989) (*Stein* "strikes at the heart of religious liberty").

Judge Wellford in dissent and several commentators have argued that these problems arise from the court's misreading of *Marsh*. The *Stein* court examined the content of the prayers because it interpreted *Marsh* to permit only nonsectarian prayers. These critics maintain that *Marsh* permits both sectarian and nonsectarian prayers; an inquiry into content is unnecessary and therefore improper. See *Stein*, 822 F.2d at 1412 (Wellford, J., dissenting); Adams & Emmerich, *supra*, at 1661 (*Stein* court "probably misread the *Marsh* opinion regarding judicial examination of the content of prayers"); James J. Dean, Comment, *Ceremonial Invocations at Public High School Events and the Establishment Clause*, 16 FLA. ST. U. L. REV. 1001, 1014-15 (1989). They rely on this passage in *Marsh*:

The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

463 U.S. at 794-95.

There is, however, a certain element of circularity in the *Marsh* Court's statement. The Court states that judges should not examine the content of prayers "where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one . . . faith or belief." But how is a judge to determine whether a "prayer opportunity" has been so "exploited" without reviewing the prayer's content? It would seem, then, that the *Stein* court was correct to read *Marsh* as sanctioning only nonsectarian prayers and, by implication, judicial review of particular invocations. The Court itself has read *Marsh* in this manner. See *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989).

43. See also *School Dist. v. Schempp*, 374 U.S. 203 (1963) (striking down analogous practice of school selection, rather than composition, of religious exercises).

44. On remand, the district court, perhaps recognizing this inconsistency, held that the school must satisfy both *Marsh* and the *Lemon* test. The court held that the prayers must be nonsectarian yet not advance a religious viewpoint. The court further directed the school to control the invocations' content while avoiding excessive entanglement with religion. See Theresa M. Serra, Note, *Invocations and Benedictions—Is the Supreme Court "Graduating" to a Marsh Analysis?*, 65 U. DET. L. REV. 769, 788-89 (1988) (citing *Stein v. Plainwell Community Schs.*, No. K85-197 CA4 (W.D. Mich. Mar. 2, 1988)). This holding, however, removes the school from an anomalous position and places it in an impossible one, for official composition of prayers is a classic form of "excessive entanglement." See *Marsh v. Chambers*, 463 U.S. 783, 798-99 & n.8 (1983) (Brennan, J., dissenting) (government monitoring of content of invocations is "excessive entanglement" with religion); *Weisman v. Lee*, 908 F.2d 1090, 1095 (1st Cir. 1990) (Bownes, J., concurring) (school's control over content is excessive entanglement), *cert. granted*, 111 S. Ct. 1305 (1991); Dean, *supra* note 42, at 1029. But see *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416, 423 (5th Cir. 1991) (school's control over content not excessive entanglement), *petition for cert. filed*, 60 U.S.L.W. 3215 (U.S. Aug. 20, 1991) (No. 91-310).

B. *Jager v. Douglas County School District and Weisman v. Lee*

The courts in *Jager v. Douglas County School District*<sup>45</sup> and *Weisman v. Lee*<sup>46</sup> rejected the *Stein* court's *Marsh* approach and examined invocations in terms of the Court's public school cases. Under this standard, "consistency" required the prohibition of all graduation prayer. As the *Weisman* court held, "If students cannot be led in prayer on all of those other [school] days, prayer on graduation day is also inappropriate under the doctrine currently embraced by the Supreme Court."<sup>47</sup>

The *Jager* court reviewed the tradition of invocations before high school football games. In response to a student's complaints about prayers offered by ministers before games, the school adopted an equal access invocation plan.<sup>48</sup> The plan neither prohibited nor required religious invocations. It specified that invocation speakers would be chosen at random by the student government. Students, parents, and school staff members were eligible to give invocations; ministers were not. The school was to have no role in selecting speakers or in composing invocations. The plan, however, was never put into effect.<sup>49</sup> As a result, the *Jager* court, unlike the *Stein* court, had no actual invocations before it.

The *Jager* court rejected *Stein's Marsh* approach in favor of the *Lemon* test.<sup>50</sup> The court held that the invocation plan had the impermissible purpose and effect of endorsing religion, for it "permit[ted] religious invocations, which by definition serve religious purposes, just like all public prayers."<sup>51</sup> The court struck down a plan permitting "religious invocations" and "prayers" because the Establishment Clause allows only "secular invocations" and "inspirational speeches."<sup>52</sup>

*Jager's* prohibition of prayer eliminates the need for courts to separate "sectarian" from "nonsectarian" references within prayers. But the court's position does not remove the necessity for judicial inquiry into the content of prayers. In order to decide whether particular invocations are valid under *Jager*, courts must determine whether they are "religious" or "secular"; stating that all "prayers" are invalid does not define "prayer." Because there were no particular invocations before the court, *Jager* prudently refrained from offering

---

45. 862 F.2d 824 (11th Cir.), cert. denied, 490 U.S. 1090 (1989).

46. 728 F. Supp. 68 (D.R.I.), aff'd, 908 F.2d 1090 (1st Cir. 1990), cert. granted, 111 S. Ct. 1305 (1991).

47. 728 F. Supp. at 74.

48. 862 F.2d at 827.

49. The district court issued a temporary restraining order enjoining the school district from implementing the plan. See *id.*

50. *Id.* at 828-29 & n.9.

51. *Id.* at 830.

52. *Id.*

any guidelines. *Weisman v. Lee*,<sup>53</sup> however, confirms the necessity and difficulty of defining the religious and the secular once a court holds that all "prayers" are invalid.

In *Weisman*, a student challenged the Providence School Department's policy of including invocations and benedictions in high school and middle school graduations.<sup>54</sup> In contrast to the invocations in *Stein* and *Jager*, the challenged invocation was given at a middle school graduation. Also unlike *Stein* and *Jager*,<sup>55</sup> school officials selected the speaker and provided both formal guidelines and verbal instructions regarding the content of the invocation.<sup>56</sup>

The *Weisman* court agreed with the *Jager* court that *Marsh*<sup>57</sup> had no application in a public school setting.<sup>58</sup> It followed *Jager* in treating school events such as graduation like "every other school day."<sup>59</sup> The court struck down the invocation and benediction under the *Lemon* test, holding that they had the impermissible effect of "endorsing" and "advancing religion."<sup>60</sup> The invocations were invalid because they "creat[ed] an identification of school with a deity, and therefore religion."<sup>61</sup> The court explicitly rejected *Stein*'s sanction of nonsectarian prayer and joined *Jager* in taking a categorical stance: "Here, it is not the particular nature or wording of the prayers which implicates the first amendment—it is prayer at the ceremony which transgresses the Establishment Clause."<sup>62</sup>

The *Weisman* court held that all prayers were invalid, regardless of their content. The court, however, could determine whether the challenged invocation

53. *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991).

54. *Id.* at 69.

55. See *supra* text accompanying notes 33, 49.

56. Two teachers chose Rabbi Leslie Gutterman to give the invocation and benediction. Rabbi Gutterman was given a pamphlet entitled "Guidelines for Civic Occasions" and was told by the school principal that "any prayers delivered at the ceremonies should be non-sectarian." See *Weisman*, 728 F. Supp. at 69.

57. *Marsh v. Chambers*, 463 U.S. 783 (1983).

58. *Weisman*, 728 F. Supp. at 74.

59. *Id.*

60. *Id.* at 73.

61. *Id.* at 72. Rabbi Gutterman's invocation read:

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 can 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.* at 69 n.2.

62. *Id.* at 74.

was a prayer only by analyzing its content. This particular invocation was an invalid prayer "because a deity [wa]s invoked."<sup>63</sup> The court meant this statement to be taken quite literally: if the invocation had not included the word "God," "the Establishment Clause would not be implicated."<sup>64</sup> The court then set out an edited version of the invocation as an example of one that "Rabbi Gutterman could have delivered."<sup>65</sup>

The *Weisman* court argued that the *Stein* court's *Marsh* approach "results in courts reviewing the content of prayers to judicially approve what are acceptable invocations to a deity."<sup>66</sup> This approach would necessarily lead to the "gradual judicial development of what is acceptable public prayer," a practice the court believed unconstitutional under *Engel v. Vitale*.<sup>67</sup> The court did not consider its own invocation composition to be inconsistent with this criticism of *Stein*, for the court did not understand itself to be composing a prayer. This belief, however, rested on a presumption that the court was competent to separate religion from nonreligion, prayers from secular invocations.

The content of the court's model "secular inspirational message"<sup>68</sup> reveals that this presumption was clearly unjustified. The court's changes in the prayer were quite minor. It merely deleted Rabbi Gutterman's title ("God of the Free, Hope of the Brave"), dropped "Amen," and changed "we thank You" to "we are thankful."<sup>69</sup> The edited invocation retained all of the prayer's thanksgivings and petitions, phrases which presuppose a being to receive these thanks and petitions.<sup>70</sup> Others could quite reasonably view the court's "secular inspirational message" as "religious." Indeed, it appears that the court had engaged in the very activity it sought to prohibit. This perception was confirmed on appeal, as one member of the First Circuit panel, while agreeing that all "prayers" are invalid, argued that the court had composed a "prayer."<sup>71</sup>

63. *Id.* at 68.

64. *Id.* at 74.

65. *Id.* at 74 n.10; *see also supra* note 61.

66. 728 F. Supp. at 74.

67. *Id.*; *see also supra* text accompanying notes 41-45.

68. 728 F. Supp. at 74.

69. *Id.* at 74 n.10; *see also supra* note 61.

70. 728 F. Supp. at 74 n.10. The court previously noted that prayer is defined as "a solemn and humble approach to Divinity in word or thought usu[ally] involving petition, confession, praise or thanksgiving." *Id.* at 70 n.4 (alteration in original) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1782 (1981)).

71. *See Weisman v. Lee*, 908 F.2d 1090, 1097 (1st Cir. 1990) (Bownes, J., concurring). Judge Bownes asserted that the district court's view is "too literal and narrow an interpretation of prayer and of what is acceptable under the Constitution." *Id.* He argued that "direct reference to a deity should not be the constitutional touchstone for our analysis" and that "[a] benediction or invocation offends the First Amendment even if the words of the invocation or benediction are somehow manipulated so that a deity is not mentioned." *Id.*; *see also Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416, 420 (5th Cir. 1991) (rejecting a proposed "secular" invocation because "[w]e do not consider invocations . . . any more secular for veiling references to a deity in pronouns and hidden objects"), *petition for cert. filed*, 60 U.S.L.W. 3215 (U.S. Aug. 20, 1991) (No. 91-310).

### C. *Judicial Prayer Composition*

The *Weisman* court's invocation composition illuminates the difficulties posed by *Stein* and *Jager*, for it clearly demonstrates what is perhaps implicit in these decisions. Like the *Stein* court, the *Weisman* court separated valid from invalid invocations by looking for specific words within the invocations. For *Stein*, the invalid references were "Christ" and "Jesus"<sup>72</sup>; for *Weisman*, "God."<sup>73</sup> In the course of parsing the prayers, both courts provided very explicit guidelines for composing acceptable invocations. In actually rewriting the invalid "prayer," the *Weisman* court merely performed the largely clerical task the *Stein* court, equally impermissibly, left to lower courts and school officials.

*Weisman* also reveals that the *Jager* court's "absolutist" approach presents the same difficulties. As *Weisman* demonstrates, simply prohibiting all "prayers" does not remove the necessity for courts to "sit as a board of censors on individual prayers."<sup>74</sup> While the need to define prayer arises under *Weisman* in applying its ban on prayer in particular cases, such a definition is a necessary part of *Jager*'s initial prohibition. The *Jager* court struck down a plan permitting prayer on grounds that schools may not "use religious means to achieve secular purposes, where, as here, secular means exist to achieve those purposes."<sup>75</sup> The court repeatedly emphasized that the school could achieve its legitimate secular purposes through "inspirational speeches" and "secular invocations."<sup>76</sup> The court's invalidation of "religious means" thus depends entirely upon the existence of a clear "secular" alternative capable of serving the valid purposes advanced by the invalid "religious" practice. Unless "prayers" and "secular invocations" may be firmly separated such that clear "secular means exist," *Jager* provides no basis for invalidating "prayers."<sup>77</sup>

72. See 822 F.2d at 1407 n.2, 1410; *supra* text accompanying note 39.

73. See 728 F. Supp. at 74; *supra* text accompanying note 64.

74. *Marsh v. Chambers*, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting); see also Frank N. White, Comment, *Stein v. Plainwell Community Schools: The Constitutionality of Prayer in Public High School Commencement Exercises*, 22 GA. L. REV. 469, 496 n.96 (1988) (arguing that judicial inquiry into content of prayers may be avoided by declaring prayer per se invalid).

75. *Jager*, 862 F.2d at 832 (emphasis added); see also *School Dist. v. Schempp*, 374 U.S. 203, 295 (1963) (Brennan, J., concurring) (state may not "use essentially religious means to serve government ends, where secular means would suffice").

76. The court made this point at least five times in its brief opinion. See 862 F.2d at 829-33.

77. It might be argued that courts could avoid defining "prayer" by either prescribing a moment of silence or banning invocations altogether. In light of its continual reference to "secular invocations," the *Jager* court's silence on these alternatives is telling. A moment of silence might provide a solemn tone for graduation, but it would not achieve the other valid secular purposes served by invocations. Justice O'Connor has stated that practices such as invocations "serve the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy in society." *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring). It would appear that invocations, whether "religious" or "secular," are uniquely suited to fulfill these purposes. See *supra* note 61. Unless a court finds that the secular purposes alleged by the school are merely a pretense, it would seem that some sort of invocations must be permitted. And once the court permits *something* to be said, it must define what may not be said.

The necessity under *Stein* to define “nonsectarian” places courts in “a hopeless theological quagmire.”<sup>78</sup> Courts are hardly more capable of distinguishing prayers and “secular invocations.”<sup>79</sup> Since these concepts do not conform to a single, “reasonable” view, one might expect, as in *Weisman*, several judicial definitions of “religious” and “secular.”<sup>80</sup> *Stein*, which permits

78. Adams & Emmerich, *supra* note 42, at 1661; see also *Marsh*, 463 U.S. at 819-21 (Brennan, J., dissenting) (illustrating the impossibility of composing “nonsectarian” prayers).

79. It might appear that judges must examine content if they are to perform their role as interpreters of the Constitution. As the Court stated in *Widmar v. Vincent*,

[T]he Establishment Clause requires the State to distinguish between “religious” speech—speech, undertaken or approved by the State, the primary effect of which is to support an establishment of religion—and “nonreligious” speech—speech, undertaken or approved by the State, the primary effect of which is not to support an establishment of religion. This distinction is required by the plain text of the Constitution.

454 U.S. 263, 271 n.9 (1981). Almost immediately after stating this principle, however, the *Widmar* Court argued that a ban on “religious speech” might be “impossible” to apply in practice: “Initially, the University would need to determine which words and activities fall within ‘religious worship and religious teaching.’ This alone could prove ‘an impossible task in an age where many and various beliefs meet the [free exercise] definition of religion.’” *Id.* at 272 n.11 (quoting *O’Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979)). Scholars have also suggested that “[f]ashioning a general definition of religion seems impossible.” Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 298 (1987) (“[T]he Supreme Court has been able largely to avoid the problem of defining religion in establishment cases. One might wisely hope that this situation will continue.”). See generally George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L.J. 1519 (1983).

There will be cases where judicial “establishment of religion” through an examination of content is unavoidable. For example, courts must make judgments on the meaning of religious symbols when they consider challenges to religious displays on public property. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). The considerable confusion and disagreement that mark such inquiries, however, do not commend an extension of this approach to prayer. See *infra* note 80. Moreover, such a content-based standard is inconsistent with the special nature of prayer: “The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayers the American people can say.” *Engel v. Vitale*, 370 U.S. 421, 429 (1962). Following *Engel’s* reasoning, Professor Tushnet argues: “A state-composed prayer that people are invited to recite is a core violation of the establishment clause, being about as close as one can imagine to what would have been regarded as a classic establishment of religion [by the Framers].” Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691, 1712-13 (1988).

80. The Court recently attempted to distinguish the “religious” and the “secular” in *County of Allegheny*. Just as the *Jager* and *Weisman* courts held that “religious” invocations were invalid but “secular” invocations were permissible, the Court in *County of Allegheny* held that “religious” holiday displays were invalid but “secular” displays were permissible. See 492 U.S. at 615 & n.62. Other Justices criticized this inquiry into content. Justice Kennedy asserted that “[t]his Court is ill-equipped to sit as a national theology board, and I question both the wisdom and the constitutionality of its doing so.” *Id.* at 678 (Kennedy, J., concurring in judgment in part and dissenting in part). Justice Brennan argued that a search for one “reasonable view” of religious symbols threatens to “mak[e] analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law.” *Id.* at 643 (Brennan, J., concurring in part and dissenting in part).

An inquiry into the content of prayers or holiday displays, however, presupposes the existence of a single, “reasonable” viewpoint. The Court compellingly rejected this assumption in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 632-33 (1943): “A person gets from a symbol the meaning he puts into it, and what is one man’s comfort and inspiration is another’s jest and scorn.” The various opinions in *County of Allegheny* reveal the wisdom of this statement. Three Justices, each purporting to give the view of the “reasonable observer,” had three different views of the religious content of a Christmas tree and menorah. Compare 492 U.S. at 616-17 (Blackmun, J.) (Christmas tree secular symbol) and *id.* at 633 (O’Connor, J., concurring in part and concurring in judgment) (Christmas tree “predominantly secular symbol”) with *id.* at 639-41 (Brennan, J., concurring in part and dissenting in part) (Christmas tree not

prayer, and *Jager* and *Weisman*, which purport to ban all prayer, are equally open to the charge that "it is simply beyond the competence of government, and inconsistent with our conceptions of liberty, for the State to take upon itself the role of ecclesiastical arbiter."<sup>81</sup>

#### D. *The Neglected Question of Endorsement*

The difference among the particular holdings in these cases stems from the different frameworks adopted by each court. The *Stein* court, viewing graduation prayer in terms of traditional practices sanctioned by the Court, held that *Marsh* permitted nonsectarian prayer. The *Jager* and *Weisman* courts claimed that the invocations' public school setting was most relevant. They held that the *Lemon* test prohibited all prayer. On a more fundamental level, however, the courts' framing of graduation prayer as *either* a "ceremonial deism" practice *or* a public school case led them collectively to ignore the crucial issue in these cases.

Regardless of which test is used, the Establishment Clause is implicated only if the challenged religious expression carries the imprimatur of the state. This principle tends to be obscured in both "ceremonial deism" and school prayer cases, for there is no question that government endorses the content of the religious activities. All of the historical practices sanctioned by the Court are authorized by statute;<sup>82</sup> every public school exercise that has been struck down by the Court has been organized and led by school officials.<sup>83</sup> The speech in each case is literally government speech. Viewing graduation prayer in terms of these cases, however, renders the private status of the speakers constitutionally irrelevant. Since all three courts assumed that invocations given by private individuals necessarily carried the school's imprimatur, the only

secular symbol); *compare id.* at 613 (Blackmun, J.) (menorah "not exclusively religious" symbol) *with id.* at 633 (O'Connor, J., concurring in part and concurring in judgment) (menorah "central religious symbol") *and id.* at 643 (Brennan, J., concurring in part and dissenting in part) (menorah "an inherently religious symbol"). In a separate opinion, Justice Stevens stated that "the presence of the Chanukah menorah, unquestionably a religious symbol, gives religious significance to the Christmas tree." *Id.* at 654 (Stevens, J., concurring in part and dissenting in part).

81. *Marsh*, 463 U.S. at 821 (Brennan, J., dissenting). It might appear that *Stein* adopted the troubling "role of ecclesiastical arbiter" to a much greater extent than *Jager* and *Weisman*. *Stein* involved explicit composition of prayers containing explicit religious references. The prayer composition in *Weisman* was of a different nature. Because it sought to apply a ban on all prayer, the *Weisman* court clearly did not intend to compose one. Moreover, the "prayers" sanctioned in *Weisman* were less likely to offend, for they contained no direct references to "God." *Weisman*, however, in one sense expressly stated what remained implicit in *Stein*. In attempting to implement its prohibition of "religious invocations" and "prayers," the *Weisman* court held that invocations that do not include the word "God" are neither "prayers" nor "religious." The holding thus conveys a message of simultaneous "endorsement" and "disapproval" to persons whose prayers do not include direct references to a deity or whose beliefs do not include a concept of "God," that is, people likely to be offended by the "nonsectarian" prayers sanctioned by *Stein*. Under *Weisman*, schools may advance these beliefs, but not others, at graduation; the court permits such "endorsement," however, only because it has established that these beliefs are not "religious" at all.

82. *See supra* cases cited note 2.

83. *See supra* cases cited note 6.

question left to ask was whether the invocation itself was religious. *Board of Education v. Mergens*,<sup>84</sup> the Supreme Court's most recent school prayer decision, however, reaffirms the importance of this neglected inquiry into endorsement. Instead of seeking to determine if the state has "symbolically place[d] the government's official seal of approval on [a] religious view"<sup>85</sup> by scrutinizing the "view" for "religious" content, *Mergens* directs courts to focus on whether the school has "symbolically place[d] the government's official seal of approval" on this view in the first place.

## II. THE DISTINCTION BETWEEN GOVERNMENT AND PRIVATE SPEECH

### A. Board of Education v. Mergens

In *Board of Education v. Mergens*,<sup>86</sup> the Supreme Court rejected an Establishment Clause challenge to the Equal Access Act.<sup>87</sup> The Act requires all public secondary schools with a "limited open forum" to grant student religious groups "equal access" to the privileges enjoyed by other student clubs.<sup>88</sup> The *Mergens* Court perceived that Congress intended to extend the principle of *Widmar v. Vincent*,<sup>89</sup> a college case, to public high schools and sanctioned this extension.<sup>90</sup>

The school argued that its compliance with the Act would have the impermissible effect of endorsing religion.<sup>91</sup> It contended that "official recognition of [a religious] club would effectively incorporate religious activities into the school's official program . . . and provide the club with an official platform to proselytize other students."<sup>92</sup> The presence of religious activities under the school's aegis would lead students to "perceive official school support for such [activities]."<sup>93</sup>

The plurality acknowledged that some school practices may "creat[e] 'a

84. 110 S. Ct. 2356 (1990).

85. See *Stein v. Plainwell Community Schs.*, 822 F.2d 1406, 1409 (6th Cir. 1987) (quoting *Marsh*, 463 U.S. at 792).

86. 110 S. Ct. 2356 (1990).

87. 20 U.S.C. §§ 4071-4074 (1988).

88. See *id.* § 4071(a)-(b). For a more complete account of the Act and its construction by the Court, see *Mergens*, 110 S. Ct. at 2364-70.

89. 454 U.S. 263 (1981) (public universities with "public forum" must give student religious groups equal access).

90. 110 S. Ct. at 2364. While the decision on the merits was 8-1, there was no majority opinion. Justice O'Connor's opinion was joined in full by Chief Justice Rehnquist, Justice White, and Justice Blackmun. Justice Kennedy, joined by Justice Scalia, concurred in the judgment, arguing that "coercion," not "endorsement," should be the Court's Establishment Clause test. 110 S. Ct. at 2377-78. Justice Marshall, joined by Justice Brennan, also concurred in the judgment. Justice Marshall accepted the endorsement analysis, but "wrote separately to emphasize the steps [the school] must take to avoid appearing to endorse the Christian Club's goals." *Id.* at 2378. Justice Stevens dissented, primarily on statutory grounds. See *id.* at 2383-93.

91. *Id.* at 2371.

92. *Id.* at 2370.

93. *Id.* at 2371 (citations omitted).

crucial symbolic link between government and religion . . . .”<sup>94</sup> The plurality, however, found the fact that *student* religious expression was at issue dispositive: “[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”<sup>95</sup> Students would not understand the school to endorse the religious speech of fellow students because “[t]he proposition that schools do not endorse everything they fail to censor is not complicated.”<sup>96</sup> The opinion contrasted the equal access plan with practices at issue in the Court’s previous school prayer cases. In those cases, endorsement could be presumed because the activities were officially authorized, teacher-led exercises. The plurality viewed the equal access plan as fundamentally different, asserting that “there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate.”<sup>97</sup>

The plurality stressed the distinction between school and student speech (and specified that “no *formal* classroom activities are involved”) because student religious speech would not be confined to the nonclassroom time when the religious club would hold its meetings. As the Court noted, “equal access” “carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair.”<sup>98</sup> It was the facilitation of the efforts of religious students to proselytize other students *during* school, not the opportunity for students to pray in private after school, that the school district and critics of the Equal Access Act emphasized.<sup>99</sup> The ability of religious clubs to use the public address system ensured, for example, that other students could frequently hear proselytizing messages along with other announcements. Critics argued that this broad access for “student evangelists,” combined with the “state’s compulsory attendance laws,”<sup>100</sup> meant that each student, “so long he or she is on the public school premises, may become an unwilling captive to proselytization.”<sup>101</sup> *Mergens* nonetheless held that these “captive” students would not attribute this religious speech to the school. Citing two cases involv-

---

94. *Id.* at 2372 (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985)).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 2370.

99. *See id.* (the school claims that the Act requires it to “provide the club with an official platform to proselytize other students”); cf. Ruti Teitel, *When Separate Is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U. L. REV. 174, 174-79 (1986) (describing several instances of proselytizing of “audience gathered by the state” by “student evangelists”). Other Justices in *Mergens* also commented on this point. *See* 110 S. Ct. at 2381 (Marshall, J., concurring) (noting “comprehensiveness of the access afforded by the Act”); *id.* at 2391-92 & n.22. (Stevens, J., dissenting) (remarking on interplay between “compulsory attendance laws” and broad access granted to religious groups).

100. 110 S. Ct. at 2371.

101. Teitel, *supra* note 99, at 183. Teitel cites one such public address announcement of a religious meeting: “[The speakers] will talk about what it means to be born again. Come and find out. Bring a friend. Come and be fulfilled.” *Id.* at 175.

ing student expression in the classroom, the plurality stated: "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."<sup>102</sup>

### B. *The Relevance of Mergens to Invocations*

*Mergens* confirms that the content of a challenged activity is irrelevant unless the court determines that the school endorses the speech. The decision also reveals that an inquiry into endorsement is more complex than lower courts might have thought. The *Weisman*,<sup>103</sup> *Stein*,<sup>104</sup> and *Jager*<sup>105</sup> courts held that schools by definition endorse invocations given on school property during a school event. The *Jager* court stated this shared assumption most clearly: "When a religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school-owned facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation."<sup>106</sup>

*Mergens*, however, indicates that even in the setting of a school-sponsored program, courts should not presume that the speech of private individuals is endorsed by the school. As the decision itself reveals, it is hardly "inescapable" that schools endorse religious speech "given via a sound system controlled by school principals . . . at a school-sponsored event at a school-owned facility . . ." In contrast to *Jager*, the Court in *Mergens* held that students would not understand the proselytizing messages given by other students over the public address system *during the school day* to carry the endorsement of the school.<sup>107</sup> While *Mergens* cannot be read as a blanket validation of all religious speech in the public schools, it does indicate that such speech is permissible in the context of programs crafted to avoid conveying a message of endorsement. Guided by *Mergens*, Part III argues that the practice of graduation invocations may be structured to avoid the appearance of endorsement and thus should be permissible.

## III. AN EQUAL ACCESS APPROACH TO GRADUATION INVOCATIONS

Courts improperly assume that schools necessarily endorse the content of the invocations they permit at graduation. Because they deem the invocations

102. 110 S. Ct. at 2372 (citing *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969), and *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

103. *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991).

104. *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987).

105. *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989).

106. 862 F.2d at 831; *see also Stein*, 822 F.2d at 1409-10; *Weisman*, 728 F. Supp. at 72.

107. *See supra* text accompanying notes 98-102.

to be school speech, these courts must focus on the content of the invocations in order to determine whether the school endorses religion. This inquiry into content places the courts in the extremely problematic position of defining and composing valid invocations. Moreover, this approach, designed to maintain the appearance of official neutrality, leads schools to convey the message to both “religious” student speakers and “nonreligious” student listeners that their beliefs are officially disfavored. Schools must assume control over the content of the invocations in order to implement the courts’ standards. Such school control means that “religious” speech will be stifled while ensuring that the edited invocations—which, if the courts’ guidelines are followed, will nonetheless remain “religious”—bear the school’s official stamp of approval.

This Note proposes a different approach: Courts should permit invocations if they are given by students on an equal access basis without school interference. This approach reflects the fundamental principles most recently confirmed in *Mergens* and avoids the need for an inquiry into the content of the invocations. The freedom from school and judicial interference precludes any appearance of official endorsement and permits the invocations to reflect the diversity of views, both “religious” and “nonreligious,” held by students.

This equal access approach rests on *Mergens*’ sanction of a similar practice in a similar setting. More importantly, it rests on the distinctive focus the endorsement test lends to the *Lemon* test, a focus revealed most clearly in *Mergens*. *Lemon* forbids laws that have the “principal or primary effect” of “advancing” religion. The test thus requires courts to gauge the effects of government action. In attempting to define this potentially amorphous inquiry, the Court has stated that “[f]or a law to have forbidden ‘effects’ under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence.”<sup>108</sup> The endorsement test emphasizes the role of the state as “speaker.”<sup>109</sup> Under this standard, the relevant question is not whether government actions somehow “advance” or benefit religion, but whether these actions indicate that government “endorses” religion.<sup>110</sup> In most cases, state action that “advances” religion will also “endorse” religion. In some cases, however, state action may “in fact cause[], even as a primary effect, advancement or inhibition of religion” and yet be permissible because the state has not endorsed religion.<sup>111</sup> *Mergens* is arguably one of these cases.

*Mergens* held that a school may provide students who wish to express religious views with the same opportunity to speak given other students. At the same time, the state “provide[s] a ready-made audience for [these] student

---

108. *Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987).

109. *See Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

110. *See id.* at 691-92 (O’Connor, J., concurring).

111. *See id.* at 692 (O’Connor, J., concurring) (citing *Walz v. Tax Comm’n*, 397 U.S. 664 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961); and *Zorach v. Clauson*, 343 U.S. 306 (1952)).

evangelists" through compulsory school attendance laws.<sup>112</sup> Even though the state compels students to listen to proselytizing speech, the Court in *Mergens* upheld this practice because these students would not understand the school to endorse the speech. The endorsement test clarifies *Lemon's* inquiry into the effects of state action by focusing on whether the state has "spoken about" or "endorsed" religion. *Mergens* in turn clarifies this inquiry into endorsement by stressing that "there is a crucial difference between government speech endorsing religion . . . and private speech endorsing religion . . ." <sup>113</sup> The "crucial symbolic link between government and religion" <sup>114</sup> is severed when students speak, for it is the speech of *students*, not the "government itself," that "advances" religion.

An equal access invocation plan permits religious as well as other types of invocations. At the same time, the pressure to attend graduation, though not legal, is strong; most students would not think of missing their graduation. Under *Mergens*, this plan should be valid if the school can avoid the appearance of endorsing the invocations. As in *Mergens*, the Establishment Clause is not violated under the endorsement test, for while the state might provide a "platform" for student religious speech and compel other students to listen, the state itself does not speak.<sup>115</sup>

112. 110 S. Ct. at 2371.

113. *Id.*

114. *Mergens*, 110 S. Ct. at 2372 (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985)).

115. The validity of graduation prayer appears more doubtful under Justice Kennedy's "coercion" test. See *supra* text accompanying notes 15-19. The difference between the endorsement and coercion tests may be understood as a disagreement over the aspect of the modern state with which the Establishment Clause should be most concerned. The endorsement test focuses on the "prestige" of government, or the special influence government has when it "speaks." This standard bars the state from "advancing" religion by engaging in practices that "convey[] a message of endorsement or disapproval [of religion]." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). The "coercion" test, in contrast, emphasizes the "power" of the state. This test prohibits "actions that further the interests of religion through the coercive power of government." *County of Allegheny v. ACLU*, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

Justice Kennedy objects to the endorsement test on two related grounds. First, he argues that the endorsement test, under which "government speech about religion is *per se* suspect," is unduly rigid and inconsistent with the Court's precedents. *Id.* at 661. Second, Justice Kennedy considers the endorsement test's searching inquiry into whether the state has "spoken about religion" rather dubious, for the concept of endorsement "has insufficient content to be dispositive." *Mergens*, 110 S. Ct. at 2377-78 (Kennedy, J., concurring). Unlike the *Mergens* plurality (as well as Justices Marshall and Brennan), Justice Kennedy thought it "inevitable that a public school 'endorses' [the] religious club, in the common-sense use of the term . . ." *Id.* at 2378.

This emphasis on the "coercion" of individuals rather than on the "speech" of the state is reflected in Justice Kennedy's treatment of *Engel v. Vitale*, 370 U.S. 421 (1962). The state-composed prayer at issue in *Engel* is perhaps the classic example of the "government speech about religion" that the endorsement test prohibits. Justice Kennedy agrees that "[s]peech may coerce in some circumstances," and he cites *Engel* as an "extreme case" where "[s]ymbolic recognition or accommodation of religious faith may violate the [Establishment] Clause." *County of Allegheny*, 492 U.S. at 661 & n.1. In contrast to the "indirect" coercion involved in "symbolic recognition," which appears to be a matter of degree, the prohibition of "direct" coercion seems categorical. For example, Justice Kennedy explains that *Engel* may also be understood to forbid "compelling or coercing participation or attendance at a religious activity." 492 U.S. at 660. This shift from endorsement to coercion no doubt validates many practices where the state speaks but does not coerce. In *County of Allegheny*, for example, the Court held that the government's creche display impermissi-

Schools may permit "religious" as well as "secular" invocations without endorsing this speech by creating an "open forum" at graduation containing the same structural features present in *Mergens*.<sup>116</sup> The *Mergens* plurality argued that students would not understand the school to endorse student religious speech for the following reasons: (1) the speech was student-initiated; (2) school officials were not permitted to interfere with "student-led religious speech" or meetings; (3) the religious club was part of a "broad spectrum of officially recognized student clubs"; and (4) students had the freedom to

---

bly endorsed religion. Justice Kennedy, however, argued that the creche was valid, for "[n]o one was compelled to observe or participate in any religious ceremony or activity." *Id.* at 664.

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

Justice Kennedy's most recent statement of the coercion test refers only to coercing "participation." See *Mergens*, 110 S. Ct. at 2377 (Kennedy, J., concurring). At the same time, however, his opinion contains strong indications that coerced "attendance" may be sufficient to invalidate a practice, either on its own or because "attendance" itself may constitute "participation." He asserted that the Equal Access Act was valid because there was no evidence that "enforcement of the statute will result in the coercion of any student to participate in a religious activity." *Id.* But his supporting argument seems to go beyond this statement: "The Act does not authorize school authorities to require, or even to encourage, students to become members of a religious club or to attend a club's meetings." *Id.* (emphasis added). The sufficiency of "attendance," intimated here, was seemingly made explicit soon after. Justice Kennedy explained that the Act did not violate the rights of school officials because "the Act does not compel any school employee to participate in, or to attend, a club's meetings or activities." *Id.* (emphasis added).

If the Establishment Clause bars the state from coercing students to "attend" as well as "participate in" a religious club's "activities" and "meetings," it is unclear how the Equal Access Act could survive scrutiny under the coercion test. Students are compelled by state law to "attend" school, and one of the primary "activities" of religious clubs granted access under the Act appears to be proselytizing other students during the school day. The school district stressed the potential for daily proselytizing of a "captive audience" by "student evangelists" under the Act. See *supra* text accompanying notes 98-102. Justice Kennedy, however, in contrast to the other Justices who wrote in *Mergens*, see *supra* note 99, was curiously silent on the broad access granted to religious clubs under the Act. This silence might be explained by the arguably secondary importance of this issue in *Mergens*. At any rate, graduation prayer provides an opportunity for clarification of the coercion test, as it squarely presents the intersection of student religious speech and state compulsion.

116. One difference between *Mergens* and graduation invocations is that *Mergens* involves student proselytizing, while invocations involve student prayer. The Court has indicated, however, that proselytization creates a greater imposition on unwilling listeners. In *Widmar v. Vincent*, the Court refused to distinguish "religious worship" (prayer) and "religious appeals to nonbelievers" (proselytization). 454 U.S. 263, 269 n.6, 271 n.9 (1981) (holding that this distinction is beyond "judicial competence to administer" and "lacks a foundation in either the Constitution or in our cases").

The Court's most recent statements maintain that proselytizing speech calls for greater Establishment Clause scrutiny. See *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983) ("The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one . . . faith or belief"); *County of Allegheny v. ACLU*, 492 U.S. 573, 603 n.52 (1989) (*Marsh* does not ensure constitutionality of "practices like proclaiming a National Day of Prayer," for "[l]egislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct."); see also *Engel v. Vitale*, 370 U.S. 421, 439 (1962) (Douglas, J., concurring) ("New York's prayer is of a character that does not involve any element of proselytizing.").

“initiate and organize additional student clubs.”<sup>117</sup> Schools also could indicate that official recognition of a club was not an endorsement of the club’s views.<sup>118</sup>

The first two factors are the most important and are easily translated into the graduation context. Under an equal access invocation plan, no school officials would be involved in either selecting speakers or monitoring the content of the invocations. Students would be solely responsible for selecting speakers; the speakers themselves would have sole control over content.<sup>119</sup> The students’ freedom from school interference is the most crucial part of the plan, for it ensures that the invocations are literally student speech. If a school selects speakers, provides composition guidelines, or edits the speakers’ text, the invocations become school speech, making endorsement of the invocations unavoidable.

The third and fourth factors cited by the *Mergens* plurality relate to students’ perceptions of the “openness” of the open forum. Here, the special nature of the graduation forum becomes relevant. In *Mergens*, proselytization was only one of potentially many types of speech to which students would be exposed throughout the school year. Graduation invocations and benedictions, however, provide opportunities for only two students to speak. Because the speech opportunities are limited, the graduation ceremony itself does not reflect a diversity of views. There is a chance that students might believe that the school prefers the particular views expressed at their graduation.

An invocation plan, however, can be structured to provide both the appearance and effect of giving equal access to all views. The school can make clear that students selected to give invocations may express any sentiments they wish.<sup>120</sup> Students could govern the process of selecting speakers. Since only two students and two views will be given “access” at graduation, the selection process must be “equal.” But instead of electing speakers, speakers could be chosen at random. This method of selection would be more consistent with the plan’s primary aim of providing equal access for all views. Selecting speakers by majority vote might tend to promote a representation of views held by the majority of students.<sup>121</sup>

---

117. 110 S. Ct. at 2372-73.

118. *Id.* at 2372.

119. This was the case in *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1407 (6th Cir.1987), and *Jager v. Douglas County School District*, 862 F.2d 824, 827 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989).

120. In order to make clear that prayer is not the preferred form of speech, the school might use the more neutral terms “opening” and “closing” rather than “invocation” and “benediction.” See Arnold H. Loewy, *School Prayer, Neutrality, and the Open Forum: Why We Don’t Need a Constitutional Amendment*, 61 N.C. L. REV. 141, 155 (1982) (suggesting that under “open forum” concept, student prayer before school assemblies should be permissible when students are chosen at random and neutral term “philosophical recitation” rather than “prayer” is used).

121. Even when students are chosen at random, there is of course a greater possibility that adherents of majority views will be selected. But a prevalence of one religious denomination or even of religious belief in general within a school should not be enough, by itself, to invalidate an equal access plan. Many religious

In addition to refraining from any actions relating to the selection of speakers and composition of invocations, schools can take affirmative steps to avoid the appearance of endorsement. Schools can add an explanatory statement or disclaimer in the graduation program confirming that the invocations are purely student speech.<sup>122</sup> More importantly, the school could inform students of the policy regarding invocations well before graduation. This would both facilitate student participation and help preclude any message of endorsement. If students are aware that all views have a fair opportunity of receiving expression at graduation, they will understand the content of the invocation and benediction in terms of the random selection process. Students might regret that a particular view was not expressed, but they would understand this to be the result of chance, not official preference.<sup>123</sup>

#### IV. CONCLUSION

Recent decisions have addressed the issue of graduation prayer solely in terms of the content of the invocations. As these cases demonstrate, an examination of content inevitably involves judicial prayer composition. The clearest command of the Establishment Clause prohibits government (including judges) from composing prayers.

The Establishment Clause is implicated only if the challenged religious

students might feel uncomfortable offering religious invocations at graduation. As Justice Brennan has convincingly argued, "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government." *School Dist. v. Schempp*, 374 U.S. 203, 259 (1963) (Brennan, J., concurring); see also *Marsh v. Chambers*, 463 U.S. 783, 811-12 (1983) (Brennan, J., dissenting); White, *supra* note 74, at 499 n.101. For this reason, a court should not assume, as the *Jager* court did, that all religious adherents will give religious invocations. *Jager*, 862 F.2d at 831 (concluding that "the likely result of the equal access plan will be the continuation of Protestant Christian invocations" because "Protestant Christianity is the majority religious preference").

In *Stein*, students at one school selected ministers to give invocations. See *Stein v. Plainwell Community Schs.*, 822 F.2d 1406, 1407 (6th Cir. 1987). In addition to the questions raised by the inclusion of outside, especially clerical, speakers, this presents the same majority-rule difficulty. Different problems would be raised if students self-consciously attempted to provide diversity by selecting representatives of different religious and nonreligious groups. Aside from the difficulties involved in identifying various discrete beliefs and the persons holding them, this procedure would achieve its end only if these speakers gave invocations that expressed their particular beliefs. Many students, however, might not wish to offer invocations reflecting their beliefs at graduation.

122. In *Mergens*, the plurality noted, perhaps as an example, the practice of the university in *Widmar v. Vincent*, 454 U.S. 263 (1981). The plurality observed that the university's student handbook stated that the school's name "will not be identified with the aims, policies, or opinions of any student organization or its members." *Mergens*, 110 S. Ct. at 2372 (citing *Widmar*, 454 U.S. at 274 n.14); see also *County of Allegheny v. ACLU*, 492 U.S. 573, 619 (1989) (Blackmun, J.) ("'explanatory plaque' may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs." (quoting *Lynch v. Donnelly*, 465 U.S. 668, 707 (1984) (Brennan, J., dissenting))).

123. See *Mergens*, 110 S. Ct. at 2373 (holding that students' knowledge of their opportunity to initiate clubs "counteract[s]" any perception of endorsement of religion); see also Loewy, *supra* note 120, at 155 (students' awareness of school's open forum policy removes likelihood of perceived school endorsement of student speech).

activity carries the imprimatur of the state. This principle presupposes an inquiry into the state's relation to the speech. Courts have been compelled to focus on the content of invocations because they have largely dispensed with this inquiry into endorsement. *Mergens*, however, confirms its importance. Taken together, *Mergens* and these recent invocation cases reveal, in sharply different ways, that fidelity to *Engel v. Vitale*<sup>124</sup> lies not in prohibiting, but in permitting, prayer at graduation.

---

124. 370 U.S. 421 (1962).

