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# Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities

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# NOTE

# ASSUMING MATURITY MATTERS: THE LIMITED REACH OF THE ESTABLISHMENT CLAUSE AT PUBLIC UNIVERSITIES

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## INTRODUCTION

As the population of the United States continues to diversify, the constitutional commitment to preventing the exclusion of individuals and groups based on religious beliefs, or lack thereof, becomes increasingly important.[1] Both the Supreme Court and scholars have acknowledged that government alignment with one religious group may effectively exclude all others, leading to the hatred, ostracism, or persecution of those with contrary beliefs.[2] The Establishment Clause, which prohibits the government from making any "law respecting an establishment of religion," aims to circumvent this danger by mandating the separation of church and state.[3]

The position of the Establishment Clause—the outset of the First Amendment[4]—conveys the Clause's fundamental nature.[5] The Clause appropriately precedes all other First Amendment guarantees because the protection it provides is essential to the rights the First Amendment subsequently confers.[6] Government preference for one religion (or religion generally) inhibits the freedom of expression of those individuals who choose to practice a different religion (or none

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1 *See* Alan E. Garfield, *A Positive Rights Interpretation of the Establishment Clause*, 76 TEMP. L. REV. 281, 283 (2003) (suggesting that the Establishment Clause's promise to include "all members [of society], regardless of their religious affiliation or lack thereof," must be continually reaffirmed as the United States becomes more diverse); Shahin Rezai, County of Allegheny v. ACLU: *Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503, 504 (1990) (noting the need for renewed clarity as to the meaning of the Establishment Clause given the growing diversity of religious beliefs in the United States); *see also* COUNCIL OF ECONOMIC ADVISORS, CHANGING AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING BY RACE AND HISPANIC ORIGIN 4 (1998) (quantifying the increased diversity in the U.S. population). The words of George Wasbington evince that this intellectual dedication to inclusion has existed since the Nation's founding moment:

> [I] beg you will be persuaded, that no one would be more zealous than myself to establish effectual barriers against the horrors of spiritual tyranny, and every species of religious persecution. . . . [E]very man, conducting himself as a good citizen, and being accountable to God alone for his religious opinions, ought to be protected in worsbipping the Deity according to the dictates of his own conscience.

ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 495 (1950). Of course, Establishment Clause doctrine has evolved throughout the last two centuries. Although inclusive attitudes in the eighteenth century may have been restricted to the acceptance of only different faiths within Christianity, modern religious tolerance is understood without such limits and applies to "'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'" *See* County of Allegheny v. ACLU, 492 U.S. 573, 590 (1989) (quoting Wallace v. Jaffree, 472 U.S. 38, 52 (1985)).

2 *See* Engel v. Vitale, 370 U.S. 421, 429–32 (1962); Garfield, *supra* note 1, at 292.

3 *See* U.S. CONST. amend. 1.

4 *Id.*

5 *See* FRANKLYN S. HAIMAN, RELIGIOUS EXPRESSION AND THE AMERICAN CONSTITUTION 11 (2003).

6 *See id.* at 11–12 (characterizing the Establishment Clause and the Free Exercise Clause as "mutually dependent concepts").

at all).[7] As a result, government selection and approval of religion necessarily reduces the status of these individuals to "second-class citizens."[8] More fundamentally, an established religion limits an individual's freedom of speech and ability to exercise religion freely by infringing on the "freedom of conscience" necessary for even the initial development and expression of religious ideas and ideals.[9]

Various actions of public institutions can suggest a state's imprimatur on religious activity and may prompt challenges under the Establishment Clause.[10] Plaintiffs raise Establishment Clause challenges to oppose the actions of public educational institutions with particular frequency.[11] This is not surprising given that the Establishment Clause rightfully assumes great significance in the distinctive context of public education.[12] After all, public educational institutions "are by nature places for instilling beliefs and thought"; that is, they function as "institutions for the inculcation of values."[13] Naturally, if the actions of public educational institutions—the very institutions responsible for instilling democratic values in, and influencing the minds of, successive generations—suggest that the government condones the establishment of a religion, then the strength of the Establishment

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7 *See id.* at 12.

8 *See id.*

9 *See* Wallace v. Jaffree, 472 U.S. 38, 50 (1985) (noting that an "individual's freedom of conscience [is] the central liberty that unifies the various Clauses in the First Amendment"); HAIMAN, *supra* note 5, at 11; Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 67–68 (2002). Protecting individual liberty, autonomy, and equality of citizenship, regardless of religious choice, are prominent values underlying the Establishment Clause. *See supra* notes 6–8 and accompanying text. For an extensive discussion of these values and others that the Establishment Clause supports, see Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 37–60 (2004).

10 *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (publicly funded vouchers to private religious schools); County of Allegheny v. ACLU, 492 U.S. 573 (1989) (display of religious symbols both in and outside of public buildings); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (property tax exemption for religious organizations).

11 *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (mandate that elementary school students recite the Pledge of Allegiance containing the phrase "under God"); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (funding of a religious newspaper at a public university); *Wallace*, 472 U.S. at 38 (moment of silence in public schools for meditation or voluntary prayer); Zorach v. Clauson, 343 U.S. 306 (1952) (release of students from public school for religious instruction); People *ex rel* McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (religious instruction in public schools); Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972) (mandatory chapel attendance policy for cadets at a public military academy).

12 *See* Patrick F. Brown, Note, Wallace v. Jaffree *and the Need to Reform Establishment Clause Analysis*, 35 CATH. U. L. REV. 573, 573 (1986) (emphasizing that the boundaries of permissible government religious activity are particularly controversial in the context of public education).

13 *See* Julie Underwood, *Public Funds for Private Schools: The Gap Between Higher and Lower Education Widens*, 41 EDUC. L. REP. 407, 420 (1988).

Clause and, for that matter, all of the Constitution's guarantees is in great doubt.[14]

The long-standing aspiration of public education as an institution designed to prepare citizens to participate in a pluralistic and democratic society[15] further necessitates the protection of all the First Amendment's guarantees.[16] Fostering and encouraging the free exchange of diverse viewpoints is essential to both teaching and learning,[17] particularly in higher education where an explicit institutional goal is to prepare individuals for productive lives in a competitive and diverse society.[18] Indeed, the Supreme Court has recognized that "'[t]he Nation's future depends upon leaders trained through wide exposure to [the] robust exchange of ideas'" that occurs in higher

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14 *See* Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1697 (1990) ("The extent to which we take the commitment to democracy seriously is measured by the extent to which we take the commitment to education seriously."); Underwood, *supra* note 13, at 420; Benjamin R. Barber, *America Skips School*, HARPER'S MAGAZINE, Nov. 1993, at 44 (stating that democracy and informed citizenship begin with public education); *see also* HAIMAN, *supra* note 5, at 43 ("[S]o many people perceive, either rightly or wrongly, that the shaping of young minds is at stake [in the public schools].").

15 The Supreme Court eloquently stated this point in the Court's unanimous opinion in *Brown v. Board of Education*:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

347 U.S. 483, 493 (1954).

16 *See* Redish & Finnerty, *supra* note 9, at 67 ("If the American public educational system produces citizens whose minds have been consciously molded in a particular manner, the exercise of free expression by those citizens cannot really be free in any meaningful sense of the term.").

17 *See* Putnam, *supra* note 14, at 1697 (highlighting the importance of an education system that produces individuals who are able to think and learn both freely and critically); John E. Walsh, *College Students as Learners and Thinkers*, 33 J. HIGHER EDUC. 324, 326 (1962) ("In one sense at least, society has set aside this period of life; it has given the student freedom, and it has created the academic atmosphere, for the precise purpose of making possible independent, creative, and imaginative thinking."); *cf.* Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 138 (explaining that a diverse population in an educational setting cultivates educational excellence because it results in the exchange of many different viewpoints); *supra* notes 7–9 and accompanying text.

18 *See* Grutter v. Bollinger, 539 U.S. 306, 330–31 (2003) (noting the role of universities in preparing students for professional careers in a diverse global marketplace); *see also* Sarah Howard Jenkins et al., *God Talk by Professors Within the Classrooms of Public Institutions of Higher Education: What Is Constitutionally Permissible?*, 25 AKRON L. REV. 289, 294 (1991) (describing institutions of public higher education as "sanctuar[ies] for presenting, exchanging, and debating ideas").

education[19] and that religious diversity cultivates informal learning for higher education students.[20]

Despite this strong interest in vigorously enforcing all facets of the First Amendment in higher education, case law and dicta reveal that courts are likely to analyze with less scrutiny potential Establishment Clause violations in this context than violations arising in primary or secondary education.[21] The courts' propensity to treat Establishment Clause claims differently depending on the institutional level is particularly apparent in one aspect of public education that often gives rise to Establishment Clause concerns—school prayer.[22]

This Note contends that the amount of protection the Establishment Clause provides against prayer in a school environment greatly depends on the level of education at which the prayer occurs. Existing case law and dicta addressing state-sponsored prayer in primary, secondary, and higher education demonstrate that courts invariably *assume* that college students are older and more mature and are, therefore, less impressionable than primary- and secondary-level students.[23] This assumption is dispositive to claims under each of the traditional frameworks for evaluating Establishment Clause challenges—the *Lemon* test, the endorsement test, the coercion test, and the *Marsh* analysis—all of which emphasize the audience's likely perception of the prayer.[24] As a result, the meaningful protection against state-sponsored prayer which is important in all public educational settings is lacking in higher education, and courts plausibly could invoke this assumption to further limit the reach of the Estahlishment Clause in other contexts where the court can similarly construe the character of the audience. It is, therefore, necessary to question both the fundamental assumption that distinguishes between students at different levels of education and the prominence with which the level of education should factor into the Establishment Clause calculus.[25]

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19 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

20 *See id.* at 312–14.

21 *See infra* Part III.

22 *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (prayer before a public high school football game); Lee v. Weisman, 505 U.S. 577 (1992) (prayer at a public middle school graduation); Marsh v. Chambers, 463 U.S. 783 (1983) (prayer at a legislative session); Engel v. Vitale, 370 U.S. 421 (1962) (prayer in a public school classroom); Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003) (prayer before supper at a public military institute); Chaudhuri v. Tennessee, 130 F.3d 232 (6th Cir. 1997) (prayer at a public university graduation); Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997) (benediction and invocation at a public university graduation).

23 *See infra* Part III.

24 *See infra* Part IV.

25 *See infra* Part V.

Part I of this Note outlines the four frameworks that courts have historically invoked to analyze potential Establishment Clause violations. Part II describes state-sponsored prayer that can, and does, occur in higher education. Part III synthesizes the Supreme Court's dicta implying that prayer in higher education is less threatening than prayer in lower levels of education. In light of the central assumption that the audience in higher education is older and more mature and, therefore, less impressionable, Part IV argues that, except in the most extreme circumstances, efforts to use the Establishment Clause to enjoin prayer in higher education are likely to prove ineffective regardless of which Establishment Clause tests or standards a court employs. Part V describes a number of grounds upon which to question each of the various components of this assumption and the assumption generally. This inquiry is essential to ensure, at the very least, that Establishment Clause decisions concerning prayer at all levels of education are well-reasoned. Ideally, questioning this fundamental assumption (and thereby questioning the overwhelming focus on the level of education in this area of Establishment Clause jurisprudence) will result in increased protection in future higher education prayer cases. More generally, this inquiry can prevent the further use of this assumption to erode the protection of the Establishment Clause whenever it is raised in the context of higher education.

## I
## JUDICIAL STANDARDS IN ESTABLISHMENT CLAUSE JURISPRUDENCE

The Supreme Court's Establishment Clause jurisprudence has given rise to a variety of tests and factors that courts have applied in subsequent challenges. Although the three-pronged *Lemon* test[26] has historically been the most prominent of the Establishment Clause tests,[27] courts also analyze Establishment Clause challenges using three other factors or tests.[28] In most Establishment Clause cases that relate to public education, courts have applied—either independently or in combination—the *Lemon* test, the coercion test, and the endorsement test.[29] The coercion test considers whether individuals are pressured to participate in a religious activity,[30] and the endorsement test focuses on whether the state intends to endorse or actually endorses a religion through the activity.[31] The Supreme Court has also

26 Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
27 *See* Garfield, *supra* note 1, at 284.
28 *See infra* text accompanying notes 30–33.
29 *See infra* Part I.A–C.
30 *See infra* Part I.C.
31 *See infra* Part I.B.

invoked the *Marsh* analysis when considering traditional prayers in public institutions.[32] And although the Court has not yet employed this analysis in the public education context, the potential exists for the Court to use a *Marsh* analysis to evaluate prayer in higher education.[33]

The use of such a variety of tests and factors raises doubt as to whether a consistent and coherent scheme exists by which to predict the outcome of an Establishment Clause challenge.[34] Many of the factors, however, are quite similar in substance, and limited Establishment Clause protection against prayer in higher education thus seems inevitable under any test or set of factors.[35] In fact, even though the Supreme Court has voiced its refusal "to be confined to any single test or criterion in this sensitive area,"[36] the Court acknowledges that

> the essential principle [of all of the Establishment Clauses tests] remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."[37]

Despite this common essential principle and the "virtually interchangeable"[38] nature of the Establishment Clause tests, courts and commentators still tend to consider the *Lemon* test, the endorsement test, the coercion test, and the *Marsh* analysis as separate—though sometimes overlapping—approaches.[39] It remains uncertain which test a court would apply to a claim of state-sponsored prayer in higher education; therefore, this Note considers each test in turn.

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32 Marsh v. Chambers, 463 U.S. 783 (1983); *see infra* Part I.D.

33 *See infra* Part I.D.

34 *See* Chelsea Chaffee, Note, *Making a Case for an Age-Sensitive Establishment Clause Test*, 2003 BYU EDUC. & L.J. 257, 259–60 (claiming that the Court has left the Establishment Clause in a "mild state of confusion" by failing to overrule the *Lemon* test and yet not always following it); Marilyn Perrin, Note, Lee v. Weisman*: Unanswered Prayers*, 21 PEPP. L. REV. 207, 252 (1993) (observing that by focusing on the psychological coercion of school prayer in *Lee*, the Court created a "notoriously incoherent Establishment Clause jurisprudence") (internal quotation marks omitted).

35 *See infra* Part IV.

36 *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

37 *See* County of Allegheny v. ACLU, 492 U.S. 573, 593–94 (1989) (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

38 Robert C. Stelle, Comment, *Religious Freedom in the Twenty-First Century: Life Without* Lemon, 23 S. ILL. U. L.J. 657, 658 (1999).

39 *See, e.g.*, Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003) (labeling the *Lemon* test, the coercion test, and the endorsement test as the "three traditional tests" in Establishment Clause cases).

A. The *Lemon* Test

The three-pronged *Lemon* test has historically been the most prominent Establishment Clause test[40] and remains good law today.[41] Courts have applied *Lemon* in many, but not all,[42] of the cases considering the validity of prayer at the primary and secondary school levels[43] and in higher education.[44] Under *Lemon*, a court first considers whether the government's action has a secular purpose,[45] which is "'a fairly low hurdle' for the state."[46] In the context of both lower and higher education cases, solemnizing or memorializing a public occasion qualifies as a secular purpose.[47] Even encouraging individuals "to reflect on and develop their own spiritual dimension" and "providing an occasion for [Americans'] tradition of expressing thanksgiving and requesting divine guidance" have passed the secular purpose prong.[48] A government action is not secular, however, if its "actual purpose is to endorse or disapprove of" religion or a religious belief.[49] But an action that is only partially motivated by a secular purpose may still pass muster,[50] and courts give a great deal of deference to the government's professed secular purpose.[51]

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40 Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); *see* Garfield, *supra* note 1, at 284.

41 *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000). Although *Santa Fe* explicitly affirmed that *Lemon* is still good law, the test applied in *Santa Fe*, generally termed the "endorsement test," slightly alters *Lemon*'s first two prongs and raises the possibility that the endorsement test will eliminate traditional *Lemon* applications in the future. *See infra* Part I.B. The Court, however, has not expressly replaced the *Lemon* test with an endorsement analysis, making it necessary to consider these two analyses separately.

42 *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587, 592 (1992) (focusing on the coercive nature of prayer at graduation, rather than explicitly applying the *Lemon* test affirmed earlier in the opinion).

43 *See, e.g.*, *Santa Fe*, 530 U.S. at 314; Wallace v. Jaffree, 472 U.S. 38, 55 (1985).

44 *See Mellen*, 327 F.3d at 371 (applying the three-pronged Establishment Clause test developed in *Lemon*, in addition to the principles of coercion and endorsement, when evaluating prayer at the Virginia Military Institute (VMI)); Chaudhuri v. Tennessee, 130 F.3d 232, 236 (6th Cir. 1997); Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997).

45 *See Lemon*, 403 U.S. at 612–13.

46 *See Mellen*, 327 F.3d at 372 (quoting Brown v. Gilmore, 258 F.3d 265, 276 (4th Cir. 2001)).

47 *See Chaudhuri*, 130 F.3d at 236; *Tanford*, 104 F.3d at 986 (citing Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)).

48 *See Mellen*, 327 F.3d at 373 (internal quotation marks omitted); *infra* note 51. Despite granting deference to this secular purpose, the *Mellen* court did voice skepticism about the prayer's purpose. *See id.* It remains significant, however, that the court could have, but did not, strike down the prayer on the secular purpose prong. *See id.*

49 *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (internal quotation marks omitted).

50 *See* W. Bradley Colwell & Paul W. Thurston, *Prayer and University Commencement: Application of* Lee v. Weisman, 94 EDUC. LAW REP. 1, 6–7 (1994).

51 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000); *Mellen*, 327 F.3d at 374 ("In evaluating the constitutionality of the supper prayer, however, we will accord General Bunting the benefit of all doubt and credit his explanation of the prayer's purposes.").

The second prong of the *Lemon* test asks whether the action's "principal or primary effect [is] one that neither advances nor inhibits religion."[52] Essentially, this prong evaluates whether the government favors or endorses religion or a particular religious belief.[53] Government action that actually endorses religion violates the Establishment Clause regardless of the secular purpose originally professed.[54]

Finally, the third prong of the *Lemon* test examines whether the government's action creates "excessive government entanglement with religion."[55] This prong scrutinizes the contact between the government and religion or religious groups.[56] Courts consider "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[57] In the context of higher education, courts traditionally have not considered a university's selection of a cleric or a university's decision to include prayer at a ceremony as excessive entanglement.[58]

B. The Endorsement Test

The endorsement test, first posed by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*, slightly alters the first two prongs of the *Lemon* test and is considered by some a modification of *Lemon*.[59] Instead of solely focusing on the presence of a secular purpose, the endorsement test scrutinizes whether the government's purpose is to endorse or condemn religion.[60] A government action that has the effect of endorsing religion, whether intentional or not, violates the Establishment Clause regardless of its secular purpose.[61] In explaining the rationale behind the endorsement test, Justice O'Connor described an apparent government endorsement of a religion as "send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the

52 *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

53 *See* County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989).

54 *See Wallace*, 472 U.S. at 56 n.42 (1985) (citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

55 *See Lemon*, 403 U.S. at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

56 *See* Brown, *supra* note 12, at 582–83.

57 *See Lemon*, 403 U.S. at 615.

58 *See* Chaudhuri v. Tennessee, 130 F.3d 232, 238 (6th Cir. 1997); Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997).

59 *See* 465 U.S. at 689–92 (O'Connor, J., concurring); Stelle, *supra* note 38; *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314–16 (2000) (applying the endorsement test); Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. MICH. J.L. REFORM 247, 271 (2003) (discussing Justice O'Connor's reformulation of the *Lemon* test).

60 *See* Lynch v. Donnelly, 465 U.S. 668, 690–91 (1984) (O'Connor, J., concurring).

61 *See id.* at 691 (O'Connor, J., concurring).

political community," ultimately leading to the very political and religious divisiveness that the Establishment Clause aims to prevent.[62] Although Justice O'Connor announced the endorsement test in a concurring opinion, the Court subsequently adopted the test.[63] The Court further confirmed an increasing focus on the endorsing nature of state-sponsored prayer in the most recent Supreme Court case examining prayer in a public high school, *Santa Fe Independent School District v. Doe*.[64]

### C. The Coercion Test

Though the *Lemon* test considers the government's purpose, effect, and involvement with religious activity, it does not explicitly consider whether the government's actions actually compel religious activity, causing courts to consider coercion separately in Establishment Clause challenges.[65] Under the coercion test, if government action "coerce[s] anyone to support or participate in religion or its exercise," the government has violated the Establishment Clause.[66] "[C]oercion has emerged as a prevailing consideration in the school prayer context,"[67] largely because pressure to conform is heightened when "the expression of religious beliefs . . . carr[ies] the sanction and compulsion of the state's authority."[68] The importance of coercive factors in a school setting is demonstrated by the Supreme Court's choice to rely on a coercion analysis in lower-level school prayer cases, even where lower courts reached the same result using the *Lemon* test.[69] Although coercion has been a prominent concern at the primary and secondary school levels, the Court has implied that the coercion test may be confined to the elementary and secondary public school contexts.[70]

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62 *Id.* at 688 (O'Connor, J., concurring). *See generally* Engel v. Vitale, 370 U.S. 421, 429–32 (1962) (outlining the effects of government endorsement of a religion).

63 *See* County of Allegheny v. ACLU, 492 U.S. 573, 595–97 (1989).

64 *See* 530 U.S. at 307–08, 316.

65 *See* Brown, *supra* note 12, at 588–89. A coercion test follows logically from the Establishment Clause. Coercing religious practice conveys the message that the government is establishing, or at least favoring, a chosen religion, which implicitly impinges upon the free exercise of religion. *See id.* at 589.

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

67 Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003).

68 Paul G. Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1046 (1963); *see Lee*, 505 U.S. at 592 (noting that prayer in the public school context is more likely to convey the use of the state's "machinery" to promote religion).

69 *See* Peter E. Barber, Bishop v. Aronov: *"No Talking in Class!"; Does the Elementary School Adage Apply to University Professors?*, 44 ALA. L. REV. 211, 215 (1992).

70 *See Lee*, 505 U.S. at 593 ("We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position."); David Schimmel, *Graduation Prayers Flunk Coercion Test: An Analysis of* Lee v. Weisman, 76 EDUC. L. REP. 913, 926–27 (1992).

D. The *Marsh* Analysis

The analysis utilized in *Marsh v. Chambers* has been interpreted in two ways, drawing on the majority and dissenting opinions in *Marsh*. Some view *Marsh* as a narrow exception to traditional Establishment Clause jurisprudence,[71] while others view the test as an alternative Establishment Clause analysis designed to validate government activities that, although religious, are "deeply embedded in the history and tradition of this country," such as prayer at the opening of daily state legislative sessions.[72] Given that *Marsh* presented a unique set of facts, it remains unclear precisely what circumstances are necessary for a religious practice to withstand scrutiny under a *Marsh* analysis.[73] The *Marsh* Court plainly stated that a historical pattern alone does not justify a governmental religious activity and the Court has subsequently invoked this analysis in a very limited fashion.[74]

The Court did not explicitly hold that the *Marsh* analysis applies to public bodies other than the federal courts and legislatures[75] and has expressly declined to engage in a *Marsh* analysis to validate prayers in a high school environment.[76] Despite its narrow interpretation, *Marsh* remains a potential consideration in evaluating the constitutionality of religious activity in higher education. In fact, the Seventh Circuit recently invoked a *Marsh* analysis in allowing invocations and benedictions at university commencements and drew comparisons between higher education and legislative settings.[77]

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71 *See* 463 U.S. 783, 796 (1983) (Brennan, J., dissenting).

72 *Id.* at 786.

73 *See id.* at 790–91 (holding that the "unique history" of legislative prayer—that the First Congress approved the draft of the First Amendment and approved payment of chaplains in Congress in the same week—proved that the prayer posed no threat to the Establishment Clause).

74 *See* County of Allegheny v. ACLU, 492 U.S. 573, 602–03 (1989) (interpreting *Marsh* narrowly and stating that a historical pattern of prayer does not justify a constitutional violation today).

75 *See* 463 U.S. at 783; Recent Case, Coles ex rel. Coles v. Cleveland Board of Education, *171 F.3d 369 (6th Cir. 1999)*, reh'g denied, *183 F.3d 538*, 113 HARV. L. REV. 1240, 1243 (2000).

76 *See* Lee v. Weisman, 505 U.S. 577, 596–97 (1992).

77 *See* Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997); Underwood, *supra* note 13, at 419. *But see* Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019 (2004). Justice Scalia even alluded to the applicability of a *Marsh* analysis when adjudging prayer in a non-legislative context by pointing out that "group prayer before military mess is more traditional than group prayer at ordinary state colleges." Bunting v. Mellen, 541 U.S. 1019, 1026 (2004) (Scalia, J., dissenting from denial of certiorari); *see* Anne Gearan, *2 Justices Hit Court Liberals on Prayer Ban; Scalia, Rehnquist Wanted to Hear Case From Military College*, CHI. SUN-TIMES, Apr. 27, 2004, at 20 (internal quotation marks omitted) (describing the controversy among the Justices over whether to grant certiorari in *Mellen*).

## II
## AN OVERVIEW OF SCHOOL PRAYER IN HIGHER EDUCATION

Establishment Clause doctrine has come to stand, in part, as a guarantee that "neither the power nor the prestige of the Federal Government will be used to control, support or influence the kinds of prayer that American people can say," because state-sponsored prayer, at the very least, conveys the appearance that the government is aligned with religion.[78] State-sponsored prayer potentially arises when the state countenances the delivery of religious messages or messages invoking religious figures or deities in a public context.[79] Naturally, prayer that occurs in, or is facilitated by, a public institution, such as a public school, provides fertile ground for an Establishment Clause challenge.[80]

Although the Supreme Court has extensively discussed prayer that occurs in primary and secondary education,[81] it "has never directly addressed whether the Establishment Clause forbids state-sponsored prayer at a public college or university."[82] The dearth of case law regarding prayer in public higher education, and the fact that only a few notable cases have challenged prayer in higher education, reflects neither the frequency with which prayer occurs in public colleges or universities nor the public's interest in the propriety of prayer in higher education. In fact, public discourse regarding the propriety

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78 Engel v. Vitale, 370 U.S. 421, 429–30 (1962). Although the text of the First Amendment originally placed substantive limits only on the Federal Government, the Court has since interpreted the Fourteenth Amendment to apply to the guarantees of the First Amendment, so as to include the states and all of their political subdivisions, including institutions of public education. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

79 One dictionary defines "prayer" as "[a] reverent petition made to a deity or other object of worship." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1029 (New College ed. 1980). What exactly qualifies as prayer in context is, of course, subject to interpretation. By definition, benedictions and invocations constitute prayer; a benediction is a "prayer or scripture passage pronounced to dismiss a meeting," and an invocation is a "prayer of entreaty that is usually a call of the divine presence and is offered at the beginning of a meeting or service of worship." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 203, 1190 (1986). In accordance with such definitions, courts have broadly considered that any religious message, including invocations, blessings, and benedictions, can constitute prayer. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306–07 (2000) (classifying an "invocation" as "primarily . . . an appeal for divine assistance" and holding that a school-sponsored invocation that presented a "focused religious message" violated the Establishment Clause). A religious figure—such as a rabbi, nun, priest, minister, or clergyman—does not have to deliver the religious message for it to qualify as prayer. *See id.* at 301 (holding a student-led and initiated invocation unconstitutional).

80 *See supra* note 22.

81 *See id.*

82 *Mellen*, 327 F.3d at 366. Notably, the Supreme Court denied certiorari in *Mellen* on procedural grounds. *See Mellen*, 541 U.S. at 1019–22. The Supreme Court also denied certiorari in the two circuit court cases addressing prayer at universities. Chaudhuri v. Tennessee, 130 F.3d 232, 240 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998); Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997), *cert. denied*, 522 U.S. 814 (1997).

of prayer at universities is occurring on many levels, including within state and federal governments, revealing the public's interest—both for and against—this practice.[83] Similar to the primary and secondary school context, prayer in higher education may take a variety of forms, including invocations, benedictions, and blessings.[84] Prayer in higher education frequently occurs in the course of sporting events,[85] meals,[86] school ceremonies, meetings, and commencement ceremonies.[87] And because "[w]e are in changing times, . . . it might be that

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83 *See* Lyle Denniston, *Justices Won't Hear Prayer Case Appeal*, BOSTON GLOBE, Apr. 27, 2004, at A2 (noting that twelve different states urged the Supreme Court to address prayer at VMI by hearing *Mellen v. Bunting* and expressed their strong interest in allowing prayers at graduation exercises and other traditional college ceremonies); Ariel Sabar, *GOP Bill Backs Meal Prayers*, BALT. SUN, Oct. 13, 2003, at 1B (describing a bill co-sponsored by twenty-three members of the House of Representatives that would safeguard prayer at military academies); *University Debates Graduation Prayer*, CHI. TRIB., Mar. 10, 2000, § 2, at 8 (stating that the Rhode Island Senate voted unanimously in 1999 to pass a resolution urging clergy-led invocations and benedictions at university commencements); Ohio State University Students for Freethought @ The Ohio State University, *at* http://www.sffosu.org/index.php?section=resources&resource=FAQs&page=prayer (last visited Feb. 28, 2005) (organizing Ohio State University students to speak out against official prayer at commencement).

84 *See infra* notes 85–87.

85 *See, e.g.*, Bernie Lincicome, *Why Legislate Religion Out of Sports, Pray Tell?*, CHI. TRIB., June 23, 2000, § 4, at 1 (describing the ritual of a former Florida State University football coach who had the team captain lead the squad in prayer before every game); Adam Thompson, *Supreme Court Will Hear Prayer Case*, DENV. POST, Mar. 29, 2000, at D7 (describing the lead role of Colorado University basketball coach Ricardo Patton in team prayers before games and after practices and stating that coaches at many other public universities practice organized team prayer). Litigation has recently ensued in Atlanta over religion and college sports. *See* Jenny Jarvie & Ellen Barry, *The Nation; Cheerleading Coach Finds Prayer Not a Team Sport; Judge Says the University of Georgia Doesn't Have to Reinstate a Woman Fired for Requiring Girls to Participate in Religious Activities*, L.A. TIMES, Dec. 21, 2004, at A23. After being fired, a University of Georgia cheerleading coach who allegedly retaliated against a squad member who complained about the coach's alleged religious activities—pressuring students to attend bible study, leading prayers before sporting events, and using the squad listserve as a vehicle for prayer requests—is suing the University of Georgia under the First and Fourteenth Amendments. *See id.* In a pending civil case, the coach claims "that the university tolerated and even encouraged religious activity." *See id.*

86 *See Mellen*, 327 F.3d 355. VMI was not the only military institution to require prayer before a meal; at the Naval Academy in Annapolis, Maryland, all 4,200 students face disciplinary action if they do not attend a meal at which a chaplain leads grace. Sabar, *supra* note 83. Even after the Fourth Circuit's disapproval of prayer before supper at VMI, the Naval Academy, which also resides in the Fourth Circuit, indicated that it did not plan to change its lunchtime ritual. *See id.*

87 *See Chaudhuri*, 130 F.3d at 233–34 (upholding nonsectarian prayer at public university functions, including "graduation exercises, faculty meetings, dedication ceremonies, and guest lectures"); *Tanford*, 104 F.3d 982 (upholding a nonsectarian invocation and benediction by a religious leader at a university commencement); Philip Hosmer, *A Different Freedom Fight*, WASH. POST, Aug. 17, 1994, at B1 ("Many public universities use some form of prayer at their graduation ceremonies."); *University Debates Graduation Prayer*, *supra* note 83 (describing the pressure on the University of Rhode Island to offer prayers at commencement similar to those that the State's two other publicly-funded campuses offer).

other universities sometimes in the future will contemplate adding prayer to other mandatory activities."[88]

Dissenting from the Court's recent denial of certiorari in *Mellen v. Bunting*, the Fourth Circuit case that invalidated daily supper prayer at the Virginia Military Institute (VMI), Justice Scalia recognized that "[t]he weighty questions raised by the petitioners—about the proper application of *Lee* where adults rather than children are the subjects[—]deserve this Court's attention . . . ."[89] In fact, because so few courts have yet to address prayer in higher education, states and public colleges have been left without guidance as to whether and when prayer is appropriate or permitted.[90]

Public colleges and universities have reached different conclusions about prayer by selectively marshalling case law addressing prayer in elementary and secondary schools or reading into the sparse case law involving higher education.[91] While some universities have chosen to continue to permit prayer, others have discontinued the practice, believing that their practices are unconstitutional.[92] Given the lack of a controlling Supreme Court rule on prayer in higher education, circuit court opinions finding prayer constitutional by distinguishing higher and lower education, and Supreme Court opinions finding prayer at lower levels of education unconstitutional, confusion remains. To provide universities with a more coherent framework for structuring their decisions regarding prayer, it is necessary to determine the probable reach of the Establishment Clause in this context before questioning the underlying reasoning.

## III

## PROVING THE ASSUMPTION EXISTS: NOTIONS ABOUT AGE, MATURITY, AND IMPRESSIONABILITY

The current rulings regarding prayer in lower and higher education evidence an "apparent double standard" that subjects similar

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88 *See* Jerry Markon, *VMI Prayer Violates Constitution, Panel Rules*, WASH. POST, Apr. 29, 2003, at B1 (internal quotation marks omitted).

89 541 U.S. 1019, 1022 (2004) (Scalia, J., dissenting from denial of certiorari).

90 States and public colleges and universities are resolving the questions surrounding prayer in many different ways. For instance, the Texas Attorney General argued that chaplain-led prayer should be allowed at public universities. *See* Dean Lewis, *Your Turn*, SAN ANTONIO EXPRESS-NEWS, Jan. 27, 2004, at 6B. Taking a very different approach, the Chancellor at Southern Illinois University permitted the deans of the individual colleges to decide whether to include prayer at each school's graduation ceremony. *See* Arin Thompson, *Forum Ends in Tie on Commencement Prayer*, DAILY EGYPTIAN, Apr. 26, 2002, *at* http://www.illinimedia.com/di/apr02/apr26/news/stories/campus01.shtml (last visited Feb. 28, 2005). An informal vote among interested students as to whether the school should offer prayer at commencement ended in a tie. *See id.*

91 *See supra* note 90.

92 *See supra* notes 83–87, 90 and accompanying text.

types of prayers in higher education to less scrutiny.[93] For instance, although prayer before a high school football game would violate the Establishment Clause, even if attendance at the game were completely voluntary,[94] both the Sixth Circuit in *Chaudhuri v. Tennessee* and the Seventh Circuit in *Tanford v. Brand* allowed prayer at technically voluntary university events, including graduation, faculty meetings, ceremonies, and guest lectures.[95] Likewise, prayer delivered at a middle school graduation by a school-selected clergyman violates the Establishment Clause,[96] while prayer at a college graduation led by a university-selected cleric remains acceptable.[97]

Despite a dearth of case law directly addressing prayer in higher education, the reasoning in cases addressing other types of Establishment Clause violations in higher education, as well as dicta in cases addressing school prayer at the primary and secondary levels, reveals that courts are likely to scrutinize prayer differently based on the level of education at which it occurs.[98] This differential treatment is rooted in one fundamental assumption never questioned by the courts: College students are older and more mature and, therefore, less impressionable than students in primary and secondary education.[99]

The Supreme Court has cited both the age and maturity of the prayer's audience as a justification for why instances of prayer in higher education might demand less exacting scrutiny than prayer in

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93 *See* Martha M. McCarthy, *Student-Initiated Prayer Meetings in Public Secondary Schools and Higher Education: An Apparent Double Standard*, 1 EDUC. L. REP. 481, 481 (1982); Underwood, *supra* note 13, at 417 (noting a clear distinction between cases addressing the establishment of religion in higher and lower education).

94 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000) ("Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.").

95 *See* Chaudhuri v. Tennessee, 130 F.3d 232, 240 (6th Cir. 1997); Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997).

96 *See* Lee v. Weisman, 505 U.S. 577, 598 (1992).

97 *See Tanford*, 104 F.3d at 986; *see also* Kevin F. O'Shea, *The First Amendment: A Review of the 1997 Judicial Decisions*, 25 J.C. & U.L. 201, 220 (1998) (concluding that prayer at colleges and universities will typically withstand Establishment Clause challenges).

98 Notably, extensive jurisprudence exists addressing other types of potential Establishment Clause violations in higher education that do not involve school prayer. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (funding for religious newspaper at a public university); Widmar v. Vincent, 454 U.S. 263 (1981) (use of public university facilities by a religious organization); Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972) (mandatory chapel attendance for cadets at a public military academy). Although it is beyond the scope of this Note to consider Establishment Clause violations other than those involving prayer in a higher education setting, this Note's analysis invokes particularly relevant language from other Establishment Clause challenges in higher education to shed light on how courts generally view the higher education environment. Additionally, this Note's analysis is relevant whenever the Establishment Clause is raised in the higher education context, whether or not the challenged action is related to school prayer.

99 *See infra* notes 118–20 and accompanying text.

primary or secondary education.[100] On numerous occasions, the Court has recognized university students as "young adults" that are "less impressionable"[101] or "less susceptible to religious indoctrination."[102] This perception of mature, young adults differs vastly from the images of primary and secondary school students who face inordinate pressure to conform to their peers,[103] require parental guidance on religious matters,[104] and are compelled by the state to attend school.[105]

A close look at the circuit court opinions in *Chaudhuri* and *Tanford* reveals that the Supreme Court's dicta distinguishing the prayer's audience by its level of education has, in fact, constrained the Establishment Clause's ability to restrict prayer in higher education.[106] In *Tanford*, the Seventh Circuit explicitly referenced the heightened concern that applies to prayer in primary and secondary schools and the "less impressionable" nature of university students.[107] The court cited these considerations to support its conclusion that university students would not feel coerced to participate in prayer and that prayer among higher education students is truly voluntary in nature.[108] The *Tanford* court also noted that "the mature stadium attendees were voluntarily present and free to ignore the cleric's remarks."[109]

Likewise, the Sixth Circuit reasoned in *Chaudhuri* that the audience's status as "college-educated adults" diminished the likelihood that prayers at university events would influence observers in such a way that would advance religion.[110] The *Chaudhuri* court explicitly invoked a maturity-focused rationale grounded in the Supreme Court's earlier statements and concluded that it would be unreasonable to presume that college-educated adults would view such prayers as indoctrination or be influenced in more than a remote or de minimis way.[111]

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100 *See Lee*, 505 U.S. at 593 ("We do not address whether [the prayer] is acceptable if the affected citizens are mature adults . . . .").

101 *Widmar*, 454 U.S. at 274 n.14.

102 Tilton v. Richardson, 403 U.S. 672, 686 (1971).

103 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000); *Lee*, 505 U.S. at 593–94.

104 *See* James E. Wood, Jr., *Religion and the Public Schools*, 1986 BYU L. REV. 349, 368.

105 *See* Schimmel, *supra* note 70, at 927–28.

106 *See* 130 F.3d 232, 237 (6th Cir. 1997); 104 F.3d 982, 985–86 (7th Cir. 1997).

107 *See* 104 F.3d at 985–86 (quoting Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981)).

108 *See id.* at 985.

109 *Id.*

110 *See* 130 F.3d at 237. The exact reach of *Chaudhuri* is somewhat unclear; although the court's discussion of the prayer's noncoercive nature frequently references the plaintiff's status as a professor and "doctor[ ] of philosophy," the court's reasoning also intimates that the situation would not be any different if applied to other participants at university events, namely students. *See id.* at 239.

111 *See id.* at 238–39.

Even *Mellen v. Bunting*, the only case where a circuit court declared prayer in a higher education setting unconstitutional, demonstrates the plain acceptance of the distinction that the audience of prayer in lower education is more impressionable than its higher education counterpart.[112] In fact, the Fourth Circuit explicitly acknowledged that the "mature adult" students at VMI were more like "children," due to the intense discipline and regulation they were subjected to at VMI, than were the observers of prayer at the universities in *Tanford* and *Chaudhuri*.[113] This figured prominently into the court's conclusion that VMI's prayer threatened its audience and, thus, violated the Establishment Clause.[114]

The Supreme Court confirmed the continued viability of this distinction as a consideration in Establishment Clause analysis in the only case explicitly addressing state-sponsored prayer aimed at adults. *Marsh v. Chambers*, which upheld prayer at the opening of each Nebraska legislative session, did not involve prayer in public education.[115] The Court, however, specifically noted that "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' or peer pressure."[116] When *Marsh*'s approval of prayer involving adults in the legislative context is compared with the Court's invalidation of prayer involving impressionable children at lower levels of education, it is clear that the level of education at which the prayer occurs is a crucial factor in determining the scrutiny to which the Court will subject the prayer.[117]

By prominently invoking age and maturity in *Marsh*, and subsequently reiterating in school prayer cases that a prayer's threat may vary depending on the level of education at which the prayer occurs, the Court has created a challenging environment for plaintiffs who wish to contest state-sponsored prayer at public universities. This environment has enabled the circuits that have thus far addressed prayer in a university setting to forego any meaningful discussion about the effects and concerns surrounding prayer in higher education by simply citing the age and maturity of the audience.[118] No decision—not *Marsh*, *Tanford*, *Chaudhuri*, *Mellen*, or any lower education prayer case—has even briefly discussed the merits of the fundamental assumption that state-sponsored prayer is less threatening when

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112 *See* 327 F.3d 355, 372 (4th Cir. 2003).

113 *See id.* at 371–72.

114 *See id.*

115 463 U.S. 783 (1983).

116 *See id.* at 792 (quoting Tilton v. Richardson, 403 U.S. 672, 686 (1971)) (citations omitted).

117 *See supra* notes 93–97 and accompanying text.

118 *See* Chaudhuri v. Tennessee, 130 F.3d 232, 237 (6th Cir. 1997); Tanford v. Brand, 104 F.3d 982, 985 (7th Cir. 1997).

targeted at an older and presumably more mature audience.[119] In fact, "courts have used the distinction without question and applied it even in other areas of law *as a matter of judicial notice.*"[120] It is particularly important to note this judicial silence, given that this key assumption appears to foreclose the possibility of protection against prayer in higher education under all four of the Supreme Court's Establishment Clause tests.[121]

## IV
## APPLYING THE ASSUMPTION: PRECLUDING PROTECTION IN HIGHER EDUCATION UNDER ANY TEST OR STANDARD

Although the Supreme Court has never ruled on state-sponsored prayer at a public college or university, the Court's dicta in lower-level school prayer cases and the approach of the three courts of appeals that have addressed prayer in higher education reveal the difficulty, if not impossibility, of bringing a successful Establishment Clause challenge. Prevailing doctrine acknowledges and apparently accepts—in both dicta and case law—key differences between the environments and audiences at varying levels of education.[122]

The assumption that the audience in higher education is older and more mature and, therefore, less impressionable, and that this properly affects Establishment Clause analysis, is dispositive regardless of which Establishment Clause test or standard a court employs. The level of education is thus a focal point of Establishment Clause analysis in the school prayer context. First, the Supreme Court's reluctance to extend a coercion analysis to higher education, coupled with the difficulty of proving coercion of young adults absent extreme circumstances, diminishes any likelihood of a successful challenge under the coercion test.[123] Second, a refusal to view prayer as threatening in a higher education setting makes it unlikely that any refuge exists under

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119 *See Chaudhuri*, 130 F.3d at 237 (concluding that "[i]t would not be reasonable to suppose that an audience of college-educated adults could be influenced unduly by prayers" without any discussion); *Tanford*, 104 F.3d at 986 (stating that "university students . . . are less impressionable" without any further discussion (internal quotation marks omitted)). Scholarly literature on Establishment Clause jurisprudence has also taken this assumption for granted. For example, in one article that briefly addresses and accepts this assumption—that older audiences are more mature and, therefore, less impressionable—the distinction is inadequately explained away in one sentence: "One need look only as far as the student protest movement of the 60s and early 70s to find support for this contention." John D. White, Casenote, *The Fight That God (Allah, Etc.) Started*, 39 S. TEX. L. REV. 165, 191 (1997).

120 Underwood, *supra* note 13, at 418 (emphasis added).

121 *See infra* Part IV.

122 *See supra* Part III.

123 *See infra* Part IV.A.

the *Lemon* or endorsement tests, as both of these tests emphasize the audience's perception of the prayer.[124] Finally, the remaining possibility that a court might apply a *Marsh* analysis, which emphasizes the age of audience members, is also unlikely to result in a successful challenge.[125] The Fourth Circuit's recent decision in *Mellen v. Bunting*, which invalidated daily prayer before supper at VMI, further reinforces the proposition that the character of the audience and the nature of the university environment are dispositive factors, and that courts will only consider offering Establishment Clause protection against prayer in higher education in the most limited of circumstances.[126]

### A. Passing the Coercion Test Barring Unusual Circumstances

The Supreme Court has invalidated prayer at lower levels of education by focusing on the coercive aspects of school prayer, especially where pressure from peers and others to take part in momentous school events made it nearly impossible for dissenters to refrain from participating in the prayer or, at least, from appearing to do so.[127] The Court has specifically stated its reluctance to consider whether coercion exists when the same situation arises in a higher education context, and has implied that the coercion test may be appropriate only when analyzing primary and secondary education cases.[128] Thus, lower courts have not utilized the coercion test when assessing prayer in higher education and are unlikely to do so. Even if a court were to employ this test, it is unlikely to consider the traditional higher education environment a coercive one.[129]

This conclusion is premised on the presumed characteristics of higher education previously discussed—reduced peer pressure to conform, a less captive and more mature audience, and a voluntary choice to attend.[130] Courts have, without question or analysis, ac-

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124 *See infra* Part IV.B.

125 *See infra* Part IV.C.

126 327 F.3d 355, 360 (4th Cir. 2003). When using circuit court cases to exemplify treatment of prayer in higher education in the following analysis, *Mellen* is not always relevant due to the unique nature of VMI as a military institution. The reasoning in *Mellen* and the unique circumstances of VMI, however, confirm the momentum in favor of limiting protection against prayer in higher education. *See infra* Part IV.B–C.

127 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310–12 (2000); Lee v. Weisman, 505 U.S. 577, 598 (1992).

128 *See Lee*, 505 U.S. at 593; Schimmel, *supra* note 70, at 926–27.

129 *See* Chaudhuri v. Tennessee, 130 F.3d 232, 238–39 (6th Cir. 1997); Tanford v. Brand, 104 F.3d 982, 985–86 (7th Cir. 1997); *see also* Schimmel, *supra* note 70, at 926–27 ("In *Weisman*, Kennedy has to stretch the coercion test rather far to include subtle peer pressure and indirect psychological coercion in order even to find that middle school graduation prayers violate the Establishment Clause."). *But see Mellen*, 327 F.3d at 371–72 (finding VMI to be a coercive environment).

130 *See supra* Part III.

cepted that these factors reduce the likelihood of audience indoctrination.[131] These factors weighed against a finding of coercion in both *Chaudhuri* and *Tanford*, where attendance at the university events was not mandatory and the "mature" attendees were "voluntarily present and free to ignore" the prayers.[132] In fact, the court in *Tanford* even distinguished its reasoning from *Lee v. Weisman*, which invalidated prayer at high school graduation,[133] by explicitly noting a lack of coercion as a result of the character of the audience.[134]

*Mellen v. Bunting*, the only case in which a court has found coercion in a higher education setting, actually reaffirms the difficulty of prohibiting prayer in higher education under the coercion test (except, perhaps, in the most unique university settings).[135] The Fourth Circuit based its decision largely on the coercive factors and pressure towards conformity that set VMI—an institution with the goal of training military cadets—apart from nearly every other university setting.[136] Cadets were forced to remain standing during the daily prayer, which occurred before a prepaid supper that the school essentially compelled students to attend.[137] To justify its focus on coercion, the court distinguished the VMI cadets from those in *Tanford* and *Chaudhuri*, openly comparing VMI cadets to children, rather than other higher education students.[138]

### B. Undermining the Possibility of Endorsement and Prohibiting Challenges Under *Lemon*

The lack of concern about coercion in higher education environments, coupled with the presumed maturity of university students, also enables prayer in higher education to pass muster under the *Lemon* and endorsement tests, both of which chiefly consider the prayer's secular purpose and effect.[139] At all levels of education, the secular purpose test is an easy one for the government to pass; a religious purpose must motivate the prayer for a court to invalidate the

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131 *See supra* notes 118–20 and accompanying text.

132 *See Chaudhuri*, 130 F.3d at 239; *Tanford*, 104 F.3d at 985–86.

133 Lee v. Weisman, 505 U.S. 577 (1992).

134 *See Tanford*, 104 F.3d at 985–86.

135 327 F.3d 355; *see* Schimmel, *supra* note 70, at 926–27 (forecasting that the only situation in which prayer in higher education might fail under the coercion test is where evidence of "direct pressure to participate" exists).

136 *See Mellen*, 327 F.3d at 361–63, 371–72.

137 *See id.* at 371–72 (describing VMI's coercive atmosphere, which results from the school's educational method that stresses ritual and conformity, "detailed regulation of conduct," and a "strict moral code").

138 *See id.* at 371 ("Although VMI's cadets are not children, in VMI's educational system they are uniquely susceptible to coercion.").

139 *See supra* Part I.A–B.

prayer under the first *Lemon* prong.[140] Courts consider solemnizing a public occasion a legitimate secular purpose, which will likely encompass the majority of occasions—particularly graduation ceremonies—at which prayer occurs in higher education.[141] Even in *Mellen*'s extreme case of daily prayer, where VMI professed that prayer furthered the school's academic mission and the cadets' spiritual development, the court (albeit hesitantly) granted VMI "the benefit of all doubt and credit" as to the prayer's purpose.[142]

The dispositive nature of the assumption that prayer is less threatening to an older audience is most evident under the second *Lemon* prong. Like the endorsement test, this prong focuses on whether a prayer advances or endorses religion.[143] The Supreme Court's previous statements comparing the impressionability of higher education participants to those in primary and secondary school support the contention that a higher education audience has a more sophisticated understanding of when government is actually endorsing or advancing religion.[144] Regardless of this conclusion's validity, its widespread acceptance sustains the belief that any prayer—including prayer with which the audience disagrees—is less likely to influence participants in higher education.[145]

Finally, the third *Lemon* prong, which asks whether the government is excessively entangled with religion as a result of prayer, remains a fact-specific determination.[146] Although this prong seems less rigid, and thus a potential factor on which a court could invalidate prayer in higher education, *Mellen* conveys just how substantial the entanglement must be for a court to find it excessive.[147] VMI's role was only excessive because the institution "composed, mandated, and monitored" the daily prayer.[148] Daily prayer in higher education, however, is atypical. Even where a public university selected a clergyman, who sat with university officials wearing a cap and gown and was given some instruction by the public university as to the nature of his or her remarks, the court did not consider the government's role significant enough to rise to the level of excessive entanglement.[149] Significantly, the *Tanford* court neglected to find excessive entanglement

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140 *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985); *Mellen*, 327 F.3d at 372–74.

141 *See* Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring); Chaudhuri v. Tennessee, 130 F.3d 232, 236 (6th Cir. 1997); Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997).

142 327 F.3d at 373–74.

143 *See supra* notes 52–54, 59–62 and accompanying text.

144 *See Chaudhuri*, 130 F.3d at 237; *supra* notes 107–11 and accompanying text.

145 *See Chaudhuri*, 130 F.3d at 238–39; *Tanford*, 104 F.3d at 985–86.

146 *See supra* notes 55–58 and accompanying text.

147 *See Mellen*, 327 F.3d at 375.

148 *See id.*

149 *See Tanford*, 104 F.3d at 986.

in the above-described circumstances even after the Supreme Court declared similar school involvement at lower levels of education inappropriate.[150]

### C. Leaving Little Chance for Success Under a *Marsh* Analysis

In upholding daily prayer before the opening of legislative sessions, the Supreme Court specifically cited the history and tradition of legislative prayer as supporting its constitutionality.[151] The *Marsh* Court's focus on the "unique history" of legislative prayer seems to render the decision an exception applicable only in cases of legislative prayer.[152] Because *Marsh* explicitly noted that the prayer's audience was an adult one, however, the case naturally suggests that a similar analysis might be appropriate in nonlegislative contexts where prayer is aimed at adults and rooted in tradition.[153] Whether courts view *Marsh* as an exception to the traditional Establishment Clause tests or as a complete reconception of Establishment Clause analysis, the potential remains for the application of *Marsh* in a manner that would diminish protection against prayer in higher education.[154] Circuit courts have used *Marsh*'s reasoning when examining prayer in higher education.[155] Even the Supreme Court has left open the possibility that *Marsh* could apply in a nonlegislative context.[156]

After dismissing the possibility that any coercion occurred at the university commencement in *Tanford v. Brand*, the Seventh Circuit explicitly relied on *Marsh*, citing the University's 155-year-old tradition and the national tradition of having prayer at university commencements.[157] *Chaudhuri v. Tennessee* also relied on *Marsh*, stating that "[t]he Supreme Court has always considered the age of the audience an important factor in the analysis."[158]

More significant than the circuit courts' invocation of *Marsh*, however, is that, based on the characteristics of the high school environment, the Supreme Court has rejected a *Marsh* analysis when par-

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150 *See* Lee v. Weisman, 505 U.S. 577, 587–88 (1992).

151 Marsh v. Chambers, 463 U.S. 783, 790 (1983). In particular, the Court noted that the first Congress approved a draft of the First Amendment the same week that Congress voted to pay congressional chaplains. *Id.*

152 *See id.* at 790–92.

153 *See id.* at 792.

154 *See* Mark S. Kouris, Comment, *Kyrie Elaison: A Constitutional Amendment Is No Panacea for the Prayer in City Council Meeting Dilemma*, 1992 UTAH L. REV. 1385, 1409 (claiming that *Marsh* is an exception to, rather than a new formulation of, the Establishment Clause).

155 *See infra* notes 157–58 and accompanying text.

156 *See supra* note 77; *infra* notes 159–61 and accompanying text.

157 *See* 104 F.3d 982, 986 (7th Cir. 1997) ("Rather than being a violation of the Establishment Clause, [prayer at university commencement] is 'simply a tolerable acknowledgement of beliefs widely held among the people of this country.'" (quoting *Marsh*, 463 U.S. at 792)).

158 *See* 130 F.3d 232, 239 (6th Cir. 1997) (citations omitted).

ties have raised it in primary education school prayer cases.[159] The Court did so without mentioning that *Marsh* was a narrow exception only crafted due to the unique history of legislative prayer.[160] If the Court conceived of *Marsh* as an isolated exception to its Establishment Clause jurisprudence, a clear statement to that effect would have sufficed to prevent *Marsh*'s application in a primary or secondary school prayer case. Instead, the Court compared the high school graduation exercise to a state legislative session, distinguishing the two based on the age of the audience, the compulsory nature of attendance, and the formality and control required at the event.[161] This comparison suggests that the Court may still approve state-sponsored prayer in higher education under *Marsh* if it considers a prayer in higher education to be more comparable to prayer at a legislative session than prayer at a high school graduation. The Court's repeated reliance on the maturity of college students and the voluntary nature of college events leaves little doubt that prayer in a higher education setting would pass a *Marsh* analysis.[162]

## V

## QUESTIONING THE ASSUMPTION: A NECESSARY UNDERTAKING TO INCREASE PROTECTION AGAINST PRAYER IN HIGHER EDUCATION

By assuming that audiences in higher education cases are older and more mature and, therefore, less impressionable—making the level of education at which prayer occurs central to Establishment Clause analysis—courts have virtually foreclosed the possibility of holding prayer at universities invalid under any of the tests that courts typically use to evaluate potential Establishment Clause violations.[163] When such important constitutional guarantees are at stake, it is surprising that the Supreme Court has perpetuated this assumption without any meaningful discussion. Perhaps more importantly, the Court has not articulated why the level of education should be a significant factor in Establishment Clause analysis.[164] Following the Supreme Court's cue, lower courts have also taken this assumption for granted

159 *See* Lee v. Weisman, 505 U.S. 577, 596–97 (1992).

160 *See id.*

161 *See id. But see* County of Allegheny v. ACLU, 492 U.S. 573, 602 (1989) (noting *Marsh*'s reliance on the "unique history" of legislative prayer).

162 *See* Schimmel, *supra* note 70, at 926–27. Even without assuming the audience's maturity, a constitutional violation is difficult to prove once a court commences a *Marsh* analysis. The Court found the prayer in *Marsh* constitutional, even though the Nebraska Legislature chose a Presbyterian chaplain to give the prayer for sixteen years, paid the chaplain out of public funds, and the chaplain himself even characterized the prayers as Judeo-Christian. *See* 463 U.S. at 793 & n.14.

163 *See supra* Part IV.

164 *See supra* Part III.

without further discussion.[165] "The question, remains, however, if [the] distinction [between higher and lower education] is a logical one to draw," especially because it could lead to vastly different conclusions on the question of whether a state is violating the Establishment Clause.[166]

Prayer continues to occur at public colleges and universities, and yet the Supreme Court has failed to rule on prayer in higher education.[167] Given this backdrop, it is appropriate to point out the valid bases upon which courts could and should question how relevant the level of education at which prayer occurs is to Establishment Clause analysis. A close look at the likely audience to prayer in higher education reveals that the older age and greater maturity of the audience may not be as uniform or significant as presumed, that the element of compulsion may still be present when state-sponsored prayer occurs in higher education, and that courts are overstating the connection between age/maturity and impressionability—even if the audience is older and more mature, members may be no less impressionable by virtue of their presence in a higher education environment.[168] These bases must be explored to ensure, at the very least, that courts have adequately considered the validity of their assumptions in this important area of Establishment Clause jurisprudence. Ideally, such an inquiry will help provide higher education students with the maximum protection the Establishment Clause has to offer. Courts must further undertake this critical inquiry to avoid presumptively extending this assumption to other Establishment Clause cases that arise in higher education.

### A. Exaggerating Differences in Age, Maturity, and Impressionability

Although the Sixth Circuit in *Tanford v. Brand* and the Seventh Circuit in *Chaudhuri v. Tennessee* simply accepted the notion that the higher education environment does not threaten the Establishment Clause, there are compelling reasons to question this distinction that is based largely on presumed age and maturity differences in the audiences at different levels of education.[169] Society considers eighteen-

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165 *See supra* notes 118–20 and accompanying text.

166 *See* Underwood, *supra* note 13, at 418.

167 *See supra* notes 83–87 and accompanying text for background on the continuing presence of prayer in higher education.

168 *See generally* Walsh, *supra* note 17, at 324 (discussing college students' failings as learners and thinkers and noting "that we do not know as much about our three-and-a-half-million college and university students as we would like to or should").

169 *See* Underwood, *supra* note 13, at 419–20 (arguing that a higher education setting is more similar to a primary and secondary education environment than to a government setting).

year-olds mature enough to make many independent decisions; thus, the age of majority seems to be a nonarbitrary way to distinguish between students. On the contrary, however, many students are in fact still minors when they enter college.[170] By distinguishing high school and college students primarily on the basis that college students are older, and thereby more mature, courts do not properly consider the vast age variation among college students. Students progress through the educational system at different rates, which causes significant age variation and overlap between high school and college students.[171] Furthermore, many college students are only one summer removed from high school.[172] To conclude without explanation that a student can distinguish an endorsement or advancement of religion in August, though they could not do so at their high school graduation in June, is a questionable distinction on which to create two different standards of Establishment Clause protection.

Commentators often refer to the "malleable minds of youth" to explain why protection against prayer is particularly important at lower levels of education.[173] It is arguable, however, that students are at the height of their ideological formation while in college, and that their minds are more malleable than ever, which runs contrary to the assumption courts make that college students' older age and more developed maturity makes them less impressionable. "[S]usceptibility [to peer pressure and coercion] does not automatically evaporate at age eighteen."[174] In fact, college may be the first time that many young adults are free from extensive parental supervision or the influence of the communities and institutions that previously shaped their lives.[175] College offers students the opportunity to explore new ideas and ways of thinking to which they previously were not exposed, and to decide what personal, professional, or spiritual path they will follow

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170 *See* Karyl Roberts Martin, Note, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173, 203 (2003).

171 *See* Underwood, *supra* note 13, at 419–20. Although the example of the child prodigy who begins college at age twelve is an extreme example, it illustrates the different rates at which students progress through the educational system. *See, e.g.*, Associated Press, *Preteen Enters College as Youngest Student Ever at California College*, Sept. 29, 2000, *available at* http://archives.cnn.com/2000/US/09/29/young.genius.ap/ (last visited Feb. 28, 2005). In the more frequent case, students advance at a rate slightly ahead of their peers, entering college at age 16 or 17, which nevertheless causes a great deal of age overlap with high school students.

172 *See* Underwood, *supra* note 13, at 419.

173 *See* G. Sidney Buchanan, *Prayer in Governmental Institutions: The Who, the What, and the at Which Level*, 74 TEMP. L. REV. 299, 307 (2001).

174 Paul Ryneski, *The Constitutionality of Praying at Government Events*, 1996 DETROIT C. L. MICH. ST. U. L. REV. 603, 626.

175 *See* Walsh, *supra* note 17, at 326 (noting that college represents the period where students are free of "family, business, professional, and social pressures").

as an adult.[176] Regardless of their maturity or age, students in such an environment—especially where the college or university is the only traditional institution then present in their lives—may be particularly susceptible to messages that favor or disfavor religion or particular religious views, as "college students generally tend to be conformists," despite that their college years are the time in their lives "when they should be most inquisitive and most daring in their thinking."[177] Even if a university audience is less impressionable on the whole, this fact should not strip away Establishment Clause protection for the entire audience, given the likely possibility that the audience includes individuals who are still uncertain about their religious identity or are susceptible to influence.[178]

### B. Reevaluating the Composition of the Audience and Compulsion to Attend

Prayer in higher education occurs at a variety of events, with prayer at commencement ceremonies being the most frequent and well publicized.[179] At graduation ceremonies and most other public university events, the audience is not restricted and likely includes members of all ages.[180] Of course, the nonstudent participants at these events may be attending the events voluntarily, which may reduce the Establishment Clause threat, but the age diversity remains significant for analytical purposes.

Because of such age diversity, it is erroneous for courts to hastily assume that the audience at university events is less impressionable and to quickly dispose of the case based on *Marsh*, which upheld prayer in the Nebraska State Legislature.[181] By nature, legislatures are composed only of adults, therefore significantly reducing age diversity among the audience. The age diversity that is undoubtedly present at college sporting events and graduation ceremonies, then, begs the question whether a more exacting Establishment Clause analysis—such as that which courts apply in primary and secondary school prayer cases—would be more appropriate for higher education prayer cases if a portion of the audience resembles secondary and primary school students.[182]

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176 *See id.*

177 *Id.*

178 *See* Ryneski, *supra* note 174, at 627.

179 *See supra* notes 83–87 and accompanying text.

180 *See* Ryneski, *supra* note 174, at 626. In fact, one plaintiff in *Tanford* pointed out that her two-year-old daughter attended the graduation ceremony, thus being forced to hear the prayer, but the district court all-too-quickly dismissed the point. *See* Tanford v. Brand, 883 F. Supp. 1231, 1237 (S.D. Ind. 1995), *aff'd*, 104 F.3d 982 (7th Cir. 1997).

181 *See supra* notes 155–58 and accompanying text.

182 *See* Martin, *supra* note 170, at 203.

It is further erroneous to conclude that students' presumed maturity, older age, or the general university environment makes attending commencement ceremonies, athletic events, and other ceremonial university events more voluntary at the higher education level than similar events at the lower levels of education. The logic behind the Court's reasoning that high school graduation is essentially compelled because "[e]veryone knows that in our society and in our culture[,] high school graduation is one of life's most significant occasions" certainly applies equally—if not moreso—to graduation from higher education.[183] Graduation is a momentous event at any level of education. And graduation from higher education logically marks a milestone of even greater achievement than that of high school graduation, which may actually increase the desire to attend formal ceremonies to memorialize the occasion. Additionally, most athletes are always compelled to attend athletic contests, regardless of the level of education.[184] Much like the high school context, then, students and families who feel compelled to attend these momentous events are unavoidably exposed to the prayer and "must accept exposure . . . as the price of such attendance."[185]

## CONCLUSION

Because of the Constitution's explicit commitment to prohibiting the establishment of religion and the relationship between the Establishment Clause and all First Amendment rights, the Court has always considered Establishment Clause jurisprudence as an area requiring sensitive "line-drawing."[186] The sensitivity involved in Establishment Clause jurisprudence should be amplified in the area of higher education, where the free exchange of ideas, without undue government influence over the content of such ideas, is essential to prepare students for life in a diverse society. Dicta and case law presume, without question, that audiences to prayer in higher education are older and more mature and, therefore, less impressionable than audiences at lower levels of education. This enables courts to assume that higher education audiences have a more sophisticated understanding of when the government is endorsing religion and are less likely to be

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183 *See* Lee v. Weisman, 505 U.S. 577, 595 (1992) (
Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.
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184 *See* Gil Fried & Lisa Bradley, *Applying the First Amendment to Prayer in a Public University Locker Room: An Athlete's and Coach's Perspective*, 4 MARQ. SPORTS L.J. 301, 321 (1994).

185 *See* Buchanan, *supra* note 173, at 309.

186 *Lee*, 505 U.S. at 598.

coerced by prayer. Thus, except in unique and nontraditional environments, courts are likely to find prayer in higher education permissible regardless of whether they apply the *Lemon* test, the endorsement test, the coercion test, or a *Marsh* analysis. As a result, courts are drawing a clear line that validates prayer in higher education with much less scrutiny than that which courts apply to prayer in primary and secondary schools, while simultaneously creating an Establishment Clause doctrine that does little to protect against state-sponsored prayer at public universities.

Given that an unexamined assumption about the audience in higher education is dispositive under any Establishment Clause test or analysis, future courts addressing the issue must more thoroughly explore the bases underlying their decisions on school prayer in higher education. After exploring the bases, courts may find that valid grounds nevertheless exist upon which to differentiate the audience to prayer in higher and lower education. At the very least, such exploration will create a more-reasoned jurisprudence where Establishment Clause violations in higher education are concerned, rather than a body of law based on an unexamined assumption. Ideally, however, the self-critical analysis advocated here will lead courts to recognize that distinguishing lower and higher education school prayer cases based on an assumption about the audience's age, maturity, and impressionability, without rigorous analysis, is too dismissive of the fact that all educational institutions "are by nature places for instilling beliefs and thought . . . [and] for the inculcation of values[,]"[187] and that such an assumption ignores the fact that audiences at higher education events where prayer occurs are often age diverse, that audience members may, in effect, still be compelled to attend, and that older age and greater maturity, if substantiated, would not necessarily make the audience in higher education a less impressionable one than audiences to prayer at lower levels of education. Upon recognizing these shortcomings, courts should refuse to consider the level of education as the *determining* factor when evaluating prayer in higher education, thereby placing greater emphasis on the nature and character of the government action. Only then will courts produce a truly reasoned jurisprudence able to fulfill the promise of the Establishment Clause at public universities.

187 *See* Underwood, *supra* note 13, at 420.