

GRADUATION CEREMONIES: A PRAYER FOR BALANCING SPONSORSHIP AND CENSORSHIP

Anton Sorkin*

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*“Tis Education forms the common mind;
Just as the twig is bent, the tree’s inclin’d.”¹*

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* Anton Sorkin (JD, LLM, SJD Candidate) is an attorney working with the Restoring Religious Freedom Project at the Center for the Study of Law & Religion, Emory University School of Law. He thanks Professor Mark Goldfeder and the Venice moot court competition squad for indulging in this topic *ad nauseam*.

1. Alexander Pope, *Moral Essays Epistle I. Of Knowledge and Characters of Men*, COMPLETE POETIC WORKS, 1 n.149–50 (1903), <http://www.bartleby.com/203/143.html>. This was used in *Brandon v. Board of Education of Guilderland Central School District*, 635 F.2d 971, 978 (2d Cir. 1980), to support the statement: “Misconceptions over the appropriate roles of church and state learned during one’s school years may never be corrected.”

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I. INTRODUCTION

In anticipation of the coronation of King Edward VII in 1902, Sir Edward Elgar composed a song that included these lyrics:

“Dear Land of Hope, thy hope is crowned.
God make thee mightier yet!
On Sov’ reign brows, beloved, renowned,
once more thy crown is set.”²

In 1905, while receiving an honorary doctorate of music at a Yale University commencement, Elgar once again heard his beloved composition.³ This time, and for the first time, he heard “Pomp and Circumstance” in the setting that it is now synonymous with—graduation services.⁴ The hymn has become “integrated into our national culture and heritage.”⁵ Yet in the wake of *Engel v. Vitale*⁶ and *Lee v. Weisman*,⁷ two seminal cases on school prayer and graduations, the constitutional survival of the famed Elgar march in many school districts seems largely dependent on a lucky historical break between words and music.⁸ If people actually knew the lyrics, threats of litigation based on the separation of church and state would undoubtedly flood school districts.

2. JERROLD N. MOORE, EDWARD ELGAR: A CREATIVE LIFE 365 (1999). The coronation was postponed, however, on account of the King’s illness. *Id.* at 370.

3. *Id.* at 462.

4. *Id.*

5. *Florey v. Sioux Falls Sch. Dist.* 49-5, 464 F. Supp. 911, 916 (D.S.D. 1979) (“Much of this art, while religious in origin, has acquired a significance which is no longer confined to the religious sphere of life. It has become integrated into our national culture and heritage.”).

6. *See generally Engel v. Vitale*, 370 U.S. 421 (1962).

7. *See generally Lee v. Weisman*, 505 U.S. 577 (1992).

8. *See generally Charles J. Russo, Tone Deaf? The Courts Turn a Deaf Ear to Religious Music in Schools*, 257 WEST’S EDUC. L. REP. 1 (2010) (outlining cases dealing with the relationship between religious music and instructional programs).

In 2016, Pottsgrove High School in Pennsylvania officially banned a twenty-year tradition of including invocations in the school's commencement ceremony after the previous year's speaker delivered an "off script" sectarian goodbye.⁹ Meanwhile, several states over at East Liverpool High School, the Freedom from Religion Foundation jeopardized a seventy-year tradition when it threatened the school district with a lawsuit that alleged the "separation of church and state" *demands* the choir stops singing the Lord's Prayer at graduation.¹⁰ Despite the school board's earnest surrender,¹¹ the entire student body still stood in unison and recited the Lord's Prayer at the prompting of their valedictorian's raised hands.¹² Perhaps this marked the start of their own tradition for the years to come—a tradition that respects the separation of church and state without unduly burdening or involving either.

The doctrine of separation of church and state is certainly not new. The medieval political scholar Marsilius of Padua set forth separationist theories in the fourteenth century.¹³ In the seventeenth century, Roger Williams was among the earliest developers of the separation of church and state doctrine, which profoundly shaped our own First Amendment.¹⁴ Williams "believed that separation was necessary in order to protect the church from the danger of destruction which he thought inevitably flowed from control by even the best-intentioned civil authorities."¹⁵

Although scholars theorized about the separation of church and state throughout history, America was the first nation to adopt the doctrine as a governing standard.¹⁶ America's founders were determined to break free from religious persecution and the "government's coercive role in directing

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9. Shawnette Wilson, *Pottsgrove High School Community at Odds Over Prayer at Graduation*, FOX29 (June 1, 2016), <http://www.fox29.com/news/151534792-story>.
 10. Virginia Kruta, *Students Banned from Saying Lord's Prayer Push Back with a Big Ol' Lesson in Freedom*, INDEP. J. REV. (May 2016), http://www.ijreview.com/2016/05/612858-students-banned-from-saying-lords-prayer-at-graduation-push-back-with-a-big-ol-lesson-in-freedom/?utm_source=facebook&utm_medium=owned&utm_campaign=ods&utm_term=ijamerica&utm_content=life.
 11. *Id.* The school board president said the decision was made because the school does not have the money for a drawn out legal battle and would rather hire teachers than pay lawyers. *Id.*
 12. *Id.* The same threat and same capitulation also took place in Arkansas. See Kathryn Gilker, *Gentry School District Will Not Include Prayer at Future Graduation Ceremonies*, 5 NEWS (June 30, 2016), <http://5newsonline.com/2016/06/30/gentry-school-district-will-not-include-prayer-at-future-graduation-ceremonies/>.
 13. DEREK H. DAVIS, NO ESTABLISHMENT OF RELIGION 182 (T. Jeremy Gunn & John Witte, Jr., eds., 2012).
 14. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 214 (1963) ("[T]he views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States."); see also David Little, *Roger Williams and the Puritan Background of the Establishment Clause*, in NO ESTABLISHMENT OF RELIGION 100 (T. Jeremy Gunn & John Witte, Jr., eds., 2012).
 15. *Engel v. Vitale*, 370 U.S. 421, 434 n.20 (1962).
 16. See DAVIS, *supra* note 13.

the religious course of citizens' lives."¹⁷ The Framers, in what has been described as a "unique experiment," enshrined the separation of church and state in the Constitution through the First Amendment's Religion Clauses.¹⁸ These clauses—the Establishment Clause and the Free Exercise Clause—prohibit the government from establishing any one religion and ensure that the free exercise of religion is protected—leaving "[a]ll forms of Christianity," and all religions broadly, to "stand on their own feet and on equal footing with all other religions."¹⁹

The concept of separation was largely invoked in the second half of the twentieth century in a series of Establishment Clause cases challenging "government transfers of wealth to religious institutions,"²⁰ namely government support of private schools.²¹ However, in 2000, *Santa Fe v. Doe*²² marked the beginning of a trend in Religion Clause jurisprudence focused on religious messages in public schools.²³

"*Santa Fe* effectively outlawed any official prodding in the direction of student-led prayer at school functions"²⁴ However, the question remains as to whether the students, themselves, can start their own prayer tradition.²⁵ The Supreme Court has recognized "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."²⁶ While strict separationists view school graduation prayers as a "breach in the wall of separation,"²⁷ courts are not required to follow this approach—nor should they. As noted by one First Amendment scholar:

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17. DEREK DAVIS, *DEMOCRACY: FREE EXERCISE AND DIVERSE VISIONS AND RELIGION* 36 (David W. Odell-Scott, ed., 2004).
 18. DAVIS, *supra* note 13, at 183.
 19. JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 1 (2016).
 20. Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 771 (2001).
 21. *See id.* at 771-72.
 22. *See generally* *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).
 23. Lupu, *supra* note 20, at 772.
 24. *Id.*
 25. Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 FORDHAM L. REV. 1147, 1184-85 (2002).
 26. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990).
 27. R. Collin Mangrum, *Shall We Pray? Graduation Prayers and Establishment Paradigms*, 26 CREIGHTON L. REV. 1027, 1033 (1993). An example of this absolutist approach can be seen in a First Circuit challenge to the Pledge of Allegiance—specifically the language "under God." *See generally* *Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1 (1st Cir. 2010). According to the majority, the Freedom from Religion Foundation argued that regardless of the voluntary nature of a student's recitation, *any* student participation amounts to the establishment of religion by the state. *See id.* at 7.

[a] strict separationists view allows religion a narrower scope than that experienced by many religious adherents, eviscerates the Free Exercise Clause, and contradicts our intuitive judgment regarding the range of tolerance we ought to endure. The religiosity of individuals and groups cannot always be as easily segregated from their cultural and personal identities as the strict separationist model would demand.²⁸

This Article sets out to find the meaningful balance between the two forbidden sides of this debate in the graduation prayer context—school sponsorship of religion and school censorship of private speech.²⁹ This analysis represents an updated survey of the graduation prayer jurisprudence and aims to provide the legal framework in considering the prudent approach for future graduation prayer policies.

Part II briefly introduces the public school prayer debate by looking at some of the major cases that play a role in this discussion. Part III analyzes the procedural history in *Lee* and the general approach, highlighting the unresolved problems that the opinion created. Part IV traces the circuit courts' differing applications of *Lee*, and considers whether any of them have yielded a more comprehensive approach to the issue. Part V focuses specifically on the Eleventh Circuit and demonstrates that the majority and dissent in *Chandler* and *Adler* provide the best-integrated tools for finding an approach where the interest of sponsorship and censorship are both meaningfully acknowledged. Finally, Part VI is a comprehensive analysis that draws largely on circuit court decisions and the writings of Paul Horwitz and Kathleen Brady. While the outcome of graduation prayer decisions is difficult to predict, this Article provides the various pitfalls and securities that a school district needs to consider if it allows students to express their religion during school-sponsored events.

28. Mangrum, *supra* 27, at 1045; *cf.* *McCullum v. Bd. Of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 237 (1948) (Jackson, J., concurring) (attempting to “lay down a sweeping constitutional doctrine” of absolute separation of church and state “is to decree a uniform . . . unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes”). The Supreme Court has on a number of occasions reaffirmed the important place that religion plays in America’s heritage. *See, e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014) (“The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time.”); *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (“It is true that religion has been closely identified with our history and government”); *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971) (“[R]eligious values pervade the fabric of our national life.”); *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984) (“One cannot look at even this brief resume without finding that our history is pervaded by expressions of religious beliefs.”); *Engel v. Vitale*, 370 U.S. 421, 434 (1962) (“The history of man is inseparably from the history of religion.”); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (“We are a religious people whose institutions presuppose a Supreme Being.”).

29. *See* Brady, *supra* note 25, at 1150 (noting the real battleground among courts is whether speech endorsing religion is private or government).

II. ROAD TO *LEE V. WEISMAN*

The issue of school prayer falls squarely within the persevering conflict between church-state separation and the rightful application of the Religious Clause. Professor Mangrum has noted that “much of our modern understanding of Establishment Clause principles can be traced directly to public prayer cases.”³⁰ School prayer poses a particularly divisive dilemma due to the presence of impressionable children who demand special protection.³¹ The problem is that such a line is demonstrably an oversimplification, and children end up appearing in almost every non-school context as well. Still, the “non-expectancy” of children is arguably one of the reasons why legislative prayer traditions are usually upheld, even as graduation prayers are struck down.³² A brief look at some of the major decisions will help set the tone as we move into the circuit courts’ developing graduation prayer jurisprudence.

A. *Engel v. Vitale* (1962)

In *Engel*, a school district instituted a school-wide prayer to be said aloud before the start of each school day.³³ The prayer purported to commemorate the spiritual heritage of the State and inculcate moral and spiritual training in the schools.³⁴ Petitioners brought suit asserting that the prayer, composed by governmental officials, was a violation of the Establishment Clause and in furtherance of the government’s program to advance religion in schools.³⁵ Justice Black, in his iconic rendition of the historical struggles between state and religion, penned the normative principle of the separation of school and religion. He wrote that the government has no business in the practice of “writing or sanctioning

30. Mangrum, *supra* note 27, at 1027.

31. See *Lee v. Weisman*, 505 U.S. 577, 597 (1992). “The [Supreme Court] consistently recognized that the inherent immaturity and inexperience of young, school-age children will often justify their special protection.” Amy Louise Weinhaus, *The Fate of Graduation Prayers in Public Schools After Lee v. Weisman*, 71 WASH. U. L.Q. 957, 980 n.103 (1993); see also cases cited *infra* note 344; *Hanover Sch. Dist.*, 626 F.3d at 8 (“[P]ublic schools are different, in part because the students are not adults, and in part because a purpose of a public school is to inculcate values and learning.”). This distinction between school and university level maturity of children will be interesting to see develop in the context of appropriate regulations if courts adopt studies that show “that brain development continues into adulthood” See Julie Seaman, *Hate Speech and Identity Politics: A Situationalist Proposal*, 36 FLA. ST. U. L. REV. 99, 110–11 (2008).

32. See *Town of Greece*, 134 S. Ct. at 1846 (Kagan, J., dissenting) (“[C]hildren . . . [may be] present to receive an award or fulfill a high school civics requirement.”).

33. *Engel*, 370 U.S. at 422. Note that Justice Hugo Black was eager to take on this case as long as he was assured that the prayer would be struck down. BRUCE J. DIERENFIELD, *THE BATTLE OVER SCHOOL PRAYER* 119 (2007).

34. *Engel*, 370 U.S. at 423, 425.

35. *Id.* at 425.

official prayers and [should] leave that purely religious function to the people . . . and to those the people choose to look to for religious guidance.”³⁶

Some have referred to this as the day the “U.S. Supreme Court kicked God out of public school.”³⁷ Others have decried *Engel* as the death knell of “Christian America.”³⁸ More accurate, and less emotionally laden, perhaps, was *Newsweek*’s statement, describing the opinion as “a landmark in the never ending search to strike a proper balance between church and state.”³⁹

B. *School District of Abington Township v. Schempp* (1963)

The following year, the Court held unconstitutional Bible readings and class recitations of the Lord’s Prayer—despite students being permitted to excuse themselves during religious exercises.⁴⁰ Writing for the majority in *School District of Abington Township v. Schempp*, Justice Clark furthered the concept of neutrality and separation by looking to, *inter alia*, the words of the great Judge Alphonso Taft.⁴¹ Judge Taft wrote that religious freedom demands absolute neutrality, and that this concept should force the government to treat all religions equally without preference or disregard.⁴² Neutrality is necessary in order to stem potential abuse by state officials in school environments.⁴³ Without it, the lines may be blurred in an effort to

36. *Id.* at 435. Note that for Chief Justice Warren, allowing this prayer into schools was like the proverbial “camel’s head under the tent.” DIERENFIELD, *supra* note 33, at 127.

37. DIERENFIELD, *supra* note 33, at 1.

38. *Id.* at 138.

39. *Id.* at 162.

40. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); *see also* Karen B. v. Treen, 653 F.2d 897, 900 (5th Cir. 1981), *aff’d*, 455 U.S. 913 (1982); State *ex rel.* Weiss v. District Board, 76 Wisc. 177, 44 N.W. 967 (1890) (striking down bible reading as unconstitutional). Interestingly, the court in *Weiss* accepted that “to teach the existence of a supreme being . . . and that it is the highest duty of all men to adore, obey, and love Him” was not a sectarian instruction because “all religious sects so believe and teach.” *Id.* at 973. It was the other passages that went further and inculcated doctrines in conflict with certain sects that the reading became sectarian and unconstitutional. *Id.* The court did leave room for biblical instruction as a form of inculcating “good morals” or teaching the Bible for its historical and literary value. *Id.* at 974. The *Weiss* decision drew national attention and was eventually cited by other courts. DIERENFIELD, *supra* note 33, at 35. Recent decisions have provided opportunity for students to read and discuss their Bible at recess, L.W. v. Knox Cnty. Bd. of Educ., No. 3:05-CV-274, 2006 WL 2583151 at *11 (E.D. Tenn. Sept. 6, 2006), but not for school officials to teach the Bible as religious truth. *Doe v. Porter*, 370 F.3d 558, 562–63 (6th Cir. 2004); *see also* W. COLE DURHAM, JR. & BRETT G. SCHARFFS, LAW AND RELIGION 520 (2010) (noting the important distinction between teaching *about* religion versus teaching religion).

41. *Schempp*, 374 U.S. at 214–15.

42. *Id.* at 215; DIERENFIELD, *supra* note 33, at 30.

43. *See Schempp*, 374 U.S. at 222.

The wholesome ‘neutrality’ of which this Court’s cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about

fuse the government with religious functions, thus creating state support of one religion at the expense of other faiths.⁴⁴ While the infringement in this instance was minor, the Court in *Schempp*, like the Court in *Engel*, looked to the words of James Madison, who wrote that “it is proper to take alarm at the first experiment of our liberties.”⁴⁵

C. The *Lemon* Test (1972)

In 1972 the Court fashioned the infamous *Lemon* test that combined various elements of prior decisions to create a three-prong framework that requires government action to: (1) have a secular purpose; (2) carry a principal or primary effect of neither advancing nor inhibiting religion; and (3) “not foster ‘an excessive entanglement with religion.’”⁴⁶ While the Supreme Court has not explicitly overruled *Lemon*, its resurfacing has produced “a bewildering patchwork of decisions as the justices engaged in a tug-of-war over the interpretation of the test.”⁴⁷ Justice Scalia dubbed the *Lemon* test a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried[.]”⁴⁸

D. *Karen B. v. Treen* (1981)

Several years later, the Supreme Court affirmed a Fifth Circuit holding premised on the principles set forth in *Engel* and *Schempp*.⁴⁹ In *Karen B. v. Treen*, the Fifth Circuit held unconstitutional a Louisiana statute that permitted classroom prayer before the start of the school day.⁵⁰ The statute expressly disclaimed that the observance was neither intended to be, nor should be identified as, a religious exercise.⁵¹ The court adamantly rejected the notion that a state statute could employ religious means if those

a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies.

Id.

44. See *Schempp*, 374 U.S. at 222.

45. *Id.* at 225; *Engel v. Vitale*, 370 U.S. 421, 436 (1962). “The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.” James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in JAMES MADISON: WRITINGS 31 (Rakove ed., 1999).

46. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) and quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

47. Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 801 (1993).

48. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

49. See generally *Treen v. Karen B.*, 455 U.S. 913 (1982).

50. *Karen B. v. Treen*, 653 F.2d 897, 899 (5th Cir. 1981), *aff’d*, 455 U.S. 913 (1982).

51. *Id.*

means further a legitimate secular interest.⁵² While the court acknowledged that the prayer policy was not “strictly religious,” the policy was, nonetheless, unconstitutional because it utilized an intrinsically religious practice.⁵³ By defining prayer as an *inherently religious* medium,⁵⁴ the court established an important aspect of Establishment Clause analyses. Subsequent cases rely on *Treen*’s characterization of prayer as “inherently religious” to invalidate school prayer as a means of accomplishing secular goals, for example, “solemnizing the graduation”—at least until *Jones I*.⁵⁵ Foreshadowing the reasoning in *Lee*, discussed *infra*, the Fifth Circuit also noted that even though participation was voluntary, an “Establishment Clause violation does not depend upon the presence of *actual* governmental coercion.”⁵⁶

III. *LEE V. WEISMAN* (1992)

While *Engel* set the wheels in motion, it was *Lee v. Weisman* that finally derailed the traditional practice of prayer at public school graduations.⁵⁷

A. The Decision

Lee involved a graduation ceremony where the Providence School Committee and the Superintendent of Schools for the City permitted school principals to select graduation speakers to offer an invocation and benediction prayer during the ceremony.⁵⁸ The school principals would deliver a set of guidelines to the speaker, which indicated that the prayer needed to be pluralistic, non-sectarian, and inclusive—but also noted that it could include references to a deity if appropriate.⁵⁹ Parents of the plaintiff,

52. *Id.* at 901.

53. *Id.*

54. *Id.* (“That [prayer] may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise.”).

55. See generally *Jones v. Clear Creek Indep. Sch. Dist.* (*Jones I*), 930 F.2d 416, 417 (5th Cir. 1991), judgment vacated, 505 U.S. 1215 (1992).

56. *Karen B.*, 653 F.2d at 902 (emphasis added).

57. Thomas A. Schweitzer, *The Progeny of Lee v. Weisman: Can Student-Invited Prayer at Public School Graduations Still Be Constitutional?*, 9 *BYU J. PUB. L.* 291, 291 (1995). For a summary of the lower court’s split on graduation prayer prompting the Supreme Court to take on *Lee*, see Robert Phillips, *The Constitutionality of High School Graduation Prayers Under Harris v. School District No. 241*, 8 *BYU J. PUB. L.* 491, 491–500 (1994); Frederick B. Jonassen, *Free Speech and Establishment Clause Rights at Public School Graduation Ceremonies: A Disclaimer: The Preceding Speech Was Government Censored and Does Not Represent the Views of the Valedictorian*, 55 *WAYNE L. REV.* 683, 700–08 (2009).

58. *Weisman v. Lee*, 728 F. Supp. 68, 69 (D.R.I. 1990), *aff’d*, 908 F.2d 1090 (1st Cir. 1990), *aff’d*, 505 U.S. 577 (1992).

59. *Id.*

Deborah Weisman, challenged the action on behalf of their daughter who was subjected to a prayer during her middle school ceremony after a temporary restraining order was denied.⁶⁰ The case in question related to Deborah's pending high school ceremony, and the plaintiffs' amended complaint asking the judge for a permanent injunction to stop the school from including prayer.⁶¹ Notably, the lynchpin of the request seemingly rested on the inclusion of a reference to a deity—without which the Establishment Clause would not necessarily have been implicated.⁶²

The district court invalidated the practice, announcing that Establishment Clause jurisprudence is deeply rooted in the prohibition of state-involvement in leading citizens in “appeals to or adoration of a deity.”⁶³ The court applied the *Lemon* test, finding the prayer failed to meet the second requirement because the identification of a deity advanced religion.⁶⁴ While the cleric's presence was not determinative, the union of prayer, school, and event signified an improper preference for religion.⁶⁵ The court, however, acknowledged that nothing in the opinion was meant to suggest that a public school must prohibit voluntary private prayers offered during the graduation ceremony.⁶⁶ On appeal, the First Circuit affirmed without elaborating further.⁶⁷

The Supreme Court also affirmed, but for new and different reasons. Not only did the Court ignore the *Lemon* test,⁶⁸ but it also introduced what Justice Scalia in his dissent dubbed the “psycho-coercion” test—a framework that had never been used to invalidate a school prayer policy.⁶⁹

60. *Id.*

61. *Id.* at 70.

62. *See id.* at 75 (“[P]laintiff here is contesting only an invocation or benediction which invokes a deity or praise of God.”). We have seen some challenges on the practice of prayer, per se. *See, e.g.,* Wallace v. Jaffree, 472 U.S. 38 (1985); Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 28 (1982).

63. *Weisman*, 728 F. Supp. at 71.

64. *Id.* at 72.

65. *Id.* at 72–73.

66. *Id.* at 74. While the content (“particular nature or wording”) was less important than the presence of the prayer per se at the ceremony, it is important to circumscribe the violation in connection with this being a “school-sponsored prayer.” *Id.*

67. *Weisman v. Lee*, 908 F.2d 1090, 1090 (1st Cir. 1990). The concurrence based its decision on the Supreme Court's prohibition on mandated forms of prayer at formal school functions, the *Lemon* test, and by distinguishing the case with legislative prayer. *See id.* at 1093–96.

68. Justice Scalia celebrates this decision as the “one happy byproduct of the Court's lamentable decision.” *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting); *see also* Paulsen, *supra* note 47, at 797 (suggesting, despite explicit repudiation, that the Court has replaced the *Lemon* test with a coercion test).

69. *Id.*; Paula Savage Cohen, *Psycho-Coercion, A New Establishment Clause Test: Lee v. Weisman and Its Initial Effect*, 73 B.U. L. REV. 501, 501 (1993). Justice Scalia notes that the majority lays waste to a long-standing tradition of “nonsectarian prayer to God at public celebrations” and “[a]s its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion[.]” *Lee*, 505 U.S. at 632 (Scalia, J., dissenting).

The Court's analysis of the prayer policy in *Lee* largely centered around two dominant facts. First, state officials directed the performance of a formal religious exercise by selecting the speaker and controlling the content of the prayer.⁷⁰ Second, the graduates were obligated to attend the ceremony.⁷¹ Taken together, the prayer converted the ceremony into a "state-sponsored religious exercise"⁷² and those in attendance were coerced into participation.⁷³ As the Court noted, "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."⁷⁴ In sum, while the Court did leave room for graduation prayers, noting that "offense alone does not in every case show a violation,"⁷⁵ in this case, the State had "in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student[.]"⁷⁶

B. Establishment Clause Confusion

The Supreme Court has created several tests for Establishment Clause analyses, including the *Lemon* test, the endorsement test established in *Allegheny County v. ACLU*,⁷⁷ and the coercion test set forth in *Lee*.⁷⁸

The endorsement test asks "whether the challenged governmental practice has the actual purpose of endorsing religion or whether it has that effect from the perspective of a 'reasonable observer.'"⁷⁹ This test is largely the brainchild of Justice O'Connor, who in several concurring opinions attempted to reexamine and refine aspects of the *Lemon* test "in order to make [it] more useful in achieving the underlying purpose of the

70. *Lee*, 505 U.S. at 588. The Court found that the instructional pamphlet created a choice "attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." *Id.* at 590 ("The degree of school involvement here made it clear that the graduation prayer bore the imprint of the State.")

71. *Id.* at 595 (explaining that although attendance was not a condition of receiving a degree, "absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years"); *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 115 (2001) (stating that *Lee* concluded that attendance at the graduation exercise was obligatory).

72. *Lee*, 505 U.S. at 592.

73. *See id.* at 587-88. "There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise." *Id.* at 593.

74. *Id.* at 596.

75. *Id.* at 597.

76. *Id.* at 598.

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

78. Elizabeth A. Harvey, Freiler v. Tangipahoa Parish Board of Education: *Squeeze the Lemon Test Out of Establishment Clause Jurisprudence*, 10 GEO. MASON L. REV. 299, 300 (2001).

79. *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 14 (2011).

First Amendment.”⁸⁰ Among her suggestions involves restricting government action that tends to “mak[e] adherence to a religion relevant in any way to a person’s standing in the political community,”⁸¹ or “conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.”⁸²

The Supreme Court “has never declared one test to be the prevailing standard” and, consequentially, lower courts and legislatures have struggled to interpret the constitutionality of legislation.⁸³ Additionally, as a result of the Court’s failed consensus⁸⁴ on a governing standard, judicial predictability has waned⁸⁵ and judges can easily inject their personal opinions in Establishment Clause interpretations.⁸⁶ This allows for “post hoc legal justification for the non-legally derived result in order not to affront the accepted myths of society, including the myth of the rule of law.”⁸⁷ As Paula Savage Cohen noted, *Lee* not only failed to resolve the graduation prayer conflict, but further complicated the Establishment Clause analysis, forcing lower courts to deal with additional issues in order to avoid reversal.⁸⁸ As this Article suggests, the Eleventh Circuit offers the most viable standard for determining the constitutionality of a graduation prayer and escaping the “Establishment Clause purgatory.”⁸⁹

An examination of other circuits’ Establishment Clause jurisprudence illustrates the various issues in this area of law. In the end, this Article will provide a consolidated approach for a constitutional safe harbor, where religious expression is allowed, and the Establishment Clause remains undisturbed.

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80. *Wallace v. Jaffree*, 472 U.S. 38, 68–69 (1985) (O’Connor, J., concurring) (“[O]ur goal should be ‘to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems.’”) (quoting Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 332–33 (1963)).
81. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).
82. *Jaffree*, 472 U.S. at 70 (O’Connor, J., concurring).
83. *Id.*
84. See John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869, 1869 (2003).
85. “Rules are important so far as they help you to predict what judges will do.” KARL LLEWELLYN, *The Bramble Bush*, reprinted in ANALYTIC JURISPRUDENCE ANTHOLOGY 182 (D’Amato ed. 1996).
86. “Efforts to eliminate the personality of the judge are doomed to failure. The correct course is to recognize the necessary existence of this personal element and to act accordingly.” JEROME FRANK, *Law and the Modern Mind*, reprinted in ANALYTIC JURISPRUDENCE ANTHOLOGY 187 (D’Amato ed. 1996).
87. FREDERICK SCHAUER, *Easy Cases Are Unlitigated Cases*, reprinted in ANALYTIC JURISPRUDENCE ANTHOLOGY 199 (D’Amato ed. 1996); see also FRANK, *supra* note 86, at 184 (“Judicial judgments . . . are worked out backward from conclusion tentatively formulated.”).
88. Cohen, *supra* note 69, at 516; accord Jonassen, *supra* note 57, at 711.
89. *ACLU v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005); accord *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 15 n.3 (2011) (Thomas, J., dissenting from denial of certiorari).

IV. THE CIRCUITS

A. First Circuit

Outside of *Lee*, no other case deals with graduation prayer in the First Circuit. In the few cases that do cite to *Lee*, the court has distinguished the case in the context of a Pledge of Allegiance challenge, which asserted that the practice of reciting the Pledge (particularly the phrase “under God”) as a school policy was unconstitutional.⁹⁰ The court found that voluntary recitation was not a religious exercise and that the presence of non-religious texts in the Pledge is a significant fact that removed this from *Lee*’s direct scope.⁹¹ Unlike the coerced participation in *Lee* triggered by the simple act of a student remaining silent, in the Pledge of Allegiance context, where participation is an active process, the “student who remains silent . . . engages in overt non-participation by doing so[.]”⁹²

B. Second Circuit

Prior to *Lee*, the Second Circuit delivered an insightful opinion on school prayer that shows the pre-*Lee* approach to these types of issues.⁹³ In *Brandon v. Board of Education*, the court addressed a student-organized group conducting prayer in a classroom immediately before the school day.⁹⁴ Interestingly, the court framed the issue within a jurisprudential and historical framework of maintaining the necessary balance between voluntarism, neutrality, and separation of religion.⁹⁵ The court asked whether the school’s refusal to allow this prayer group to meet on school property exhibited sufficient government neutrality so as to avoid an improper degree of hostility towards religion in violation of the Free Exercise Clause.⁹⁶

In considering this question, the court began with an inquiry into whether there is any “coercive effect of the (state) enactment as it operates

90. *Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 5 (1st Cir. 2010).

91. *Id.* at 13.

92. *Id.* at 13–14. While the Court in *Lee* may have been convinced that in “our social conventions, a reasonable dissenter . . . could believe that the group exercise signified her own participation or approval of it,” *Lee*, 505 U.S. at 593, in *Hanover*, the First Circuit did not find that the Pledge of Allegiance was a formal religious exercise nor would the silence of a student be considered a form of participation. *Hanover Sch. Dist.*, 626 F.3d at 13–14.

93. *See generally* *Brandon v. Bd. of Educ. of Guilderland Cent. Sch. Dist.*, 635 F.2d 971 (2d Cir. 1980).

94. *Id.* at 973. “Any voluntary student prayer meetings conducted after the arrival of the school buses and before the formal ‘homeroom’ period at 7:50 a.m., therefore, would occur during school hours.” *Id.* at 979.

95. *Id.* at 975.

96. *Id.* at 975–76.

against [an individual's] practice of religion.”⁹⁷ As part of this inquiry, the court looked to the pre-*Smith* standard for free exercise scrutiny, which demanded that a state's infringement on religion be justified as a compelling interest achieved by the least restrictive means.⁹⁸ Applying this standard, the court determined the refusal of school officials in allowing this prayer group to meet *on school property* did not impose a “coercive restraint” on their religious observance.⁹⁹ The court noted that in some instances, religious accommodation may be appropriate.¹⁰⁰ “Authorization for prayer at public universities, for example, has been required because students both study and reside there.”¹⁰¹ The religious needs of the prayer group in this case, however, did not warrant such accommodations.¹⁰²

Even if other means were not available, the court found that the state would still have grounds to disallow this meeting by showing a compelling state interest in preventing Establishment Clause violations.¹⁰³ Allowing the students to pray during school would violate the prohibition on endorsement, advancement, and entanglement with religion since the school would need to monitor the prayer meeting to ensure that participation remains voluntary.¹⁰⁴ Considering all this, no alternative accommodation could be made to avoid the appearance that the school was sponsoring a religious activity.¹⁰⁵

While the inquiry in *Brandon* does little to predict the outcome of graduation prayer cases after *Lee*, it remains among the few cases from the Second Circuit to speak on the issue at length. In fact, the only other case to deal with graduation prayers after *Lee* was *A.M. ex rel. McKay v. Taconic Hills*, an unpublished opinion from 2013.¹⁰⁶ In that case, the court addressed a challenge brought by the parent of the plaintiff who was elected co-president and permitted to deliver a brief message during an annual

97. *Id.* at 976 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963)).

98. *Id.*

99. *Id.* at 977.

100. Court gave the example of a Moslem “who must prostrate himself five times daily.” *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 978.

104. *Id.* at 979. This same rationale was offered in the context of *Karen B* where the voluntary one-minute prayer required school authorities “to supervise the implementation of the prayer program in order to guarantee that all participation would remain purely voluntary.” *Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982).

105. *Brandon*, 635 F.2d at 979. The court also dismissed a free speech argument of the students by noting that a high school is not a “public forum” and that comparing the political speech granted in *Tinker* with the right to religious speech triggering Establishment Clause concerns is unsuitable. *Id.* at 980.

106. *See A.M. ex rel. McKay v. Taconic Hills Cent. Sch. Dist.*, 510 F. App'x 3 (2d Cir. 2013) (unpublished table decision); *see also Hsu ex rel. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996). The court offered an excellent extended dive into the issue of equal access for a religious group.

“Moving-Up Ceremony” scheduled to take place in a middle school auditorium.¹⁰⁷ The student’s proposed message ended with a verse from the Old Testament invoking the “Lord” to bless the congregation.¹⁰⁸ After review, the faculty advisor and the principal requested that the last sentence be removed because it sounded “too religious” and could be perceived by the audience as the school’s endorsement of “one religion over another.”¹⁰⁹ The student refused, and was told she could not deliver the message without compliance—at which point she agreed to remove the statement.¹¹⁰ After the ceremony, the student filed suit alleging a violation of her rights under the Free Speech Clause of the First Amendment.¹¹¹

The court determined that the school did not violate the student’s rights under the First Amendment.¹¹² In reaching this conclusion, the court rested on *Hazelwood School District v. Kuhlmeier*, which held schools could exercise editorial control over student speech “so long as their actions are reasonably related to legitimate pedagogical concerns.”¹¹³ The school, here, was centrally concerned that the speech would be delivered at a school-sponsored event and, thus, members in attendance “might reasonably perceive [the speech] to bear the imprimatur of the school.”¹¹⁴ Given that the last sentence of the speech was “purely religious,” the school, pursuant to *Hazelwood*, maintained that the “legitimate pedagogical concerns” of avoiding the endorsement of religion and violating the Establishment Clause provided a “reasonable” basis for what the court recognized to be a content-based discrimination of speech.¹¹⁵ The court noted that in the context of student speech, a school retained the right to impose restrictions on speech in the effort to avoid the reasonable perception that the school has betrayed its position of neutrality “on matters of political controversy.”¹¹⁶

While *Taconic Hills* offers little guidance as to how the court will rule in future cases, the Second Circuit’s jurisprudence on religion in school

107. *A.M. ex rel. McKay*, 510 F App’x at 5. As the court pointed out, the Ceremony was entirely funded by the school, insured by the school district, held in a school auditorium, publicized on materials bearing the school district’s letterhead, and bore a number of insignia that the school was directly responsible for the event. *Id.* at 6.

108. The sentence read: “As we say our goodbyes and leave middle school behind, I say to you, may the LORD bless you and keep you; make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace.” *Id.* at 5.

109. *Id.* at 6. The school’s legal counsel also agreed that allowing A.M. to deliver the sentence could violate the Establishment Clause. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 10.

113. *Id.* at 7 (quoting *Hazelwood Sch. Dist v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

114. *Id.* at 7–8 (quoting *Morse v. Frederick*, 551 U.S. 393, 405 (2007)).

115. *Id.* at 9.

116. *Id.* at 10 (quoting *Hazelwood*, 484 U.S. at 272).

provides sufficient language to suggest its conformity with the more limited view on school prayer. As discussed *infra*, the solution will largely rest between the school's relinquishment of editorial control and its willingness to embrace the narrow balance between sponsorship and censorship.¹¹⁷

C. Third Circuit

The leading case from the Third Circuit touching on graduation prayer is *ACLU v. Black Horse Pike*.¹¹⁸ There, the court dealt with a post-*Lee* policy of the Black Horse Pike Regional Board of Education (the "Board").¹¹⁹ Prior to *Lee*, the Board maintained a longstanding tradition of including a nonsectarian prayer during high school ceremonies.¹²⁰ In order to bring the school policy in conformity with *Lee*, the Board decided to implement a policy for graduation ceremonies that would allow the graduating class to vote on whether they wanted a "prayer, a moment of reflection, or nothing at all."¹²¹ "[D]uly elected class officers" were to decide the form of prayer, and the school took efforts to disclaim its endorsement in the printed graduation program.¹²² As a result, the plurality of students voted to include a prayer—although the majority of students voted against it.¹²³ After the school denied¹²⁴ the ACLU an opportunity to also speak at graduation on safe sex and condom distribution, a petition was filed to enjoin any student-led prayer—alleging a violation of the First Amendment and the New Jersey Constitution.¹²⁵

The court, in striking down the Board's new policy, discussed the merits in regards to the free speech and Establishment Clause concerns brought by the ACLU.¹²⁶ As to the free speech claim, the court recognized

117. See Part VI.

118. See generally *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996).

119. *Id.* at 1474.

120. *Id.*

121. *Id.*

122. *Id.* at 1475.

123. "[The Policy] required that printed programs for the graduation include a disclaimer explaining that any presentation that may be given at commencement did not reflect the views of the School Board, the School District, administrators, staff, or other students." *Id.*; see also *Lee v. Weisman*, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting) (suggesting this much in *Weisman* when he contested that schools may simply proceed with the prayer so long as they disclaim in some way that "while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so"); Cohen, *supra* note 69, at 516 (calling this Scalia's "mischievous invitation to school officials to subvert the *Weisman* decision").

124. *Black Horse*, 84 F.3d at 1475. The vote produced the following results: "128 students voted for prayer, 120 for reflection/moment of silence, and 20 voted to have neither." *Id.*

125. The school's denial was based upon time constraints and the subject matter not being one that is generally discussed at graduation ceremonies. *Id.*

126. *Id.* at 1475–76.

127. See generally *id.* at 1478–88.

that the policy was a mere attempt to transform an “impermissible practice...into a constitutionally acceptable one by putting a democratic process to an improper use.”¹²⁷ The court acknowledged that while the policy may have been an attempt to bring the Board in conformity with *Lee* and to promote the free speech rights of the majority by election, its unprecedented¹²⁸ outcome essentially converted the graduation service into a public forum and allowed a religious plurality to dictate the terms of expression.¹²⁹ In providing this opportunity to the students, the school failed to create sufficient distance to eliminate the state’s imprint thus violating the holding in *Lee*, which forbade state officials to “direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools.”¹³⁰

As to the Establishment Clause analysis, the court found that the school policy violated the first two prongs of *Lemon*.¹³¹ While the Board contended that the new policy maintained a secular purpose, the court was not persuaded that the policy had shed its religious long-standing practice of prayer at graduation.¹³² The court recognized that the new policies proscription on content review from the school created an opportunity for unrestricted religious expression.¹³³ This “hands-off” approach to religious speech is problematic because, in theory, it would provide students the right to proselytize or degrade other religions, in a forum controlled by the school, without the “concomitant right” of the school to refuse to foster such expression.¹³⁴

Further, the policy violated the second prong of *Lemon* by having the “principal or primary effect” of advancing or endorsing a religion in the eyes of a reasonable observer cognizant of the school’s historical and ubiquitous practice of having prayer at graduation.¹³⁵ By intentionally conflating the endorsement test with the second prong of *Lemon*, the court determined that the Board’s policy unequivocally violated the Establishment Clause by providing an opportunity for prayer with only a plurality vote.¹³⁶ By this, the court reasoned that a reasonable observer

127. *Id.* at 1477.

128. *See id.* at 1478 (“High school graduation ceremonies have not been regarded, either by law or tradition, as public fora where a multiplicity of views on any given topic, secular or religious, can be expressed and exchanged.”).

129. *Id.* at 1487.

130. *See id.* at 1479 (citing *Lee v. Weisman*, 505 U.S. 577, 586 (1992) (“We believe that the control exercised by state officials . . . is not sufficiently distinct to require a different result under the ‘first dominant fact’ of *Lee*.”)).

131. *Id.* at 1488.

132. *Id.* at 1484.

133. *Id.*

134. *Id.* at 1484–85.

135. *Id.* at 1486.

136. *Id.* at 1487.

would see that the school sustains an interest in advancing prayer—even in the face of majority opposition—giving off the impression that dissenting religious choices were disfavored.¹³⁷ While the school did advance a disclaimer,¹³⁸ the court considered this an insufficient remedy to neutralize the advantage provided for religious over secular speech.¹³⁹

The Board's policy in *Black Horse* essentially fell into the same trap as the later policy in *Santa Fe* by entangling the school with a religious debate, thus providing the necessary state involvement to trigger a violation under *Lee*.¹⁴⁰ The precise language used by the Third Circuit that suggested the "first dominant fact"¹⁴¹ of *Lee* was unmet was its noting that the students could only decide on the graduation prayer because the school officials agreed to let them.¹⁴² Removing the school's direct involvement with the graduation prayer process alleviates these sponsorship concerns and brings the policy in line with *Lee*, while still allowing for students to deliver a private, religious message, without the need for censorship.¹⁴³ At the same time, looking back to the lessons from the Second Circuit—where the editorial control was too great in *Taconic Hill* (i.e. censorship)—in *Black Horse* it seemed too little (i.e. sponsorship). While striking the perfect balance is difficult since courts analyze graduation prayer cases on a case-by-case basis, the contours for a balance between sponsorship and censorship lies somewhere between *Taconic Hill* and *Black Horse*.

D. Fourth Circuit

American Humanist Ass'n v. Greenville County School District, the only Fourth Circuit case concerning graduation prayer after *Lee*, remains undecided after the Fourth Circuit punted on the merits and decided in part

137. *Id.* The Court reached this conclusion by distinguishing this case with *Allegheny*, where the Supreme Court determined that the religious displays, as part of the city's holiday celebration, would not suggest to a reasonable observer that the state was trying to endorse religion. *See id.* (citing *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 616 (1989)).

138. *See supra* note 122.

139. *Black Horse*, 84 F.3d at 1487.

140. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) ("[The policy] established a governmental electoral mechanism that turns the school into a forum for religious debate . . ."); *accord Black Horse*, 84 F.3d at 1479 ("Students decided the question of prayer at graduation only because school officials agreed to let them . . .").

141. *See Lee v. Weisman*, 505 U.S. 577, 586 (1992) ("State officials direct the performance of a formal religious exercise . . .").

142. *Black Horse*, 84 F.3d at 1479-80.

143. While this approach treads lightly on terrain that needs further legal development, some have argued that the policy in *Black Horse* was in fact neutral and should have passed under the *Lee*-coercion test. *See* Ann E. Stockman, *ACLU v. Black Horse Pike Regional Board of Education: The Black Sheep of Graduation Prayer Cases*, 83 MINN. L. REV. 1805, 1830 (1999). This scholarship did not, however, have the benefit of the *Santa Fe* decision, which, assuming it overruled *Jones II*, would have likely confirmed the Third Circuit's decision.

on procedural grounds.¹⁴⁴ The issue involved the policy and practice of a school district in South Carolina that held its graduation ceremonies in a “Christian-based venue”—a chapel affiliated with the Southern Baptist Convention—and allowed a designated student to deliver a “school-sponsored prayer.”¹⁴⁵ This policy was subsequently revised to be more neutral—allowing for a student-initiated prayer, but whitewashing the religious venue from any iconography that would suggest that the district was endorsing religion.¹⁴⁶ The plaintiffs—the Does family and the American Humanist Association (AHA)—sued, contending that the revised prayer and chapel policy was an unconstitutional endorsement of religion.¹⁴⁷ The plaintiffs sought damages for past harms and an injunction barring any school prayer or the use of religious venues for school events.¹⁴⁸ Although the Does were once part of the school district and their daughter was allegedly coerced to participate in a school-sponsored religious activity, they have since transferred.¹⁴⁹

The Fourth Circuit largely decided the case along procedural lines. It allowed all past claims for nominal damages to stand regarding the Does family for prior constitutional violations despite moving.¹⁵⁰ As to their prospective claims, both were dismissed as moot since the family would no longer be subject to the alleged harms of the revised policy.¹⁵¹ As to the ongoing litigation efforts by the AHA, the court dismissed its prospective *chapel* claim for failure to establish standing at the district court level.¹⁵² However, the court allowed the prospective *prayer* claim to move forward on remand to allow the AHA to establish representational standing on behalf of other members.¹⁵³

E. Fifth Circuit

In *Jones v. Clear Creek Independent School District* (“*Jones I/II*”) the Fifth Circuit offered its post-*Lee* approach to school prayer.¹⁵⁴ In *Jones I*, the Clear Lake High School Board of Trustees (“Clear Lake”) adopted a resolution (the “Resolution”) that permitted the graduating class to decide

144. *Am. Humanist Ass’n v. Greenville Cty. Sch. Dist.*, No. 15-1574, 2016 WL 3402536 (4th Cir. June 21, 2016).

145. *Id.* at *1.

146. *Id.* at *2.

147. *Id.*

148. *Id.*

149. *Id.* at *2, 3.

150. *Id.* at *6.

151. *Id.* at *6, 7.

152. *Id.* at *6.

153. *Id.* at *5.

154. See generally *Jones I*, 930 F.2d 416, 417 (5th Cir. 1991), *judgment vacated*, 505 U.S. 1215 (1992).

whether to include a graduation invocation in the graduation ceremony.¹⁵⁵ Additionally, the Resolution required that a student volunteer deliver the invocation and benediction, which had to remain “nonsectarian and nonproselytizing in nature.”¹⁵⁶

In considering the constitutionality of the prayer under the *Lemon* test, the court found that the Resolution possessed a secular purpose—finding no evidence in the legislative history or in the drafted language to suggest a religious motivation or preference.¹⁵⁷ The court accepted that the Resolution’s intent in allowing prayer was meant to solemnize the graduation ceremony instead of serving as a pretext for introducing prayer into public schools as suggested by the plaintiffs.¹⁵⁸ Considering the second prong of the *Lemon* test, the court found that the Resolution’s primary effect was not to advance or endorse religion when considered in light of the full context surrounding the graduation ceremony.¹⁵⁹ Finally, the court found the school’s review of the invocations for “sectarianism and proselytization” was not constitutionally excessive as to violate the entanglement prong in *Lemon*.¹⁶⁰ The court adopted Justice O’Connor’s reading of the *Lemon* test, which “limited [the entanglement prong] to institutional entanglement” between “governmental and religious institutions.”¹⁶¹ Since the Resolution required the invocation to be nonsectarian and delivered by a student volunteer, it “effectively exclude[d] religious institutions from its purview.”¹⁶² This judgment was accepted on

155. *Id.* at 417.

156. *Id.*

157. *Id.* at 420.

158. *Id.* The fact that the Resolution “deemphasize[d] the religious significance of allowed invocations” by mandating they be “nonsectarian and nonproselytizing” supported this fact. *Id.* This is important considering that a prior Fifth Circuit opinion also said that “states cannot employ a religious means to serve otherwise legitimate secular interest.” *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff’d*, 455 U.S. 913 (1982) (“That [prayer] may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise.”). *But see Jones I*, 930 F.2d at 420 (“[T]o say that the Resolution employs a ‘religious means’ is to confuse purpose and effect analysis under *Lemon*.”). The Fifth Circuit noted in *Jones I* that the Resolution did “not employ an obviously religious means to solemnize Clear Creek graduation ceremony.” *Id.* Also noteworthy is the fact that the Ninth Circuit in *Harris* rejected “that solemnization is sufficient . . . to secularize what is objectively and inherently religious.” *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 458 (9th Cir. 1994), *cert. granted, judgment vacated*, 515 U.S. 1154 (1995), *and cert. granted, judgment vacated sub nom.*, *Citizens Preserving Am.’s Heritage, Inc. v. Harris*, 515 U.S. 1155, (1995), *and vacated*, 62 F.3d 1233 (9th Cir. 1995).

159. *Jones I*, 930 F.2d at 421. Factors considered included the fact that the invocation took place once every four years, was historically brief (lasting under one minute), outside the classroom setting, and the passive role of Clear Creek based on its inclusion process and allowing the student volunteer to decide on referencing a deity. *Id.* at 422. The court in *Jones II* acknowledged that in *Jones I*, it “mistakenly . . . conflated advancement and endorsement analysis.” *Jones v. Clear Creek Indep. Sch. Dist. (Jones II)*, 977 F.2d 963, 968 (5th Cir. 1992) (sitting en banc).

160. *Jones I*, 930 F.2d at 422.

161. *Id.* at 423 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 684 (O’Connor, J., concurring)).

162. *Id.* at 423.

writ, vacated, and remanded for reconsideration in light of *Lee v. Weisman*.¹⁶³

On remand, the court reviewing *Jones I* affirmed its decision by examining the claim under the five relevant tests for Establishment Clause challenges in school settings.¹⁶⁴ The court again found that the standard had met all three prongs of the *Lemon* test.¹⁶⁵ First, it found that “solemnization is a legitimate secular purpose of ceremonial prayer.”¹⁶⁶ Second, the primary effect of the Resolution remained secular due to the uncertainty of having an invocation and the unlikelihood that attendees would consider any religious references to be advancing religion.¹⁶⁷ Finally, nothing in *Lee* abrogated the decision in *Jones I* to “limit violative entanglement to *institutional* entanglement.”¹⁶⁸

As to the endorsement inquiry, the court in *Jones II* distinguished endorsement of religion from the Resolution by pointing out that there was no requirement for a prayer and that the presence of the invocation was not only the workings of a vote by the senior class, but also the invocation’s religious content depended entirely on the choice of a student volunteer.¹⁶⁹ Finally, the court determined that the Resolution did not succumb to any of the three elements in *Lee* that contributed to a finding of unconstitutional coercion, namely “when (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors.”¹⁷⁰ By providing a mechanism where the senior class controls the content with minimal interference from the school, the Resolution allowed for much less government involvement.¹⁷¹ The Resolution did not amount to a “formal religious observance” as in *Lee*, but simply tolerated a nonsectarian, nonproselytizing prayer.¹⁷² Finally, the Resolution placed less “psychological pressure on students” since they participated in the process of deciding on the prayer and its presence at the ceremony is the product of their own labor and not the state’s.¹⁷³

After the *Jones* decisions, the Fifth Circuit briefly dealt with a preliminary injunction issue in *Ingebretsen v. Jackson Public School District*, which looked at a Mississippi statute that allowed for a “nonsectarian, nonproselytizing student-initiated voluntary prayer . . .

163. *Jones v. Clear Creek Indep. Sch. Dist. (Jones)*, 505 U.S. 1215 (1992).

164. *Jones II*, 977 F.2d at 966.

165. *Id.* at 966–68.

166. *Id.*

167. *Id.* at 967.

168. *Id.* at 968.

169. *Id.* at 969.

170. *Id.* at 970.

171. *Id.* at 971.

172. *Id.*

173. *Id.*

during compulsory or noncompulsory school-related” events on public school property.¹⁷⁴ In evaluating whether a preliminary injunction was warranted, the court considered the “substantial likelihood of success on the merits[.]”¹⁷⁵ The court applied the *Lemon* test, the coercion test, and the endorsement test, and found that the statute failed every prong of every test.¹⁷⁶ Under *Lemon*, the court opined the statute was another attempt by the legislature to advance religion by returning prayer to public schools.¹⁷⁷ Under the coercion test, the court found that application was easier under *Lee* since the students were required to attend at least some of the classes, rendering them a captive audience.¹⁷⁸ Finally, under the endorsement test, the statute as applied allowed for teachers to set aside time for prayer that was otherwise not allowed for other activities.¹⁷⁹

The Fifth Circuit may remain committed to the principle in *Jones* that a student “can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies[.]”¹⁸⁰ and the holding in *Ingebretsen*, which permitted “students to choose to pray at high school graduation[s] to solemnize that once-in-a-lifetime event.”¹⁸¹ However, later cases may have abridged the constitutionality of *Jones II*, which in turn may have a ripple effect on all subsequent cases that depended on its holding.¹⁸² For example in *Doe v. Santa Fe*, the Fifth Circuit refused to extend the type of resolution at issue in *Jones III* to football games (regardless if the policy contains nonsectarian, nonproselytizing restrictions), as well as explicitly denied a policy that would allow sectarian, proselytizing graduation prayers.¹⁸³

In *Santa Fe*, a school board policy permitted invocations and benedictions for the purpose of solemnizing the school’s graduation ceremonies.¹⁸⁴ The court focused on a July 1995 policy that intentionally

174. *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 277 (5th Cir. 1996). The district court enjoined the enforcement of the statute in all instances except graduation ceremonies in accordance with *Jones II*. *Id.* at 278.

175. *Id.* at 278.

176. *Id.* at 278.

177. *Id.* at 279.

178. *Id.*

179. *Id.* at 280.

180. *Jones II*, 977 F.2d at 972.

181. *Ingebretsen*, 88 F.3d. at 278, 280.

182. A Texas district court has explicitly stated that *Santa Fe* overruled *Jones II* to the extent that it approves a majoritarian election on religion. *Does 1-7 v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735, 750 (W.D. Tex. 2007). However, it did approve of *Adler II*’s reading of *Santa Fe*, *id.* at 748, rendering “the Eleventh Circuit the only federal jurisdiction which permits elective student prayer at public school graduations.” Jonassen, *supra* note 57, at 742.

183. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 809, 818 (5th Cir. 1999), (“Student-selected, student-given, sectarian, proselytizing invocations and benedictions at high school graduations violate both the *Lemon* test and the Endorsement test . . .”), *aff’d*, 530 U.S. 29 (2000).

184. *Id.* at 811–12.

left out the twin restriction language (“nonsectarian, nonproselytizing”) in the event that the district court allowed the policy to go forward.¹⁸⁵ Otherwise, the language would retroactively be applied and the July 1995 policy would conform closely to the Resolution in *Jones I*.¹⁸⁶ In considering these two policies, the trial court decided that *Jones II* required the additional limitations for the policy to be constitutional.¹⁸⁷

The school district challenged this ruling, claiming the inclusion unnecessary.¹⁸⁸ The circuit court, however, disagreed.¹⁸⁹ Looking to *Jones II*, the court determined that a policy that does not include the added twin restrictions violates the dictates of the Establishment Clause.¹⁹⁰ Reflecting on cases after *Jones II*, the court made clear that the mere fact that a prayer is the product of a student-led initiative does not automatically ensure that the prayer survives the “principal or primary effects” prong in *Lemon*.¹⁹¹ In sum, the Fifth Circuit in *Santa Fe* upheld the *Jones II*-type policy so long as it remains in its “nurturing context”¹⁹² and that football games are simply not the “sober type of annual event[s] that can be appropriately solemnized with prayer.”¹⁹³

The Supreme Court granted writ on appeal limited to the question of whether the “policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.”¹⁹⁴ Although the Court struck down¹⁹⁵ the practice—fundamentally because the Santa Fe policy did not sufficiently remove itself from involvement with the prayer—it remains uncertain whether the same can be inferred to apply to the graduation context.¹⁹⁶ The strongest language suggesting it does involves the Court’s invalidation, on facial grounds, of the school policy based on it “impos[ing] upon the student body a majoritarian election on the issue of prayer,” “undermin[ing] the essential protection of minority viewpoints,” and creating the perception of “encouraging the delivery of prayer at a series of important school events.”¹⁹⁷ However, the context does play an important

185. *Id.* at 812.

186. *Id.*

187. *Id.* at 813.

188. *Id.* at 814.

189. *Id.* at 824.

190. *Id.* at 816.

191. *Id.* at 817 (citing *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407 (1995); *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (1996)).

192. *Id.* at 818, 823.

193. *Id.* at 823.

194. The Supreme Court granted writ limited to the question of whether the “policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.” *Santa Fe Indep. Sch. Dist. v. Doe*, 528 U.S. 1002 (1999).

195. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000).

196. Jonassen, *supra* note 57, at 729–30.

197. *Santa Fe*, 530 U.S. at 317.

role in the precedential usefulness of this decision, considering the question presented has not required the Fifth Circuit to extend the holding to graduation prayers.¹⁹⁸ As discussed *infra*, the Eleventh Circuit was careful to distinguish the ruling in *Santa Fe* with all graduation prayer policies, and maintained that each case should be decided based on its own unique factual circumstances.¹⁹⁹ In its conclusion, the Eleventh Circuit noted that *Santa Fe* “did not rule that an election process itself is always incompatible with the Establishment Clause.”²⁰⁰

As a final note, the Supreme Court, despite its limiting language in *Santa Fe*, relied heavily on the school’s historical custom of prayer at graduation.²⁰¹ Justice Stevens—leaning on Justice O’Connor’s concurring opinions in *Lynch*, *Wallace*, and *Pinette*—adopted a framework for analyzing a school’s policy that looks beyond the mere text and considers how the policy’s history advances an “actual or perceived” endorsement of religion.²⁰² By doing so, he was able to deduce from the construction of the policy at *Santa Fe* that the school administration’s delegation was a mere sham²⁰³ for the Court to unravel and that the students were well aware “that the central question before them was whether prayer should be a part of the pregame ceremony.”²⁰⁴ Given the history and the circumstances surrounding the election process, the Court concluded that the specific purpose of the policy was to preserve a popular “state-sponsored religious practice”²⁰⁵ in violation to the Establishment Clause.

As scholars have noted, this suggests an almost inescapable dilemma where no prayer policy deemed unconstitutional could ever²⁰⁶ be corrected if the Court is poised to judge based on “past history, context, and social circumstances.”²⁰⁷ If the Court recognizes a long-standing historical

198. *Cf. Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 502 (5th Cir. 2007) (implying acknowledgment of the constitutionality of policy in *Jones II*) (en banc).

199. *Adler II*, 250 F.3d at 1336; *see also Chandler v. Siegelman (Chandler II)*, 230 F.3d 1313, 1316 (11th Cir. 2000) (“[*Santa Fe*] does not reject the possibility that some religious speech may be truly private even though it occurs in the schoolhouse. Nor does it hold that all religious speech is inherently coercive at a school event.”).

200. *Id.* at 1340-41.

201. *See Jonassen, supra* note 57, at 730 n.300.

202. *See Santa Fe*, 530 U.S. at 307-09 (citing *Wallace v. Jaffree*, 472 U.S. 38, 73 (1985) (O’Connor, J., concurring); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O’Connor, J., concurring)).

203. *Id.* at 308 (quoting *Wallace*, 472 U.S. at 75 (O’Connor, J., concurring)). “The election mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games.” *Id.* at 311.

204. *Id.* at 307, 308, 315. “[A]n objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval.” *Id.* at 308.

205. *Id.* at 309 (quoting *Lee v. Weisman*, 505 U.S. 577, 596 (1992)).

206. Jennifer Carol Irby, *Santa Fe Independent School District v. Doe: The Constitutional Complexities Associated with Student-Led Prayer*, 23 CAMPBELL L. REV. 69, 111 (2000).

207. Jonassen, *supra* note 57, at 730.

practice of prayer at school, any curative steps to bring that policy in compliance would in essence be “condemned by the school’s graduation prayer history.”²⁰⁸ If the school is not able to escape its history, *Santa Fe* “comes close to making *Lee* an absolute ban on religious expression at graduation.”²⁰⁹ This is what Professor Ira Lupu indicated when he wrote:

After *Santa Fe*, any system of student election, in which school policy promotes invocation as a message or solemnization as a purpose, is doomed. Moreover, any system of official selection of student speakers for such events will violate the Establishment Clause if the history and context of the selection system reveals an official desire to have or maintain prayer at the event. Given the usual history of such policies, enacted in the wake of *Lee* precisely to avoid that decision’s strictures and thereby maintain a community custom of graduation prayer, few are likely to survive.²¹⁰

These concerns will largely be the driving force behind the dissenting voices in Part V.C and the contribution of Professor Paul Horwitz on this topic.

F. Sixth Circuit

Prior to the holding in *Lee*, the Sixth Circuit based its analysis of graduation prayers on the holding in *Marsh v. Chambers*.²¹¹ The court was careful to: protect the proper boundaries between liberty of conscience and public order;²¹² recognize the solemnizing function of prayer at graduation ceremonies analogous to legislative and judicial sessions;²¹³ and consider that the public nature of the proceeding and the presence of parents served as a sufficient buffer against religious coercion.²¹⁴ After *Lee*, the Sixth Circuit has only touched on the topic of graduation prayer in the university context when it upheld a “nonsectarian prayer or moment of silence” in *Chaudhuri*.²¹⁵ There, Tennessee State University maintained a practice of

208. *Id.*; cf. Kelly J. Coghlan, *Those Dangerous Student Prayers*, 32 ST. MARY’S L.J. 809, 840 (2001) (“[P]rayer did not doom the [revised football game] policy, the peculiar history and text [did].”).

209. Jonassen, *supra* note 57, at 730–31.

210. Lupu, *supra* note 20, at 810.

211. See *Stein v. Plainwell Cmty. Sch.*, 822 F.2d 1406, 1409–10 (6th Cir. 1987); *Marsh v. Chambers*, 463 U.S. 783 (1983).

212. See *Stein*, 822 F.2d at 1409.

213. *Id.*

214. *Id.* For ceremonial prayers to pass constitutional muster, they must remain nonsectarian, nondenominational, and similarly secular to those approved by *Marsh*. *Id.* at 1410 (Milburn, J., concurring).

215. *Chaudhuri v. Tennessee*, 130 F.3d 232, 233 (6th Cir. 1997).

including an invocation and benediction at certain university events.²¹⁶ A Hindu faculty member challenged the practice, and it was subsequently modified to allow for a prayer without any formal review process or guidelines, except for a request that the content be nonsectarian and omit any references to Jesus Christ.²¹⁷ The university later modified this stance even further by reducing the prayer to a moment of silence to “afford dignity and formality to the event . . . and to solemnize the occasion.”²¹⁸ After a spontaneous recitation broke out on two occasions during these “moments of silence,” the plaintiff brought an action to enjoin the practice as well.²¹⁹

The court determined, under the *Lemon* analysis, the school’s prior practice of allowing nonsectarian prayers qualified as a secular purpose as a way to “dignify or to memorialize a public occasion.”²²⁰ The court noted that an effort to extirpate from public ceremonies all vestiges of religious acknowledgment goes against the Bill of Rights, which was not adopted “in order to strip the public square of every last shred of public piety.”²²¹ Like the verbal prayer, the moment of silence contained a legitimate secular purpose by demonstrating the absence of overtly Christian titles, references to Jesus Christ, and overt efforts by the school to “return voluntary prayer to . . . schools.”²²² The fact the school failed to censor the audience was not evidence of complicity, and the Constitution does not require the university to silence private citizens.²²³ Further, the challenged practice did not have the primary effect of advancing religion or indoctrinating the audience, and a reasonable observer would readily acknowledge a nonsectarian prayer is meant to solemnize the occasion and encourage reflection.²²⁴ In the presence of college-educated adults, any endorsement of religion was “indirect, remote, and incidental”²²⁵ Lastly, the final prong of *Lemon* was also met because “any entanglement resulting from the inclusion of nonsectarian prayers at public university functions [was], at most, *de minimis*” and nonexistent for the moment of silence.²²⁶

216. *Id.* at 333–34 (discussing “university functions such as graduation exercises, faculty meetings, dedication ceremonies, and guest lectures”).

217. *Id.*

218. *Id.* at 235.

219. *Id.*

220. *Id.* at 236.

221. *Id.*

222. *Id.* at 237 (citing *Wallace v. Jaffree*, 472 U.S. 38, 43 (1985)).

223. *See id.* at 237; *see also* *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion) (“The proposition that schools do not endorse everything they fail to censor is not complicated.”).

224. *Chaudhuri*, 130 F.3d at 237–38.

225. *Id.* at 237.

226. *Id.*

The court distinguished this issue from *Lee* because, unlike *Lee*, attendance was encouraged and therefore in no “real sense obligatory”;²²⁷ the presence of peer pressure was simply absent; and the age of those in the audience plays an important factor in determining coercion as a corollary to maturity.²²⁸

G. Seventh Circuit

Like the Sixth Circuit, since *Lee* the Seventh Circuit has only touched on the issue of graduation prayer in a substantive way within a university context.²²⁹ In *Tanford v. Brand*, a faculty member and several students at Indiana University brought a suit to enjoin an invocation and benediction at a graduation ceremony.²³⁰ The court, considering *Lee*, recognized that the element of coercion was not present since the freedom to come and go was manifest and the maturity of the audience reduced the special underlying concerns in *Lee*.²³¹ The court also found the university’s longstanding tradition of having an invocation and benediction has a legitimate secular purpose of solemnizing public occasions and “any advancement of religion or governmental entanglement [was] *de minimis* at best.”²³²

On the periphery, however, the Seventh Circuit did strike down the practice of hosting graduations inside a Christian church, concluding that it violates the Establishment Clause and could not be meaningfully distinguished from *Lee* and *Santa Fe*.²³³ The court considered the religious environment to be an endorsement of religion and, as a corollary, a violation of the coercion-based principles from *Lee* and *Santa Fe*.²³⁴

227. *Id.* (citing *Lee v. Weisman*, 505 U.S.577, 586 (1992)).

228. *See id.* at 239 (“We may safely assume that doctors of philosophy are less susceptible to religious indoctrination than children are.”).

229. The only relevant case involved a motion for civil contempt from an alleged violation of a permanent injunction, which prevented a school “from participating or actively involving itself in religious prayer at graduation.” *Goluba v. Sch. Dist. of Ripon*, 45 F.3d 1035, 1036 (7th Cir. 1995). The court focused on the interpretation of the consent decree and not on the words of the Establishment Clause, noting that the intent of the decree was to prevent the school from taking part in organizing or promoting graduation prayer. *Id.* at 1037–39. The court did note that a school couldn’t prevent “an individual student from engaging in unobtrusive private prayer . . . [and] willfully obstructing an individual from personally recognizing the religious implications of a momentous event in her life is impermissible interference.” *Id.* at 1040.

230. *Tanford v. Brand*, 104 F.3d 982, 983 (7th Cir. 1997).

231. *Id.* at 985–86.

232. *Id.* at 986.

233. *See Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 850 (7th Cir. 2012) (en banc). This case had similar factual concerns as *American Humanist Ass’n v. Greenville County School District*, 571 Fed. App’x. 250 (4th Cir. 2014).

234. *Id.* at 855 (“[I]t is a mistake to view the coercion at issue in [*Lee* and *Santa Fe*] as divorced from the problem of government endorsement of religion in the classroom generally.”).

In the dissenting opinion, Judge Posner pointed out that the Supreme Court's language in Establishment Clause cases is "formless, unanchored, subjective and provide[s] no guidance."²³⁵ In the context of the Religion Clauses, without guidance from the Constitution, judges are prone to adjudicating based on "political orientation," "personality, upbringing, conviction, experience, emotions, and so forth[.]"²³⁶ His analysis, based in principle on the Latin maxim *de minimis non curat lex*,²³⁷ argued that renting out a church for a secular event poses no real threat to the establishment of religion.²³⁸ While the plaintiffs argued that the presence of religious symbols coerces students and parents to attend what they perceive to be a religious service, Judge Posner calls this *Lee*-based involuntariness argument—claiming that students are not free to leave a graduation service—as "whistling in the dark."²³⁹ The mere exposure to religious symbols without the act of proselytizing is an implausible standard for considering an Establishment Clause violation.²⁴⁰ As a result, the majority simply reaffirmed what many religious Americans already believe—that "courts are hostile to religion."²⁴¹

H. Eighth Circuit

The Eighth Circuit has dealt with the issue of graduation prayers by following the holdings in the Eleventh Circuit. A single case only tangentially touched on the constitutional issue of graduation prayers, but laid out the important principles that drive the proper analysis for these issues. In *Doe v. School District of Norfolk*, a school suspended its practice of permitting graduation prayers after the ACLU threatened a lawsuit.²⁴² At the following graduation ceremony, the school board's president clearly stated that a prayer would not be heard.²⁴³ Nonetheless, another member of the school board allotted time to lead the congregation in reciting the Lord's Prayer.²⁴⁴ The Eighth Circuit had to decide whether this prayer sufficiently triggered state involvement because the school failed to stop the

235. *Id.* at 872 (Posner, J., dissenting).

236. *Id.* at 873.

237. *Id.* at 877. *De minimis non curat lex* is "a doctrine applicable to constitutional . . . cases," translated: "[t]he law doesn't concern itself with trifles." *Brandt v. Bd. of Educ. of City of Chi.*, 480 F.3d 460, 465 (7th Cir. 2007).

238. *Elmbrook*, 687 F.3d at 873–74 (Posner, J., dissenting); *see also id.* at 871 (Easterbrook, J., dissenting).

239. *Id.* at 876 (Posner, J., dissenting).

240. *Id.*

241. *Id.* at 877.

242. *Doe ex rel. Doe v. Sch. Dist. of City of Norfolk*, 340 F.3d 605, 607 (8th Cir. 2003).

243. *Id.* at 608, 611.

244. *Id.*

recitation²⁴⁵ or whether this was merely private action, protected by the First Amendment.²⁴⁶ The court in discussing these competing claims noted two important principles for fairly examining these issues.

The court first noted that not every speaker at a high school graduation is a state speaker.²⁴⁷ While the state has minimal room to involve itself in the process of facilitating graduation prayers,²⁴⁸ sufficient room is left for private speakers to express their personal message with an endorsement of religion—speech protected by the First Amendment.²⁴⁹ Even though the board member who delivered the prayer was representing the school district, he was also a parent of a graduating senior.²⁵⁰ Had the speaker been acting primarily as member of the school board, state-sponsorship would have been more obvious.²⁵¹ Looking to the reasoning of the Eleventh Circuit, the Eighth Circuit agreed that the “complete absence of any involvement by the School District in determining whether [the speaker] would deliver a speech as well as the complete autonomy afforded to [him] in determining the content of his remarks indicates a lack of state-sponsorship of his recitation.”²⁵²

The court then noted that the inquiry into private speech also depended on whether an “objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive [the prayer] as a state endorsement or prayer in public schools.”²⁵³ The court reinforced its finding that the speech was private because the speaker spoke in first person and the school board made clear in advance that no prayer could be delivered because of the looming threat of litigation.²⁵⁴ In the end, the speaker gained access through constitutionally available means²⁵⁵ and delivered a personal statement disconnected from any school endorsement of religion.²⁵⁶

Although the opinion reflects the nature of private speech, the limits of providing a disclaimer, and the absence of school sponsorship of

245. *Id.* at 608.

246. *Id.* at 610–11.

247. *Id.*

248. The “degree of school involvement” is the basis for inquiry as to whether the prayer bore the “imprint of the State.” *Id.* at 611 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

249. *Id.*; *cf.* *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (“[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.”) (emphasis added).

250. *Sch. Dist. of City of Norfolk*, 340 F.3d at 611–12.

251. *Id.* at 612.

252. *Id.*

253. *Id.* (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985)).

254. *Id.* at 612–13.

255. *See id.* at 611 n.5 (“[The] informal policy [that allowed the speaker to address the audience had] no constitutional deficiencies.”).

256. *Id.* at 613.

religion, it does little to draw a proper balance since school officials imposed a policy that largely censored private speech.²⁵⁷

I. Ninth Circuit

While the Ninth Circuit is not the standard bearer for the most balanced approach to graduation prayer cases, it remains the most comprehensive in its treatment of the various related doctrines implicated in this context. While many of these cases failed for lack of standing and other technicalities, they still offer an opportunity to discuss the procedural side of graduation prayer cases as well as various issues invoking the *Lemon* test, equal protection, and limited public forum.

Prior to *Lee*, the Ninth Circuit in *Collins v. Chandler* discussed an issue involving a voluntary prayer at school assemblies orchestrated by the Student Council and school officials.²⁵⁸ The student was selected by the Student Council and was given the freedom to choose the words and manner in which he would deliver the prayer.²⁵⁹ Relying largely on the Second Circuit opinion in *Brandon*, the Ninth Circuit noted several key points.

First, the court acknowledged that the voluntary attendance of the assembly could not save the prayer from a constitutional attack.²⁶⁰ While questions of constitutionality may change based on the level of “meaningful distinction” between school and student involvement in organizing a prayer, no such distinction existed in *Collins*.²⁶¹ Second, the court noted what *Lee* would later expand upon—the coercive nature involved in having to decide between attending a major school function at the expense of being exposed to a religious exhibition.²⁶² Since the school was largely responsible for the assemblies, the court, applying *Lemon* and *Brandon*, found that prayer during school hours violated the Establishment Clause for reasons of coercion and perception of the state placing its “imprimatur on a particular religious creed.”²⁶³

257. Cf. Jonassen, *supra* note 57, at 818–19.

258. *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 760 (9th Cir. 1981). Note that students were given the option to forego attending the assembly by reporting to a supervised study hall. *See id.* at 762.

259. *Id.*

260. *Id.* at 761; *see also* *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224–25 (1963) (“[T]he fact that individual students may absent . . . upon parental request . . . [is] no defense to a claim of unconstitutionality under the Establishment Clause.”) (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)).

261. *Collins*, 644 F.2d at 761.

262. *Id.* at 762.

263. *Id.* (citing *Brandon v. Bd. of Educ. Of Guilderland Cent. Sch. Dist.*, 635 F.2d 971, 978 (2d Cir. 1980)). The free speech claims by the students were also dismissed by distinguishing the political

After *Lee, Harris v. Joint School District* addressed an Establishment Clause challenge to the inclusion of prayer at a high school graduation ceremony in Idaho that ostensibly allowed the senior class to vote on whether to have prayer at graduation with “little or no [state] involvement.”²⁶⁴ Although the school allowed the senior class to make the decisions regarding each aspect of the graduation prayer “without interference from school officials,” the school district superintendent sent a memo that explicitly described the process by which students were permitted to vote on a prayer, and outlined the procedure for each step of that process.²⁶⁵ Importantly, as the court noted, the memo “did not change existing policy, but simply reinforced”²⁶⁶ prior practice, which for the last thirteen years had maintained a fairly consistent pattern of including prayer at graduation.²⁶⁷ The court was not convinced the school had sufficiently distanced itself from the graduation prayer.²⁶⁸ It also found sufficient state action to implicate the factors relied on in *Lee* and strike down the policy in *Harris*.²⁶⁹

Among the facts supporting this conclusion was that the school ultimately retained a high degree of control over the graduation (e.g. content of program, the speeches, the dress, the venue, and decorum of students) and that the seniors were only allowed to decide on the inclusion of a prayer by virtue of the school’s discretion.²⁷⁰ Looking to the overlapping factual circumstances in *Collins*, where the Ninth Circuit found that the school had not sufficiently distanced itself from the graduation prayer by “merely permitting students to direct the exercises,”²⁷¹ the court in *Harris* concluded “[t]hat school officials cannot divest themselves of constitutional responsibility by allowing the students to make crucial decisions should not be surprising.”²⁷² The court was cautious of avoiding a policy that delegated to a majority the power to impose its religion on the minority,²⁷³ and cause “divisiveness regarding religion against which the *Lee* decision intended to guard.”²⁷⁴ In short, the court was adamant that

speech allowed for in *Tinker* and the specter of Establishment Clause prohibition on religion. *Id.* at 762–63.

264. *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 453 (9th Cir. 1994), *vacated* 515 U.S. 1154 (1995), and *vacated sub nom. Citizens Preserving Am.’s Heritage, Inc. v. Harris*, 515 U.S. 1155 (1995), and *vacated* 62 F.3d 1233 (9th Cir. 1995).

265. *Id.* at 452–53.

266. *Id.* at 453.

267. *Id.* at 452 n.4.

268. *Id.* at 454.

269. *Id.*

270. *Id.*

271. *Id.* (quoting *Collins v. Chandler Unified Sch. Dist.*, 644 F. 2d 759, 761(9th Cir. 1981)).

272. *Id.* at 455.

273. *Id.* at 455–56.

274. *Id.* at 455 (quoting *Lee v. Weisman*, 505 U.S. 577, 588 (1992)).

because this was a school sponsored event, the school could not simply delegate to the senior class a decision that the school itself could not make without violating the Constitution.²⁷⁵ This decision did not stand, however, because the plaintiff's children graduated prior to the completion of legal proceedings.²⁷⁶ The Supreme Court vacated the *Harris* decision and dismissed it as moot.²⁷⁷

Following *Harris*, the Ninth Circuit again dealt with a school's policy that allowed a student prayer at graduation in *Doe v. Madison School District* and likewise dismissed the case on standing grounds.²⁷⁸ The court, sitting en banc, determined that the plaintiff, who asserted taxpayer standing,²⁷⁹ could not identify the tax dollars the defendant spent on graduation prayers.²⁸⁰ Therefore, the plaintiff could not show a misuse of

275. *Id.* at 455.

276. *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 796 (9th Cir. 1999).

277. *Joint Sch. Dist. No. 241 v. Harris*, 515 U.S. 1154 (1995). In *Harris*, the Court cited *Munsingwear*, which states in relevant parts that “[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). As a general matter, defeating mootness requires two things, the latter of which is commonly not met in graduation cases: “(1) challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.” *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Assuming the action remains after the graduation takes place, the claim is moot under Article III since no one is threatened with harm from possible future prayers thus no active case or controversy exists. See *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1477 (11th Cir. 1997) (“[A]n action that is moot cannot be characterized as an active case or controversy.”). This would preclude claims for declaratory and injunctive relief, which contemplates some future harm, but not money damages, which looks at a past harm. *Id.* at 1478. Often times, the Court will try to avoid the constitutional question regarding a school's policy if the case can be dismissed on procedural grounds based on the “fundamental and longstanding principle of judicial restraint [which] requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.” *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). However, the constitutionality of a school's policy has “little independent relevance” to the claim for damages since recovery “depends entirely on the circumstances under which the prayer was delivered.” *Adler*, 112 F.3d at 1479–80.

278. *Madison Sch. Dist. No. 321*, 177 F.3d at 791.

279. Similar to the mootness concerns in *Harris*, the graduation of plaintiff's children, and a failure to claim that she will attend another graduation ceremony, left only taxpayer standing. *Id.* at 796–97. As a general matter, in order for citizens to bring a claim using taxpayer standing, they must comply with the requirements under Article III of the United States Constitution by showing that the injury is “fairly traceable” to the wrongful conduct. *Id.* at 793. This means that a taxpayer needs to show that the injury is the result of government's expenditure of tax revenues, and in this case, the plaintiff could not “identify municipal expenditure occasioned solely by the only activity that she challenge[d]—the graduation prayer.” *Id.* at 793–94 (“Doe identifies no tax dollars that defendants spent solely on the graduation prayer, which is the only activity that she challenges.”). The court was clear: “when a plaintiff has failed to allege that the government spent tax dollars solely on the challenged conduct, we have denied standing.” *Id.* at 794.

280. *Id.* at 794.

public funds as required to establish a taxpayer injury.²⁸¹ This decision was important because later courts have used its language to advance the principle that, in order for a state to effectively disconnect itself from a graduation prayer it “must be able to articulate secular, neutral criteria for selecting the speaker that are not related to the content of the speech.”²⁸²

Similar procedural concerns continued to belabor the Ninth Circuit in prayer-related cases; in *Cole v. Oroville*, however, the court was able to provide some guidance on this issue.²⁸³ The case involved two former students of Oroville High School, Cole and Niemeyer, who brought suit claiming the school violated their freedom of speech by refusing to allow them to deliver unedited “valedictory” and “invocation” speeches, respectively, at graduation.²⁸⁴ Cole’s classmates chose him to deliver the invocation, while Niemeyer was chosen to deliver the valedictory speech based on his academic success.²⁸⁵ The principal required the two boys to submit their respective versions to the principal’s office for review.²⁸⁶ After reviewing the speeches, the principal told the students to “tone down the proselytizing and sectarian religious references,”²⁸⁷ such as references to God and Jesus Christ; a gospel presentation; and requests that the audience “accept God’s love and grace” and “yield to God [their] lives.”²⁸⁸ However, neither complied—instead filing this lawsuit to bar the school from denying them the opportunity to present their unedited remarks at graduation.²⁸⁹ At graduation, the principal refused to allow either speaker to deliver their message.²⁹⁰

The court first addressed the standing concerns and determined that unless an exception applies, “once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school’s action or policy.”²⁹¹ While the students argued that the issue falls under the “capable of repetition, yet evading review” exception, the court found that the students failed to show “a reasonable expectation that the

281. *Id.* at 797. It is noteworthy that the Eleventh Circuit does cite the original *Doe v. Madison Sch. Dist. No. 321* opinion, 147 F.3d 83 (1998), for support that a graduation speech does not violate the Establishment Clause if the speaker is a student selected based on neutral and secular criteria and manifests full control over the content of that speech. *See* *Adler v. Duval Cty. Sch. Bd. (Adler I)*, 206 F.3d 1070, 1078–79 (11th Cir. 2000).

282. *See Adler I*, 206 F.3d at 1095 (Kravitch, J., dissenting).

283. *See generally* *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000).

284. *Id.* at 1095. The spiritual invocation was “delivered by a student chosen by a vote of his or her classmates,” *Id.* at 1096, while the valedictory speech was not. *Id.* at 1103.

285. *Id.* at 1096; *see also* Appellants’ Opening Brief, *Cole v. Oroville Union High Sch. Dist.*, 288 F.3d 1092 (9th Cir. 2000) (No. 99-16550), 1999 WL 33621186, at *8.

286. *Cole*, 228 F.3d at 1096.

287. *Id.*

288. *Id.* at 1097.

289. *Id.* at 1096–97.

290. *Id.* at 1097.

291. *Id.* at 1098 (citing *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999)).

same complaining party [would] be subjected to the same action again.”²⁹² In *Lee*, the party claiming injury was still a student in high school in the district where her claimed injury occurred and it appeared likely that she would be subjected to another prayer during her high school graduation. Contrarily, the students in *Cole* had already graduated and could no longer get relief from the court.²⁹³ While the plaintiffs had no standing for the purpose of bringing a claim for declaratory and injunctive relief, they did have standing on their claims for damages stemming from the school’s refusal in allowing them to deliver their unedited speeches at graduation.²⁹⁴

Considering the free speech issue, the court looked to *Lee* and *Santa Fe* in determining that the school’s refusal to allow the students sectarian invocation was necessary to avoid an Establishment Clause violation.²⁹⁵ The invocation would not be private speech because the school authorized the speech, allowed the student to be elected by a vote, and provided the equipment that would facilitate the speaker’s address to the audience.²⁹⁶ Furthermore, the court noted the violation went beyond the problems in *Santa Fe* because of the sectarian, proselytizing characteristics of the Invocation.²⁹⁷

The issue was not so simple with the valedictorian speech because the speaker was not selected by a majority vote and the school’s policy did nothing to encourage a religious message.²⁹⁸ Nevertheless, the court found that the school exercised sufficient plenary control over the graduation ceremony by: (1) hosting it on school property and financing some aspects of the proceeding “in which only selected students are allowed to speak”; (2) the principal exercised supervisory control over the graduation and had final authority over the content of the speeches; (3) the school required a contractual agreement with the students involving behavior and dress codes; and, (4) the message was broadcasted using the school’s equipment.²⁹⁹ Considering all this in light of the requirement that the school approve Niemeyer’s sectarian and proselytizing message, the court reasoned that an “objective observer” familiar with the policy and implementation involved would conclude that the message bore the school’s “seal of approval.”³⁰⁰ Through this process, the dissenting

292. *Id.* (citing *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)).

293. *Id.* at 1098; *see Lee v. Weisman*, 505 U.S. 577, 584 (1992).

294. *Cole*, 228 F.3d at 1099–1100. The Court also rejected the student’s claims under the doctrine of third party standing “because [the] injury to these third parties [was] too speculative to satisfy the injury-in-fact requirements under Article III.” *See id.* at 1100.

295. *Id.* at 1101–02 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee*, 505 U.S. at 577)).

296. *Id.* at 1102.

297. *Id.* at 1103 (citing *Santa Fe*, 530 U.S. at 298).

298. *Id.*

299. *Id.*

300. *Id.*

members of the community would feel their membership depleted to an inferior class, and would feel coerced to change their religious views to gain acceptance.³⁰¹ The presence of the proselytizing invocation would only magnify these concerns, because those standing in silence may still be perceived to be joining in the process, thus triggering the impermissible coercion to participate discussed in *Lee*.³⁰² In the end, the court left little room for graduation prayers, suggesting that the students should conduct these practices outside of school “or in contexts where the [school] would not have been an actual or perceived party to their religious activities.”³⁰³

Following *Cole*, the Ninth Circuit in *Lassonde v. Pleasanton* upheld a school’s censorship of a nearly identical graduation prayer where the student, chosen based on academic merit, drafted a proselytizing prayer “that quoted extensively from the Bible.”³⁰⁴ The court, in applying *Cole*, recognized that the school’s plenary control³⁰⁵ over the graduation and the content of the speech gave it the right to censor the speech in the interest of

301. *Id.* at 1103–04.

302. *Id.* at 1104 (citing *Lee v. Weisman*, 505 U.S. 577, 593 (1992)).

303. *Id.*; see also *Lee*, 505 U.S. at 629–30 (Souter, J., concurring) (“Religious students . . . may express their religious feelings . . . before and after the [graduation] ceremony.”). For a critique of *Cole*’s free speech and forum analysis, see Jonassen, *supra* note 57, at 750–52; In the court’s defense, the student gave the school officials little option by displaying what Professor Bruce Cameron would oftentimes refer to in his classes as a lack of “emotional intelligence.” Professor Bruce Cameron has been teaching on the value of “emotional intelligence” for years at Regent School of Law and argues that among its benefits is the ability to decide an outcome of litigation especially involving religious accommodation claims under Title VII. Cf. Bruce N. Cameron, *Et, Et, Oh What an Employee: The Biblical Basis for Teaching Emotional Intelligence in the Workplace* 7 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972519. According to Professor Cameron, “emotional intelligence” involves a plaintiff’s stubborn refusal coupled with emotionally charged requests that tend to control the outcome of litigation because the judge is given no reasonable alternatives—a scenario evidenced in this case when the student was seemingly attempting to use his “graduation as a soapbox opportunity to deliver his own private message regardless of its effect on his listeners.” Brady, *supra* note 25, at 1175; *Cole*, 288 F.3d at 1096–97 (“Niemeyer viewed his graduation as a soapbox opportunity to deliver his own private message regardless of its effect on his listeners. Niemeyer seemed blind to the fact that the graduation ceremony belonged as much to the other students and their families as to himself.”). Had Niemeyer requested to deliver a message that involved less overt religious proselytization—perhaps one that reflects his personal faith and how it has helped him through the years—he would have likely found a compromised position with the school district.

304. *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 981 (9th Cir. 2003).

305. It seems the school justified this plenary authority by ignoring that the speaker was chosen on the basis of his academic achievement. See *id.* at 984 (“[T]he school endorsed and sponsored the speakers as representative examples of the success of the school’s own educational mission.”). This seemingly implies, contrary to *Tinker v. Des Moines*, that the “valedictorian’s academic success proves no more than his ability to parrot what the school tells him to say, or that the exemplar of a school’s academic mission is the conformist, not the independent thinker.” Jonassen, *supra* note 57, at 754 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511–12 (1969)). By taking this step, the school is effectively allowed to censor the student’s private speech, thus failing to strike a proper balance between censorship and sponsorship. This is also at odds with “the historical record [that] presents a picture of permitting, if not encouraging, student governance, debate, and discussion at graduation.” *Id.* at 772.

avoiding an Establishment Clause violation.³⁰⁶ The court did suggest that a disclaimer prior to the speech might sufficiently untangle the school's involvement with the prayer; however, this disclaimer would not be sufficient to overcome the coercive effects of a proselytizing prayer.³⁰⁷

The Ninth Circuit recently made a more substantial holding in *Nurre v. Whitehead*.³⁰⁸ *Nurre* involved unique facts—an instrumental version of “Ave Maria” instead of an actual prayer.³⁰⁹ The court provided meaningful commentary on the application of forum³¹⁰ analysis and the *Lemon* prongs to claims of hostility to religion.³¹¹ In *Nurre*, the school previously allowed the student choir to perform “Up Above My Head,” which included several reference to “God,” “heaven,” and “angels.”³¹² Immediately following the graduation, the school district received a number of complaints from disgruntled attendees that objected to the “religiously-themed musical selection.”³¹³ As a result, the following year, the superintendent refused to allow the plaintiff to perform “Ave Maria” due to its religious content.³¹⁴ The plaintiff, a band member, filed suit alleging First Amendment and Equal Protection violations.³¹⁵

The court first recognized that purely instrumental music is speech for First Amendment purposes.³¹⁶ It then analyzed the First Amendment claim, considering that a graduation service is a limited forum.³¹⁷ Under this analysis, when a nonpublic forum is opened for a limited purpose, restrictions to access may be drawn based on subject matter so long as those distinctions are “reasonable in light of the purpose served by the forum” and the surrounding circumstances.³¹⁸ In this case, the court found that the school was justified in requiring that all music performances be “entirely

306. *Lassonde*, 920 F.3d at 983–84.

307. *Id.* at 984–85. The student's appeal to an equal access claim was also rejected since facts in those cases generally involve (1) the access to school facilities after hours and (2) voluntary attendance in distinction to *Lee*, thereby precluding any valid Establishment Clause concerns. *Id.*

308. *See generally* *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009).

309. *Id.* at 1090.

310. For a historical excursus into graduation ceremonies as forum, see Jonassen, *supra* note 57, at 761–82. This section of the article discusses the error in the oft-quoted language from *Lundberg* that claims graduation ceremonies have never been a forum for public debate. *See id.* at 766–72; *Lundberg v. W. Monona Cmty. Sch. Dist.*, 731 F. Supp. 331, 339 (N.D. Iowa 1989).

311. *Nuree*, 580 F.3d at 1095–98.

312. *Id.* at 1091. *Engel* left open the opportunity for school children and others to “express love for . . . country . . . by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being[.]” *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962).

313. *Nurre*, 580 F.3d at 1091.

314. *Id.*

315. *Id.*

316. *Id.* at 1093.

317. *Id.* at 1094. “[T]he term ‘limited public forum’ . . . refer[s] to a type of nonpublic forum that the government intentionally has opened to certain groups or to certain topics.” *Id.* (citing *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999)).

318. *Id.* (citing *DiLoreto*, 196 F.3d at 967)).

secular” given that a graduation ceremony is a place with a “captive audience” and a high demand for time renders it likely that “non-religious musical works might not be presented.”³¹⁹

Under the Establishment Clause challenge, the court took a unique approach by applying the *Lemon* test to determine whether the school district had “acted with hostility towards religion.”³²⁰ Looking to the purpose prong, it found that the school’s attempt to avoid violating the Establishment Clause qualified as a secular purpose.³²¹ This same logic applied to the primary effects prong; an objective observer, who knew the school intended to remain neutral and avoid a violation of the Establishment Clause, would understand that the intended effect was not to disparage religion.³²² Finally, under the entanglement prong, the court looked to the two types of entanglements contemplated in *Vernor v. City of Los Angeles*.³²³ The first, administrative entanglement, typically involves a “comprehensive, discriminating, and continuing state surveillance of religion.”³²⁴ The second, although alone insufficient to constitute a violation, is political entanglement, and usually occurs when “political divisiveness result[s] from government action which divides citizens along political lines.”³²⁵ Political entanglement mainly involves cases where direct financial subsidies benefit parochial schools.³²⁶ The court found neither type of entanglement since the graduation service was a one-time event, involved no financial subsidies, and any potential for political divisiveness was too speculative.³²⁷

Finally, the court disposed of the equal protection claim because “[t]he District had a legitimate interest in avoiding what it believed could cause confrontation with the Establishment Clause.”³²⁸

Interestingly, the court conceded that allowing the performance of “Ave Maria” may not even be a violation of the Establishment Clause.³²⁹ This means that the fear of being sued was an adequate basis for prohibiting religious music at graduation.³³⁰ This exclusion of music, based on a religious title, is “a disturbing limitation on the discourse students are permitted at graduation.”³³¹ As Professor Jonassen has noted, “[w]hatever

319. *Id.* at 1095.

320. *Id.*

321. *Id.* at 1096

322. *Id.*

323. *Id.* at 1097.

324. *Id.* (citing *Vernon v. City of L.A.*, 27 F.3d 1385, 1399 (9th Cir. 1994)).

325. *Id.* (citing *Vernon*, 27 F.3d at 1401)).

326. *Id.*

327. *Id.* at 1098.

328. *Id.* at 1099.

329. *Id.*

330. Jonassen, *supra* note 57, at 763.

331. *Id.* at 761.

artistic, historical, and moral value these perspectives have to offer can be banished at the political whim of the local school board.”³³²

Striking down religious speech for fears of an Establishment Clause violation is music to the ears of those who make a living challenging every instance involving the slightest overlap between church and state. These concerns are further exacerbated by the Ninth Circuit’s use of “captive audience”³³³ in the graduation setting, which further increases the court’s capacity for *de facto* speech restrictions.³³⁴ This term of art³³⁵ is typically invoked in instances where an individual “cannot escape an unwanted message that exists in some way by virtue of a government action.”³³⁶ It is difficult to predict how far this doctrine would apply outside the quintessential places of application such as the home,³³⁷ and given that the Supreme Court has stated in the past that the need for balancing “the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away.”³³⁸ The Supreme Court has acknowledged that at best this doctrine is used sparingly³³⁹ and at worst may lead to a form of “mechanical jurisprudence” that attaches legal implication without careful examination.³⁴⁰

332. *Id.* at 806.

333. *Nurre*, 580 F.3d at 1095; *see also* *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 985 (9th Cir. 2003) (“[T]he essence of high school graduation is the participation of all, as a captive audience.”).

334. For helpful background on the captive audience doctrine, see Erica Salkin, *Are Public School Students “Captive Audiences?” How an Unsupported Term in Fraser Created A “Mischievous Phrase” in Educational Speech Law*, 20 COMM. L. & POL’Y 35 (2015) (outlining the development, use, and problems with the captive audience doctrine); Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 943–52 (2009).

335. Salkin, *supra* note 334, at 39.

336. *Id.* at 36. The term invokes two related concepts: (1) the inability of the audience to avoid objectionable speech *or* (2) the fact that the audience should not have to avoid the objectionably message. *Id.* at 40.

337. *See* *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970) (“[W]e are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech . . .”) (citing *Public Utilities Comm. of D.C. v. Pollak*, 343 U.S. 451 (1952); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 759 (1978) (looking at broadcasting notes the home to be the “one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds”); *Cohen v. California*, 403 U.S. 15, 21 (1971) (“[G]overnment may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . .”).

338. *Pacifica Found.*, 438 U.S. at 749; *see also* *Erznoznik v. Jacksonville*, 422 U.S. 205, 210 (1975) (“[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.”); *Cohen*, 403 U.S. at 21 (suggesting the audience can “effectively avoid further bombardment of their sensibilities simply by averting their eyes”).

339. *Snyder v. Phelps*, 562 U.S. 443, 459 (2011).

340. Salkin, *supra* note 334, at 52. The term “mechanical jurisprudence” is borrowed from Justice Frankfurter who believed the majorities use of the term “preferred position of freedom of speech” was merely “a complicated process of constitutional adjudication by a deceptive formula.” *Kovacs v. Cooper*, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring).

In the school setting, the Supreme Court used the “captive audience” language in *Bethel v. Fraser* to suggest that school authorities acting *in loco parentis* bear the role of protecting children from sexually harmful material.³⁴¹ Justice Douglas in *Engel* disqualified prayer in school if the element of coercion is inherent—asserting that any audience in that instance is, in a sense, a captive audience.³⁴² The Supreme Court has considered that the extent of privacy interest³⁴³ and the age of the audience³⁴⁴ are both important factors in this consideration.³⁴⁵ While it makes sense that graduation speeches be edited for sexually explicit material pursuant to *Bethel*, the rightful balance between speech and offense may fall to judicial discretion, creating unpredictable results. The danger is that the Ninth Circuit may use the doctrine to expand speech restrictions in the same way that the court in *Nurre* required that all music be “entirely secular” in order to avoid any Establishment Clause violations. At best, the courts should use this doctrine sparingly and only after thorough analysis based on the unique merits of each case.³⁴⁶ Adding this to the above concerns including the personality of judges and politically motivated decision-making, graduation prayer is entirely up for grabs and gives no secure measures for developing a safe prayer policy within the Ninth Circuit.

As a final note, the Ninth Circuit is in the middle of an appeal in a matter involving a school board resolution that allowed for a short prayer prior to the start of school board meetings—given usually by a clergy or by

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341. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986); Salkin, *supra* note 334, at 50. “Courts have often considered children in other school settings to be members of a ‘captive audience’ whose interests school authorities may seek to protect (children in public schools are a ‘captive audience’ that ‘school authorities acting in loco parentis’ [*sic*] [may] protect’).” *Id.* (citing 2012 Pa. Dist. & Cnty. Dec. LEXIS 193, *28 (Pa. D. & C. 2012)).
342. *Engel v. Vitale*, 370 U.S. 421, 442 (1962) (Douglas, J., concurring).
343. *Cohen*, 403 U.S. at 21 (“The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependen[t] upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”).
344. *Erznoznik*, 422 U.S. at 214 n.11. The influence of prayer on students as a “primary religious activity,” *Karen B. v. Treen*, 653 F. 2d 897, 901 (5th Cir. 1981), *aff’d*, 455 U.S. 913 (1982), carries a “particular risk of indirect coercion” most pronounced in the elementary and secondary public school setting. *Lee v. Weisman*, 505 U.S. 577, 592 (1992); *see also* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001) (“elementary school children are more impressionable than adults”); *Shelton v. Tucker*, 364 U.S. 479, 487 (“The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools.”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (“[The First Amendment] does not tolerate laws that cast a pall of orthodoxy over the classroom.”); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (“Students in [public schools] are impressionable”); *Tilton v. Richardson*, 403 U.S. 672, 686 (1971) (“[C]ollege students are less impressionable and less susceptible to religious indoctrination.”).
345. *Cf.* Salkin, *supra* note 334, at 52 (noting that the age of the student is important in deciding whether the doctrine should apply).
346. *Id.* at 53 (“Such analysis is needed . . . to avoid this ‘mischievous phrase’ from playing havoc in our academic sandbox.”). Broad application of the term in the educational environment with little to no legal analysis is problematic. *Id.* at 52.

a board member.³⁴⁷ The record also discloses that various forms of religious messages were incorporated into the actual meeting and that students were present.³⁴⁸ The Central District Court of California ruled in favor of the plaintiffs,³⁴⁹ striking down the resolution as a violation of the Establishment Clause.³⁵⁰ Maybe the most important aspect of the lower court's decision was to apply the jurisprudence of school, not legislative, prayer in this context.³⁵¹ The court noted that the board meetings were a school sponsored setting and that the "power imbalance between the State and the students is even more pronounced than at football games or graduations."³⁵² Given our prior analysis, applying school prayer jurisprudence—particularly under *Lemon* as the court did here—provides an inferior form of protection in comparison with legislative prayer decisions.³⁵³

J. Tenth Circuit

The Tenth Circuit has not ruled in a graduation prayer case relevant to this discussion. It has, however, looked to *Lee* in determining several things. First, in instances where a the state infringes a dissenter's right of religious freedom, courts have recognized that a difficult task remains in

347. *Freedom from Religion Found. v. Chino Valley Unified Sch. Dist.*, EDCV 14-2336-JGB-DTB (C.D. CA 2016).

348. *Id.* at 7–8.

349. The district court found standing to sue for the plaintiff by virtue of his presence at the meeting—"came in contact with government endorsement of another's religion"—and being made to suffer the offense as a result (i.e. "injury in fact"). *Id.* at 10–11.

350. *Id.* at 25.

351. *Id.* at 21–23. Justice Scalia would have certainly disagreed with this approach, preferring instead to look for "a long-established practice" as evidence of an Establishment Clause violation. *Cf. Lee*, 505 U.S. at 632-36 (Scalia, J., dissenting); Weinhaus, *supra* note 31, at 976 ("For Justice Scalia, the role of history and tradition, not the presence or absence of coercion . . . was the dispositive factor.").

352. *Chino Valley*, *supra* note 347, at 21. For readers interested on the topic of prayer at school board meetings, several student notes provide a helpful introduction. *See, e.g.*, Marie Elizabeth Wicks, *Prayer Is Prologue: The Impact of Town of Greece on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & POL. 1 (2015); Paul Imperatore, *Solemn School Boards: Limiting Marsh v. Chambers to Make School Board Prayer Unconstitutional*, 101 GEO. L.J. 839, 840 (2013); Bruce P. Merenstein, *Last Bastion of School Sponsored Prayer? Invocations at Public School Board Meetings: The Conflicting Jurisprudence of Marsh v. Chambers and the School Prayer Cases*, 145 U. PA. L. REV. 1035, 1095 (1997); *see also* Brief of Amicus Curiae the National Center for Law & Policy in Support of Appellee, *Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013) [hereinafter NCLP Amicus]. The Supreme Court in a footnote, looking at the non-application of the *Lemon* test in *Marsh v. Chambers*, stated that "a historical approach [taken in *Marsh*] is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987).

353. *See generally* *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer tradition). The Fifth Circuit has recently taken the opposite approach, deciding that a prayer prior to a school board meeting constitutes "legislative prayer" for the purpose of the Establishment Clause. *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521 (5th Cir. 2017).

distinguishing a real constitutional challenge from a “mere shadow.”³⁵⁴ Second, other courts have noted that government requirements that put social pressure on individuals to make religious statements in the public school context *does* amount to an injury in fact.³⁵⁵ Finally, at least one court has been reluctant to move away from the *Lemon* test in the context of religious displays, although noting that “actual coercion, rather than endorsement, appears the most faithful to the original meaning of the Establishment Clause.”³⁵⁶

V. THE ELEVENTH CIRCUIT

The debate within the Eleventh Circuit—between the majority and the dissent (particularly in *Adler*)—brings together the extent of the principles invoked above and leads to the final stage of developing a balanced approach between sponsorship and censorship. The debate between the majority and dissent allows for a refined systematic approach to graduation prayer jurisprudence—neither capitulating to the strict separationists who seek to remove all prayer from school, nor the traditionalists, who attempt to retain prayer policies by repackaging them in secular trappings.

A. Majority Opinions

The Eleventh Circuit has reinstated two primary cases after they were vacated by the Supreme Court for further consideration in light of *Santa Fe*.³⁵⁷ In order to fully understand the later decisions, we need to first map out the prior holdings.

354. *Bauchman ex. rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 562 (10th Cir. 1997).

355. *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1226 (10th Cir. 2008). On the other hand, the Tenth Circuit, looking to the “legitimate pedagogical purpose” for suppressing student speech, has allowed censoring religious expressions of faith based on a desire to avoid confrontation. See *Corder v. Lewis Palmer Sch. Dist. No. 48*, 566 F.3d 1219, 1228-29 (10th Cir. 2009). The Court—considering whether requiring a valedictorian to apologize prior to receiving her diploma after sharing her faith without school permission—noted that the “School District is entitled to review the content of speeches in an effort to preserve neutrality on matters of controversy within a school environment” and that “the School District’s unwritten policy of reviewing valedictory speeches prior to the graduation ceremony was reasonably related to pedagogical concerns.” *Id.* at 1230. By absorbing a high-level of control over the valedictorian speeches, the message became school speech, which in turn allowed the school to compel the student to issue an apology in an effort to ensure that “the views of the individual speaker are not erroneously attributed to the school.” *Id.* at 1231 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)). This level of control that breeds censorship is certainly a poor balance that should not be seen as exemplary.

356. *Green v. Haskell Cty. Bd. of Comm’rs*, 574 F.3d 1235, 1236 n.3 (10th Cir. 2009).

357. *Adler v. Duval Cty. Sch. Bd. (Adler I)*, 206 F.3d 1070, 1071 (11th Cir. 2000), *opinion reinstated*, 250 F.3d 1330 (11th Cir. 2001); *Chandler v. James (Chandler I)*, 180 F.3d 1254 (11th Cir. 1999), *reinstated sub nom. Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000).

I. Chandler v. James (“Chandler I”) (1999)

The first case essential to understanding Eleventh Circuit precedent is *Chandler v. James*, which dealt with the constitutionality of an Alabama statute that allowed for, *inter alia*, “non-sectarian, non-proselytizing student-initiated prayer” during graduation.³⁵⁸ The challenge was brought by the vice principal at DeKalb County school system, along with his son, contending that the statute was facially invalid and that any student-initiated prayer in public school “*is* state prayer” and therefore a violation of the Establishment Clause.³⁵⁹ The limited question was “whether the district court can constitutionally enjoin DeKalb from permitting student-initiated religious speech in its schools.”³⁶⁰ To this, the court responded in the negative and reaffirmed the longstanding tradition of striking a proper balance between toleration and hostility of religion in the context of private versus government speech.³⁶¹ It did this by stressing four important points.

First, religious speech that is the product of private choice is protected from an Establishment Clause violation unless evidence is produced that shows that the state was using the private parties as “surrogates to accomplish what the State may not do.”³⁶² The state may not write or require that a prayer be recited, may not delegate that task to others, and may not permit private speech conditioned on it being a prayer.³⁶³

In making this first point, the court was careful to reject the claim that government should prohibit any public expression of religion at school.³⁶⁴ Citing *Engel*, the Eleventh Circuit pointed out that the purpose of ending “governmental control of religion and of prayer” at school was not for the purpose of destroying either.³⁶⁵ A balance must be reached between the First Amendment’s positive requirement of toleration towards students’ religious expression and the prohibition on the government from commanding or prescribing prayer.³⁶⁶ When a state seeks to censor student-initiated religious speech, it fails in its duty of neutrality and instead emits an outward sign of hostility towards religion in violation of the

358. *Chandler I*, 180 F.3d at 1255.

359. *Id.* at 1256, 1258.

360. *Id.* at 1258.

361. *Id.*

362. *Id.* at 1258–59. This is also comparable with the Supreme Court’s teachings that says a “state cannot employ a religious means to serve otherwise legitimate secular interests.” *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff’d*, 455 U.S. 913 (1982).

363. *Chandler I*, 180 F.3d at 1259. The Court lists a number of cases that were mentioned above that include policies that fail to meet the constitutional standard because they circumscribe the limits of private speech to be only religious. *Id.* (“[T]he State’s decision [was] to create an exclusive religious medium . . .”).

364. *Id.*

365. *Id.* at 1260 (citing *Engel v. Vitale*, 370 U.S. 421, 435 (1962)).

366. *Id.*

Constitution.³⁶⁷ By allowing genuine student-initiated religious speech, the state does not therefore adopt, nor endorse, that speech and it remains the product of the student's own constitutional prerogatives.³⁶⁸

Second, the court noted that even if allowing the student-initiated religious speech advances religion, this does not amount to a violation of the Establishment Clause.³⁶⁹ Looking to Supreme Court precedents, the court acknowledged that “indirect,” “remote,” or “incidental” benefit upon religion does not render every law unconstitutional.³⁷⁰ Student-initiated religious speech that manifests an incidental advancement of religion does not violate the Establishment Clause, because it retains its private character protected by the First Amendment.³⁷¹

Third, religious speech, especially at graduations, that is devoid of state involvement, may certainly offend the unwilling listeners, “but offense alone does not in every case show a violation.”³⁷² Respect for the rights of others in allowing them to express their beliefs is “the price the Constitution extracts for our own liberty.”³⁷³ Quoting a powerfully worded dissent from Justice Scalia:

[M]aintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate—so that even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter's interest in avoiding even the false appearance of participation constitutionally trumps the government's interest in fostering respect for religion generally.³⁷⁴

Perceived coercion from otherwise neutral and bland religious speech should only trigger the specter of unconstitutionality when the state is active in orchestrating that speech.³⁷⁵ Thus, the only real issue that remains is to map out what limits courts can genuinely impose in an effort to balance the interest of private persons to speak religiously and the interest in protecting unwilling listeners from government-mandated prayer.³⁷⁶ Strictly speaking, to banish all prayer from public schools is certainly

367. *Id.* at 1263 n.14 (“The prohibition of all religious speech in [] public schools implies [] an unconstitutional *disapproval* of religion.”).

368. *Id.* at 1261–62 (“Religious speech by students does not become forbidden ‘state action’ the moment the students walk through the schoolhouse door.”).

369. *Id.* at 1262.

370. *Id.* (citing *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984)).

371. *Id.* at 1263.

372. *Id.* (citing *Lee v. Weisman*, 505 U.S. 577, 597 (1992)).

373. *Id.*

374. *Id.* at 1263 n.14 (citing *Lee*, 505 U.S. at 638 (Scalia, J., dissenting)).

375. *Id.* at 1263.

376. *Id.*

easier, but this would be, “not only constitutionally incorrect, but also fundamentally unfair to our society.”³⁷⁷

Finally, in striking the right balance, the court noted several forms of restrictions on student speech.³⁷⁸ The first invokes the equal access doctrine and states that although student religious speech should not be subject to government oversight or supervision, it may be subject to “reasonable time, place, and manner restrictions as all other student speech in school.”³⁷⁹ The second restriction involves the opening of a limited forum so long as the government does not engage in religious viewpoint discrimination.³⁸⁰ Finally, schools can impose limits on students’ religious speech to ensure that they do not use their liberty as a vehicle for proselytizing.³⁸¹ The Eleventh Circuit later looked to the standard set in *Chandler I* to determine when religious speech in schools is considered private.³⁸² The court further developed this well-balanced scheme when it addressed graduation prayer once more a mere year later.

2. *Adler v. Duval County* (“Adler I”) (2000)

After *Chandler I*, the Eleventh Circuit dealt with a challenge previously vacated for mootness.³⁸³ *Adler I* involved a graduation policy instituted by Duval County in the aftermath of *Lee* that permitted, but did not require or suggest, a graduation prayer as a product of an entirely student-led process.³⁸⁴ The court continued to build on the opinion in *Chandler I* in constructing its graduation prayer jurisprudence by emphasizing the crucial difference between government-endorsed speech versus private speech.³⁸⁵ Most important was the court’s constant reinforcement that state involvement is essential to an Establishment Clause violation.³⁸⁶ The court focused on the two dominant facts in *Lee*: (1) the school directing the performance of the religious exercise and (2) the pressure exerted on the students to participate (“coercion”).³⁸⁷ Unlike the

377. *Id.* at 1264.

378. *Id.* at 1265.

379. *Id.*

380. *Id.* (citing *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 831 (1995) (noting that religious viewpoint discrimination is “the most egregious form of content-based censorship”).

381. *Chandler I*, 180 F.3d at 1265.

382. *Chandler II*, 230 F.3d at 1316.

383. *Adler*, 112 F.3d at 1477; *Adler I*, 206 F.3d at 1073. For the sake of clarity, I have not designated the case dismissed for mootness with a short cite (e.g. *Adler I, II*). My designations only incorporate the 2000 *Adler I* decision that set the standard, which was vacated by the Supreme Court, and the 2001 *Adler II* decision, which reinstated *Adler I*.

384. *Adler I*, 206 F.3d at 1071 (citing *Lee v. Weisman*, 505 U.S. 577 (1992)).

385. *Id.*

386. *Id.* at 1075, 1083.

387. *Id.*

process in *Lee*, the policy in *Adler I* survived constitutional scrutiny because the school board did not ordain, establish, or endorse the prayer.³⁸⁸ The students were free to select the speaker, and in turn, the speaker was given full autonomy to decide the content of that message without it being “monitored or otherwise reviewed.”³⁸⁹ The school limited its involvement by merely permitting the students to vote, deciding the time and length of the message, and providing the venue for presentation.³⁹⁰

In reference to a forum analysis, the Eleventh Circuit analogized the availability for a private message at a graduation ceremony to the “equal access”³⁹¹ cases that deemed it constitutional for a school to accommodate a religious message as a product of an individual’s free exercise rights.³⁹² This approach is entirely consistent with the Supreme Court’s opinion that while a state must remain neutral and cannot endorse religion, it is also proscribed from acting in a hostile matter towards it.³⁹³

Further, the court rejected the notion that any speech at a graduation ceremony becomes state-sponsored by virtue of the school’s involvement in facilitating the graduation ceremony.³⁹⁴ While the state may not endorse religion, it is not tasked with the role of censoring all religious expression for fear of otherwise violating the Establishment Clause.³⁹⁵ As the court pointed out, the most crucial elements warranting the suspicion of state action include: “the selection of the messenger, the content of the message, or . . . the decision whether or not there would be a message in the first place.”³⁹⁶ While the school is not obligated to provide an opportunity for free expression, it is free to do so; tolerance of offensive speech is simply one price we pay for the “First Amendment and our democratic traditions.”³⁹⁷ The court also rejected the argument that allowing the

388. *Id.* at 1076.

389. *Id.* (“[N]ot even the senior class exercises control over the content of the graduation message.”). The court noted that the added disclaimer that “any message will be ‘prepared by the student . . . and shall not be monitored or otherwise reviewed’” was further insulation from the perception that the speech was school sponsored. *Id.* at 1089.

390. *Id.* at 1076, 1082. *Lee* did not preclude the opportunity for school districts to create a neutral, secular policy that provide opportunity for private religious expression. *Id.* at 1076 (citing *Lee*, 505 U.S. at 589).

391. *Id.* at 1077 (citing *Widmar v. Vincent*, 454 U.S. 263, 274–75 (1981)).

392. *Id.* at 1077–78 (citing *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (“[S]econdary school students . . . are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis . . .”).

393. *Adler I*, 206 F.3d at 1078 (citing *Lee*, 505 U.S. at 598 (“A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.”)).

394. *Adler I*, 206 F.3d at 1080. The court noted control of things like “event’s sequence, venue, dress, and facilities” is not sufficient to raise the alarm of an Establishment Clause violation. *Id.*

395. *Id.* “The Supreme Court has consistently held that in nonpublic for the government may not engage in viewpoint discrimination.” *Id.* at 1081.

396. *Id.* at 1080.

397. *Id.* at 1081.

students to vote for the speaker places the imprimatur of the state on the message.³⁹⁸ In order to prevail on this claim, evidence must establish that the student's private conduct had become so entwined with the government's policies "as to become subject to the constitutional limitations placed on state action."³⁹⁹ Mere delegation and permission to hold an independent student process to decide on the content of the message is not enough.⁴⁰⁰ As to the coercion element in *Lee*, the court reiterated the need for school endorsement in order to violate the Establishment Clause taken in conjunction with the obligatory "inherent nature of the graduation ceremony."⁴⁰¹ Otherwise the participation is not a product of state coercion and would not rise to the level of a constitutional violation.⁴⁰²

Finally, the court rejected any finding that the policy at Duval County violated any of the *Lemon* prongs.⁴⁰³ The court found that a secular purpose exists in the interest of allowing a prayer to "solemnize [the] graduation as a seminal educational experience."⁴⁰⁴ While the legislative history and specific sequence of events may be considered in determining a secular purpose, it is also necessary to examine the policy's language to ascertain its stated purpose.⁴⁰⁵ Further, the name or heading of a section, as well as "post hoc statements," cannot override the plain language of the text as a process for interpreting the policy's intended purpose.⁴⁰⁶ Regarding the entanglement prong of *Lemon*, the court noted that to force a school to censor all religious speech would entangle the school further in religious matters.⁴⁰⁷ If the plaintiffs had their way, no speech would be allowed at graduations or all speech would be subject to censorship by school authorities.⁴⁰⁸ Either option would violate the First Amendment and create more problems than solutions for school officials.⁴⁰⁹ Neither option strikes the proper balance required by the Establishment Clause to neither advance, nor inhibit, religion.⁴¹⁰

398. *Id.*

399. *Id.* at 1082.

400. *Id.*

401. *Id.* at 1083.

402. *Id.*

403. *Id.* at 1084.

404. *Id.* at 1085. While the school may not endorse a religious message, the selected student is free to express his experiences in a secular or religious form. *Id.*

405. *Id.* at 1085–86 (citing *Brown v. Gwinnett Sch. Dist.*, 112 F.3d 1464, 1469 (1997)).

406. *Id.* at 1087, 1088. The title and heading is "of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947).

407. *Adler I*, 206 F.3d at 1090.

408. *Id.*

409. *Id.*

410. *See Sch. Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963); *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968).

B. Distinguishing and Reinstating

The decisions in *Chandler I* and *Adler I* were vacated⁴¹¹ for further consideration in light of *Santa Fe* and later reinstated after the Eleventh Circuit distinguished the Supreme Court's holding.⁴¹² In order to properly understand the graduation prayer dynamics of the Eleventh Circuit, it is important to consider the above standard in conjunction with the distinguishing factors below and the dissenting opinion to follow. *Adler II*, the focus of this section, provided the most thorough examination of *Santa Fe*. However, the Eleventh Circuit embodied its take on graduation prayer in *Chandler II* when it distinguished its precedent with *Santa Fe*: "*Santa Fe* condemns school *sponsorship* of student prayer. *Chandler* condemns school *ensorship* of student prayer. In their view of the proper relationship between school and prayer, the cases are complementary rather than inconsistent."⁴¹³

In *Adler II*, the court, sitting en banc, was tasked to reconsider its prior decision in *Adler I* in light of *Santa Fe*.⁴¹⁴ In doing so, it found that *Santa Fe* did not alter the previous decision and that the judgment in favor of Duval Country should stand.⁴¹⁵ The central point of analysis involved distinguishing the involvement of the state in both cases. The court noted that in *Adler I*, the policy allowing student speech and the content of that speech was entirely the decision of the graduating class.⁴¹⁶ Additionally, the fact that the school provided a vehicle for that graduation message did not amount to state-sponsorship.⁴¹⁷ Since the prayer was not state-sponsored, the element of coercion (subjecting the unwilling listeners to participate in a state-sponsored religious exercise) was also missing.⁴¹⁸ The policy in Duval Country was facially neutral and manifested a secular purpose with no contrary evidence to suggest that the secular intent was a sham.⁴¹⁹ On the contrary, the court noted that the policy in *Santa Fe* did, in fact, convey the school board's purpose of ensuring a place for prayer during a school function.⁴²⁰ Further, in *Santa Fe* the school entangled itself with a student election, in which students voted on whether a "statement or

411. See generally *Adler v. Duval Cty. Sch. Bd.*, 531 U.S. 801 (2000); *Chandler v. Siegelman*, 530 U.S. 1256 (2000).

412. *Adler II*, 250 F.3d at 1332; *Chandler II*, 230 F.3d at 1314.

413. *Chandler II*, 230 F.3d at 1315.

414. *Adler II*, 250 F.3d at 1332.

415. *Id.*

416. *Id.* at 1337.

417. *Id.* at 1333.

418. *Id.*

419. *Id.* at 1334.

420. *Id.* at 1336.

invocation” would be given.⁴²¹ This demonstrated a clear religious bent imposed on every home football game, coupled with the school’s review process, which created “potential state censorship of non- or anti-religious messages.”⁴²² Two critical facts in *Santa Fe* distinguished it from *Adler I*: (1) the speech was subject to content regulation⁴²³ and (2) the policy on its face invites and encourages a religious message.⁴²⁴ On the contrary, the policy in *Adler I/II* contained no language on its face that could reasonably be construed to suggest a school preference for a religious message.⁴²⁵ Furthermore, the logic in *Santa Fe* could not be equally applied in *Adler I* to transform the private speech into a state-sponsored policy endorsing religion.⁴²⁶ Importantly, the court noted that despite the power to do so, *Santa Fe* did not hold that all student elections and religious expressions at graduation ceremonies violated the Establishment Clause.⁴²⁷ Despite the school providing a venue for the message, what ultimately turns private speech into state speech is the element of state control over the content of the message.⁴²⁸

C. Dissenting Voices

The majority’s framing of the issue in *Adler I* and the Court’s subsequent reliance⁴²⁹ on that construction in *Adler II* was a critical final step towards finding a meaningful balance between sponsorship and censorship. While the above construction of the issue comports well with

421. *Id.*; see also *Chandler II*, 230 F.3d at 1315 (“The fatal flaw in the *Santa Fe* policy was its attempt to disentangle itself from the religious messages by instituting the student election process.”).

422. *Adler II*, 250 F.3d at 1336.

423. *Id.* at 1337 (“[S]chool officials were effectively authorized to review the message . . . to ensure that it was ‘consistent with the goals and purpose of the policy.’”) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 298 n.6 (2000)); see also *Santa Fe*, 530 U.S. at 306 (emphasizing that “the policy mandates that the ‘statement or invocation’ be ‘consistent with the goals and purposes of this policy’” and that accordingly “the District has failed to divorce itself from the religious content of the invocations”).

424. *Adler II*, 250 F.3d at 1336. “The fact that the text of the *Santa Fe* policy expressed a clear preference for religious messages was a key factor in the Court’s determination that student speech delivered pursuant to that policy would be viewed as state-sponsored.” *Id.* at 1337. The Court noted that the policy at *Santa Fe*, by permitting students to vote on an “invocation” and giving the school final authority to determine the “appropriateness” of the final version, guaranteed the student election would be about conducting a prayer. *Id.* at 1338.

425. *Id.* at 1338–39.

426. *Id.* at 1339. The court noted that another key distinction was that the policy at *Santa Fe* “was found to be nothing more than the product of repeated efforts by the school district to inject prayer and other religious activities into school events even after *Lee v. Weisman*.” *Id.* at 1340.

427. *Id.* at 1341–42.

428. *Id.* at 1341; see also *Chandler II*, 230 F.3d at 1316 (noting that *Santa Fe* did not “reject the possibility that some religious speech may be truly private even though it occurs in the schoolhouse”).

429. Paul Horwitz, *Demographics and Distrust: The Eleventh Circuit on Graduation Prayer in Adler v. Duval County*, 63 U. MIAMI L. REV. 835, 857 (2009).

the final balance envisioned below, incorporating the dissenting voices and Paul Horwitz's treatment of the *Adler* decision into the discussion helps sharpen the necessary balance. Without this balance, a policy like Duval County's may still be struck down given the unpredictability of Establishment Clause jurisprudence.

The dissent in *Adler I* was centrally concerned with the majority's "unwillingness to look beyond the policy's terms" and consider the broader context in which the policy was enacted.⁴³⁰ While the school administration may have "distanced" itself from the graduation ceremony, it had failed to "disconnect" from the policy's coercive effect on the audience.⁴³¹ The policy's design arguably encouraged prayer to continue at Duval County. The policy was constructed in such a way as to implicitly inform and coax⁴³² the student electors,⁴³³ and the student speaker, to decide in a way that would ultimately lead to a prayer.⁴³⁴ The dissent considered the issues in light of the county's traditional prayer policy and the intense pressure it received to find a way to retain prayer in ceremonies after *Lee*.⁴³⁵ It focused on the following evidence: (1) the message was to be given at the start and finish of the ceremony;⁴³⁶ (2) the message was to be no longer than two minutes;⁴³⁷ (3) the students were allowed sole control of this small aspect of the graduation;⁴³⁸ and, (4) the title of the memorandum announcing the new policy was "Graduation Prayer."⁴³⁹

Importantly, the dissent employed the principle from *Edmonson v. Leesville Concrete*, asserting that private party actions can be attributed to the state "if they are taken in exercise of a right or privilege rooted in state authority, and if the party can 'in all fairness' be describes as a state actor."⁴⁴⁰ Since the school is generally tasked with managing the graduation ceremony, and since the students only have the power to select a speaker by virtue of school delegation, the student's actions and the

430. *Adler I*, 206 F.3d at 1091 (Kravitch, J., dissenting).

431. *Id.*

432. *Id.* at 1096.

433. The dissent suggests that the senior class is fully cognizant that they are selecting an individual to deliver a prayer and proceed accordingly. *Id.* at 1095.

434. Looking at the purpose prong of *Lemon*, the dissent writes: "[t]he dominant reason for its passage was to keep prayer in graduation ceremonies; the secular justification embraced by the majority are at best incidental effects of the policy." *Id.* at 1098.

435. *Id.* at 1098 (noting that until 1992, Duval County consistently opened and closed with a graduation prayer).

436. *Id.* at 1092.

437. *Id.*; *Adler II*, 250 F.3d at 1350 (Carnes, J., dissenting) ("[T]wo minutes comports nicely with the length of a good, short prayer.").

438. *Adler I*, 206 F.3d at 1093.

439. *Id.* at 1098; see also *Adler II*, 250 F.3d at 1345-46 (Kravitch, J., dissenting) ("[T]he text of the Policy Memo indicates that the policy is intended as an 'end run' around the law against state-sponsored graduation prayers . . .").

440. *Adler I*, 206 F.3d at 1093 (citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991)).

subsequent private message becomes, in all fairness, “government in character.”⁴⁴¹ If this is the case, then delivering the prayer becomes the product of state action and therefore a violation of the *Lee*-coercion test.⁴⁴²

When the Eleventh Circuit reinstated *Adler I*, the dissent in *Adler II* (including, again, Judge Kravitch) incorporated the above-mentioned historical reliance on the *Santa Fe* decision.⁴⁴³ Where the policy was unconstitutional in its broader context, the dissent contended that the policy, in light of *Santa Fe*, was facially unconstitutional.⁴⁴⁴ First, finding that the policy in *Adler I* intended to retain ceremonial prayer, Judge Kravitch’s read *Santa Fe* to bar any such policy that retains an unconstitutional purpose of prompting religion.⁴⁴⁵ Second, the dissent argued that the distinction between the direct vote in *Adler I* (voting on speaker not prayer), and the indirect vote *Santa Fe* (voting on prayer), is immaterial if considered in light of the “policy’s purpose, history, and the context in which it was adopted.”⁴⁴⁶ Looking to the language in *Santa Fe*, the dissent was adamant that the policy in *Adler I* is nothing more than a “sham” to retain a tradition of pray at graduation.⁴⁴⁷

It is against this backdrop that the question of majoritarian election, noted by Judge Carnes, becomes an issue, since the process of voting, itself, cannot be unconstitutional *per se*. As the dissent noted, the majority assumes that it knows the policy’s intent, and acts accordingly to bring that intent into reality.⁴⁴⁸ Professor Paul Horowitz, reflecting on the dissents, made several key contributions based largely on the writing of John Hart Ely. Among the most pertinent is the statement that the election process in *Adler* “would inevitably . . . generate a result that would place the ‘ins’

441. *Id.* at 1093–94.

442. *Id.* at 1096–97. While the dissent concedes that the involvement was not as extensive as in *Lee*, the involvement remained too extensive to comport with the Establishment Clause.” *Id.* at 1092. “It is *government* participation in religious expression that offends the First Amendment because of its power to influence the inherently personal nature of religious faith, potentially coercing religious minorities or even coopting mainstream sects.” *Id.* at 1094.

443. See text accompanying *supra* notes 201–210.

444. *Adler II*, 250 F.3d at 1343 (Kravitch, J., dissenting).

445. *Id.*

446. *Id.* at 1344.

447. *Id.* (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

448. *Id.* at 1348–49 (Carnes, J., dissenting). The analogy to political elections only makes sense with this first premise already being assumed, which the dissent does. See *id.* Politicians are elected based on a promise to certain issues and in *Adler I* the dissent assumes that the majority is selecting a speaker to deliver a prayer (i.e. “one-issue”). *Id.* at 1349. This only makes sense if the *Adler I* dissent is adopted and that the student election is understood by all to be an extension of the school’s intent of retaining prayer at ceremonies. Note that the dissenters in *Santa Fe*, in picking up this type of reasoning, believed that the majority “essentially invalidates all student elections.” *Santa Fe*, 530 U.S. at 321 (Rehnquist, J., dissenting). However, Professor Horowitz has aptly noted that the issue is when “the political process is perverted when a seemingly fair process is used in a way that systematically creates losers and entrenches them in that status—and is designed to accomplish just this end.” Horowitz, *supra* note 429, at 871.

back in the driver's seat and exclude the 'outs.'"⁴⁴⁹ As a solution to a fair process that will not necessarily rule out religious speech at graduation, Professor Horowitz offered the policy in *Doe v. Madison School District* particularly for its process of selecting student speakers based on purely neutral and secular criterion—i.e. academic performance.⁴⁵⁰

VI. BETWEEN SPONSORSHIP AND CENSORSHIP

Santa Fe failed to articulate the circumstances under which religious speech in schools can be considered private.⁴⁵¹ *Chandler I* stated, simply, “So long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected.”⁴⁵² While school officials retain a minimal level of authority over the editorial control of speeches, a lot of that control is largely tied up in preventing speech that: is vulgar and lewd⁴⁵³ or proselytizing,⁴⁵⁴ advocates illegal use of drugs,⁴⁵⁵ and

449. Horwitz, *supra* note 429, at 873.

450. *Id.* at 874 (quoting *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 835 (9th Cir. 1998), *reh'g granted, opinion withdrawn*, 165 F.3d 1265 (9th Cir. 1999)).

451. *Chandler II*, 230 F.3d 1313, 1316 (11th Cir. 2000).

452. *Id.* at 1317. Recall also that the “promotion of religion” is not the same as “commemoration of religion,” *cf.* *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984). Neither is it the same as the promotion of “religious freedom.” *Karen B. v. Treen*, 653 F.2d 897, 903 (Sharp, D.J., dissenting).

453. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding that disciplining students for lewd and indecent speech does not violate First Amendment).

454. *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 416–17 (2d Cir. 2001). Courts have used various expressions to connote proselytizing. *See, e.g., Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008) (“attempt to indoctrinate”). Although proselytizing could be construed broadly or narrowly, *see Jonassen, supra* note 57, at 813–14, it is best to retain a clear distinction between confession and proselytization. The Supreme Court has made distinctions in pointing out varying types of religious speech based on purpose. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 130 (2001) (Stevens, J., dissenting). However, conflated views have been offered, for example, by the Fifth Circuit when it described “sectarian and proselytizing prayers” as those which “are designed to reflect, and even convert others to, a particular religious viewpoint.” *Santa Fe*, 168 F.3d at 817; *accord Chandler I*, 180 F.3d 1254, 1265 (11th Cir. 1999). Arguably, for speech to be proselytizing, the speaker must solicit a response from the audience. *See, e.g., Lassonde v. Pleasanton*, 320 F.3d 979, 981 (9th Cir. 2003) (“Have you accepted the gift, or will you pay the ultimate price?”); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1097 (2000) (“[S]peech called upon the audience to ‘accept God’s love and grace’ and ‘yield to God our lives.’”). As Professor Jonassen writes, a “valedictorian may, perhaps, recite a brief personal prayer, as long as it does not engage audience participation.” *Jonassen, supra* note 57, at 813; *see also Brady, supra* note 25, at 1190 (“[Proselytizing speech] is primarily designed to convert . . . to one’s own religious beliefs . . . and involves an insistent call to conversion.”). There is also good reason to believe that the definition of proselytizing may be broader in a captive audience environment. *Id.* at 814. This would increase the opportunity to censor speech, which would comport well with the Ninth Circuit’s approach in *Nurre*.

455. *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (holding that a school confiscating a pro-drug banner and punishing student is not a violation of the First Amendment).

substantially disrupts school operations.⁴⁵⁶ Most importantly, in areas where the speech might reasonably be perceived as bearing the imprimatur of the school,⁴⁵⁷ educators are tasked with striking a proper balance between avoiding a sponsorship⁴⁵⁸ of religion and a censorship of speech—in accordance with a “legitimate pedagogical concern.”⁴⁵⁹

A. Constitutional Safe Harbor

In order for a school district to make the appropriate changes and seek the “constitutional safe harbor”⁴⁶⁰ in compliance with *Lee* and *Santa Fe*, it needs to distance⁴⁶¹ itself from any involvement in planning and editing a prayer. Additionally, any election of student speakers must be “genuinely fair and neutral.”⁴⁶² Notably, schools cannot escape the taint of involvement by delegating⁴⁶³ to the senior class the option to hold a graduation prayer.⁴⁶⁴

456. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (“[C]onduct by the student . . . [that] materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech.”).

457. This expression has been described in many ways to connote state endorsement of religion. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (“imprimatur of the school”); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 214 (1963) (“throwing the weight of secular authority behind”); *Lee v. Weisman*, 505 U.S. 577, 590 (1992) (“bore the imprint of the State”); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (“State affirmatively sponsors”); *Brandon v. Bd. of Ed. of Guilderland Cent. Sch. Dist.*, 635 F.2d 971, 978 (2d Cir. 1980) (“improper appearance of official support”); *Adler I*, 206 F.3d 1070, 1082 (11th Cir. 2000) (“impregnated with governmental character”); *Weisman v. Lee*, 728 F. Supp. 68, 72 (D. R.I. 1990), *aff’d*, 908 F.2d 1090 (1st Cir. 1990), *aff’d*, 505 U.S. 577 (“[c]reating an identification of school with . . . religion”).

458. Although most aspects of a graduation will be subject to school control, the one that typically tips the scale towards sponsorship is “final authority to approve the content of student speeches.” *Lassonde*, 320 F.3d at 983–84; *see also Cole*, 228 F.3d at 1103 (concluding the district’s plenary control over the graduation ceremony, especially student speech, made apparent that Niemeyer’s speech would have borne the district’s imprint); *Adler II*, 250 F.3d 1330, 1341 (11th Cir. 2001) (noting that state control over the content of the message is what turns private speech into state speech).

459. *Hazelwood*, 484 U.S. at 273. School officials may exercise editorial control over student speech only if the speech at issue would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” *Id.* (quoting *Tinker*, 393 U.S. at 513).

460. *Santa Fe*, 530 U.S. at 317.

461. *Id.* at 310. On delivering a prayer at a football game, *Santa Fe* asserts that “[o]ne of the purposes served by the Establishment Clause is to *remove* debate over this kind of issue from governmental supervision or control.” *Id.* (emphasis added).

462. Horwitz, *supra* note 429, at 880.

463. *See Adler I*, 206 F.3d 1070, 1094 (11th Cir. 2000) (Kravitch, J., dissenting) (“[W]hen government delegates authority over a portion of a public operation to an ostensibly private actor, but retains ultimate control over the larger operation, the exercise of the delegated authority is attributable to the state.”).

464. *See, e.g., Santa Fe*, 530 U.S. 290 (2000); *ACLU v. Black Horse Pike Reg’l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996); *Jones I*, 930 F.2d 416 (5th Cir. 1991), *judgment vacated*, 505 U.S. 1215 (1992).

Instead, the school should incorporate the involvement of the senior class⁴⁶⁵ and permit a student speaker to deliver a private message,⁴⁶⁶ so long as the process itself is not a veiled attempt to perpetuate an otherwise unconstitutional policy behind the pretext of neutrality.⁴⁶⁷ School officials must avoid drafting ostensibly neutral policies that contain circumstantial indicators⁴⁶⁸ suggesting unconstitutional intent while also making efforts to minimize secondary religious benefits that would push a scrutinizing court to perceive the process as a rigged process or a sham. As evident in *Adler I/II*, a prayer policy after *Santa Fe*—stained with a history of unconstitutional intent—is going to be largely defeated if the courts do not “turn a blind eye to the context”⁴⁶⁹ in which the school prayer policies developed.

Once the endorsement of religion-issue⁴⁷⁰ is removed from the student-delegated opportunity, the “fundamental rights subject to a vote” argument is no longer viable since mere offense, with no state action,

465. See Jonassen, *supra* note 57, at 764–72 (offering historical data as evidence that the tradition of American graduation ceremonies included student participation).

466. This would alleviate some of the concerns critics have of “ceding constitutional rights or duties to the will of the majority.” FRANK S. RAVITCH, *SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS* 64 (1999). Since being offended is not a constitutional right, without state action to advance religion, any seeming coercion should not violate *Lee*, nor *Santa Fe*. Jonassen, *supra* note 57, at 709–10, 728. After all, there are always those easily offended by “the slightest hint of a religious reference or perspective.” *Id.* at 806. As a Russian writer once wrote, a man who lies to himself “knows that no one has offended him, and that he himself has invented the offense and told lies just for the beauty of it . . . still he is the first to take offense, he likes feeling offended, it gives him great pleasure, and thus he reaches the point of real hostility.” FYODOR DOSTOEVSKY, *THE BROTHER KARAMAZOV* 44 (Richard Pevear and Larissa Volokhonsky trans. 1991).

467. Cf. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963) (“In the relationship between man and religion, the State is firmly committed to a position of neutrality.”); *McCreary Cty v. ACLU*, 545 U.S. 844, 874 (2005) (“[T]he importance of neutrality as an interpretive guide is no less true” today than it was in 1947.). The dissent in *Adler I* suggests credible secular purpose may be found in the revised policy if evidence existed that shows that the administration considered the benefits of expanding student speech and self-governance before *Lee*. *Adler I*, 206 at 1099 (Kravitch, J., dissenting).

468. Coghlan, *supra* note 208, at 846 (“A student speaker must feel no pressure or prompting from the school or from the text of the school’s policies, suggesting that the student must or should pray or offer a faith-based viewpoint as his or her choice of speech.”). Lupu, *supra* note 20, at 772 (“*Santa Fe* effectively outlawed any official prodding in the direction of student-led prayer at school function.”). As John Hart Ely wrote:

[if] it can be proven that the officials are granting applications so as systematically to favor or disfavor a certain viewpoint or family of viewpoints or indeed that they have instituted a given method of selection with the expectation that it will have that effect, a constitutional violation will have been made out.

Horwitz, *supra* note 429, at 871 (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 142 (1980)).

469. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000).

470. *Adler II*, 250 F.3d 1330, 1349 (11th Cir. 2001) (Carnes, J., dissenting) (“[R]eligious issues are not supposed to be decided by vote of the people, and the majority should not be allowed to force its religious views on those in the minority.”).

should not be enough for a constitutional violation.⁴⁷¹ As the First Circuit noted, public schools are not obligated to shield students from religious ideas that may be offensive, especially if the school does nothing to impose a requirement to agree or participate.⁴⁷² The Supreme Court in *Tinker* said this best:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.⁴⁷³

Because they have nothing short of a duty to embrace the delicate balance between sponsorship and censorship, school officials should cultivate a “respect for the religious observances of others [as] a fundamental civic virtue[.]”⁴⁷⁴ As Judge Posner noted, “[h]ypersensitivity is not a First Amendment principle.”⁴⁷⁵

Further, relying on fears of an Establishment Clause violation⁴⁷⁶ as a means for ignoring First Amendment guarantees is a failed solution to

471. *Lee v. Weisman*, 505 U.S. 577, 597 (1992); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1815 (2014); *but see Santa Fe*, 530 U.S. at 305 (stating that majoritarian election “does nothing to protect the minority; indeed, it likely serves to intensify their offense”); Brady, *supra* note 25, at 1186-89 (outlining judges and scholars who have advanced a theory that offense may be enough for censorship in a captive audience environment). “The problem is, once you start prohibiting speech that is offensive there is no limit to how far you can extend the concept of offensiveness.” Warren Richey, *Free Speech: Westboro Church Supreme Court Case Tests First Amendment*, CHRISTIAN SCIENCE MONITOR (Oct. 2, 2010), <http://www.csmonitor.com/USA/Justice/2010/1002/Free-speech-Westboro-church-Supreme-Court-case-tests-First-Amendment>.

472. *Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008).

473. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *accord* Jonassen, *supra* note 57, at 787 (“Disagreement alone does not compromise school discipline or operation.”); *see also* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (“[F]undamental values of ‘habits and manners of civility’ essential to a democratic society must . . . include tolerance of divergent political and religious views, even when the views expressed may be unpopular.”); *accord* *Hsu ex rel Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996) (“[F]undamental values . . . include ‘tolerance of divergent political and religious views, even when the views expressed may be unpopular.’”).

474. *Lee*, 505 U.S. at 638 (Scalia, J., dissenting).

475. *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 877 (7th Cir. 2012) (Posner, J., dissenting). *But see* *Illinois ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71*, 333 U.S. 203, 227 (1948) (“That a child is offered an alternative . . . does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school’s domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children.”).

476. This approach taken by the Ninth Circuit in *Nurre* closely resembles the language of Justice O’Connor when she wrote that “the Establishment Clause imposes affirmative obligations that may require a State to take steps to avoid being perceived [by an objective observe] as supporting or endorsing a private religious message.” Jonassen, *supra* note 57, at 803; *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (O’Connor, J., concurring). Justice O’Connor’s approach has been criticized by both sides—Justice Scalia and Justice Stevens—in *Pinette*. Jonassen, *supra* note 57, at 804.

finding a meaningful balance between sponsoring religion and censoring free speech. However, it is important to remember that the real constitutional concern is not in exposing people to potentially disagreeable views, but with the state taking “advantage of the political process in a way that inevitably and permanently rigs the game to the majority’s advantage.”⁴⁷⁷ Concerns may arise when the metaphysics of an election process suppress minority views. However, this is only troubling when the election removes a fundamental right or the process, itself, is designed to achieve the inequality created.⁴⁷⁸

B. *Thomas v. Review Board* and the Department of Education

The Supreme Court and the Department of Education have both further offered supplemental language that mirrors the balance established by the Eleventh Circuit in an effort to alleviate any Establishment Clause concerns.⁴⁷⁹ In *Thomas v. Review Board*, the Court—drawing largely on the dissenting opinion in *Schempp*—made this helpful analysis:

governmental assistance which does not have the effect of ‘inducing’ religious belief, but instead merely ‘accommodates’ or implements an independent religious choice does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause of the First Amendment.⁴⁸⁰

Since students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”⁴⁸¹ school officials must honor this commitment and not impose restrictions driven largely by a fear of litigation.

Likewise, the Department of Education outlines the scope of constitutionally protected prayer in public schools.⁴⁸² It said that a student speaker—chosen by neutral criteria⁴⁸³ and retaining “primary control” over

477. Horwitz, *supra* note 429, at 872.

478. *Id.* at 875. If the selection process provides a meaningful opportunity for every student to speak, “behind the proverbial Rawlsian veil of ignorance, [the minority student] would have no reason to complain that the process was fundamentally tilted toward particular religious views.” *Id.* at 875.

479. Julie P. Samuels, *Graduation ceremonies*, FIRST AMENDMENT CENTER (May 2, 2005), <http://www.firstamendmentcenter.org/graduation-ceremonies>.

480. *Thomas v. Rev. Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting).

481. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

482. *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, U.S. DEP’T OF EDUC. (Feb. 7, 2003) [hereinafter GUIDELINES], http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

483. *Adler I*, 206 F.3d 1070, 1095 (11th Cir. 2000) (Kravitch, J., dissenting) (“To effectively disconnect itself from that speech, the state must be able to articulate secular, neutral criteria for selecting the speaker that are not related to the content of the speech.”).

his expression—may speak in a public setting (or to a public audience) without that message being attributable to the state.⁴⁸⁴

While the school district may provide this platform for private expression, it should not do so in a way that pushes the speaker towards prayer.⁴⁸⁵ This policy adequately responds to the dissent in *Adler I* concerning actions of a private party becoming state action by virtue of delegated authority.

Finally, in an effort to avoid mistaken perceptions, the Department of Education also allows school officials to “make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker’s and not the school’s.”⁴⁸⁶ While a school district may not escape its past, it must be afforded the opportunity to cure a constitutional defect and escape a running history of unconstitutional establishment.⁴⁸⁷ If the dominant reason for revising a policy is to bring it in conformity with Supreme Court standards, circumstantial religious implications—such as those embraced by the dissenters in *Adler I*—are at best incidental effects. School officials must encourage the student body to take part in the planning stages of a graduation service and conduct itself in ways that “inform the reasonable observer’s understanding of the policy’s [secular] purpose.”⁴⁸⁸ Courts must be equally vigilant in not only seeking out a sham

484. GUIDELINES, *supra* note 482; *see also* Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (“[S]chools do not endorse everything they fail to censor”); *Lee v. Weisman*, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring) (“[I]t would have been harder to attribute an endorsement of religion to the State [if the State had chosen speakers by wholly secular criteria.]”).

485. *Adler I*, 206 F.3d at 1350 (Kravitch, J., dissenting) (mentioning that aspects relate to the “context surrounding the creation of the policy, the policy’s terms, and the policy’s title all suggest its predominantly religious purpose”); *see also* Horwitz, *supra* note 429, at 858 n.168 (noting one account when principal introduced the senior message by asking everyone to remain standing).

486. GUIDELINES, *supra* note 482. Justice Scalia suggested this much when he provided a “mischievous invitation” to circumvent the full-extent of *Lee* by providing a disclaimer, before the introduction of the speaker, informing the audience that “while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so.” *Lee*, 505 U.S. at 645 (Scalia, J., dissenting); Cohen, *supra* note 69, at 516.

487. Justice Ginsburg, during oral argument in *Santa Fe*, alluded to the possibility of a school district “purging” itself from a history of encouraging prayer. *See* Coghlan, *supra* note 208, at 848 n.173.

488. *Adler I*, 206 F.3d at 1101 (Kravitch, J., dissenting). In this context, the reasonable (or objective) observer standard asks whether a person acquainted with the text, legislative history, and implementation of a policy could readily perceive a school’s endorsement of prayer at graduation. *See* *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring). “Reasonable observers have reasonable memories, and our precedents sensibly forbid an observer ‘to turn a blind eye to the context in which [the] policy arose.’” *McCreary Cty. v. ACLU*, 545 U.S. 844, 866 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)). These steps will ensure that school policies involve “both perceived and actual” secular purposes. *Santa Fe*, 530 U.S. at 305.

policy, but also appropriately deferring to a school policy that “expresses a plausible secular purpose.”⁴⁸⁹

These corrective measures are largely responsive to *Adler I*. The issue is significantly less difficult when the speaker is the valedictorian since he or she is chosen by empirical factors such as academic performance. In these instances, the school must not encourage the speaker to give a prayer, nor significantly edit the messages to an extent that censors otherwise protected speech.

C. “Grey Area Speech”

As a final note, Kathleen Brady’s thorough analysis on the issue of private religious expression offers further guidance to constructing a “genuinely fair and neutral” graduation policy as a supplement to the above suggestions.⁴⁹⁰ Her suggestion is to create a distinct “grey area speech” category founded on the premise that in the public school setting, controversial speech is typically an admixture of public and private speech.⁴⁹¹ Along with confronting the aforementioned issues, she also believes that “allowing grey area speech is valuable for mitigating values conflicts in public education, forging common bonds among an increasingly diverse citizenry and strengthening the public schools.”⁴⁹² However, since the grey area speech contains the traces of public speech, the court should permit the schools an increased level of control over its content.⁴⁹³

Among the topics discussed in this Article, the question of speech before a captive audience is offered as an example to support the emergence of grey area speech.⁴⁹⁴ As part of the grey area speech proposal, several baseline rules are established. First, schools cannot discriminate against grey area speech if it remains a student-initiated expression and the school has done nothing to influence the process in favor of religious speech.⁴⁹⁵

489. *Santa Fe*, 530 U.S. at 322 (Rehnquist, J., dissenting); *Wallace*, 472 U.S. at 74–75 (O’Connor, J., concurring); Irby, *supra* note 206, at 110; *see also* *Mueller v. Allen*, 463 U.S. 388, 394–95 (1983) (“[R]eluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State’s program may be discerned from the face of the statute.”).

490. Brady, *supra* note 25, at 1152.

491. *Id.* at 1151–52. For a critique of this approach, see Horwitz, *supra* note 429, at 878–81.

492. Brady, *supra* note 25, at 1152.

[G]rey area religious speech in the public schools is an important foundation for building lasting common bonds that are forged, not in spite of our religious and nonreligious differences, but, rather, in and through them. Grey area religious speech can also serve an important role in mitigating the clash over values in the public schools and can help to make public schools more hospitable to minority religious groups.

Id. at 1189–90.

493. *Id.*

494. *Id.* at 1172.

495. *Id.* at 1190.

Second, the schools can provide a platform for religious expression at school-sponsored events so long as the policy is also available for nonreligious expression.⁴⁹⁶ Finally, a school may use a disclaimer in order to distance itself from any endorsement concerns and may edit the content of the message “to ensure that it is appropriate for the occasion and the school’s pedagogical objectives.”⁴⁹⁷

VII. CONCLUSION

Justice Jackson in his concurrence in *McCullum* stated: “[t]he task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy.”⁴⁹⁸ Within these words lies an implicit allowance for balancing the interest of secular education alongside the religious expression of students—religious expression that allows students to grow and challenge the very secularism imposed on school officials by groups who threaten litigation if their respective demands are not met.⁴⁹⁹

This Article introduces and resolves the varying conflicts and pitfalls of graduation prayer and the larger debate regarding the presence of religion in public schools. It traces the language of each federal circuit that dealt with the graduation prayer issue after *Lee* in an effort to discover the available room for religious speech at graduation ceremonies. The contributions of Kathleen Brady, Paul Horwitz, and the debate within the Eleventh Circuit are largely the ingredients for this consolidated (and hopefully delicate) approach—carving out where exceptions should be allowed and where school officials are wise to tread lightly.

Having considered the extent of the current graduation prayer jurisprudence after *Lee* and *Santa Fe*, this Article concludes that there is sufficient room to operate within the law to provide opportunity for students to begin their own tradition of prayer without violating the Establishment Clause. Allowing students an opportunity to express both religious and secular values is indispensable for developing their common mind and advancing the goals of education in inculcating values while providing a marketplace for ideas.⁵⁰⁰

496. *Id.*

497. *Id.*

498. *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist.*, 333 U.S. 203, 237 (1948) (Jackson, J., concurring).

499. While writing this, another school district capitulated to the pressure mentioned. *See Missouri School District Drops Prayer, Religious Hymn After Complaint*, CBN NEWS (Sept. 12, 2016), <http://www1.cbn.com/cbnnews/us/2016/september/missouri-school-district-drops-prayer-religious-hymn-after-complaint>.

500. Brady, *supra* note 25, at 1203.