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Prayer at Graduations: Why We Should Celebrate Religious Invocations by Students, Not Silence Them

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I. Introduction

In an address to the Danbury Baptist Association in the State of Connecticut, Thomas Jefferson famously wrote of the "wall of separation between church in state" while advocating for religious liberty. He wrote:

> Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.[1]

In his brief letter, Jefferson highlighted the contradictory language in the First Amendment; the concern of the Framers that government should not promote a single religion over another, while simultaneously recognizing the right of every American to freely worship whatever religion they choose. Justice Roberts, in *Cantwell v. Connecticut,* aptly summarized this interrelationship. Writing for the Court, Justice Roberts stated, "On the one hand, [the First Amendment] forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the

[1] Letter from Thomas Jefferson to Danbury Baptists, Jan 1, 1802, in 16 THE WRITINGS OF THOMAS JEFFERSON (1861).

free exercise of the chosen form of religion."[2] The conflict between the Establishment and Free Exercise Clauses has culminated in impassioned debates about the use of prayer in schools and school-related events.

In 1992, the Supreme Court in *Lee v. Weisman* held that the inclusion of clergy who offer prayers as part of a graduation ceremony at a public school violates the Establishment Clause.[3] What some viewed as a resolution to the debate regarding prayer at school ceremonies only gave birth to another issue, whether student-composed and delivered prayers at graduation was constitutional. As a result, circuit courts have become split on the question of whether a student may, without involvement from the school, decide to include prayer as part of a school-related event.[4]

This paper will not attempt to disturb the well-settled principle that school-sponsored prayer contravenes the First Amendment. Rather, because of the constitutional guarantees of freedom of choice and exercise of religion, mechanisms should be recognized which allow for student-initiated prayer in certain contexts. More specifically, this paper argues that student-sponsored prayer delivered at graduation ceremonies without involvement from the school is constitutional. The first section of this paper will analyze the constitutional framework underlying the Establishment and Free Exercise Clauses, including the tests the Court has used to determine constitutionality. The second part will address the interpretations offered by different circuit courts. Third, the argument will be put forth that student-initiated prayer at graduation ceremonies should be recognized as private speech, and a vote to include this prayer should not be constitutionally problematic. Finally, by changing the facts of *Lee v. Weisman* to create

[2] 310 U.S. 296, 303 (1940).
[3] 505 U.S. 577 (1992).
[4] *See infra* notes 55-73 and accompanying text.

different hypotheticals, this paper will show that students unilaterally electing to include and deliver prayer as part of a graduation ceremony pass any of the Establishment Clause tests proffered by the Supreme Court.

II. Constitutional Framework Underlying the Establishment Clause

Supreme Court Establishment Clause jurisprudence is, at best, disorderly. Current confusion surrounding the proper analysis is in large part due to the fact the Court has never settled on one controlling test. Rather, using multiple standards, Establishment Clause cases have largely been decided on fact-specific grounds. Analysis of the various standards employed by the Court will begin with *School Dist. of Abington Tp., Pa. v. Schempp*, where the Court announced the underlying principle of the Establishment Clause, neutrality.[5] In that case, the Court considered consolidated cases wherein state actions required schools begin the day with readings from the Bible.[6] Despite both states' statutes allowing for students to be excused from the reading upon request from a parent or guardian, the Court held the statutes to be in violation of the Establishment Clause.[7] In both instances, the state required the religious exercises as part of the curricular activities of students who were required by law to attend school under the supervision and participation of teachers.[8] That a student could be excused from the exercise, the Court held, did not lessen the violation.[9] In its Establishment Clause analysis, the Court placed great emphasis on the "neutral position in which the Establishment and Free Exercise Clauses of the First Amendment place our government[.]"[10] In striking down the statutes, the Court stated,

[5] 374 U.S. 203, 222 (1963).
[6] *Id*. at 205.
[7] *Id*. at 205-207.
[8] *Id*. at 206-207.
[9] *Id*. at 225.
[10] *Id*. at 215 (quotations omitted).

"[t]he test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[11] Because the States were requiring the reading of a prayer at schools where students' attendance was required, and thus promoting religion, the wall of neutrality had been breached.[12]

After emphasizing the neutrality of the State as the guidepost, the Court announced a three-prong test in *Lemon v. Kurtzman* to deal with Establishment Clause challenges.[13] Under this test, laws must satisfy three different prongs: (1) they must have a secular purpose; (2) they must have no primary effect of advancing or inhibiting religion; and (3) there must be no excessive entanglement between church and state.[14] The first two prongs requiring a secular purpose and neutrality were already in place following the Court's decision in *Schempp*.[15] In adding the entanglement prong, the Court reinforced a concern for the potential of government directing or supporting religious entities.[16] The *Lemon* test, however, has been maligned by courts and academics for the indeterminacy of its standards.[17]

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[11] *Id*. at 222.
[12] *Id*. at 226.
[13] 403 U.S 602 (1971).
[14] *Id*. at 612-613.
[15] *Schempp*, 374 U.S. at 222.
[16] *Lemon*, 403 U.S. at 620.
[17] *See* Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1628–29 (2006) (noting critiques of the Lemon test, such as the difficulty in determining what makes a purpose "secular" or an effect "primary," id. at 1628); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080-81 (2019) (plurality opinion); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again[.]").

Since *Lemon*, the Court has turned to a more fact-specific inquiry which looks to history for guidance.[18] The Court in these cases has reasoned that the historical practice of prayer, for instance in the context of legislative sessions, is deeply-rooted in the history of American government. The same reliance on tradition has been used in other contexts, like in *American Legion*, where the court noted, "monuments, symbols, and practices with a longstanding history follow in the tradition of the First Congress in respecting and tolerating different views, and endeavoring to achieve inclusivity and nondiscrimination, and recognizing the important role religion plays in the lives of many Americans[.]"[19]

The Court has also employed the endorsement test, which looks to whether a reasonable observer would think the government has, through its actions, expressed endorsement or disapproval of religion.[20] In her concurrence in *Lynch*, Justice O'Connor correctly noted that a focus on endorsement offers clarity to the *Lemon* test as an analytical device.[21] A focus on endorsement is reasonable; situations where the State seemingly encourages adherence to a certain religious orthodoxy as it relates to an individual's standing in the community are concerning. However, this test has also been subject to similar criticisms as *Lemon*; it presents certain vagaries since the "reasonable observer" is a subjective term.[22] As endorsement's prevalence as an Establishment Clause test has declined, yet another test has emerged: coercion.[23]

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[18] Supreme Court cases regarding prayer before legislative sessions are illustrative. *See e.g., Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014).
[19] *Am. Legion*, 139 S. Ct. at 204.
[20] *Lynch v. Donnelly*, 465 U.S. 668, 688, (1984).
[21] "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id*.
[22] *Am. Legion*, 139 S. Ct. 2067 ("[H]ow 'reasonable' must our 'reasonable observer' be, and what exactly qualifies as impermissible endorsement of religion in country where 'In God We Trust' appears on the coinage, the eye of God appears in its Great Seal[.]") (GORSUCH, J., concurring).
[23] Note, *The Establishment Clause and the Chilling Effect*, 133 HARV. L. REV. 1338 (2020).

Justice Kennedy first articulated the coercion test in *County of Alleghany v. ACLU*, where he concurred and dissented in part.[24] Writing about why coercion is one of the limiting principles of the Establishment clause, Justice Kennedy said, "it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing."[25] Justice Kennedy's opinion in *Alleghany* also recognized a distinction between direct and indirect coercion.[26] Direct coercion can be an explicit sanction, either monetary or criminal, for not conforming to preferred religious behavior, while indirect coercion may be less overt actions which nevertheless encroach on religious freedom.[27]

Justice Kennedy's focus on coercion was adopted in *Lee*, where he authored the opinion for the Court.[28] In *Lee*, a middle school principal invited a Rabbi to offer a prayer at the graduation ceremony for her class pursuant to a district policy.[29] The Rabbi was given a pamphlet with "guidelines" for the composition of the prayer at a civic ceremony and advised him to make the prayer nonsectarian.[30] The Rabbi's invocation and benediction were nonsectarian with a few references to "God" and the "Lord".[31] In striking down the school policy Justice Kennedy discussed the indirect and subtle social pressures placed upon students because they had no real alternative to attending the ceremony.[32] Further, the Court cited the school's

[24] 492 U.S. 573, 656 (1989) (KENNEDY, J., concurring in part and dissenting in part).
[25] *Id*. at 662.
[26] Ward, *supra* note 17 at 1631.
[27] *Id*.
[28] *Lee v. Weisman*, 505 U.S. 577 (1992).
[29] *Id*. at 581.
[30] *Id*.
[31] *Id*. at 582.
[32] *Id*. at 588.

direction over the religious speech, namely the "guidelines" given by the principal to the Rabbi, as evidence of content-control by the State.[33]

Just eight years later in *Sante Fe Independent School Dist. v. Doe*, the Court took up a case regarding yet another incident of prayer in the school context, only this time it was a student delivering the message.[34] In *Sante Fe*, the school district allowed students to read Christian invocations at graduation ceremonies, and a student who is elected to the office of student council Chaplin to deliver a prayer over the public address system before each football game for the season.[35] The district court entered an interim order providing that a non-denominational prayer consisting of an invocation and or benediction could be delivered by students selected by the graduation class.[36] While the text of the prayer was not allowed to be preapproved or scrutinized by the school, overt references to religious figures was permissible so long as the general tenor of the speech was non-proselytizing.[37] In response to the district court order, the school district enacted a series of policies which provided, in part:

> The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise. If so chosen the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies.[38]

The policy adopted for football games was similar to the above policy for graduation.[39] Although the Fifth Circuit found both policies unconstitutional, the Supreme Court granted certiorari limited to the question only of whether the policy permitting student-led, student-initiated prayer

[33] *Id*.
[34] 530 U.S. 290 (2000).
[35] *Id*. at 294.
[36] *Id*. at 295.
[37] *Id*. at 296.
[38] *Id*. (quotations omitted).
[39] *Id*. at 297.

at football games violates the Establishment Clause.[40] While acknowledging this case presented a slightly different set of circumstances – with the student prayer at a different type of school function – the Court made clear its analysis "is properly guided by the principles [] endorsed in *Lee*."[41] In striking down the school policy, the Court determined that similar coercive pressures which existed in *Lee* arose in this case.[42] Bandmembers, cheerleaders, and fans alike could feel socially coerced to participate in the religious invocation which is being sanctioned by the school, thereby resulting in the State coercing participation in an act of religious worship.[43]

Relevant to the Court's Establishment Clause jurisprudence is the Department of Education's Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools (the "2020 Guidelines"). Section 8524(a) of the Elementary and Secondary Education Act of 1965 ("ESEA") requires the Secretary of Education to issue information to and guidance on the current state of the law concerning religious expression in public schools to State educational agencies.[44] The 2020 Guidelines reiterate well-established principles of the Establishment Clause, such as "teachers and other public school officials, acting in their official capacities, may not lead their classes in prayer, devotional readings from the Bible, or other religious activities, nor may school officials use their authority to attempt to persuade or compel students to participate in prayer or other religious activities."[45] The 2020 Guidelines do note, however, that "nothing in the Constitution … prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday…. Students

[40] *Id*. at 301.
[41] *Id*. at 302.
[42] *Id*. at 312.
[43] *Id*.
[44] U.S. Department of Education: *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools* (2020).
https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.
[45] *Id*.

may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics."[46] This language is more welcoming of student-initiated prayer than perhaps the Court's precedent would seem. Indeed, the 2020 Guidelines even go so far as to say that where the school permits content-neutral student religious expression, and the student retains control of the content of the speech, the speech is not attributable to the school nor can it be restricted.[47]

Speaking specifically about the use of prayer at graduation, the 2020 Guidelines offer contradictory advice from the Court's Establishment Clause jurisprudence. This section states:

> School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely content-neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content and may include prayer. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's speech.[48]

Perhaps most notable is the 2020 Guidelines' suggestion that the school providing a neutral disclaimer will serve as protection from an Establishment Clause violation.[49] The Court in *Lee* took specific issue with this exact decision by the school district when they gave Rabbi Gutterman guidelines for his speech.[50] Where the Court has held that this amounts to the school

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[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] In his remarks announcing the Guidelines issues by the Department of Education, President Trump said, "today, my administration is issuing strong new guidance to protect religious liberty in our public schools. The right of students and teachers to freely exercise their faith will always be protected, including the right to pray." President Donald J. Trump, "President Trump Remarks on Constitutional Prayer in Schools", C-SPAN transcript, Jan. 16, 2020. https://www.whitehouse.gov/briefings-statements/remarks-president-trump-announcement-guidance-constitutional-prayer-public-schools/.
[50] *Lee*, 505 U.S. at 588.

directing and controlling the content of speech, the 2020 Guidelines put forth by the Department of Education advise that it is, in fact, safe policy.[51] Further, the 2020 Guidelines suggest that it may be permissible for a school to have a process by which it selects a speaker, and that speaker ends up giving a religious speech.[52] So long as the process by which the speaker is chosen is content-neutral and the speaker retains control over the content of the speech itself, this is allowed. This conclusion stands opposed to the Supreme Court's conclusion in *Sante Fe Independent School Dist. v. Doe*.[53] This part of the case will be discussed in more detail below; however, it is relevant now simply for its holding – that the school's voting process to determine which student delivers a prayer before a football game is unconstitutional.[54] The 2020 Guidelines do not appear to proscribe such a selection process, so long as the elected speaker controls what they say and the school does not endorse the speech.[55]

As will be discussed below, circuit courts have applied various tests when deciding the constitutionality of student-led prayer at graduation. In my view, the school always advances or inhibits religion anytime it is *at all* involved in the student-led prayer. Indeed, courts often cite the potential for "sponsorship" by the school were it to allow a student to give a religious speech as a justification for upholding a ban or policy.[56] This concern is well-founded, but it need not exist were the school to adhere to the original guidepost of neutrality. In each of the circuit decisions discussed below, were the school to have refrained from any involvement, they would have avoided acting in any way as to denote "sponsoring" the religious speech at issue or to have been "coercing" students.

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[51] 2020 Guidelines *supra* note 44.
[52] *Id*.
[53] 530 U.S. at 317.
[54] *Id*.
[55] 2020 Guidelines *supra* note 44.
[56] *See Lemon*, 403 U.S. at 612 (stating that one of "the three main evils against which the Establishment Clause was intended to afford protection [is] sponsorship[.]) (quotations omitted).

a. Circuit Interpretation on Student-Initiated Prayer

Lee narrowly resolved the issue of whether prayer is acceptable at graduation only in the context of a school official "direct[ing] the performance of formal religious exercise for secondary schools."[57] In an effort to evade *Lee*'s fact-sensitive holding, students have unilaterally made the decision to include prayer at school-sponsored events. Given the uncertain direction from the Supreme Court as to which standard is guiding in this context, the question of whether student-initiated prayer absent any encouragement from the school contravenes the Establishment clause has led to a divide among the circuits.

The Fifth Circuit was the first to take up this question in *Jones v. Clear Creek Indep. Schs.*, the same year that *Lee* was decided.[58] This case came before the Supreme Court immediately following *Lee*, but was remanded so that the Fifth Circuit could appropriately address the issue considering the Supreme Court's decision.[59] In this case, a high school traditionally included in its graduation ceremonies invocations and benedictions which were voluntarily crafted and presented by students of the graduating class.[60] Three weeks prior to the graduation ceremony, the Board of Trustees adopted a Resolution which provided, among other things, that the use of a benediction is within the discretion of the graduating class, it will be given by a student volunteer, and it shall be nonsectarian and non-proselytizing in nature.[61] Upon remand, the Fifth Circuit reanalyzed the Resolution under the *Lemon*, endorsement, and coercion tests.[62] Under all three, the court held that the Resolution does not violate the Establishment

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[57] *Lee*, 505 U.S. at 586; Kevin E. Broyles, *Establishment of Religion and High School Graduation Ceremonies: Lee v. Weisman*, 16 HARV. J.L. & PUB. POL'Y 279, 279 (1993) (explaining how Lee only resolved the issue of school officials inviting clergymen to deliver prayers).
[58] 977 F.2d 963 (5th Cir. 1992).
[59] *Id.* at 965.
[60] *Jones v. Clear Creek Independent School Dist.*, 930 F.2d 416, 417 (1991).
[61] *Id.*
[62] *Jones*, 977 F.2d at 966.

clause.[63] Of particular importance to the court was the crucial fact that the *students themselves* were deciding the type of invocation given, and the Resolution explicitly disallowed any sectarian or proselytizing prayer.[64]

The Fifth Circuit in *Jones* was partially correct in its ultimate determination. It is true that because the students themselves oversaw selecting the type of invocation, crafting it, and delivering it without any input from the school, then it cannot be said there is any advancing of religion (*Lemon*), endorsement, or coercion by the school. Where the Fifth Circuit partially erred, however, is in its conclusion that the Resolution shielded the school from any Establishment clause violation. While the school district in *Jones* surely was well-intentioned and attempting to abide by the "neutrality" principle guiding the Establishment clause, any action by the school risks the potential for entanglement. To be sure, *Lemon* prohibits "excessive entanglement" as part of the tri-part Establishment clause test. The proper course of action, however, is for the school district to adhere to "neutrality" strictly because any school involvement can be viewed as "excessive".

The Third Circuit in *Am. C.L. Union of New Jersey v. Black Horse Pike Reg'l Bd. of Educ.*, reached the opposite conclusion when considering a district's policy.[65] Responding directly to the Fifth Circuit's decision in *Jones*, the school board proposed a policy where the graduating student would choose whether to include a prayer at graduation, a student volunteer would give the prayer, and the school is not allowed to endorse or promote the prayer in any way.[66] The senior class voted by a narrow margin, 128 to 120 (with 20 voting neither), to include

[63] *See id*.
[64] *Id*.
[65] *See Am. C.L. Union of New Jersey v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996).
[66] *Id*. at 1475.

the prayer.[67] In considering the free speech rights of the students, the Third Circuit took issue with the student-voting mechanism the school employed. "[The school policy] allowed the 128 seniors who wanted verbal prayer at their graduation to impose their will upon 140 of their fellow classmates who did not."[68] The court next looked at the policy to see the level of state control over the ceremony and whether the students were coerced.[69] Determining that the student vote does not erase the state's imprint from the ceremony, and there is public and peer pressure placed on students, the court held the policy violated the Establishment Clause.[70]

The Third Circuit is partially correct regarding the student vote. As with *Jones*, whenever a school enacts a policy, no matter how well-intentioned, it runs the risk of entanglement. At its most basic roots, any school policy on prayer during graduation is in some way interacting with students' expression of religion. Even if the policy, as in this case, explicitly bars the endorsement of a student's religious statement, it can be misconstrued as a tacit approval of the message.[71] Given the potential Establishment Clause violation that could occur, schools would be wise to not entertain any policy, simply allowing the students to unilaterally decide to include religious messages in graduation speeches on their own. Where the Third Circuit erred, however, is in its conclusion that the school is coercing the students in any way. Certainly, graduations themselves are not truly "voluntary"; they are the culmination and celebration of a student's academic career. Regardless of tradition or social pressure, which might compel a student to attend a graduation, participation in a religious invocation at that graduation is a separate action.

[67] *Id*.
[68] *Id*. at 1477.
[69] *Id*. at 1479.
[70] *See id*.
[71] Nevertheless, this policy should not have been read as the having "the state's imprint."

In this case, the school strived to achieve neutrality and in no way encouraged the participation in prayer or adherence to a specific religious orthodoxy.

The Eleventh Circuit, in *Adler v. Duval County School Bd.*, upheld a county's policy of allowing students to vote whether to include prayer at graduation. The county policy was similar to the policy in *Jones*; discretion whether to include a prayer rests with the senior class, it will be given by a student volunteer, and if the class chooses to include a prayer it will not be monitored or reviewed by the school.[72] In upholding the County's policy, the court employed a combination of the coercion and endorsement tests.[73] Critical to the Eleventh Circuit's decision, was that the prayers were not subject to regulations on their topic or content, and that the policy did not encourage religious messages.[74] Because the school was entirely removed in the crafting and delivering of the prayer, it could not be said to have been endorsing or encouraging the participation of the religious speech.[75] The school district in *Adler* corrected the mistake made in *Jones*. By removing itself entirely from the decision to include and drafting of the prayer, it stood firmly neutral.

III. Why Student-Initiated Prayer Is Private Speech

One of the challenges surrounding school suppression of student religious speech is determining at what point this speech no longer is private speech, but government speech endorsing religion.[76] It is well settled that private religious speech is fully protected under the

[72] *Adler v. Duval Cty. Sch. Bd.*, 250 F.3d 1330, 1332 (11th Cir. 2001).
[73] *See id.*
[74] *Id.* at 1336.
[75] *Id.* at 1338.
[76] *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995) ("[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.") (citations omitted).

Free Speech Clause as private expression.[77] The right to use government property for personal expression depends, however, upon whether the property "has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses."[78] The issue here turns, therefore, on whether a graduation ceremony is considered a public forum.

The Court has recognized a category of limited public fora which the state has opened for use by the public as a place for expressive activity.[79] For example, in *Widmar v. Vincent*, the Court considered whether a state university, which allows registered student groups access to school facilities, may close the facilities to student groups who want to use them for religious discussion and worship.[80] The Court declared in *Widmar* that student meetings which included prayer and religious discussion, "are forms of speech and association protected by the First Amendment."[81] Just a few years later in *Mergens*, the Court addressed a similar question; whether the Equal Access Act prohibited a high school from denying student religious groups permission to meet on school grounds during noninstructional time.[82] While reaffirming the "limited public forum" discussed in *Widmar*, the Court recognized that Congress used a separate phrase – "limited open forum" – as the operative phrase in the statute.[83] The Court struck down the high school's policy on statutory grounds, noting that the Equal Access Act "prohibits denial

[77] *See e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 352 (1993); *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, (1990); *Widmar v. Vincent*, 454 U.S. 263, 102 (1981); *Heffron v. International Soc. for Krishna Consciousness, Inc*., 452 U.S. 640 (1981).
[78] *Pinette*, 515 U.S. at 761.
[79] *Widmar v. Vincent*, 454 U.S. 263 (1981) (university meeting facilities*); City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board meeting); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal theater).
[80] *Widmar*, 454 U.S. at 265.
[81] *Id*. at 269.
[82] *Mergens*, 496 U.S. at 231.
[83] *Id*. at 242.

of equal access…to…any students who wish to conduct a meeting within [the school's] limited open forum on the basis of the religious content of the speech[.]"[84]

Both *Widmar* and *Mergens* overtly state there exists a limited public forum in which free speech, which includes religious speech, must be allowed. That proposition, coupled with the Court taking a relaxed approach in *Town of Greece* towards a legislative body opening a session with prayer, leads to a possible conclusion that student-initiated speech in the graduation context would be considered private speech within a limited public forum. The same conclusion that the Court reached in *Widmar* can be drawn here. An open-forum policy which included no discrimination against religious speech would have a secular purpose and avoid entanglement with religion. If a school aimed to bar a student from including in their graduation speech any religious statements, it would risk greater entanglement than if the school maintained neutrality within this limited public forum. This is similar to the conclusion drawn in *Sante Fe*, where it found critical the "degree of school involvement" which made clear the prayer bore "the imprint of the State[.]"[85] In *Capitol Square Review and Advisory Bd. v. Pinette*, Justice Scalia recognized the distinction between private speech and government speech cannot exist where the government has not "fostered or encouraged the [speech]."[86] As has been repeatedly pointed out, what more efficient way is there for the government to not encourage religious speech than to avoid involvement entirely? In the graduation ceremony context, the time where a student begins to address his or her fellow classmates could be recognized as another example of a limited public forum. If, for instance, this student was the valedictorian, the school would not be designating the speaker based on a specific viewpoint or what speech they plan to give. It would

[84] *Id*. at 247.
[85] *Sante Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000).
[86] *Pinette*, 515 U.S. at 766.

be an opportunity for a student who, through extraordinary academic achievement, has earned the right to address his or her peers. Any further announcement by the school would be unnecessary, as it has presumably already made clear that the valedictorian will be given a chance to speak before the graduating class and any attendees. Under these circumstances, a student speaker would merely be taking advantage of an already recognized forum where they are given a chance to speak.

In a limited public forum, the State "may impose restrictions on speech that are reasonable and viewpoint neutral." [87] By barring students from speaking at a graduation entirely because they might give a religious speech, the State is discriminating on the basis of viewpoint. The Court has recognized certain categories of student speech which may be regulated under certain circumstances: vulgar speech, speech which materially disrupts the classroom and causes a substantial disruption, speech promoting illegal drug use, and speech that may reasonably be seen as bearing the imprimatur of the school such as a school newspaper.[88]

A student giving a religious speech at a graduation certainly would not fall into the first three categories. First, a student who stands before his or her fellow classmates and gives a religious invocation is not engaging in the "lewd" or "vulgar" speech uttered in *Fraser*.[89] Looking next at *Tinker*, there the Court was concerned with passive political speech which, it was argued, could cause a disruption to the classroom.[90] A student speaking at a graduation cannot cause a disruption to the classroom. They are, by definition, progressing out of the control

[87] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009); *See also Good News Club v. Milford Central School*, 533 U.S. 98, 106-07 (2001).
[88] *See Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).
[89] While nominating a fellow classmate for student elective officer, a student referred to the candidate by way of a graphic and explicit sexual metaphor. *Fraser*, 478 U.S. at 678.
[90] *Tinker*, 393 U.S. at 504.

of the school along with their fellow graduating classmates. Third, while the student in *Morse*, was punished for holding up a banner reading "BONG HiTS 4 JESUS" at a school approved event, he was ultimately punished for promoting drug use, not any perceived religious message.[91] Moreover, the student in that case did not even try to argue he was attempting to convey a religious message with the banner.[92] A student reciting a Gospel passage or scripture from the Quran would present entirely different circumstances.

An argument could be made, however, that observers might believe that the student speaking at the graduation came with the approval of the school administration as in *Hazelwood*. There, a school chose not to publish two articles written by students which dealt with the pregnancies of students at the school and the impact of divorce on children.[93] The Court held the school was able to exercise editorial control over the content of the student speech because the public could reasonably have perceived it to bear the school's imprimatur.[94] But the circumstances surrounding a student speaker and a graduation invitee are distinct. Someone who is invited to give an invocation or speak to the graduation class is, in effect, an agent of the school. The individual's message will be, correctly, interpreted as coming directly from the school itself. Conversely, when a student stands to deliver a message to his or her peers, the reasonable observer would understand that whatever message is delivered is coming purely from the student. Often these students are either selected by their peers to deliver an address, or have earned the ability to do so as a valedictorian due to their academic excellence. The circumstances surrounding why a student appears before the graduating class and an administrator or outside individual are not equivalent. Therefore, when a student, on their own, chooses to include

[91] *Morse*, 551 U.S. at 398.
[92] *Id*. at 403.
[93] *Hazelwood*, 484 U.S. at 263.
[94] *Id*. at 271.

religious messages in a graduation speech, this should be recognized as private speech and schools should not attempt to silence the student.

IV. Why A Student-Led Vote to Determine Whether A Prayer Should Be Included In a Graduation Is Not Constitutionally Problematic

The Court's Establishment Clause jurisprudence has correctly recognized the potential for coercion as a legitimate concern with governmental advancement of religion. Where the Court has strayed, however, is placing great weight on how severe this coercion can be when the government is removed from the equation.[95] In his dissent in *Lee*, where the Court explicitly used the coercion test for its decision, Justice Scalia argued that the type of coercion originally contemplated by the Framers is not the type of coercion which receives strong consideration by the Court today. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by *force of law and threat of penalty*."[96] Justice Thomas echoed this sentiment in his concurrence in *Town of Greece*. "[T]o the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts – not the subtle coercive pressures[.]"[97] This distinction between *true* coercion – that which comes with the force of law and threat of penalty – and social pressure masked as coercion has been lost

[95] Scholars continue to debate the efficacy of using indirect coercion as a standard for Establishment Clause cases. *See generally* Matthew A. Bills, *Let Us Pray?: The Constitutionality of Student-Led Graduation Prayer After Sante Fe v. Doe*, 149 U. ILL. L. REV. (2002) (arguing that student-led prayer at graduations is permissible where schools follow specific secular criterion in selecting the speaker, recognize the speech as private speech, and do not attempt to censor the message).; Charles Adside III, *The Establishment Clause Forbids Coercion, Not Cooperation, Between Church and State: How The Direct Coercion Test Should Replace The Lemon Test*, 95 N.D. L. REV. (2020) (proposing that the proper coercion analysis focuses on direct coercion, not indirect coercion, because the later only applies in certain fact-specific cases).

[96] *Lee*, 505 U.S. 577 (SCALIA, J., dissenting).

[97] *Town of Greece*, 572 U.S. 565 (THOMAS, J., concurring) (citations omitted).

in recent Establishment Clause cases. By broadening the definition of coercion, the Court has allowed threat of peer pressure to serve as a potential bar to student's speech.

As this definition has been broadened, practices which should have insulated the school from Establishment Clause violations became questionable policy. The Court in both *Sante Fe Independent School Dist. v. Doe*, and *Board of Regents of Univ. of Wis. System v. Southworth*, stated that student elections deciding which expressive activities prevail are constitutionally problematic.[98] Although these cases dealt with student expression in other school-related contexts (prayer before a football game and use of student fees for student groups promoting religious ideology), the Court determined in both instances that a student-voting mechanism runs afoul of the Establishment Clause.

In *Sante Fe*, The Court first engaged an analysis of whether the student's prayer before the football game can be considered "private speech".[99] Crucial to its' determination that this is not private speech, was the finding that the invocations "are authorized by a government policy[.]"[100] This policy allowed for one student to give an invocation before every game, subject to specific regulations which restrict the topic and content of the message.[101] Because the policy put the rights of students to a vote, the policy was an insufficient safeguard of student speech. [102]

The Court focused primarily on the fact the school district implemented a policy which allowed for majoritarian views to prevail. The solution to this, yet again, is the removal of the school entirely from the equation. Where a school creates a mechanism through which majoritarian opinion controls, the State still has some authority. Where government grants access

[98] *Sante Fe*, 530 U.S. 290 (2000); *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217 (2000).
[99] *Sante Fe*, 530 U.S. at 302.
[100] *Id*.
[101] *Id*. at 303.
[102] *Id*. at 305.

to a platform pursuant to a set standard of guidelines and restrictions, the Court's precedent confirms that there is serious potential for Establishment Clause violations. Where there is not policy in place, and students simply decide on their own who will be a speaker and let the speaker unilaterally decide what message will be delivered, there is no control by the school. Further, while the Court has settled that "[a]ccess to a public forum, for instance, does not depend upon majoritarian consent[,]" without implementation of a policy like in *Sante Fe*, access to the *forum* would not be dependent on a voting-mechanism.[103] Rather, the *message* delivered is dependent on student-voting. Access to the forum (such as a graduation speech) is not limited by the school, instead the speech itself will be determined by the students.

In striking down the school policy in *Sante Fe*, the Court stated that it was guided by the coercion principles endorsed in *Lee*. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in a religion or its exercise[.]"[104] The Court held that simply granting students the ability to elect a speaker who may choose to pray "regardless of the students' ultimate use of it, is not acceptable because of the social coercive pressures which accompany it.[105] But the Court completely ignores the fact that any speech which results from these student-elections would be entirely private speech, and not government speech. The school would have no input as to who is chosen to say what. As Justice Rehnquist noted in his dissent, "[a] newly elected student body president, or even a newly elected prom king or queen, could use opportunities for public speaking to say prayers. Under the Court's view, the mere grant of power to the students to vote for such offices, in light of the fear that those elected might publicly pray, violates the Establishment Clause."[106] The social

[103] *Id*. at 304.
[104] *Id*. at 302. (citing *Lee*, 505 U.S. at 587.).
[105] *Id*. at 316.
[106] *Id*. at 321-22. (REHNQUIST, J., dissenting).

pressures highlighted by the Court in *Sante Fe* are not equal to coercion by the State. That these social pressures exist is not in question. Rather, it is whether these social pressures rise to the level of coercion accompanied by force of law and threat of penalty which was the trademark of establishments of religion. They do not. As the Court stated in *Mergens*, "[w]e think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[107] Even if one believes that social pressures felt by students is overwhelming, the State is still not coercing them in any way. When students unilaterally decide whether prayer should be involved in a graduation ceremony, the school is left out of the equation. There is no potential for coercion by the State, because the State is not involved. The students assume any coercive pressures themselves, and, any penalty to be received is entirely without the force of law.

V. Why Student-Led Prayer Should Pass Any Test

Consider Debra Weisman's story that led her to bring suit in *Lee v. Weisman*. With the underlying facts of *Lee* set forth, now adjust them slightly given the subsequent Establishment Clause cases decided by the Court.

Most importantly, there is a massive distinction between the school inviting a Rabbi to deliver an invocation at a graduation and if one of Debra Weisman's classmates had delivered a prayer.[108] When a school invites an outside individual to deliver a message, the reasonable observer would view this person, and their message, as an extension of the school itself. This is only compounded by the fact the invitee is a member of the clergy. Inviting a rabbi or a priest to

[107] *Mergens*, 496 U.S. at 250.
[108] *See* Rick A. Swanson, *Time for Change: Analyzing Graduation Invocations and Benedictions Under Religiously Neutral Principles of the Public Forum*, 26 U. MEM. L. REV. 1405, 1406-08 (1996).

deliver an invocation to a graduating class, regardless of whether the prayer is nonsectarian or not, is far too much entanglement between church and state. If instead Debra Weismann heard a religious speech from one of her fellow classmates, the analysis would change. Where an invocation or benediction from a Rabbi chosen by the school tears down the wall of separation between church and state, a student's voluntary inclusion of religious messages does not begin to approach it.

Moving on from who the speaker is, now let us change how the invocation comes to be delivered. In *Lee*, Rabbi Gutterman was given a pamphlet entitled "Guidelines for Civic Occasions" which recommended certain restrictions on the content and topic of his speech before the school.[109] By giving Rabbi Gutterman these guidelines, the Court held that the school was effectively controlling and directing the content of the prayer, thereby involving the State with religious activity.[110] Restrictions on the content of religious speech at graduations has been seen in many cases since *Lee*, as schools try to create a space where students can freely engage in religious expression while maintaining a nonsectarian appearance.[111] The problem with the guidelines in *Lee*, and subsequent limitations imposed by schools, is that the school is still entangled with the religious expression. Restricting or imposing limitations on the content of religious speech at all will potentially result in a *Lemon* test failure on either advancement or inhibition of religion, or excessive entanglement. If the student speaking to Debra Weisman's class in this hypothetical instead was given no guidelines or suggestions on the content of the speech, then the school is not controlling or directing the potential prayer at all. The content of

[109] *Lee*, 505 U.S. at 581.
[110] *Id*. at 588.
[111] *See supra* notes 57-75 and accompanying text.

the speech, and any religious messages the student elects to include, would come entirely from the student's own choice.

Changing the speaker and restrictions on speech in our new hypothetical comports with the Establishment Clause. But, now, we must ask whether there remains potential for coercion. In *Lee*, the Court recognized that, "[t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact."[112] As was previously noted, the original dangers of coercion were accompanied by force of law and threat of penalty. Here, the only danger to Debra Weisman would be for a few moments she would listen to religious invocations by a fellow classmate. The social pressure potentially felt would be incomparably small to the financial and legal pressures felt at the time of the amendment's drafting. Moreover, such speech would come without any involvement from the state in the religious exercise. The state would have no way to penalize Ms. Weisman for not agreeing with the religious message, or even actively engaging in a prayer if one was offered. She would not need to agree with whatever message is being proffered. In fact, disagreement with the message is directly in line with the meaning of the Establishment Clause. The State, or the school, would have no way to punish her for disagreeing with the speaker since they are removed from the process by which the speaker came before her in the first place. Social pressures, especially in the school-context, are genuine concerns, and for a student perhaps are the only concerns that matter to them at the time. What they are not, however, are legitimate legal grounds for denying a student the right to freely engage in religious expression.

[112] *Id*. at 598 (quotations omitted).

To add even further to this fact pattern, imagine now that the student who speaks at the graduation was chosen among a voluntary student election, entirely ran by the graduating class. To be sure, if the class voted to permit a student to give a speech, then there would be some students, like Debra Weisman, who fall into the minority. This does not mean, however, that the minority must convert to whatever religious orthodoxy might be referenced by the elected student speaker. Nor do the minority of students have to actively participate in the prayer or show agreement in any way. Just as students do in school buildings every day, Debra Weisman would be asked to hear an opposing viewpoint. Having to listen to a few minutes of a fellow-student invoking religious messages is not a concern that should outweigh a student's ability to engage in religious expression.

VI. Conclusion

Regardless of which test a court would choose to employ: *Lemon*, endorsement, or coercion, the outcome should be the same. Student-initiated religious speech at a graduation does not contravene the Establishment Clause and is protected by the Free Exercise Clause. Schools have tried a myriad of different policies in an effort to permit student expression. Unfortunately, each of these policies have been struck down by the Supreme Court on coercion or entanglement grounds. As the Court has noted, however, the fact a policy might "operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid."[113] The tradition and history of public ceremonies in the United States which include prayer is voluminous, as has been pointed out by the Supreme Court in most of its school-context Establishment Clause cases. From the oath taken by civil servants when they assume office, to

[113] *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Thanksgiving proclamations proffered by Presidents, religious invocations are commonplace in American society. Much like these religious acknowledgements, invocations and benedictions as part of a graduation ceremony have a lengthy and celebrated history. Denying students the opportunity to voluntarily celebrate their academic achievements through even the slightest religious invocation deprives them of their right to freedom of expression. Moreover, while the Supreme Court might be trying to create a more unifying graduation experience, one where the minority would not feel psychologically coerced, they are in fact achieving the opposite. When a student, on their own, decides to engage in a religious invocation at a graduation, it is an opportunity to demonstrate patriotic unity. Students of all faiths may stand or sit, join in prayer or remain silent, each in their own way celebrating and respecting the religious freedom promised by the United States Constitution. When that choice is taken from the students, all that allowed is silence and religious expression is chilled.

A student who wishes to engage in religious speech during a graduation ceremony unfortunately is met with conflicting advice. The Supreme Court has suggested in recent cases that psychological coercion is grounds to proscribe the religious speech, while the 2020 Guidelines put forth by the Department of Education suggests that there are contexts in which it would be tolerated. The student, as well as school administration, is left unsure of which perspective prevails. Schools who seek to create an environment where freedom of religious expression is permissible commonly have found themselves subjects of Establishment Clause suits. This cannot be the reality of religious freedom intended by the First Amendment. Lost amidst the legal conflict that has surrounded the use of prayer in the school-context, is that there are children who only want to celebrate their religion with their classmates. Student-sponsored religious speech at graduations should be celebrated, not silenced. When the school has no input

in the determination of which student speaks, and what that student says, the inclusion of religious messages at a graduation speech should be allowed.