Prayer in our Public Schools: Is There Room at the Inn?

By Danielle Logan*

A quick scan of the newspaper shows how contentious and current the issue of school prayer is for our schools. Stories involve schools cautiously setting policies to avoid lawsuits, government officials trying to legalize prayer, and school officials violating the current rules. In Kentucky, for example, a superintendent ended a seventeen-year-tradition of local Baptist ministers meeting to have lunch with students. The issue has been placed on the school board’s agenda.¹ In Georgia, State Representative Burkhalter proposed a bill that would allow public prayers before games played at private high schools. His inspiration came from reading about Landmark Christian being unable to publicly pray before a playoff game against Clinch County.² And, of course, there are the violations that occur from time to time, as happened when a minister led a public prayer at the state-sponsored wrestling championship in Macon.³

Such stories reflect the current confusion and controversy that arise whenever school prayer is involved. For many citizens, the subject is sensitive and likely to involve strong emotions. For schools, the issue is confusing as they try to set policies that accommodate public demand without violating the Constitution. Unfortunately, this confusion continues in the courtroom. As this paper shows, the school prayer cases from the past sixty years have

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² Carlos Campos, Bill Unblocks Private School Playoff Prayer, Atlanta J.-Const., Jan. 30, 2004, at C1 (quoting Representative Burkhalter on how it is “absurd that we can have a high school association responsible for organizing sporting events at our schools, both public and private, and can somehow prohibit the very activity for which many private schools exist.”).

³ Jay Stone, Public Prayer Breaks Rule at Wrestling Final, Atlanta J.-Const., Feb. 8, 2004, at D1 (quoting Georgia High School Association assistant executive director, Gary Phillips, reporting the prayer took him by “surprise” and “it kind of got in there when it shouldn’t have.”).
incorporated a variety of tests and leave many guessing as to what the Supreme Court will do next. In the interim, lower courts must sift through the confusion.

This paper will focus on one lower court’s attempt to deal with the issue: the Eleventh Circuit’s Adler v. Duval County School Board. This paper will not discuss whether Supreme Court precedent has been decided correctly or whether Establishment Clause jurisprudence is based on an accurate view of history. In addition, this paper hopes to avoid any view on religion and its proper place in the schools. Instead, the sole focus is whether the Eleventh Circuit followed precedent developed by the Supreme Court. Part II of this paper will examine the history of school prayer. Part III will explain the three Establishment Clause tests used in school prayer jurisprudence: the three-prong Lemon test, Justice O’Connor’s endorsement test, and the Lee coercion analysis. Part IV will examine the Supreme Court’s most recent decision, Santa Fe Independent School District v. Doe, where the Court applied all three tests. With such history in mind, the paper will then turn to the Eleventh Circuit Adler decisions in Part V. Part VI will consider other circuits and predict how they may treat Adler. Finally, the paper concludes with an analysis of why schools and courts should be wary of the Adler opinion.

II. The History of the Establishment Clause in School: the Road From Everson to Lee

The language of the First Amendment’s Establishment Clause seems simple enough: “Congress shall make no law respecting an establishment of religion.” This phrase, however,

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4 250 F.3d 1330 (11th Cir. 2001).
5 In Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, C.J., dissenting), Chief Justice Rehnquist responded to how the majority used Jefferson’s constitutional wall of separation between church and state. Rehnquist viewed the majority’s use of history as “mistaken” and lamented how Establishment Clause jurisprudence has been “expressly freighted with Jefferson’s misleading metaphor for nearly 40 years.” Id.
6 U.S. Const. amend. I.
has spawned countless lawsuits, ranging from recent disputes over Ten Commandments monuments\(^7\) to holiday displays on public property.\(^8\) This dispute entered the schoolhouse in 1947 with *Everson v. Board of Education*\(^9\) and, with the Supreme Court granting certiorari in *Elk Grove Unified School District v. Newdow*, appears to be in no hurry to leave.\(^10\)

In *Everson*, a New Jersey statute allowed local school districts to make agreements for the transportation of children to and from schools. Acting under this statute, Ewing’s Board of Education granted financial reimbursement to parents using public transportation to send their children to school. The problem, however, were the parents who sent their children to Catholic parochial schools. Everson, in his capacity as a district taxpayer, made a constitutional challenge over whether the Board could reimburse parents of private school children. Everson found favor in the state court, but the decision was reversed at the appellate level.\(^11\)

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\(^7\) See Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) (challenging Roy Moore, Chief Justice of the Alabama Supreme Court, for placing a Ten Commandments monument in the state judicial building).


\(^10\) 124 S.Ct. 384 (2003). In *Newdow*, the Supreme Court will decide “whether a public school district policy that requires teachers to lead willing students in the Pledge of Allegiance, which includes the words ‘under God,’ violates the Establishment Clause.” Id. Oral arguments were heard on March 24, 2004 and experts predict a decision this July. Charles Lane, *In Pledge Case, Passing the Test; Newdow Withstands Justices’ Inquiries*, *Wash. Post*, Mar. 25, 2004, at A3. However, the Court may never reach this issue if it decides Michael Newdow lacks standing. His ex-girlfriend, Sandra Banning, has custody of their daughter and has the final say on educational decisions. Banning approves of the Pledge of Allegiance in schools. Id.

\(^11\) *Everson*, 330 U.S. at 3. This citation pertains to all facts within this paragraph.
The Supreme Court affirmed the appellate court’s decision (and thus approved the legislation), but not without setting standards that would govern subsequent cases.\textsuperscript{12} Noting first that the First Amendment and its Establishment Clause were applicable to the states through the Fourteenth Amendment,\textsuperscript{13} the Court then used Thomas Jefferson’s words to explain the clause’s purpose as “erect[ing] a wall of separation between Church and State.”\textsuperscript{14} According to the Court, this wall must be kept “high and impregnable” in order to withstand even the “slightest breach.”\textsuperscript{15}

These statements reflect the Court’s view of Establishment Clause history. In early colonial times, settlers came from Europe to escape laws requiring them to support and attend churches supported by the government. Noncompliance could entail fines, jail sentences, torture,

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  \item \textsuperscript{12} \textit{Id.} at 18. The Court approved the legislation on the ground that money was granted for the safety of children, regardless of their religion. According to the Court, while the Establishment Clause requires a state to be neutral in its dealings with groups of believers and non-believers, it “does not require the state to be their adversary.” \textit{Id.}
  \item \textsuperscript{13} \textit{Id.} at 8.
  \item \textsuperscript{14} \textit{Id.} at 16. In later cases, outside of the school prayer context, the Court has stated that the metaphor of a constitutional wall is “not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state” since no institution in society can “exist in a vacuum or in total or absolute isolation from all the other parts, much less from government.” Lynch v. Donnelly, 465 U.S. 668, 673 (1984). The wall the Establishment Clause erects is more of a “blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.” Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). But in the school prayer context, the Court has not directly weakened this wall. The Court has noted that religion will inevitably arise at times throughout the educational process, but the Court is also quick to point out that such instances involve questions of religious accommodation (issues not present when school sponsored prayer is involved). Lee v. Weisman, 505 U.S. 577, 598-99 (1992). In addition, school prayer adds the element of young, impressionable children. This element is not present in other contexts, perhaps explaining why the Court has not mentioned any weakening of this wall in school prayer jurisprudence.
  \item \textsuperscript{15} \textit{Id.} at 18.
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and even death; compliance meant paying taxes to churches that preached hatred of dissenters.\textsuperscript{16}

Unfortunately, such practices continued in the new world with Quakers, Catholics, Baptists, and Protestants finding themselves at different times persecuted and even jailed. In Virginia, James Madison and Thomas Jefferson began a movement to combat such practices. Their efforts culminated with the Virginia Bill for Religious Liberty. According to Madison, a “true religion did not need the support of law” and “cruel persecutions were the inevitable result of government-established religions.”\textsuperscript{17} Soon thereafter, Madison and Jefferson played leading roles in the adoption of the First Amendment, and the Court treats their Virginia arguments as giving support to the Establishment Clause and its purpose. Thus, with such history in mind, the Supreme Court cemented Jefferson’s wall and ensured that it would remain sturdy with the Church on one side, the State and its schools on the other.\textsuperscript{18}

Subsequent school prayer cases have reinforced this wall. In \textit{Engel v. Vitale}, the Court found a New York law directing schools to use a specific prayer at the start of every school day to have breached the “constitutional wall of separation.”\textsuperscript{19} Repeating its historical discussion in \textit{Everson}, the Court also observed how government support can “degrade religion” and cause people to lose respect for it.\textsuperscript{20} According to the Court, the Establishment Clause expresses the principle that “religion is too personal, too sacred, too holy, to permit its unhallowed perversion

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\item Id. at 8-9.
\item Id. at 11-12.
\item Critics have questioned the historical reasoning of the Court. \textit{See} Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, C.J., dissenting) (noting how Jefferson was in France during the passage of the First Amendment).
\item 370 U.S. 421, 425 (1962). The prayer at issue stated “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” This prayer was part of the State’s “Statement on Moral and Spiritual Training in the Schools.” Id. at 422-23.
\item Id. at 431.
\end{enumerate}
by a civil magistrate” or by its subjection to the ballot box.\textsuperscript{21} Thus, out of respect, not hostility, for religion, the Court left religion to the people themselves, rather than the government.\textsuperscript{22} If nothing else, “it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”\textsuperscript{23}

One year later, in School District of Abington v. Schempp, the Court found another constitutional violation in companion cases involving Bible readings and recitations of the Lord’s Prayer.\textsuperscript{24} After citing Everson and its historical discussion, the Court noted the presence of eighty-three religious bodies in the United States to underscore the importance of government remaining neutral toward all religions.\textsuperscript{25} Quoting previous Establishment Clause cases, the Court emphasized how “separation must be complete and unequivocal” and the prohibition “absolute.”\textsuperscript{26} Even minor encroachments concerned the Court since a “trickling stream” can easily turn into a “raging torrent.”\textsuperscript{27}

Twenty years later, the Supreme Court remained committed to this wall. In Wallace v. Jaffree, the Court struck down an Alabama statute authorizing a moment of silence for mediation or silent prayer.\textsuperscript{28} Rather than repeating the history of the Establishment Clause as in its

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\item \textsuperscript{21} Id. at 432, 430.
\item \textsuperscript{22} Id. at 435.
\item \textsuperscript{23} Id. at 425.
\item \textsuperscript{24} 374 U.S. 203 (1963) (using a factor later crystallized in the Lemon test, the Court found the Pennsylvania and Maryland laws lacked a secular purpose since the exercises were clearly religious in character). Id. at 222-23.
\item \textsuperscript{25} Id. at 214.
\item \textsuperscript{26} Id. at 220 (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)).
\item \textsuperscript{27} Id. at 225.
\item \textsuperscript{28} 472 U.S. 38 (1985).
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previous opinions, the Court relied on Justice Jackson’s statement in West Virginia Board of Education v. Barnette that “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” (emphasis added).

The Court then moved into a Lemon analysis and declared the statute to be unconstitutional because of its religious purpose. According to the Court, the State failed to present evidence of any secular purpose and the history of the law showed its religious intent. In reaching this conclusion, the Court reiterated that a state cannot endorse a religion and must instead “pursue a course of complete neutrality toward religion.” As the guardian of the Establishment Clause and its values, the Court continued to keep watch else this separation be eroded in “subtle ways.”

The Supreme Court continued to keep watch even when school prayer moved outside the classroom to a graduation ceremony. In Lee v. Weisman, principals at public schools in Providence, Rhode Island invited clergy to speak at graduations. The principals provided the clergy with guidelines, which essentially boiled down to keeping the prayers nonsectarian.

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29 The Court noted the history in extensive footnotes but kept the historical discussion to a minimum in the main text of the case.
30 319 U.S. 624 (1943).
31 Id. at 55.
32 See Part III, infra, for a discussion of the Lemon test.
33 Wallace, 472 U.S. at 57-59. The Court looked to how the Alabama legislature added the words “voluntary prayer” to an already existing law allowing meditation. Moreover, it did not help the State’s case when the bill’s sponsor testified in district court that the bill was an “effort to return voluntary prayer to public school” and he had “no other purpose in mind.” Id. at 57.
34 Id. at 60.
35 Id. at 61.
When Principal Lee invited a rabbi to give a prayer at Nathan Bishop Middle School’s graduation, Deborah Weisman and her parents objected.\textsuperscript{36} When the Weismans alleged a violation of the Establishment Clause, the school board argued that an event as significant as graduation warranted prayer and the objector, rather than the majority, must take personal action to avoid compromising religious beliefs.\textsuperscript{37} The lower courts agreed with the Weismans and the Supreme Court affirmed.

Writing for the majority, Justice Kennedy made no mention of the constitutional wall between church and state. However, he did allude to the Establishment Clause history used from Everson to Wallace and declared that Lee could be decided without “reconsidering the general constitutional framework” already set forth for public schools and religion.\textsuperscript{38} For Kennedy, the lesson behind the Establishment Clause’s ban on state intervention in religious matters was that in the “hands of government,” what “might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.”\textsuperscript{39}

Kennedy’s focus on coercion decided the case; the Court found the school’s involvement with religion to be “pervasive” and believed the State, in a “school setting, in effect required

\textsuperscript{36} 505 U.S. 577, 581 (1992). This citation applies to all prior facts.
\textsuperscript{37} Id. at 583-84, 596.
\textsuperscript{38} Id. at 587.
\textsuperscript{39} Id. at 592. Interestingly, Justice Blackmun’s recently released tapes reveal how Justice Kennedy initially supported the school’s policy. According to the tapes, Blackmun started drafting the dissent and Kennedy the majority opinion for this 5-4 decision. But on March 30, 1992, Kennedy informed Blackmun he had changed his mind. Kennedy told Blackmun that “my draft looked quite wrong so I have written it to rule in favor of the objecting student.” Six drafts later, this new opinion became law. Weekend Edition: Blackmun Papers: Justices Parse School-Prayer Language (NPR radio broadcast, Mar. 7, 2004)(available at http://www.npr.org/dmg/dmg.php?prgCode=WESUN&showDate=07-Mar-2004&segNum=12&mediaPref=RM).
According to Kennedy, the school was composing official prayers, and the “cornerstone principle of our Establishment Clause jurisprudence” prohibits such actions. In addition, Kennedy noted how in lower education there must be “heightened concerns with protecting freedom of conscience from subtle coercive pressure”; school children are more prone to coercion than mature adults, and the Court must be careful to protect them. While the school board may have argued graduation to be a voluntary event, the Court dismissed this argument, finding graduation to be an important event in a student’s life that must not be forfeited due to different religious beliefs. Thus, without mentioning the constitutional wall, the Court nevertheless affirmed the principle that it is not the government’s place to involve itself with religion.

III. So Many Tests, so Few Cases

Until 2000, the number of Supreme Court school prayer cases could be counted on one hand. Curiously, the Court had at least three Establishment Clause tests at its disposal to decide future school prayer cases (as seen in Part IV, the Court opted to use all three tests when deciding *Santa Fe*). Therefore, before embarking on *Santa Fe* and what is currently the final chapter in the Supreme Court’s school prayer jurisprudence, a quick summary of the Establishment Clause tests used in school prayer cases may be helpful.

In the beginning, there was *Lemon*. Arising from a controversy over state aid to church-related schools, the Court in *Lemon v. Kurtzman* established a three-prong test to determine

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40 *Lee*, 505 U.S. at 587, 594. The school principal decided prayer would be given, chose who would give this prayer, and then dictated the content of the prayer. *Id.* at 588.
41 *Id.*
42 *Id.* at 592.
43 *Id.* at 596.
when a state’s law or action violates the Establishment Clause. First, the statute or act must have a secular purpose; second, its principal or primary effect must neither advance nor inhibit religion; and third, the statute or act must not excessively entangle government with religion. This three-prong test attempted to unify tests developed by the Court since Everson, but the test has prompted widespread criticism. Justice Scalia cites at least five justices that have criticized the test in their own opinions and points to a high number of constitutional scholars who dislike the test. Nevertheless, the Lemon tests survives and was cited with approval in the Santa Fe decision.

An alternative to the Lemon test is Justice O’Connor’s endorsement test. This test was originally proposed in O’Connor’s concurring opinion in Lynch v. Donnelly and discussed in her concurring opinion in the school prayer case Wallace v. Jaffree. The Court adopted the test in Allegheny v. American Civil Liberties Union when deciding the constitutionality of two holiday displays on public property. Under this test, the Court must decide whether an “objective observer, acquainted with the text, legislative history, and implementation of the

44 403 U.S. 602 (1971).
45 Id. at 612-13.
46 Perhaps the most entertaining criticism comes from Justice Scalia’s concurrence in Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment) where he compares the Lemon test to “some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.”
47 Id. at 398-99. In Scalia’s words, these five fellow justices have “personally driven pencils through the creature’s heart.” Id.
48 530 U.S. 290, 314 (2000) (stating how the Court must “assess the constitutionality of an enactment by reference to the three factors first articulated in Lemon v. Kurtzman.”).
statute, would perceive [the law or practice] as a state endorsement” of religion.52 For O’Connor, this test began as a “clarification” of Lemon’s purpose prong,53 but the test has evolved to stand separately from Lemon.54 The guiding principle of the endorsement test is that government must not endorse religion and thereby send 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.”55

For those not satisfied with the Lemon or endorsement test, there is Justice Kennedy’s coercion test. First used by the Court in Lee v. Weisman, this test is based on the principle that “at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so.”56 In the school context, the coercion test is especially concerned with vulnerable students and the peer pressure that forces them to conform; prayer in public schools always carries “a particular risk of indirect coercion.”57 Students at graduation ceremonies are a captive audience, and the State violates the Constitution whenever it places students in a situation where they feel compelled to conform.58

Unfortunately, the test is not this simple. Lee was a 5-4 decision, and four of the majority justices wrote (or at least agreed) in concurring opinions that an Establishment Clause violation

52 Wallace, 472 U.S. at 76 (O’Connor, J., concurring).
57 Id. at 592.
58 Id. at 593.
has never been based on coercion alone and that state involvement must also be present.\textsuperscript{59} In fact, Justice Souter noted how it would be a more difficult task to find an endorsement of religion at a graduation where the State chooses its speaker by secular criteria and this speaker chooses on his/her own to deliver a religious message.\textsuperscript{60}

\textbf{IV. Santa Fe Independent School District v. Doe: The Last Chapter on School Prayer}

Returning to the history of school prayer, \textit{Santa Fe} currently provides the final chapter in the Supreme Court’s discussion on the subject. Here, a school board policy allowed high school students to vote on whether an invocation/message would be given at football games and if so, who would give it.\textsuperscript{61} Two families, one Mormon, the other Catholic, filed suit to stop the policy from taking effect.\textsuperscript{62} The District Court found the policy to be unconstitutional since prayer given over the school’s sound system “coerces student participation in religious events.”\textsuperscript{63} The Court of Appeals also found a violation, but based its decision on a distinction between prayer at graduation ceremonies and prayer at athletic events.\textsuperscript{64} The school district fared no better with the Supreme Court. The Court dismissed the school district’s arguments that the speech was private

\textsuperscript{59} \textit{Id.} at 491-92 (Blackmun, J., concurring).
\textsuperscript{60} \textit{Id.} at 508 (Souter, J., concurring). In that instance, Souter doubted a Establishment Clause violation could be found when the State had no involvement with the religious message. \textit{Id.}
\textsuperscript{61} 530 U.S. 290, 298 (2000). This policy was just one of the school’s several proselytizing practices; the school district also chastised non-Baptist children, distributed Bibles on campus, encouraged students to attend Baptist revival meetings, and promoted student membership in religious organizations. \textit{Id.} at 295.
\textsuperscript{62} \textit{Id.} at 306.
\textsuperscript{63} \textit{Id.} at 309.
\textsuperscript{64} \textit{Id.} at 304. Under Fifth Circuit precedent, prayer was allowed at graduation events due to the event’s significance and a need to make it solemn. With football games, however, the Court of Appeals found this rationale to be lacking and refused to extend the rule to sporting events. \textit{Id.}
student speech (and therefore not governed by the Establishment Clause) and that there was no coercion here as in Lee.65

Regarding the school district’s argument that the speech involved was private, the Court said because the speech took place on school property at a school-sponsored event with the school’s approval, the speech was not private.66 The Court also found no public forum was created since only majoritarian views were (or ever could be) heard.67 Using the Lee analysis, the Court pointed to how the school district “failed to divorce itself from the religious content in the invocations” and concluded the prayers bore the “imprint of the State” rather than a particular student.68 Pulling in Justice O’Connor’s endorsement test, the Court also thought an objective student observer would “unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval.”69 After all, the prayer is broadcast via the school’s sound system to an audience decked out in school colors. In addition, the prayer is part of a pregame ceremony involving school cheerleaders and band members, all wearing their school uniforms.70 Resorting next to a partial Lemon analysis, the Court believed the school district’s secular purpose to be a sham. Looking at the history of the policy, the school district “intended to preserve the practice of prayer before football games” rather than foster free expression.71 Adding all these tests and their results together, the Court found this prayer could not be classified as private student speech.

65 Id. at 310.
66 Id. at 302.
67 Id. at 304.
68 Id. at 305.
69 Id. at 308.
70 Id. at 307-08.
71 Id. at 308-09.
Thus, without any shelter from the Establishment Clause, the school district then tried to distinguish itself from Lee by arguing a lack of coercion. First, the school district argued the pregame prayer was a result of student choices, not government coercion. Referring to the earlier analysis regarding free speech, the Court noted the State was too involved in the prayer to permit such an argument.\textsuperscript{72} Next, the district argued attendance at football games to be voluntary and that these games were not as important as Lee’s graduation ceremony.\textsuperscript{73} The Court disagreed, noting how attendance for some students (the cheerleaders, band members, players) was mandatory, at times even for class credit.\textsuperscript{74} In addition, high school football games are part of the school community; requiring a student to choose between staying home to avoid offensive religious practices or attending the game would be unconstitutional.\textsuperscript{75}

Finally, the school district argued the facial challenge must fail since religious messages had not yet occurred under the policy. In response, the Court reaffirmed the need to guard against “the myriad subtle ways in which Establishment Clause values can be eroded.”\textsuperscript{76} It was not just the possible applications of the policy that concerned the Court; it was also the purpose behind the policy. The Court refused to “turn a blind eye to the context in which this policy arose”; it would not “pretend that we do not recognize what every Santa Fe High School student understands clearly – that this policy is about prayer.”\textsuperscript{77}

Thus, in its last chapter on school prayer, the Court continued its prohibition on prayer outside the classroom. Unfortunately, the Lemon, endorsement, and coercion tests all made

\textsuperscript{72} Id. at 315.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 311.
\textsuperscript{75} Id. at 312.
\textsuperscript{76} Id. at 314.
\textsuperscript{77} Id. at 315.
appearances in the opinion, but the Court never indicated which test would control. The use of so many tests begs the question of what happens when a school’s policy satisfies one of the tests but fails the other two? Or satisfies two of the tests but fails one? Moreover, sometimes the Court used only portions of these tests, leaving open the question of whether lower courts should use the entire test or just a portion of it. Lastly, the Court left open the issue of what happens if the student speech is truly private and not the result of state action.

Schools are now left with very little guidance on how to formulate policies on religion. According to one report, the rules regarding graduation exercises “remain as hazy as ever about how much religious content is permissible” and this issue “boils over nearly every year when a school tries to limit what a student can say during a graduation speech.”\(^{78}\) One writer declared the Supreme Court’s use of different Establishment Clause tests to be “troubling and irresponsible in this particularized context.”\(^{79}\) Still others say that while the Court has established a “basic view of how church and state should be reconciled in our society,” this view has “little value when applied to a specific set of facts.”\(^{80}\) Lastly, the frustrated lawyer in the Adler decision declared there to be “one rule for the 11\(^{th}\) Circuit, one rule for the 5\(^{th}\) Circuit and, in my opinion, no rule on this issue for the rest of the country.”\(^{81}\)

**V. Adler: The Eleventh Circuit’s Take on Establishment Clause Jurisprudence**


This lawyer’s frustration is understandable. For in his case, Adler v. Duval County School Board, the Eleventh Circuit appears to have departed from the Supreme Court’s precedent (as confusing as it may be).

A. The Eleventh Circuit’s majority opinion

In Adler, Duval County’s superintendent revised the district’s prayer policy in response to Lee. The superintendent believed Lee’s prayer was found unconstitutional since the school instituted it. Therefore, a prayer resulting from “permissive student choice and initiative” must be valid. Based on this understanding, the new policy had students choose whether to have a two minute opening and/or closing message at graduation and which student would deliver it. The messages would be prepared by the student and would not be reviewed by any school employees. The purpose of the policy was to let students control their own graduation message without oversight from school officials.

In 1993, Leslie Adler and other students argued the policy violated the Establishment Clause. Their suit was dismissed after graduation for mootness. Five years later, Emily Adler and other students brought a similar suit and the district court granted judgment for the school district. On appeal, the Eleventh Circuit found the policy constitutional on its face. Citing a “total absence of state involvement” in the election process and content of the message, the court declared the message to be private student speech, insulated from the reach of the Establishment Clause.

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82 Adler v. Duval County School District, 206 F.3d 1070, 1071 (11th Cir. 2000). The superintendent also revised the policy in response to several letters from the community suggesting how to make prayer constitutional. An example reprinted in the district court’s opinion (but not the Eleventh Circuit’s) included a letter from Pastor Carr at First Baptist Church to the superintendent. In this letter, Carr stated that he was “fish[ing] for ways to incorporate prayer in our graduation ceremonies.” Adler v. Duval County Sch. Dist., 851 F. Supp. 446, 451 (M.D. Fla. 1994), aff’d, 206 F.3d 1070 (11th Cir. 2000).

83 Adler, 206 F.3d at 1072. This citation applies to all facts thus far.

84 Id. at 1073.
Clause. According to the court, Lee prohibited a state from “ordaining, directing, endorsing, or sponsoring a religious message.” Lee did not, however, say that “all religious expression, even the private religious expression of an elected student speaker, must be excised from public high school graduation ceremonies.” The court refused to label all speech at a graduation event as automatically attributable to the State. Nor did it believe the student speaker acted as a state actor when giving the speech.

In addition, the court found no violation under the Lemon test. The court believed the policy had a secular purpose since it gave students a chance to direct their own graduation, solemnize the occasion, and exercise their freedom of speech. The court refused to imply a religious purpose simply because the title of the policy indicated prayer and a few board members made questionable comments after the policy was enacted. The court also found the policy’s primary effect did not advance religion since the policy was content-neutral and did not encourage prayer. Finally, the court found no entanglement and even commented that the school would “find itself far more entangled with religion if it attempted to eradicate all religious content from student messages.”

B. The dissent

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85 Id. at 1071.
86 Id. at 1076.
87 Id.
88 Id. at 1080.
89 Id. at 1082.
90 Id. at 1085.
91 Id. The majority noted how the school board member comments were made a month after the policy was enacted and concluded that the “post-enactment comments are not sufficient to transform the policy’s express secular purpose into a preeminently religious purpose.” Id. at 1088.
92 Id. at 1089.
93 Id. at 1090.
Judge Kravitch’s dissent agreed that Lee and Lemon should control but disagreed with how the majority applied them. Under Lee, Kravitch thought the state played an active role in choosing prayer. Invocations and benedictions at Duval county graduations were not only traditional and familiar, but also expected.94 The state limited student speech to two minutes – hardly enough time to develop anything besides prayer.95 Though the school claimed the students were planning their graduation, the school controlled the entire event save these two minute messages.96 As for the election, it never would have occurred had the school not decided to conduct one. Moreover, the election was not neutral; students chose speakers based on what they thought the speaker would say.97

As for the coercion element in Lee, Judge Kravitch thought the majority ignored this factor. The dissent found attendance to be mandatory due to the significance society places on graduation. In addition, school officials still controlled large portions of the program. Finally, the dissent pointed to how students can be prone to peer pressure, especially in matters of social acts that could include standing when told to and being quiet during messages.98

Moving on to Lemon, Judge Kravitch believed the policy failed to meet the first two prongs. First, the purpose of the policy was religious. The policy allowed messages only at the beginning and end of the ceremony, a time historically devoted to prayer. The messages were only two minutes long – the length of a typical prayer. The policy allowed a majoritarian vote to control, thereby eliminating any chance for innovation or variety. And the policy itself was titled

94 Id. (Kravitch, J., dissenting).
95 Id. at 1092.
96 Id. at 1093.
97 Id. at 1095. Students could campaign on the basis they would say a prayer, and the Duval policy placed no limits on student campaigns. Id.
98 Id. at 1096. All facts in this paragraph pertain to this citation.
‘Graduation Prayer.’ As for the state’s alleged purpose of giving the students more control over their graduation, the dissent thought this rationale was just tacked on to the end of the policy. In fact, there was no evidence that students had been demanding a larger part in graduation planning. As for the solemnization purpose, the policy made no mention of it and the dissent viewed this purpose as a mere “hypothetical justification.”

Regarding the second prong of Lemon, the dissent used much of the same evidence to show the primary effect of the policy was to advance religion. Based on the previously mentioned evidence, Kravitch thought the reasonable observer would conclude the state favored the inclusion of prayer. She pointed to how schools labeled these messages “invocations” and “benedictions” in their graduation programs and referred to the student speaker as “Chaplain.” In addition, during the policy’s first year, students at ten out of seventeen schools chose to have prayer. Thus, having already failed the Lee test, the dissent felt the policy clearly failed Lemon as well.

C. The majority’s opinion, on remand

But then Santa Fe happened. On remand from the Supreme Court, the Eleventh Circuit had to reconsider Adler in light of Santa Fe. Some commentators thought the Eleventh Circuit would have to reverse. The Eleventh Circuit, however, stood by its first opinion, believing the

99 Id. at 1098. All facts thus far pertain to this citation.
100 Id. at 1099.
101 Id. at 1100.
102 Id. at 1101.
103 Id. at 1102.
104 Id.
105 See e.g., Mark W. Cordes, Prayer in Public Schools after Santa Fe Independent School District, 90 Ky. L.J. 1 (2001/2002) (predicting the policy in Adler, “though somewhat removed from the problems presented in Santa Fe, should still be unconstitutional.”). Id. at 71.
facts of these two cases to be “fundamentally different”\textsuperscript{106} with these differences being “substantial and material.”\textsuperscript{107}

The court believed the “ability to regulate the content of speech is a hallmark of state involvement” and found this element to be missing in Adler.\textsuperscript{108} In addition, the court thought the policy was both “entirely neutral” as to whether a message would even be given and the content of it.\textsuperscript{109} In contrast to Santa Fe, the Adler policy did not involve a vote “up-or-down on prayer”; students were voting on messages, not the inclusion of prayer.\textsuperscript{110} Moreover, the Adler policy did not preclude the minority view from ever winning. The court also dismissed the notion that selected students would be nothing more than puppets through which the majority would speak.\textsuperscript{111} The court then pointed to how seven of the seventeen elections in the record involved speakers who did not have religious messages.\textsuperscript{112}

Regarding Lemon, the court noted how Santa Fe used only the first prong. The court saw no reason to revisit its findings in its earlier decision, believing it had already “explore[d] the background to the Duval County policy … at considerable length.” The court distinguished Santa Fe, where school officials had “stated unabashedly that the policy was designed to permit a student vote for prayer at graduation.” In Adler, such intent was lacking.\textsuperscript{113}

D. The dissent on remand

\textsuperscript{106} Adler v. Duval County Sch. Bd., 250 F.3d 1330, 1336 (11\textsuperscript{th} Cir. 2001).

\textsuperscript{107} Id. at 1340.

\textsuperscript{108} Id. at 1337.

\textsuperscript{109} Id. at 1338.

\textsuperscript{110} Id. at 1339.

\textsuperscript{111} Id. at 1339.

\textsuperscript{112} Id. at 1340. This citation applies to all facts in the paragraph.
The dissent picked up a few more votes and an additional opinion. It was not, however, enough to overturn a majority standing fast to its original opinion. In the first dissent, Judge Kravitch looked at the policy, viewing it as an “end run” around the Supreme Court’s decision in Lee v. Weisman. According to Kravitch, when the policy talked about whether student initiated prayers would be acceptable and stated how the policy was meant to give guidelines on this issue, the purpose of the policy was really about preserving prayer. Indeed, the policy even mentioned the “key” to the Lee decision and how to work around it. In Kravitch’s opinion, the policy was created to be a “vehicle for the delivery of student-initiated – as contrasted with school-initiated – prayers at graduation.”

Next, Kravitch looked to the purpose behind the policy. She believed the majority, in examining only the terms of the policy, ignored the “mandate of the Supreme Court that an evaluation of the purpose of a policy … is not complete without an examination of the context in

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114 Id. at 1345 (Kravitch, J., dissenting). The policy, entitled “Graduation Prayers,” stated in part:

You will recall that after the 1992 Supreme Court case of Lee v. Wiseman [sic], you received a memorandum from me instructing that because of the decision, we would no longer be able to have prayers at graduation ceremonies. Most of you have recently been bombarded with information, as have I, regarding whether or not student initiated and led prayers are acceptable based upon a recent Fifth Circuit opinion. The purpose of this memorandum is to give you some guidelines on this issue if the graduating students at your school desire to have some type of brief opening and/or closing message by a student.

This area of law is far from clear at this time, and we have been threatened by lawsuits from both sides of the issue depending on what action we take. The key to the Lee v. Wiseman [sic] decision was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather than by permissive student choice and initiative. With that premise in mind, the following guidelines may be of some assistance … Id. at 1344.

115 Id. at 1346.

116 Id.
which the policy was enacted.”  

117 Kravitch reiterated the observations from her earlier dissenting opinion (messages were only two minutes in length, the majority controlled the content of the speech), but added more details to fill out the Lemon analysis. Kravitch looked to a discussion the school board had when considering whether to replace the student graduation messages with a moment of silence. In rejecting the proposal, the members mentioned the words “prayer,” “pray,” and “prayed” seventeen times.  

118 One member even stated that “in good conscience I cannot vote in favor of silent meditation when we all know that in the past someone has prayed out loud to thank the Lord.”  

119 For Kravitch, these facts show the policy was enacted in order to make prayer part of the graduation program. With Santa Fe as a guide, the policy failed Establishment Clause scrutiny.  

117 Id. at 1345.  

118 Id. at 1346.  

119 Id. Cited in the district court’s decision (but not the Eleventh Circuit decision) was another statement from fellow school board member Bill Parker. It follows:  

I cannot vote to allow our ’93 graduating class to have a few minutes of silent meditation when we all know that in the past, someone has prayed out loud to thank the Lord for the twelve great and successful years during this period of time. And now we want silence . . . . I think that our school principals should be allowed to work out a nonsectarian message with our student chaplains, or a guest minister, rabbi, or whatever would be acceptable to all at this very important time in our young people’s lives. We need to tell everyone that our free public schools are the cornerstone of this republic and that we want to preserve this country and the things that made it great, that we are all here because of God. Adler v. Duval County Sch. Dist., 851 F. Supp. 446, 451 (M.D. Fla. 1994), aff’d, 206 F.3d 1070 (11th Cir. 2000), aff’d 250 F.3d 1330 (11th Cir. 2001). According to plaintiffs, three school board members made statements of this nature. Id.  

120 Id. at 1345.
Judge Carnes also dissented. Carnes had joined the majority in its first opinion, but on remand was not convinced that Adler followed the Supreme Court’s mandate in Santa Fe. 121 Carnes believed the majority spent too much time addressing its earlier decision rather than acknowledging the lessons provided by Santa Fe. 122 One of these lessons was how a “school board may not delegate to the student body … the power to do by majority vote what the school board itself may not do.” 123 Here, when the school board could not authorize prayer, the board gave the power to the students via an election process.

The second lesson was that a student delivering a message is no more autonomous from the student body than a politician is from the majority who voted for him. While the court argued the student speaker would be more than a mere “puppet” to the “majority’s demands” and viewed Carnes’ opinion as “pessimistic,” Carnes believed his observation simply reflected an “optimistic assumption behind democracy.” 124 According to Carnes, this optimistic assumption reflects how the “majority can and will select representatives who will carry out its will.” 125 Here, the majority of the class could ensure the content of the message by choosing an appropriate speaker. These selections have worked well; Carnes pointed to how over half of the

121 Adler, 250 F.3d at 1347 (Carnes, J., dissenting). According to Judge Carnes, the Eleventh Circuit initially believed (and he agreed) that a challenge to the policy would be successful only if it was established that there would be no circumstances in which the policy would be valid. The Santa Fe opinion, however, made clear the Establishment Clause does not require such a showing; if the policy has an unconstitutional purpose, then it follows by inference that there would be no circumstances in which the policy would be valid. Id.
122 Id. at 1348.
123 Id. (quoting Santa Fe, 530 U.S. at 304-12).
124 Id. at 1339, 1349.
125 Id. at 1349.
graduation messages in Duval County schools have been religious. Thus, more often than not the majority violated the Constitution by imposing its religious will on the minority.

Finally, Carnes argued the majority was wrong in concluding the policy passed O’Connor’s endorsement test. For Carnes, the reasonable person attending the graduation could believe the message was state-sponsored. The student was selected by a majority of students, and this election took place only because the school board had delegated its power.

VI. The View Outside the Eleventh Circuit

Surprisingly enough, despite thousands of public school graduations taking place every year, few circuits have addressed an Adler issue. Most post-Santa Fe lawsuits involve issues easily resolved under Supreme Court precedent. Thus far, only the Eighth and Ninth Circuits have dealt with issues outside of Lee and Santa Fe and closer to the Adler context. But even these decisions involved facts so different that one could certainly argue Adler still stands on its own.

A. The Eighth Circuit

In Doe v. School District of Norfolk, a school planned to have an invocation and benediction at graduation. Under threat of lawsuit, the school changed its decision.

126 Id. (noting although “sixty percent is not perfection … it is close enough for government work, and Duval County’s “Graduation Prayers” policy is government work.”). Id.

127 Id. at 1350.

128 In Deveney v. Board of Education, for example, the senior class officers in St. Albans, West Virginia chose to have an invocation and the school approved the content. 231 F. Supp. 2d 483 (D. W. Va. 2002). Applying Santa Fe, the district court granted the requested temporary restraining order. The court cited Adler as requiring an examination of how heavily the state is involved and found that in Deveney, the state involvement was much greater and constituted an Establishment Clause violation. Id. at 486-87.

129 340 F.3d 605 (8th Cir. 2003).
a school board member whose child was graduating, addressed the audience. After commenting on how the door for prayer had been closed, he asked the audience to join him in reciting the Lord’s Prayer. Two individuals on the stage stood, but otherwise all the students remained seated and none removed their hats. While no school official stopped the prayer, there was also no indication that any state official knew about Scheer’s plan. Six months later, the Does filed suit alleging a violation of the Establishment Clause. The Does sued Scheer, the principal and the school district.

The Eighth Circuit used Santa Fe to guide its analysis. Basing its opinion on the “crucial difference between government speech endorsing religion … and private speech endorsing religion,” the court found Scheer’s speech to be private and therefore constitutionally protected. According to the court, Scheer’s remarks were not state sponsored because he used words such as “I” or “me” in his speech, indicating his speech reflected personal views, rather than those of the school board. In addition, due to the principal’s announcement at the beginning of the ceremony, all students knew the school board had decided not to have prayer. In a

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130 Id. John Doe learned of the prayer at graduation rehearsal and his mother contacted the American Civil Liberties Union. The school board president announced at graduation that “with deepest regret … and with our most sincere apologies to the Senior Class of 2000, we will need to remove the Invocation and Benediction from today’s graduation ceremonies.” The president explained how after consulting with lawyers and the Nebraska Supreme Court, he was “saddened” that “one of the last schools in the State of Nebraska to continue to include prayer at graduation” had to make such a “difficult decision.” Id. at 608.

131 Id. All facts thus far pertain to this citation.

132 The district court dismissed the claims against the school district and principal in his official capacity. A month later, the district court also granted summary judgment in favor of the principal in his individual capacity as well as for Scheer. Id. at 609.

133 Id. at 610 (quoting Santa Fe, 530 U.S. at 303).
definitive statement, the Eighth Circuit concluded that there “being no affirmative sponsorship of
the practice of prayer in this case, no constitutional violation has occurred.”134

One sentence later, however, the court stated that “our private speech determination does
not necessarily end this matter” since the Does also raised the issue of coercion. But rather than
addressing the substantive issues of the claim, the court launched into a procedural analysis and
found the district court’s dismissal of it to be proper. Thus, it appears as though in the Eighth
Circuit, the lack of state involvement can resolve an alleged Establishment Clause violation. The
presence of coercion need not be considered. Using such reasoning, had the Eighth Circuit
decided Adler, it would have dismissed the coercion element upon a finding that state
involvement was lacking.135

B. The Ninth Circuit

In Lassonde v. Pleasanton Unified School District, the valedictorian alleged a violation of
free speech when school officials censored his proselytizing comments.136 The school principal
told him that while he could include religious references relating to his personal beliefs, he could
not deliver the proselytizing comments.137 Lassonde proposed the school use a disclaimer, but
the school principal rejected the suggestion.138 Ultimately, Lassonde delivered the censored

134 Id. All facts thus far pertain to this citation.
135 Id. All facts in this paragraph relate to this citation.
136 320 F.3d 979 (9th Cir. 2003).
137 Id. at 981. Portions of the censored speech included Lassonde saying “I urge you to seek out the Lord,
and let Him guide you” and later that the “gift of God is eternal life through Jesus Christ … have you
accepted the gift, or will you pay the ultimate price?” Id.
138 Id.
speech but distributed copies of his original speech outside the ceremony.\textsuperscript{139} One year later, he sued.

The Ninth Circuit allowed its earlier decision in \textit{Cole v. Oroville Union High School District}\textsuperscript{140} to control. There, the school was justified in censoring speech for two reasons. First, censorship was necessary to “avoid the appearance of government sponsorship of religion.”\textsuperscript{141} Second, permitting such speech would have had an “impermissibly coercive effect on dissenters, requiring them to participate in a religious practice even by their silence.”\textsuperscript{142} In \textit{Lassonde}, the government would have appeared to sponsor the religion because it controlled the program and reviewed student speeches beforehand.\textsuperscript{143} As for the second reason, the Ninth Circuit noted how even if the school avoided any appearance of state involvement, the coercion element would still involve a constitutional violation.\textsuperscript{144} Despite a disclaimer or hands-off approach to the speech, there would still be the “coerced participation of dissenters attending their graduation ceremony.”\textsuperscript{145} Thus, in the Ninth Circuit, it appears if an Adler situation were to arise, the presence of a captive audience would result in a decision different from the Eleventh Circuit’s.

\textbf{Conclusion: Where to Go From Here?}

\textsuperscript{139} \textit{Id.} at 982.
\textsuperscript{140} 228 F.3d 1092 (9th Cir. 2000). In \textit{Cole}, high school students were not permitted to deliver their unedited speeches. According to one student, he “was going to refer to God and Jesus repeatedly, and if anyone was offended, they could leave the graduation.” \textit{Id.} at 1097.
\textsuperscript{141} \textit{Lassonde}, 320 F.3d at 983.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} at 983-84.
\textsuperscript{144} \textit{Id.} at 984.
\textsuperscript{145} \textit{Id.} (Observing that “although a disclaimer arguably distances school officials from ‘sponsoring’ the speech, it does not change the fact that proselytizing amounts to a religious practice that the school district may not coerce other students to participate in, even while looking the other way.”) \textit{Id.} at 984-85.
In the end, Adler is still out there, receiving little attention or criticism from other circuits. Schools, however, should be cautioned about relying on this decision. Combining the dissents in Adler creates a very strong argument, one that could easily be accepted by a court outside the Eleventh Circuit. After all, the Adler majority did not consider the case anew; the court only looked to see if any part of Santa Fe forced it to abandon the earlier decision. Subsequent courts will not be biased toward their earlier opinions; they will start from scratch with Santa Fe guiding the decision. Adler may be alone in overlooking Santa Fe’s lessons.

Furthermore, the Adler majority turned a blind eye to facts revealing a religious purpose. The dissents, for example, quoted two (and mentioned three) Duval County School Board members indicating the policy was really about prayer. Generally, school boards are small, having only a handful of members. Here, three members admitting prayer as a primary purpose is strong evidence of a Lemon violation, especially when so small a group is involved. As seen in Wallace, the testimony of the bill’s sponsor alone appeared sufficient for the Supreme Court to find an Establishment Clause violation. Surely three outspoken school board members could be enough.

An even more obvious indication comes from the graduation ceremonies themselves. In the graduation program, the messages were labeled as invocations and benedictions. The student speaker was referred to as a chaplain. The messages were only two minutes in length, the typical

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146 See supra note 120 and accompanying text.
147 There are currently seven members on the Duval County School Board. Duval County School Board, School Board Member Profiles, at http://www.educationcentral.org/schoolboard/profiles.asp (last visited Apr. 8, 2004).
148 See supra notes 33-36 and accompanying text.
length of prayers opening and ending a ceremony. Not surprisingly, ten out of seventeen graduations included prayer the first year of the policy.\textsuperscript{149}

In addition, there is the captive audience problem. According to the Supreme Court, both graduations and football games are significant events in a student’s life. As such, a student should not have to avoid them because of religious beliefs. Even if a school has no involvement in a student’s speech, the presence of an audience could trigger the coercion element of Lee. While Lee’s four concurring justices doubted an Establishment Clause violation could be based on coercion alone, Justice Kennedy’s majority opinion leaves open the possibility.\textsuperscript{150} Sitting or standing through a prayer could represent coercion to conform. Moreover, the school’s refusal to review a student’s speech may be an attempt to allow prayer. A “we won’t ask, you don’t tell us about the prayer” policy could send signals to students that prayer can be brought in through a back door.

For schools wary of depending on the Adler decision, there are safer options. Students may still organize baccalaureate services independent of graduation. These events are often away from school property (at local churches) and attendance is voluntary. In addition, students can still pray to themselves at graduation. The Supreme Court has adamantly upheld this right in its Establishment Clause decisions.\textsuperscript{151} The school is even likely to be safe if it holds a moment

\textsuperscript{149} See supra notes 103-105 and accompanying text. The court only had figures for 1993, the first year of the policy. Since 1994, however, fifty-eight of sixty-two classes have voted to have invocations, several of which were delivered by a student chaplain. David Savage, OK to Pray in Public School? Court Skirts “Message” Case, Leaving Lawyers and Educators in Lurch, 88-Feb. A.B.A. J. 31 (2002).

\textsuperscript{150} See supra notes 60-61 and accompanying text.

\textsuperscript{151} Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000) (noting how “nothing in the Constitution as interpreted by this Court prohibits any school student from voluntarily praying at any time before, during, or after the schoolday.”).
of silence.\textsuperscript{152} In addition, disgruntled valedictorians can still hand out uncensored speeches outside the graduation site.

If schools still insist on allowing students to speak without any prior review of the speech, then schools should use a more neutral selection process when deciding the speaker.\textsuperscript{153} As Justice Carnes pointed out in \textit{Adler}, an election process allows the majority to control. If the majority knows a particular student will give a prayer, then a religious majority can select the student and thereby impose its views on the minority. Perhaps a more neutral criteria, such as highest grade point average, would be better. But even this selection could be questioned; as the Ninth Circuit pointed out, the State in this selection could be “endors[ing] and sponsor[ing] the speakers as representative examples of the success of the school’s own educational mission.”\textsuperscript{154}

In the end, a school may just want to play it safe. With the Supreme Court refusing certiorari in \textit{Adler}, the line between state involvement/coercion and student free speech is far from clear. While prayer may make a majority of students and parents happy, the costs of

\textsuperscript{152} In \textit{Wallace v. Jaffree}, Justice O’Connor noted how a “state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading.” O’Connor explained that these moment of silence laws are not “inherently religious” because they “need not be associated with a religious exercise.” In addition, she believed a student participating in a moment of silence did not have to “compromise his or her beliefs … during a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others.” 472 U.S. 38, 72 (1985) (O’Connor, J., concurring).

\textsuperscript{153} In South Carolina, for example, the General Assembly passed an act allowing student led messages at graduations and athletic events. The law is similar to the guidelines in \textit{Adler} except for the speaker selection process: rather than holding an election, the speaker is selected based on more neutral criteria. At graduation, the speaker selection is based on grade point average or a student office/position. \textit{S.C. Code Ann.} § 59-1-441 (2002). For sporting events, the speaker is either a team captain or a student chosen by the team. \textit{S.C. Code Ann.} § 59-1-442 (2002).

\textsuperscript{154} Lassonde v. Pleasanton Unified Sch. Dist., 320 F.3d 979, 984 (9th Cir. 2003).
litigation can be great (Adler itself took several turns through multiple courts). Until the Supreme Court rules in favor of student speech in an Adler situation, schools should set policies explaining that messages and speeches at graduation must not involve prayer. To be safe, schools should review the student speeches to ensure compliance; otherwise, the Lee coercion element could prove troublesome.

In the end, there may not be room in the school for prayer. The Supreme Court, wary of degrading religion or turning it into a coercive weapon, has consistently struck down school prayer. In the school context, young children susceptible to coercion are always involved. In addition, the State seldom gives up complete control in its graduation ceremonies or sporting events. When it does, the intent may be suspect – the school may be trying to pass the baton to students. Until the Supreme Court speaks definitively on the subject, schools walk a dangerous line whenever student speech is involved at school-sponsored events. In the meantime, schools should just accept that there may be no vacancy at this inn.
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