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The First Amendment: Has the Supreme Court Overlooked its Role as Guardian of our Freedom by Failing to Distinguish Between Real Threat and Mere Shadow?

by Jimmy Daniels

I. THE ESTABLISHMENT CLAUSE

"Congress shall make no law respecting an establishment of religion..."

This single phrase, referred to as the Establishment Clause, has created much confusion among legal scholars throughout the latter part...
of the Twentieth Century and particularly the past two decades. This confusion, in my opinion, can be attributed to historical ignorance, misapplication, or both.

II. THE HISTORY OF RELIGION IN AMERICA

"A page of history is worth a volume of logic." This is particularly true in Establishment Clause cases, in light of the fact, as expressed by Justice Black, that "[t]he history of man is inseparable from the history of religion."

A. Religious Custom

By uncovering realities, history exposes the truth and raises such questions as why, traditionally, is the history of our Country replete with religious references to a divine being? Indeed, the pervasiveness of religion in our society is evident from such examples as our national motto "In God We Trust" and our pledge of allegiance to a "nation under God." Yet, there are those who insist that any alliance between government and religion, including our Country's heritage of pledging allegiance and trust in a Supreme Being, runs counter to the Establishment Clause. If true, then why is it not a violation of the Establishment Clause, for example, to have the Declaration of Independence placed on our national walls, where it appeals to "the Supreme Judge of the World for the Rectitude of our Intentions" avowing "a firm Reliance on the Protection of divine Providence . . ."? On the other hand, how could this magnificent document that marked the birth of our Country and signified the freedom of our people be considered unconstitutional? Herein lies the dilemma.

Chief Justice Burger, writing for the Court in Marsh v. Chambers, attempted to reconcile the dilemma. The Chief Justice, in upholding the practice of opening legislative sessions with an invocation, stated, "[i]n

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2. 112 S. Ct. at 2664 (Scalia, J., dissenting) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (quoting Holmes, J.)).
3. Id.
6. Id. at 676.
8. 463 U.S. 783 (1983). In Marsh, a Nebraska legislator and taxpayer brought an action challenging the constitutionality of opening legislative sessions with an invocation given by an ordained minister paid with the public funds. Id. at 784-85.
light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that [this tradition] has become part of the fabric of our society.\textsuperscript{9} That invoking such "Divine guidance ... in these circumstances ... is simply a tolerable acknowledgement of beliefs widely held among the people of this country.\textsuperscript{10}

B. Civil Religion

History demonstrates that our Founding Fathers considered legislative prayer to be a nonproselytizing activity.\textsuperscript{11} This practice, like our pledge of allegiance to a "nation under God," is said to "harmonize with the tenets of some or all religions."\textsuperscript{12} This common integration of religion acknowledged by our Founding Fathers\textsuperscript{13} and adopted by the Court is referred to as civil religion.\textsuperscript{14}

9. Id. at 792 (emphasis added).
10. Id. (emphasis added). In noting that "our history is pervaded by expressions of religious beliefs," Chief Justice Burger, in Lynch v. Donnelly, 465 U.S. 668, 677 (1984), took this tolerable acknowledgement exception one step further by upholding a government sponsored depiction of a Nativity scene. Id. at 687. The Chief Justice reconciled his holding in Lynch by pointing to the government's acknowledgement of public religion in the context of, for example, such long-standing traditions as the opening of court sessions with "God save the United States and this honorable court." Id. The Nativity scene had been, for more than forty years, part of the city's annual display which included a Santa Claus house, Christmas tree, and banner that read "Seasons Greetings." Id.
11. Id. at 788 (citing J. of the Sen. 88; J. of the H.R. 121). The Court, in evaluating the impressions of our Founding Fathers, noted that the First Congress, just three days after approving the appointment of paid chaplains, reached a final agreement as to the language of the Establishment Clause. Id. This strongly suggests that the practice of opening legislative sessions with prayer does not establish a particular religion.
12. Id. at 792 (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).
13. 465 U.S. at 675 (quoting A. Stokes & L. Pfeffer, Church and State in the United States 87 (rev. 1st ed. 1964)) (emphasis added). This becomes evident upon review of the First Congress. One day after proposing the First Amendment, Congress urged President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many signal favours of Almighty God." Id. On November 26, 1789, President Washington proclaimed a day of thanksgiving to "offer[] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions ... ." Id.
14. Mirsky, Civil Religion and the Establishment Clause, 96 Yale L.J. 1237, 1249 (1986) (quoting West, A Proposed Neutral Definition of Civil Religion, 22 J. of Church & State 23, 39 (1980)). Civil religion, sometimes referred to as public religion or civic religion, is defined as "a set of beliefs and attitudes that explain the meaning and purpose of any given ... society in terms of its relationship to a transcendent, spiritual reality, that are held by the people generally of that society, and that are expressed in public rituals, myths and symbols." Id.
The doctrine of civil religion derives its power from the language of varying religions.15 This societal phenomenon has worked its way into our lives through our desire and need for unity.16 As a result of modern-day development,17 this need for unity intensified, "forcing [our society] to come up with new means of attaining and expressing social cohesiveness."18

Thus, the rejoicing of a day for Thanksgiving and the embracing of such documents as the Declaration of Independence "are not just the remnants of some pre-constitutional Christianity; they are the constituent parts of a long-term response [to modern day development and the subsequent disunification of our society]."19 Moreover, these traditions, while maintaining religious significance, are civil in nature, and do not, therefore, endorse a particular faith.20 For that reason, civil religion is well established in law and firmly embraced by the people; "a religious people whose institutions presuppose a Supreme Being."21

III. Present-Day Establishment Clause Jurisprudence

Consider, in light of the doctrine of civil religion, the following case of Adler v. Duval County School Board.22 Ask yourself whether the Court's acknowledgement of civil religion should apply in the context of high school commencement exercises.

15. Id. at 1249-50. Civil religion, by its very definition, is non-sectarian in nature, neither espousing nor establishing a particular religion.
16. Id.
17. Id. The types of development which have contributed to this modern-day separateness include the industrial movement and the subsequent increase in capital and growth of populations; the creation of new and varying social organizations and special interest groups; and the disestablishment of church which led to the categorization and subsequent fragmentation of religion, government, society, and science.
18. Id. Society, subsequently, created this idea of civil religion, subconsciously or not, in order to regain the unity that once was and is now lost.
19. Id. at 1253.
20. Id. at 1245 (quoting F. Wallace, cited in J. WILSON, PUBLIC RELIGION IN AMERICAN CULTURE 166 (1979)).
   [Civil] religion is not an unconstitutional establishment but rather a recognition by the government that the majority of this country's inhabitants adhere to [a number of] religious beliefs. Thus the organs of the state are not in any way creating or establishing a religion, they are simply fashioning shared enactments out of "particles of ritual" supplied by the people themselves.
22. 851 F. Supp. 446 (M.D. Fla. 1994).
A. Factual Background

Shortly following the closing of the 1992 school year, Vicki Reynolds, the legal liaison for the Duval County School Board, under the direction of Superintendent Larry Zenke, issued a memorandum regarding graduation prayer to all high school principals. The memorandum stated, "due to the recent Supreme Court ruling in Lee v. Weisman, there should be no prayer, benediction, or invocation at any graduation ceremonies."

After receiving a number of letters which suggested that student-initiated and student-led prayer at graduation may be constitutional, Superintendent Zenke directed Ms. Reynolds to further research the issue. Ms. Reynolds concluded that student-initiated and student-led prayer at graduation may be appropriate so long as the School Board was not involved in the decision making process. Superintendent Zenke, thereafter, issued a second memorandum. The memorandum provided, in part, that a brief graduation message, if so chosen, was to be prepared and delivered by a student volunteer, elected by the graduating class as a whole, without the assistance or direction of the school board or its employees.

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23. Id. at 448.
24. 112 S. Ct. 2649 (1992). The Court in Lee held that the Establishment Clause is violated where a school principal, acting pursuant to state policy, invites a rabbi to deliver an invocation at a middle school graduation ceremony.
25. 851 F. Supp. at 448.
26. Id.
27. Id. at 449.
28. Id. The memorandum, in its entirety, states:

You will recall that after the 1992 Supreme court case of Lee v. [Weisman], 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 the law is far from clear at this time, and we have been threatened by lawsuits from both sides on the issue depending on what action we take. The key to the Lee v. [Weisman] decision was that 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 in mind, the following guidelines may be of some assistance:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;
At a subsequent school board meeting, a motion was made for a "moment of silence" substitution for the current policy. The motion failed by a four to three vote, leaving in effect, for the 1993 commencement exercises, Superintendent Zenke's policy which favored student-initiated and student-led prayer. As it turned out, ten of the seventeen graduating classes in the Duval County School District chose to recite various religious messages. The remaining classes opted to give entirely secular messages or no message at all.

B. Procedural History

Prior to the 1993 graduation exercises, petitioners, a group of graduating seniors and one parent, brought this action in the United States District Court for the Middle District of Florida. Asserting that their rights under the Establishment Clause of the First Amendment were violated by Superintendent Zenke's new policy, petitioners sought to enjoin the Duval County School District from permitting student-initiated and student-led prayer at graduation.

The Middle District denied petitioners' motion for preliminary injunctive relief, finding that they failed to sustain their burden of demonstrating a substantial likelihood of success on the merits. Subsequently, the 1993 graduation ceremonies for the Duval County

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees;

The purpose of these guidelines is to allow the students to direct their own graduation message without monitoring or review by school officials.

Id.

29. Id. Petitioners asserted that the school board's primary purpose in creating the new policy "was to preserve and perpetuate prayer during graduation exercises" as evidenced by the motion for a "moment of silence." See id. at 451.

30. Id. at 449.

31. Id.

32. Id.

33. Id. at 449-50.

34. Id. at 448.

35. Id.

36. Id. Denial of petitioner's preliminary injunctive relief request was mostly based on a recent decision by the Fifth Circuit where the court upheld a school resolution, similar to that of Superintendent Zenke's, which permitted student-initiated invocations and benedictions that were nonsectarian and nonproselytizing in nature. Id. See Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 966 (5th Cir. 1992).
School District were conducted in accordance with the new policy. 37 Thereafter, the case proceeded through discovery and was presented before the Middle District on the parties’ cross motions for summary judgment. 38

In their motion for summary judgment, petitioners argued that prayer during graduation is per se unconstitutional, and that the school board could not avoid responsibility by delegating decision making to the graduating students. 39 Respondents, asserting their own First Amendment right of Free Speech, 40 argued that student-initiated, student-written and student-delivered prayer at graduation is not subject to official monitoring by the school board or its employees and, therefore, lacks the pervasive government involvement condemned by the Establishment Clause. 41

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Middle District found no genuine issue of material fact, holding that respondents were entitled to prevail on the constitutional issues as a matter of law. 42 The Middle District, applying both Lee v. Weisman 43 and Lemon v. Kurtzman, 44 denied petitioners’ motion for summary judgment and granted respondents’ cross motion. 45 Accordingly, final judgment was entered for respondents, allowing student-initiated, student-written and student-delivered prayer at graduation. 46

C. Analysis

Nine years following the holding in Marsh v. Chambers, 47 Justice Kennedy, writing for the Court in Lee v. Weisman, 48 denied application of the well-established doctrine of civil religion in the context of

37. 851 F. Supp. at 448.
38. Id.
39. Id. at 450.
40. Id. at 449. Another group of students were granted leave to intervene as defendants. Defendant-respondents asserted that their right of free speech, pursuant to the School Board’s equal access policy, would be violated upon the School Board’s compelled discrimination of religious speech at graduation. Id.
41. Id. at 450.
42. Id. at 448.
43. 112 S. Ct. 2649.
44. 403 U.S. 602 (1971). Lemon is the landmark case in Establishment Clause jurisprudence.
45. 851 F. Supp. at 448.
46. Id.
47. 463 U.S. 783. The Court in Marsh upheld the practice of opening legislative sessions with an invocation given by an ordained minister paid with the public funds.
48. 112 S. Ct. 2649.
traditional graduation exercises. To permit prayer at graduation, the Court held, would be to coerce dissenting graduation attendees to participate in religious exercises. The Court, though acknowledging the similarities between legislative invocations and traditional prayer at graduation, took great strides in distinguishing Marsh and Lee. The Court's distinction was grounded in psycho-theory. That the "atmosphere" at graduation lent itself to a greater likelihood of coercing religion upon the attendees; in particular, the graduating seniors.

The Lee Court, in addition to confusing civil religion with sectarian religion, turned a blind eye to over two hundred years of American history. Common sense and judicial integrity require the application of history in constitutional analysis. Undeniably, therefore, the intent and impressions of our Founding Fathers must be afforded

49. Id. at 2680-81 (Scalia, J., dissenting) (quoting H. MCKOWN, COMMENCEMENT ACTIVITIES 56 (1931)). Prayer at graduation has been practiced since the mid 1800s and is considered to be "as traditional as any other part of the [public school] graduation program . . . ." Id.

50. 112 S. Ct. at 2657 ("The suggestion that government may establish an official or civic religion as a means of avoiding the [Establishment Clause] . . . strikes us as a contradiction that cannot be accepted"). Id. The Court in Lee failed to understand that civil religion, by its very definition, cannot establish a religion. See supra notes 14-15. See also Mirsky, supra note 14, at 1254 ("To ignore civil religion's existence would be simply to blink reality . . . "). Id.

51. 112 S. Ct. at 2656. The Court, by way of imaginative thinking and creative penmanship, fashioned the psychological coercion test, which addresses the "subtle coercive pressures" inherent in a secondary school environment, where, according to the Lee Court, the student has no real choice but to participate in the graduation invocation. Id.

52. Id. at 2660-61. Specifically, the Court held, by a five to four vote, that the Establishment Clause is violated where a public school principal coerces dissenting graduation attendees to participate in religious exercises by inviting a rabbi to deliver a nonsectarian, nonproselytizing invocation at a middle school graduation ceremony. Id.

53. Id. ("The considerations we have raised in objection to the invocation and benediction are in many respects similar to the arguments we considered in Marsh."). Id.

54. Id. ("The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in Marsh."). Id.

55. See id. at 2684-85 (Scalia, J., dissenting), where Justice Scalia referred to the Court's psychological coercion test as a "psycho-journey" . . . more commonly associated with interior decorators than with the judiciary," and in comparing interior decorating to the practice of psychology, he found it to be a "rock-hard science." Id.

56. Id. The Court distinguished the atmosphere of legislative sessions, where adults are "free to leave," from graduation exercises, where attendees are not, in theory, granted the same freedom, due to the importance of the event to the student. Id.

57. See supra notes 14-15.

58. 112 S. Ct. at 2659. Justice Kennedy, rather than turning to history for constructive decision making, pointed to "[r]esearch in psychology" in supporting the Court's holding. Id.

59. See supra note 2 ("A page of history is worth a volume of logic.").
considerable weight when analyzing the Constitution. Indeed, the Framers of our Constitution were opposed to the alliance of a single religion with the sovereign. Their concerns date back to the colonial period, and much earlier, where the sovereign exercised complete control over the Church, and, in turn, provided the Church its foundation by compelling attendance and financial support. By use of the “civil sword,” the sovereign conformed the beliefs of its citizenry to that of the Church and punished, by death or banishment, the blasphemer or heretic. The “imminent target” of our Founders, therefore, was the eradication of this form of government establishment of religion; sectarian religion, that is, coerced by threat of penalty.

Although Justice Kennedy's holding in Lee is the law, however unfortunate, the application of history to the Court's ultimate determination raises some very fundamental questions: Is graduation prayer the type of establishment of religion the Framers of our Constitution intended to deter? Has the Supreme Court gone too far in its Establishment Clause jurisprudence by substituting sound reasoning based on historical data for imaginative thinking grounded in psycho babble? If so, is this the type of boundless decision making that we, as a constitutionally-based society, wish to encourage by way of passivity and ignorance? And if so, what then lies ahead in the future?

60. 465 U.S. at 674 (quoting Myers v. United States, 272 U.S. 52, 174-74 (1926)).
61. The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's emphasis that the First Congress [which included seventeen draftsmen of the Constitution] “was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument.” See also 463 U.S. at 790 (“[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress.”).
63. Id. at 1618-19. See also Fain, Prayer in Public Schools: A Moment of Silence, 15 T. MARSHALL L. REV. 27 (1990), noting that government officials, with aspirations of political advancement, commonly “tortured, maimed and killed” blasphemers and heretics. Id.
64. Fain, supra note 63, at 27.
66. 465 U.S. at 678 (quoting Walz v. Tax Comm’n, 90 S. Ct. 1409, 1411 (1970)) (“The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.”). Id.
67. See supra note 55.
IV. THE FUTURE

The specific question invoked by the holding in Lee is whether the Court's interpretive stretch in Establishment Clause jurisprudence will ultimately lead to the conclusion that student-initiated, student-written and student-delivered prayer at graduation is unconstitutional. The answer may depend on which Establishment Clause test controls: The traditional three-prong test of Lemon v. Kurtzman or the psychological coercion test created in Lee v. Weisman. The remainder of this article will be devoted to answering the specific question posed by analyzing the facts of Adler under both Lemon and Lee.

A. Three-Prong Test

To protect our citizenry from the “three main evils” of Establishment Clause intrusion, the Court in Lemon v. Kurtzman created the three-prong test.

1. Purpose Prong. The practice of permitting prayer at graduation, like the opening of court sessions with “God save the United States and this honorable court,” serves “the legitimate secular purpose of solemnizing [the] occasion, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” While maintaining its religious significance, the tradition of opening court sessions with reference to a divine being is so deeply rooted in our
national customs that it assumes a secular purpose. This applies equally to the long-standing tradition of opening graduation exercises with an invocation.

High school graduation is a moment to be cherished, arriving only once in a lifetime. Mothers, fathers, siblings, grandparents, distant relatives and close friends are brought together to witness and celebrate this momentous occasion. Thus, by opening the graduation ceremony with a student-elected message, whether religious or not, serves the legitimate secular purpose of solemnizing the moment. Further, "[a] meaningful graduation ceremony [complete with invocations and benedictions] can provide encouragement to finish school and the inspiration and self-assurance necessary to [succeed] after graduation." Certainly, providing an incentive to complete high school and excel in the future serves, at the very least, a legitimate secular purpose.

Note, however, that the purpose prong of Lemon is violated where a state policy, although having a legitimate secular purpose, is primarily motivated by religious design. Thus, the question raised in Adler is whether the School Board's "actual purpose [in adopting the new district-wide policy was] to endorse or disapprove of [a particular]..."
Actual purpose may be determined by reviewing the plain language, legislative history and application of the policy in question. There is no indication, based on the plain language of the policy, that the School Board intended to "endorse or disapprove of [a particular] religion." Instead, the policy which permits, without any administrative guidance, student-initiated, student-written and student-delivered prayer at graduation, is clearly neutral. The subsequent application of the new district-wide policy further supports the School Board's position of neutrality. This is evidenced by the fact that seven of the seventeen graduating classes opted, and were allowed, to give entirely secular messages or no message at all, while the remaining classes chose to recite various religious messages. The "moment of silence" motion, asserted by petitioners as evidence of religious design on the part of the School Board, is easily reconciled by the fact that a majority of the Board voted for the current, more neutral, policy. Upon this evidence, it becomes plainly clear that the School Board did not intend to "endorse or disapprove of [a particular] religion." Instead, it appears that their motivations were the exact opposite; to permit the graduating seniors to choose, wholly on their own, whether or not to celebrate their commencement exercises with a brief religious message.

2. Effect Prong. The practice of permitting prayer at graduation, like the opening of legislative sessions with an invocation, has the primary effect of solemnizing [the] occasion, expressing confidence in the

81. Id. (quoting Wallace v. Jaffree, 472 U.S. 38, 56 (1985)). The Eleventh Circuit found that, although a secular purpose existed in having pregame prayer, the "pre-eminent" purpose of the School District was to "express support for Protestant Christianity" as stated in the record. Id.
82. 851 F. Supp. at 451 (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566-68; Aldridge v. Williams, 44 U.S. (3 How.) 8, 23; Church of Scientology v. City of Clearwater, 2 F.3d 1514, 1527 (11th Cir. 1993)).
83. See supra note 28.
84. See supra note 81.
85. See supra notes 32-33. See also 851 F. Supp. at 454 (Due to the long-standing tradition of having invocations and benedictions at graduation, it is not surprising that ten of the high schools in the Duval County School District chose to continue that tradition.). Id.
86. See supra note 29.
87. 851 F. Supp. at 451 ("The individual, and quite possibly varied, purposes or intentions of the several operative decision makers, especially when those views are known only with respect to less than a majority of those voting or deciding, would have little or no probative value."). Id.
88. See supra note 81.
future, and encouraging the recognition of what is worthy of appreciation in society."90 Where the School Board merely permits student-initiated, student-written and student-delivered prayer at graduation, it is understood by the graduation attendees that the chosen message is neither endorsed nor disapproved of by the state.90 Clearly, there can be no perceived endorsement of a particular religion by the state where the School Board provides the graduating seniors with the sole discretion to determine the type and manner of the message, if any, to be delivered at graduation.91

The likelihood of the School Board’s policy having the primary effect of “communicating a message of government endorsement or disapproval of religion”92 is further diminished because of the relative age and maturity of graduating seniors who, because of their stature, are less likely to be influenced by religious messages than their younger, more impressionable peers.93 The impressionability and susceptibility of adolescent school children is firmly established in law.94 The heightened scrutiny afforded to adolescents, however, should not apply to graduating seniors, who, upon completion of high school, enter the realm of adulthood.95

89. 465 U.S. at 693 (O’Connor, J., concurring).
90. Id. at 692 (The crucial question under the effect prong is whether the state action or policy has the primary effect of “communicating a message of government endorsement or disapproval of religion.”). Id.
91. 851 F. Supp. at 454 (quoting Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 337 (1987)) (“To have forbidden ‘effects’ under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence.”). Id.
92. See supra note 90.
93. 794 F. Supp. at 1057 (quoting Widmar v. Vincent, 454 U.S. at 264) (“It is the ‘undue influence’ on a captive audience composed of young, developing, and susceptible minds that has prompted the Supreme Court to give special scrutiny to religious influences in the elementary and secondary public schools.”). Id. See also Albright v. Board of Educ. of Granite Sch. Dist., 765 F. Supp. 682, 691 (C.D. Utah 1991) (citing 454 U.S. at 274) (“It should be recognized that high school students are not ‘babes in arms’ and that in fact they are mature enough to understand that a school does not endorse or promote a religion by permitting prayer [at graduation].”). Id.
94. See supra 92-93. See also 977 F.2d at 970 (citing 112 S. Ct. at 2658) where the Court failed to reconcile its “previous recognition that graduating seniors ‘are less impressionable than younger students’ by holding that age is not a factor in determining whether state-mandated prayer at graduation is unconstitutionally coercive. Id.
95. 794 F. Supp. at 1057 (quoting Jones v. Clear Creek Indep. Sch. Dist., [Jones I] 930 F.2d 416, 421 (5th Cir. 1991)) (“The graduation ceremony lies on the threshold of high school students’ transitions into adulthood, when religious sensibilities hardly constitute impressionable blank slates.”). Id. See also Widmar v. Vincent, 454 U.S. at 274. That this transition into adulthood often includes attending college; and that college students are considered less impressionable than adolescent students. Id. See also Board of Educ. v.
This realm, however grand it may seem at the time, nevertheless, carries with it some harsh realities. Those walls which at one time were erected to shield the graduates as children suddenly collapse, exposing them to a reality never before known nor imagined. Now these graduates, many of whom are eighteen, must choose the direction of their lives. Is it reasonable, therefore, to require that these adults receive the same protection as our adolescent school children? The answer, indeed, should be no.96

The likelihood that student-initiated and student-delivered prayer at graduation conveys a message of government endorsement of a particular religion is even further reduced by the relaxed atmosphere of the graduation setting as compared to the strictures of the classroom setting.97 The Court, today, becomes immediately distrustful upon discovery of religious instruction in the classroom.98 Because of a child's inherent "emulation of teachers as role models," the concern is that this special student-teacher relationship will likely result in the indoctrination of religion; in particular, that of the teacher.99 Upon completion of high school, however, this special relationship ends, marking a time of transition from childhood to adulthood and notably reducing the likelihood of religious indoctrination.100 Thus, the heightened scrutiny required of the Court in the classroom setting is no longer necessary.

Additionally, the graduating seniors and their younger family members, as distinguished from the classroom setting, are accompanied by their parents at graduation, which, by their mere presence, act as a "buffer" against any religious influences that might arise.101 Equally important is the fact that graduation attendance is voluntary as compared to the classroom setting where attendance is enforced by

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96. See supra note 95.
97. Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 390 (1985). ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as free and voluntary choice."). Id. (emphasis added).
98. 496 U.S. 226, 251 (quoting Edwards v. Aguillard, 482 U.S. at 584).
99. Id.
100. See supra note 95. See also 822 F.2d at 1409 ("[T]he graduation context does not implicate the special nature of the teacher-student relationship—a relationship that focuses on the transmission of knowledge and values by an authority figure."). Id.
101. 822 F.2d at 1409. See also 794 F. Supp. at 1057 (The accompaniment of parents is “expected to mitigate any ‘coercive power’ that might otherwise be present.”). Id.
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threat of penalty. Furthermore, graduation, unlike class, is a special, once in a lifetime, highly celebrated occasion.

Petitioners argue, nevertheless, that any reference to a divine being at a school sponsored event inescapably results in an unconstitutional establishment of religion by the state. This argument should fail because it assumes that there is no difference between a graduation ceremony and the classroom setting. Granted, the two settings are similar, but they are not by any stretch of the imagination the same. Indeed, graduation prayer is more analogous to the opening of legislative sessions with an invocation, than say, for example, beginning class with a reading from the Bible.

3. Entanglement Prong. By delegating its authority to the graduating class, the Duval County School Board retained its neutrality and was not, therefore, excessively entangled with religion. The facts in Adler are nothing like the continuous and comprehensive state surveillance present in Lemon. In contrast, the School Board's policy requires no administrative or faculty monitoring of the student--elected, graduation message. In fact, the School Board commands administrative neutrality, which is evidenced by the policy-setting memorandum which provides, in part, that the student-elected message "shall not be monitored or otherwise reviewed by the Duval County School Board, its officers or employees."  

102. See supra note 93. See also 822 F.2d at 1409 (quoting Edwards v. Aguillard, 107 S. Ct. at 2577) ("The State exerts great authority and coercive power through mandatory attendance requirements."). Id.
104. See supra note 39.
105. 112 S. Ct. at 2660. But see note 94.
106. See supra note 75. See also Marsh v. Chambers, 463 U.S. at 792 (quoting Tilton v. Richardson, 403 U.S. 672, 686 (1971)) where the Court distinguished between "adult[s] ... not readily susceptible to 'religious indoctrination,'" and children who are. Id.
107. See 977 F.2d at 967-68. The Fifth Circuit found that even where the policy requires review of the graduation message there is no excessive entanglement with religion on the part of the state. Id. See also 794 F. Supp. at 1059.
108. 465 U.S. at 684 (quoting Lemon v. Kurtzman, 403 U.S. at 619-22). The types of "state surveillance" and "enduring entanglement" that concerned the Court included, for example, the government's examination of school records to compare the amount of expenditures attributable to secular and religious education. Id.
109. See 862 F.2d at 831. The Eleventh Circuit found that there is no entanglement with religion where the School District does not "monitor" the content of the message nor choose the deliverer of the pregame prayer. Id.
110. See supra note 28.
4. Free Speech. Interestingly, the facts in Adler invoke an equally fundamental First Amendment right; specifically, the right of Free Speech.111 The right of Free Speech is implicated where the state, pursuant to its policy, creates a public forum.112 Generally, a public forum is created where the state deliberately provides the community with a forum, open to indiscriminate speech and expression.113 Once a public forum is effectuated, the Free Speech Clause is triggered, and the state cannot exclude speech without first proving the existence of a compelling interest.114 This fundamental principle applies equally to religious speech which "enjoys sanctuary within the First Amendment."

Indeed, a claim of religious establishment by the state may be considered compelling in this context.116 To hold, however, that the Establishment Clause is violated in a true public forum, would be paradoxical, since, in order for the state to create such a forum, it must not convey a message of government endorsement of a particular religion.117 In other words, a true public forum cannot, by its very

111. See supra note 39-40.
112. See Widmar v. Vincent, 454 U.S. at 267; Board of Educ. v. Mergens, 496 U.S. 226; Chabad-Lubavitch of Ga. v. Miller, 5 F.3d 1383. See also Brody v. Spang, 957 F.2d 1108, 1120 (3d Cir. 1992) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988)) (Referring specifically to commencement exercises, the Third Circuit found that "school facilities may become public forums if by policy or by practice school officials have opened those facilities for indiscriminate use by . . . some segment of the public, such as student organizations."). Id. The court went on to say that a public forum may be created at graduation where students are authorized to decide the topic and speaker of the message. Id.
113. 454 U.S. at 273. The Court held that a university, having "opened its facilities for [indiscriminate] use by student groups," created a public forum and therefore, "[could not] now exclude groups because of the content of their speech." Id.
114. Id. at 270.
115. 5 F.3d at 1387. See also 454 U.S. at 269 (citing Heffron v. International Society for Krishna Consciousness, Inc. 452 U.S. 640 (1981); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948)) ("[R]eligious worship . . . [is the] form of speech and association protected by the First Amendment."). Id.
116. 454 U.S. at 271 ("We agree that the interest of the [state] in complying with [the Establishment Clause] may be characterized as compelling."). Id.
117. Id. at 274. See also 5 F.3d at 1393 ("The analysis that courts must bring to bear on the interplay between the Free Speech Clause and the Establishment Clause in the public forum context is somewhat curious in that the existence of [a] public forum initially implicates the Free Speech issue and ultimately determines the Establishment Clause issue."); Id.; 496 U.S. at 250 ("[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."); Id.; 5 F.3d at 1392 (quoting Americans United For Separation of Church & State v. City of Grand Rapids, 980
definition, exist where a particular religion is established by the state.118

The Middle District in Adler found that a true public forum is created where the state permits indiscriminate, student-initiated, student-written and student-delivered prayer at graduation.119 Indeed, the Duval County School Board’s policy is one of neutrality rather than endorsement.120 If, in fact, the School Board were to deny religious speech in this context, it would display hostility, rather than neutrality, towards religion.121 Such discrimination, even in the interest of Establishment Clause, though mistaken, would be completely contrary to, and therefore unconstitutional, under the Free Speech and Free Exercise Clauses of the First Amendment.122

Thus, because of the new open-forum policy, the Duval County School Board has a legitimate secular purpose of, in addition to solemnizing the occasion, permitting, without discrimination, all forms of speech at graduation.123 This includes, unequivocally, religious speech.124 Furthermore, by permitting student-initiated and student-led prayer at graduation, the School Board avoids entanglement with religion.125

F.2d 1538, 1553 (6th Cir. 1992)) (“[T]ruly private religious expression in a truly public forum cannot be seen as [an] endorsement [of a particular religion].”); Id.; 5 F.3d at 1394 (citing Doe v. Small, 964 F.2d 611, 629 (7th Cir.1992) (“Any perceived endorsement of religion in a true public forum is simply misperception; the Establishment Clause is not in fact violated.”); Id.

118. 496 U.S. at 250-52. To illustrate the relationship between establishment and free speech, consider the Court’s holding in Mergens. There the Court found that a message of endorsement of a particular religion was not conveyed where the state permitted a student-initiated and student-led, Christian club, to meet with other clubs after school hours. The Court, in addition, made it a point to say, “[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.” Id.

119. 851 F. Supp. at 454. The Middle District also noted that graduation exercises, traditionally, are held off campus, which further supports the holding that the School Board’s policy did not convey a message of endorsement of a particular religion.

120. 496 U.S. at 248. See also 5 F.3d at 1391 n.11 (“The endorsement test is based on the perceptions of a reasonable observer rather than the ill-informed . . . who simply view [the] religious [speech] . . . without regard to [the existence of a] public forum.”); Id.; 5 F.3d at 1394 (citing Doe v. Small, 964 F.2d 611, 629 (7th Cir.1992) (“Religious speech may not be excluded from a public forum just because [a] passerby misunderstands the public role.”). Id.

121. 496 U.S. at 248.

122. 454 U.S. at 267-68.

123. See 454 U.S. at 272; 496 U.S. at 248; 5 F.3d at 1389; 851 F. Supp. at 453.

124. See supra note 115. See also 851 F. Supp. at 454 (quoting Americans United, 980 F.2d at 1543) (“A policy of treating religious speech the same as all other speech certainly serves a secular purpose.”).

125. See 454 U.S. at 272; 496 U.S. at 248; 5 F.3d at 1389.
Indeed, the School Board “would risk greater ‘entanglement’ by attempting to [exclude] ‘religious speech’ [at the commencement exercises].”

B. Psychological Coercion Test

The inquiry with respect to psychological coercion is whether the state directs a religious exercise in such a manner as to oblige the participation of dissenters. The Court, in Lee v. Weisman, answered this question in the affirmative. Specifically, the Court held as unconstitutional state directed prayer, delivered by a rabbi, at a middle school graduation ceremony. Note, however, that Justice Kennedy, writing the opinion in Lee, emphasized the “dominant facts [which] mark[ed] and control[led] the confines of [the Court’s] decision.”

Particularly troubling to the Court was the fact that a school official, pursuant to state policy, mandated prayer at graduation and, in addition, chose the speaker and message to be delivered. Graduation prayer in this context, the Court in Lee held, effectively coerces, unconstitutionally, dissenting graduation attendees to participate in religious exercises.

Unlike the facts in Lee, the officials of the Duval County School District are, pursuant to the new policy, clearly prohibited from mandating or soliciting prayer at graduation. In fact, the graduating seniors of the Duval County School District are afforded complete...
discretion to determine the message, if any, to be delivered at graduation.\textsuperscript{134} Moreover, the new policy requires that the graduation message, whether religious or not, be prepared and delivered by a student volunteer, elected by the graduating class as a whole.\textsuperscript{135} Thus, the graduating seniors, after participating in the selection of the message, clearly understand that prayer at graduation, if desired, is neither endorsed nor disapproved of by the state.\textsuperscript{136} For that reason, graduation prayer in this context places less psychological pressure on dissenting students to participate since it is understood that the message "represent[s] the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy."\textsuperscript{137}

The Court in Lee expressed, however, that the advancement of religious conformity through peer pressure is as strong, if not stronger, than religious coercion by the state.\textsuperscript{138} Thus, the Court may find, based on this idea of \textit{subtle peer pressure coercion},\textsuperscript{139} that the School Board's new policy effectively forces religion upon a minority of students who vote for a different message and fail.

Although there is a certain degree of inequity inherent in subjecting a minority of students to the views of the majority in this context, the Court's responsibility to the American public is limited to upholding the Constitution. However shocking this hard reality may appear to the minority of students in the Duval County School District, the fact is the Framers did not intend nor has the Supreme Court found that the Establishment Clause must shield society from exposure to every religious force.\textsuperscript{140} Instead, the intent of the Framers in drafting the Establishment Clause was to \textit{guard the people from the inherent harms of government mandated religion, enforced by threat of penalty}.\textsuperscript{141}

\section{V. Conclusion}

Simple inquiry can clarify the most complex of issues. Quite often, unfortunately, legal scholars, by use of colorful language and fine aphorisms, hide, or miss entirely, the obvious issue. Hiding the ball is

\begin{footnotesize}
\textsuperscript{134} \textit{Id.}  \\
\textsuperscript{135} \textit{Id.}  \\
\textsuperscript{136} 861 F. Supp. at 456 (citing 977 F.2d at 971).  \\
\textsuperscript{137} \textit{Id.} (quoting 977 F.2d at 971).  \\
\textsuperscript{138} 112 S. Ct. at 2659.  \\
\textsuperscript{139} \textit{Id.} The Court in Lee was concerned about the peer pressure on attending students to maintain respectful silence during the graduation invocation.  \\
\textsuperscript{140} \textit{Zorach}, 343 U.S. at 312 ("The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State . . . [otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly."). \textit{Id.}  \\
\textsuperscript{141} \textit{See supra} notes 63-66.
\end{footnotesize}
common among legal scholars, at least in my experience. Missing the obvious, as I see it, can be attributed to, as odd as it may seem, too much scholarly analysis in the legal abstract which, in my opinion, for whatever its worth, results in a failure to ask the right question.

The plain and simple question here is why? Why in our society do we attach such great significance to high school graduation?142 By analyzing this question (outside of the legal abstract), the real and obvious issue will unravel, leaving us with an answer, I'm willing to bet, the common person already holds.

So again, why? Why is high school graduation so highly celebrated in our society? The answer is ridiculously obvious. Apparently there's more to graduation than mere recognition of achievement by the state; otherwise, a diploma would suffice.143 Indeed, for the graduates, this cherishable, once-in-a-lifetime, highly celebrated occasion, is a moment to be relished and a time to be applauded by family and friends, or generally, the community, for their efforts and successes.144 And for the community, graduation is a time to share in the joy, reflect on the past, and look idealistically to the future.145 Thus, it should not be surprising to find, in an event held so dear by the graduates and community, a touch of public ritual—or civil religion.146 That is the case in Adler v. Duval County School District.

"It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."147 Profoundly stated, the above phrase squarely depicts the fears and apprehensions of our Supreme Court justices. As the ultimate interpreters of our Constitution their responsibilities loom large. In particular, and most importantly, each member of the Supreme Court, upon taking oath, assumes a role as protector of our freedom and liberty. Considering the magnitude of this pledge to the American people, a position of extreme caution and trepidation in interpreting the Constitution is clearly understandable.

Indeed, the Court in Lee took a similar stand. There Justice Kennedy cautioned, "what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."148 The concern on the

142. 977 F.2d at 972.
143. Id.
144. Id.
145. Id.
146. Id.
147. Marsh, 463 U.S. at 795 (emphasis added).
148. 112 S. Ct. at 2658.
part of the Court in *Lee* was that graduation prayer, although nonsectarian and nonproselytizing in nature, could mark the beginning of the type of government establishment of religion feared by our Founders. But how much protection is too much? Phrased another way, at what point does the Court's Establishment Clause paranoia become hostile towards religion, thus, violating the equally fundamental rights of Free Exercise and, in this case, Free Speech?

Naturally, the above inquiry presumes a necessity for constitutional equilibrium in a truly democratic society. Indeed, our Constitution requires nothing less. Thus, the Court, as guardian of our freedom, has an obligation to strike the proper balance between equally fundamental rights. Applying this doctrine to the facts of *Adler v. Duval County School District*, the Court must, in order to obtain constitutional equality, uphold the School Board policy which permits student-initiated, student-written and student-delivered prayer at graduation. Otherwise, wouldn't the Court in ruling differently fail its own standards for constitutional adjudication by overlooking the "real threat" for "mere shadow"?  

149. 463 U.S. at 795.