Constitutional Law: Establishment Clause v. Free Expression:

Adler v. Duval County School Board

Ron Shinn

Follow this and additional works at: https://digitalcommons.law.ou.edu/olr

Part of the Constitutional Law Commons, and the First Amendment Commons

Recommended Citation


This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.
NOTES

Constitutional Law: Establishment Clause v. Free Expression: Adler v. Duval County School Board

I. Introduction

Throughout the course of the 2000 presidential election campaign, Democratic vice presidential nominee Joseph Lieberman, a prominent senator from Connecticut, spoke frequently and passionately about the role of God in his life. President George W. Bush spoke of Jesus Christ as his favorite philosopher. Both men, along with many other politicians, discussed the power of prayer and the need for more morality in our nation, and studies indicate this nation is quite concerned about both a lack of religion and our collective morality. While many applaud this candor regarding the role of religion in Americans’ lives, others are troubled that government officials are so open and uninhibited about revealing and promoting their religious beliefs. It seems illogical that while the law requires some form of separation between church and state, those who seek election to the government by the American people would be oblivious to the First Amendment. Yet these politicians may be mirroring what society sees everyday: a struggle to determine what role, if any, religion should play in our nation’s governmental entities. Perhaps this struggle is fiercest when it concerns children in our nation’s public schools.

For nearly forty years, since the U.S. Supreme Court first considered public school prayer in the case of Engel v. Vitale, our nation’s judicial system has struggled in addressing one of our society’s most deeply rooted traditions; it has attempted to reconcile the conflicting protections of free speech and the separation of church and state. Few issues have spawned such emotion, passion, and disagreement as prayer in public schools. Recently, the Court once again

attempted to clarify the legal boundaries of public-school prayer in *Santa Fe Independent School District v. Doe.*

The latest public-school prayer case to capture the national spotlight, *Adler v. Duval County School Board,* came out of the Eleventh Circuit. *Adler* involved a school district policy that grants high school seniors the discretion to decide if they want a graduating senior to deliver an opening or closing message at the graduation ceremony, and if so, to choose the graduating speaker. The school district and its employees cannot monitor or review the selected student's message or its content.

This note analyzes whether the Duval County School Board policy is constitutional. Part II of this note traces the relevant law prior to the *Adler* case, including both Establishment Clause cases and student free-expression cases. Part III examines how the Eleventh Circuit reached its conclusion in *Adler* and analyzes whether the *Adler* decision is consistent with the previous case law. In Part IV, the note analyzes *Adler* and draws four main conclusions: (1) that the current Establishment Clause jurisprudence needs to be revamped; (2) that the Supreme Court should look to the history and tradition of government practices and adopt the Endorsement Test; (3) that even under the current Establishment Clause jurisprudence, *Adler* is constitutional; (4) that the current Establishment Clause jurisprudence is in such disarray that it is futile to predict how it affects Oklahoma.

**II. Law Prior to the Case**

**A. Establishment Clause Concerns in Public Schools**

The First Amendment of our Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The first clause of the First Amendment contains two subclauses: the Establishment Clause and the Free Exercise Clause. This note's analysis of prayer in public school implicates the Establishment Clause.

The Supreme Court first considered the effect of the Establishment Clause on our nation's public schools in *Everson v. Board of Education.* In *Everson,* the Court found that the Establishment Clause applied both to the federal government and to the states. *Everson* involved a statute allowing school boards to

---

10. Id.
11. U.S. CONST. amend. I.
14. Id. at 14-15. The Court reasoned that the Establishment Clause applied to the states through the
reimburse families for the costs of transporting their children to school. A taxpayer challenged the statute's provision allowing reimbursement for parents who chose to send their children to parochial schools. The Court found the statute to be constitutional, despite the partition that must be kept between religion and government.

The Court first addressed the issue of public-school prayer in Engel v. Vitale. Engel involved the daily reading of a state-written prayer at a public school in New York. It found the prayer reading to be unconstitutional under the Establishment Clause, holding that "in this country 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." While Engel resolved the immediate situation, it failed to provide a doctrine for future Establishment Clause conflicts.

The next major development in the Establishment Clause controversy occurred in the case of Lemon v. Kurtzman. This landmark decision created the much-discussed Lemon test, which was the Court's attempt at defining a constitutional standard for governmental involvement with religion. Lemon involved taxpayers' challenges of similar statutes in two different states, both of which provided public financial assistance to private, parochial schools. The Court found both statutes to be unconstitutional violations of the Establishment Clause.

In its decision, the Lemon Court outlined a three-part test to determine whether a statute is constitutional under the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government entanglement with religion.'" With the Lemon test in place, it seemed as though the nation had a consistent doctrine for addressing Establishment Clause concerns.

The Supreme Court, however, was not finished with its handiwork. The Court once again considered the issue of school prayer in Lee v. Weisman. Lee involved a public-school graduation ceremony at which the principal invited a member of the clergy to deliver a neutral prayer. Although the lower court in

---

Fourteenth Amendment. Id.

15. Id. at 3.
16. Id. at 3-4.
17. Id. at 18.
19. Id. at 425.
21. Bira, supra note 6, at 1538.
22. Lemon, 403 U.S. at 606.
23. Id. at 607.
24. Id. at 612-13 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
26. Id. at 581. "Neutral prayer" refers to prayer in which the religious message is not devoted to any particular religion; rather, it is nonsectarian. In Lee, the principal gave a pamphlet to the speaker
Lee attempted to use the Lemon test to reach a decision, the Supreme Court forged a new standard and determined that the school prayer in question was an Establishment Clause violation.\(^{27}\) It held that two dominant facts rendered the school's graduation prayer unconstitutional: first, a state actor (the principal) requested the prayer and gave instructions as to the content of the prayer; and second, the graduation ceremony (and consequently the prayer) was a mandatory public event, even if students were not technically obliged to attend.\(^{28}\)

Recently, the Court once again examined public-school prayer in Santa Fe Independent School District v. Doe, a case involving prayer at high school football games.\(^{29}\) In Santa Fe, a school permitted students to hold two separate elections: the first determined whether a nonsectarian prayer or message should be delivered at high school football games, and the second determined which students would deliver the invocations.\(^{30}\) Looking to the principles established in Lee, the Court found the policy to be an unconstitutional violation of the Establishment Clause.\(^{31}\) First, it found the school district's policy of allowing students to elect a student to give a prayer to be an official state action violative of the Establishment Clause.\(^{32}\) Second, it found that while a high school football game may not be a mandatory event for all students, certain students, including the team, the band, and the cheerleaders, must attend.\(^{33}\) Moreover, the Court concluded that even if the game is a voluntary event, it still coerces all present to participate in religious worship, a situation that violates Lee.\(^ {34}\)

The Court's decisions, while less than clear, do suggest a trend. Some limited forms of religious expression and involvement appear to be permissible, even in public schools, so long as the State does not endorse the expression. Lee clearly states, "Our jurisprudence in this area is of necessity one of line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State."\(^ {35}\)

### B. The Tenth Circuit and the Establishment Clause

The Tenth Circuit Court of Appeals cases demonstrate that the interpretation of the doctrine of separation of church and state can vary dramatically, depending on the particular facts at issue. The Tenth Circuit considered the role of the
Establishment Clause in public schools in *Lanner v. Wimmer.*[^36] *Lanner* involved a state policy allowing students to take religion classes off-campus during regular school hours.[^37] Applying *Lemon,* the court held that the overall policy did not violate the Establishment Clause.[^38] However, the court did conclude that two provisions of the policy contravened the Establishment Clause: (1) requiring the public school to regulate attendance of the students in the religion class; and (2) awarding school credit for the religion class.[^39]

The Tenth Circuit once again considered an Establishment Clause question in *Roberts v. Madigan.*[^40] In *Roberts,* a principal ordered a teacher in her school to keep two religious books as well as the Bible out of public view during regular classroom hours.[^41] The teacher challenged the principal's command.[^42] Once again, the court applied the *Lemon* test. The court concluded that the principal's order to remove the books was constitutional under the Establishment Clause, since a public school has to maintain its secular purpose and ensure that religion is not taught in the school.[^43] While the teacher argued that the principal's order was content-based discrimination and a violation of the teacher's First Amendment rights, the court held that removal of the books did not constitute a disapproval of Christianity and that, based on the facts, there was "no reason . . . to draw a distinction between teachers and students where classroom expression is concerned."[^44]

The Tenth Circuit continued its Establishment Clause jurisprudence in *Bauchman v. West High School.*[^45] In this case, a Jewish student sued her school because the choir, of which she was a member, sang predominantly Christian songs and performed at religious locations.[^46] In a familiar pattern, the Tenth Circuit first looked to *Lemon* to determine the law.[^47] The court held that the choir's songs and performance locations did not violate the Establishment Clause, that the singing of religious songs did not constitute a coercion of religious

[^36]: 662 F.2d 1349 (10th Cir. 1981).

[^37]: Id. at 1351. While the court stated that some Protestant churches offered courses, it also indicated that a vast majority of the classes were part of a seminary program offered by the Church of Jesus Christ of Latter-Day Saints. Id. at 1354.

[^38]: Id. at 1359.

[^39]: Id.

[^40]: 921 F.2d 1047 (10th Cir. 1990).

[^41]: Id. at 1049-50.

[^42]: Id. at 1050.

[^43]: Id. at 1054.

[^44]: Id. at 1054-58.

[^45]: 132 F.3d 542 (10th Cir. 1997).

[^46]: Id. at 546. The objectionable song lyrics included those that "sing praise to 'Jesus Christ our savior' and 'Jesus Christ our Lord,' and that include[d] other devotional references to God." Id. at 553. Performance locations included several Christian churches and religious sites, such as "the Church of the Madeleine, the First Presbyterian Church and Temple Square." Id.

[^47]: Id. at 551. In fact, the court concluded that because singing religious songs does not constitute prayer, the *Lee* test of coercion did not apply. Id. at 552 & n.8.
activity analogous to school prayer, and that the singing did not constitute a violation of the student's right to free speech.44

C. Oklahoma and the Establishment Clause

The most relevant Oklahoma case discussing the Establishment Clause and prayer is Martinez v. State.46 In Martinez, a defendant was convicted of two counts of first degree murder.47 On appeal, the defendant alleged that he received ineffective assistance of counsel because his attorney did not object to a prayer by the trial judge.48 The court did not find the judge's prayer to be reversible error because the trial judge offered an opportunity for both sides to object to the prayer, and because the defendant agreed to the prayer.49 However, the Oklahoma Court of Criminal Appeals did warn other courts that they should refrain from offering prayers in the future, especially in criminal trials, due to the possibility of creating trial errors.50

D. Free Expression of Students; Public Schools as Public Forums

While the Establishment Clause plays a significant role in determining whether the Adler policy is constitutional, students' First Amendment rights to free speech and expression also must be considered. The seminal case on students' right of free speech is Tinker v. Des Moines Independent Community School District.51 In Tinker, students chose to protest the Vietnam War by wearing black armbands.52 The school administration, fearing the students' actions would lead to disruptions in school, enacted a policy prohibiting the wearing of armbands; students who violated the policy were suspended until they complied with it.53 The Court held that the policy was an unconstitutional violation of the students' First Amendment right to free speech.54 Tinker also established a rule for schools to follow when attempting to prohibit free expression:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and

48. Id. at 550-58.
49. 1999 OK CR 33, 984 P.2d 813.
50. Id. ¶ 1, 984 P.2d at 817.
51. Id. ¶ 51, 984 P.2d at 827.
52. Id. ¶¶ 52-54, 984 P.2d at 827.
53. Id. ¶¶ 55-59, 984 P.2d at 827-29.
55. Id. at 504.
56. Id.
57. Id. at 505-06.
substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.58

Absent the aforementioned criteria, the Court concluded that "students are entitled to freedom of expression of their views."59 Tinker's ruling seemed to provide students with considerable freedom of expression. However, Tinker has been limited by the Court on notable occasions. Bethel School District No. 403 v. Fraser60 considered Tinker's interpretive boundaries. In Fraser, the Court held that schools have the discretion to limit and define what constitutes offensive speech within the schools.61 Fraser involved a sexually related speech given by a student at a school assembly.62 The student gave the speech despite a school policy banning the use of obscene language in the school.63 In finding that the school could punish the student for the offensive content of his speech, the Court reasoned that "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."64 It found the students' expression in Tinker, which involved political speech, incomparable to the lewd and vulgar expression at issue in the present case.65 The Court also reasoned that while adults may have the constitutional right to certain freedoms, such as offensive speech, not all of these freedoms extend into the public schools.66 Significantly, however, the Court did not define what type of speech should be considered offensive; rather, it left such decisions to the local school boards around the country.67

The Court further explored a school's role in regulating students' speech in Hazelwood School District v. Kuhlmeier.68 Looking to Fraser, the Kuhlmeier

58. Id. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
59. Id. at 511.
60. 478 U.S. 675 (1986).
61. Id. at 683.
62. Id. at 677-78. The student delivered the speech while nominating a fellow student. Id. at 677.
63. Id. at 678.
64. Id. at 681.
65. Id. at 685.
66. Id. at 682.
67. Id. at 683-85.
Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."\textsuperscript{69} Kuhlmeier involved a principal's removal of two pages from a school-sponsored student newspaper.\textsuperscript{70} Finding the principal's actions to be constitutionally acceptable, the Court reasoned that the school did not intend for the newspaper to serve as an open public forum; rather, the newspaper served as an educational vehicle that was part of a classroom curriculum.\textsuperscript{71} As such, the school maintained a much higher level of control over the content of the student newspaper than it would have if the newspaper were a designated public forum.\textsuperscript{72}

While school officials can control free expression in schools, they must consider whether the speech occurs in a public forum. In \textit{Perry Education Ass'n v. Perry Local Educators' Ass'n},\textsuperscript{73} the Court analyzed how much control the government can have over speech based upon the public forum in which it is spoken.\textsuperscript{74} Perry examined the three levels of public forums; each level becomes increasingly subject to governmental control.\textsuperscript{75} The first level is the traditional public forum, such as a street or a park.\textsuperscript{76} In such a forum, "the government may not prohibit all communicative activity."\textsuperscript{77} For the State to limit speech based on content, the limitation must pass the test of strict scrutiny.\textsuperscript{78} Additionally, the government can "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."\textsuperscript{79} The second type of forum "consists of public property which the State has opened for use by the public as a place for expressive activity."\textsuperscript{80} In this type of forum, the government need not designate the public property as an open forum; however, once it has done so, the government must abide by the same content requirements and time, place, and manner requirements placed upon a traditional public forum for as long as the government designates the public property as an open forum.\textsuperscript{81}

\textsuperscript{69} Id. at 273.
\textsuperscript{70} Id. at 264.
\textsuperscript{71} Id. at 267-70.
\textsuperscript{72} Id. at 269-70.
\textsuperscript{73} 460 U.S. 37 (1983).
\textsuperscript{74} Id. at 44.
\textsuperscript{75} Id. at 45-47.
\textsuperscript{76} Id. at 45.
\textsuperscript{77} Id.
\textsuperscript{78} Id. The Perry Court specifically stated that "[f]or the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Id.; see also Daniel A. Farber & John E. Nowak, \textit{The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication}, 70 VA. L. REV. 1219 (1984).
\textsuperscript{79} Perry, 460 U.S. at 45.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 45-46; see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (finding that a public school committed unconstitutional viewpoint discrimination by denying a church after-hours access to school premises while the school simultaneously permitted other,
The third type of forum consists of public property that is not an open forum by either tradition or designation.\textsuperscript{82} This third type of forum is subject to different standards than the previous two: "[I]n addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."\textsuperscript{83}

The courts seem to provide a basic framework for how religion and free speech should be handled in our public schools. The Constitution permits some religion within the walls of the public school, but not too much. Public school students have a right to speak freely and express their views in the schoolhouse, so long as it is within a public forum and within certain limitations of school-defined public decency. These basic guidelines, however, provide little solace for those who must attempt to conform to the mandates of the Constitution. It seems unreasonable to assume that most teachers, principals, superintendents, and school board members are legal experts; yet, they must hazard a guess at what the Constitution and the law requires. Certainly, if the Supreme Court of the United States cannot produce a clear policy, public school administrations may not be able to do so. This area of the law has been relegated to fact-specific analyses, yet the courts assert that they are applying the law in a consistent fashion, using a clear doctrine.

III. Adler v. Duval County School Board

A. Facts

The Duval County School District traditionally included a prayer or religious message at its high school graduation ceremonies.\textsuperscript{84} However, after the Lee decision, the Duval County superintendent determined that no prayers or similar messages should be delivered at commencement exercises.\textsuperscript{85} Many in the community contacted the superintendent to discuss the new graduation policy, and some suggested that the school district should not be involved in the decision of whether to have a graduation prayer.\textsuperscript{86}

\begin{itemize}
\item nonreligious groups to use school facilities); Widmar v. Vincent, 454 U.S. 263, 267-69 (1981) (holding that a state university that made its facilities generally available to student groups had designated such facilities as public forums, and could not discriminate or exclude certain student groups unless meeting the constitutional standards for traditional or designated public forums).
\item Perry, 460 U.S. at 46.
\item Id. The Court in Perry found that teachers' mailboxes in a public school fell within the third type of forum. Therefore, a restriction that allowed only one labor union access to the mailboxes was permitted to stand, since the other unions could still communicate with teachers on school property, post notices on school bulletin boards, and make announcements on the public-address system. See id. at 53.
\item See Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1071 (11th Cir. 2000), vacated, 531 U.S. 801 (2000), aff'd, 250 F.3d 1330 (11th Cir. 2001).
\item Adler, 206 F.3d at 1071.
\item Id. at 1071-72.
\end{itemize}
Thereafter, the superintendent, in conjunction with the school district’s legal-affairs officer, issued a new policy in a memorandum entitled "Graduation Prayers." The memorandum stated that the Lee decision had caused confusion for school districts regarding prayer, and the memorandum aimed to provide guidelines for administrators whose students may wish to have an opening and/or closing graduation message given by a student. The guidelines in the memorandum read as follows:

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;
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 the Duval County School Board [sic], its officers or employees;

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

In 1993, the first year of the new policy, ten of seventeen high schools within the school district had religious messages delivered at their commencement exercises. At the remaining seven graduations, the students either elected not to have a student speaker, or the student speakers delivered nonreligious messages.

B. Procedural History

In June 1993, students within the school district filed a class action suit against the Duval County School Board, alleging the board’s newest policy violated both the Establishment Clause and the Free Exercise Clause. The district court refused to certify the students as a class and granted summary judgment in favor of the school board. Following summary judgment, the students appealed to a panel of the Eleventh Circuit, which ruled that because all of the protesting

87. Id. at 1072.
88. Id.
89. Id. (alteration in original).
90. Id.
91. Id. (alteration in original) (setting forth the text of the memorandum). The Court observed that following 1993, statistics were not available to determine who spoke and what they said at subsequent graduation ceremonies. See id.
92. Id.
93. Id. at 1072-73. The original district court opinion can be found at Adler v. Duval County School Board, 851 F. Supp. 446 (M.D. Fla. 1994).
students had graduated, their claims for declaratory and injunctive relief were moot. 94

In May 1998, a new group of students brought suit against the Duval County School Board, arguing the same constitutional infringements as the students did in the prior action and seeking essentially the same remedies. 95 The protesting students contended (1) that the policy attempted to dodge the U.S. Supreme Court's holding in Lee; (2) that the policy had a primarily religious purpose because it was entitled "Graduation Prayer;" and (3) that some school board members made comments about school prayer demonstrating that the primary purpose of the policy was religious. 96 The district court denied the motion and entered final judgment for the school board. 97 Upon appeal, a panel of the Eleventh Circuit reversed and remanded the district court's judgment, whereupon the full Eleventh Circuit granted rehearing en banc. 98

On rehearing, the Eleventh Circuit held the school policy was constitutional. 99 The students consequently appealed to the U.S. Supreme Court, which granted a writ of certiorari. 100 The Court vacated the judgment of the Eleventh Circuit and remanded the case to the Eleventh Circuit for further consideration in light of its decision in Santa Fe. 101 On remand, the Eleventh Circuit again held that the school policy was constitutional. 102

The Eleventh Circuit's decision was again challenged, but this time the Supreme Court denied the petition for writ of certiorari, effectively upholding the Eleventh Circuit's decision. 103

C. Issue

The Eleventh Circuit stated the issue as "[w]hether the Duval County school system's policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies is facially violative of the Establishment Clause." 104

94. Adler, 206 F.3d at 1073. The Eleventh Circuit panel's opinion is designated as Adler v. Duval County School Board, 112 F.3d 1475 (11th Cir. 1997).
95. Id. at 1073.
96. Id. at 1085.
97. Id.
98. Id. at 1073.
99. Id. at 1074-75.
101. Id.
104. Adler, 206 F.3d at 1073. Interestingly, the court only considered that policy's constitutionality under the Establishment Clause and not the Free Exercise Clause, despite the protesting students' assertions that the policy violated both.
D. Holding

In the original opinion from the Eleventh Circuit, the Adler court held that under both Lemon and Lee, the school board's policy was constitutional. Looking first to Lee, the court found that based on the Duval County graduation policy, a student speaker's message could not be considered a message endorsed by the State. The Adler court also declared that there was no governmental coercion of the graduation message; therefore, the facts did not meet either element of the Lee analysis. Using the Lemon test, the court held (1) the graduation policy had a secular purpose; (2) the policy did not have the primary effect of advancing religion; and (3) the policy did not excessively entangle government with religion.

E. Reasoning

1. Application of Lee v. Weisman

The Eleventh Circuit found Adler to be readily distinguishable from Lee. The Adler court stated that in Lee, "There can be little doubt . . . [that the] school system ordained and established a religious exercise at a graduation ceremony, and that the graduation prayer . . . was in every sense endorsed and supported by the state." The Adler court reasoned:

[1] In striking contrast, under the Duval County graduation policy, however, neither the School Board nor its principals may ordain, direct, establish, or endorse a religious prayer or message of any kind . . . . The Duval County policy explicitly divorces school officials from the decision-making process as to whether any message — be it religious or not — may be delivered at graduation at all. Moreover, decisional control over the most crucial elements of the graduation policy rests with the students and not the state.

The Adler court additionally reasoned that Lee did not mean to exclude all religion, even private religious exercise, from graduation ceremonies; rather, the court asserted that Lee simply required neutrality on the part of the government. The court determined that "the policy can be analogized to a line of open forum cases in which the Supreme Court has held that neutral secular policies that merely accommodate religion or individual free exercise rights do not amount to an unconstitutional state endorsement of religion." Additionally, the
court made it clear that state neutrality towards religion must be distinguished from government hostility towards religion, and the government risks constitutional impingement by attempting to prevent someone from exercising his First Amendment right to free speech.\textsuperscript{113}

Continuing its analysis of the school policy under Lee, the Adler court reasoned that while the school may sponsor the graduation ceremony, this hardly means that religious speech at the ceremony is attributable to the State.\textsuperscript{114} The court pointed out that in Lee, the Court did not find the graduation policy unconstitutional because religious speech occurred at a graduation sponsored by the State. Rather, the Lee Court found the school policy unconstitutional because state actors (i.e., the school administration) selected speakers to deliver an invocation or prayer.\textsuperscript{115} Furthermore, the state actors even gave pamphlets to designated religious speakers in an attempt to control what those speakers said.\textsuperscript{116} The Adler policy is clearly distinguishable, according to the court, because student speakers are not state actors.\textsuperscript{117} The Adler court readily acknowledged that a student selected under the Duval County policy may potentially use offensive speech while on stage at the graduation ceremony, but found that "[t]he occasional tolerance of speech we may deem offensive is one price we pay for the First Amendment and our democratic traditions."\textsuperscript{118}

Finally, the court rejected the contention that the school's policy of allowing students to decide upon a graduation speaker transformed the designated student's message into one endorsed by the State.\textsuperscript{119} The court reasoned that the chosen speaker is a "representative of the student body, not an official of the state."\textsuperscript{120} The court concluded that for the elected speaker to be considered a state actor, each individual high school student would also have to be considered a state actor, a premise the court found to be untenable.\textsuperscript{121}

2. Application of Lemon v. Kurtzman

The Adler court next analyzed the school policy under the Lemon test. Looking to Lemon's first prong, which requires a statute to be primarily secular, the court reasoned that the graduation policy serves three primary secular purposes: (1) It provides students with an opportunity to plan their own graduation ceremony; (2) It allows students to solemnize the graduation; and (3) It permits students' freedom of expression.\textsuperscript{122} The court also made it clear that Lemon's first prong
can be fulfilled even if the act in question is partially motivated by a religious purpose, if the policy is primarily motivated by a secular purpose. 123

The court proceeded to analyze the policy under the second prong of Lemon, which requires that the principal effect of a statute be one that neither advances nor restricts religion. 124 The court reasoned that because the policy allows the student freedom to choose a topic without state interference, the policy satisfied the second prong. 125 The court stressed that the policy "is content-neutral and does not mandate or even encourage that a graduation prayer will be uttered." 126

Finally, the court found that the policy fulfilled the third requirement of Lemon, which forbids the excessive entanglement of government and religion. 127 The court found that the essence of the policy represented a lack of entanglement between government and religion because the school could not review the student's message at all. 128 The court emphasized that "the School Board would find itself far more entangled with religion if it attempted to eradicate all religious content from student messages than if it maintained a meaningful policy of studied neutrality." 129

F. Dissent

The Adler dissenting opinion expressed the most concern with the majority's "unwillingness to look beyond the policy's terms." 130 The dissent suggested that Lemon is the appropriate test for the school's policy, but that the policy does not withstand the three-prong test. 131 The dissent argued that the "policy runs afoul of the Lemon test because its only credible purpose is to maximize the chance that prayer will continue to play a prominent role in Duval County graduations. Furthermore, the policy's 'primary effect' is to advance religion." 132

The dissent then looked to Lee and found the facts in Adler similar to the facts in Lee. 133 The dissent argued that while state control may not be as prevalent in the Adler situation, the majority still blindly ignored the reality that a student speaker would not be at the graduation but for the State's action of facilitating a student election. 134 The dissent found it significant that while the government

123. Id. at 1084.
124. See supra note 24 and accompanying text.
125. Adler, 206 F.3d at 1089.
126. Id.
127. Id. at 1090.
128. Id.
129. Id.
130. Id. at 1091 (Kravitch, J., dissenting).
131. Id.
132. Id.
133. Id. at 1091-92 (Kravitch, J., dissenting). For some reason, perhaps because the majority opinion applied Lee, the dissent felt obliged to apply Lee to the facts of the case even after asserting that Lemon was the appropriate standard.
134. Id. at 1092-93 (Kravitch, J., dissenting).
gave a small portion of the graduation planning authority to the students, it "retain[ed] ultimate control over the larger operation."135

G. The Eleventh Circuit's Opinion on Remand

After the Supreme Court remanded the case, the Eleventh Circuit issued a new opinion that again affirmed the school district's policy as constitutional.136 Per the Court's instructions to consider Adler in light of the Court's Santa Fe decision,137 the Eleventh Circuit compared the policies in the two cases and found them readily distinguishable.138 After reviewing its Lee and Lemon analyses from its first decision, the Eleventh Circuit turned to the Santa Fe decision and found Adler distinguishable for two primary reasons: first, the school district in Santa Fe directly controlled the content of the speech, whereas the school district in Adler had no control over the content of the student's speech; and second, the Santa Fe policy invited religious messages exclusively, while the Adler policy invited any message that the student speaker wished to give, regardless of viewpoint or content.139 The Adler court stressed that the sole purpose of the Santa Fe policy was to decide whether to elect a religious speaker, a primarily religious purpose.140 Conversely, the court found the Adler policy to be "entirely neutral regarding whether a message is to be given, and if a message is to be given, the content of that message."141

The Adler court also explained several other reasons why its prior decision should be affirmed. First, it argued that Santa Fe did not provide any new rule of law; to the contrary, it used "the very same framework of Lee and Lemon that [it] applied in [its] prior decision."142 Second, it pointed out that the Court's Santa Fe decision "did not rule that an election process itself is always incompatible with the Establishment Clause. Nor did it rule that a student elected to speak to the student body is necessarily a state-sponsored speaker."143 Third, the court stressed Santa Fe's assertion that speech becomes state sponsored when the government controls the content of the speech, not simply because the speech is ""authorized by a government policy and [takes] place on government property at a government-sponsored school-related event."144 Fourth, the court noted that regardless of the Adler school board's intent in passing the new graduation policy, the court should only concern itself with the facial constitutionality of the

135. Id. at 1094 (Kravitch, J., dissenting).
138. Adler, 250 F.3d at 1332.
139. Id. at 1336-40.
140. Id. at 1340. Any government action failing to have a primarily secular purpose should fail the Lemon test. See Lemon v. Kurtzman, 403 U.S. 602 (1971).
141. Adler, 250 F.3d at 1337.
142. Id. at 1340.
143. Id. at 1340-41.
144. Id. at 1341 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000)).
language; the Eleventh Circuit did find the policy constitutional on its face.\textsuperscript{145} Finally, the court reasserted that the Adler policy promoted three legitimate secular purposes: (1) solemnization of the graduation, (2) allowing students a chance to control their own graduation ceremony, and (3) enhancing a student's right to freedom of speech and expression.\textsuperscript{146} The Supreme Court denied the petition for writ of certiorari on this opinion.\textsuperscript{147}

\textbf{IV. Analysis of the Adler Decision}

Based on the history of prayer in public schools in conjunction with the aforementioned courts' analyses of the Establishment Clause and public forums, it seems quite unclear what the actual rule of law is. Rather than attempt to continue onward with a series of holdings that judges can easily manipulate and distinguish based upon their individual viewpoints, the U.S. Supreme Court should have reconsidered its Establishment Clause doctrines. One can draw several conclusions from the \textit{Adler} case, especially when one considers that this case is the latest in a long line of public-school prayer cases: (1) The current Establishment Clause jurisprudence is nothing more than ad hoc balancing by the courts, leaving the courts free to rule on the Establishment Clause as they wish based upon their own viewpoints; (2) The Court should adopt a new standard for dealing with the Establishment Clause; (3) The Court correctly found the policy in \textit{Adler} to be constitutional; and (4) It is difficult to determine how Oklahoma courts would rule on a policy similar to that in \textit{Adler}.

\textbf{A. Ad Hoc: Courts Have Yet to Fashion a Workable Establishment Clause Doctrine}

At the very least, it seems clear that the United States court system has failed to produce a consistent, workable Establishment Clause doctrine. While the Supreme Court has been able to establish a basic view of how church and state should be reconciled in our society,\textsuperscript{148} this "basic view" has little value when applied to a specific set of facts.

For instance, in \textit{Everson v. Board of Education}, the Court held that the Establishment Clause requires "a wall of separation between Church and State"\textsuperscript{149} in this country, and that such a wall "must be kept high and impregnable."\textsuperscript{150} Such a basic view may seem based upon constitutional language. However, in sustaining a school transportation funding policy that benefitted students in both public and private schools, the Court explained that such a wall

\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.} at 1334, 1342; \textit{see also} Adler v. Duval County Bd. of Educ., 206 F.3d 1070, 1085 (11th Cir. 2000) (listing the Eleventh Circuit's findings of the three secular purposes of the policy in question).
\textsuperscript{147} \textit{Adler} v. Duval County Sch. Bd., 122 S. Ct. 664 (2001).
\textsuperscript{149} \textit{Id.} at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).
\textsuperscript{150} \textit{Id.} at 18.
was not absolute.\textsuperscript{151} In defining its Establishment Clause view, the Everson Court reasoned that the government could not establish an official church, benefit a particular faith, or even pass a law to benefit all religions.\textsuperscript{152} By the same token, the Court also noted that the government could not discourage or inhibit religious beliefs, including the exercise of them.\textsuperscript{153} Therefore, in its very first attempt at fashioning a doctrine for the Establishment Clause as it relates to public schools, the Court spoke of strict divisions, yet granted exceptions to such divisions for "public welfare legislation."\textsuperscript{154} The Court specifically mentioned transportation, utilities, and police and fire protection as the types of government services that should not be subject to the mighty "wall" that must exist between church and state.\textsuperscript{155}

Everson was only the beginning of the court system's problems with the Establishment Clause. The Lemon Court, in its attempt to create a sustainable doctrine, admitted the difficulty of developing a standard, stating, "[W]e can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."\textsuperscript{156} The Court reasoned, "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."\textsuperscript{157} In fact, the Court even addressed past use of the image of a "wall"\textsuperscript{158} between church and state by declaring "that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."\textsuperscript{159} Lemon constituted the Court's recognition that no simple doctrine would adequately handle the Establishment Clause; on the contrary, Lemon suggests that no one doctrine is capable of addressing the multidimensional relationship between church and state, particularly when applied to our nation's public schools.

The Court continues to struggle with the Establishment Clause, admitting that it cannot limit Establishment Clause questions to "any single test or criterion."\textsuperscript{160} One Justice has declared that the Court's Establishment Clause rulings are in "hopeless disarray."\textsuperscript{161} Another pronounced that the Establishment Clause holdings are in need of "[s]ubstantial revision."\textsuperscript{162}

The test established in Lee v. Weisman hardly constitutes a breakthrough. To the contrary, it could be argued that Lee's holding makes matters worse because

\textsuperscript{151} Id. at 17.
\textsuperscript{152} Id. at 15-16.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 16.
\textsuperscript{155} Id. at 16-17.
\textsuperscript{156} Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
\textsuperscript{157} Id. at 614.
\textsuperscript{158} See supra notes 149-50 and accompanying text.
\textsuperscript{159} Lemon, 403 U.S. at 614.
\textsuperscript{162} County of Allegheny v. ACLU, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part).
it requires courts to look at two tests: both Lemon and Lee. In fact, the Adler court faced such a predicament. Rather than guessing as to the appropriate standard, the court in Adler analyzed the facts using both Lemon and Lee.\(^{163}\) This leads to confusing, and as of yet, unresolved issues. Should Lee only apply to public-school prayer cases? Can a school board choose which doctrine it would like to utilize, or must it consider both? As a corollary, what if a school's policy fulfills the dictates of one of the two policies, but not the other?

Lee seems to signify that the Court cannot create one consistent Establishment Clause doctrine. Rather, the Court appears to be making Establishment Clause rulings on an ad hoc basis. The Supreme Court case of Marsh v. Chambers\(^ {164}\) reinforces this theory. In Marsh, the Court considered a challenge to the constitutionality of a prayer that opened each legislative day of the Nebraska legislature; a taxpayer-funded chaplain delivered the prayer.\(^ {165}\) Admittedly, the Court decided this case before it decided Lee, so, understandably, the Court did not consider the Lee test to determine the outcome of Marsh. What is perplexing is why the Court disregarded Lemon and found the Nebraska prayer constitutional. Indeed, the Eighth Circuit Court of Appeals applied Lemon and found the prayer to be unconstitutional under the Lemon standard.\(^ {166}\) The Court chose to disregard Lemon, however, considering instead that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."\(^ {167}\) The Court pointed out that the First Congress appointed chaplains in both the House and Senate to deliver prayers.\(^ {168}\) The Court reasoned that "[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress."\(^ {169}\) The Court did attempt to qualify its holding:

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical 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 — their actions reveal their intent.\(^ {170}\)

\(^{163}\) Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1075 (11th Cir. 2000).
\(^{164}\) 463 U.S. 783 (1983).
\(^{165}\) Id. at 784.
\(^{166}\) Id. at 785-86.
\(^{167}\) Id. at 786.
\(^{168}\) Id. at 787-88.
\(^{169}\) Id. at 788.
\(^{170}\) Id. at 790.
The Court also acknowledged that at least two Founding Fathers opposed prayer in the Continental Congress. \(^{171}\) The Court reasoned that this fact demonstrated that the Founding Fathers specifically considered the issue of prayer and found it to be constitutional, even when differing religious views existed among those present. \(^{172}\) The Court did qualify its holding by asserting that this matter involves adults, who are not easily impressionable or subject to peer pressure. \(^{173}\)

In *Marsh*, it seems the Court did not wish to overturn the historic and seemingly popular practice of legislative prayer that occurs all around the nation, including the U.S. Congress; therefore, the Court chose to disregard *Lemon*. The Court justified the decision by the age of the prayer participants, but this seems a feeble argument. The *Lemon* standard does not include a requirement that it only be applied to matters affecting those under the age of eighteen. \(^{174}\) While *Marsh* provides another example of the indeterminate nature of Establishment Clause doctrine, it also further darkens the already muddied waters of current Establishment Clause jurisprudence. For instance, the Tenth Circuit used *Marsh* as the basis for its holding in *Snyder v. Murray City Corp.* \(^{175}\) This case involved a city council that held a prayer before the opening of every meeting. \(^{176}\) In *Murray*, the city council decided to deny a specific individual the right to deliver his prayer, based on the content of his message. \(^{177}\) The Tenth Circuit approved the city council's decision, asserting that if a legislative body has the right to have a prayer delivered, it should have the right to decide who should deliver the prayer. \(^{178}\) The Tenth Circuit, like the Supreme Court, seemed unconcerned about *Lemon* or *Lee*, which the Supreme Court had decided at the time of this case. \(^{179}\)

One need only look to the long line of Establishment Clause cases, only some of which this note mentions, to realize that the Court's handiwork has proved unsuccessful. This creates significant problems because school officials who wish to create policies that conform with the Establishment Clause are not sure how to do so. In *Adler*, the Duval County School Board intentionally changed its policy in hopes of reflecting the law announced in *Lee*. \(^{180}\) By attempting to conform its policy with the Court's latest standard, the school district actually exposed itself to liability.

The Court's actions also create frustration because the Court deems some forms of religious expression appropriate within public schools. The Court has refused to declare that all religious interaction is inappropriate; rather, it has realistically...

171. *Id.* at 791.
172. *Id.* at 791-92.
173. *Id.* at 792.
174. See supra note 24 and accompanying text.
175. 159 F.3d 1227 (10th Cir. 1998).
176. *Id.* at 1228.
177. *Id.* at 1228-29.
178. *Id.* at 1232-34.
179. *Id.* at 1231.
acknowledged that some interaction between church and state is inevitable.\textsuperscript{181} However, the Court's actions will have a chilling effect on religious expression within public schools. Because public school officials cannot determine what the law is in this arena, they will logically avoid as much religious subject matter as possible to avoid potential liability, even to the point of inhibiting a student's religious expression. Before the new policy in\textit{ Adler}, the Duval County School Board decided that students would have no right to speak at graduation, limiting both free religious exercise and, more generally, free exercise of speech.\textsuperscript{182} While the Court has clearly pronounced that the Establishment Clause means that a state cannot advance or inhibit religion,\textsuperscript{183} school officials who stifle a student's right to free expression and exercise will be doing that which the Court has forbidden: inhibiting religion, not to mention free speech. This is the danger of ad hoc balancing: it creates a de facto way for the Court to gut the basic tenets of the Establishment Clause and, in a broader sense, the First Amendment. Despite the Court's holding in\textit{ Marsh}, this danger should not apply only to children and public schools. This limitation could apply to any situation; one cannot know when or why because the Court has been so haphazard.

\textbf{B. The Court Should Adopt a New Establishment Clause Doctrine}

The Court's ad hoc Establishment Clause balancing should not continue. The Court has created a maze of tests, qualifications, and exceptions that produces little consistency and leads to confusion. Rather than providing a solution to these difficult questions of law, the Court has only created more controversy. The U.S. Supreme Court should look to two possible solutions, which combined would create a workable Establishment Clause doctrine: (1) Courts should consider this nation's history and tradition when interpreting the Establishment Clause; and, (2) The U.S. Supreme Court should officially adopt the "Endorsement Test" as outlined by Justice O'Connor in\textit{ Lynch v. Donnelly}.\textsuperscript{184}

\textit{1. History and Tradition Provide the Foundation for the Establishment Clause}

One possible solution to the current Establishment Clause dilemma lies in the\textit{ Marsh} opinion. In\textit{ Marsh}, the Court looked to history and tradition and found that legislative prayer was constitutional under the Establishment Clause.\textsuperscript{185} Perhaps the courts should begin to disregard\textit{ Lemon} and\textit{ Lee}, like the Supreme Court did in\textit{ Marsh} and the Tenth Circuit did in\textit{ Murray}, and look to our nation's history and traditions to interpret the Establishment Clause more precisely. Such an approach provides a key advantage: although history can be subject to viewpoint

\begin{itemize}
\item \textsuperscript{181} See supra notes 151-59 and accompanying text.
\item \textsuperscript{182} See supra note 85 and accompanying text.
\item \textsuperscript{183} See supra note 153 and accompanying text.
\item \textsuperscript{184} 465 U.S. 668 (1984).
\item \textsuperscript{185} See supra notes 164-67 and accompanying text.
\end{itemize}
manipulation, it provides all concerned with the Establishment Clause a foundation that is less subject to judicial manipulation.

In *Lee*, Justice Scalia discussed the importance of history and tradition in relation to the Establishment Clause in his dissenting opinion. Justice Scalia provided examples of how, "[f]rom our nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations." His opinion discussed the religious nature of Thanksgiving proclamations given by the President, the legislative prayer at issue in *Marsh*, and the invocation that opens sessions of the U.S. Supreme Court to justify the strong tradition of public prayer in this nation. He then detailed the long tradition of prayers being delivered at public-high-school graduations, dating back to the first public-high-school graduation in 1868.

Justice Scalia correctly considered history and tradition in order to determine if the Establishment Clause has been violated. However, the Court should not adopt an exclusive history and tradition test to determine if an action violates the Establishment Clause. It would be a mistake to presume that all actions conducted in our nation's history are constitutional simply because they are a part of the national "fabric," as suggested by Justice Scalia. Likewise, it is also folly for a court to disregard those customs and norms that have become a part of this nation's traditions, for these traditions should get the benefit of the doubt when their constitutionality is called into question. History and tradition should be reviewed as an indicator of whether an action has become accepted by the American people as part of our national experience, but should not be the ultimate test of whether an action is constitutional.

For instance, the Christmas holiday could prove problematic under both *Lemon* and *Lee*. Every year, in presumably every public school district in this nation, our children receive several weeks of vacation between semesters. While this vacation time does provide a break for the children, the primary reason for the existence of this break is to celebrate Christmas, a time for families to gather and celebrate the birth of Jesus Christ.

Looking to the *Lemon* test, a court could find this holiday break to be constitutionally suspect. Considering the first prong, it is arguable that the primary purpose of the policy is not secular; rather, it is to allow all public schoolchildren to celebrate Christmas, even those who are not Christian. Certainly, such a policy's primary effect could also advance religion, specifically Christianity, but perhaps even those of Jewish faith, since Hanukkah is celebrated at approximately the same time as the school break. This would violate *Lemon*'s second prong. By allowing students time off, they are able to recognize the significance and importance of Christmas. Moreover, non-Christian children realize the importance of Christianity in this country when school closes for

187. *Id. at 633* (Scalia, J., dissenting).
188. *Id. at 635* (Scalia, J., dissenting).
189. *Id. at 635-36* (Scalia, J., dissenting).
nearly a month. This situation could cause these children to feel isolated or different. Could one argue that imposing such feelings on non-Christian children actually inhibits their religious beliefs or lack thereof? The third prong, prohibiting excessive government entanglement with religion, is more difficult to find. However, if a court were inclined, it could argue that closing school buildings and denying children a public education for one month to celebrate a religious holiday could constitute such an entanglement.

Lee could also be used to eliminate a holiday break. While Lee concerns school prayer and does not provide a general Establishment Clause test, one could easily reason that closing a public school and denying all children one month's education constitutes coercive action by the State. School children have no choice in the matter. Even if their family's most important religious holiday falls in October, they still must take their holiday break in December.

While arguments can be made that a Christmas-break policy violates Lemon and Lee, it is hard to imagine that any court in the nation would make such a finding. The Christmas break has become accepted as part of the history and tradition of this nation. It is accepted, welcomed, and enjoyed by virtually all schoolchildren, regardless of their faiths. A court may argue that there are numerous secular purposes for such a holiday break, such as the bad winter weather in northern regions of the country or the fact that schools want to give students and teachers a needed break to avoid burnout. However, it is impossible to argue that schools originally authorized the holiday break for any other purpose than to give students time with their families to celebrate Christmas.

Considering history and tradition provides a standard, other than an individual judge's own worldview, for a court to follow. One of the biggest problems with the current Establishment Clause jurisprudence is that it provides no consistency. The Supreme Court's doctrines in Lemon and Lee are malleable enough to allow a judge to find however she wishes, and then to manipulate the Court's language to fit her holding. By looking to history and tradition as a factor in Establishment Clause cases, the Court could create an institutional "check" on judges. In our legal system, which is built upon the concept of stare decisis, it is imperative that courts use some consistent standard to make judgments. Otherwise, legal continuity is lost. The law can be interpreted in different ways for different entities in different courts. This is exactly what is happening today with Establishment Clause jurisprudence: judges who desire more religious involvement with government rule accordingly, and those who wish to strengthen the wall between church and state make their pronouncements. While this type of viewpoint discrimination may be inevitable to some degree, the U.S. Supreme Court can take action to help curb it by holding that history and tradition should be considered relevant to constitutionality in Establishment Clause cases.

190. Stare decisis is "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).

https://digitalcommons.law.ou.edu/olr/vol54/iss4/4
Certainly, the Adler policy is rooted in history and tradition, based on Justice Scalia's recognition of the history of public-school graduation prayer.\textsuperscript{191} Interestingly, however, the Adler dissenting opinion also attempted to use history and tradition to defeat the graduation speech policy.\textsuperscript{192} If the dissent can use the history and tradition of the school district's graduations in an attempt to defeat the policy, then those supporting the policy should also be able to use its history and tradition to support such a policy, particularly if the school district wrote the policy in response to previous judicial holdings.\textsuperscript{193}

History and tradition are an important part of this nation. The courts should not disregard these factors when considering Establishment Clause questions. They should look to history and tradition to determine if there is a national consensus on an action that may help the decision-making process. However, situations will arise, such as in Lee, where history and tradition support the action, yet it should not be found constitutional. In order to make such a determination, the Court should use an "Endorsement Test."

2. The Endorsement Test Should Be the Black-Letter Standard

In Lynch v. Donnelly,\textsuperscript{194} Justice O'Connor attempted to improve Establishment Clause jurisprudence by modifying the Lemon test to create an Endorsement Test. The Endorsement Test states that the government violates the Establishment Clause if its conduct has either (1) the purpose or (2) the effect of conveying a message that "religion or a particular religious belief is favored or preferred."\textsuperscript{195} To apply the "purpose" element of the Endorsement Test, the court must ask "whether the government intends to convey a message of endorsement or disapproval of religion."\textsuperscript{196} For the effect element, it "is crucial ... that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."\textsuperscript{197} Justice O'Connor also made clear that the divisiveness of a government practice cannot, without more, provide grounds for finding the practice unconstitutional; rather, "the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself."\textsuperscript{198}

Based on its language alone, the Endorsement Test may not seem to be an improvement over Lemon or Lee. The language is vague enough to be potentially manipulable. However, requiring courts to look to the history and tradition of a government action, in combination with the Endorsement Test, could provide a more consistent doctrine. Justice O'Connor recognized this in Lynch. Discussing the legislative prayer in Marsh, the governmental recognition of Thanksgiving as

\textsuperscript{191} See supra note 189 and accompanying text.
\textsuperscript{192} See supra notes 130-32 and accompanying text.
\textsuperscript{193} See supra notes 87-88 and accompanying text.
\textsuperscript{196} Lynch, 465 U.S. at 691 (O'Connor, J., concurring).
\textsuperscript{197} Id. at 692 (O'Connor, J., concurring).
\textsuperscript{198} Id. at 689 (O'Connor, J., concurring).
a holiday, the phrase "In God We Trust" printed on coins, and court invocations as examples of relationships between church and state, she reasoned:

Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. 199

The Adler policy could clearly be found constitutional using the "history and tradition approach" coupled with the Endorsement Test. The history and tradition of graduation prayer is clearly established. 200 Additionally, the policy's language indicates that the Duval County School Board wished to provide a student with the opportunity to speak at graduation. The policy does not have the purpose or the effect of ensuring a religious message would be delivered at graduation. By permitting the student-selected speaker to say what she choose, subject to any school-imposed decency requirements per Fraser, the Duval County School Board did not intend to approve or disapprove of religion, even if the student gave a religious message. Therefore, the policy does not violate the purpose element of the Endorsement Test. Nor does the policy violate the effect element of the Endorsement Test. After the enactment of the policy, some of the selected high school speakers within the school district did not even choose to deliver a prayer. 201 Thus, it seems ridiculous to argue that the effect of the Adler policy is to ensure that a prayer will be delivered at high school graduations. Under the Adler policy, a student could deliver a prayer if she chose to do so. Likely, the prayer could offend some in the audience and could even cause divisiveness in the crowd. However, as Justice O'Connor noted, divisiveness alone is not enough to render a government practice unconstitutional. 202 The end result of the process may be offensive to some, but so long as the process itself is constitutional, then it should be allowed to exist.

The Court should adopt a new Establishment Clause standard so that everyone in society, not just public school districts, can better understand the boundaries between church and state. The current Establishment Clause jurisprudence, anchored by Lemon and Lee, results in ad hoc balancing. Rather than perpetuate these easily exploitable holdings, the Court should look to the history and tradition of the government practice in question while adopting Justice O'Connor's Endorsement Test as the black-letter law for future Establishment Clause questions.

199. Id. at 693 (O'Connor, J., concurring).
200. See supra note 189 and accompanying text.
201. See supra note 91 and accompanying text.
202. See supra note 198 and accompanying text.
C. The Supreme Court Correctly Upheld the Eleventh Circuit's Decision

Although the Court needs to adopt a new Establishment Clause standard, one must look to the Court’s current clutter to determine the constitutionality of the policy in Adler. Based on the Court’s decisions, the Eleventh Circuit correctly concluded that the policy in question is constitutional, and the Supreme Court properly upheld the Eleventh Circuit’s decision by denying the petition for writ of certiorari. The Engel Court plainly held that a government-written prayer violates the Establishment Clause, even if the prayer is neutral and of neutral content.203 Engel reasoned that prayer is a "purely religious function,"204 and therefore, the First Amendment’s Establishment Clause is "a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer people can say."205 Clearly, the Adler policy did not provide for a government-written prayer. The policy stated that no employee of the State could have any role in the development of the student’s comments, if the student body decided to have a graduation speaker.206 However, if the Duval County School Board decided to allow graduation speakers, but ban the speaker from expressing religious views, one could see how Engel may be violated. In this hypothetical, the government would be attempting to control, support, or influence prayer, a situation that Engel proscribes.207 Such a policy would violate an individual’s freedom of religious expression and speech.

The Lee Court also provided justification for the policy in Adler. Lee reasoned that "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."208 It emphasized that despite best intentions, the Establishment Clause “do[es] not permit school officials to assist in composing prayers as an incident to a formal exercise for their students.”209 The Court seemed particularly sensitive to the reality that the school’s role in establishing the graduation prayer would create public and peer pressure on students to participate in the prayer, or at the least, remain respectfully compliant through the prayer.210 It concluded that this type of pressure amounted to de facto coercion. Should a student object to the prayer, she would have to either remain silent contrary to her views or protest by refusing to attend graduation.211 However, the Court also placed a disclaimer on the extent of its Lee holding. It stressed, "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as

204. Id. at 435.
205. Id. at 429.
206. See supra note 89 and accompanying text.
207. See supra note 205 and accompanying text.
209. Id. at 590.
210. Id. at 593.
211. Id. at 593-94.
nonreligious messages, but offense alone does not in every case show a violation.\textsuperscript{212} The Court also proclaimed that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.\textsuperscript{213}

The \textit{Adler} policy clearly falls within the dictates of \textit{Lee}. The Duval County School Board did not write a prayer, nor did it impose a graduation prayer. Rather, in an attempt to be consistent with the \textit{Lee} holding (among others), the school board allowed the students to choose a graduation speaker, if they so desired. Indeed, it is entirely possible that some in the crowd, perhaps even all in the crowd, could be offended by the content of the student's speech. Such offense does not mean that the school cannot constitutionally offer a process that affords students an opportunity to speak, even if the student uses the opportunity for religious speech.

If the policy allows the students to select any graduation speaker they wanted, and the students selected the pope, would the school forbid the pope's speech for fear that he may deliver a religious message? It would be difficult to argue that anyone could perceive that the school endorsed the pope's message or that the pope delivered his message on behalf of the school. Yet by choosing the pope, the students would almost assuredly receive at least a quasi-religious message. What if the students selected Britney Spears, a choice the school permitted because she is not a religious figure, and Britney proceeded to deliver a two-hour lecture on her interpretation of the New Testament? Should the school be liable for the students' selection simply because the speaker gave a religious message? There is no difference between these hypothetical situations and the \textit{Adler} policy except that in \textit{Adler}, the policy permitted the students to select one of their fellow classmates as the speaker. So long as he does not violate school policy, the designated student should be permitted to speak.

Despite the U.S. Supreme Court's advice to analyze \textit{Adler} in light of \textit{Santa Fe}, the cases are clearly distinguishable. The \textit{Santa Fe} Court expressed concern about a student selection process with the sole purpose of electing a student to give a religious message. The Court stated, "Santa Fe's student election system ensures that only those messages deemed 'appropriate' under the District's policy may be delivered."\textsuperscript{214} The Court clarified that "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."\textsuperscript{215} The Court determined that while students decided whether to have a religious speaker, the school district ultimately designated the election as a school policy, and therefore the election comprised

\textsuperscript{212} Id. at 597.
\textsuperscript{213} Id. at 598.
\textsuperscript{215} Id. at 313.
an unconstitutional state action. While Santa Fe and Adler contain similar facts, there is one crucial distinction: in Santa Fe, the students decided whether to have a religious speaker, and if so, who it should be; in Adler, the students decided whether to have a fellow student speaker, and if so, who it should be. The facts in Santa Fe constituted a situation where the State attempted to limit a student's expression and speech to one narrow category; in Adler, the State attempted to provide freedom to a student's expression and speech.

In fact, the most troublesome effect of reversing Adler would have been the chilling effect on students' ability to think critically and to feel free to express themselves in an academic environment. The Tinker Court clearly held that students do enjoy constitutional rights of free speech and expression. The Court justified this holding on several grounds. First, the Court concluded that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court reasoned that the school did not direct its policy banning armbands at students' appearance, like a clothing or hair regulation; rather, the school unconstitutionally directed its policy at controlling the expression of students. The Court found freedom of speech and expression to be particularly important in our nation's schools, asserting a need for a free exchange of ideas and thoughts without school (and consequently, government) interference. Moreover, the Court emphasized that "personal intercommunication" is an "important part of the educational process." Finally, the Court made it clear that such freedom of expression did not merely apply to time spent in the classroom; rather, the educational process (including the right to free expression) extended to any authorized campus activity.

While the Court has narrowed Tinker in important ways, none of those restrictions apply to the Adler policy. Fraser states that a school can restrict offensive speech, so long as there is a school policy forbidding the speech. In Adler, the policy in question does not proscribe certain types of speech; rather, the policy attempts to encourage students' free speech by permitting a student-selected speaker to say whatever she chooses. However, even assuming the school district in Adler had an offensive-speech policy similar to the one in Fraser, it would only narrowly restrict one area of student speech: vulgar or lewd content, as defined by the school policy. There is a difference between offensive speech

216. Id. at 311.
217. See supra note 30 and accompanying text.
218. See supra note 89 and accompanying text.
219. See supra note 57 and accompanying text.
221. Id. at 507-10.
222. Id. at 512.
223. Id.
224. Id. at 512-13.
225. See supra notes 60-72 and accompanying text.
226. See supra note 67 and accompanying text.
that offends others due to its inappropriateness, which a school can restrict, and speech that offends others because they disagree with its content. A policy such as the one in Fraser would have no bearing on whether a student could deliver a religious message.

Kuhlmeier, also an interesting case, held that a school could restrict the content of student speech if the school’s actions reasonably related to educational concerns.227 However, Kuhlmeier does not apply to Adler. The Duval County School Board does not attempt to control the content of student speech. It offered a special opportunity for students to select a speaker who would have the opportunity to address her fellow students. The Duval County School Board does not attempt to exercise editorial control; in fact, the Adler policy is constitutional precisely because the school district does not control or dictate the content of the speech of the student speaker. The only role the State plays is allowing the students to select a student speaker for their own graduation ceremony.

Perry’s discussion of forums also does not apply to the Adler policy. Forums become relevant when the government attempts to control an individual’s speech.228 Even if the Duval County School Board creates a public forum by allowing the students to select a speaker, the school district does not attempt to control the content of student speech.229 Based on Tinker, a school cannot control speech unless it materially and substantially disrupts a school’s activities, operations, or the rights of others. Fraser allows a school to punish lewd and vulgar speech. Kuhlmeier states that a school can control the content of curriculum, so long as the restriction is limited to a legitimate pedagogical concern. None of these holdings would render the Adler policy unconstitutional.

D. Oklahoma and the Establishment Clause

While Oklahoma has yet to consider a public-school-prayer Establishment Clause case, it presents the ideal example of why the U.S. Supreme Court should adopt a new standard. If an Oklahoma court looked to the U.S. Supreme Court and the Tenth Circuit Court of Appeals holdings, it would certainly have a wide array of discretion to decide its particular case. While the Tenth Circuit seems reliant on Lemon,230 perhaps Oklahoma would utilize Lee’s reasoning, since it specifically addressed school prayer. Regardless, the inconsistency of Establishment Clause jurisprudence makes it futile to attempt to predict an outcome in the absence of specific facts.

V. Conclusion

Public-school prayer has been debated and litigated for decades. While courts have recognized the impracticability of placing a strict wall between church and state, they have also struggled to produce a clear, consistent doctrine concerning

227. See supra note 69 and accompanying text.
228. See supra notes 73-83 and accompanying text.
229. See supra note 89 and accompanying text.
230. See supra notes 38, 43, 47 and accompanying text.
the Establishment Clause. When considering Establishment Clause issues, specifically public-school prayer, the U.S. Supreme Court needs to modify its current approach by looking to the history and tradition of government practices and adopting an Endorsement Test. Continuing on its current path will not only produce confusing and inconsistent results, it will also unconstitutionally inhibit religious expression.

The Supreme Court properly upheld the Eleventh Circuit's finding that the Adler policy is constitutional. It not only meets the requirements of Lemon and Lee, it also obeys all of the public-school-prayer precedent. The Supreme Court's ruling in Adler has only compounded the confusion. Because the Court did not issue a written opinion, the nation can only continue to guess at the true meaning of the Establishment Clause. However, at least for now, students still maintain a right to speak that is free from content or viewpoint discrimination by school authorities.

Ron Shinn