



THE CONSTITUTIONALITY OF PRAYER AND STUDENT RELIGIOUS EXPRESSION AT PUBLIC UNIVERSITY GRADUATIONS

Advocates of the so-called “separation of church and state” have complained that invocations and benedictions at public university graduations violate the Establishment Clause of the First Amendment.¹ At the same time, college students often have the opportunity to express a personal message during a graduation event (e.g., through an event program, personal message when walking across stage, etc.). This memorandum analyzes the constitutionality of prayers and student religious expression at public university graduations.

Alliance Defending Freedom is an alliance-building legal ministry that advocates for the right of people to freely live out their faith. We frequently assist students, faculty, staff, and administrators at public colleges and universities in understanding their rights and responsibilities concerning religious expression. Each legal situation differs, so the information provided below should be used only as a general reference and should not be considered legal advice.² If you think your rights have been violated as a result of a restriction on your religious expression at a public college or university or if you want to protect students’ religious expression on campus, please contact our Legal Intake Department so that we may review your situation and possibly assist you. You can reach us at 1-800-835-5233, or visit our website at www.ADFLegal.org and select the “Request Legal Help” button to submit a request for legal assistance.

I. The Constitutionality of Graduation Invocations and Benedictions at Public Universities

A. Background on the Supreme Court’s Extracurricular Prayer Cases

In *Lee v. Weisman*, 505 U.S. 577 (1992), the United States Supreme Court held that a public school district violated the Establishment Clause by inviting a local cleric to deliver a school-sponsored prayer at middle school and high school graduations. Nearly a decade later, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Court held that a public school violated the Establishment Clause by permitting high school students to vote on whether to have student-led and student-initiated prayer before football games. Both *Lee* and *Santa Fe* focused on the coercive nature of these religious practices in light of the young age of the students and the appearance of

¹ See, e.g., Jeff Schapiro, *West Point Military Academy at Center of Prayer Debate*, CHRISTIAN POST, Jan. 12, 2013, available at <http://www.christianpost.com/news/west-point-military-academy-at-center-of-prayer-debate-88139/#YAfhZiOu7hrfiugu.99> (last visited Jan. 25, 2013).

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government endorsement of religion. These two cases, however, do not answer whether graduation invocations and benedictions are constitutional at public university graduations.³

B. Invocations and Benedictions at Public University Graduations Do Not Coerce Participation in Religion.

A student's age is a significant factor in the constitutionality of graduation prayer at public educational institutions. *Chaudhuri v. Tennessee*, 130 F.3d 232, 239 (6th Cir. 1997). A central concern of the Court in *Lee* was that the official graduation prayers coerced young students to participate in religious practices. "[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. *Lee*, 505 U.S. at 592. The Court contrasted "the dissenter of high school age," which it described as "adolescents [who] are often susceptible to pressure from their peers," with "mature adults" for whom peer pressure is a lesser concern. *Id.* at 593.

A public college campus is occupied with "mature adults" and the "[t]he First Amendment guarantees wide freedom in matters of adult public discourse." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). "University students are . . . less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981). University seniors are adults, not children who are susceptible to coercion. Moreover, some graduation commencement events are not mandatory, and even if they are attendees are not required to participate in the prayers or pay attention to them. *Chaudhuri*, 130 F.3d at 239.

Graduation prayers do not coerce college students to participate in religion. In *Tanford v. Brand*, 104 F.3d 982, 983 (7th Cir. 1997), the Seventh Circuit held that Indiana University's inclusion of an invocation and benediction during commencement did not violate the Establishment Clause. The court ruled "there was no coercion – real or otherwise – to participate" in the prayers because students could choose not to attend the event or simply "ignore the cleric's remarks." *Id.* at 985. In addition, the students were mature adults, not children in primary or secondary schools. *Id.* In *Chaudhuri*, 130 F.3d at 233, Tennessee State University offered invocations and benedictions at university events. The court ruled there was no risk of coercion because attendance at many of the events was not mandatory, and even if it was, attendees were not required to participate in the prayers. *Id.* at 239; *cf. Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) (finding daily supper prayers at military college violated the Establishment Clause due to their coercive nature). One "may have found the prayers offensive, but that reaction, in and of itself, does not make them unconstitutional." *Chaudhuri*, 130 F.3d at 239 (citing *Lee*, 505 U.S. at 597). Public university graduation prayers do not violate the coercion test.

³ For an analysis of student-initiated and student-led prayers at public high school graduations and baccalaureates, please see our Memorandum on the "Constitutionality of Prayer at High School Graduation/Baccalaureate."



C. Invocations and Benedictions at Public University Graduations Do Not Endorse Religion.

Even analyzing public university invocations and benedictions under the traditional three part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), does not yield an Establishment Clause violation. According to that test, state-sponsored activity can pass Establishment Clause muster if it has a secular purpose, neither advances nor inhibits religion, and does not excessively entangle the government with religion. *Id.* at 612-13.

First, in considering whether the invocations have a “secular purpose” under *Lemon*, we ask “whether government’s actual purpose is to endorse or disapprove of religion.” *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). The historical practice of offering invocations and benedictions “is widespread throughout the nation,” *Tanford*, 104 F.3d at 986, and does not violate the Establishment Clause, because it is “simply a tolerable acknowledgement of beliefs widely held among the people of this country.” *Id.* (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)). The prayers “solemnize public occasions, express confidence in the future, and encourage the recognition of what is worthy of appreciation in society.” *Chaudhuri*, 130 F.3d at 236; *cf. Mellen*, 327 F.3d at 370 (finding the historical tradition of daily supper prayers at a military college did not lend them constitutional support because “public universities and military colleges, such as VMI, did not exist when the Bill of Rights was adopted”). Many universities may even decide that there is pedagogical value to solemnizing graduation for which they deserve “decent respect.” *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2988-89 (2010). A public university’s desire to solemnize significant events in a student’s education with non-sectarian invocations is steeped in sound tradition and pedagogy.

Second, we ask whether the invocations “advance or inhibit” religion, which requires us to consider the reaction of a hypothetical reasonable observer. *Chaudhuri*, 130 F.3d at 237. Public universities are not endorsing religion by occasionally utilizing invocations and benedictions to solemnize an event. Any reasonable observer would see the invocations serve the secular purpose of dignifying events and connecting the university’s current students to its grand history. *See id.* at 236-38 (“A reasonable observer, it seems to us, would conclude that the nonsectarian prayers delivered at [university] events were intended to solemnize the events and to encourage reflection.”); *Tanford*, 104 F.3d at 986 (“inclusion of a brief non-sectarian invocation and benediction does not have a primary effect of endorsing or disapproving religion”). No religion is advanced over another by non-sectarian prayer. The prayers do not express any official religion, and do not compel students to assent to a particular belief.

Third, we ask whether the invocations excessively entangle the state with religion. *Lemon*, 403 U.S. at 613. The entanglement between a public university and cleric delivering an invocation or benediction at a graduation ceremony is *de minimis* at best, and certainly not something that violates the Establishment Clause for being excessive entanglement with religion. *See Chaudhuri*, 130 F.3d at 238 (finding entanglement “is, at most, *de minimis*”); *Tanford*, 104 F.3d at 986 (finding entanglement “is *de minimis* at best”). Moreover, these prayers do not entangle the government with religion because they do not proselytize students and are prepared by private individuals. So long as public



universities neither review the prayers nor prescribe guidelines for their content, *Chaudhuri*, 130 F.3d at 238, they need not strip “the public square of every last shred of public piety,” *id.* at 236.

II. The Constitutionality of Student Religious Expression at Public University Graduations

Often students may make a personal statement during a graduation or commencement exercise at their public university. The statement may take the form of a printed message in an event program or the reading of a “thank you” message while the student walks across the graduation stage and receives her diploma. In either case, or in any similar situation, the public university cannot exclude this private religious expression pursuant to the Establishment Clause. That clause merely “requires the state to be a neutral in its relations with . . . religious believers and non believers; it does not require the state to be their adversary.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). As the Supreme Court stated:

Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression . . . Indeed, in Anglo American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free speech clause without religion would be Hamlet without the prince.

Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).

Indeed, the Court has held for many years that private religious speech, even in public settings, does not implicate the Establishment Clause, which applies only to government speech. There 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.” *Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis in original). While private religious expression may be regulated in certain limited contexts where there is a real danger of the appearance of government endorsement, or coercion of a captive audience to participate in or be present for devotional activities, those circumstances do not exist when students offer personal religious sentiments during graduation exercises.

Allowing individual students to express themselves during graduation activities, such as personal statements in a graduation event program, even when some students choose to acknowledge their religious beliefs in those statements, conveys a message of governmental neutrality toward religion, which is what the Establishment Clause requires. And certainly no danger of perceived endorsement can be said to exist, since no reasonable person would attribute those statements to anyone except the graduate.

Moreover, the censorship of a college student’s religious viewpoint may actually violate the Free Speech Clause of the First Amendment. Government discrimination against certain viewpoints, religious ones included, is unconstitutional. *Rosenberger v. Rector & Visitors of the Univ. of*



Va., 515 U.S. 819, 829 (1995). “[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (referring to holdings in *Rosenberger*, 515 U.S. 819, and *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)). Personal religious expression of students during graduation ceremonies is constitutional.

III. Conclusion

Offering invocations and benedictions at public university graduations does not violate the Establishment Clause because they are historical traditions employed by universities to solemnize a milestone event in a student’s education, they do not coerce participation, and they do not endorse any particular religion. Likewise, when public universities open public forums for private expression by students at a graduation, they cannot exclude religious expression.