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ABSTRACT

This Article, a contribution to a symposium on the constitutional jurisprudence of the United States Court of Appeals for the Eleventh Circuit, focuses on the Eleventh Circuit's opinion in *Adler v. Duval County*. *Adler* involved a policy that permitted students to vote on whether to deliver opening and/or closing "messages" at high school graduation ceremonies. The Eleventh Circuit, sitting en banc, upheld the policy against an Establishment Clause challenge. After the Supreme Court remanded the case for reconsideration in light of its decision in *Santa Fe Independent School District v. Doe*, which outlawed a similar policy in the context of high school football games, the court, insisting that *Santa Fe* was distinguishable, again upheld Duval County's policy. I argue that the Eleventh Circuit's analysis in *Adler* was wrong, and indeed can be seen as little more than an act of willful resistance to the Supreme Court's opinion in *Santa Fe*.

Beyond this simple doctrinal criticism, however, this Article suggests that both *Santa Fe* and *Adler* are fruitful subjects of study for what they say about two issues that have drawn relatively little sustained and serious attention: the role of majoritarian elections within the Establishment Clause, and the relationship between the Establishment Clause and the demographics of religion in local communities. I argue that John Hart Ely's representation-reinforcement theory of judicial review, presented in his influential work *Democracy and Distrust*, can contribute significantly to our understanding of both of these issues. In the first case, Ely's theory shows why majoritarian election processes that permit or encourage school prayer cannot generally insulate schools from Establishment Clause challenges. In the second, I argue that Ely's theory

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can help dislodge the usual baseline assumptions about the religious pluralism of the United States, which are accurate at the national level but collapse at the level of the overwhelmingly religiously homogeneous local communities in which many Establishment Clause cases arise. On this understanding, I argue that, contrary to some recent arguments, the Establishment Clause might best be understood as being more properly concerned with *state* and *local* establishments of religion than with *federal* establishments of religion.

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INTRODUCTION

I was proud to serve as a law clerk on the Eleventh Circuit in 1998–99. I was happy to contribute to the work of the court, fortunate in finding lifelong friends in my co-clerks, and especially grateful to the judge for whom I clerked, the Honorable Ed Carnes, for the opportunity to learn a great deal in his chambers.

Gratitude is not the same thing as obsequiousness, however, and it must be said that every now and then a good court can get things quite wrong. So it is with the decision I will discuss here.

The Eleventh Circuit's en-banc decision in 2001 in the case of *Adler v. Duval County School Board*[1] was actually the *second* occasion on which the full court erred. In the same case a year earlier, the en-banc court upheld a school-district policy that submitted to a student vote the question of whether to have a student volunteer give a short opening or closing message at high school graduation exercises in Duval County, Florida.[2] The Supreme Court vacated that judgment and remanded it to the Eleventh Circuit for reconsideration in light of its recent decision in *Santa Fe Independent School District v. Doe*.[3]

On remand, the Eleventh Circuit did not budge an inch. *Santa Fe*, it

1. Adler v. Duval County Sch. Bd. (*Adler IV*), 250 F.3d 1330 (11th Cir. 2001).

2. *See* Adler v. Duval County Sch. Bd. (*Adler III*), 206 F.3d 1070 (11th Cir. 2000), *vacated*, 531 U.S. 801 (2000).

3. 530 U.S. 290 (2000). *See Adler*, 531 U.S. 801 (2000).

said, "does not alter the outcome of this case."[4] The high school graduation "message" policy—and let us now call it what it is, a high school graduation prayer policy—remained permissible. The votes changed: Two additional judges joined the two judges who had dissented from the earlier en-banc judgment. The result did not.

In this Article, I argue that the dissenters had the better of the argument. Both before the Supreme Court's ruling in *Santa Fe*, and even more clearly after it, Duval County's graduation prayer policy was unconstitutional, a victim not only of the circumstances of its promulgation but also of the mechanics of the policy itself. The policy plainly, and with a plain intent, accomplished what the Establishment Clause forbids: to use the power and resources of the state to hold the exercise of religious belief hostage to the will of a political majority.

It is especially fitting that I should have an opportunity to address the Eleventh Circuit's error in *Adler v. Duval County* in the *University of Miami Law Review*. The University of Miami School of Law was privileged to have a long association with one of the giants of constitutional law scholarship, the late John Hart Ely.[5] Ely's signal contribution to constitutional law scholarship, the classic *Democracy and Distrust*,[6] mounted a powerful rearguard defense of the Warren Court that sought to find a coherent principle behind that Court's decisions. That principle, representation-reinforcement, holds that the Court's fundamental work under the Constitution is to safeguard "the basic democratic theory of our government."[7] One way it does so is to ensure that, where fundamental rights are concerned, there are no permanent minorities. If the channels of political change are to remain clear and function properly, the majority cannot exercise its will in ways that create a lasting division between the "ins" and "outs." *Democracy and Distrust* remains, in the words of one appreciative but critical writer, "the single most perceptive justificatory account of the work of the Warren Court and arguably of modern constitutional law more broadly."[8]

One could heartily wish that the majority of the Eleventh Circuit judges in *Adler v. Duval County* had consulted their copies of Ely's classic. If they had, I will argue, they would have seen their way clear to a sound resolution of the case. In particular, Ely's invaluable work helps

4. *Adler IV*, 250 F.3d at 1332.

5. *See, e.g.*, Anthony V. Alfieri, *John Hart Ely: Fathers and Sons*, 58 U. MIAMI L. REV. 953 (2004); Clark Freshman, *Behind the Process: Remembering John Ely's Compassion*, 58 U. MIAMI L. REV. 955 (2004); Patrick O. Gudridge, *Ely's Gifts*, 58 U. MIAMI. L. REV. 961 (2004).

6. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

7. *Id.* at 45.

8. Michael C. Dorf, *The Coherentism of* Democracy and Distrust, 114 YALE L.J. 1237, 1238 (2005).

illuminate two aspects of both *Adler* and *Santa Fe*, which were central to those cases but have not yet received enough sustained critical attention.

First, Ely's focus on representation-reinforcement helps us to understand a critical piece of the puzzle surrounding "voluntary" student-led prayer at graduations and other school ceremonies: why the use of majoritarian processes, such as student referenda, often will not and should not insulate a graduation prayer policy from constitutional attack, and what sort of processes *might* permit student prayers.[9]

Second, Ely's work helps us to achieve a better grasp of the real world of Establishment Clause challenges. It reminds us that although ours is a deeply religiously pluralistic nation, that pluralism is not equally distributed in every part of the country. Although we tend to think of Establishment Clause cases, and the nation itself, as an undifferentiated whole, Ely's focus on democratic representation and the Constitution helps remind us that in many regions, the overwhelming majority of the population belongs to one faith, and dissenters from that faith are a tiny minority. That fact, which often receives too little attention,[10] has important implications. In areas that are genuinely religiously pluralistic, and in which we might thus expect the most political division over religious questions, the political process is in fact most likely to achieve working accommodations between various religious groups rather than fomenting division. On the other hand, in areas that overwhelmingly favor one religion, the political process, viewed through an Elysian lens, is most likely to arrive at a policy that favors the majority and does the most harm to the tiny religious minority, whose members are most likely to face both official disapproval and unofficial harassment. A deeper consideration of the demographics of religion is thus likely to say much about both the real-world treatment of religious minorities (and majorities) and the unevenness of American religious pluralism.

Part I sets out the facts and law of the *Santa Fe* case. Part II focuses on the facts in *Adler* and the Eleventh Circuit's treatments of that case. Part III critiques the Eleventh Circuit's final en-banc opinion in *Adler* in light of the Supreme Court's ruling in *Santa Fe*. Part IV brings Ely into the mix. After briefly introducing Ely's theory of representation-reinforcement and noting his sparse treatment of the Religion Clauses under

9. Although this aspect of *Adler* and *Santa Fe* has certainly received scholarly attention, I find most of it unsatisfying. A singular exception, although I disagree with some of its conclusions, is Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 FORDHAM L. REV. 1147 (2002). I discuss Brady's article at length below. *See infra* Part IV.B.

10. The primary exception here is the work of Frank Ravitch. *See, e.g.*, FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS (1999).

that theory, it suggests that Ely's work may lead to a better understanding of both the failure of ersatz democratic processes to insulate school prayer policies from constitutional challenge, and the real-world unevenness of American religious pluralism.

I. *SANTA FE*

The Santa Fe Independent School District is a political subdivision representing about 4000 students in southern Texas.[11] The district, according to some complaining residents of the district, had a tangled history of Establishment Clause violations and the harassment of religious minorities. Its activities included the promotion of attendance at a Baptist revival, the distribution of Bibles on school grounds, the encouragement of student membership in religious clubs, and "chastising children who held minority religious beliefs."[12] Among its policies, prior to 1995, was the creation of the elected post of student council chaplain, responsible for "deliver[ing] a prayer over the public address system before each varsity football game for the entire season."[13]

Following litigation over these matters in federal district court, the school district adopted a series of new policies addressing student prayer at school events. The first set of policies dealt with graduation prayers. It provided, in its first iteration, that the senior class could "elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise."[14] The policy provided that a "yes" vote on a benediction or invocation would be followed by a student election to select a student "to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies."[15] A subsequent version of the policy eliminated the language requiring the prayers to be nonsectarian and nonproselytizing, but provided that the earlier policy would be effective in the event that the district was enjoined from enforcing the later policy.[16]

The second set of policies dealt with prayer at football games. It, too, came in two iterations. The first, titled "Prayer at Football Games," also provided for two elections—one to determine whether to give an invocation at football games, and the second to determine who would deliver it.[17] It also provided that if, but only if, a court required it, the

11. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000).
12. *Id.* at 295.
13. *Id.* at 294.
14. *Id.* at 296.
15. *Id.* at 296–97.
16. *Id.* at 297.
17. *Id.*

invocation should be nonsectarian and nonproselytizing.[18] The second version of the policy omitted the word "prayer" from its title and talked about "messages" and "statements" as well as invocations.[19]

The district court held that the policies dealing with both graduation and football games violated the Establishment Clause. On appeal, the Fifth Circuit, over a dissent, affirmed the district court, in an opinion that attempted to thread a path between two seemingly conflicting Fifth Circuit precedents. In one case, the circuit had upheld a nonsectarian and nonproselytizing student-led graduation prayer approved by student vote.[20] In the other, the court struck down a similar policy with respect to football games, distinguishing its earlier ruling on the grounds that football games were "far less solemn and extraordinary" than high school graduations.[21] The Fifth Circuit panel in *Santa Fe* emphasized again that its graduation decision had "hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a [student-led prayer] [p]olicy cannot survive."[22] The Supreme Court granted a writ of certiorari, limited to the question "[w]hether . . . student-led, student-initiated prayer at football games violates the Establishment Clause[.]"[23]

Writing for a six-to-three Court, Justice Stevens held that it did. He began by recognizing Justice O'Connor's earlier suggestion that "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."[24] In this case, the Court rejected the argument that the student-led prayer was private speech. It pointed out that the "invocations are authorized by a government policy and take place on government property at government-sponsored school-related events."[25] While the same might be said of private speech in government-owned public fora, the Court concluded that the fact that only one student was entitled to give the invocation over the whole year rendered the policy far too selective and limited to constitute a public forum.[26]

The Court then came to one of the distinctive features of the Santa

18. *Id.*

19. *Id.* at 298; the policy is set out in full at 298–99 n.6.

20. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992).

21. Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 407 (5th Cir 1995).

22. Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 823 (5th Cir. 1999).

23. Doe v. Santa Fe. Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999), *cert. granted*, Santa Fe Indep. Sch. Dist. v. Doe, 528 U.S. 1002 (U.S. Nov. 15, 1999) (No. 99–62).

24. *Santa Fe*, 530 U.S. at 302 (quoting Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990)) (emphasis in original).

25. *Santa Fe*, 530 U.S. at 302.

26. *Id.* at 302–03.

Fe policy: its use of a student vote to decide whether to have graduation speakers and to elect those speakers. Drawing on its recent opinion in *Board of Regents of University of Wisconsin System v. Southworth*,[27] the Court suggested that "the majoritarian process implemented by the District" was "problematic," because it did "nothing to protect minority views but rather places the students who hold such views at the mercy of the majority."[28] It suggested that the fact that students effectively voted on the content of the message—an invocation—before voting on the identity of the speaker distinguished it from an election process in which the speech is not so constrained, such as the election of a prom king or queen.[29] It held that the fact that a majority of students approved of the message did "nothing to protect the minority; indeed, it likely serves to intensify their offense."[30] It concluded with a flourish by quoting Justice Jackson's statement in *West Virginia Board of Education v. Barnette*: "[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections."[31]

The Court also found that the election process did not sufficiently insulate the school district from the religious content of the student invocations, rejecting the district's argument that the election served as a "circuit-breaker" separating the district from the speech.[32] To the contrary, the Court believed that the district was intimately involved in the speech, from the fact that the district had established the policy in the first place to the fact that it mandated a particular form of speech—an invocation, which common usage and local practice both suggested was intended to be religious in nature.[33] Beyond this, a host of details tied the government to the speech, in the Court's view: the fact that the speech would be delivered at a regularly scheduled school event, the fact that the government retained control over the public address system, and the fact that the pregame ceremony would be "clothed in the traditional indicia of school sporting events."[34] All of these factors led to the conclusion that a reasonable objective observer would "unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[35]

The Court also held that its view of whether an endorsement had

27. 529 U.S. 217 (2000).
28. *Santa Fe*, 530 U.S. at 304.
29. *Id.* at 304–05 n.15.
30. *Id.* at 305.
31. *Id.* at 304–05 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).
32. *Santa Fe*, 530 U.S. at 305 (quotation and citation omitted).
33. *See id.* at 305–07.
34. *Id.* at 307–08.
35. *Id.* at 308.

occurred in this case should be influenced by the "text and history of [the] policy" at issue.[36] As Justice Stevens wrote, "We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer."[37] That context included the "evolution of the current policy," under which the district had begun with an official office of student chaplain and ended with a regulation "candidly titled 'Prayer at Football Games.'"[38] And it included the surrounding background of the case, in which the district had been accused of a wide range of practices endorsing the beliefs of the local religious majority and scorning religious minorities.[39]

The Court's decision also turned on coercion. Its earlier decision in *Lee v. Weisman* had rejected a school graduation-prayer policy in part on the grounds that by expecting students to stand respectfully and silently during the invocation, the policy effectively coerced religious practice.[40] The school district urged the Court to distinguish its policy from the policy in *Lee* because both the majoritarian selection process and the voluntary nature of attendance at football games rendered any prayer in this case non-coercive. The Court rejected both arguments. As to the first argument, it held that the very fact that the election process created religious winners and losers within the district "encourages divisiveness along religious lines in a public school setting" and puts at issue a debate that the Establishment Clause intended to "remove . . . from governmental supervision or control."[41] On the second argument, it pointed out that some students—players, band members, and others—are in fact required to attend school football games, and in any event bowed to the reality (in southern Texas, if not elsewhere) that high school football is of immense importance to students and community members, and argued that students and others ought not be put to the choice of attending and hearing a religious speech or not attending at all.[42]

Finally, the Court responded to the objection that a ruling striking down the policy would be premature at the facial challenge stage. On this score, it concluded that some injuries had already occurred, regardless of the outcome of the vote, including the passage of the policy itself and the implementation of an election process that "subjects the issue of

36. *Id.*
37. *Id.* at 315.
38. *Id.* at 309.
39. *See id.* at 315.
40. *See* Lee v. Weisman, 505 U.S. 577 (1992).
41. *Santa Fe*, 530 U.S. at 310–11.
42. *See id.* at 311–12.

prayer to a majoritarian vote."[43] It held that as long as the policy itself had an unconstitutional religious purpose, the "simple enactment of [the] policy" would be unconstitutional.[44] It held that there was manifestly such a purpose: that "every Santa Fe High School student understands clearly [ ] that this policy is about prayer."[45]

Chief Justice Rehnquist filed an angry dissent on behalf of himself and Justices Scalia and Thomas, charging that the Court's opinion "bristles with hostility to all things religious in public life."[46] Its central line of attack was that the Court's ruling was premature. Given that the case presented a facial challenge, the question before the Court should have been whether the district's policy "inevitably will be" applied "in violation of the Establishment Clause."[47]

The Court's conclusions on this point were purely speculative, Chief Justice Rehnquist argued. The election process itself left open the possibility that students might vote not to have an invocation, or not to give an expressly religious invocation. He added, however, that a clearer record would be presented if the election process led "to a Christian prayer before ninety percent of the football games."[48] Moreover, the policy ensured, in the dissent's view, that any viewpoints expressed belonged to the student speaker and not the government, and thus fell on the private side of the public-private divide.[49] And the Chief Justice argued that taken on its face, the policy had a plausible secular purpose—the solemnization of a school event—and thus could not be injurious in itself.[50] The dissent also rejected the Court's willingness to hold the district's history against it, arguing instead that the district's efforts to modify its policies suggested that the district "was acting diligently to come within the governing constitutional law."[51]

The dissent concluded that if the students had selected speakers "according to wholly secular criteria," the policy would be constitutional even if the private speech that resulted was religious.[52] If, on the other hand, the policy was "applied in an unconstitutional manner," there would be time enough to act; but that time was not now.[53]

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43. *Id.* at 314.
44. *Id.* at 316.
45. *Id.* at 315.
46. *Id.* at 318 (Rehnquist, C.J., dissenting).
47. *Id.*
48. *Id.* at 321.
49. *See id.*
50. *See id.* at 321–22.
51. *Id.* at 323.
52. *Id.* at 324–25.
53. *Id.* at 326.

II. *ADLER*

The *Adler* litigation involved the high school graduation practices of Duval County, Florida. Prior to the Supreme Court's decision in *Lee v. Weisman*, the county school board had apparently permitted some form of graduation prayer.[54] After that decision, the board distributed a memorandum suggesting that those practices would no longer be permissible.[55] In response to some objections, the school superintendent sought the advice of the school board's lawyer, who suggested that it would be permissible "to allow student-initiated and student-led prayer during the graduation ceremony so long as the administration and faculty were not involved in the decision making process."[56]

Accordingly, in May 1993, the board's counsel sent around a memorandum titled "Graduation Prayers."[57] The memo began by noting that the board had been "bombarded with information" suggesting that student-initiated and student-led prayers would be constitutionally acceptable.[58] The memo stated, in pertinent part:

> 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, its officers or employees;
>
> The purpose of these guidelines is to allow the students to direct their own graduation message without monitoring or review by

54. *See* Jessica Smith, *"Student-Initiated" Prayer: Assessing the Newest Initiatives to Return Prayer to the Public Schools*, 18 CAMPBELL L. REV. 303, 312 (1996) ("For many years, invocations, benedictions and other religious prayers or messages had been offered at Duval County public high school graduations.") (citing Brief for National PEARL, et al. at 4 & n.6, Adler v. Duval County Sch. Bd., 112 F.3d 1475 (11th Cir. 1997) (No. 94-2638)).

55. *See* Adler v. Duval County Sch. Bd. (*Adler IV*), 250 F.3d 1330, 1344–45 n.1 (11th Cir. 2001) (Kravitch, J., dissenting) (quoting a memorandum recounting that following the Court decision in *Lee*, the board stated that "we would no longer be able to have prayers at graduation ceremonies").

56. Adler v. Duval County Sch. Bd. (*Adler I*), 851 F. Supp. 446, 448 (M.D. Fla. 1994).

57. *Adler I*, 851 F. Supp. at 449. I will subsequently refer to the memorandum as the Graduation Prayer Memo.

58. *Id.* For example, the High School Director for the First Baptist Church in Jacksonville wrote the board's counsel thanking her "for being patient with me as I continue to 'fish' for ways to incorporate prayer in our graduation ceremonies." Adler v. Duval County Sch. Bd. (*Adler II*), 174 F.3d 1236, 1238 n.2 (11th Cir. 1999), *vacated*, 531 U.S. 801 (2000).

school officials.[59]

The policy was not directly subjected to deliberation by the school board, but at a June 1993 meeting, the board debated a motion to substitute a moment of silence for any student-initiated messages that might result from the Graduation Prayer Memo. At that meeting, one board member opposed the motion because, he said, "I cannot vote [in favor of] silent meditation when we all know that in the past someone has prayed out loud to thank the Lord."[60] Another said,

> God is not going away. Neither is our godly heritage . . . . Americans who believe this have rights, too. . . . I . . . believe that the democratic process in which seniors were given the ability to choose which form of inspirational message, if any, they wanted at their commencement was an appropriate one and I'm going to stand by it.[61]

A third, speaking in favor of the Graduation Prayer Memo as against the silent meditation proposal, said,

> In 1962, the Bible went out of the school and in 1992–93 the bullets come in. You don't have to be a brain surgeon to figure out that['s] where we're going in America . . . . [H]ow absurd are we going to take these special interest groups that are fanning their particular agenda at the expense of the best interest of this country?[62]

A fourth member spoke more directly to the issue of the student election process, arguing that "the only way we can keep ourselves clear on this thing is to keep ourselves out of what happens in this area of the graduation ceremony."[63] Ultimately, the motion to substitute a moment of silence failed by a four-to-three vote, and the policy set out in the Graduation Prayer Memo was retained.[64]

The county's high school principals acted accordingly, delegating to their senior classes—the whole senior class in some cases, and select groups of students in others—the decision whether to have a student message and who should deliver it.[65] Of the seventeen high schools involved, a clearly religious and prayerful message was delivered at ten schools; at the other seven, either no message was given or the message was secular in nature.[66]

Following litigation, the district court granted summary judgment

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59. *Adler I*, 851 F. Supp. at 449.

60. Adler v. Duval County Sch. Bd. (*Adler IV*), 250 F.3d 1330, 1346 n.3 (11th Cir. 2001) (Kravitch, J., dissenting).

61. *Adler II*, 174 F.3d at 1240 n.3.

62. *Id.*

63. *Id.*

64. Adler v. Duval County Sch. Bd. (*Adler I*), 851 F. Supp. 446, 449 (M.D. Fla. 1994).

65. *See id.*; *see also id.* at 449 n.4.

66. *See id.* at 449–50.

for the defendants. Given the ongoing confusion in the lower courts about what test to apply in Establishment Clause cases, it looked to both the three-part test set out in *Lemon v. Kurtzman*[67] and the coercion test set out in *Lee v. Weisman*.[68] It found the policy acceptable under both tests.[69]

Following some skirmishing over procedural issues, the case on the merits reached the Eleventh Circuit, which reversed. Like the district court, the panel applied both *Lemon* and *Lee*.[70] Under *Lee*, it held that "the delegation of the decision regarding a 'prayer' or 'message' to the vote of graduating students does not erase the imprint of the state from graduation prayer,"[71] and concluded that the policy was nothing more than "an attempt to circumvent *Lee* and continue the practice of prayer at graduation ceremonies."[72] It found that the school board "exerted tremendous control over the graduation ceremonies" by planning and controlling every aspect of the occasion.[73] Even the student vote whether to have a graduation message took place only "because school officials agreed to let them decide that one question."[74] Although the Graduation Prayer Memo referred only to opening or closing "messages," the court concluded in light of the circumstances that a two-minute message at the opening or closing of a graduation ceremony was likely to be a prayer.[75] Ultimately, it concluded that "the state's control over nearly all aspects of the graduation ceremony, and the choices of a student-elected representative, subjects the ceremony to the limits of the Constitution," and that "the state's endorsement of the prayer subjects it to a facial violation of the Establishment Clause."[76] Under the second question presented by *Lee*—whether the prayer was coercive—the panel easily concluded that the prayers, once attributed to the state, were indistinguishable from those in *Lee*.[77]

The panel reached the same result applying the *Lemon* test. It held that "the policy, both on its face and based upon the history surrounding its inception, has an actual purpose to permit prayer—including secta-

67. 403 U.S. 602 (1971).

68. *See Adler I*, 851 F. Supp. at 450–51.

69. *See id.* at 451–56.

70. *See* Adler v. Duval County Sch. Bd. (*Adler II*), 174 F.3d 1236, 1242 (11th Cir. 1999), *vacated*, 531 U.S. 801 (2000).

71. *Id.* at 1244.

72. *Id.*

73. *Id.*

74. *Id.* (quoting ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1479 (3d Cir. 1996) (en banc)).

75. *See Adler II*, 174 F.3d at 1245–46.

76. *Id.* at 1248.

77. *See id.*

rian and proselytizing prayer—at graduation ceremonies."[78] Similarly, it held that the primary effect of the policy was "to permit prayer at graduation ceremonies," and that a reasonable observer would find that the policy was in effect an extension of the board's pre-1992 policy of graduation prayers, and thus that it constituted an endorsement of those prayers even if they came as a result of a student vote.[79] Judge Kravitch filed a special concurrence to argue that the "grounds of the majority opinion are quite narrow,"[80] and to emphasize that student prayer that was genuinely private in nature would meet a different fate under the Establishment Clause.[81]

Sitting en banc, the Eleventh Circuit reversed the panel's opinion. Judge Marcus, who had dissented from the panel's judgment, wrote for the court. He characterized the case as asking "whether 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."[82] Put that way, he suggested, the conclusion was obvious: the Establishment Clause was not violated "merely because an autonomous student speaker *may* choose to deliver a religious message."[83]

In framing the issue this way, Judge Marcus drew on language from Justice Souter's concurrence in *Lee*, which suggested that that case might have come out differently if the state "had chosen its graduation day speakers according to wholly secular criteria."[84] In Judge Marcus's view, the policy contained in the Graduation Prayer memo met those conditions. First, the policy "explicitly divorces school officials from the decision-making process."[85] Second, aside from requiring that the "message" be delivered at the opening or closing of graduation and that it last no longer than two minutes, the school retained no control over the content of that message.[86] Third, the policy did not require, or even suggest, "that the graduating class consider religious or any other criteria in deciding whether to have a student message or in selecting a particular

78. *Id.* at 1249.

79. *Id.* at 1251.

80. *Id.* at 1252 (Kravitch, J., specially concurring).

81. *See id.* at 1252–53. Judge Marcus filed a dissent, *see id.* at 1256–71 (Marcus, J., dissenting), but because he authored the en-banc opinions for the Eleventh Circuit in *Adler III* and *Adler IV*, I will skip over his dissent and address his reasoning in discussing those opinions.

82. *See* Adler v. Duval County Sch. Bd. (*Adler III*), 206 F.3d 1070, 1073 (11th Cir. 2000).

83. *Id.* at 1074.

84. *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring)).

85. *Adler III*, 206 F.3d at 1076.

86. *See id.* at 1087.

student speaker."[87] All of these factors, Judge Marcus concluded, made Duval County's policy far different from the express sponsoring of religious expression in *Lee*. He compared the Board's policy, which he called "content-neutral," to the line of cases permitting private religious speech in public fora—a comparison that, as we have seen, the Supreme Court subsequently rejected in *Santa Fe*.[88] The graduation venue, he concluded, was "equally available for religious or secular expression" by the student speaker.[89] He thus concluded that the policy was indistinguishable from the one upheld by the Ninth Circuit in *Doe v. Madison School District No. 321*,[90] in which that court gave its blessing to a policy allowing for speech on any subject by a minimum of four student speakers selected on the basis of academic standing.[91] The court also found no coercion under *Lee*, because the message was "privately crafted" and could not be laid at the feet of any state actor.[92]

The court reached the same conclusion under *Lemon*. Taking a deferential approach to the district's argument that its policy had a secular purpose,[93] it argued that three such interests were implicated by Duval County's policy. First, the county wished to "afford[ ] graduating students an opportunity to direct their own graduation ceremony by selecting a student speaker to express a message."[94] Second, the Graduation Prayer Memo sought to "solemnize graduation as a seminal educational experience."[95] Third, the policy "evince[d] an important and long accepted secular interest in permitting student freedom of expression, whether the content of the expression takes a secular or religious form."[96] It disdained the argument that the history of actions by the school district, including titling its policy with the words "Graduation Prayer," revealed the district's argued purposes to be a sham, concluding that the evidence was insufficient and that the memorandum and its title did no more than describe the issue without "compelling[ ] the outcome of th[e] debate."[97] It also found no primary effect of advancing religion, arguing that the policy "allows a student message on any topic of the

87. *Id.* at 1076.

88. *Id.* at 1077.

89. *Id.* at 1078.

90. 147 F.3d 832 (9th Cir. 1998), *vacated on other grounds*, 177 F.3d 789 (9th Cir. 1999) (en banc).

91. *See Adler III*, 206 F.3d at 1078–79, 1082 (comparing the Graduation Prayer Memo policy to a policy allowing for the election of a homecoming queen or a student speaker at graduation).

92. *Id.* at 1083.

93. *See id.* at 1084.

94. *Id.* at 1085.

95. *Id.*

96. *Id.*

97. *Id.* at 1087.

student's choice" and that, in any event, any religious speech that occurred was the sole result of the student's choice, not the school's.[98] Nor did it find any excessive entanglement with religion.[99]

Judge Kravitch, joined by Judge Barkett, dissented. She argued that Duval County's policy's "only credible purpose is to maximize the chance that prayer will continue to play a prominent role in Duval County graduations," and that the primary effect of the policy was to advance religion.[100] For Judge Kravitch, the majority's attempt to "focus[ ] on the student standing alone at the podium delivering an uncensored message" while "ignor[ing] how she got there" was all too simple.[101] Rejecting the majority's effort to describe the policy, and the student election process, as neutral and secular, she thought the policy did "encourage the senior class to consider religious criteria in planning the opening and closing."[102] This encouragement began with the format of the speech itself, whose brevity and placement at the opening and closing of the ceremony, which echoed the county's placement of graduation prayers prior to *Lee*, "provide clues about the type of message the school administration had in mind."[103] Nor did she agree with the majority's description of the student vote as taking place essentially without regard to the anticipated content of the resulting speech. In her view, all of the factors taken together suggested that the county, if subtly, was "encourag[ing] the choice of prayer."[104] Citing *Barnette*, she did not find the fact that the policy took place through a majoritarian vote comforting, and argued that by the majority's logic, "student councils could, without prompting, vote to decorate each classroom with the Ten Commandments or to have a student volunteer begin each day by reading a prayer over the public address system."[105]

Under the *Lemon* test, the dissent argued that "[t]he context surrounding the creation of the policy, the policy's terms, and the policy's title all suggest its predominantly religious purpose."[106] Finding such a purpose "requires no speculation," Judge Kravitch added, "but only common sense."[107] Likewise, she argued that the "seeming neutrality" of the policy could not disguise a "preference for religious expression"

98. *Id.* at 1089.
99. *Id.* at 1090.
100. *Id.* at 1091 (Kravitch, J., dissenting).
101. *Id.* at 1092.
102. *Id.*
103. *Id.*
104. *Id.* at 1096.
105. *Id.* at 1095.
106. *Id.* at 1098.
107. *Id*

that led to a primary effect of advancing religion.[108] She drew on evidence of actual school practice since the promulgation of the policy, which suggested that many principals in the school district had held direct votes on whether to have a graduation prayer, that others "directly asked the senior class chaplain to deliver a message during graduation," and that still others listed the student speaker as "Chaplain" in the graduation program and referred to his or her speeches as "invocation[s]" or "benediction[s]" rather than "messages."[109]

Finally, she rejected the majority's effort to liken the case to the public forum line of cases, arguing that "Duval County's graduation ceremonies have none of the public forum's characteristics."[110] In sum, she concluded that Duval County had shown a clear intention of preserving its tradition of graduation prayers despite *Lee*, and that its use of the student vote mechanism to do so "corrupts the most cherished of democracy's tools. For the government cannot delegate the authority to do what it could not itself, and constitutional rights are not subject to the whims of an electoral majority."[111]

Between this decision and the final act, the Supreme Court's decision in *Santa Fe* intervened. *Adler*, in which a petition for a writ of certiorari had been filed, was instead vacated and remanded by the Supreme Court for further consideration in light of its decision in *Santa Fe*.[112]

In an eight-to-four vote, the Eleventh Circuit let stand its earlier ruling. Again writing for the en-banc court, Judge Marcus brusquely rejected the view that *Santa Fe* changed anything at all:

> Simply put, after (as before) *Santa Fe*, it is impossible to say that the Duval County policy *on its face* violates the Establishment Clause without effectively banning *all* religious speech at school graduations, no matter how private the message or how divorced the content of the message may be from any state review, let alone censorship. *Santa Fe* does not go that far, and we are not prepared to take such a step.[113]

Emphasizing the fact-specific nature of the Supreme Court's Establishment Clause rulings, the majority focused on particular aspects of the Court's ruling in *Santa Fe* that it said distinguished that case from the *Adler* case. It focused first on the Court's finding in *Santa Fe* that the

108. *Id.* at 1101.
109. *Id.* at 1102.
110. *Id.* at 1103.
111. *Id.* at 1106.
112. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
113. Adler v. Duval County Sch. Bd. (*Adler IV*), 250 F.3d 1330, 1332 (11th Cir. 2001).

student speech was "state-sponsored rather than private."[114] It characterized the Court's ruling on this point as based on two facts: that the speech in *Santa Fe* was subject to regulation by school officials, and that the policy at issue in *Santa Fe* "*by its terms*[ ] invites and encourages religious messages."[115] It added: "Those two dispositive facts are not present here, and that makes all the difference."[116]

On the first point, the majority correctly noted that Duval County's Graduation Prayer policy affirmatively forbade school officials to regulate the content of any student speech in an opening or closing message.[117] On the second, the court reprised its earlier conclusion that Duval County's policy was "entirely neutral regarding whether a message is to be given, and if a message is to be given, the content of that message."[118] Under the circumstances, it concluded, "the speech at issue here—unlike the speech contemplated by the Santa Fe policy—cannot reasonably be described as state sponsored."[119]

The court next took up the question of the majoritarian vote mechanisms which were common to both cases, and which it described as "the linchpin of the [*Santa Fe*] Court's analysis" of whether student religious speech was public or private.[120] In its view, the Court's conclusion on this issue turned on its finding that the Santa Fe policy, "by specifically permitting students to vote upon an 'invocation' and authorizing school officials to ensure that any message proposed by the chosen student was 'appropriate,' made it virtually *impossible* for the election to be anything other than a referendum on conducting prayer."[121] The court characterized the policy in *Adler* as simply involving whether or not to deliver a "message," which it described as "not expressly or inherently concern[ing] prayer."[122] Any prayer that resulted from such a policy, it suggested, would be wholly incidental, and the record showing that only ten of seventeen high schools that had acted on the policy featured religious messages at graduation confirmed this.[123] Any suggestion that the policy bent the students' will toward prayer, it said, was "pessimistic about the exercise of First-Amendment freedoms."[124]

The majority rejected any suggestion that the Court's opinion in

114. *Id.* at 1336.
115. *Id.*
116. *Id.*
117. *See id.* at 1336–37.
118. *Id.* at 1337.
119. *Id.* at 1338.
120. *Id.*
121. *Id.*
122. *Id.*
123. *See id.* at 1339.
124. *Id.* at 1339 n.2.

Santa Fe had altered matters by delving deeply into the background of the policy at issue in that case. It argued that the actual motivations of the Duval County School Board remained opaque at best.[125] In any event, it suggested that the conduct at issue in *Santa Fe* more clearly indicated that school board's effort to inject prayer into the school context than did Duval County's conduct.[126]

The only basis for altering its earlier ruling, the court concluded, would be if *Santa Fe* had dramatically altered the legal landscape, and it held that it had not.[127] It had not ruled "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."[128] Rather, it had reached a highly fact-specific decision that did not require the en-banc court to revise its earlier ruling in *Adler*. In particular, "above all," what mattered in *Santa Fe* was "the additional element of state control over the content of the message,"[129] which it found was absent here.

In sum, the court concluded, *Santa Fe* had not "declare[d] that all religious expression permitted at a public school graduation ceremony violates the Establishment Clause . . . We could not invalidate Duval County's policy, *on its face*, without taking the very step the Court declined to take."[130] The "critical facts" that distinguished the case from *Santa Fe*—"the complete absence in the text of code words such as 'invocation' unequivocally connoting religion, the policy's outright *prohibition* on state content review of non-or-anti-religious messages, the lack of any evidence . . . that students must vote up-or-down on prayer, and the sparseness of the record"—convinced it that there was no need to revisit its earlier ruling.[131]

Judge Kravitch dissented, this time joined by Chief Judge Anderson and Judge Carnes, in addition to Judge Barkett. Against the majority's repeated references to the facial nature of the challenge in *Adler*, she argued that "the Court in *Santa Fe* flatly rejected the school district's argument that a facial challenge to the validity of the District's policy is premature until a student actually delivers a solemnizing message."[132] If the Graduation Prayer Memo betrayed an unconstitutional purpose, she wrote, *Santa Fe* instructed that the policy was unconstitutional even if

125. *See id.* at 1340.
126. *See id.*
127. *See id.*
128. *Id.* at 1340–41.
129. *Id.* at 1341.
130. *Id.* at 1342.
131. *Id.*
132. *Id.* at 1343 (Kravitch, J., dissenting).

some graduation messages "might be totally devoid of religious content."[133] Moreover, she asserted, the majority erred in supposing that, because the election mechanism stripped the district of control over the messenger or the content of the message, it was not responsible for the results of the policy. Quoting *Santa Fe*, she argued that the

> "majoritarian election [policy] might ensure that *most* of the students are represented, [but] does nothing to protect the minority." Indeed, the very mechanism that the majority of this Court claims removes any impermissible coercion from the Duval policy serves to silence students espousing minority views, and forces them to participate in a state-sponsored exercise in which the message is determined by students holding majority views. The First Amendment does not permit such coercion.[134]

Judge Kravitch rejected the majority's efforts to draw distinctions between the facts in *Santa Fe* and *Adler*. The majority made much of the distinction between the *Santa Fe* policy's reference to a "statement or invocation" and the *Adler* policy's reference to a "message." But in the dissent's view, the distinction was immaterial, because the word "message" ultimately meant the same thing once one took into account "the policy's purpose, history, and the context in which it was adopted."[135] Similarly, the majority's emphasis on the fact that the *Adler* policy, unlike the one in *Santa Fe*, maintained no control over the content of the student speeches was faulty because the policy, viewed in a proper context, still had an impermissible purpose and was designed to "ensure[ ] that minority viewpoints will be silenced, and that those possessing such viewpoints will be forced to participate in the majority's 'message.'"[136]

In Judge Kravitch's view, the majority rescued the policy from an Establishment Clause violation only by stripping it of its context, ignoring such matters as the very title of the Graduation Prayer Memo, in violation of *Santa Fe*'s requirement that the court examine "the context in which the policy was enacted."[137] In her view, the context and content of the Graduation Prayer Memo, with its reference to the District's past practice of having graduation prayers and its efforts to find a new way to allow such prayers, showed that "the policy's purpose is to endorse student-initiated rather than school-initiated *prayers* at graduation, not merely to allow students to deliver a generic message."[138]

Judge Carnes, who had abandoned his earlier vote for the majority

133. *Id.*
134. *Id.* at 1344 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305 (2000)).
135. Adler v. Duval County Sch. Bd. (*Adler IV*), 250 F.3d 1330, 1344 (11th Cir. 2001).
136. *Id.* at 1346.
137. *Id.* at 1344–45.
138. *Id.* at 1346.

in *Adler III* and joined the dissent in *Adler IV*, filed a dissent of his own, charging the majority with a grudging and perhaps disingenuous approach to its obligation to reexamine its earlier decision in light of *Santa Fe*. In his view, the majority read *Santa Fe* only in light of whether it specifically commanded the court to revisit its ruling in *Adler*, and not in terms of "what the Establishment Clause, read in light of *Santa Fe*, permits."[139]

Judge Carnes based his departure from his earlier vote on his conclusion that *Santa Fe* had "unequivocally held that [the] principle of facial challenge law does not apply in the Establishment Clause area."[140] With that in mind, he engaged in a more careful examination of the context and background of the Graduation Prayer Memo policy and concluded that it betrayed an impermissible purpose, beginning, again, with the very title of the memorandum. Beyond this, he noted that the requirement that the "message" come at the beginning or end of the ceremony, and be no more than two minutes in length, made quite clear that the Board was aiming at encouraging a "good, short prayer" at its schools' graduations.[141]

More central still to Judge Carnes's reading of *Santa Fe* was his conclusion that that decision taught that "a school board may not delegate to the student body or some subgroup of it the power to do by majority vote what the school board itself may not do."[142] Although he acknowledged that the policy in this case offered the appearance of student autonomy in deciding whether to give a message and what kind of message it should be, he concluded that "*Santa Fe* makes clear what should have been apparent all along: the messenger is not autonomous from the majority who chooses her any more than a political figure is autonomous from the majority who selects him."[143]

Given his conclusion that the policy, taken as a whole and in light of its history and context, was aimed at encouraging graduation prayers, it was but a small step from this to his conclusion that the policy ultimately put the school's resources behind any message that a majority of students might want to hear, through a process that would give no heed to minority views. In these circumstances, since the government

> allow[ed] its power and authority to be wielded according to the will of a majority of students, the resulting message delivered on government property during a government-controlled event is the message of government. . . . The identity of the messenger is controlled and

139. *Id.* at 1348 (Carnes, J., dissenting).
140. *Id.* at 1347.
141. *Id.* at 1350.
142. *Id.* at 1348.
143. *Id.*

> the content of the message is censored in advance through the majority selection process.[144]

Judge Carnes argued that Duval County did "not just permit[ ] but invites" a religious majority to impose its views on the minority through the majoritarian election process.[145] He concluded:

> As interpreted in *Santa Fe*, the Establishment Clause forbids that type of exercise of majority power. Government is not allowed to aid in the establishment of religion by giving a majority of students a proxy to use government power to do that which government itself may not do.[146]

III. WHAT *ADLER* GOT WRONG

Writing shortly after the Supreme Court's decision in *Santa Fe*, and before the Eleventh Circuit's post-*Santa Fe* opinion in *Adler IV*,[147] Professor Ira Lupu wrote that "[t]he sweeping opinion in *Santa Fe* should resolve the uncertainty . . . about the acceptability of school-enacted policies which are designed to promote student-spoken prayer at commencement or other school-sponsored events."[148] He added:

> After *Santa Fe*, any system of student *election*, in which school policy promotes invocation as a message or solemnization as a purpose, is doomed. Moreover, any system of official *selection* of student speakers for such events will violate the Establishment Clause if the history and context of the selection system reveals an official desire to have or maintain prayer at the event. Given the usual history of such policies, enacted in the wake of *Lee* precisely to avoid that decision's strictures and thereby maintain a community custom of graduation prayer, few are likely to survive. Indeed, school districts' best hope is that the U.S. Courts of Appeals will stubbornly resist the teachings of *Santa Fe*.[149]

In this Section, I will argue that Professor Lupu was all too prescient. Despite its efforts, the en-banc majority in *Adler* fails to persuade. In treating the Supreme Court's decision in *Santa Fe* in fairly narrow terms, the majority captures some of the lyrics of the Court's decision in *Santa Fe*, but is deaf to the music of the opinion. In particular, the *Adler* decision's narrow focus on particular factors that played a part in the *Santa Fe* Court's judgment neglects the Court's overarching

144. *Id.* at 1350.

145. *Id.*

146. *Id.*

147. Unless otherwise noted, all subsequent references in the text to "*Adler*" are to the decision in *Adler v. Duval County School Board* (*Adler IV*), 250 F.3d 1330, 1344 (11th Cir. 2001).

148. Ira C. Lupu, *Government Messages and Government Money:* Santa Fe, Mitchell v. Helms, *and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 810 (2001).

149. *Id.*

emphasis on the need for courts to confront "the realit[y] of the situation"[150]—to "refuse to turn a blind eye to the context" in which school prayer policies arise.[151] As the policy's very name suggests, that contextual approach should have doomed the Graduation Prayer Memo policy in *Adler* just as surely as it doomed the prayer policy in *Santa Fe*. Even on the narrower and more technical reading of *Santa Fe* offered by the *Adler* court, the decision is still wrong. As we will see, the conclusions I reach in this Section point us toward the broader questions that the remainder of this Article will address.

The *Adler* majority's failure to fully confront the import of *Santa Fe*—what Professor Lupu aptly calls its resistance to *Santa Fe*[152]—is apparent at the very outset of its substantive discussion of the application of the Supreme Court's decision. It notes that "[i]n *Santa Fe* itself the Supreme Court reiterated just how case-specific Establishment Clause analysis must be under its precedent."[153] But it strikes this note for essentially defensive purposes, using the fact-intensive nature of the Supreme Court's inquiry in *Santa Fe* to argue that "[t]he facts of this case are fundamentally different, and in our view require exactly the same result today as they did at the time of our prior opinion."[154] The *Adler* majority wields *Santa Fe*'s close examination of the facts as a shield against revisiting its earlier ruling.

But this misses the point of the Supreme Court's approach. *Santa Fe* makes clear that in cases involving school policies that *might* constitute an endorsement of prayer, the reviewing court's duty is to carefully, skeptically, and searchingly look at the factual context behind that policy. As the Court notes, the reviewing court's job is to look at "factors beyond just the text of the policy."[155] Courts must look beyond the text to the "legislative history[ ] and implementation of the [policy],"[156] in order to "'distinguish a sham secular purpose from a sincere one . . . .'"[157] This searching inquiry is required even in facial challenges, in which the court "not only can, but must, include an examination of the circumstances surrounding [the policy's] enactment."[158] The *Santa Fe* Court's focus on the circumstances surrounding the school prayer policy

150. Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 305 (2000).

151. *Id.* at 315.

152. Lupu, *supra* note 148, at 810.

153. Adler v. Duval County Sch. Bd. (*Adler IV*), 250 F.3d 1330, 1336 (11th Cir. 2001).

154. *Id.*

155. *Santa Fe*, 530 U.S. at 307.

156. *Id.* at 308 (quoting Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in judgment)).

157. *Santa Fe*, 530 U.S. at 308 (quoting Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in judgment)).

158. *Santa Fe*, 530 U.S. at 315.

at issue in that case was thus not an invitation to find bases for distinguishing that opinion; it was a command that lower courts engage in the same kind of skeptical inquiry that the Court undertook in *Santa Fe*. It was a reminder to other courts to "refuse to turn a blind eye to the context" in which school prayer policies arise in school districts.[159]

This is precisely what the *Adler* majority fails to do, as the dissenters clearly recognized.[160] Instead, it rests summarily on its "earlier findings,"[161] refusing to reexamine them in light of *Santa Fe*'s clear direction to thoroughly, and skeptically, scour the record for evidence of state promotion of school prayer. No other explanation adequately accounts for the court's failure to consider a host of factors that suggested that the Duval County policy was intended to continue its policy of permitting and encouraging the kinds of prayers that had been outlawed by the Court in *Lee v. Weisman*.

Those factors are not buried in an inscrutable or "limited record."[162] To the contrary, they begin with the text of the policy itself, which is styled, in capital letters, "GRADUATION PRAYERS."[163] The majority makes much of the fact that the policy refers only to "opening and/or closing message[s],"[164] but that language cannot be understood outside the context of the memorandum announcing the policy, whose first paragraph makes clear in two separate instances that these messages refer to prayers.[165] Similarly, as Judge Kravitch recognizes, the policy's reference to "a brief opening and/or closing message, not to exceed two minutes,"[166] is no accident. Taken in the context of both the memorandum and the history behind it, under which Duval County had apparently conducted school prayer ceremonies of the kind banned by *Lee v. Weisman*,[167] it is clear that these "message[s]" are consistent with the

159. *Id.*

160. Adler v. Duval County Sch. Bd. (*Adler IV*), 250 F.3d 1330, 1344–45 (11th Cir. 2001) (Kravitch, J., dissenting) ("The majority, by extracting the core policy from the remaining text of the memorandum promulgating the policy (the "Policy Memo"), ignores the mandate of the Supreme Court that an evaluation of the purpose of a policy like Santa Fe's or Duval's is not complete without an examination of the context in which the policy was enacted.") (footnote omitted); *id.* at 1348, 1350 (Carnes, J., dissenting) (criticizing the *Adler IV* majority's failure to consider the Duval County graduation prayer policy in light of the lessons of *Santa Fe*).

161. *Id.* at 1340 n.3 (majority opinion).

162. *Id.* at 1340.

163. *Id. at* 1344 n.1 (Kravitch, J., dissenting). As Judge Kravitch points out, this language goes beyond the actual policy struck down in *Santa Fe*, which in its final iteration "did not contain the word 'prayer.'" *Id.* at 1345 n.2.

164. *Id.* at 1345 n.1.

165. *See id.* (referring to "prayers at graduation ceremonies" and "student initiated and led prayers").

166. *Id.*

167. *See id.* (stating in the Graduation Prayer Memorandum that after *Lee*, "we would *no*

timing and length of "a good, short prayer."[168] These conclusions are buttressed by the admittedly limited record of discussion of the policy by the School Board, which points to the conclusion that "the board adopted the policy in an effort to make prayer a part of graduation."[169] As Judge Carnes writes, "the purpose of Duval County's 'Graduation Prayers' policy is," quite evidently, "consistent with its name."[170]

In short, in purporting to follow *Santa Fe*, the *Adler* majority misses the central lesson of that decision, which requires courts to carefully scrutinize the record of such cases for evidence showing that a school board has promoted school prayer. The evidence in *Adler* more than amply pointed to the conclusion that the Duval County School Board did just that. Duval County's policy clearly followed the "usual history of such policies, enacted in the wake of *Lee* precisely to avoid that decision's strictures and thereby maintain a community custom of graduation prayer."[171] Only the *Adler* majority's refusal to read the record in anything other than a forgiving light—only its willingness to "turn a blind eye to the context in which [the] policy arose," and to fail to "recognize what every [Duval County] student understands clearly—that this policy is about prayer"—allows it to leave the policy undisturbed.[172]

Even on the narrow terms in which *Adler* reads *Santa Fe*, the outcome is still mistaken. The *Adler* majority describes as "[c]ritical to the Supreme Court's [opinion]" in *Santa Fe* the conclusion that the Santa Fe policy represented government rather than private speech.[173] Ignoring the broadly critical contextual approach to the case that we have seen at work in this Section, the majority argues that the Court in *Santa Fe* relied primarily on two factors: "(1) the speech was subject to particular regulations that confine the content and topic of the student's message; and (2) the policy, *by its terms*, invites and encourages religious messages."[174] The court is wrong in both instances.

The first factor focused on by the court points out that in *Santa Fe*,

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longer be able to have prayers at graduation ceremonies") (emphasis added); *see also* Smith, *supra* note 54, at 312–13.

168. *Adler IV*, 250 F.3d at 1350 (Carnes, J., dissenting). Indeed, according to one account, when one of the members of the Adler family graduated from high school in 1998, "the school principal introduced the 'senior message' by directing everyone to 'remain standing for the invocation.'" Robyn E. Blumer, *Activist Court Embraces Religious Intolerance*, ST. PETERSBURG TIMES, June 13, 1999, at 4D.

169. *Adler IV*, 250 F.3d at 1346 (Kravitch, J., dissenting).

170. *Id.* at 1350 (Carnes, J., dissenting).

171. Lupu, *supra* note 148, at 810.

172. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000).

173. *Adler IV*, 250 F.3d at 1336.

174. *Id.* (internal quotations and citation omitted).

the student invocation was "subject to particular regulations that confine the content and topic of the student's message."[175] This control of content stemmed from the policy's statement that the invocations were to "solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."[176] According to the *Adler* majority, this stands "in sharp contrast" to the Duval County policy, which affirmatively forbids the School Board and its subordinates from monitoring or reviewing the messages the students choose to deliver.[177] To the court, this distinction severs the link between public and private expression, such that "[n]o reasonable person attending a graduation could view that wholly unregulated message as one imposed by the state."[178] Absent "the element of potential censorship, and the attendant risk . . . that non-religious messages (or messages hostile to religion) will be suppressed," the speech cannot be considered state sponsored.[179]

As I have already argued, this argument misses the forest for the trees, because the *Santa Fe* Court's conclusions on this point were not derived from a narrow reading of the school prayer policy, but from a broad contextual examination of "the realities of the situation."[180] A focus on the bare text of Duval County's policy thus does not conclusively demonstrate that the apparent hands-off nature of the policy renders it purely private speech. The *Adler* court fails to provide a proper analysis of the question.

In any event, the court gets it wrong. First, as we have already seen, the Graduation Prayer Memo makes clear that it is encouraging "message[s]" on a particular subject—namely, "prayers at graduation ceremonies."[181] The content of the "message" is further constrained and controlled by the state, and pushed in the direction of prayer, by requiring that the message be no more than two minutes long and come at the beginning or end of the graduation exercise.[182] As Judge Carnes notes, this suggests that the "message[s]" were to fill precisely the length,

175. *Santa Fe*, 530 U.S. at 303.

176. *Id.* at 298 n.6; *see also id.* at 306–07.

177. *Adler IV*, 250 F.3d at 1336–37.

178. *Id.* at 1337.

179. *Id.* at 1341.

180. *Santa Fe*, 530 U.S. at 305; *see also Adler IV*, 250 F.3d at 1346–47 (Kravitch, J, dissenting) ("It was not solely the existence of two facts, however, but rather a contextual analysis of the District's entire policy, including its history and purpose, that persuaded the *Santa Fe* Court that the policy impermissibly coerced students to participate in a religious exercise chosen by the majority of the graduating class.").

181. *Adler IV*, 250 F.3d at 1344–45 n.1 (Kravitch, J., dissenting) (setting out the full text of the Memo).

182. *See id.* at 1345 n.1; *see also id.* at 1350 (Carnes, J., dissenting).

space, and role of the graduation prayers that existed in Duval County until *Lee v. Weisman*.[183] This is no accident: as Judge Carnes observes, "no one sues about student participation [*vel non*] in graduation ceremonies, but people do sue about whether prayer is allowed or prohibited at graduation and other school-related events."[184] These facts, suggesting that Duval County meant to encourage students to deliver two-minute religious invocations and benedictions at graduation, restore the link between the District and the message that the majority argues has been severed by the lack of content control. In these circumstances, a reasonable observer could easily see the hand of the state in the resulting religious message.[185] If Duval County's policy purports to leave the content of the graduation messages up to the students, it is not because the School Board is indifferent to what they say; it is because, as in *Santa Fe*, the District understood full well "what every . . . student" would have understood "clearly—that this policy [was] about prayer."[186]

More importantly, the *Adler* court's conclusion that Duval County's policy is content-neutral, and thus involves private speech, effectively ignores the role of the majoritarian student selection process in encouraging school prayer. In a school district with a long history of school prayer and a substantial majority belonging to a single faith, it was clearly understood that a majoritarian speaker selection process would result in the increased "probability"—indeed, the likely certainty, at least on many occasions—"that a prayer [would] be delivered at graduation."[187]

Although most of the *Adler* majority's discussion of the purported content-neutrality of the Graduation Prayer policy is simply untethered from the majoritarian-vote question, it does recognize that "[t]he linchpin of the [*Santa Fe*] Court's analysis on this issue was its finding that *Santa Fe*'s policy subjected the issue of prayer to a majoritarian vote."[188] But the majority argues that the Supreme Court's finding on this issue depended on its conclusion that the *Santa Fe* policy, by speaking in terms of an invocation and by ensuring that the student message was appropriate, "made it virtually *impossible* for the election to be any-

183. *See id.* at 1350 (Carnes, J., dissenting).

184. *Id.*

185. *See id.* at 1347 n.4 (Kravitch, J., dissenting) ("Because at graduation the majority-elected student delivers her message at a preordained point in a program planned by school officials who determine the place, time, attire, and all other aspects of the ceremony, members of the listening audience must perceive the [student's] message as a public expression of the views of the majority of the student body delivered with the approval of the school administration.") (internal quotations and citation omitted).

186. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000).

187. *Adler IV*, 250 F.3d at 1346 (Kravitch, J., dissenting).

188. *Id.* at 1338 (Marcus, J., majority opinion) (internal quotation and citation omitted).

thing other than a referendum on conducting prayer. Indispensable to this analysis was the school district's unambiguous concession that the vote authorized by the policy was indeed a vote up-or-down on prayer."[189] By contrast, the majority argues, because students in Duval County only voted on whether to permit a student "message" and who would deliver it, "it cannot plausibly be argued that, *on its face*, the Duval County policy calls for a student vote on whether to mandate the inclusion of prayer in a graduation ceremony."[190] In its view, this means that whether students choose to have a prayer "is not preordained," and reflects only "the uncensored and wholly unreviewable decision of a single student speaker."[191]

Again, this both misunderstands and resists the reasoning in *Santa Fe*. Central to the Court's conclusion in that case was the underlying principle that "student elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic."[192] Such procedures, while ensuring that the majority has its say, "do[ ] nothing to protect minority views but rather place[ ] the students who hold such views at the mercy of the majority."[193] That process "involv[es] the school in the selection of the speaker," because whether to hold such elections in the first place is a matter within the school district's discretion, and because the message is then delivered to an audience gathered at the school's behest, assisted by all the resources devoted to the ceremony by the school.[194]

Nor did the *Santa Fe* Court rely strictly on the terms of the policy itself, or even on the School District's concession that the vote centrally concerned prayer. Rather, its conclusion that the majoritarian device failed to insulate the school from the product of the students' choice relied on its examination of the "election mechanism . . . in light of the history in which the policy in question evolved."[195] Again, then, the nature and effect of the policy could only be properly viewed once the Court carefully examined the context in which the policy took place. It was *that* inquiry that suggested that the Santa Fe policy improperly subjected student views on religion to a majoritarian vote, a policy at odds with the longstanding principle that "fundamental rights may not be sub-

189. *Id.*

190. *Id.*

191. *Id.* at 1339.

192. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 304 (2000) (citing Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)).

193. *Santa Fe*, 290 U.S. at 304.

194. *Id.* at 306; *see also id.* at 307–08.

195. *Id.* at 311.

mitted to vote; they depend on the outcome of no elections."[196]

This kind of contextual analysis is almost entirely absent from the majority's decision in *Adler*, which focuses largely on the text of the policy itself and suggests that the policy must be read in light of the facial nature of the attack on the policy. A more sensitive analysis would have compelled the contrary conclusion. Viewed in context, as we have seen, Duval County's Graduation Prayer policy clearly aimed at providing a space in the graduation ceremony for a specifically *religious* "message," one whose timing and length precisely suggested an opening invocation and a closing benediction.

The majority argues that it cannot be said that "the Duval County policy calls for a student vote on whether to *mandate* the inclusion of prayer in a graduation ceremony."[197] But this is asking the wrong question. The key question is whether the School District deployed a majoritarian election process that *encouraged* student prayer, a process that used the power of numbers to give voice to majority religious views without leaving the minority any effective out.[198] This the policy handily accomplished. As Judge Kravitch writes, given the impermissible purpose of the policy, the majoritarian device hardly rescues the School District; to the contrary, it "ensures that minority viewpoints will be silenced, and that those possessing such viewpoints will be forced to participate in the majority's 'message.'"[199]

Finally, the majority wrongly asserts that the policy cannot be flawed if it is anything less than "*impossible* for the election to be anything other than a referendum on conducting prayer."[200] To the contrary, it says, the fact that religious messages occurred in only ten of the seventeen cases reflected in the record proves that minority views are protected; this contradicts *Santa Fe*'s statement that "the majoritarian process implemented by the district *guarantees*, by definition, that minority candidates will *never* prevail and that their views will be effectively silenced."[201]

This is an obtuse reading of both the facts of *Adler* and the Court's pronouncement in *Santa Fe*. For one thing, it neglects the record itself, which offered a very different picture of how the schools behaved under

196. *Id.* at 304–05 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

197. Adler v. Duval County Sch. Bd. (*Adler IV*), 250 F.3d 1330, 1338 (11th Cir. 2001) (emphasis added).

198. *See id.* at 1349 (Carnes, J., dissenting) ("All the majority has to do to ensure that a religious message is delivered at graduation is select as its messenger one whom it can rely upon to give such a message. There is no reason at all to believe that will be difficult to do.").

199. *Id.* at 1346 (Kravitch, J., dissenting).

200. *Id.* at 1338.

201. *Id.* (quoting *Santa Fe*, 530 U.S. at 304).

the policy. As Judge Kravitch noted in the Court's earlier en-banc opinion, the evidence suggested that many schools had indeed voted directly on whether to have a graduation prayer; others "directly asked the senior class chaplain to deliver a message during graduation," while other schools listed the student speaker as "Chaplain" in the graduation program and referred to his or her speeches as "invocation[s]" or "benediction[s]" rather than "messages."[202] Even if these facts are less directly relevant in a facial challenge to the Graduation Prayers policy, they are wholly relevant to the kind of contextual analysis that *Santa Fe* demanded with respect to the impermissible purpose and effect of such policies, even at the facial challenge stage.

Moreover, this is a strained reading of *Santa Fe* itself. Of course, the policy in that case did not make it *impossible* for students to reject a religious message; they could simply have voted not to have prayers at football games. The Court's point was that, once the students voted to have prayers, that choice would remain in place "for the entire season,"[203] and there would be nothing the minority could do about it. That is precisely the case in *Adler*. By subjecting the decision whether to have students deliver "messages" to a majoritarian voting process, the school district ensured that those schools that chose to have such a message would lock such a message in place, leaving the minority no recourse but to take its lumps. A student with minority religious views could not move to another school when it came time for the graduation ceremony; she would be stuck with having to listen to the religious views of the popular majority at her own school. (Conversely, of course, a religious student at a school that voted against having graduation "messages" would be equally powerless to affect the outcome.)

Given the history and context of the Graduation Prayer policy, and the demographics of each school, it is fair to say that "the policy seems to have worked as intended for the most part."[204] Perhaps the schools that opted not to have a message, or in which a secular message was delivered, were more religiously diverse than the schools that opted for a religious message. But for schools in the latter category, the majoritarian process enabled, or even encouraged, the religious majority to vote its preferences into power, and left minority students with no recourse. In that sense, *Santa Fe* was wholly on point: The process would guarantee the airing of majority religious views and silence minority views, and it would do so year after year. Judge Carnes observed that although relig-

202. *See* Adler v. Duval County Sch. Bd. (*Adler III*), 206 F.3d 1070, 1102 (11th Cir. 2000) (Kravitch, J., dissenting).

203. *Santa Fe*, 530 U.S. at 303.

204. *Adler IV*, 250 F.3d at 1349 (Carnes, J., dissenting).

ious messages were only delivered at some sixty percent of the schools reflected in the record, "[s]ixty percent is . . . close enough for government work."[205] Perhaps more to the point, Duval County's policy ensured that the encouragement of religious messages would be 100% effective some sixty percent of the time, with no recourse for minority views.[206] In short, the *Adler* majority wholly misses the point of *Santa Fe* and fails either to understand or to properly apply its conclusion that majoritarian processes that encourage or determine the delivery of religious student views, without protecting minority views, are "constitutionally problematic."[207]

The final piece of the *Adler* majority's effort to distinguish *Santa Fe* is its characterization of that case as having been based on the fact that the Santa Fe policy, "*by its terms*, invites and encourages religious messages."[208] The court concedes that "the Supreme Court did not limit its analysis to the text of the Santa Fe policy," but argues that "it placed heavy emphasis on the text's express and unambiguous preference for the delivery of religious messages."[209] It finds such a preference in the Santa Fe policy's use of the term "invocation" and its references to solemnizing the school event.[210] By contrast, it says, "the [Duval County] policy is entirely neutral regarding whether a message is to be given, and if a message is to be given, the content of that message."[211]

Short work can be made of this argument. First, the Duval County policy is no more or less neutral, on its face, than the Santa Fe policy as to whether a message is to be given. In both cases, the question is subjected to an up-or-down student vote, and in both cases the result will be absolutely enforced against the loser of that vote, and all the resources of the school district brought to bear in airing the winner's message. For the reasons we have seen, that is constitutionally unacceptable. Second, as we have also seen, the majority's attempt to describe *Santa Fe* as having leaned heavily on the express terms of the policy at issue in that case utterly neglects the *Santa Fe* Court's real approach, which is deeply reliant on the history and context of the policy. To say that Duval County's policy on its face is neutral as to whether a religious message is delivered, without considering the context in which the policy was

205. *Id.*

206. This calls to mind a line in the cinematic classic ANCHORMAN: THE LEGEND OF RON BURGUNDY (DreamWorks 2004), in which Brian Fantana says of "Sex Panther" perfume: "They've done studies, you know. Sixty percent of the time it works, every time."

207. *Santa Fe*, 530 U.S. at 304.

208. *Adler IV*, 250 F.3d at 1336.

209. *Id.* at 1337.

210. *Id.* at 1337–38.

211. *Id.* at 1337.

promulgated, the reasons behind it, and its apparent effort to continue a preexisting policy of having graduation prayers, is to do precisely what the Court warned against in *Santa Fe*: It "turn[s] a blind eye to the context in which this policy arose," and refuses to recognize what the students of Duval County surely "under[stood] clearly—that this policy [was] about prayer."[212] As Judge Carnes rightly observes, Duval County's policy did "not just permit[ ] but invit[ed]" the imposition of prayer "by the majority regardless of the views of the minority."[213]

In sum, despite its efforts to escape the lessons of *Santa Fe*, *Adler* gets it quite wrong. With all due respect, that a policy actually *entitled* "Graduation Prayers" could have been understood as utterly neutral as to religion beggars belief. That is especially true given the broader context in which the policy arose, a context which the Eleventh Circuit was duty-bound by *Santa Fe* to consider, and the fundamental First Amendment principle that "fundamental rights . . . depend on the outcome of no elections,"[214] a principle that was announced by the Court more than a half-century before *Santa Fe*. If, as Professor Lupu states, "*Santa Fe* effectively outlawed any official prodding in the direction of student-led prayer at school functions,"[215] then *Adler* should have been an easy case. It was; the majority is clearly wrong.

IV. SCHOOL PRAYER, DEMOGRAPHICS, AND DISTRUST

A. *Ely, Representation-Reinforcement, and Religion*

For a former law clerk, there is, I suppose, some Oedipal joy to be had in pointing out when one's former master has erred. And for a law and religion scholar, there is the additional value of helping to bring order to a messy area and correct those courts that have "stubbornly resist[ed]" the clear teachings of the Supreme Court in this field[216]—particularly when, as in this case, I think the Court got it right. But there is more to the Eleventh Circuit's error in *Adler* than that. Ultimately, both *Santa Fe* and *Adler* speak to broader questions of constitutional law and theory, particularly in the area of the Religion Clauses. Those questions have not yet been fully or satisfactorily aired, and the purpose of the remainder of this Article is to fill that gap.

In examining the questions I raise below, I draw substantially on the work of the late John Hart Ely, whose *Democracy and Distrust* is widely acknowledged, even by its critics, as one of the most important

212. *Santa Fe*, 530 U.S. at 315.
213. *Adler IV*, 250 F.3d at 1350 (Carnes, J., dissenting).
214. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).
215. Lupu, *supra* note 148, at 772.
216. *Id.* at 810.

works of constitutional theory in the past three decades. Ely's work on this subject is well-known, but a brief introduction may help set the stage.

Democracy and Distrust is both an effort to explain and defend the work of the Warren Court,[217] and a broader attempt to rescue judicial review from the counter-majoritarian difficulty described by Alexander Bickel,[218] which plagued constitutional theorists for most of the last half of the Twentieth Century and continues, in a perhaps more exhausted way, to animate much of contemporary constitutional theory.[219] The book consists of two parts. In the first, Ely argues that neither "interpretivist" nor "noninterpretivist" theories adequately justify or constrain constitutional adjudication.[220] In the second half of the book, which will be my focus here, Ely sets out an alternate account of judicial review, one that is centered on the (slightly more) modest role of the Supreme Court as the defender of a properly functioning political process. Drawing on the famous Footnote Four of *United States v. Carolene Products Co.*,[221] Ely argues that the central role of the Court is twofold. First, it functions to "keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open."[222] Second, and in service of the political process function, the Court also "concern[s] itself with what majorities do to minorities, particularly . . . laws 'directed at' religious, national, and racial minorities and those infected by prejudice against them."[223]

Thus, both the Constitution and the Bill of Rights, for Ely, should be understood as being "principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values."[224] Ely finds support for this reading across a wide swath of constitutional provisions.[225]

Ely finds two central principles at work, both of them captured by the phrase "representation-reinforcement": "*access* to the tools of self-

217. The book is famously dedicated to Earl Warren, with the words, "You don't need many heroes if you choose carefully." ELY, *supra* note 6, at v.

218. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (Yale Univ. Press 2d ed. 1986) (1962).

219. *See, e.g.*, LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996).

220. *See* ELY, *supra* note 6, at 1–72.

221. 304 U.S. 144, 152 n.4 (1938).

222. ELY, *supra* note 6, at 76.

223. *Id.*

224. *Id.* at 92.

225. *See id.* at 88–101.

government, and the elimination of *prejudice*."[226] Under the access prong of his approach, courts ensure that everyone has an equal opportunity to participate, in a fair manner, "in the political processes by which values are appropriately identified and accommodated."[227] The First Amendment, for instance, ensures that people can have their voice heard in the political process, while voting rights ensure equal representation and participation in the legislative forum. The prejudice prong of Ely's theory shores up his political process-oriented theory by ensuring that discrete and insular minorities, who are likely to be perennial losers in the political process, are not permanently disadvantaged by the majority.[228]

Ely's theory is sufficiently familiar to constitutional lawyers that I need not extend my summary description. It has also, of course, been subjected to sustained criticism.[229] Much of that criticism has concerned the question of whether Ely's theory of prejudice is genuinely process-oriented rather than substantive, and thus whether his theory truly dissolves the counter-majoritarian difficulty. For two reasons, which are in some tension, little turns on that question for purposes of this Article. First, as Michael Klarman observes, even if the criticisms of Ely for being more substantive than he is willing to acknowledge are valid, they do not wholly dispel the value of Ely's theory; the access prong of Ely's process-oriented theory "has emerged relatively unscathed from the barbs of Ely's critics."[230] Even those critics who believe Ely cannot make his case that a process-oriented theory of judicial review is immanent in the Constitution still find his argument "ingenious, elegant, and plausible."[231] Indeed, there is no doubt that Ely's representation-reinforcing theory of judicial review has much to recommend it, has a great deal of potential explanatory force, and has been highly influential.

Second, as Frank Michelman has argued in an excellent recent arti-

226. Carlton Morse, Note, *A Political Process Theory of Judicial Review Under the Religion Clauses*, 80 S. CAL. L. REV. 793, 803 (2007).

227. ELY, *supra* note 6, at 77.

228. *See id.* at 135–79.

229. For prominent early examples, see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

230. Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 748 (1991).

231. Richard A. Posner, Democracy and Distrust *Revisited*, 77 VA. L. REV. 641, 646 (1991); *see also* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1282 (2005) ("After reading the book, you want to believe that the theory was inherent in the Constitution.").

cle, these criticisms of Ely may be somewhat misplaced.[232] On this view, "strictly speaking Ely need not be understood" as having intended to "purge constitutional discourse of controversial claims about values."[233] To the contrary, Ely can be understood as having been "unabashed about the substantive commitments embedded in his normative model of representative democracy," and as having required only that courts "conscientiously strain to limit [their] entanglements to cases in which upholding [those] commitment[s] required them."[234] As I attempt to show in the remainder of this Article, in my view, even a strongly process-oriented view of Ely's work still has much to say about the proper interpretation of the Religion Clauses. To the extent that Ely is properly viewed as having championed particular substantive views, however, without necessarily signing on to Ely's substantive views *in toto*, I am quite willing to accept the value of those substantive views to the extent that they influence the argument I develop below.

I proceed, then, from the assumption that Ely has much to contribute to constitutional law and theory. I assume, moreover, that Ely has much in particular to tell us about the proper functioning of the Religion Clauses. And yet, Ely himself was hesitant to lump in the Religion Clauses with the rest of his process-oriented understanding of the Constitution. Although he suggested that "part of the point of combining [the] cross-cutting commands" of the Free Exercise and Establishment Clauses "was to make sure the church and the government gave each other breathing space," thus "perform[ing] a structural or separation of powers function" that could be understood in light of process theory, he did not think that was the whole story.[235] He added immediately that "the obvious cannot be blinked: part of the explanation of the Free Exercise Clause has to be that for the framers religion was an important substantive value they wanted to put significantly beyond the reach of at least the federal legislature."[236]

Perhaps partly for that path-dependent reason, and perhaps for independent substantive reasons, law and religion scholars have done little

232. Frank I. Michelman, *The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory*, 42 TULSA L. REV. 891 (2007).

233. *Id.* at 896, 900.

234. *Id.* at 901.

235. ELY, *supra* note 6, at 94. For a similar take on the Religion Clauses, rooted in the Kuyperian concept of sphere sovereignty, see Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009).

236. ELY, *supra* note 6, at 94; *see also* Tribe, *supra* note 228, at 1065 ("One difficulty that immediately confronts process theorists is the stubbornly substantive character of so many of the Constitution's most crucial commitments: commitments defining the values that we as a society, acting politically, must respect. Plainly, the First Amendment's guarantee of religious liberty and its prohibition of religious establishment are substantive in this sense.").

with Ely's representation-reinforcement theory. A few scholars have discussed the connections between the two, but have done so both cursorily and skeptically.[237] One valuable student work has usefully elaborated on the relationship between Ely's theory and the Religion Clauses, although I do not agree with all of that writer's conclusions.[238] For the most part, then, the relationship between representation-reinforcement theory and the Religion Clauses remains a largely untapped well.

As I hope to show, Ely can in fact contribute significantly to our understanding of the Religion Clauses. In particular, he can help shed light on two central aspects of both *Santa Fe* and *Adler*, neither of which has been adequately explored on its own terms. As we will see, *Democracy and Distrust* can help us to think more clearly about the role of distrust *of* democracy in *Adler* and *Santa Fe*; that is, about why majoritarian processes like the one that was employed in *Santa Fe* not only do not successfully insulate school districts from the Establishment Clause consequences of student-led school prayer, but positively point in the direction of an Establishment Clause violation. By the same token, it can help us to see more plainly why the Eleventh Circuit was wrong in *Adler*. Second, *Democracy and Distrust* can help us think more clearly about *demographics* and distrust in law and religion. It can help us dissolve the general but unhelpful picture of religious pluralism that is said to characterize the United States at the national level, and enable us to think more clearly about the representation-reinforcing role of the Establishment Clause at the local level.

B. *"Democracy" and Distrust: Majoritarian School Prayer*

Schools, school districts, and state legislatures have sought to use the vehicle of majoritarian student votes to find a place for prayers in public-school ceremonies ever since the Supreme Court's decision in *Lee v. Weisman*, often at the behest of various groups that argued that these policies offered a way around the strictures of that opinion.[239] Ever

237. *See* Morse, *supra* note 226, at 798 n.18 (collecting sources).

238. *See id. passim.* Morse's work focuses more on the role of mediating institutions within the law-and-religion framework. That is an important matter, which I take up at length (without reference to Ely) in Horwitz, *supra* note 235. But my concerns here are different. Another student work specifically addresses Ely in the context of student-led prayer cases like *Santa Fe* and *Adler*. *See* John P. Cronan, Note, *A Political Process Argument for the Constitutionality of Student-Led, Student-Initiated Prayer*, 18 YALE L. & POL'Y REV. 503 (2000). It does not, however, develop the connection at any length, and as the following discussion will suggest, I am unpersuaded by that author's conclusions.

239. *See* Smith, *supra* note 54, at 305–14. As Smith notes, the more immediate impetus for the majoritarian process movement was the Fifth Circuit's opinion in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), which suggested that some courts might distinguish student-initiated prayers from school-endorsed prayers.

since, a substantial number of courts—although, as *Adler* itself suggests, not all of them—have raised the same objection to these policies: that, in the words of the Supreme Court, a majority cannot "use the machinery of the State to practice its beliefs."[240] As one such court put it, "[t]he notion that a person's constitutional rights may be subject to a majority vote" is "anathema."[241] This is the position the Court reaffirmed in *Santa Fe*, when it quoted *Barnette* for the proposition that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[242] The battle lines have thus been drawn for some fifteen years, and they were apparent in the Eleventh Circuit's debate over the Duval County policy.

One way to view this debate is through the lens of whether student prayers that result from a majoritarian process are genuinely attributable to the private choices of students, or whether they are still school sponsored.[243] The Supreme Court has emphasized the "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."[244] If student prayers selected by a majority of schools can be treated as private and voluntary speech, the argument runs, then they should fall on the permissible side of the line.[245]

Although this may clarify the issues underlying the debate over majoritarian student speech selection processes, it does not resolve them. The difficult question with respect to such processes is whether they render the student speech voluntary, or whether they engage the machinery of the State in a way that violates the Constitution. To understand this debate more clearly, it helps to understand just why it is that majoritarian processes can violate the Constitution. This is where Ely's representation-reinforcement theory makes its contribution.

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240. Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 226 (1963).

241. Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097, 1100 (E.D. Va. 1993); *see also* ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1478 (3d Cir. 1996); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 455 (9th Cir. 1994).

242. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 304–05 (2000) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

243. *See, e.g.*, Mark W. Cordes, *Prayer in Public Schools After* Santa Fe Independent School District, 90 KY. L.J. 1, 4 (2002) (arguing that "the central consideration in analyzing school prayer cases" is "the distinction between voluntary student prayer on the one hand, and state-sponsored prayer on the other").

244. Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990).

245. *See also* Lee v. Weisman, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring) ("If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State."). I discuss the import of this passage in greater detail below.

Ely's approach generally privileges the results of the political process, arguing that courts should only intervene in the political process when "the political market[ ] is systematically malfunctioning."[246] He describes a malfunctioning political process in these terms:

> Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[247]

Ely adds that legislative motivation may provide some evidence of a malfunctioning political process. Ostensibly fair and democratic processes that are transparently designed to entrench a particular outcome desired by the majority and to keep out the minority—especially a minority that for systematic reasons will continue to be subjected to hostility at the hands of the majority—will counsel in favor of court intervention. This is true even in cases in which the State need not grant particular rights to anyone—where, for example, schools need not allow *any* student to speak at a graduation ceremony but opt to allow *some* to speak. In such cases, if

> it can be proven that the officials are granting applications so as systematically to favor or disfavor a certain viewpoint or family of viewpoints *or indeed that they have instituted a given method of selection with the expectation that it will have that effect*, a constitutional violation will have been made out.[248]

On this process-oriented view, simple majoritarianism is not always enough to ensure political outcomes that are both politically legitimate and consistent with the Constitution. Of course, the political process routinely generates winners and losers; that is how democracy functions. But the political process is perverted when a seemingly fair process is used in a way that systematically creates losers and entrenches them in that status—and is designed to accomplish just this end. This is especially true when the political process systematically operates in a way that deprives a minority of fundamental rights,[249] or in which the very tools that are supposed to guarantee and maintain access to the political

246. ELY, *supra* note 6, at 103.

247. *Id.*

248. *Id.* at 142 (emphasis added).

249. *See generally* Douglas Laycock, *Voting with Your Feet Is No Substitute for Constitutional Rights*, 32 HARV. J.L. & PUB. POL'Y 29 (2009).

system, such as free speech or, indeed, the free exercise of religion,[250] are used in a way that deprives people of the ability to exercise those rights.

To be clear, the problem is not one of losing *per se*—it is one of losing in a repeated and systematic way, always along the same essential lines and for the same immutable reasons. Nor is the problem one of being forced to hear views that one finds disagreeable. As I will suggest below, it is perfectly acceptable for someone to be exposed to even the disagreeable views of others—whether political or religious views. But it is unacceptable for the State to take advantage of the political process in a way that inevitably and permanently rigs the game to the majority's advantage. That is Ely's lesson.

Nor is it a sufficient response to this argument to say that, under some set of circumstances, the losers *could* win.[251] There are at least two problems with this response. First, it turns a blind eye to the fact that, at least in the kinds of circumstances that Ely would consider unconstitutional, the process has been designed precisely to make sure that this doesn't happen; it has been set up to deliver a particular and recurring outcome that locks out the minority. If this does not occur in every single place, it is still an impermissible form of "government work."[252]

Second, it refuses to acknowledge the one-shot nature of rigged systems when considered from the perspective of the loser, and the fairness concerns raised by such systems. At least in situations involving the distribution of a limited good, such as a speaking slot for a particular

250. Free exercise rights are often viewed not as political rights, but as non-political individual rights tied to private beliefs and practices. For reasons I have offered elsewhere, that distinction is false. Religious viewpoints can be as politically salient and powerful as any other reasons offered for political action. Thus, protecting the free exercise of religion is ultimately not just a means of protecting private belief and practice, but also a means of guaranteeing that individuals and groups can form and voice religious arguments for political change. *See generally* Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral* (forthcoming 2009); Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75 (2006); *see also* Kathleen A. Brady, *Religious Group Autonomy: Further Reflections About What Is at Stake*, 22 J.L. & RELIGION 153 (2006) (arguing for religious group autonomy because, among other things, it enables religious believers and groups to make political arguments); Morse, *supra* note 226 (arguing that Ely's political process theory justifies a robust vision of religious freedom because religious groups serve a powerful political function as mediating institutions in the civil sphere).

251. *See, e.g.*, Adler v. Duval County Sch. Bd. (*Adler IV*) 250 F.3d 1330, 1339 (11th Cir. 2001) (observing that "in seven of the seventeen instances reflected in the record, students voted for no message at all or for a student speaker who subsequently delivered an entirely secular message"); *id.* at 1339 n.2 (criticizing Judge Carnes's dissent for assuming "that the student speaker is nothing more than a puppet to give voice to the student body majority's demands for prayer" and calling that assumption "deeply flawed").

252. *Id.* at 1349 (Carnes, J., dissenting) (noting that the Duval County policy "seems to have worked as intended for the most part," and that if it did not always secure student prayer, the policy was still "close enough for government work").

occasion, there is only one opportunity to participate. A student only attends one graduation ceremony. And, as the *Santa Fe* Court notes, these are not public fora, in which both winners and losers can speak in turn.[253] Having lost the election, the member of the losing minority has no recourse but to like it or lump it.[254] She cannot simply raise her own voice. Where the system has been designed to take systematic advantage of the majority status of a particular belief system, this means that the outcome for the minority is close to a foregone conclusion, and that there is no recourse for the minority. That the minority loses, that its own views are subordinated to the views of the majority, is problematic enough, particularly where fundamental rights are concerned. That the system is designed to achieve precisely this result adds insult to injury.

This is the problem with the graduation prayer policy established by Duval County in *Adler*. The school district officials, who had been besieged by objections to the loss of graduation prayer, knew their district well enough to understand that a majoritarian process for selecting graduation "messages" would inevitably, although perhaps not invariably, generate a result that would place the "ins" back in the driver's seat and exclude the "outs." Given the nature of the graduation ceremony, in which the school literally set the stage and in which dissenting voices had no equal opportunity to speak, the process "guarantee[d], by definition, that minority candidates [would] never prevail and that their views [would] be effectively silenced."[255] By definition, the majority might be satisfied with such an outcome, but the minority never would be, and, precisely because it was a minority, would lack any effective recourse.

The majoritarian process employed by Duval County thus "might ensure that *most* of the students [were] represented," but "it [did] nothing to protect the minority; indeed, it likely serve[d] to intensify their offense."[256] The majoritarian process loaded the dice in favor of the religious majority, and ensured that the minority would have no remedy once the dice were cast.[257] In sum, Ely's political process theory helps us understand precisely why the majoritarian processes used in both *Santa Fe* and *Adler* were so objectionable despite the patina of political

253. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302–04 (2000); *see, e.g.*, *id.* at 303 ("[T]he school allows only one student, the same student for the entire season, to give the invocation.").

254. *See, e.g.*, ACLU of N.J. v. Black Horse Pike, 84 F.3d 1471, 1487 (1996) ("Although it is true that [the policy] does not require the view that prevails in any given year to prevail in subsequent years, it is nonetheless true that the effect of the particular prayer that is offered in any given year will be to advance religion and coerce dissenting students.")

255. *Santa Fe*, 530 U.S. at 304.

256. *Id.* at 305; *see also* Lee v. Weisman, 505 U.S. 577, 594 (1992).

257. *See* RAVITCH, *supra* note 10, at 66.

legitimacy that the school districts in both cases tried to apply to the process.

We can usefully contrast the Court's correct decision in *Santa Fe*, and the Eleventh Circuit's incorrect decision in *Adler*, with two other cases, one of which was rightly decided and the other wrongly decided. These cases suggest that there is a difference between fair processes and unfair ones, and that a fair process will by no means rule out student religious speech at graduation ceremonies.

First, consider *Doe v. Madison School District No. 321*.[258] In that case, the Madison School District had a policy inviting "a minimum of four students . . . to speak at commencement exercises *according to academic class standing*."[259] The content of the speech was left to the individual and, as in *Adler*, was protected from censorship by the school administration.[260] The plaintiff complained that because the policy would "allow[ ] students to inject prayers and religious songs into the graduation program," it violated the Establishment Clause.[261] The Ninth Circuit rejected this argument. Like the Eleventh Circuit in *Adler*, the Ninth Circuit relied in part on the absence of school control over the content of the speakers' messages.[262] But the court also noted the presence of another factor that distinguishes this case from *Adler*: the student speakers were "selected by academic performance, a purely neutral and secular criterion."[263]

This distinction makes all the difference. There is a considerable difference between a policy like that in *Adler*, which subjects the choice of student speaker to a process that the school district understands will almost certainly lead to the selection of a religious speaker and intends this result to occur, and a policy in which the selection criteria are *genuinely* neutral. Under the latter policy, whether or not the process results in a religious speech has nothing to do with local sentiments about religion. A student with a minority religious view is every bit as eligible for selection, if she achieves the best grades in the class. Although, given the simple demographics of a particular district, it may be that religious students will more often than not be among the best students in the class, their selection will turn only on their grades, and not on local views about the merits of particular religious or non-religious beliefs. A minority student should thus be more willing to accept victory or defeat in this selection process, knowing that it is no mere popularity contest and that

258. 147 F.3d 832 (9th Cir. 1998).
259. *Id.* at 834 (emphasis added).
260. *See id.*
261. *Id.*
262. *See id.* at 835.
263. *Id.*

every student is given an equal and genuine opportunity to speak. If she considered such a process from behind the proverbial Rawlsian veil of ignorance, she would have no reason to complain that the process was fundamentally tilted toward particular religious views.[264]

Madison is thus rightly decided, and reveals that it is possible to craft student speaker selection policies that result in religious speech without violating the Establishment Clause. The Supreme Court recognized this in *Santa Fe*. It noted that its decision would be quite different if the case had involved a religious speaker who emerged from a process that was indifferent to the religious nature of the message that would be delivered, such as the selection of a student body president or a prom king or queen. In such cases, that person's election might turn on general popularity, but would not depend solely on the popularity of a religious message to be delivered on a single occasion such as graduation.[265] Because such positions still involve an element of popularity, they may be closer calls than the policy at issue in *Madison*, which did not depend on any such considerations. Assuming that a student body president or prom king or queen might fulfill other functions or have other symbolic meaning to the students, however, such a policy would at least be less closely tied to the single question of using majoritarian processes to guarantee a religious message at graduation.[266]

Ely himself speaks to the distinction between *Madison* and *Santa Fe* and *Adler*. He offers a hypothetical in which a National Guard sergeant has to select three members of a six-man squad for a dangerous

264. In employing Rawls's veil-of-ignorance approach here, I should not be taken to be making too strong a claim. I am making only the relatively narrow claim that such an approach says something useful about why a student might consider a speaker selection process based on criteria such as class performance fairer than one based on a majoritarian vote; I am not suggesting that this approach is always necessary, or that it is possible in every circumstance to divorce our views about fairness from our prior commitments. *Cf.* Michelman, *supra* note 232, at 892 (distinguishing between "democratic process-based constitutional theories" such as Ely's, and "liberal proceduralist constitutional theories" such as Rawls's). I am grateful to Marc DeGirolami for pressing me on this point.

265. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 304–05 n.15 (2000).

266. Critics of Ely might fairly point out that one would still at this point require a theory that distinguishes the example of the prom king or queen, which turns on general popularity, from the example of a majoritarian selection process that turns on the religious makeup of a graduating class. If Ely is treated as having intended to purge his theory of controversial substantive positions, then we would need to know why it is not an equally unacceptable result if, as seems likely to be the case, only the "cool" students are elected as prom king or queen every year. *But see* Michelman, *supra* note 232 (arguing that Ely did not intend to purge his theory of substantive commitments). In any event, as I have argued above, I am comfortable with the thicker and more substantive commitments that are implicit in this Article, and that I believe the *Santa Fe* Court correctly identified as being present in the Constitution itself, which treats religion as having a different status in the political process, at least in some cases, than questions of general "coolness." I am grateful to Rick Schragger for his comments on this point.

mission. He argues that the Constitution would not be offended "if those three were picked because they had scored highest on their riflery tests," or even if they were chosen at random.[267] It would be different, however, if the soldiers were selected based on their membership in a particular political party or ethnic group, or because they were the least popular members of the squad. In such a case, the system would have "malfunctioned."[268] As Ely notes, "[p]erhaps a properly functioning system would have generated the same result."[269] But the problem is not the result itself; it is the fact that the selection takes place in a way that rigs the results in a palpably unfair way. This is the distinction between *Madison* and *Adler*. *Adler* relied on a selection process that privileged the locally popular religion for inclusion in the graduation ceremony and excluded unpopular views; *Madison* presents a selection process in which anyone may be chosen to speak for perfectly acceptable and neutral reasons.

Consider also another Ninth Circuit case, *Cole v. Oroville Union High School District*.[270] That case involved a couple of different selection processes for student speakers at graduation. It involved both "a spiritual invocation delivered by a student chosen by a vote of his or her classmates" and "graduation speeches by the valedictorian and salutatorian."[271] The school in recent years had reviewed speeches to make sure "they were not offensive or denominational."[272] One student, Cole, was chosen by his fellow students to deliver an invocation; the other, Niemeyer, was co-valedictorian of his class.[273] Both students submitted openly sectarian speeches, both speeches were rejected, and both students filed suit.[274]

The Ninth Circuit found that the district officials were entitled to qualified immunity, holding that "the District's refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was necessary to avoid violating the Establishment Clause" under *Lee* and *Santa Fe*.[275] For the reasons I have discussed above, the Ninth Cir-

267. ELY, *supra* note 6, at 137.

268. *Id.*

269. *Id.*

270. 228 F.3d 1092 (9th Cir. 2000); *see also* Lassonde v. Pleasanton Unified Sch. Dist., 320 F.3d 979 (9th Cir. 2003) (reaching the same result in a similar case on the basis of the decision in *Cole*); Corder v. Lewis Palmer Sch. Dist. No. 38, 568 F. Supp. 2d 1237 (D. Colo. 2008) (affirming the decision of a school principal, pursuant to school district policy, punishing a student valedictorian for delivering an address with religious content without first obtaining school officials' approval of the religious portion of the speech).

271. *Cole*, 228 F.3d at 1096.

272. *Id.*

273. *Id.*

274. *See id.* at 1096–97.

275. *Id.* at 1101.

cuit was clearly right as to Cole, whose selection was part of a process in which a majority of students openly voted on a religious invocation. But the panel also held that Niemeyer's sectarian speech would be impermissible, despite the fact that the selection process was based on neutral criteria, because "the District's plenary control over the graduation ceremony . . . ma[de] it apparent Niemeyer's speech would have borne the imprint of the District."[276] It described Niemeyer's desire to give a sectarian address as falling afoul of "[t]he requirement that religion be left to the private sphere."[277]

Here, I think, the Ninth Circuit erred. One might question whether Niemeyer *ought* to have given an openly sectarian address on an occasion that "belonged as much to the other students and their families as to himself."[278] But the Establishment Clause does not require a non-sectarian speech in such circumstances, any more than the Speech Clause requires speech that pleases everyone. As Ely suggests, and as *Madison* confirms, it simply requires a fair *process*, in which the game is unrigged in the majority's favor and anyone can stand before the class as valedictorian or salutatorian. Whatever basic content control the school district retained over the students' speeches, the Establishment Clause did not require the school to strip the speeches of sectarian content, any more than the school should have been permitted to exclude a valedictorian who wanted to talk in a minimally civil manner about health care or the arms race.

Because nothing in the selection process implicated the concerns raised in a case like *Santa Fe* or *Adler*, the Establishment Clause should not have been read as permitting the school to silence Niemeyer. A process-oriented view of graduation prayer thus suggests that it is possible for schools to go too far in restricting sectarian prayers at graduation ceremonies, provided that such speeches are the result of a process in which all are genuinely eligible to give a message of their choosing. This belies the *Adler* court's fear that striking down Duval County's policy, as it should have done, would "effectively ban[ ] *all* religious speech at school graduations."[279]

Thus far, I have argued that Ely's political process-oriented theory helps sort between permissible and impermissible processes for selecting student graduation speakers, and that the distinction turns on whether the process is genuinely fair or whether it employs the machinery of

276. *Id.* at 1103.

277. *Id.* at 1104.

278. Brady, *supra* note 9, at 1175; *see also* Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, 5 NEXUS 61, 78–79 (2000).

279. Adler v. Duval County Sch. Bd. (*Adler IV*), 250 F.3d 1330, 1332 (11th Cir. 2001),

majoritarian elections to rig the game in favor of the religious majority without leaving any meaningful protection or recourse for minority views. Let me close this section by considering the writing of Professor Kathleen Brady, who argues thoughtfully that this distinction is insufficient. Brady asserts that the public-private dichotomy is "too simplistic for the public school setting" because "most of the disputes in the public school context concern speech that is neither purely public nor purely private."[280] Brady suggests that a significant amount of student religious speech in public schools constitutes "[g]rey area speech" that "is both partly private and partly public, and, thus, should be approached as a distinct category of speech requiring unique treatment."[281]

Brady proposes two "baseline principles" to address "grey area religious speech," principles that she argues "strike[ ] a workable balance between the benefits of grey area religious expression and the preservation of Establishment Clause values."[282] The first principle states that "when student religious expression is entirely student-initiated and the school has not taken any action to provide the opportunity for religious speech, the expression should receive the same protections that secular speech does."[283] This principle I find unproblematic; it is certainly consistent with everything we have seen so far.

The second baseline principle suggests "that schools can design and provide an opportunity for student religious expression at graduations or other school-related events as long as the school's policy provides an equal opportunity for nonreligious speech and the school's policy is scrupulously neutral and fair among different religious perspectives."[284] The purpose of the principle "is to permit the school to initiate an opportunity for students from a variety of backgrounds to engage in religious and nonreligious expression at school-related events and in other grey area settings."[285] Brady argues that a policy of "set[ting] aside a handful of slots for inspirational messages and randomly select[ed] student volunteers to fill these slots" will be constitutionally permissible "[i]f the composition of the community is diverse."[286] Where the school district population is not religiously diverse, Brady proposes that the school could "provide for a few broad categories like Protestant, Catholic, Jewish, Muslim, other religion, and nonreligious, and ask student volunteers

280. Brady, *supra* note 9, at 1151–52.
281. *Id.* at 1152.
282. *Id.* at 1225.
283. *Id.*
284. *Id.* at 1227.
285. *Id.* at 1227–28.
286. *Id.* at 1228.

to identify themselves with one of these categories."[287] She acknowledges that not every belief will be represented in any given year, but suggests that the result will still be permissible if it provides "a broadly inclusive and diverse group of voices."[288] Even under this policy, however, she would permit schools to review the content of the speeches "to ensure that [the speech] is appropriate for the occasion, relevant to the school's pedagogical objectives, and civil and respectful to other students."[289] This includes a potential restriction on some forms of "proselytizing speech."[290] She would, for instance, allow the school to prevent a student like Chris Niemeyer from delivering an openly sectarian and proselytizing speech at graduation.[291] Such speech, she says, is "not purely private," and the school thus has "an interest in and an obligation to ensure that Establishment Clause principles are also preserved."[292]

Brady's examination of these issues is the most sensitive and thorough that I have seen in the scholarship on student graduation prayer. Commendable as it is, however, I think it is also mistaken. From an Elysian perspective, that might be because, despite its reference to "equal opportunity" and "neutral and fair" selection processes,[293] Brady's approach is too focused on outcome and not focused enough on process. Her proposal is intended to ensure that graduations feature a wide diversity of religious and nonreligious views. But despite its valuable aims, it gives the school too much discretion to shape a choir of views, and I think the result will ultimately satisfy no one. Schools are not well-situated to provide for genuine diversity of religious or nonreligious views, and the experience with a variety of school districts, including those in Santa Fe and Duval County, suggests that they are likely to load the deck in a way that pays lip service to diversity while favoring particular groups.

Even if they do not, it is unlikely that they can be completely diverse. As Brady acknowledges, some students will still be left out. That is not a problem in and of itself; a selection process based on academic standing also may not guarantee that every view is heard either. But the *process* will be genuinely fair, and students whose views happen to be left out in a given year will have far less reason to feel slighted or coerced. That is less true for Brady's proposal. Indeed, while Brady

287. *Id.* at 1229.
288. *Id.*
289. *Id.* at 1230.
290. *Id.* at 1231.
291. *See id.* at 1231–32.
292. *Id.* at 1235.
293. *Id.* at 1227.

argues that a process that guarantees a reasonably diverse set of views will remove the threat of coercion, from the audience's perspective a process that uses the school's power to impose a particular suite of views, no matter how diverse it may be or how well-meaning the school officials are, may seem even more coercive. Rather than preserve the shared public/private nature that Brady says characterizes grey area student religious speech, the proposal she offers, by giving so much power to schools to shape the content of graduation speech, tends to push this speech into the public, and thus impermissible, category.

At the same time that it ensures diverse religious and nonreligious student speech, albeit by means of a process that I have suggested is ultimately improper, Brady's proposal also sacrifices too much religious speech. If student religious speech, even of a sectarian or proselytizing nature, results from a genuinely fair and neutral process, it is not the school's business to restrict it. A student who is given an opportunity to speak based on a genuinely fair process—one based on academic standing, for example—should not be censored just because she wishes to give a speech that actually has bite and content, even if it might alienate some of the audience. That is just as true if the speech is religious in nature as if it were political or ideological in nature (if such a distinction is even tenable). From behind the veil of ignorance, what the students should care about is that any view is equally likely to be aired; if that is true, then any fairness concerns are satisfied, both for the "winners" and the "losers," and the speech should not be subject to censorship.

Perhaps schools should retain some degree of minimal control over the content of the speech based on relatively neutral concerns such as a desire to avoid profanity, and perhaps they should consider using disclaimers in their graduation programs; but their power should not extend to a more substantive authority to regulate the content of religious or nonreligious speech. Conversely, students are not *obliged* to offer sectarian or proselytizing speech, and they might well wish to consider the "etiquette" of doing so.[294] In this case, however, a rule of law should not be drawn from a rule of etiquette. Provided that the process is genuinely fair in an Elysian sense, as it was not in *Adler*, the fact that student religious speech is proselytizing in nature should not preclude its inclusion in a graduation ceremony.

In sum, an Elysian, political process-oriented examination of student religious speech at graduation ceremonies helps us understand why the majoritarian election process used by Duval County in *Adler* is constitutionally problematic, and it helps us sort between various cases, see-

294. *See generally* Brownstein, *supra* note 278; *see id.* at 61 (commenting "on the clash of values presented in these cases from a more personal and non-constitutional perspective").

ing why a case like *Madison* is rightly decided and a case like *Cole* wrongly decided. It also suggests that proposals like Brady's, which attempt to secure sound substantive outcomes without sufficient concern for fair processes, are ultimately mistaken. But Brady's discussion, with its deep concern for the differences between school districts that are genuinely diverse and those in which "one or more religions predominate[ ] or secularism predominates,"[295] directs our attention to an important problem. It is that problem to which I finally turn.

C. *Demographics and Distrust: What "Footnote One" Tells Us About Public Religion in Overwhelmingly Homogeneous Political Districts*

The last section of this Article argued that *Adler* and *Santa Fe*, viewed through the lens of political process theory, can be instructive on the constitutional wrongs wrought by majoritarian selection processes for student prayers at graduation ceremonies. Implicit, perhaps, in this discussion has been a broader suggestion that Elysian theory can say something about the uses to which majoritarian processes can be put, and the occasions on which majority rule can be used in ways that entrench the majority and disserve the minority. Thus, it says something about the ways in which majoritarian processes, understood from an Elysian perspective, can violate the Establishment Clause or other constitutional provisions.

In this final section, I want to examine a still broader question raised by *Adler* and *Santa Fe* as supplemented by Ely's political process theory. The question I want to examine here has to do with the "size" of constitutional decisions, particularly with respect to the Establishment Clause. This is a question that Ely himself does not raise directly. Although others have famously applied a political process theory of their own to the subject of the role of the courts in mediating between different levels of government,[296] Ely himself has little to say about how his political process theory relates to the broader question of federalism and the Constitution.[297] Ely does suggest at one point that one of the minority-protecting devices of the original Constitution was its effort to separate and divide power both within the federal government (what we call

295. Brady, *supra* note 9, at 1228.

296. *See, e.g.*, Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

297. *See* Daniel D. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 721 n.3 (1991) (noting that Ely "does not much discuss the theory" of federalism).

separation of powers) and "between the national government and the states."[298] And he notes, crucially for present purposes, that "[t]he fact that effective majorities can usually be described as clusters of cooperating minorities won't be much help when the cluster in question has sufficient power and perceived community of interest to advantage itself at the expense of a minority (or group of minorities) it is inclined to regard as different."[299] But for the most part he addresses himself to the Constitution's "frontal assault on the problem of majority tyranny"[300]—particularly the Bill of Rights, both as applied to the federal government and, through the Fourteenth Amendment, against the states as well. One will find no index reference for "federalism," "localism," or "municipalities" in *Democracy and Distrust*—surprisingly, perhaps, for a book that purports to offer a complete theory of judicial review and the Constitution.

Certainly, Ely's discussion of the Religion Clauses themselves contains no meaningful discussion of the varying role that might be played by different levels of government in protecting religious freedom.[301] Whether his representation-reinforcement theory of the Constitution applies directly to the Religion Clauses or whether, at least in Ely's own view, those clauses are better viewed as a primarily substantive guarantee, he has nothing to say about the relevance of the size of the governmental entities that might violate the Religion Clauses. Until recently, few others had taken up this question either.

That may have something to do with a particular popular vision of religion's place in American society. That vision assumes that the United States is a deeply, perhaps uniquely, religiously pluralistic society.[302] It treats the United States as a meeting ground and melting pot for a rich diversity of religious and nonreligious views. That picture tends to focus more on the sheer number of faiths at large in America and not on the majority status of any one or more of those faiths. Moreover, it tends to treat the United States as an undifferentiated whole, in which Americans of a variety of faiths (or no faith), from the tip of Alaska to the far reaches of the Florida Keys, meet in a single public square.

There is something to this picture, of course. In substantial part, ours *is* a religiously pluralistic society. In some areas of the country—

298. ELY, *supra* note 6, at 80.

299. *Id.* at 81.

300. *Id.* at 82.

301. Ely notes in an aside that the Free Exercise Clause suggested that the framers wanted to put religion "significantly beyond the reach of at least the federal government." *Id.* at 94. But he does not build on the "at least."

302. *See, e.g.*, Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1, 8 (1991); Michael J. Perry, *Freedom of Religion in the United States:* Fin de Siècle *Sketches*, 75 IND. L.J. 295, 330 (2000).

particularly urban areas—we may experience at a microcosmic level something of the religious diversity of the country writ large. But the picture can also be dangerously misleading. Although we may participate in national politics and discussion, we also, and most directly, live and participate in *local* communities—states, cities, suburbs, and towns. That fact can have important implications for our understanding of the Religion Clauses.

Recently, a number of scholars have begun paying increased attention to this question. They have begun to "conceptualize," as Richard Schragger puts it, "the role of the local in the doctrine and discourse of religious liberty."[303] These treatments arrive at varying conclusions, but they share in common a desire to complicate the simple picture of a single, unified religiously pluralistic American society, and to consider the role that different levels of government might play under the Religion Clauses.

Richard Schragger's rich account is especially worth examining. Schragger notes that although many scholars have examined the degree to which "America's extraordinary religious pluralism" is the result of majority-restraining principles of religious freedom, relatively few have paid attention "to the location and institutional character of these majorities."[304] Despite the breadth of Religion Clause principles in the abstract, in practice "modern Religion Clause jurisprudence has been to a significant degree a product of religious conflicts within smaller polities."[305] Indeed, Schragger argues, "the American experiment in pluralism is only truly tested under conditions of urbanity."[306] When religious groups take to the frontiers or to insular communities, they need face no threat from others; only when they are competing for scarce resources in a finite space do religious groups run afoul of each other.

Schragger argues that the received wisdom about "the role of the local" in American religious liberty assumes that local political institutions are parochial, "often hostile to religious minorities[,] and therefore particularly in need of central oversight—judicial or otherwise."[307] By contrast, Schragger argues that "local government—and more generally

303. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1813 (2004). For other examinations of this question, see for example Alex Geisinger & Ivan E. Bodensteiner, *An Expressive Jurisprudence of the Establishment Clause*, 112 PENN. ST. L. REV. 77 (2007); Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (2006); Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669 (2003).

304. Schragger, *supra* note 303, at 1812.

305. *Id.* at 1813.

306. *Id.* at 1814.

307. *Id.* at 1815; *see also id.* at 1820–21 ("The conventional wisdom is that local governments are more likely than the national government to engage in religion-based discrimination or

the decentralization of power—is a robust structural component of religious liberty."[308] This is so for two reasons. First, government cannot overreach in a system in which political authority is dispersed. Second, local governments, by serving as "valuable sites of civic association," can "serve as counterweights to private religious power."[309] On these two bases, he argues that Religion Clause jurisprudence should "be more skeptical of federal and state regulations that touch on religion than of similar local regulations."[310] Thus, the Court should "embrace a nuanced approach . . . that is attentive to the institutional location of any particular religion-burdening or -benefiting activity."[311] With respect to the "regulation of government-sponsored religious expression," he argues that the Supreme Court's concern with the expressive harms wrought by such expression—a concern that is evident in the endorsement and coercion tests and their application in *Lee v. Weisman* and *Santa Fe*—is "overblown," and that "local communities should have room to permit the public expression of religiously grounded values."[312]

Schragger is by no means completely skeptical of the received wisdom. He agrees that "some locals can be hostile to minority religions or to nonbelievers and that this hostility can generate serious exclusionary harms to individual dissenters, especially in those communities dominated by a single religious group."[313] Nonetheless, he questions the conventional account, arguing that "[t]he problem of overt religious bigotry in local settings is less relevant today" than it was just a few decades ago.[314] And he worries that the endorsement test, if applied insensitively to local governmental entities, has the potential to do as much harm as good. First, he thinks that local religious expression is "unlikely to generate a dangerous religious faction in the whole" polity.[315] Second, he argues that local government speech is less likely to be persuasive "in a religiously pluralistic society," and that practices that favor a particular religious group are likely to dissipate as locales grow more diverse.[316] Finally, he worries that too constraining a rule for local governments may erode the health and vitality of local government, which he believes

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favoritism. . . . [S]mall-scale polities are more likely to be afflicted by the scourge of faction; religious bigotry finds legislative expression more easily where stable majorities can form.").

308. *Id.* at 1815.

309. *Id.*

310. *Id.*

311. *Id.* at 1818–19.

312. *Id.* at 1820.

313. *Id.* at 1880.

314. *Id.* at 1822.

315. *Id.* at 1881.

316. *Id.* at 1882.

to be vital for the proper functioning of a democratic state.[317]

Schragger is not a wild-eyed optimist about all local governments, but he believes that an approach to the Religion Clauses that emphasizes greater deference to local government decisions will "facilitate[ ] the salutary dispersal of political authority that serves to prevent any one belief system from dominating the whole" and "buttresses the local civic community as a counterweight to religious privatism."[318] Even within this approach, he argues that there must be some restraints on what local governments can do by way of religious expression.[319] Nonetheless, his approach on the whole casts doubt on the prevailing constitutional approach to local government religious expression, and would expand the field of permissible local governmental religious speech.

There is a great deal to admire in Schragger's account, although I will bend it toward somewhat different conclusions. I have argued elsewhere that the Court should take account of the different institutional roles of the varying actors within First Amendment jurisprudence; although my account focuses on private or semi-private institutions such as churches, universities, and libraries rather than on government regulators themselves, I still agree with Schragger on this general point.[320] And Schragger's argument that "the American experiment in pluralism is only truly tested under conditions of urbanity" is essential and too often overlooked, although I will use it for different ends below.[321]

In short, I am sympathetic to the general ambition of Schragger and other scholars to focus on the nature and scale of various actors, public or private, when considering the proper scope of the Religion Clauses; as I have said, my own work on "First Amendment institutions" can be viewed as a small part of this movement.[322] But neither am I entirely ready to give up on the conventional account of the dangers of granting too much deference to local government when it comes to religious expression, particularly in a forum such as the public schools. Although Schragger acknowledges that there must be some genuine constraints on

317. *See id.* at 1887–88.

318. *Id.* at 1891.

319. *See id.* at 1890 (arguing that local governments cannot engage in "nonneutral or discriminatory financial or political support," and that religious expression by local governments must occur "within the terms of public democratic discourse—a discourse of equal concern and respect").

320. *See, e.g.*, Horwitz, *supra* note 235; Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461 (2005); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007); Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061 (2008).

321. Schragger, *supra* note 303, at 1814.

322. *See* Horwitz, *supra* note 235 (applying First Amendment institutionalism to religious entities); *see also* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008).

local governmental actors, his dismissal of the expressive harm argument, and his generous description of local governments as nomic communities that compete for allegiance and attention with a host of "other private and public entities,"[323] gives too little weight to the threat local governments may pose to religious minorities.

This threat arises precisely from the point Schragger makes: that "the American experiment in pluralism is only truly tested under conditions of urbanity."[324] Although the conventional picture of American religion is one of extraordinary diversity, demographically speaking the United States is less like a religious melting pot and more like a bowl of oatmeal: it's lumpy. In some pockets, such as major urban centers, the diversity of religious views is such that any single faction is less likely to prevail at the local level. In those areas, perhaps counter-intuitively, the very fact of potential religious strife is more likely to lead to broad accommodations between and among all the players.[325] In many other areas, however, a single religious group is far more likely to predominate overwhelmingly over any religious minorities.

If those areas were *wholly* homogeneous—if there were simply no one with a minority religious viewpoint in those jurisdictions—then all of Schragger's arguments for deference to local religious authorities might apply, and deference to local governmental decisions concerning religious expression might be understandable. But they are almost never (if ever) *wholly* religiously homogeneous; they are just *overwhelmingly* religiously homogeneous. Those are precisely the conditions in which Schragger's fears that the local government, when speaking religiously, might engage in "nonneutral or discriminatory financial or political support" for a particular faith and against others, or might violate conditions of "equal concern and respect" for religious minorities, are most likely to arise.[326] And, if my description of the demographics of religious diversity in America as a lumpy affair is right, then it is a pattern that is likely to recur again and again in local governmental entities, including school districts and individual schools, across the country. In those circumstances, Schragger's argument that "the benefits [for] local diversity" of a "decentralized approach" to the Establishment Clause may outweigh "the potentially significant costs to individual dissenters" is

323. Schragger, *supra* note 303, at 1882.

324. *Id.* at 1814.

325. Although this point will not always hold true. *See, e.g.*, Laycock, *supra* note 249, at 41–42 (discussing Bronx Household of Faith v. New York City Bd. of Educ., 492 F.3d 89 (2d Cir. 2007), a case in which the New York City Board of Education has labored to exclude a religious group from enjoying equal access to school facilities on weekends).

326. Schragger, *supra* note 303, at 1890.

less likely to hold true.[327]

At this point, it is worth filling in the picture by asking just what local government action in overwhelmingly religiously homogeneous political districts looks like. There is no better place to start than with *Santa Fe* itself. Just as Ely helped to burnish the fame of "Footnote Four" in the *Carolene Products* case, so I want to suggest that, for students of the Establishment Clause, *Santa Fe*'s "Footnote One" should become equally famous. In that footnote, the Court noted that, a month after the anonymous complaint in the *Doe* case was filed, the district court found it necessary to enter an order barring

> any further attempt on the part of [the school] District or school administration, officials, counsellors, teachers, employees or servants of the School District, parents, students or anyone else, overtly or covertly to ferret out the identities of the Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping[.]' [Such attempts] will cease immediately.[328]

Unlike *Carolene Products*' Footnote Four, which is widely known, *Santa Fe*'s Footnote One is, alas, generally excised from most of the constitutional law casebooks, including those focusing on the First Amendment or law and religion. This is a mistake. It is impossible to fully appreciate the Court's decision in *Santa Fe* without knowing this piece of the case's history.[329] Moreover, Footnote One speaks broadly to the status of minority religions in overwhelmingly religiously homogeneous local political districts such as public schools. It tells us that where a majority religion seeks to entrench itself through public-sponsored religious expression, even where it does so through the tactic of majoritarian election processes, public and private intimidation of the objecting religious minority is sure to follow.

Indeed, the case law and literature are rife with examples of this kind of conduct.[330] In one such case, a family that objected to public prayer at a public school in an overwhelmingly Southern Baptist region of Mississippi was subjected to both public and private harassment; as an example of the former, a teacher "made one child wear headphones to avoid hearing the offending prayers."[331] In another case, a Jewish family in Pike County, Alabama, filed suit objecting to various religious exer-

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327. *Id.* at 1891.

328. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294–95 n.1 (2000).

329. For more on the harassment of the plaintiffs in *Santa Fe*, and other students in that district, see Laycock, *supra* note 249, at 38–40.

330. The best account is that of Frank Ravitch. *See* RAVITCH, *supra* note 10; *see also* Frank S. Ravitch, *A Crack in the Wall: Pluralism, Prayer, and Pain in the Public Schools*, *in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 296, 296 (Stephen M. Feldman ed., 2000).

331. RAVITCH, *supra* note 10, at 9.

cises conducted by the local public schools; one of the children was physically forced by a school official to bow his head during Christian prayers, and a minister at a school assembly told the students that those who did not accept Jesus as their savior "were doomed to hell."[332] In a third case, a Jewish high school student in Utah who objected to the singing of religious songs by the high school choir, to which she belonged, was spat on by audience members and was identified as Jewish by one of her teachers.[333] In an extreme case, two families who objected to religious meetings held at a primary school in a small town in Oklahoma received death threats, and one family's house was burned down, in addition to their suffering from petty acts of harassment by school employees.[334]

These are only a few examples.[335] No doubt there are examples of both public and private intimidation of religious minorities in similar circumstances in towns too obscure to gain national attention. It is likely, too, that the threat or reality of intimidation has in some cases choked off any objections to particular majoritarian religious practices by religious minorities before they ever reached the stage of formal protests or litigation. Not incidentally, one account of the *Adler* litigation itself suggests a similar dynamic of intimidation at work. When one of the Adler children sat through the prayers at her graduation, a classmate told her, "Stand up, you stupid bitch."[336]

I hasten to add that the point of this list is not to be alarmist, or to ignore the locales in which no such intimidation occurred. Nor am I arguing by implication for some form of strict separationism across the board in Establishment Clause cases. The concerns raised by this sort of conduct may not be raised by other government actions, such as funding for religious entities, that take place on a fair and neutral basis.[337] They

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332. *Id.* at 9–10.

333. *See id.* at 11–12.

334. *See id.* at 12–13.

335. For these and other examples, see also Smith, *supra* note 54, at 328–29 (adding the example of a student who was called a "little atheist" during class by one teacher for objecting to prayer by a school basketball coach at games and practices, and a student who was "lectured on Christianity" for objecting to a school's practice of offering invocations at football games); Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 WM. & MARY BILL RTS. J. 607, 609–14 (1995).

336. Blumer, *supra* note 168.

337. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000); *see also* Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 507–08 (1992) (arguing that battles over the government use of religious symbols are more polarizing than battles over the allocation of government resources to religion); Lupu, *supra* note 148, at 771 (noting that the "emerging trend" in Establishment Clause litigation is "away from concern over government transfers of wealth to religious institutions, and toward interdiction of religiously partisan government speech").

will likely also be absent in cases of true private religious speech involving willing audiences, such as the use of school rooms for meetings by religious groups before or after school hours on an equal basis with non-religious groups.[338] Moreover, and the point is particularly relevant here, one cannot easily argue for an across-the-board separationist rule because the nature, scope, and likelihood of this kind of majority harassment of minorities will vary depending on the size and demographic makeup of the political district in question. Schragger's general point about "the importance of scale" in Establishment Clause jurisprudence is quite correct, although I do not believe it always points in the direction of deference to local governmental officials.[339]

The conclusion I have drawn in this section is ultimately a simple one, although it may often be overlooked in law and religion scholarship. For all our rhapsodies over American religious pluralism,[340] it is important to remember that American religious pluralism writ large is not at all the same thing as American religious pluralism writ small. If it were—if local political jurisdictions were every bit as religiously diverse as the national polity—perhaps a different approach would be appropriate.[341] Courts and scholars have often worried about the effects of religious "division" or "strife."[342] But, in genuinely religiously pluralistic political jurisdictions, these divisions are likely to result in compromise among all the players rather than the dominance of any one group. Even if there is discord along the way, no single faction is likely to win, and the political process is more likely to find ways of hearing from and accommodating everyone. Both the process and the outcome are thus likely to be fairer and more neutral in an Elysian sense.

This is not true, however, in overwhelmingly religiously homogeneous political districts. There, both the process and the outcome are

338. *See, e.g.*, Good News Club v. Milford Cent. Sch. Dist., 533 U.S. 98 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

339. Schragger, *supra* note 303, at 1817.

340. And I do mean "our." *See, e.g.*, Horwitz, *supra* note 250 (discussing American religious pluralism in the context of religion and American presidential politics).

341. I emphasize the word "perhaps." How we treat government religious expression that takes place at the national level, or that is imposed locally through decisions made at the national political level, is beyond the scope of this Article. My general sense, however, is that at a de facto level we already often permit or excuse religious expression by national political figures, such as public prayer at presidential inauguration ceremonies, both because those actions do *not* involve the imposition of government religious expression on locally gathered bodies of citizens, and because the few occasions on which national political figures speak religiously are far more non-coercive in nature than they would be at the local level. For some related musings on similar questions, see William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11 (2002).

342. For a comprehensive and critical examination of the role of concerns over religious "division" in Religion Clause jurisprudence, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).

likely to permanently favor the majority, and to disenfranchise the minority—if not worse, as the laundry list of examples of public and private harassment offered above suggests. Because the demographics of religion in those districts overwhelmingly favor a particular group, the process is unlikely to create a shifting cast of "ins" and "outs"; the ins will always be in, and the outs will always be out. It cannot be surprising, then, that it is precisely at the local level, and specifically at the level of overwhelmingly religiously homogeneous political jurisdictions, that the Supreme Court's rulings on school prayer have been most openly defied.[343]

This in turn suggests a somewhat contrarian, but important, conclusion. Although the implications of this conclusion remain to be worked out more fully in subsequent work, it is worth spelling out here, albeit tentatively. In recent years, some judges[344] and scholars[345] have argued that the Establishment Clause may best be understood as being solely or primarily concerned with *federal* establishments of religion, and not state or local establishments of religion. For other reasons, as we have seen, similar implications may follow from the arguments of localist scholars like Richard Schragger. The argument I have offered in this section suggests a different conclusion: the Establishment Clause might instead be better understood, at least in the modern era, as being more properly concerned with *state* and *local* establishments of religion than with *federal* establishments of religion.

One possible response to this conclusion is that exit is possible from state and local jurisdictions in a way that it is not at the national level. Indeed, defenders of the localist approach to the Establishment Clause often point to the availability of exit in defending their approach.[346] I acknowledge the force of this argument, and a full response to this point may have to await another occasion. Still, I want to venture some tentative responses. First, I am not so sure that exit is always as easy or available in practice as this argument would suggest.

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343. *See, e.g.*, FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE 296–300 (Princeton Univ. Press 1976); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 608 (1993); Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 8–9 (1984); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 15–16 (1996) (suggesting that the Court's school prayer decisions reflected national majority sentiment and were thus imposed primarily against local outliers, but noting that the school prayer rulings may have been "defied in many locales"); Stephen J. Wermiel, *Appointment Controversies and the Supreme Court*, 84 NW. U. L. REV. 1033, 1034 (1990).

344. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49–50 (2004) (Thomas, J., concurring in the judgment).

345. *See, e.g.*, Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006).

346. *See, e.g.*, Schragger, *supra* note 303, at 1848; Rosen, *supra* note 303, at 703–07.

As Douglas Laycock and others have pointed out, "Voting with your feet is expensive."[347] Second, even if exit from smaller jurisdictions is *somewhat* available, the high costs of exit at a local level must be taken into account in weighing the costs and benefits of a "jurisdictional" or decentralized approach to the Establishment Clause.[348] Third, as I have argued above, even if exit is not available at the national level, the fact of significant religious pluralism at the national level means that exit is also less *necessary* at that level, since any single religious faction is less likely to prevail in the national political process than it is at the local level. Thus, even given the argument from exit, it may still be the case that the Establishment Clause ought, on balance, to be more concerned with state and local establishments of religion than with federal establishments.

Finally, the argument from exit may not be a trump where individual rights are involved.[349] As Laycock writes, there is a difference between "those cases in which a person leaves the jurisdiction in response to illegitimate pressures [and] those cases in which a person leaves the jurisdiction in response to legitimate policy disagreements."[350] I have argued in this Article that practices of overwhelmingly religiously homogeneous political jurisdictions that entrench the ins, and dislodge the outs, on a religious basis fall within the former category. To be sure, that argument is a substantive one.[351] My conclusion may thus seem to be in some tension with the conventional view that Elysian political process theory is supposed to be utterly substance-free.[352] But it is doubtful that Ely can be properly read as having disclaimed any such substantive choices,[353] and the view I have developed in this Article is that religious freedom, including non-establishment, is one such substantive choice that fits properly within Ely's theory.

Ely himself had little or nothing to say about the relevance of the "size" or "scale" of governmental actors in applying either political pro-

347. Laycock, *supra* note 249; *see id.* at 34 n.30 (collecting sources).

348. *See* Schragger, *supra* note 303, at 1891 (treating the question of whether to defer to local religious practices as a matter of weighing the costs and benefits of such an approach).

349. *See, e.g.*, Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS., Winter 1992, at 147, 150 ("[T]he institution of federalism, without the rigorous enforcement of substantive individual rights, will not be equal to the formidable task before it."); Laycock, *supra* note 249, at 30–43.

350. Laycock, *supra* note 249, at 31.

351. *See id.* (noting that distinguishing between legitimate and illegitimate instances of being forced to exit, or "vot[e] with your feet," "reduces to a debate over which rights to constitutionalize and over the proper scope of each constitutional right").

352. *See* Tushnet, *supra* note 229, at 1048–51; *see id.* at 1050 (arguing that Ely's theory, by championing certain rights even where exit is a possibility, is "inconsistent with the principle of value-free adjudication").

353. *See generally* Michelman, *supra* note 232.

cess theory in general or the Religion Clauses in particular. Still, the arguments I have offered above seem wholly consistent with his theory. The machinery of the political process is especially likely to malfunction in overwhelmingly religiously homogeneous political jurisdictions. In sum, contrary to some localist and "jurisdictional" arguments about the Establishment Clause, and consistently with a proper reading of the facts in *Adler* and *Santa Fe*—and especially that case's Footnote One, which ought to be far better known by law and religion scholars—perhaps we ought to be *especially* vigilant and rigorous in applying the Establishment Clause to these sorts of political subdivisions. In opposition to some of the arguments raised not only by localists but by champions of the "jurisdictional" reading of the Establishment Clause, like Justice Thomas and Steven Smith, this Article might thus also be viewed as an initial sally in support of what we might call the "counter-jurisdictional" Establishment Clause.

CONCLUSION

This Article has been, in large measure, about why the Eleventh Circuit was wrong in *Adler v Duval County*. But it is not only about that. For all that the court's opinion in *Adler* was wrong, that case, and *Santa Fe* too, reveal much more when viewed through an Elysian lens. Understanding the majoritarian speaker selection policies in *Adler* and *Santa Fe* as providing for a rigged political process, in an Elysian sense, helps us understand more clearly why unconstitutional state purposes cannot be laundered by running them through a democratic dumb show. More broadly, *Adler* and *Santa Fe* offer insights about the nature of American religious pluralism, and the dangers of assuming that it exists on a local as well as a national scale. These cases suggest that the localists are right to believe that courts and scholars have paid insufficient attention to the scale of government action in Establishment Clause cases. They also suggest, however, that sometimes, in some overwhelmingly religiously homogeneous areas, the local can be more of a threat to religious liberty than the national. For these reasons, too, *Adler* is important even if it is mistaken.