

Graduation prayers should not do indirectly what is prohibited directly  
Written by K. Hollyn Hollman, BJC General Counsel

One of my best early professional experiences was working on a successful arbitration in a contract dispute. My client was seeking to enforce a provision that prohibited the other party from taking some business action unless he paid my client. I'll spare you the document-reviewing, witness-interviewing, hours-billing details. The case was fun because it turned on a very satisfying rule of contract law: You cannot do indirectly what the contract forbids you to do directly. It is a rule that protects fairness by protecting the essence of the agreement.

That rule came to mind with this year's crop of graduation questions. I was repeatedly asked if graduation prayer was OK, so long as students do the praying. Most callers know the Supreme Court's holding that the Establishment Clause was violated by the clergy-led graduation prayer in *Lee v. Weisman* (1992). The Court has not decided a case involving student-led prayer at graduation, but the *Santa Fe v. Doe* (2000) decision on prayer at football games by an elected student chaplain dispelled the notion that if a prayer comes from a student, there is no problem. Where, for example, the school provides the microphone, invites the audience and defines a selection procedure that ensures a majoritarian outcome on a matter of religious expression, the constitutional problem remains. Still, as the Court itself has noted, its jurisprudence in this area "is of necessity one of line-drawing."

The two widely publicized graduation incidents this year involved religious speech by students. While factually and legally distinct, both appear to miss the essence of the rule prohibiting graduation prayer. In one Kentucky town, a crowd of students upset by a court order requiring the removal of prayer from scheduled graduation exercises stood during the ceremony and recited the Lord's Prayer. While the school may have had a sticky disciplinary issue on its hands, it probably avoided any constitutional violation. The students ably, though perhaps not wisely, demonstrated they could pray voluntarily, without the school scheduling it or directing them.

In a Nevada school district, school officials cut short an address by a valedictorian who veered from her school-approved text to give a more elaborate Christian testimony. On review of the student's draft speech, school officials had reportedly deleted six of her 12 references to God. The student had agreed to comply. On graduation day, however, she attempted to use her time in the spotlight to give the original version of her speech. While the speech ended abruptly, the story received extended attention in the news and Internet chat rooms.

No doubt the students involved in these cases would claim free speech rights and discount the impact on those who don't share their perspective. They would argue, quite persuasively, that they did not coerce participation in religious exercises the same way a formal invocation might. Appeals to free speech, however, only go so far. A graduation stage is not what the law regards as a traditional free speech forum. School officials will typically set the agenda and control the content of graduation ceremonies. In any event,

these incidents disregard significant religious rights and values that lie at the essence of the graduation prayer ruling. At a highly regulated school event— this one marking an achievement of singular importance to students and their families— no student should be made to feel like an outsider. Protecting religious freedom requires guarding rights of conscience and avoiding the use of government to promote religion.

By design, the First Amendment protects speech and religion differently. As Justice Anthony Kennedy noted in *Lee*, speech is protected by insuring its full expression, but religion is protected by "a specific prohibition on forms of state intervention in religious affairs, with no precise counterpart in the speech provisions." The explanation for this difference lies in the lessons of history that inspired the Establishment Clause— lessons that protect freedom of conscience and ensure religious faith is real, not imposed.

It is quite likely that boundary-testing graduation cases will continue to emerge; one may eventually reach the Supreme Court. Fortunately, the law reaches beyond formalism, and schools will not be allowed to simply substitute a student for a school official— doing indirectly what is prohibited directly. Many school districts recognize that a moment of silence or private baccalaureate service is a better vehicle for those who want to mark graduation with prayer. During graduation ceremonies, communities are better served when schools and students promote the essence, and not just the letter, of the religion clauses. After all, the rule protects not only the objector or dissenting nonbeliever, but religion itself.

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