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WHO SPEAKS FOR THE STATE?: RELIGIOUS SPEAKERS ON GOVERNMENT PLATFORMS AND THE ROLE OF DISCLAIMING ENDORSEMENT

Steven H. Aden, Esq.*

The recent Supreme Court decision in Santa Fe Independent School District v. Doe prohibits prayer at school-sponsored events. In this Article the author analyzes the development of Supreme Court jurisprudence in the area of religion in public schools. Noting the tension between the Establishment and Free Speech Clauses, the author proposes the use of disclaimers to allow student expression at school events to avoid violating the Establishment Clause.

* * *

INTRODUCTION

In the Supreme Court's decision this term in *Santa Fe Independent School District v. Doe*,¹ the Court at last made it clear—for now—that its decision in *Lee v. Weisman*² was not about prayer by members of the clergy, or prayer “sponsored by” public school officials, or even about prayer at graduation ceremonies. Rather, the plurality's decision, as the *Santa Fe* majority interprets it, was intended to erect a constitutional barrier against organized prayer at school events generally. It now seems clear that after *Santa Fe*, virtually no policy or practice that, either on its face or as applied, permits prayer at school-sponsored events or fosters an environment in which prayer would be the reasonably foreseeable result, can pass constitutional muster with this Court.

After *Santa Fe*, prayer in public schools will be relegated to the private spheres of personal belief and group association, where purely voluntary, student-initiated prayer outside of instructional periods remains as fully protected as other forms of non-religious speech and peaceful assembly.³ It is

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¹ 530 U.S. ___, 120 S. Ct. 2266 (2000).

² 505 U.S. 577 (1992).

³ See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.”); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (“[Religious worship and discussion] are forms of speech and association protected by the First Amendment.”). *Widmar* upheld the provision of public university meeting facilities to a student religious group for the purpose of “prayer, hymns, Bible

elementary and fundamental that the freedom to believe is sacrosanct,⁴ and the freedom to profess belief is subject to no governmental regulation other than reasonable time, place, and manner restrictions, which in the public school context chiefly relates to instructional time.⁵ Voluntary, student-initiated activities such as the annual "See You at the Pole" event, non-curricular related Bible clubs, and the distribution of religious literature during non-instructional time to willing recipients (at least at the secondary school age levels),⁶ remain forms of fully protected speech and association.

The Establishment Clause acts as a structural constraint on the power of government to promote or engage in religious activity.⁷ Where the impetus for religious activity is purely of private initiative and design, there is no state action and the Establishment Clause does not proscribe the conduct.⁸ This is true even if there is government assistance, so long as the criteria for receiving that assistance is neutral with respect to religion.⁹ Nonetheless, after *Lee* and *Santa*

commentary, and discussion of religious views and experiences." *Id.* at 265 n.2.

⁴ See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("[T]he Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute.").

⁵ The Court acknowledged in *Santa Fe*, "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday." 530 U.S. at ___, 120 S. Ct. at 2281.

⁶ The Seventh Circuit cautiously held that religious speech is appropriate for elementary level students. See *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538-39 (7th Cir. 1996). Also, it vigorously asserted the rights of junior high students to engage in religious expression at school. See *Hedges v. Wauconda Cmty. Sch. Dist.*, 9 F.3d 1295, 1298-1300 (7th Cir. 1993).

⁷ See Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311, 311 (2000).

⁸ See *Capital Square Review*, 515 U.S. at 760.

⁹ In recent decisions, the Court has substantially resolved the confusion over the constitutional status of indirect aid to sectarian activities by articulating a rule that aid to sectarian interests is permissible as long as the aid is provided under religiously neutral funding criteria. See *Mitchell v. Helms*, 530 U.S. ___, 120 S.Ct. 2530, 2544 (2000); *Agostini v. Felton*, 521 U.S. 203, 234-35 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986). This rule, however, is simply an alternative formulation of the state action test. So long as the funding conditions are religiously neutral, and the decision to commit the funds to sectarian education is made by private individuals and not the state, the Establishment Clause is not implicated. See *Mitchell*, 530 U.S. at ___, 120 S. Ct. at 2544; *Agostini*, 521 U.S. at 226; *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 487. The Court in *Agostini* pointed out that the common thread running through the funding cases was that "any money that ultimately went to religious institutions did so 'only as a result of the genuinely independent and private choices of' individuals." 521 U.S. at 226 (quoting *Witters*, 474 U.S. at 487). The funding program's neutral eligibility criteria ensured that the religious use of the funds "was a 'result of the private decision of individual parents' and '[could not] be attributed to state decisionmaking.'" *Id.* (quoting *Zobrest*, 509 U.S. at 10); see also *Mitchell*, 530 U.S. at ___,

Fe, compelling First Amendment questions remain over the constitutional status of public professions of personal faith. For example, may a high school valedictorian speak about the importance of his religious faith to his success during his valedictory address? May the same student invite the audience to convert to his faith? Perhaps more importantly, may a school exercise prior restraint by censoring these students' speeches because of the religious nature of their messages, out of fears that they may be subjecting a "captive audience" to a "religious exercise?"¹⁰ An analysis of the Court's past holdings and current trends in the First Amendment's free speech and religion clause jurisprudence suggests that religious students may not, in fact, be censored by school authorities solely because of their religious viewpoints. This brief Article will attempt to set out an introduction to the issues and applicable First Amendment law, and provide a proposed framework for understanding and accommodating the right of expression of religious public school students without compromising the important interest of church-state separation.

I. FROM *TINKER* TO *ROSENBERGER*

It is well established that student speech is protected by the First Amendment. As the Supreme Court put it in an often-quoted, but infrequently examined, maxim in *Tinker v. Des Moines*, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹¹ The essence of *Tinker* was its holding that students' freedom of speech, and other fundamental freedoms such as free exercise of religion and freedom of association, may not ordinarily be subjected to infringement by school authorities without evidence that would reasonably lead officials to fear a substantial disruption in the educational process.¹² *Bethel School District No. 403 v. Fraser*¹³ began the process of defining cabining strictures to this broad proposition by recognizing a school's right to sanction lewd and indecent speech.¹⁴ *Fraser* involved a sexually explicit speech given by

120 S. Ct. at 2544 (discussing the lack of government support for religion where neutral aid is available); cf. *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998) (finding no state action leading to endorsement problem where school officials merely permitted private individuals on a viewpoint-neutral basis to place Bibles on school property).

¹⁰ Compare *Cole v. Oroville Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000) (holding that review and control of religious content of valedictorian's graduation speech was necessary to avoid Establishment Clause violation), with *Chandler v. Siegelman*, 230 F.3d 1313 (2000) (reinstating upon remand from Supreme Court earlier decision vacating injunction that could have effect of chilling private student religious expression in public schools).

¹¹ *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹² See *id.* at 513.

¹³ 478 U.S. 675 (1986).

¹⁴ See *id.* at 680.

a high school student in support of a friend's candidacy for student office.¹⁵ Although the speech could not be said to have caused an imminent substantial disruption in the educational function of the school, it could be sanctioned nonetheless.¹⁶ As the Court clarified subsequently in *Hazelwood School District v. Kuhlmeier*, "[t]he decision in *Fraser* rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of a speech . . . rather than on any propensity of the speech to 'materially disrupt classwork or involv[e] substantial disorder or invasion of the rights of others.'"¹⁷ In the *Fraser* Court's view, the speech involved was near the outer periphery of First Amendment protection and inappropriate to a public school audience.¹⁸

In *Hazelwood*, a journalism class produced the high school student paper.¹⁹ The case arose after a principal eliminated stories dealing with sexual activity inappropriate for some of the younger students at school.²⁰ The very nature of the activity in question was such that members of the public might reasonably perceive it to bear the imprimatur of the school because "[t]hese activities may fairly be characterized as part of the school curriculum, . . . as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."²¹ *Hazelwood*, however, did not sanction viewpoint discrimination; rather, it involved subject matter that was inappropriate for certain ages or that would violate the privacy rights of students or parents. In *Hazelwood*, the Supreme Court declared that a school must tolerate "a student's personal expression that happens to occur on school premises."²² However, it may restrict "material that may be inappropriate for their level of maturity."²³

In *Board of Education of the Westside Community Schools v. Mergens*,²⁴ the Court held that a public school does not unconstitutionally endorse religion by permitting a religious club to meet on school grounds and recruit members through the school's newspaper, bulletin boards, public address system, and annual club fair.²⁵ The Court emphasized that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause

¹⁵ See *id.* at 677.

¹⁶ See *id.* at 683.

¹⁷ 484 U.S. 260, 271-72 n.4 (1988) (quoting *Tinker*, 393 U.S. at 513).

¹⁸ See *Fraser*, 478 U.S. at 688 (citing *Cohen v. California*, 403 U.S. 15 (1971)).

¹⁹ See *Hazelwood*, 484 U.S. at 262.

²⁰ See *id.* at 263.

²¹ *Id.* at 271.

²² *Id.*

²³ *Id.*

²⁴ 496 U.S. 226 (1990).

²⁵ See *id.* at 247-53 (affirming the constitutionality of the Equal Access Act, 20 U.S.C. §§ 4071-74, which grants religious clubs the same privileges as those of other non-curricular student organizations).

forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”²⁶ The Court reasoned: “We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis The proposition that schools do not endorse everything they fail to censor is not complicated.”²⁷ The *Mergens* Court thus acknowledged that secondary school students are mature enough not to attribute official school endorsement to student religious groups merely because the school permits the groups to meet and to enjoy the privilege of disseminating information about their group.²⁸

This distinction between private religious speech and government action endorsing religion was also critical to the Supreme Court’s rationale in *Lee v. Weisman*.²⁹ In *Lee*, the principal of a public school invited a local member of the clergy, a Jewish rabbi, to give “nonsectarian” prayers and provided the rabbi with guidelines as to the content of the prayers.³⁰ A student challenged the legality of these prayers on Establishment Clause grounds.³¹ While no particular Establishment Clause approach garnered a majority, the Court’s plurality held that when a public school official invites a member of the clergy to deliver a graduation prayer, and when the official advises the member of the clergy on how to deliver that prayer, the Establishment Clause is violated.³²

The plurality emphasized that the crucial factor in determining whether coercion exists in a prayer case is whether state officials have directed the “performance of a formal religious exercise.”³³ Justice Kennedy reasoned:

²⁶ *Id.* at 250; *cf.* *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 841 (1995) (“[T]he government has not fostered or encouraged’ any mistaken impression that the student newspapers speak for the University.”) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995)).

²⁷ *Mergens*, 496 U.S. at 250.

²⁸ *See id.* In *Hedges v. Wauconda Cmty. Union Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993), the court stated:

[I]gnorant bystanders cannot make censorship legitimate Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether . . . schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.

Id. at 1299-1300.

²⁹ 505 U.S. 577 (1992).

³⁰ *Id.* at 581.

³¹ *See id.* at 584.

³² *See id.* at 597.

³³ *Id.* at 586.

[T]he school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.³⁴

Justice Kennedy's plurality opinion in *Lee* turned on four factors. First, the case involved a public school.³⁵ Second, school officials and teachers were active in planning the graduation ceremony, inviting a person to offer graduation prayers, and advising the clergy member on the content of his prayers.³⁶ Third, a local member of the clergy offered the graduation prayers.³⁷ Fourth, the case involved a graduation ceremony that graduates and their families might have felt an obligation to attend, even though their attendance was not mandatory.³⁸

II. SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE

The Supreme Court granted certiorari in *Santa Fe Independent School District v. Doe* to clarify an issue that had remained unclear in the circuit courts of appeal after *Lee v. Weisman*: “[Whether Santa Fe’s] policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.”³⁹ After *Lee*, Santa Fe had adopted a policy permitting an elected student council chaplain to deliver a prayer over the public address system before each football game.⁴⁰ Mormon and Catholic parents challenged the policy as a violation of the Establishment Clause.⁴¹ While the case was pending, Santa Fe adopted a policy that permitted, but did not require, prayer initiated and led by students at games.⁴² The district court ordered the policy modified to permit only nonsectarian, nonproselytizing prayer, in accordance with the Fifth Circuit’s decision in *Jones v. Clear Creek II*.⁴³ The text of the prayer was to be

³⁴ *Id.* at 593.

³⁵ *See id.* at 581.

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See id.* at 595.

³⁹ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. ___, 120 S. Ct. 2266, 2269 (2000).

⁴⁰ *See id.* at 2291. Justice Stevens stressed the historical context of the Santa Fe policy as an attempt to circumvent *Lee*, noting, “[t]his case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause.” *Id.* at 2282.

⁴¹ *See id.* at 2271.

⁴² *See id.*

⁴³ *See id.*; *see also Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

determined by students without input from school officials.⁴⁴ The order permitted references to specific religious figures, so long as the general thrust was “nonproselytizing.”⁴⁵ In response, Santa Fe enacted a graduation policy permitting the senior class to vote by secret ballot to choose whether to have an invocation.⁴⁶ If they so chose, a separate vote would be held to elect the student who would give it.⁴⁷ The policy was subsequently extended to govern football game prayers.⁴⁸ The final policy, which became known as the “October policy,” omitted the reference to “prayer” and referred instead to “statements” and “messages” as well as “invocations.”⁴⁹ The district court enjoined the first, open-ended policy, but permitted the October policy as restricted to “nonsectarian and nonproselytizing” prayer.⁵⁰ On review, the Fifth Circuit Court of Appeals reversed. It noted that while its decision in *Jones* had permitted a similar voting arrangement for nonsectarian, nonproselytizing prayer at graduation ceremonies, it had restricted the rationale of the case to graduation, a “once in-a-lifetime event” which appropriately called for “solemnization.”⁵¹

The Court stated that, although *Santa Fe* involved student led prayers and a different type of school function, it was guided by the principles of *Lee v. Weisman*.⁵² Justice Stevens, writing for the 6-3 majority, first rejected the argument that the pre-game invocations could be deemed “private speech.”⁵³ While not every message given in such a setting is the government’s own, the Court said, it distinguished *Rosenberger* and the limited forum cases. Forum analysis was held inapplicable because the school district did not open the asserted forum to indiscriminate use, but only allowed one student (the same student for the whole season) to give the invocation.⁵⁴ The message was also restricted as to the content and the topic because the “majoritarian process implemented by [Santa Fe] District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.”⁵⁵

⁴⁴ *Santa Fe*, 530 U.S. at ___, 120 S. Ct. at 2271.

⁴⁵ *Id.* at 2272.

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ *See id.* at 2273.

⁴⁹ *Id.*

⁵⁰ *Id.* at 2272-73.

⁵¹ *Id.* at 2274 (quoting *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406-07 (5th Cir. 1995)).

⁵² *See id.* at 2269.

⁵³ *Id.* at 2287.

⁵⁴ *See id.* at 2275-76.

⁵⁵ *Id.* at 2269. This Article assumes that the constitutional status of private religious speech in a public school sponsored forum is not altered by the nature of the forum. Certainly, a student’s First Amendment rights are even more clearly protected where a school has created a limited open forum. Unlike the systematized student prayer struck down

The Court also cited its perception that "the District has failed to divorce itself from the invocations' religious content" by implementing the voting process.⁵⁶ "[A]s we found in *Lee*, the 'degree of school involvement' makes it clear that the pregame prayers bear 'the imprint of the state and thus put school-age children who objected in an untenable position.'"⁵⁷ Other language in the policy stated the prayer "shall" be conducted by the student council "with advice and consent" of the principal. The "statement or invocation" was to be "consistent with the goals and purposes of this policy," which were "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."⁵⁸ The Court found that the policy actually "invites and encourages religious messages" because the stated purpose is "to solemnize the event," and a religious message is the most obvious way to do this.⁵⁹

The Court noted that an "invocation," which it defined as "an appeal for divine assistance," was the only type of message specifically approved in the policy.⁶⁰ The Court also reasoned that the Santa Fe policy created an endorsement of religion because the student prayer was delivered at a school-sponsored function on school property, surrounded with the insignia, symbols, and colors of the school. In this context, the audience "must perceive" the message as "delivered with the approval of the school administration."⁶¹ The Court thus decided that the objective observer would "unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."⁶² Justice Stevens concluded that "the use of an invocation to foster such solemnity

in *Santa Fe*, graduation ceremonies and other school assemblies frequently involve student speech on various subjects, often without prior review and approval of the speech by school officials. In these circumstances, a limited open forum has been created and the state may only justify its censorship or editing of student speech if it has a "compelling state interest." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). However, even if a school assembly may be considered a nonpublic forum, viewpoint discrimination is not permitted. *See generally* *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804 (1985) ("Although a speaker may be excluded from a nonpublic forum . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."). A school may still only place restrictions on speech that are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46.

⁵⁶ *Santa Fe*, 530 U.S. at ___, 120 S. Ct. at 2269.

⁵⁷ *Id.* at 2277 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

⁵⁸ *Id.* at 2273 n.6.

⁵⁹ *Id.* at 2277.

⁶⁰ *Id.* at 2269.

⁶¹ *Id.* at 2278.

⁶² *Id.*

is impermissible when, in actuality, it constitutes prayer sponsored by the school . . . [a]nd it is unclear what type of message would be both appropriately 'solemnizing' . . . and yet non-religious.⁶³

III. THE STATUS OF RELIGIOUS SPEECH AFTER *SANTA FE*

Taken together, the Court's public school free speech cases—*Tinker*, *Fraser*, and *Hazelwood*—suggest that public school authorities may certainly review a proposed student expression for any content that can fairly be said to be subject to correction or censorship for legitimate pedagogical reasons. Spoken words, like written works, may be reviewed for grammar, style, punctuation or the like, if the presentation may be characterized as furthering the school's curriculum. Certainly, content that falls outside the scope of the purpose for the presentation may be struck, or the student directed to remain on topic.

Likewise, speech may be excised of content that is patently offensive, age-inappropriate, or slanderous. Speech that could foreseeably incite disruption or create an impediment to the learning process may also be proscribed. These strictures ought to offer administrators more than sufficient authority for reviewing and tailoring student presentations in ways that avoid material disruption or gross offense. Where, however, public school officials determine to monitor and control *religious* references in a student presentation, whether out of Establishment Clause concerns or out of fear of permitting offense, they cross a line forbidden by the First Amendment. As the Supreme Court has made clear, for the devout individual, religion is not a discrete category or a form of "content;" it is a viewpoint that pervades that person's outlook and informs virtually every aspect of his or her being.⁶⁴ Any restriction on a religious viewpoint must accordingly be justified by a showing that a compelling state interest is at stake, and the means chosen by the school are the least restrictive of speech.⁶⁵

With regard to student-initiated graduation presentations, school districts have three alternative courses of action. First, they may refrain from monitoring and censoring presentations at all, i.e., engage in no review whatsoever for content. Although constitutionally permissible, the First Amendment does not require this course. It is undoubtedly the least practical of alternatives, raising numerous unnecessary problems; for example, how should school officials respond if one student attempts to lead the assembly in prayer, or another chooses to "solemnize" the occasion by reciting Marilyn Manson lyrics or

⁶³ *Id.* at 2279.

⁶⁴ See generally *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995) (finding viewpoint discrimination of student-run Christian newspaper).

⁶⁵ See *id.* (disallowing scarcity of funds as reason for discrimination).

similar offensive creeds? Second, administrators could monitor and correct for inappropriate content only, in a viewpoint-neutral fashion, as discussed above. This also is a constitutionally-permissible course, and the one that seems least intrusive. Third, administrators could monitor and censor for improperly "religious" content, which generally breaks down into two subordinate concerns: whether religious expressions are sufficiently "nonsectarian" to avoid causing offense, and whether they remain "non-proselytizing." Of the three policy alternatives, the latter is easily the most constitutionally offensive for several important reasons.

First, this course requires government actors to enter the constitutionally prohibited realm of delineating the degree of religious content that will be deemed acceptable and inoffensive to the audience. The term "nonsectarian," in a less pluralistic age, once referred to generic Christian doctrine, as expressed, for example, in the Apostles' Creed, and as opposed to doctrinal distinctions between Roman Catholicism and Protestant sects. Today, in a society in which urban public schools may include large numbers of Buddhist, Hindu, Muslim, Jewish, and Sikh students, as well as practitioners of fetishistic and animistic religions, atheists and agnostics, the term "nonsectarian" has become meaningless. Because of this rich diversity, virtually any expression of sincere religious devotion in the public sphere is likely to cause offense to some. On the other hand, this diversity also militates against the likelihood that a particular student's permitted expression might be taken as a state endorsement of his or her faith.

Furthermore, "nonsectarian" is simply a proxy for "non-offensive." That some could be offended has never been the basis for a constitutional proscription on speech, either outside the public school context or within it,⁶⁶ nor for religious speech.⁶⁷ Offense to religious speech has nothing to do with the Establishment Clause problem or apparent endorsement of religion.

Second, the course of censorship for religious content requires the government to enmesh itself in the hopeless task of determining whether speech

⁶⁶ See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (holding state's prosecution of flag burner unconstitutional); *Cohen v. California*, 403 U.S. 15 (1971) (finding state statute for disturbing the peace unconstitutional); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (discussing a "clear and present danger" test for polemic political speech).

⁶⁷ See, e.g., *Capital Square Review & Advisory Bd. v. Pinette*, 510 U.S. 1307 (1993) (discussing cross erected by the Ku Klux Klan); *Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990) (discussing access of Christian club to school); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (discussing sale of materials by Jehovah's Witnesses). Confirming this view in the present context, Justice Kennedy, writing for the majority in *Lee v. Weisman*, stated, "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." 505 U.S. 577, 597 (1992).

is unduly “proselytizing,” i.e., whether it has the effect of persuading others to its position. This kind of invasive parsing of religion has been consistently and vigorously opposed by the Supreme Court as a dangerous form of excessive entanglement with religion.⁶⁸ “[S]crutiniz[ing] the content of student speech, lest [it] . . . contain too great a religious content” violates the Establishment Clause.⁶⁹ In *Lee*, rejecting the school district’s defense that the rabbi’s prayer was “nonsectarian,” Justice Kennedy opined that the First Amendment does not permit the government to undertake the drafting of such “non-sectarian” prayers.⁷⁰ As the Court has said in another context, “Courts should not undertake to dissect religious beliefs.”⁷¹

A policy of censoring religious graduation speeches strikes at the heart of the principles that animate the First Amendment prohibition on viewpoint discrimination. A valedictorian earns the right to speak by completely objective criteria, based on academic merit; he or she is, quite literally, chosen by computer according to grade point average.⁷² A valedictory speech on the topic of how to succeed, or how that particular student succeeded, is intended to persuade by personal example and exhortation. A valedictorian speaks to the public as an example to be followed; the speaker’s habits and attitudes are examined closely as a model to copy, by students for their personal success and

⁶⁸ See e.g., *Frazee v. Ill. Dep’t of Employment Sec.*, 489 U.S. 829 (1989) (adhering to a recognized form or denomination of religion not required for Free Exercise protection); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (discussing three-part test for cases involving the Establishment Clause); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding that religion recognized by Free Exercise Clause need not be theistic, but only a view of universal meaning that takes the place of God in one’s life).

⁶⁹ *Rosenberger*, 515 U.S. at 844.

⁷⁰ *Lee*, 505 U.S. at 589.

⁷¹ *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981) (discussing employee terminated because the production of war materials violated his religious beliefs); see also *Rouser v. White*, 944 F. Supp. 1447, 1454 (E.D. Cal. 1996) (“Abjuring inquiry into whether the orthodox interpretation of a religion requires a particular practice, as contrasted with the subjective understanding of the plaintiff as to his religious needs, is required by virtue of the fact that ‘[c]ourts are not arbiters of scriptural interpretation.’”) (quoting *Thomas*, 450 U.S. at 716).

⁷² Selection by grade point average altogether avoids the majoritarian concerns expressed by the Court in *Santa Fe*, *supra* Part II, and *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000). Except in cases in which multiple valedictory candidates may be eligible to speak, as where several students have attained the highest G.P.A., and the “tie-breaker” is subjective, the selection of a valedictory speaker is typically not subject to majoritarian constraints. In a concurring opinion in *Lee v. Weisman*, Justice Souter, joined by Justices O’Connor and Stevens, wrote, “If the state had chosen its graduation day speaker according to a 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.” 505 U.S. at 630 n.8 (Souter, J., concurring).

by parents as an ideal to instill in their own children. To order, for example, a Christian valedictorian to attribute his success to anything or anyone but his personal faith in God, is to negate the essence of who he is as a person. It is discrimination, pure and simple, as it clearly communicates to him that he is a second-class citizen whose views, alone among those of his peers, are not to be aired publicly.⁷³

Nor does suppression of this sort promote diversity. By conveying a message of bias and disregard for the personal convictions of others, this type of policy contravenes the pedagogical interest in encouraging the exploration of ideas. Under such a policy, when an atheist or agnostic student held the microphone she would be free to express herself consistently with her convictions, but a religious student would be required to forego the opportunity to speak or else not to relate their own convictions. Such a double standard would impose a state hostility to religion, which the Court has frequently warned against. As the Court cautioned in *Rosenberger*, "official censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis."⁷⁴

IV. THE ROLE OF DISCLAIMING ENDORSEMENT IN NEGOTIATING CONFLICTS BETWEEN THE ESTABLISHMENT AND FREE SPEECH CLAUSES

In its recent session, the Supreme Court reiterated its view that prior restraints based upon the content of speech must serve a compelling state interest by the least restrictive means.⁷⁵ A number of free speech cases have discussed the efficacy of private or government disclaimers to save a religious expression from the appearance of endorsement, chief among them *Capitol Square Review and Advisory Board v. Pinette*.⁷⁶ Many of the cases regarding religious holiday

⁷³ A third reason is inherent in the first two: the state "cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action." *Kunz v. New York*, 340 U.S. 290, 295 (1951). Regulation of the freedom of speech is allowed only "with narrow specificity." *NAACP v. Buttons*, 371 U.S. 415, 433 (1963). Censoring "proselytizing," "sectarian speech," or "denominational speech" is intrinsically "lacking in 'terms susceptible of objective management.'" *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 604 (1967) (quoting *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 286 (1961)); see also *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

⁷⁴ *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 845 (1995); see also *Chandler v. James*, 180 F.3d 1254, 1261 (11th Cir. 1999), *reh'g denied*, 198 F.3d 265 (11th Cir. 1999), *cert. granted judgment vacated by Chandler v. Siegelman*, 120 S. Ct. 2714 (2000) ("'Cleansing' [the schools] of all religious expression . . . inevitably results in 'establishment' of disbelief. . . [T]he Constitution requires neutrality.").

⁷⁵ See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000).

⁷⁶ 515 U.S. 753 (1995).

displays on public property also discuss the presence or absence of a disclaimer as a factor in determining whether a reasonable observer would perceive religious endorsement.⁷⁷ Implicit in the view of the Justices who have promoted the use of disclaimers is the notion that where the speech or display is private, but is on public property and may be perceived as governmental endorsement, a disclaimer of governmental involvement may be a less restrictive means of avoiding an Establishment Clause violation than a prior governmental restraint. If the existence of an endorsement concern is a real one, and the question of governmental sponsorship of religious speech is at least ambiguous under the circumstances, then the state may indeed be obligated to take steps to obviate the concern. If the state has two real alternatives, one of which is to exercise prior restraint by review and censorship, and the other is to disclaim endorsement, it would seem obvious that the latter is the less restrictive means of furthering that important governmental end.

For example, an announcement such as this one could be made before all student presentations at graduation ceremonies: "The students have been given the platform this evening for personal expressions. While the school district has given advice on content and style where it was sought, we wish to make it clear that the students are speaking on their own behalf, and not on behalf of the school or its administration." This would make explicit what should already be implicitly understood. The Court's statement in *Santa Fe* that the school district had failed to disassociate itself from the religious content in the invocations by implementing a student voting process implies that there may be alternative means of disassociation that might prove satisfactory to the Court.⁷⁸ While the presence of a disclaimer will not necessarily save the constitutionality of all forms of religious expression on public property,⁷⁹ it is certainly a means that should be employed before the constitutional last resort of a prior restraint is imposed.

⁷⁷ *E.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

⁷⁸ *Cf. Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 270 (1990) (Brennan, J. and Marshall, J., concurring). The concurrence stated:

[Westside] must fully disassociate itself from the [Christian] club's religious speech and avoid appearing to sponsor or endorse the club's goals. It could, for example, entirely discontinue encouraging student participation in clubs and clarify that the clubs are not instrumentally related to the school's overall mission. Or, if [Westside] sought to continue its general endorsement of those clubs that did not engage in controversial speech, it could do so if it also affirmatively disclaimed any endorsement of the Christian club.

Id.

⁷⁹ *See, e.g.*, *Stone v. Graham*, 449 U.S. 39 (1980) (holding the presence of a disclaimer of endorsement on the Ten Commandments display was insufficient).