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FREE SPEECH AND ESTABLISHMENT CLAUSE RIGHTS AT PUBLIC SCHOOL GRADUATION CEREMONIES: A DISCLAIMER: THE PRECEDING SPEECH WAS GOVERNMENT CENSORED AND DOES NOT REPRESENT THE VIEWS OF THE VALEDICTORIAN

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Table of Contents

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I. INTRODUCTION

It's a quintessential American scene, repeated each spring in hundreds of cities and towns across the land. Brittany McComb appears behind a large microphone to give her valedictory address at the 2006 graduation exercises of Foothill High School in Henderson, Nevada.[1] She is wearing a golden-colored graduation gown and mortar board, the bright tassel playfully dancing back and forth as she trips rapidly over

1. YouTube, Brittany McComb Valedictorian Speech, http://www.youtube.com-/watch?v=k-qzflitfHjU (last visited Sept. 24, 2009); Commentary, *One Girl's Testimonial or School-Sponsored Religion?*, LAS VEGAS REV. J., June 20, 2006, at 9B. Quotations from Ms. McComb's speech are taken from the newspaper article; visual and auditory details are taken from the YouTube video.

her words and phrases.[2] As it happens, Ms. McComb has more on her mind than the task of addressing her teachers, classmates, parents and friends in the cavernous hall. She had, as required, submitted her speech to the principal of the school, who was advised by legal counsel that the speech contained sectarian and proselytizing elements likely to provoke litigation based on the Establishment Clause.[3] The principal advised Ms. McComb to remove these elements.[4] At first she agreed, but she changed her mind and finally resolved to give her original speech.[5] School administrators told her to cut her speech, or they would cut her microphone.[6]

The speech began with a disarming metaphor for her life. "Do you remember those blocks? The ones you would fit into cut-outs and teach you all the different shapes? The ones you played with before kindergarten in the good old, no-grades, no-pressure preschool days?"[7] For a long time, Ms. McComb tried to find blocks that would fit and fill the empty cut-outs of her life.[8] When she quit trying to fill the voids in her soul with meager accomplishments, she claimed, "[A]n amazing sense of peace rushed over me," and she noticed, "[T]here was someone standing above me trying to help me: God."[9] Nothing—not friends, family, swimming, drinking, shopping, or partying—was large enough to fill the cut-outs of her life; only God's love was the right fit for that.[10] "It's unprejudiced, it's merciful, it's free, it's real, it's huge, and it's everlasting," she declared.[11] Ms. McComb went on, "God's love is so great that He gave us His . . . gave us His only Son . . . ."[12] And then, no sound.[13]

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2. Brittany McComb Valedictorian Speech, *supra* note 1.

3. Opening Brief of Defendants-Appellants at 5, McComb v. Crehan, No. 07-16194, 2007 WL 4755467 (9th Cir. Dec. 3, 2007).

4. *Id.* at 5-6.

5. *Id.* at 8; *see also Silenced Valedictorian Speaks Out*, Today on msnbc.com, June 21, 2006, http://www.msnbc.msn.com/id/21134540/vp/13457402#13457402 (last visited Nov. 3, 2009) (giving Ms. McComb's account in her Today Show interview that she felt backed into a corner, and wished to discuss the matter further with the school administration).

6. Opening Brief of Defendants-Appellants, *supra* note 3, at 8.

7. *One Girl's Testimonial or School-Sponsored Religion?*, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Brittany McComb Valedictorian Speech, *supra* note 1.

The audience began to cheer for Ms. McComb as she approached the forbidden sectarianism.[14] When the sound failed, the crowd fell silent a few moments, as Ms. McComb went on, her arms flailing.[15] The crowd began to boo, alerting her to the lack of sound.[16] She tapped the microphone and shrugged, but gave the rest of her speech even though she could not be heard.[17] The audience applauded, and Ms. McComb reluctantly returned to her chair on the stage where students, teachers, and administrators were formally seated.[18] The crowd went on cheering her.[19]

A school official came up to the microphone to announce the next valedictorian, but the crowd resumed booing.[20] Confusion followed, as two school officials talked with Ms. McComb.[21] Finally, the school official returned to the microphone.[22] She testily said, "OK, we would like to go on with the ceremony, please."[23] Boos.[24] Once again she announced the next speaker, "We would like you to please give her your attention . . . she deserves this chance to speak, please."[25] More boos.[26]

The unceremonious manner in which school administrators treated Ms. McComb sparked a lawsuit and a national debate over the constitutional propriety of censoring the speech of a valedictorian in order to avoid a violation of the Establishment Clause. However, this recent incident of valedictory religious expression was by no means unique.[27] At the graduation exercises of Lewis Palmer High School in

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14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. Brittany McComb Valedictorian Speech, *supra* note 1.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. Brittany McComb Valedictorian Speech, *supra* note 1.
26. *Id.*
27. For the purposes of this paper, the term "religious expression" refers to a range of religious speech that includes discussions about religion, sectarian declarations of faith, proselytizing speech, prayer, and even religious music. Justice Stevens presents a similar taxonomy in his description of the three types of "speech for religious purposes" in *Good News Club v. Milford Central School*, 533 U.S. 98, 130 (2001) (Stevens, J., dissenting) ("Speech for 'religious purposes' may reasonably be understood to encompass three different categories. First, there is religious speech that is simply speech about a particular topic from a religious point of view. . . . Second, there is religious speech that amounts to worship, or its equivalent. . . . Third, there is an intermediate category that is

Monument, Colorado, in May, 2006, Erica Corder departed from the thirty-second speech she rehearsed before the principal and stated the following:

> We are all capable of standing firm and expressing our own beliefs, which is why I need to tell you about someone who loves you more than you could ever imagine. He died for you on a cross over 2,000 years ago, yet was resurrected and is living today in heaven. His name is Jesus Christ. If you don't already know him personally I encourage you to find out more about the sacrifice he made for you so that you now have the opportunity to live in eternity with him.[28]

After the ceremony, Ms. Corder was informed that she would not receive her diploma that day and that she was to make an appointment to see the principal in his office.[29] Ms. Corder sued the school district for violating her right of free speech, claiming in her complaint that the district "refused to present her with her diploma unless she issued an apology for mentioning Jesus Christ in her graduation speech."[30]

In Russell Springs, Kentucky, a federal judge issued an order barring a prayer at the graduation ceremony of Russell County High School only a few hours before the ceremony was to begin on May 19, 2006.[31] Megan Chapman, a graduating senior, had been elected by her fellow seniors to deliver opening remarks at the graduation, and she had planned to include a prayer, which was customary for the graduation exercises of that school.[32] As the principal was about to open the ceremony, two hundred students rose and began to recite the Lord's Prayer aloud.[33] At

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aimed principally at proselytizing or inculcating belief in a particular religious faith." (citations omitted)).

28. Brian Newsome, *Valedictorian Sues Over "Jesus" Speech, Withheld Diploma*, THE GAZETTE, August 30, 2007, 2007 WLNR 16918663.

29. *Id.*

30. *Id.* Ms. Corder did not apologize for the content of her remarks, but did agree to compose an email to be sent to those who attended. *Id.* It stated, "I'm sorry I didn't share my plans with Mr. Brewer or the other valedictorians ahead of time." *Id.*

31. Bill Estep, *Judge: No Prayer at Graduation but Student Delivers Religious Remarks Anyway, Drawing Loud Applause*, LEXINGTON HERALD-LEADER, May 20, 2006, at A1.

32. *Id.*

33. Bruce Schreiner, *Kentucky Students Defy Judge's Ban on Prayer; Crowd Applauds Actions of Seniors at Commencement*, HOUSTON CHRONICLE, May 20, 2006, at A17. At the graduation, Ms. Chapman spoke of the peace she had experienced after giving her life to Jesus and wished her classmates the same peace that only came from a personal relationship with Jesus Christ. *Graduates Stand Up to ACLU and Other Censors*

Wolfson High School in Jacksonville, Florida, in 2007, valedictorian Shannon Spaulding delivered a proselytizing speech of almost twenty minutes, punctuated by enthusiastic applause from some members of the audience.[34] In her speech, Ms. Spaulding asserted that accepting Jesus is necessary, since every person is weighed down with sin, and "if we die with that sin on our souls, we will immediately be pulled down to hell, to pay the eternal price for our sins ourselves."[35] It is not complicated, she observed, to have a home in heaven; it is only necessary to acknowledge one's sin and call upon Jesus.[36] "Like the Geico Insurance slogan, 'So easy a caveman can do it,' letting Jesus take care of your sin problem is so easy a child can do it."[37]

These incidents, like unusual seismic activity that often foreshadows an earthquake, may be an indication of a strain, or tectonic shift, beneath the civil consensus over the proper etiquette to be observed at graduation exercises in the United States.[38] Sixteen years ago, the landmark case of *Lee v. Weisman* decided that the Establishment Clause prohibited state-sponsored prayer at public school graduation ceremonies.[39] Since then, there has been some disarray in the attempts of the lower federal courts to work out what this means for the right of religious dissenters not to have religion imposed upon them at a graduation ceremony, and for the

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During 2008 Commencements, THE LIBERATOR, LIBERTY COUNSEL'S MONTHLY ACTION/ALERT NEWSLETTER, May, 2008. Courts have addressed other instances in which students have recited prayer at graduation ceremonies in defiance of court orders and administrative instructions that there be no prayer. *See, e.g.*, Chaudhuri v. Tenn., 130 F.3d 232, 235 (6th Cir. 1997) (describing spontaneous recitation of the Lord's Prayer followed by applause at a university graduation during what was supposed to be a moment of silence); Goluba v. Sch. Dist. of Ripon, 45 F.3d 1035 (7th Cir. 1995) (denying contempt motion against school administrators for failure to act against student plan to recite the Lord's Prayer at graduation despite injunction forbidding prayer).

34. A video of Shannon Spaulding's entire speech is not available on the internet. Video of parts of her speech may be found on YouTube, *Valedictorian's Speech Condemns People to Eternal Torture*, http://www.youtube.com/watch?v=zXhinhdnu28 (last visited Nov. 3, 2009), in a report by Jim Piggott of WJXT News in Jacksonville, FL. The quotations from her speech are taken from an audio recording of her entire speech which may be found at news4jax.com, *Valedictorian's Speech About Christ Prompts Controversy*, May 28, 2007, http://www.news4jax.com/download/2007/0528-/13401074.mp3 (last visited Nov. 3, 2009).

35. *Valedictorian's Speech About Christ Prompts Controversy*, *supra* note 34.

36. *Id.*

37. *Id.*

38. The use of the term "etiquette" in this context is taken from Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, 5 FALL NEXUS: A JOURNAL OF OPINION 61 (2000).

39. 505 U.S. 577 (1992).

right of student speakers to engage in religious expression at graduation if they so wish.

The ultimate focus of this Article is the valedictory speech that is customary at public school graduations. Typically, dictionaries define "valedictorian" as "the student usually having the highest rank in a graduating class who delivers the valedictory address at the commencement exercises."[40] Thus, the school as an agency of the state does not select the valedictorian, but rather the valedictorian earns the privilege of speaking at graduation on the basis of her academic record. Although school officials have often attempted to control the speech of the valedictorian to varying extents and success, the general social and historical consensus, as this Article will demonstrate, is that the valedictory speech is a form of expression composed by and belonging to the student. If this is the case, then the issue arises of whether the Free Speech Clause protects the valedictory speech. This speech, then, marks the fault line along which two great freedoms of the First Amendment, freedom of religion, guaranteed by the Establishment Clause, and freedom of speech, guaranteed by the Free Speech Clause, exert pressure on one another. Does the Establishment Clause require a school to prevent a class valedictorian from engaging in religious expression at a public school graduation ceremony? Or does the Free Speech Clause protect the valedictory speech so that the school may not censor it? Or is there some middle ground which can protect both Establishment Clause interests and free speech interests?

In attempting to develop answers to these questions, this Article takes the decided position that the courts, in their zeal to protect dissenting religious minorities from the imposition of prayers and proselytizing by the majority, have minimized the rights of students to engage in free speech at the graduation ceremony. This is not to say that religious dissenters do not have rights, or even that the results of court decisions that have limited speech to protect those rights have been wrong. However, the strategy which courts and commentators have employed to protect Establishment Clause rights has often involved arguments that so reduce the free speech interests of students at graduation ceremonies as to render them devoid of First Amendment protection. In the confrontation between Establishment Clause rights and free speech rights, jurists who have favored the former have been aggressive in declaring, without any historical basis, that graduation ceremonies have never been forums for free speech. On the other hand,

40. Merriam-Webster Online Dictionary, *available at* http://merriam-webster.com-/dictionary-/valedictorian (last visited Nov. 3, 2009).

jurists who are primarily solicitous of free speech have demonstrated an apparent hesitancy to argue that, given the traditional understanding of the valedictorian speech or the particular policies of a given school, parts of the graduation ceremony are public forums in which free speech rights must be protected.

This unbalanced jurisprudence does not simply understate the free speech interest involved, but has likely influenced school administrators to assert greater control over the speech of valedictorians at public school graduations, a development which is altogether detrimental to free speech at this important event in the lives of young Americans, and influential in shaping their attitudes towards free speech afterwards. As Josie Foehrenback Brown has recently put it, the public school is a "First Amendment institution, a venue where children practice self-expression and acquire a developmentally calibrated understanding of their expressive liberties."[41] In regard to student speech at graduation ceremonies, courts are failing to fully appreciate this.

After the Introduction, this Article consists of three parts and a conclusion. Part One is a review and commentary on opinions that have addressed the issue of religious expression at graduation ceremonies. It culminates in a discussion of *Nurre v. Whitehead*, in which a district court approved a school district decision to exclude a student performance of an instrumental piece of music from a high school graduation because of its sectarian name, *Ave Maria*.[42] Part Two consists of an examination of historical practices and customs at high school graduations. This discussion will demonstrate that, contrary to the assertions of several court opinions, public high school graduations have long been forums for debating and discussing issues of interest to the community. Contemporary principles of free speech rights, it is argued, would protect such debates and discussions today. Part Three presents a preliminary attempt to outline a principled solution to the conflict of Establishment Clause and free speech rights at graduation ceremonies. The Article will conclude that in a speech delivered by a valedictorian

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41. Josie Foehrenback Brown, *Representative Tension: Student Religious Speech and the Public School's Institutional Mission*, 38 J.L. & EDUC. 1, 3 (2009). Brown continues:

> As such an institution, the school must undertake a complex project – providing opportunities for children to express their identities, which may have a religious dimension, while ensuring that the school maintains its identity as a state institution that exhibits equal respect for all school community members without regard to their choices in matters of religious faith.

Id. at 3-4. Brown observes that the "[i]nstitutionally tailored approach" of the Supreme Court and lower courts to student speech cases "has become, regrettably, less sensitive to the public school's special role as a First Amendment institution . . . ." *Id.* at 6.

42. 520 F. Supp. 2d 1222 (W.D. Wash. 2007).

chosen on the basis of neutral and secular criteria to speak at a public school graduation, there is some religious expression which the Free Speech Clause protects, and some which the Establishment Clause forbids.

II. PART I—A REVIEW OF CASES ADDRESSING RELIGIOUS EXPRESSION AT PUBLIC SCHOOL GRADUATIONS

A. The Tests

In the cases to be reviewed, two types of challenges over religious expression at public school graduations dominate: Establishment Clause challenges brought by those who object to religious expression at graduation, and free speech challenges brought by those who object to limitations placed on their religious expression. Before beginning to review those cases, a summary of the tests used to determine breaches of the Establishment Clause and of free speech follows.

1. The Establishment Clause Tests

The First Amendment to the United States Constitution places the Establishment Clause and the Free Speech and Free Exercise Clauses in close juxtaposition.[43] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."[44] The brevity and terseness with which these freedoms are expressed conceal the complexity of reconciling them to one another.

In the 1971 case, *Lemon v. Kurtzman*, the Supreme Court formulated what has remained the standard test for determining whether government action is consistent with the Establishment Clause: "First, the [government action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[45] However, the Court has developed two other tests which it may rely upon in place of the *Lemon* test, though the

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43. U.S. CONST. amend. I.

44. *Id.* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 118 (1992) (observing the perplexing contrast between the Free Speech Clause, which requires "content-based" neutrality, and the religious clauses, which require "content-based" distinctions between "religious and non-religious ideologies and institutions").

45. 403 U.S. 602, 612-13 (1971) (internal quotation marks omitted) (citations omitted).

court has not explained when such alternative reliance is appropriate. In *Lynch v. Donnelly*, Justice O'Connor explained the rationale for the endorsement test:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. . . . Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[46]

In *County of Allegheny v. ACLU*, the Court provided the corresponding endorsement test, which would identify an Establishment Clause violation when "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."[47]

The second Establishment Clause alternative is the coercion test, largely associated with Justice Kennedy, who probably best described the harm this test is intended to prevent in *Lee v. Weisman*: "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so."[48] As applied in *Lee's* majority opinion, the coercion test requires two elements for a violation: (1) state action, and (2) government coercion.[49] Following the lead of *Lee*, the lower courts emphasize the coercion test in cases involving religious expression at public school graduations.[50]

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46. 465 U.S. 668, 687-88 (1984).

47. 492 U.S. 573, 597 (1989) (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985)).

48. *Lee*, 505 U.S. at 587 (internal quotation marks omitted).

49. *Id.* at 586.

50. However, the lower courts often apply the other tests as well as the coercion test in such cases because they have no sure way of predicting which test the Supreme Court will apply. In *Jones v. Clear Creek Independent School District*, 977 F.2d 963, 966 (5th Cir. 1992), *cert. denied*, 508 U.S. 967, *overruling recognized by* Does 1-7 v. Round Rock Independent School District, 540 F. Supp. 2d 735, 744 n.4 (W.D. Tex. 2007), the appellate court observed, "[T]he [Supreme] Court has used five tests to determine whether public schools' involvement with religion violates the Establishment Clause. To fully reconsider this case in light of *Lee*, we reanalyze the Resolution under all five tests that the Court has stated are relevant." *Id.* (footnote omitted). The Fifth Circuit then

In *Marsh v. Chambers*, the Court carved out an exception, deciding that the practice of beginning legislative sessions with prayer by a paid chaplain does not violate the Establishment Clause largely because this is an historical tradition dating back to the founding of the nation.[51] Moreover, under the relatively informal circumstances of a legislative session where adults can enter and leave as they please, a nonsectarian prayer presents minimal concerns to Establishment Clause interests.[52]

2. The Free Speech Standards

In Supreme Court jurisprudence, the right of free speech rather than of free exercise has emerged as the main protector of religious expression.[53] At graduation ceremonies, free exercise may protect an individual's right to pray privately, but it does not protect what reasonably appears to be state-endorsed prayer during such ceremonies.[54]

The Supreme Court devised a system of forum analysis to determine when private expression should be protected in government-controlled

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proceeded to apply the three prongs of *Lemon*, the endorsement test, and the coercion test.

51. 463 U.S. 783, 792 (1983). The Court stated:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.

Id.

52. *Id.* ("Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to religious indoctrination or peer pressure.") (internal quotation marks omitted) (citing Sch. Dist. of Abington Twp. Pa. v. Schempp, 374 U.S. 203, 290 (1963) (Brennan, J., concurring)). *See also id.* at 299-300 ("The saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements of the kind prohibited by the Establishment Clause. Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect.") (footnote omitted).

53. William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 593 (1983) (noting, twenty-five years ago, that "the [Supreme] Court's jurisprudence has already established that there is no constitutionally definable interest protected by the free exercise clause that is not simultaneously protected to some extent by the free expression clause"); *see also* Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 190 (2007) (stating, more recently, that "the Free Speech Clause, not the Free Exercise Clause, often does the so-called 'heavy lifting' work of protecting individuals' religious liberty interests").

54. *Lee*, 505 U.S. at 629 (Souter, J., concurring).

areas.[55] The purpose of public forum analysis is to provide "a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."[56] To this end, the Court has divided government property into three types of forums: the traditional public forum, the designated public forum, and the non-public forum.[57]

The traditional public forum includes "places which by long tradition or by government fiat have been devoted to assembly and debate."[58] The quintessential examples of these forums are "streets and parks, which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[59] In these places, the state may enforce a content-based restriction on speech only if it can show that the restriction is necessary to serve a compelling state interest and is narrowly drawn to achieve that purpose.[60] The state can also "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and which leave open ample alternative channels of communication."[61]

The designated public forum is public property which the "state has opened for use by the public as a place for expressive activity."[62] Even though the state may not be required to maintain the open nature of a designated public forum, as long as the state keeps it open, the state is bound by the same strict scrutiny standard that applies to the traditional public forum.[63] The government may create a type of designated public forum, the limited public forum, for speech that the state may limit for

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55. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788 (1985).

56. *Cornelius*, 473 U.S. at 800.

57. *Perry*, 460 U.S. at 45-46; *Cornelius*, 473 U.S. at 802.

58. *Perry*, 460 U.S. at 45.

59. *Id.* (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 45-46.

> The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. . . . Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

Perry, 460 U.S. at 45-46 (citing Widmar v. Vincent, 454 U.S. 263, 269-70 (1981)).

the use of certain groups or for the discussion of certain subjects.[64] In a limited public forum, the government may limit speech as long as the restriction is reasonable in the light of the forum's purpose and does not discriminate against a point of view.[65]

A non-public forum is public property which neither tradition nor government designation has made a forum for public communication.[66] Here the state may impose time, place, and manner restrictions and reserve the forum for its own intended purposes as long as the regulation on speech is reasonable and not an effort to suppress expression because public officials oppose the speaker's viewpoint.[67]

The Supreme Court has emphasized that public schools, which have created forums for speech, must not discriminate against the viewpoints of religious speakers and that the government should treat religious views as it does non-religious views, with neutrality. As an example of a limited public forum, the *Perry* Court pointed to *Widmar v. Vincent*.[68] In *Widmar*, the University of Missouri made its facilities available for the activities of registered student groups, but would not permit a registered religious student group to use university facilities for religious worship or teaching.[69] The Court found that the university had created an "open forum," so that it could not exclude the religious content of a group's speech unless the restriction were based on a compelling interest and was narrowly drawn.[70] Though the Court conceded that compliance with other constitutional obligations would be a compelling interest, the Court

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64. *Id.* at 46 n.7.

65. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (citing *Cornelius*, 473 U.S. at 804-06).

66. *Perry*, 460 U.S. at 46.

67. *Id.*; *Cornelius*, 473 U.S. at 806 ("Although a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, 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.") (citations omitted).

68. *Perry*, 460 U.S. at 46 n.7.

69. *Widmar*, 454 U.S. at 265-67.

70. *Id.* at 267-70. The Court stated:

> Through its policy of accommodating their meetings, the University created a forum generally open for use by student groups. . . . In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must . . . show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Id.

applied the *Lemon* test and found that an "equal access" policy would not violate the Establishment Clause.[71]

The Court did not extend this ruling to public schools.[72] However, Congress did so in the Equal Access Act.[73] The Act made it illegal for a public secondary school that receives federal funds to discriminate against religious student groups when the school has created a "limited open forum" by offering non-curricular student groups the opportunity to meet at school outside instruction hours.[74] The Supreme Court found the Act constitutional in *Board of Education v. Mergens*.[75] In this case, a public school denied a Christian group permission to use school facilities although it allowed other groups to do so.[76] The Court found that the school had created a "limited open forum" under the Act.[77] As in *Widmar*, application of the *Lemon* test revealed no violation of the Establishment Clause.[78] In rejecting the plaintiff's Establishment Clause defense, Justice O'Connor wrote the following passage destined to be frequently quoted in graduation speech cases:

> [T]here 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. We think that secondary school

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71. *Id.* at 271-74. The creation of a forum that provided equal access to all speakers had a secular purpose and would avoid government entanglement with religion; the primary effect of the forum did not advance or inhibit religion because the benefits a religious group would derive from the forum were incidental benefits that did not violate the prohibition against advancing religion. *Id.* The state was no more endorsing the religious group than it would be endorsing the beliefs of a socialist student group. *Id.*

72. *Id.* at 274 n.14. The Court distinguished between the maturity of university students and that of high school students. *Widmar*, 454 U.S. at 274 n.14. "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.*

73. 20 U.S.C.A. § 4071 (West 2008).

74. *Id.* § 4071(a).

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

Id. § 4071(b) ("A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.").

75. 496 U.S. 226, 248 (1990).

76. *Id.* at 231-33.

77. *Id.* at 246.

78. *Id.* at 248-49.

> 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.[79]

Thus, the issue of who speaks, the state or a private person, is crucial to deciding whether pro-religious speech is forbidden by the Establishment Clause or protected by the Free Speech Clause. If the speaker is private, the speech is both permissible and protected.

In *Lamb's Chapel v. Center Moriches Union Free School*, the school, which had opened its facilities after school hours to a variety of groups, denied a religious group access under a school rule prohibiting the use of school facilities for religious purposes.[80] The Court rejected the appellate court's reasoning that excluding religious uses from a limited public forum was viewpoint neutral.[81] The Court argued that even if the forum were non-public, the exclusion of a religious group, which would have presented a religious perspective on the permissible subjects of family issues and child-rearing, was viewpoint discrimination and therefore prohibited.[82] In *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court perceived viewpoint discrimination in the university's denial, within a limited public forum, of funds for communicative purposes to an otherwise qualified student religious group.[83] In *Good News Club v. Milford Central Schools*, the Court again found viewpoint discrimination in a limited public forum when the school denied access to a religious club because it would teach moral lessons through storytelling and prayer.[84]

The lesson of the *Widmar* line of cases is that government may not exclude speakers who provide a religious perspective on topics permissible in the instant forum merely because of the religious nature of the speech. This is viewpoint discrimination that is impermissible even in a non-public forum.

In *Tinker v. Des Moines Independent Community School District*, five public school students protested the war in Vietnam by wearing

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79. *Id.* at 250.

80. 508 U.S. 384, 386-92 (1993).

81. *Id.* at 393.

82. *Id.*

83. 515 U.S. at 830.

84. 533 U.S. 98, 110 (2001). On the difficulties of defining neutrality, see Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51 (2007); Laycock, *Formal, Substantive, and Disaggregated Neutrality Towards Religion*, 39 DEPAUL L. REV. 93 (1990).

black armbands in school.[85] School officials suspended the students because they refused to remove the armbands.[86] The Supreme Court advanced a robust affirmation of the free speech rights of the students: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[87] The Court emphasized, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[88] In order to justify prohibition of a student's opinion, it is not enough for a school to show a desire to avoid "the discomfort or unpleasantness that always accompany an unpopular viewpoint."[89] There must be evidence that the "forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "impinge upon the rights of other students"[90] "to be secure and to be let alone."[91]

Since *Tinker*, the Supreme Court has found exceptions to its student free speech doctrine in *Bethel School District No. 403 v. Fraser*,[92] *Hazelwood School District v. Kuhlmeier*,[93] and *Morse v. Frederick*.[94] *Hazelwood* is the most important for the purposes of this Article. In this case, the principal of a high school removed articles which students had written in a journalism class for the school newspaper.[95] The Court found the students' free speech rights were not violated.[96] The Court distinguished *Tinker* by finding that the newspaper was a non-public forum because it was part of a curricular course in which the school retained control over its contents.[97] Whereas *Tinker* involved students'

85. 393 U.S. 503, 503-04 (1969).

86. *Id.* at 504.

87. *Id.* at 506.

88. *Id.* at 512 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

89. *Id.* at 509.

90. *Id.* (internal quotation marks omitted).

91. *Tinker*, 393 U.S. at 508.

92. 478 U.S. 675 (1986) (holding that the school did not violate the First Amendment in disciplining a student for using lewd and indecent speech).

93. 484 U.S. 260 (1988).

94. 551 U.S. 393 (2007) (holding that because the school had a duty to protect students from speech encouraging illegal drug use, the school did not violate the First Amendment by confiscating a pro-drug banner and punishing student).

95. 484 U.S. at 262-64. The principal thought the article about pregnancy and birth control was inappropriate and the students written about, though not named, could be identified; regarding the divorce article, a father whose conduct was criticized had no opportunity to respond. *Id.* at 263.

96. *Id.* at 273.

97. *Id.* at 270. The Court stated:

> School officials did not evince either by policy or by practice any intent to open the pages of Spectrum to indiscriminate use by its student reporters and editors,

personal expression that happened to occur on school premises, *Hazelwood* involved "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[98] The Court concluded that educators may exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[99]

Of the Supreme Court's religious display cases, *Capitol Square Review and Advisory Board v. Pinette* has particular pertinence to this Article.[100] Ohio law made Capitol Square in Columbus, Ohio, a forum for the discussion of public questions and public activities.[101] The Advisory Board refused an application of the Ku Klux Klan to place an unattended cross in the Square during the 1993 Christmas season.[102] The Supreme Court, however, held that the religious display was private speech in a traditional public forum which the First Amendment fully protected.[103] There was no Establishment Clause violation because the state did not sponsor the expression and permission was requested by the same process and on the same terms required of other private groups.[104]

However, the majority fractured on the question of whether private speech in a public forum could possibly constitute government endorsement of religion, thereby violating the Establishment Clause. Justice Scalia maintained that the endorsement test is only applicable when the government actually speaks or shows favoritism to religious expression.[105] Justices O'Connor and Souter disagreed.[106] O'Connor

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> or by the student body generally. Instead, they reserved the forum for its intended purpose, as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner.

Id. (internal quotation marks omitted) (citations omitted).

98. *Id.* at 271.

99. *Kuhlmeier,* 484 U.S. at 273.

100. 515 U.S. 753 (1995). The other major religious display cases are: *Lynch,* 465 U.S. 668, and *Allegheny*, 492 U.S. 573.

101. *Capitol Square*, 515 U.S. at 757-58.

102. *Id.* at 758.

103. *Id.* at 760.

104. *Id.* at 762-63.

105. *Id.* at 764-66. Justice Scalia distinguished *Lynch* because in that case the city itself mounted a display which included a crèche, but it did not violate the Establishment Clause since in that particular context the display did not endorse religion. *Id.* He distinguished *Allegheny* because a privately sponsored crèche was placed on the "Grand Staircase" of the Allegheny County Courthouse. *Capitol Square*, 515 U.S. at 764. This violated the Establishment Clause because the staircase was not open to all on an equal basis, so the county was favoring sectarian religious expression. *Id.*

argued that an Establishment Clause violation occurs if a perception of government endorsement, even though mistaken, is reasonable.[107] Justice Souter similarly emphasized that a government action may violate the Establishment Clause not only by having the purpose to endorse, but also by having the effect of endorsement.[108] For this reason, a case like *Mergens* arrived at its conclusion not by "applying an irrebuttable presumption. . . ," but by "making a contextual judgment taking account of all the circumstances of the specific case."[109]

*B. The Pre-*Lee v. Weisman *Cases*

Prior to the Supreme Court's decision in *Lee*, several lower federal courts and state courts had addressed the issue of prayer at public school graduations with varying results.[110] These cases were primarily concerned with Establishment Clause rights and evince a trend that went from permitting such prayer to forbidding it.[111] However, in *Sands v.*

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106. *Id.* at 772-83, 783-96.

107. *Id.* at 773-77. "Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated." *Id.* at 777.

108. *Id.* at 786-87 (citing *Allegheny*, 492 U.S. at 593 (O'Connor, J., concurring in judgment)).

109. *Capitol Square*, 515 U.S. at 788-89. In February, 2009, the Supreme Court decided *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009). Pleasant Grove City rejected the petition of Summum, a religious organization, to erect a monument displaying a religious message in a public park. *Id.* at 1129-30. Summum claimed this was a violation of its free speech rights. *Id.* at 1130. The Court disagreed: "Permanent monuments displayed on public property typically represent government speech." *Id.* at 1132. This includes "privately financed and donated monuments that the government accepts and displays to the public on government land." *Id.* at 1133. Government may select what monuments to accept based on the message the government wishes to express. *Id.* at 1133-34. From the outset, the Court distinguished this case from a speech case: "[A]lthough a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies." *Id.* at 1129. *See also id.* at 1138 (distinguishing *Summum* from *Capitol Square*).

110. Stephen M. Durden, *In the Wake of* Lee v. Weisman*: The Future of School Graduation Prayer is Uncertain at Best*, 2001 BYU EDUC. & L.J. 111 (2001) (providing an excellent summary of these cases).

111. The earlier cases of the 1970s, *Wood v. Mt. Lebanon Township School District*, 342 F. Supp. 1293 (W.D. Pa. 1972), *Wiest v. Mt. Lebanon School District*, 320 A.2d 362 (Pa. 1974), and *Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974), permitted prayer at graduation. *Doe v. Aldine Independent School District*, 563 F. Supp. 883 (S.D. Wis. 1982), *Graham v. Central Community School District of Decatur County*, 608 F. Supp. 531, 535-36 (S.D. Iowa 1985), and *Bennet v. Livermore Unified School District*, 238 Cal. Rptr. 819, 823-24 (1987), found the practice to be unconstitutional. In *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409-10 (6th Cir. 1987), the Sixth Circuit

Morongo, Justice Mosk observed, "A benefit conferred on religion will not be considered an unconstitutional preference if it occurs in a forum accessible to a multitude of viewpoints and forms of expression, both religious and secular."[112] Citing to *Perry* and *Widmar*, Mosk continued, "[T]he denial of religious expression in these forums would raise the specter of discrimination against religion. Under such circumstances, the granting of access to religious expression in a forum does not constitute an unconstitutional preference."[113] Aside from this brief note, two pre-*Lee* opinions discuss free speech considerations in graduation cases at greater length.

1. Lundberg v. West Monona Community School District

Unlike the typical pre-*Lee* cases brought to enjoin graduation prayer, *Lundberg v. West Monona Community School District* was brought to enjoin a local school board from ending the practice.[114] When the school board announced an end to graduation prayers at Onawa High School in Northern Iowa, parents filed suit claiming violations of the Free Speech and Free Exercise Clauses.[115]

The court decided that the school was not violating the free speech rights of the plaintiffs because the plaintiffs failed to show that the graduation ceremony was a public forum.[116] In the course of its reasoning, the court rejected the possibility that a graduation ceremony could be a public forum, making the following statement destined to be often repeated by higher courts reviewing graduation prayer cases, though its ultimate source in *Lundberg* has seldom been acknowledged: "Graduation ceremonies have never served as forums for public debate or discussions, or as a forum through which to allow varying groups to voice their views. Schools hold graduation ceremonies for very limited

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approved graduation prayer, as long as it was non-sectarian and non-proselytizing in accordance with *Marsh*. In *Sands v. Morongo Unified School District*, 809 P.2d 809, 815 (Cal. 1989), the California Supreme Court found graduation prayer unconstitutional on *Lemon's* entanglement prong. The court also found that the effect of prayer at a graduation ceremony where the school provided the sound system, the facilities, and the general administrative organization was inescapably religious. *Id.* In *Griffith v. Teran*, 794 F. Supp. 1054, 1059 (D. Kan. 1992), the court found it permissible for school officials to select student speakers of diverse backgrounds and religious beliefs and counsel them to give nonsectarian and non-proselytizing prayers.

112. 809 P.2d at 912 n.4 (Mosk, J., concurring).

113. *Id.*

114. 731 F. Supp. 331 (N.D. Iowa 1989).

115. *Id.* at 334.

116. *Id.* at 336.

secular purposes–to congratulate graduates of the high school."[117] *Lundberg* provided no legal or historical authority for this view of graduation ceremonies.

The court also compared the graduation ceremony to the school newspaper in *Hazelwood* and reasoned that like the school in *Hazelwood*, the school district could ban certain subject matter, like religion, as inappropriate for the activity.[118] Not having the benefit of *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, all of which later found that the exclusion of groups because of their religious speech was viewpoint discrimination,[119] the court did not consider whether the exclusion at Onawa High was viewpoint neutral.[120]

In the alternative, the court held, "[e]ven if the court were to hold that a high school graduation ceremony constitutes a public forum, the School Board would still have the right to ban prayer at the graduation ceremony because it has a compelling state interest in not violating the Establishment Clause of the First Amendment."[121] Having argued that

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117. *Id.* at 339.

118. *Id.* at 338.

119. *Lamb's Chapel*, 508 U.S. at 394. The Court stated:

> The film series involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the series dealt with the subject from a religious standpoint. The principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. That principle applies in the circumstances of this case . . . .

Id. (internal quotation marks omitted) (citation omitted); *Rosenberger*, 515 U.S. at 832 ("The University's denial of WAP's request for third-party payments in the present case is based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid."); *Good News Club*, 533 U.S. at 107 ("Concluding that Milford's exclusion of the Good News Club based on its religious nature is indistinguishable from the exclusions in these cases [*Lamb's Chapel* and *Rosenberger*], we hold that the exclusion constitutes viewpoint discrimination. Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum.").

120. *Lundberg*, 731 F. Supp. at 337-38.

121. *Id.* at 339 n.8. The court went on to say, "[I]t is irrelevant whether such graduation prayer *actually* violates the establishment clause – it is enough that the School Board had a reasonable basis for believing that it would." This proposition, also presented with no authority, contradicts *Widmar*, a case *Lundberg* cites. In *Widmar*, the university argued that despite having created a forum for student speech, it could not offer its facilities to religious groups on the same terms as other groups without violating the Establishment Clause. *Widmar*, 454 U.S. at 270-71. Using the *Lemon* test, the Supreme Court carefully demonstrated that permitting the religious student group to use school facilities did not violate the Establishment Clause. *Id.* at 270-72. If merely perceived, as opposed to actual, violation of the Establishment Clause permitted the suppression of free speech rights, then the Supreme Court would not have needed to demonstrate the absence of such a violation in *Widmar*.

graduation prayer would violate the Establishment Clause under *Lemon*, the court reasoned that if religious expression were both protected by the Free Speech Clause and violative of the Establishment Clause, the court would then be obliged to balance the conflicting rights.[122] The court contended that the Establishment Clause would trump free speech because a violation of the former would affect more individuals, that is "*all* the graduating seniors that would be forced to hear the prayer" as opposed to "the four plaintiffs who would not be able to hear the prayer if there was a violation of their First Amendment rights."[123] The court also noted that the plaintiffs could always pray silently, so that violating the free speech right is not as serious a denial as violating rights under the Establishment Clause.[124]

These arguments are not persuasive. If the prayer controversy at Onawa High School was at all typical, then in all probability there were more students who wished to pray than students who objected to the prayer. But in any event, the sheer numbers of those whose rights would be compromised should not decide the issue. It is ironic that the *Lundberg* court should determine which right ought to prevail on the basis of majoritarian considerations when both the Establishment Clause and the Free Speech Clause protect the rights of unpopular minorities.[125] The court's other point regarding silent prayer does nothing to mitigate the denial of free speech.[126]

2. Brody By and Through Sugzdinis v. Spang

Brody By and Through Sugzdinis v. Spang, decided three months before *Lee*, presents an inconclusive but thoughtful analysis of the public forum question in the context of graduation ceremonies.[127] In this case, two students in the 1990 class of Downingtown Area Senior High School in Pennsylvania brought suit against school officials. The students claimed that the inclusion of benedictions and invocations at the graduation ceremonies violated the Establishment Clause.[128] After the

122. *Lundberg*, 731 F. Supp. at 347.

123. *Id.*

124. *Id.*

125. *See infra* Part IV.C.

126. *Lundberg*, 731 F. Supp. 331. The silent prayer alternative might have resolved the free exercise claim. The plaintiffs failed to show that reciting a public prayer alone at a graduation exercise was central to their religious practice.

127. 957 F.2d 1108 (3d Cir. 1992).

128. *Id.* at 1111. The plaintiffs also complained of the school's sponsorship of a baccalaureate service, requirements to write essays on religious topics in English courses,

plaintiffs obtained a temporary restraining order prohibiting any prayer or proselytization at the commencement, other members of the class who opposed the prohibition filed a motion to intervene.[129] On September 24, 1990, the court approved a consent decree agreed to by the original plaintiffs and the defendant school officials.[130] It stated that the defendants would not "pray, [or] proselytize with respect to religion or engage in any religious ceremony or activity during the annual commencement exercises or any other official event at the Downingtown Senior High School."[131] The petitioners for intervention claimed that the consent decree's restrictions on speech infringed on the free speech rights of students invited to speak at graduation.[132] Nevertheless, the district court denied the motion to intervene for lack of sufficient legal interests.[133] The petitioners appealed.[134]

The question raised on appeal was whether the district court erred in denying the motion to intervene as of right or by permission.[135] The appellate court believed that the basis of the intervention motion, the students' claim of a free speech right to discuss religion at commencement, depended "on whether the graduation ceremony qualifie[d] as a First Amendment public forum."[136] If the graduation ceremony did so qualify, the court's task would be that of evaluating "the competing interests of students under the free speech and establishment clauses of the First Amendment."[137]

The court discounted the possibility that the graduation could be a traditional public forum and narrowed its discussion to whether it was a limited public forum or a non-public forum.[138] After quoting *Lundberg's* statement that "graduation ceremonies have never served as forums for public debate or discussions," the court reasoned, "Nevertheless, it is certainly possible that the commencement exercises at Downingtown

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and the school's refusal to permit the formation of a student group to discuss the constitutionality of the baccalaureate and graduation ceremonies. *Id.*

129. *Id.* at 1111-12.

130. *Id.*

131. *Id.* at 1112 n.2.

132. *Brody*, 957 F.2d at 1113.

133. *Id.*

134. *Id.*

135. *Id.* at 1111.

136. *Id.*

137. *Brody*, 957 F.2d at 1111.

138. *Id.* at 1117. The court thought it unlikely that the commencement exercises at Downingtown had been designated a public forum because the control exercised over these ceremonies resembled the control which the school in *Hazelwood* exercised over the school newspaper rather than the broad access policies of *Widmar*. *Id.* at 1118-19.

Senior High School could qualify as a public forum, and nothing in the present record demonstrates otherwise."[139]

> If, for example, school officials have authorized students to choose which of them will speak and have permitted these speakers to select their own topics, including controversial subject matters, then officials may have created a limited public forum. Not only would such a practice demonstrate an intent to foster public discourse, but it would avoid attaching the imprimatur of the school to the views expressed in students' speeches. Moreover, . . . an assessment of school officials' intent should be governed by their acts, and not by their bald assertions that they had no desire to create a public forum.[140]

The original plaintiffs claimed that the graduation exercises were not a public forum because school officials exercised control over the speeches, provided the topics, and edited them.[141] The court acknowledged that, if true, these facts would suggest that the forum was non-public, but the record did not have these and other facts which the court needed in order to decide the issue.[142] If the school had by its practice and policies created a public forum at its graduation exercises, then the exclusion of religious expression would be subject to strict scrutiny; the school would need a compelling interest to restrict the speech and the restrictions would have to be narrowly drawn.[143]

The school argued that it had a compelling interest, that of avoiding a violation of the Establishment Clause.[144] The court agreed that this would be a compelling interest, and if the limitations were narrowly drawn, they would pass constitutional muster.[145] However, noting that *Lee v. Weisman* was pending before the Supreme Court, the appellate court recommended that the district court should await the guidance of the

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139. *Id.* at 1119-20. The court found that confining the pool of graduation speakers to members of the school community and invited guests did not preclude the graduation ceremony from being a limited public forum wherein restrictions on speech would infringe on the free speech rights of the speakers. *Id.* at 1120 (citing *Hazelwood,* 484 U.S. at 267 (stating that school facilities may become public forums if "'by policy or by practice' [school officials have] opened those facilities 'for indiscriminate use by . . . some segment of the public, such as student organizations'")).

140. *Id.* at 1120 (citing Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1374 (3d Cir. 1990)).

141. *Brody,* 957 F.2d at 1120.

142. *Id.*

143. *Id.* at 1121.

144. *Id.*

145. *Id.*

High Court on this issue if indeed the lower court determined that the Downington graduation ceremony was a public forum.[146] If no Establishment Clause violation would occur, then there would be no compelling interest to support the consent decree's restrictions, and the intervenors would have a cognizable interest in the dispute and a right to intervene.[147]

The court then addressed the status of the speech restrictions if the graduation were found to be a non-public forum. Citing *Cornelius*, the court noted that such restrictions in a non-public forum are permissible if they are reasonable in regard to the purpose of the forum and viewpoint neutral; under *Hazelwood*, restrictions are permissible if they are "reasonably related to the pedagogical concerns" of the school and are intended to avoid associating the school with non-neutral positions on matters of political controversy.[148] The court maintained that even though the graduation was not curricular, *Hazelwood* stood for according broad discretion to school officials regarding speech in non-public forums.[149] Most importantly, the court regarded the exclusion of religious speech as a content restriction, not a viewpoint restriction.[150] Under the reasonableness standard for non-public forums, then, the court reasoned that the school officials could restrict religious speech to avoid offending those who would dissent from the speaker's religious assertions or to avoid religious controversy.[151]

However, because the court could not rule out the possibility that the graduation ceremony was a limited public forum, in which case restrictions on speech would have to pass strict scrutiny rather than reasonableness, the court concluded that the intervening students could possibly have an interest to defend against the consent decree.[152] The court found that the school district did not adequately represent the

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146. *Id.*

147. *Brody*, 957 F.2d at 1121.

148. *Id.* at 1122.

149. *Id.*

150. *Id.*

151. *Id.* at 1122. The court stated:

> [S]chool officials may wish to prohibit all religious speech at a graduation ceremony in order to avoid offending anyone in the audience, who may not share the speaker's religious beliefs. Officials might also aim to prevent controversy and to maintain neutrality as between religion and non-religion. Since the consent decree's provisions appear to exclude all religious speech and not just one particular viewpoint, such a limitation would constitute a permissible content-based restriction.

Id.

152. *Brody*, 957 F.2d at 1123.

interests of the students.[153] To decide whether the graduation was a limited public forum, the court needed more facts, so that a remand with instructions to develop the record was proper.[154]

Perhaps it is because *Brody* was inconclusive that it has not had much authority in later cases dealing with religious expression at public high school graduations. The one proposition for which other courts have frequently cited *Brody* is the statement it took from *Lundberg* that graduations were never forums for public debate or discussion. *Brody's* status as a circuit court opinion has given this statement clout even though *Brody* immediately qualified it.[155]

Brody entertained the possibility that a graduation ceremony could be a limited public forum. It also acknowledged that the government may not practice viewpoint discrimination without a compelling interest at graduation, even if it is a non-public forum, but thought that the exclusion of religious expression was a content-based restriction that was permissible in the context of a non-public forum. Of course, the *Brody* opinion, like *Lundberg*, was decided before *Lamb's Chapel*, *Rosenberger*, and *Good News Club* in which the Supreme Court consistently found the exclusion of religious groups on the basis of their speech to be viewpoint and not content discrimination. With the benefit of this case law, perhaps *Brody* would have found that the school needed a compelling interest to restrict religious speech regardless of whether the graduation was a limited public forum or a non-public forum.

*3. Summary of Pre-*Lee *Cases*

In the graduation prayer cases prior to *Lee*, the major concern was with violations of the Establishment Clause rather than the issue of free speech. There was a trend toward greater protection of Establishment Clause rights, and even in those opinions which considered free speech rights, the lower federal courts readily assumed that avoidance of an Establishment Clause violation was a compelling interest that permitted the limitation of free speech. The assumption, however, largely overlooked the question of why the exercise of free speech would violate the Establishment Clause at all. A private individual, speaking freely and without government endorsement, generally does not violate the Establishment Clause.[156] Without such a violation, there is no compelling government interest to limit speech. Even if there is such a conflict, the

153. *Id.* at 1123-24.
154. *Id.* at 1124.
155. *See infra* notes 505-516 and accompanying text.
156. *See* discussion *supra* Part II.B.1.

courts also did not contemplate whether respect for free speech might ever be a compelling interest permitting a limitation on the Establishment Clause interest. Finally, these courts asserted without discussion that exclusion of religious expression was content as opposed to viewpoint discrimination.

C. Lee v. Weisman

In 1991, Daniel and Vivien Weisman objected to prayer at their daughter's graduation from the Nathan Bishop Middle School of Providence, Rhode Island.[157] Because they were Jewish, the principal hoped to address their concerns by inviting a rabbi to give the invocation.[158] This did not satisfy the Weismans who sought a temporary restraining order from the federal district court.[159] The court declined on account of lack of time to study the issue, but later, despite misgivings, ruled in favor of the Weismans.[160] The First Circuit summarily affirmed.[161]

To the surprise of many, the Supreme Court affirmed as well, and it was Justice Kennedy who wrote the 5-4 majority opinion.[162] Previously, in his partial concurrence and dissent in *County of Allegheny v. ACLU*, and in his concurrence in *Mergens*, Kennedy had expressed his preference for using the coercion standard to determine whether the

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157. JOAN DELFATORRE, THE FOURTH R 255 (2004). The Weismans' concerns had been raised two years earlier, when, at the graduation of their older daughter, an ebullient Baptist minister asked the audience to join hands and pray to Jesus. *Id.*

158. *Id.*

159. *Lee*, 505 U.S. at 584.

160. Weisman v. Lee, 728 F. Supp. 68, 75 (D.R.I. 1990). The court ruled:

> The fact is that an unacceptably high number of citizens who are undergoing difficult times in this country are children and young people. School-sponsored prayer might provide hope to sustain them, and principles to guide them in the difficult choices they confront today. But the Constitution as the Supreme Court views it does not permit it.

Id. The district court found that the prayer violated the second prong of the *Lemon* test. *Id.* at 71-73.

161. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990). Judge Torruella's majority opinion was extremely brief, "We are in agreement with the sound and pellucid opinion of the district court and see no reason to elaborate further." *Id.* at 1090. Judge Bownes elaborated further in a concurrence finding that the prayer violated all three prongs of the *Lemon* test. *Id.* at 1094-95. Judge Campbell dissented. *Id.* at 1097-99.

162. DELFATTORE, *supra* note 157, at 257-65 (2004), explains that the defense prepared its argument based on the coercion test which Kennedy, who was likely to be the swing vote, had favored in previous decisions.

government was violating the Establishment Clause.[163] Application of this standard as opposed to the *Lemon* three-part test, it was thought, would make it more difficult to find a violation in this case.[164] Indeed, Kennedy ignored the *Lemon* test to apply the coercion test, but in so doing he applied a version of that test broad enough to find coercion under the instant facts.[165]

After summarizing the "fundamental limitations imposed by the Establishment Clause" under the coercion test,[166] Kennedy identified the two elements necessary for the violation: (1) state action and (2) government coercion.[167] The state action consisted of Principal Lee's decision that prayer should be given, his selection of the clergyman to deliver it, and his advice and guidance to the rabbi that the prayers be nonsectarian.[168] Kennedy characterized the last as "direct[ing] and controll[ing] the content of the prayers."[169] As to coercion, Kennedy found that the school's control of the ceremony created public pressure and peer pressure on the students to participate or to appear to be participating in the prayer.[170] On account of this pressure, the State had in effect "required participation in a religious exercise."[171] Though

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163. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part, dissenting in part) ("[G]overnment may not coerce anyone to support or participate in any religion or its exercise . . . ."); *Mergens*, 496 U.S. at 260 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he government cannot coerce any student to participate in a religious activity.") (internal citations omitted).

164. Under the second prong of the *Lemon* test, government action is not constitutional if it has the primary effect of advancing religion. 403 U.S. at 612. Under a narrow version of the coercion test, government action may advance religion as long as no one is forced to participate or support the religious activity or adhere to the religious belief.

165. *Lee*, 505 U.S. at 593-95. Kennedy's broad understanding of impermissible coercion includes social pressure to attend one's graduation when there is no formal requirement to do so and peer pressure to stand and maintain respectful silence for a prayer although one disagrees with it. *Id.* Scalia's narrow view of impermissible coercion limits it to force of law or threat of penalty. *Id.* at 640-41 (Scalia, J., dissenting).

166. *Id.* at 587. *See also* discussion *supra* Part II.A.1.

167. *Lee*, 505 U.S. at 587-96.

168. *Id.* at 587-88.

169. *Id.* at 588. Kennedy saw in the principal's direction and control of the prayer state action that *Engel v. Vitale's* prohibition of official government prayer had condemned. 370 U.S. 421, 425 (1962). Kennedy rejected the notion that the principal's good faith effort to render the prayer nonsectarian and inoffensive could justify the participation of the state; nor did he find it acceptable for the state to be involved in the development of a civic religion. *Lee*, 505 U.S. at 589. To regard the prayers as de minimis, Kennedy maintained, "would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority." *Id.* at 594.

170. *Id.* at 592-94. Kennedy cited several studies from the social science disciplines to support his point. *Id.*

171. *Id.* at 594.

attendance at the graduation ceremony was not required to obtain the diploma, Kennedy rejected the argument as "formalism."[172] Kennedy countered that commencement ceremonies are events so significant in the lives of Americans that failure to attend would be a substantial loss.[173] "The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation."[174]

Justice Blackmun and Justice Souter wrote concurring opinions, in both of which Justices Stevens and O'Connor joined.[175] Justice Blackmun argued that coercion is a sufficient, but not a necessary, condition for a violation of the Establishment Clause.[176] Blackmun insisted on the current vitality of the *Lemon* test and the endorsement test.[177] Souter also made the point that Supreme Court precedent did not make coercion necessary to support the finding of an Establishment Clause violation.[178]

In a provocative dissent, in which Chief Justice Rehnquist and Justices White and Thomas joined, Justice Scalia articulated a much narrower concept of coercion than did Kennedy.[179] For Scalia, the

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172. *Id.* at 594-95.

173. *Lee*, 505 U.S. at 595.

174. *Id.* at 596. Kennedy distinguished the case from *Marsh*, where the Supreme Court found no Constitutional offense from prayers led by chaplains at legislative sessions. *Id.* at 596-97 (citing *Marsh*, 463 U.S. at 783). At those sessions, adults, not impressionable children, are free to come and go, so that "the influence and force of a formal exercise in a school graduation are far greater than the prayer exercise . . . condoned in *Marsh*." *Id.* at 597.

175. *Id.* at 599-609 (Blackmun, J., concurring); *id.* at 609-31 (Souter, J., concurring).

176. *Lee*, 505 U.S. at 604-05. Justice Blackmun explained:

> [I]t is not enough that the government restrain from compelling religious practices: It must not engage in them either. . . . The Establishment Clause proscribes public schools from "conveying or attempting to convey a message that religion or a particular religious belief is *favored or preferred*" . . . even if the schools do not actually "impos[e] pressure upon a student to participate in a religious activity.

Id. (internal citations omitted).

177. *Id.* at 603 n.4 ("Since 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision of *Marsh v. Chambers*, . . . has the Court not rested its decision on the basic principles of *Lemon*.").

178. *Id.* at 618. Souter also made the point that the Establishment Clause "forbids not only state practices that 'aid one religion . . . or prefer one religion over another,' but also those that 'aid all religions.'" *Id.* at 609-10 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947). Thus, "the Establishment Clause forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be." *Id.* at 610. For both positions, Souter appropriated arguments derived from history as well as court precedent. *Lee*, 505 U.S. at 610.

179. *Id.* at 631-46.

historical sense of establishment was a matter of "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[180] He conceded that government endorsement of religion is out of order even when there is no legal coercion, but only when the endorsement is sectarian, that is, "specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ."[181] He distinguished graduation prayer from daily prayer in school where attendance is compulsory, the setting is instructional, and parents are not present.[182] To avoid any coercion, he thought it sufficient to include a disclaimer in the graduation program indicating that no one is compelled to join in prayer.[183]

The *Lee* opinion has proved to be confusing. It is unclear whether *Lee* prohibits the level of government participation in religious expression at public school graduations similar to that which occurred under the facts of *Lee*, or prohibits all religious expression at such events. If the former, then prayer at public school graduations might be permissible if there is less government involvement than there was in *Lee*. But if *Lee* is a blanket prohibition, then no reduction of government involvement could make prayer at public school graduations permissible.

There is language in *Lee* that limits its prohibition to the degree of government involvement comparable to what occurred in the case. "These dominant facts mark and control the confines of our decision."[184] The opinion claims it does not ban all religious expression from public life. "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. . . ."[185] Some religious expression might be permissible at a public school graduation.

> A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. . . . We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious

180. *Id.* at 640.

181. *Id.* at 641.

182. *Id.* at 643.

183. *Id.* at 644-45. Justice Scalia took comfort in noting that the majority essentially ignored the *Lemon* test in reaching its decision, "[T]he interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision." *Lee*, 505 U.S. at 644.

184. *Id.* at 586.

185. *Id.* at 597-98. The opinion continues, "[O]ffense alone does not in every case show a violation. . . . sometimes to endure social isolation or even anger may be the price of conscience or nonconformity." *Id.*

> persons will have some interaction with the public schools and their students.[186]

A comment from Justice Souter's concurrence also suggests that less government involvement might make prayer at public school graduations permissible. "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."[187] Justices Stevens and O'Connor joined in Souter's concurrence and presumably agreed with this footnote. These three members of the *Lee* majority along with the four *Lee* dissenters might have found prayer at a public school graduation constitutional as long as a non-state actor chosen by secular criteria made the decision and led the prayer. Souter's footnote has implications for valedictorian speakers, since schools customarily choose such speakers on the basis of "secular" criteria, that is, academic records.

Kennedy's and Souter's limiting language notwithstanding, the logical extension of *Lee's* reasoning suggests that the case is a blanket prohibition. This is because both elements of the coercion test, state action and coercion, are highly elastic concepts. In regard to state action, a public school, or school district, or school board will always have ultimate control of its own graduation ceremony. To whatever extent the school hands over the issue of prayer, or student speeches, or any other detail of the graduation to anyone else, it is still the school that delegates this authority. Because the school is ultimately responsible for all that happens at the graduation, an inescapable element of government involvement remains if a prayer is part of the ceremony. This minimal amount of state action, mere permission to the valedictorian to engage in religious expression, may be deemed enough to satisfy the state action prong of the coercion test.

If a prayer takes place at the graduation, it is also inevitable that some coercion, as Kennedy conceives of it, will occur. In the same way that *Lee* does not indicate what degree of state participation is unacceptable, *Lee* also does not indicate what degree of coercion is impermissible. It is clear, however, that *Lee's* sense of forbidden coercion is broad. Whether school officials arrange for the prayer or not,

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186. *Id.* at 598-99 (citation omitted). For the last sentence, the opinion cites *Mergens*, which stands for government neutrality towards religious speech within the "limited open forum" of the Equal Access Act. *Id.* The citation suggests that the *Mergens* holding may apply to the graduation ceremony. *Lee*, 505 U.S. at 598-99.

187. *Id.* at 630 n.8.

students who dissent from prayer will still very much want to attend their graduation and will still be subject to the pressure of participating or appearing to participate in the prayer.[188]

The concern which the *Lee* concurrences reflect—that an Establishment Clause violation need not be predicated on coercion, endorsement alone is enough—suggests that coercion sets too high a standard, one which would fail to identify some violations that endorsement would properly catch. Just the opposite is the case. Endorsement requires the reasonable perception that the state has acted in a manner that advances religion. Under the coercion standard, all that is necessary is state action that creates coercion. Kennedy's tendency in *Lee* to exaggerate the state action and coercion present—where merely providing guidelines for nondenominational prayer becomes "directing and controlling the content of the prayer,"[189] and peer pressure is part of government coercion—sets a tone whereby lower courts are likely to be quite expansive in identifying an extremely minor degree of state action and coercion as sufficient to satisfy the coercion test. Though Souter said it may be difficult to ascribe state action to a speaker chosen by secular criteria who decides to pray, he did not say it was impossible. Thus, a court that would be hard-pressed to ascribe government sponsorship to the speech of a valedictorian chosen by academic criteria and independently deciding to deliver a religious message or prayer, nevertheless, may readily find state action and government coercion in the school's permitting the speech to be delivered to the unwilling attendees of the graduation.

D. Free Speech in the Wake of Lee

The *Lee* decision had ramifications for school districts across the country, many of which had developed the longstanding and popular custom of prayer at graduation. Souter himself referred to the graduation

188. Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 798 (1993), argues that the coercion test should consider only pressure exerted by the government as opposed to pressure that derives from social considerations alone. He states:

> Contrary to the confused approach of the *Weisman* majority, it must be made clear that the forbidden coercion is *government* coercion–state action, not private action–lest the Establishment Clause be perverted into a sword of suppression of private religious expression and evangelism that occurs on public property and lest private expression generally be deprived of constitutional protection whenever it occurs in a forum maintained or sanctioned by the state.

Id. at 798-99.

189. *See Lee*, 505 U.S. at 578.

ceremony as a "rite of passage,"[190] a phrase that is redolent of religious significance, for a rite of passage is a ritual that marks a passage from one state of life to another, such as birth, adulthood, marriage, and death.[191] Religious ceremonies traditionally accompany rites of passage in virtually all cultures.[192] It is, then, quite natural for students, parents, and teachers to feel a need to mark the public occasion at which children become adults in American society with some reflection upon the purpose and meaning of life. For religious people, such an occasion calls for prayer.[193] The desire to preserve the custom conspired with *Lee's* limiting language to generate cases that tested whether the Constitution permitted students to include prayers at their graduations when school involvement in the religious expression is diminished. But as in *Lee*, the legal question was consistently framed as an Establishment Clause issue rather than one of free speech.

1. The Fifth Circuit: Jones v. Clear Creek Independent School District

After deciding *Lee,* the Supreme Court vacated the Fifth Circuit's decision in *Jones v. Clear Creek Independent School District* (*Clear Creek I*) and remanded the case for reconsideration in light of *Lee.*[194] In *Clear Creek I*, the plaintiffs complained of graduation prayers which had included references to Christianity.[195] Three weeks before the trial was to begin, the school district adopted a resolution that exemplifies subsequent attempts to make graduation prayer pass constitutional

190. *Id.* at 629 (Souter, J., concurring).

191. ARTHUR VAN GENNEP, THE RITES OF PASSAGE 10-11 (Monika B. Vizedom & Gabrielle L. Caffee, trans., Univ. of Chi. Press 1960) (1908). Van Genep developed the concept, defining rites of passage as "ceremonial patterns which accompany a passage from one situation to another or from one cosmic or social world to another." *Id.*

192. *See id.; see also* MAX GLUCKMAN, RITUALS OF REBELLION IN SOUTH-EAST AFRICA (1954); CUSTOM AND CONFLICT IN AFRICA (1955); VICTOR TURNER, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE (1969); DRAMAS, FIELDS AND METAPHORS (1974). These authors have observed that rites of passage often contain rituals of reversal or inversion in which the participants act in a manner that is precisely opposite or contrary to how they would normally act. Social superiors serving social inferiors would be an example. The valedictory speech is a ritual of reversal because after years in which the teachers at an educational institution have lectured the students, a student lectures the teachers.

193. Caleb McCain, *Religion in the Valedictory*, 37 J.L. & EDUC. 135, 135 (2008) ("Because religion is a preeminent aspect of American life, it is naturally present at important moments like graduations.").

194. 930 F.2d 416 (5th Cir. 1991), *cert. granted & judgment vacated*, 505 U.S. 1215 (1992).

195. *Id.* at 417.

muster by allowing the students to decide whether there would be prayer, who would recite the prayer, and what was in it:

> 1. The use of an invocation and/or benediction at high school graduation exercises shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
>
> 2. The invocation and benediction, if used, shall be given by a student volunteer; and
>
> 3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.[196]

The district court thought it passed the *Lemon* test.[197]

The appellate court provided a hint that forum analysis might be pertinent to this case. The court stated that the resolution was "the mechanism through which the state provides space in a closed forum for arguably religious speech at a government sponsored event."[198] It is not clear whether the court intended "closed forum" to mean a non-public or limited public forum. In any event, the court said nothing more about the forum, but agreed that the resolution passed the *Lemon* test.[199]

In its remand opinion (*Clear Creek II*), the Fifth Circuit affirmed its earlier decision.[200] *Clear Creek II* relied extensively on *Mergens* to get by the endorsement test. The circuit argued the instant case was closer to *Mergens* than to *Lee*.[201] There was no government endorsement of

196. *Id.*

197. *Id.* at 418.

198. *Id.*

199. *Id.* at 419. The court applied the *Lemon* test as opposed to *Marsh's* historical approach because the Supreme Court had found historical analysis inapposite for deciding religious issues in public schools "since free public education was virtually nonexistent at the time the Constitution was adopted." *Jones,* 930 F.2d at 419 (quoting Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987)).

200. *See Jones,* 977 F.2d 963. The Fifth Circuit noted that though the Supreme Court decided *Lee* under a coercion analysis, four of the justices also held that the prayers of *Lee* would be unconstitutional under the endorsement test. *Id.* at 966. The court concluded that it had to reanalyze the Clear Creek resolution under five tests: the three prongs of *Lemon*, the coercion test, and the endorsement test. *Id.*

201. *Id.* at 969 ("Concerning endorsement, the instant case more closely parallels *Mergens* because a graduating high school senior *who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer* will understand that any religious references are the result of student, not government, choice.").

religion because the school submitted "the decision of graduation invocation content, if any, to the majority vote of the senior class" and "after participating in a student determination of what kind of invocation their graduation will contain, . . . students will [not] perceive any more government endorsement of religion from the Resolution than do students in [the *Mergens* case] who are regularly recruited during school hours to join a Christian club."[202]

In regard to the coercion test, the court reasoned that any coercive effect was significantly reduced because the students, "*after having participated in the decision of whether the prayers will be given*, are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy."[203] The circuit concluded: "The practical result of our decision, viewed in the light of *Lee*, is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies."[204]

Mergens was predicated on the Equal Access Act which prohibited schools from discriminating against student groups on the basis of their religious speech within any "limited open form" created by the school.[205] The Fifth Circuit, however, did not consider whether Clear Creek had created a "limited open forum" under the Equal Access Act within its graduation ceremony. Rather, the circuit reasoned that the Clear Creek resolution reflected government neutrality towards religion and non-religion by allowing students to make their own decisions about whether to have prayer at a school-sponsored event, and this paralleled the neutrality the Supreme Court approved in *Mergens*.[206]

2. *The Ninth Circuit:* Harris v. Joint School District No. 241

Soon after, the Ninth Circuit had its first opportunity to address the issue of student-initiated graduation prayer, *Harris v. Joint School District No. 241*, a case which the Supreme Court later vacated as moot.[207] Students and a parent at Grangeville High School in Grangeville, Idaho, challenged graduation prayer under the

202. *Id.*
203. *Id.* at 971.
204. *Jones*, 977 F.2d at 972.
205. 20 U.S.C.A. § 4071(b) (West 2009).
206. *See Mergens*, 977 F.2d at 968-69.
207. 41 F.3d 447 (9th Cir. 1994), *cert. granted, vacated as moot*, 515 U.S.1154 (1995). Although the Supreme Court granted certiorari, vacated the case, and remanded it with instructions to dismiss as moot, *Harris* is still worth examining for the light it casts on the development of the law.

Establishment Clause.[208] The district court allowed several other students and parents to intervene who claimed rights under the Free Speech and Free Exercise Clauses to pray at graduation.[209] The district court held that the prayers did not offend the Establishment Clause.[210]

The students at Grangeville planned a good deal of their graduation ceremony. They could decide on music, printed programs, the speaker, the sequence of events, and even on whether there would be a commencement at all.[211] In 1990, the superintendent issued the following guidelines regarding graduation prayer:

> 1. Let the senior students vote on whether they do or don't want Invocation and Benediction at graduation.
>
> 2. If the answer is yes, then they should vote on whether they want a minister or a student to say the Invocation and Benediction.
>
> 3. If the students vote for a minister, then the students should vote on which minister they want to say the Invocation and Benediction.
>
> 4. Make everything an option and let the students vote. We will dictate nothing to the students. . . .[212]

The Grangeville High School benedictions for 1991 and 1992 consisted of musical numbers; that of 1993 was a moment of silence.[213]

Not impressed by this evidence of student participation and choice, the Ninth Circuit panel observed, "all of the parties . . . agree that the seniors have authority to make decisions regarding graduation only

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208. *Id.* at 448.

209. *Id.*

210. Harris v. Joint Sch. Dist. No. 241, 821 F. Supp. 638, 639-44 (D. Idaho 1993).

211. *Harris*, 41 F.3d at 452.

212. *Id.* at 452-53. The school issued a disclaimer in its graduation program:

> The Board of Trustees of Joint School District No. 241 neither promotes nor endorses any statements made by any person involved in the graduation ceremony. The District endorses each person's free exercise of speech and religion and any comments or statements made during the graduation ceremony should not be considered the opinion or beliefs of the District, the Board of Trustees or the Superintendent.

Id. at 453.

213. *Id.* However, the principal conceded that school officials would not interfere even if the students planning the graduation voted to "have the whole thing be a religious service." *Id.*

because the school allows them to have it."[214] The court found "no meaningful distinction between school officials acting directly and school officials merely permitting students to direct the exercises."[215] The court stated, "[S]chool officials cannot divest themselves of constitutional responsibility by allowing the students to make crucial decisions,"[216] and quoted a district court which had earlier addressed a graduation prayer case: "The notion that a person's constitutional rights may be subject to a majority vote is anathema."[217]

The Ninth Circuit distinguished such cases as *Widmar* and *Lamb's Chapel*: "In all of these cases, attendance at all religious . . . meetings was entirely voluntary, no religious meeting was sponsored by the school, and school officials neither encouraged nor participated in the meetings except on a custodial basis."[218] The court rejected the public forum argument of the defendants because

> [o]nly speakers chosen by the majority of the senior class are allowed. The message . . . is also chosen by the majority; the relevant speakers are instructed to pray. . . . A forum that allows only selected speakers to convey an established message and forecloses a significant portion of its members from any speech at all is not open in the required sense.[219]

The court concluded, "Once the requisite state involvement is shown, the rest of this case is indistinguishable from *Lee*."[220] Noting the school's proffered purpose of allowing students to learn leadership by planning their graduation, the court advised the school to teach the responsibilities

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214. *Id.* at 454.

215. *Harris*, 41 F.3d at 452 (internal quotation marks omitted) (citations omitted).

216. *Id.* at 455.

217. *Id.* at 455 (quoting Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097, 1100 (E.D. Va. 1993)). In *Gearon*, the school board attempted to apply a policy similar to that in *Clear Creek*. *Gearon*, 844 F. Supp. at 1099. The district court held that "a constitutional violation inherently occurs when, in a secondary school graduation setting, a prayer is offered, regardless of who makes the decision that the prayer will be given and who authorizes the actual wording of the remarks." *Id.* In the alternative, the court found that the facts of the case demonstrate excessive state entanglement with religion. *Id.* The court did not mention the *Lemon* test, but added in a footnote that the alternative basis was "the more 'realistic' ground for its decision given that no court has declared that prayer at a high school graduation is *per se* unconstitutional." *Id.* at 1100 n.4.

218. *Harris*, 41 F.3d at 456.

219. *Id.* at 456-57.

220. *Id.* at 457.

of leadership, "one of which is to respect the constitutional rights of others."[221]

The distinction *Harris* advanced between graduation ceremonies and student activities—the former having a captive audience compelled to attend because of the social importance of graduation, the latter having students who voluntarily attend the meetings of religious student groups—is significant in challenging the relevance of the *Widmar/Mergens* line of cases.[222] The distinction is not air-tight, however, when one considers the accurate observation in *Clear Creek II*, that *Mergens* explicitly allows the recruiting efforts of religious groups in school "through the school's newspaper, bulletin boards, public address system, and annual Club Fair."[223] In many of these situations, public school students are involuntary attendees required to hear the pitch to join the religious group several times during a school year. Like a graduation audience, the students are a captive audience. The court's other argument, that allowing the majority of students to vote on graduation prayer issues cannot create any kind of open forum because the vote will always preclude the minority from access, applies only to religious speech approved by majority student vote.[224] The argument does not apply to the speech of a valedictorian or several valedictorian speakers who are selected on the basis of academic achievement.[225]

3. *The Third Circuit:* ACLU v. Black Horse Pike Regional Board of Education

In *ACLU v. Black Horse Pike Regional Board of Education*, the defendant school board had maintained a graduation tradition of nonsectarian invocation and benediction delivered by local clergy.[226] To conform to *Lee*, the school board approved the following policy:

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221. *Id.* at 459. The dissent argued that the degree of school involvement in *Harris* did not measure up to that of *Lee*, and because students rather than the school initiated the prayers, there was a corresponding diminishment of coercion to participate. *Id.* at 460 (Wright, J., concurring in part and dissenting in part).

222. On captive audiences, see Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L. Q. 85 (1991).

223. *Clear Creek II*, 977 F.2d at 968 (quoting *Mergens*, 496 U.S. at 247).

224. *Id.* at 964.

225. The *per se* violation of the Establishment Clause entailed by any prayer at a public school graduation ceremony may be perceived in such lower federal court decisions as *Gearon*, 844 F. Supp. 1097; and in state courts, *Comm. For Voluntary Prayer v. Wimberly*, 704 A.2d 1199 (D.C. 1997).

226. 84 F.3d 1471, 1474 (3d Cir. 1996).

> 1. The Board of Education, administration and staff of the schools shall not endorse, organize or in any way promote prayer at school functions.
>
> 2. In the spirit of protected speech, the pupils in attendance must choose to have prayer conducted. Such prayer must be performed by a student volunteer and may not be conducted by a member of the clergy or staff.[227]

The policy allowed students to decide by a voting process "conducted by duly elected class officers" whether "to choose prayer, a moment of reflection, or nothing at all."[228] In the election at Highland Regional High School, 128 students voted for prayer, 120 for a moment of reflection, and 20 for nothing at all.[229]

A member of the Highland senior class requested the principal to allow an ACLU representative to speak at graduation about "safe sex and condom distribution."[230] The principal refused, citing time constraints and explaining, "that the topic requested was not generally one discussed at graduation ceremonies."[231] The ACLU and the student filed a complaint. Eventually, the district court permanently enjoined the school board from "conducting a school-sponsored graduation ceremony that include[d] prayer . . . ."[232]

In an en banc opinion, the Third Circuit affirmed.[233] Without citation to either *Lundberg* or *Brody*, the court repeated almost verbatim *Lundberg's* pronouncement, 'High school graduation ceremonies have not been regarded, either by law or tradition, as public fora where a multiplicity of views on any given topic, secular or religious, can be expressed or exchanged."[234] The court later provided the original quotation verbatim, citing *Brody*, but not *Lundberg*.[235] The court found state involvement because of the school's control over the graduation evidenced by the principal's refusal to permit the ACLU request.[236] The

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227. *Id.* at 1475.
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Black Horse*, 84 F.3d at 1475-76. The district court denied plaintiff's request for a preliminary injunction, but an emergency two judge panel of the Third Circuit reversed and granted the injunction. *Id.* at 1476.
233. *Id.* at 1488.
234. *Id.* at 1478.
235. *Id.* at 1484. For more on *Black Horse's* use of the two slightly differing versions of this statement, see discussion *infra* Part III.A.
236. *Black Horse*, 84 F.3d at 1478-79. The court stated:

court concluded, "Delegation of one aspect of the ceremony to a plurality of students does not constitute the absence of school officials' control over the graduation."[237] As for coercion, the court saw "no difference whatsoever between the coercion in *Lee* and the coercion here."[238] As in *Lee*, the Third Circuit found the social significance of graduation compelled attendance, and the influence of apparent government sponsorship and peer pressure impermissibly forced participation.[239] Contrary to *Clear Creek II*, the Third Circuit found that the significance of a once-in-a-lifetime event as opposed to routine daily prayer amplified rather than diminished the violation.[240]

Judge Mansmann composed a vigorous dissent, which Judge Alito, later to be elevated to the Supreme Court, joined with two others.[241] Emphasizing the fact-sensitive nature of *Lee*, the dissent contended that "[t]he case before us contains neither the indicia of state action nor the particular facts which were outcome-determinative in *Lee*."[242] The dissent found the independence that the policy allowed to the students sufficient to create an official government stance of neutrality.[243] The rejection of extra speakers did not disturb the dissent because the school could still implement restrictions compatible with a limited public forum as to time.[244]

The dissent pointed to *Brody v. Spang's* suggestion that a graduation ceremony could be a public forum depending on the facts of the case,[245]

> School officials at Highland did not allow a representative of the ACLU to speak about 'safe sex' and condom distribution at graduation . . . . The question was not submitted to referendum . . . because the principal understandably determined that the proposed topic was not suitable . . . . We do not suggest that the school's response to this request was inappropriate. However, we do note that the response illustrates the degree of control the administration retained over student speech at graduation.

Id. at 1478.

237. *Id.* at 1479.

238. *Id.* at 1480.

239. *Id.* ("Students at Highland had to either conform to the model of worship commanded by the plurality or absent themselves from graduation and thereby forego one of the most important events in their lives. That is an improper choice to force upon dissenting students.").

240. *Id.* The Third Circuit aligned itself with the Ninth Circuit decision in *Harris*, which found that prayer at graduation violated the Establishment Clause even though it would have been initiated, selected, and delivered by students. *Black Horse*, 84 F.3d at 1480.

241. *Id.* at 1489-97 (Mansmann, J., dissenting).

242. *Id.* at 1490.

243. *Id.*

244. *Id.* at 1491 n.4.

245. *Id.* The dissent stated:

and argued that *Widmar* and *Mergens* supported the idea that "[r]eligious speech in an open public forum does not confer the state's endorsement on religious sects or practices, and cannot be deemed to have the primary effect of advancing religion."[246] According to the dissent, the instant policy was in fact less constitutionally objectionable than that of *Clear Creek II* because under *Clear Creek* school officials could censor the student speech for sectarianism and proselytizing, whereas the "uncompromising neutrality" of the Black Horse hands-off policy would tolerate such speech.[247]

Harris and *Black Horse* illustrate how a court may treat *Lee* as a complete prohibition of prayer at graduation. Regardless of the freedom a school district allowed students in planning their graduation and in deciding whether to have a prayer, message, or musical performance, the school's ultimate authority over the graduation, which a school will always have, determined that any prayer that may possibly result from a student vote is school-sponsored. If merely permitting prayer at graduation entails impermissible state sponsorship under *Lee*, then *Lee* is a prohibition on all graduation prayer, and perhaps all religious expression, including that of the valedictorian.

The decisions also had implications for the free speech rights of students at graduation. In emphasizing the school's authority and control of the graduation ceremony, these courts summarily rejected the notion that a graduation could ever be a public forum of any kind. This attitude, however, ignores the effect of delegating decisions about expressive activities such as speeches and musical performances to private

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> We did recognize that commencement exercises at a public high school could qualify as a public forum. Restrictions on the use of the forum or on the class of speakers does not necessarily render the forum non-public. The subject matter and category of speaker restrictions of [the school district policy] are arguably compatible with the concept of a *limited* public forum.

Black Horse, 84 F.3d at 1491 n.4 (internal citations omitted).

246. *Id.* (citing *Widmar*, 454 U.S. at 274; and *Mergens*, 496 U.S. at 248).

247. *Id.* at 1492. The dissent stated:

> By contrast Black Horse's policy for prayer at graduation ceremonies is more liberal [than *Clear Creek's*] in that it extends the scope of its toleration to include even sectarian prayer, if the graduates so choose. I believe that in this way [the school district policy] comports with the First Amendment's prohibition against the inhibition of the practice of religion or of free expression, while at the same time precludes even the remote possibility of an establishment of religion by virtue of its uncompromising neutrality.

Id. The dissent downplayed the aspect of coercion, emphasizing that as graduates, the students had reached a level of maturity warranting a less restrictive approach to religious expression and that the graduation activity did not involve school curricula or pedagogy. *Id.* The dissent viewed the majority's opinion as an effective ban on all religious expression at the graduation ceremony, a result unwarranted under *Lee*. *Id.* at 1493.

individuals. As *Brody* noted, such a delegation could create a limited public forum.[248] The creation of such a forum is not mitigated by the ultimate control the government may have over the forum because the very concept of a delegated public forum is that the government cedes control over its property for expressive purposes other than its own. Once the government creates such a forum, it cannot selectively withdraw the forum on account of government objections to private viewpoints.[249] In not exploring the possibility that the schools had created public forums, and in not discussing the interaction between the free speech rights and the Establishment Clause rights that result, these courts treated the circumstances of a graduation ceremony as if only Establishment Clause interests, but not free speech interests, were at stake.

4. The Fifth Circuit Again: Santa Fe Independent School District v. Doe

It may have been unfortunate, as Kathleen A. Brady has observed, that the Supreme Court chose *Santa Fe Independent School District v. Doe* "as a vehicle for addressing the constitutionality of student-initiated prayer," because the "bad facts" of the case "obscured the most difficult issues at stake."[250] Two families, one Catholic and one Mormon, challenged the graduation and the football prayer policies of the Santa Fe High School in the small south Texas town of that name.[251] On May 10, 1995, the district court entered an order which permitted a "'non-denominational prayer' consisting of 'an invocation and/or benediction'" by a senior or seniors "selected by members of the graduating class."[252] In response to the district court order, the school district issued a graduation policy which read:

248. *See* discussion *supra* Part II.B.2.

249. *See* discussion *supra* Part II.A.2.

250. Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 FORDHAM L. REV. 1147, 1168 (2002). Aside from the Establishment Clause and free speech issues, the litigation in *Santa Fe* involved other issues of religious prejudice. 530 U.S. 290, 295 (2000); Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 810 (5th Cir. 1999). Furthermore, the attempt by school officials to "ferret out the identities" of the plaintiffs by "bogus petitions, questionnaires, individual interrogation, or down-right snooping" prompted the district court to threaten the "harshest possible contempt sanctions" and "criminal liability," as both the Supreme Court and the Fifth Circuit noted. *Santa Fe*, 530 U.S. at 294 n.1; *Santa Fe*, 168 F.3d at 809 n.1.

251. *Santa Fe*, 530 U.S. at 294.

252. *Id.* at 295-96. The students were to determine the text of the prayer without review from school officials. *Id.* The district court permitted references to specific religious figures such as Mohammed, Jesus, or Buddha, as long as the prayer was in general non-proselytizing. *Id.* at 296.

> The board has chosen to permit the graduating class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise. If so chosen the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies.[253]

In July, the school district eliminated the nonsectarian, nonproselytizing language, but provided that if the new policy were to be enjoined on account of this deletion, the previous nonsectarian, nonproselytizing language would return in effect.[254] In August, the school district devised a policy entitled, "Prayer at Football Games."[255] The football policy was similar to the graduation policy in providing for two elections and in omitting the nonsectarian and nonproselytizing requirements with the fallback provision that these be restored if the policy were enjoined.[256] The school replaced this with an October policy, which omitted the word "prayer" from the title and referred to "messages," "statements," and "invocations."[257] The district court upheld the graduation and football policies provided that the school district implement the fallback position that the prayer be nonsectarian and nonproselytizing for both.[258] The parties appealed, the plaintiffs arguing that the approved fallback position was unconstitutional, and the school district arguing that the original enjoined version was permissible.[259]

In a split decision, the Fifth Circuit found that Santa Fe's graduation policy was constitutional, provided the fallback nonsectarian and nonproselytizing language be included; the football prayer policy, however, did not pass muster.[260] The majority and dissent disagreed on whether it was necessary for the prayers to be nonsectarian and nonproselytizing in order for the policy to be constitutional.[261] The jurists

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253. *Id.* at 296-97.
254. *Id.* at 297.
255. *Santa Fe*, 530 U.S. at 297.
256. *Id.*
257. *Id.* at 298.
258. *Id.* at 299.
259. *Id.*
260. *Id.* at 809. For the Fifth Circuit majority, nonsectarian and nonproselytizing prayer meant the exclusion of references that the district court allowed to religious figures such as Mohammed, Jesus, or Buddha. *Santa Fe*, 530 U.S. at 822.
261. *Id.* For the majority, *Clear Creek II's* requirement that the graduation prayer be nonsectarian and nonproselytizing was necessary to the court's finding of

thought this depended on whether this part of the graduation ceremony was a public forum or not and therefore devoted much argument to the forum issue. The majority looked to the two factors that determine whether a forum is public, intent and extent of use granted, to decide whether the graduation was a designated public forum.[262]

In regard to intent, the majority summarily stated, "Neither its character nor its history makes the subject graduation ceremony in general or the invocation and benediction portions in particular appropriate fora for such public discourse," and then quoted the *Lundberg/Brody* pronouncement that graduations have never been public forums, citing only to *Brody*.[263] The majority continued, "For obvious reasons, graduation ceremonies . . . are not the place for exchanges of dueling presentations on topics of public concern."[264] On the extent of use factor, the majority argued that the school district in no way granted general access to a class of speakers, but rather, "simply concocted a thinly-veiled surrogate process by which a very limited number of speakers–one or two–will be chosen to deliver prayers denominated as invocations and benedictions."[265] The majority concluded that even though the government could designate a forum for particular speakers or for particular topics, the school district's "restrictions so shrink the pool of potential speakers and topics that the graduation ceremony cannot possibly be characterized as a public forum . . . at least not without fingers crossed or tongue in cheek."[266]

The majority's position, however, ran into some trouble with Fifth Circuit precedent in *Clear Creek II*. The reader may remember that in that case, the Fifth Circuit compared the student activities of *Mergens* to the Clear Creek graduation prayer policy in order to argue that since the use of school facilities by a religious student group did not imply government endorsement of religion in *Mergens*, neither would a student's choice to recite a religious invocation at a Clear Creek

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constitutionality after the *Lee* decision. *Id.* at 814-18. The dissent disagreed, arguing that the *Lee* court specifically stated that the nonsectarian nature of the graduation prayer made no difference. According to the dissent, student choice alone made the prayer policy in *Clear Creek II* constitutional. *Id.* at 825-28 (Jolly, J., dissenting).

262. *Id.* at 819.

263. *Id.* at 820 (quoting *Brody*, 957 F.2d at 1117).

264. *Santa Fe*, 530 U.S. at 820. For authority, the majority quoted the comments of *Doe v. Duncanville Independent School District*, 70 F.3d 402, 406 (5th Cir. 1995), regarding basketball games. The majority did not explain why it found basketball games analogous to graduations when the majority subsequently distinguished between graduations and football games to reach its conclusion that the prayer policy that was acceptable for graduations was not acceptable for football games.

265. *Santa Fe*, 168 F.3d at 820.

266. *Id.* at 821.

graduation.[267] To make it clear that this comparison did not mean that a graduation was a limited public forum paralleling the "limited open forum" of *Mergens*, the majority maintained:

> *Clear Creek II* does not rely on *Mergens* for the conclusion that [Clear Creek] had created a public forum. Rather, *Clear Creek II* adverts to *Mergens* only within the limited context of its Endorsement Test analysis, concluding that the graduation prayer policy at issue "paralleled" the practices held constitutional in *Mergens*.[268]

However, in *Mergens* it was the existence of a limited open forum which required the school to treat religious and nonreligious speech alike, with neutrality.[269] Thus, the majority accepted the neutrality mandated by *Mergens* for the graduation ceremony, but excluded the basis that necessitated that neutrality, that is, the creation of a "limited open forum." But in the absence of some kind of forum creating a free speech right, there was no reason for the government to be neutral. It appears, then, that in the majority's view, excluding the possible existence of a public forum was necessary in order to keep the "nonsectarian and nonproselytizing" limitation in the school's policy, for if the graduation ceremony were a public forum, then the restriction that the prayer be nonsectarian and nonproselytizing would have been unconstitutional viewpoint discrimination.[270] In any event, citing the limited access to speakers, the majority concluded there was no forum: "Absent feathers, webbed feet, a bill, and a quack, this bird just ain't a duck."[271]

Undaunted by the majority's rhetorical flourishes, the dissent maintained that the school district had created a limited public forum.[272] The dissent argued that the instant case only limited the benedictions and invocations by limiting the potential class of speaker to graduation students.[273] Any student speaker the graduating class elected had access

267. *Clear Creek II*, 977 F.2d at 969.

268. *Santa Fe*, 168 F.3d at 821.

269. *Mergens*, 496 U.S. at 246-47 ("Because Westside maintains a 'limited open forum' . . . , it is prohibited from discriminating, based on the content of the students' speech, against students who wish to meet on school premises during noninstructional time.").

270. *Santa Fe*, 168 F.3d at 819.

271. *Id.* at 822.

272. *Id.* at 831. The dissent perceived the *Clear Creek II* policy as a religious accommodation that relied on *Mergens's* neutral accommodation principle, as well as *Widmar* and *Rosenberger*. *Id.* at 831 n.11 (Jolly, J., dissenting).

273. *Id.* at 831. Like the *Clear Creek II* policy, the *Santa Fe* policy did not require that the messages have a religious component. *Id.*

to the graduation podium.[274] Therefore, the dissent concluded, the policy created a forum that was sufficiently open to participants and subject matter to constitute a limited public forum.[275]

As for the majority's citation to *Brody* for *Lundberg's* pronouncement that graduation ceremonies have never served as forums, the dissent observed that *Brody* only quoted the statement to assert that a commencement exercise could be a public forum, and remarked that the majority "panhandles a remote district court's musings as Third Circuit law without proper attribution."[276] The dissent also disputed the idea that graduation ceremonies are not the place to discuss views of political and social import, pointing out that graduation ceremonies have traditionally hosted "speakers attempting to impart wisdom and reflect on life's . . . goals."[277] Often these guest speakers are "controversial public figures."[278]

In regard to football games, the majority distinguished them from graduations in that "high school graduation is a significant once-in-a-lifetime event that could appropriately be marked with a prayer," whereas with sporting events, "we are dealing with a setting . . . far less solemn and extraordinary . . . ."[279] The dissent, however, rejected the distinction and argued that the school district created a limited public forum at the football games, just as it had at graduations.[280]

The Supreme Court granted certiorari to review the football game policy only, leaving the policy for graduation ceremonies intact.[281] Though it is possible that the Court drew the same distinction between graduations and football games as the Fifth Circuit, denial of certiorari does not necessarily indicate the High Court's agreement with the results of a case.[282] However, the Supreme Court's opinion in *Santa Fe* might indicate how the Court would analyze a graduation prayer policy. The Court's remand of the *Adler* case to the Eleventh Circuit to reconsider its approval of a similar graduation prayer policy in the light of *Santa Fe* lends some support to this reading of the Court's actions.[283]

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274. *Santa Fe*, 530 U.S. at 831.

275. *Id.*

276. *Id.* at 832 n.12 (Jolly, J., dissenting).

277. *Id.* at 831.

278. *Id.*

279. *Id.* at 822-23. A football game is "hardly the sober type of annual event that can be appropriately solemnized with prayer." *Santa Fe*, 530 U.S. at 823.

280. *Id.* at 834-35.

281. Sante Fe Indep. Sch. Dist. v. Doe, 528 U.S. 1002 (1999).

282. Atlantic Coast Line R.R. v. Powe, 283 U.S. 401, 403-404 (1931) (internal quotation marks omitted) (citations omitted) ("The denial of a writ of certiorari imports no expression of opinion on the merits of the case.").

283. Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir. 2000), *cert. granted, vacated, and remanded*, 531 U.S. 801 (2000). *See* discussion *infra* Part II.D.6.

The Supreme Court agreed with the Fifth Circuit that the pregame football ceremony was not a limited public forum because the school district's policy and practice did not evince an intent to open up the ceremony to indiscriminate use of the students.[284] The extent of access was also limited since only one student each year could give the invocation.[285] The policy regulations confined the content of that student's speech so that "only messages deemed 'appropriate' under the District's policy may be delivered."[286] The Court also objected to the majoritarian process which left students who held minority views opposed to the prayer "at the mercy of the majority."[287]

The Court maintained that the circumstances of a high school football game, such as school sponsorship of the regularly scheduled event on school property, the message broadcast over the school's public address system, the school banners, the cheerleaders and band members dressed in school uniform, and the school mascot, all would have the effect of projecting school endorsement so that the pregame prayer would be "stamped with [the] school's seal of approval."[288] And as in the graduation ceremonies, many students would feel compelled to attend their high school football game; indeed, some, such as the cheerleaders, band members, and the players themselves would be required to be there and thus would feel pressured to participate in the prayers.[289]

The Court discounted the proffered secular purposes of the district and argued that the historical background of the school's pregame policy indicated "that the District intended to preserve the practice of prayer before football games."[290] Given "the school's history of regular delivery of a student-led prayer at athletic events," the Court found it "reasonable

284. *Santa Fe*, 530 U.S. at 302-03 (internal quotation marks omitted) (citations omitted) ("Although the District relies heavily on *Rosenberger* and similar cases involving such forums, it is clear that the pregame ceremony is not the type of forum discussed in those cases. The Santa Fe school officials simply do not 'evince either by policy or by practice, any intent to open the [pregame ceremony] to indiscriminate use, . . . by the student body generally.'").

285. *Id.* at 303 ("Rather, the school allows only one student, the same student for the entire season, to give the invocation.").

286. *Id.* at 304.

287. *Id.* "[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id.* at 304-05 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

288. *Id.* at 307-08.

289. *Id.* at 311-12.

290. *Santa Fe*, 530 U.S. at 309.

to infer that the specific purpose of the policy was to preserve a popular 'state-sponsored religious practice.'"[291]

Chief Justice Rehnquist wrote the dissent, joined by Justices Scalia and Thomas.[292] Rehnquist complained that the majority opinion "bristles with hostility to all things religious."[293] Rehnquist maintained that the changes the school district incorporated into the policy evinced a good faith effort to follow the law as it had been interpreted by the district court, and not an attempt to circumvent the *Lee* prohibition on government-sponsored religious observances.[294] Besides, the dissent argued that *Lee* was distinguishable because that case was concerned with government speech, whereas *Santa Fe* concerned speech created by students.[295] Finally, even if the policy had limited what the speech could be, it was permissible for a school to restrict student speech to certain categories.[296]

The fundamental reason the *Santa Fe* policy did not pass constitutional muster with the Supreme Court is that it did not sufficiently remove the school from involvement with the prayer. The language of the policy and the circumstances of a pregame football address tended to limit whatever message a student might be elected to deliver to some sort of prayer or religious expression. In regard to the public forum issue, the Supreme Court clearly did not accept the notion that the Santa Fe policy created a public forum. However, this was, of course, in the context of a pre-football game ceremony rather than a graduation ceremony, concerned a prayer policy rather than a valedictory speech, and was predicated on the facts of the instant case. In fact, the Court went out of its way to make it clear that the valedictorian custom may be compatible with a public forum: "Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum."[297] Whether the speech of a valedictorian selected by objective, secular means would create a public forum at a graduation is still an open question as far as the Supreme Court is concerned.

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291. *Id.* (quoting *Lee*, 505 U.S. at 596). The enactment of the policy alone was a constitutional violation, "even if no Santa Fe High School student were ever to offer a religious message," because it was an attempt by the school district to encourage prayer. *Id.* at 316.

292. *Id.* at 318-26.

293. *Id.* at 318.

294. *Id.* at 323-24.

295. *Id.* at 324.

296. *Santa Fe*, 530 U.S. at 325.

297. *Id.* at 304.

Thus, *Santa Fe* left unresolved whether any of its holdings would apply with equal force to graduation ceremonies and the valedictory address. Moreover, even if the *Santa Fe* analysis is applicable to graduations, *Lee's* ambiguity remains. Although *Santa Fe* indicated that subtle government manipulation to maintain prayer that might otherwise be student-initiated satisfies the state action prong in *Lee*, *Santa Fe* does not ban prayer or other types of religious expression from public school graduations.[298] The question remains whether it is still possible for a public school to have a prayer at graduation by lowering the degree of school involvement still further than in *Santa Fe*. In its remand of the *Adler* case, the Supreme Court elected to punt,[299] allowing the Eleventh Circuit to move the ball on this question.

Despite *Santa Fe's* limiting language, however, the Supreme Court's reliance on the past history, context, and social circumstances of a prayer custom in determining the constitutionality of a current prayer policy unpredictably, and unfairly, favors an absolute ban on graduation prayer. Several times the Court reiterates the argument that the school's historic custom of prayer at graduation and football reveals the real purpose of its present policy: to preserve this tradition.[300] As Jennifer Carol Irby has pointed out, under this historical approach, any school policy allowing the mere possibility of student-initiated graduation prayer would then be condemned by the school's graduation prayer history as intended to maintain an unconstitutional practice, regardless of the school's efforts to conform its policy to the constitutional standards currently promulgated by the courts.[301] Steffen N. Johnson, an attorney who filed a brief in *Santa Fe*, astutely observed, "[I]t would be odd if the [school] District's former or unrelated policies were dispositive of whether its current football policy is constitutional. If it were, no government body could ever correct an unconstitutional practice."[302] Because a school cannot

298. *Id.* at 313 ("By no means do these commands impose a prohibition on all religious activity in our public schools.").

299. *Adler*, 206 F.3d 1070.

300. *Santa Fe*, 530 U.S. 290. "This history indicates that the District intended to preserve the practice of prayer before football games." *Id.* at 309. "The election mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games." *Id.* at 311. "Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment. Whether a government activity violates the Establishment Clause is 'in large part a legal question to be answered on the basis of judicial interpretation of social facts. . . .'" *Id.* at 315 (citations omitted).

301. Note, *Santa Fe Indep. Sch. Dist. v. Doe: The Constitutional Complexities Associated with Student-Led Prayer*, 23 CAMPBELL L. REV. 69, 74 (2000).

302. *Id.* at 111.

escape its history, the effect of this approach comes close to making *Lee* an absolute ban on religious expression at graduation.[303]

5. The Eleventh Circuit: Adler v. Duval County School Board

When *Lee* came down, the Duval County School Board ordered that no prayers be offered at graduation.[304] But after receiving many letters and suggestions from the community urging the adoption of student-initiated and student-led prayers, the board issued the following rules:

> 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 Duval County School Board, its officers or employees;
>
> The purpose of these guidelines is to allow students to direct their own graduation message *without monitoring or review by school officials*.[305]

In 1998, several students filed a complaint alleging that the policy infringed on their rights under the Establishment and Free Exercise Clauses.[306] The district court denied the plaintiffs' motion for injunctive relief and entered final judgment for the school board.[307] A panel of the Eleventh Circuit reversed the district court, but the Eleventh Circuit

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303. *Id.* at 74.

304. *Adler*, 206 F.3d at 1071 n.1.

305. *Id.* at 1072.

306. *Id.* at 1073. The plaintiffs had lost earlier in the district court after which the Eleventh Circuit held the claims were either moot or waived. They now argued that the law had changed in their favor. *Id.* at 1072-73 (citing Adler v. Duval County Sch. Bd., 851 F. Supp. 446, 451-56 (M.D. Fla. 1994); and Adler v. Duval County Sch. Bd., 112 F.3d 1475, 1477-78, 1480-81 (11th Cir. 1997)).

307. *Id.*

vacated and granted a rehearing en banc.[308] On March 15, 2000, in *Adler v. Duval County School Board* (*Adler I*), a majority of the Eleventh Circuit found that the policy did not violate the Establishment Clause because "an autonomous speaker *may* choose to deliver a religious message."[309]

The Eleventh Circuit read *Lee* as prohibiting a specific degree of government control of a religious message, and not as a ban on all religious expression.

> *Lee* does not stand for the proposition that all religious expression . . . must be excised from public high school graduation ceremonies. Rather, *Lee* prohibits the state from ordaining, directing, endorsing, or sponsoring a religious message at such ceremonies but not from adopting neutral secular policies which simply permit the possibility of private religious expression.[310]

Although the majority said it was unnecessary to decide whether the policy created a designated or limited public forum, nevertheless, like the Fifth Circuit, the Eleventh Circuit found the policy before it "can be analogized to a line of open forum cases in which the Supreme Court has held that neutral secular policies that merely accommodate religion or individual free exercise rights do not amount to an unconstitutional state endorsement of religion."[311]

Despite finding the access cases analogous only in an accommodationist sense, the majority repeatedly relied upon them. It observed that the Supreme Court extended the *Widmar* principle to the public schools in *Mergens*,[312] and had in recent cases such as *Capitol Square*, *Rosenberger*, and *Lamb's Chapel* reaffirmed the principle "by finding that the inclusion of private religious groups in 'open forums' through neutral selection principles does not violate the Establishment Clause or constitute a state endorsement of religion."[313] The majority disagreed with the appellant argument that the government platform converted private speech to public speech. That would make every

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308. *Id.*

309. *Adler*, 206 F.3d at 1074.

310. *Id.* at 1076.

311. *Id.* at 1077. The public forum doctrine, then, was only relevant to the extent "it informs Establishment Clause jurisprudence regarding principles of state endorsement and neutral accommodation towards private religious speech." *Id.* at 1077 n.6.

312. *Id.* at 1078 (citing *Mergens*, 496 U.S. at 235).

313. *Id.* (citing *Capitol Square*, 515 U.S. at 763; *Rosenberger*, 515 U.S. at 832; and *Lamb's Chapel*, 508 U.S. at 395).

speaker at a government sponsored event a government speaker.[314] Converting every speaker's speech into government speech because of the government platform would also run afoul of the Free Speech and Free Exercise Clauses because it would lead to viewpoint discrimination. After stating, "The Supreme Court has consistently held that in non-public fora the government may not engage in viewpoint discrimination,"[315] the circuit quoted the cases that established the public forum doctrine.[316] Thus, the majority's reliance on the public forum doctrine was thoroughgoing, not narrow.

Having found that the state did not endorse religion under the school board policy, the court discounted coercion, arguing that coercion is dependent on government control and endorsement of the message combined with the typical circumstances of a graduation ceremony likely to induce forced participation in a religious exercise.[317] Noting that seven of the seventeen student elections resulted in secular messages, or no messages at all, the court discounted the significance of majoritarianism in denying access to the minority.[318]

In its *Lemon* analysis, the majority found no entanglement because the school policy prohibited any review of the student message by the school.[319] Quoting *Mergens*, the court pointed out that "the School Board would find itself far more entangled with religion if it attempted to eradicate all religious content from student messages than if it maintained a meaningful policy of studied neutrality."[320] The plaintiffs' position, the court argued, would leave school officials with two choices: either eliminate all student speech, or censor it for religion.[321] Identifying what is religious for purposes of censorship is further complicated by the

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314. *Adler*, 206 F.3d at 1080. The court explained:

> [Privately held views] do not become the state's views merely by being uttered at a state event on a state platform. Otherwise, each 'open forum' case in which the Supreme Court found that granting religious groups access to generally available public facilities or benefits through neutral selection criteria was not an unconstitutional state endorsement of religion would be wrongly decided.

Id. (citing *Capitol Square*, 515 U.S. at 762-70; *Rosenberger*, 515 U.S. at 839-46; *Lamb's Chapel*, 508 U.S. at 395-97; *Mergens*, 496 U.S. at 248-53; and *Widmar*, 454 U.S. at 271-79)).

315. *Id.* at 1081.

316. *Id.* at 1081 (citing *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 46).

317. *Id.* at 1083.

318. *Id.* at 1083-84.

319. *Adler*, 206 F.3d at 1090.

320. *Id.* (citing *Mergens*, 496 U.S. at 253; *Widmar*, 454 U.S. at 272 n.11).

321. *Id.* at 1090.

problem of the constitutional definition of religion, which the court pointed out is expansive.[322]

The dissent's opinion foreshadowed the historical approach the Supreme Court was later to adopt in *Santa Fe*, as the dissent claimed that the majority's analysis was "flawed by an unwillingness to look beyond the policy's terms. A broader, more contextual appraisal leads me to conclude that the Duval County policy violates the Establishment Clause of the First Amendment."[323] The broader context included "the graduation traditions in Duval County, and the events leading to the policy's creation."[324]

The dissent found ample evidence of state control. The dissent argued that "actions of a private party can be attributed to the state if they are taken in exercise of a right or privilege rooted in state authority . . ."[325] The student decisions were pursuant to Duval County policy because the students acted at the behest of the policy, school graduation is a traditional government function, and prayers at the graduation ceremony are associated with the state.[326] The fact that the majority of students select the speakers actually exacerbated the peer-pressure element.[327]

The dissent attacked the majority's analogy to the access cases as if the majority had found the graduation to be a public forum. "The majority cites a number of cases permitting religious groups to use school facilities or funds, or public parks, but their holdings depended on the fact that use of the fora by a 'broad spectrum' of groups eliminated any potential message of endorsement or preference for religion."[328] In

322. *Id.* at 1090 n.11.

323. *Id.* at 1091 (Kravitch, J., dissenting).

324. *Id.* In its discussion of the purpose prong of the *Lemon* test, the dissent relied on the "context" of the school policy and noted the pressure from the community to find some way to maintain prayer at graduation. *Adler*, 206 F.3d at 1098. The title of the policy, "Graduation Prayer," suggested it was all about prayer. *Id.* Again, against the backdrop of tradition, the placement and time allotment of the messages created the expectation they would be prayers. *Id.* at 1100. Solemnization of the ceremony, which implies a prayer or solemnizing message, did not make sense as a purpose for the policy if students decided whether or not to have any message at all. *Id.* at 1091.

325. *Id.* at 1093.

326. *Id.* at 1093-94. The dissent pointed out that the school could not allow the students to vote to decorate their classrooms with the Ten Commandments, nor could local government hold votes on whether to mount a nativity scene on government property because a religious majority could then dominate the expression in a public area. *Adler*, 206 F.3d at 1095 n.3. To sever the state's association with the speech, the criteria for choosing the speaker must be secular and neutral and not related to the content of the speech. *Id.* at 1095.

327. *Id.* at 1097.

328. *Id.* at 1103-04.

permitting only one speaker selected by the majority and no diversity of views, the graduation policy was contrary to the notion of general access necessary for a public forum.[329] In its final footnote, however, the dissent indicated that it would give more freedom for religious expression to a valedictorian selected by neutral criteria.[330] "[T]he valedictorian could thank God or share the role faith played in her life."[331]

The Supreme Court vacated this decision and remanded the case to the circuit with instructions to reconsider it in the light of the High Court's intervening *Santa Fe* decision.[332] After reconsideration, the Eleventh Circuit found that *Santa Fe* did not alter its previous decision.[333] The circuit distinguished the *Santa Fe* policy because the level of influence permitted to the state was greater in that case than in *Adler II*.[334] The *Santa Fe* election system placed the selection of the student speaker under the advice and direction of the principal, and school officials could review the message for consistency with the purpose of the policy so the message would be appropriate.[335] The Duval County policy, in contrast, made the student elected to deliver the message completely free and autonomous.[336] *Santa Fe* encouraged a religious message by expressly endorsing an "invocation" and by subjecting the question of prayer to a majoritarian vote.[337] In the Duval County policy, students did not vote on whether to have a prayer, but rather on whether to have a message.[338] Thus, the policy did not preordain that the message would be a prayer. To find this policy unconstitutional on its face, the Eleventh Circuit would have to conclude

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329. *Id.* at 1104 (stating, "Selecting speakers through a majority vote also runs counter to the notion of 'general access' necessary for a public forum . . . .").

330. *Id.* at 1106 n.32.

331. *Adler*, 206 F.3d at 1106 n.32.

332. *Adler*, 531 U.S. 801.

333. Adler v. Duval County Sch. Bd., 250 F.3d 1330 (11th Cir. 2001) [hereinafter *Adler II*].

334. *Id.* at 1336-38.

335. *Id.* at 1337.

336. *Id.*

> Under the Duval County policy, if the senior class elects to have a message, the student elected to give that message is totally free and autonomous to say whatever he or she desires, without review or censorship by agents of the state or, for that matter, the student body. No reasonable person attending a graduation could view that wholly unregulated message as one imposed by the state.

Id.

337. *Id.* at 1337-38.

338. *Adler II*, 250 F.3d at 1338 ("The Duval County policy, unlike the Santa Fe policy, does not subject the issue of prayer to an up-or-down vote; students do *not* vote on whether prayer, or its equivalent, should be included in graduation ceremonies.").

that the Supreme Court had banned all religious speech at public school graduations, which the Supreme Court did not do.[339]

There were two dissents. In the first, Judge Kravitch argued that Duval County's election mechanism, like that of *Santa Fe*, did not cure the constitutional infirmity of the policy.[340] The distinctions which the majority drew between the cases, such as graduation ceremonies as opposed to football games, or the use of the word, "message," instead of, "statement or invocation," were insignificant.[341] The dissent renewed its arguments regarding the context of the policy and the manipulation of the school administration to encourage a religious message.[342]

Judge Carnes, who had been with the majority on the first go-round, wrote the second dissent.[343] He argued that the lesson of *Santa Fe* was 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."[344] Noting that the policy had led to prayer sixty percent of the time, he remarked, "Sixty percent is not perfection, but it is close enough for government work . . . ."[345] Judge Carnes asserted that a reasonable person could well perceive as government-endorsed a religious message, delivered by a student, who was selected by a majority of seniors, pursuant to a school policy delegating the power to choose this message for a school-controlled event.[346]

6. Chandler v. James

Although *Chandler v. James* concerns student religious speech in school as well as at graduation, and although the Supreme Court vacated *Chandler I* along with *Adler I* to be reviewed by the Eleventh Circuit in the light of *Santa Fe*, some of the most incisive reasoning regarding student religious speech may be found in its pages.[347]

A vice principal and his son filed suit complaining of an Alabama statute which permitted non-sectarian, non-proselytizing student-initiated

339. *Id.* at 1338.
340. *Id.* at 1342-47.
341. *Id.* at 1344.
342. *Id.* at 1344-45.
343. *Id.* at 1347-50.
344. *Adler II*, 250 F.3d at 1348.
345. *Id.* at 1349.
346. *Id.* at 1349-50. *See* Colin Delaney, *The Graduation Prayer Cases: Coercion by Any Other Name*, 52 VAND. L. REV. 1783 (1999), for an argument against majoritarian-determined prayer at public school graduations.
347. 180 F.3d 1254 (11th Cir. 1999), *cert. granted, vacated and remanded*, 530 U.S. 1256 (2000).

prayers during compulsory and non-compulsory school sponsored events such as assemblies, sporting events, and graduations.[348] The district court found the statute to be unconstitutional on its face and enjoined the DeKalb County School Board from enforcing the statute.[349] In its appeal, the School Board did not object to the part of the injunction which prohibited it from "aiding, abetting, commanding, counseling, inducing, ordering or procuring . . . school organized or officially sanctioned religious activity in the school building," but did protest the injunction's prohibition on "permitting" vocal prayer in school.[350] Though the injunction permitted purely private prayer, it prohibited any prayer or devotional speech that was not purely private, requiring "*school officials to forbid students or other private individuals from [leading public or vocal] prayer while in school or at school-related events.*"[351]

The Eleventh Circuit restricted its review to this portion of the injunction.[352] The court noted that "students are not state actors and, therefore, by definition, their actions cannot tend to 'establish' religion in violation of the Establishment Clause."[353] Rather, "the Free Speech and Free Exercise Clauses of the First Amendment require the State to *tolerate* genuinely student-initiated religious speech in schools."[354]

The court rejected the argument that by allowing students to speak religiously in situations that were not purely private, the state lent its imprimatur to the speech.[355] "The suppression of student-initiated religious speech is neither necessary to, nor does it achieve, constitutional neutrality towards religion."[356] Rather, "[p]ermitting students to speak religiously signifies neither state approval or disapproval" but only the state's "constitutional duty to tolerate religious expression."[357] The real issue, according to the court, was not whether

348. *Id.* at 1256. The Alabama statute at issue in *Chandler* read: "(b) On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events." Chandler v. James, 958 F. Supp. 1550, 1553 (M.D. Ala. 1997).

349. *Chandler*, 180 F.3d at 1256.

350. *Id.* at 1257.

351. *Id.* The permanent injunction required that any prayer be purely private, limiting students to "quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto." *Id.* at 1260 n.10.

352. *Id.* at 1258.

353. *Id.*

354. *Chandler*, 180 F.3d at 1258.

355. *Id.* at 1261.

356. *Id.*

357. *Id.*

school officials could prescribe prayer or prohibit or censor religious expression—they cannot—but rather, "[W]hat sort of time, place and manner limits may be imposed upon genuinely student-initiated religious speech in school?"[358] To answer this, "[w]e must fulfill the constitutional requirement of *permitting* students freely to express their religious beliefs without allowing the machinery of the government—the school—to be used to command prayer."[359] The court acknowledged the answer was not easy or simple. It would be far easier "simply to banish prayer from our public institutions, but this would be not only constitutionally incorrect, but also fundamentally unfair to our society."[360]

The court proposed that to accommodate religious speech without commanding it, school officials must observe the principles that the speech be permitted to students but not supervised by school officials.[361] The court imposed this explicit limitation:

> [A] student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience. The Constitution requires that schools permit religious expression, not religious proselytizing. . . . Proselytizing speech is inherently coercive and, the Constitution prohibits it from the government's pulpit.[362]

Noting that the school district had endorsed, encouraged, and participated in religious activities, the Eleventh Circuit affirmed the part of the district court's injunction which enjoined the "aiding, abetting, commanding, counseling, inducing, ordering or procuring" of school organized or sanctioned religious activity and also affirmed the appointment of a monitor by the district court to ensure the enforcement of the injunction.[363]

In *Chandler II*, the Eleventh Circuit reaffirmed its previous opinion. "*Santa Fe* condemns school *sponsorship* of student prayer. *Chandler* condemns school *censorship* of student prayer."[364] As the appellate court saw it, the Supreme Court declared the Santa Fe policy unconstitutional because it approved only one kind of message, an invocation, failed to separate itself from the religious content in the invocations, and

358. *Id.* at 1263.
359. *Id.* at 1263-64.
360. *Chandler*, 180 F.3d at 1264.
361. *Id.* at 1264-65.
362. *Id.* at 1265.
363. *Id.*
364. Chandler v. Siegelman, 230 F.3d 1313, 1315 (11th Cir. 2000).

consequently "crossed the line from state *neutrality* toward religion to state *sponsorship* of religion."[365] For the Eleventh Circuit, *Santa Fe* did not prohibit student prayer aloud or in front of others, such as an audience assembled for some purpose. "So long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected."[366]

7. *Texas and the Fifth Circuit One More Time:* Does 1-7 v. Round Rock Independent School District

On June 8, 2007, a Texas statute became effective, which provides a speech policy at school events for all public schools in Texas.[367] The

365. *Id.* (citing *Santa Fe*, 530 U.S. at 305).

366. *Chandler*, 230 F.3d at 1317. *Contra* Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274 (5th Cir. 1996) (finding a similar Mississippi statute unconstitutional except insofar as a graduation prayer was permissible under *Clear Creek II*). The challenged language in *Ingebresten* read, "[o]n public school property, other public property or other property, invocations, benedictions or nonsectarian, nonproselytizing student-initiated voluntary prayer shall be permitted during compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies and other school-related student events." *Id.* at 277. The court found that the statute failed all three prongs of the *Lemon* test. *Id.* Its purpose was not secular because its "clear intent was to inform students, teachers and school administrators that they can pray at any school event so long as a student 'initiates' the prayer (ostensibly by suggesting that a prayer be given)." *Id.* at 279. The statute's effect advanced "religion over irreligion because it gives a preferential, exceptional benefit to religion that it does not extend to anything else." *Id.* It excessively entangled government with religion because the statute would "inevitably involve school officials in determining which prayers are 'nonsectarian and nonproselytizing' and in determining who gets to say what prayer at each event." *Id.* The statute failed the coercion test because it "would allow prayers to be given by any person, including teachers, school administrators and clergy at school functions where attendance is compulsory." *Id.* It failed the endorsement test because "it allows school officials in their capacity as representatives of the state to lead students in prayer and sets aside special time for prayer that it does not set aside for anything else." *Id.* at 280. The court made no exception for permitting verbal student prayer which did not coerce religiously dissident students. *Ingebretsen*, 88 F.3d at 281-88 (Jones, J., dissenting).

367. TEX. EDUC. CODE ANN. §§ 25.151-25.152 (Vernon 2007). Kelly J. Coghlan, *Those Dangerous Student Prayers*, 32 ST. MARY'S L.J. 809, 850 (2001), discusses a resolution of the Texas State Board of Education to bring student speaker policies in compliance with the *Santa Fe* decision. She presents three model student speaker policies which that Board developed in the wake of *Santa Fe*, on September 15, 2000, and mailed to all Texas school districts. Ms. Coghlan provides the three models in their original form and in a slightly modified form resulting from the input of attorneys from the Texas Association of Public School Boards, school officials, and other sources. *Id.* at 867-73. Of particular interest is the model policy for graduation ceremonies. *Id.* at 870-73. Although these cover many of the points of the Texas statute, the model policies are somewhat more comprehensive and do not highlight religious expression.

statute declares that its purpose is to prevent discrimination against a student's religious viewpoint (if any) and at the same time to prevent attribution of that potential religious viewpoint to the school.[368] To this end, the statute mandates that Texas public schools establish a limited public forum for student speakers at all school events, which would, of course, include graduation ceremonies.[369] The schools must exclude obscene, vulgar, lewd, or indecent speech.[370] The schools must choose students according to neutral criteria[371] and provide a disclaimer.[372] Students may address any topic permissible for the occasion from a religious viewpoint.[373]

The Texas statute is yet another attempt to allow religious expression that may include a prayer, sectarian references, and proselytizing at graduation ceremonies. In the statute's protection of free speech, however, it provides no protection for Establishment Clause rights beyond its proposed effort to avoid government endorsement of a student-initiated religious statement. A district court from the Western District of Texas, Austin Division, found that it did not have to pass any judgment on this statute in *Does 1-7 v. Round Rock Independent School District*, but expressed doubt that "the new statute will do much to resolve the issue of prayers at graduations," and speculated that "the new legislation will be quite effective at keeping attorneys in fees for the foreseeable future."[374] This opinion is significant because it declared the Fifth Circuit's opinion of *Clear Creek II* overruled in the light of *Santa Fe*.[375]

In *Does 1-7*, the plaintiffs challenged the school district's policy of conducting a majoritarian vote on whether to have a student present a prayer at graduation.[376] Three of the four high schools in the district voted for prayers, and each of these was heavily edited by school officials. One prayer was edited to the point that plaintiffs claimed, "[I]ts content must be almost exclusively attributed to District officials."[377]

The court rejected the defendants' contention that the Supreme Court affirmed *Clear Creek II's* approval of graduation prayer predicated on students' votes when it failed to grant certiorari to review that part of the

368. § 25.152(a).
369. *Id.*
370. § 25.152(a)(3).
371. § 25.152(a)(2).
372. § 25.152(b).
373. § 25.152(c).
374. 540 F. Supp. 2d 735, 744 n.4 (W.D. Tex. 2007).
375. *Id.* at 750.
376. *Id.* at 739.
377. *Id.*

opinion.[378] The district court, however, approved *Adler II's* reading of *Santa Fe*, that a school district policy is unconstitutional if it subjects the question of graduation prayer to an up-or-down student vote, allows the school district to retain significant control over the content of the message, and is the product of the school district's efforts to inject prayer into school events.[379]

After acknowledging that it could not declare *Clear Creek II* bad law even if it was certain the Fifth Circuit would do so,[380] the district court asserted that it could recognize when a "precedent has been explicitly or implicitly overruled by a subsequent Supreme Court decision."[381] The *Does 1-7* court then compared *Santa Fe's* holding that the school's prayer policy was "invalid on its face because it establishes an improper majoritarian election on religion"[382] with the holding of *Clear Creek II* as described by *Santa Fe*, that "student-led prayer that was approved by a vote of the students . . . was permissible at high school graduation ceremonies."[383] The court found a "prayer that was approved by a vote of the students," which *Clear Creek II* allowed, to be indistinguishable from a "majoritarian election on religion," which *Santa Fe* condemned.[384]

For the *Does 1-7* court, the policy on student speech in *Adler II* was likely to be constitutional because the students voted on a "message" and the choice to make it a religious message was up to the student elected to give the message.[385] The policy in *Clear Creek II* was unconstitutional because it involved a vote on invocations and benedictions, which are

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378. *Id.* at 747 ("[T]he Court's denial of certiorari means only that it 'accepts, without approving or disapproving, the Court of Appeals' conclusion. . . . Thus, the Court's silence on the issue cannot be taken for anything more than it is - silence." (citation omitted)).

379. *Id.* at 749. The court also helpfully explained the Supreme Court's practice of "granting certiorari, vacating, and remanding for further consideration in the light of some intervening development." *Does 1-7*, 540 F. Supp. 2d at 748 (citing Carter v. Johnson, 131 F.3d 452, 457 (5th Cir. 1997)). Known as a "GVR," such an order is not a reversal of the lower court's decision, but rather, for the sake of judicial economy, permits the lower court to reconsider an issue with the wisdom of the intervening development. *Id.* at 748 (citing Lawrence v. Chatter, 516 U.S. 163, 167-68, 174 (1996)). Thus, "the Supreme Court's GVR in *Adler*, is not a statement about *how* the *Santa Fe* holding applies to elections on prayer at graduation ceremonies. Nevertheless, the GVR is a clear statement from the Supreme Court that the *Santa Fe* decision *does* apply to this situation. In other words, the Supreme Court has not impliedly exempted graduations from the reach and reasoning of *Santa Fe*." *Id.* at 748-49.

380. *Id.* at 749.

381. *Id.*

382. *Id.* at 750 (quoting *Santa Fe*, 530 U.S. at 317).

383. *Does 1-7*, 540 F. Supp. 2d at 750 (quoting *Santa Fe*, 530 U.S. at 299).

384. *Does 1-7*, 540 F. Supp. 2d at 750.

385. *See* discussion *supra* Part II.D.1.

likely to be prayers to a deity.[386] Though the Fifth Circuit had viewed invocations and benedictions as inclusive of purely secular expression,[387] the court also discussed these as prayers.[388] Because the Supreme Court had ruled in *Santa Fe* that student votes on prayer were impermissible violations of the Establishment Clause, the district court concluded that *Santa Fe* overruled *Clear Creek II*.[389]

8. Summary

The *Does 1-7* opinion made the Eleventh Circuit the only federal jurisdiction which permits elective student prayer at public school graduations. However, in opinions concerning this issue, all the circuits are consistent in their reluctance or refusal to examine the consequences of regarding a graduation ceremony, in part or in whole, as any kind of public or non-public forum. The Third Circuit's willingness to consider the possibility in *Brody* was effectively withdrawn in *Black Horse*. The Fifth Circuit's *Clear Creek* analogy to the school access cases was weakened in *Santa Fe*, and may have been scuttled by the district court in *Does 1-7*. The Ninth Circuit bluntly rejected the public forum argument in *Harris*. Even in *Adler*, the Eleventh Circuit did not go beyond proffering a limited analogy to the access cases, though its dependence on this analogy was extensive. Only the dissent in the Fifth Circuit's *Santa Fe* opinion argued, in the teeth of the majority's ridicule of the notion, that the instant student elective prayer policy created a public forum.[390]

Thus, despite the free speech issue that student-initiated prayer potentially could entail, the courts largely stuck with the Supreme Court's *Lee* analysis that the issue of prayer at public school graduations

386. *See* discussion *supra* Part II.D.5.

387. *Clear Creek II*, 977 F.2d at 969 (citing *Clear Creek I*, 930 F.2d at 420 n.3) (noting that "the Resolution permits invocations free of all religious content, and the 1987 student proposal was acceptable to the plaintiff-appellants").

388. *E.g., Clear Creek II*, 977 F.2d at 971 ("We think that the graduation prayers permitted by the Resolution place less psychological pressure on students than the prayers at issue in *Lee* . . . ."); Merriam-Webster Online Dictionary, *supra* note 40 (defining "invocation" as "a prayer of entreaty (as at the beginning of a service of worship)"); Merriam-Webster Online Dictionary, *supra* note 40 (defining "benediction" as "the invocation of a blessing, *especially*: the short blessing with which public worship is concluded").

389. *Does 1-7*, 540 F. Supp. 2d at 750. The student voting policy in *Harris* refers to an "Invocation and Benediction," 41 F.3d at 454; in *Black Horse* to a "prayer," 84 F.3d at 1475. Under the distinction drawn by *Does 1-7*, these policies would also be unconstitutional. *Does 1-7*, 540 F. Supp. 2d at 750.

390. *Santa Fe*, 168 F.3d at 835.

is primarily an Establishment Clause issue. Perhaps the majoritarian implications of voting in an area of constitutional rights intimidated jurists from hazarding the argument when they otherwise would have been inclined to permit some religious expression at public school graduations. Or perhaps such judges were concerned about the far-reaching social implications of ruling that students at a graduation had a constitutional right to say what they wished regardless of the divisiveness the speech could entail. Whatever the reason, as litigation turned to the rights of students who were selected to speak, not on the basis of an election, but rather on the basis of objective criteria, the issue of free speech based on forum analysis became harder to evade.

E. The Valedictorian Cases of the Ninth Circuit

1. Doe v. Madison School District No. 321

In respect to its expansive view of what students may say at graduation, *Doe v. Madison School District No. 321* contrasts markedly with *Harris* and the Ninth Circuit's subsequent case law.[391] However, *Madison* is no longer good law. After the Ninth Circuit withdrew the panel opinion to rehear *Madison* en banc, the circuit dismissed the case because it had become moot due to the graduation of the student involved.[392]

A parent on behalf of herself and her child challenged the graduation speaker policy at Madison High School in the Idaho town of Rexberg.[393] Rather than select a single speaker by student election, the school selected four student speakers on the basis of their academic performance.[394] The school did not attempt to influence the speeches, except for style and expression, and left it up to the students whether to present "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement."[395] The school provided a disclaimer which read, "Any presentation by participants of graduation exercises is the *private expression of the individual participants* and does not reflect any official position of Madison School District # 321, its Board of Trustees, administration or employees or indicate the views of any other

391. 147 F.3d 832 (9th Cir. 1998), *withdrawn*, 165 F.3d 1261 (1999).

392. Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789 (9th Cir. 1999) (finding that parent did not have standing, the challenge did not present a live controversy after the plaintiff student graduated, and no exception to the mootness doctrine applied).

393. *Madison*, 147 F.3d at 834.

394. *Id.*

395. *Id.*

graduate."[396] The district court granted summary judgment to the defendants.[397]

The circuit court rejected the plaintiffs' argument that *Lee* was a complete prohibition of prayer at high school graduations. "*Lee* did not purport to erect a per se rule against religious activity in public school graduation ceremonies."[398] Although the court conceded the presence of some coercion as *Lee* defined it, the court found school control to be sufficiently diminished for the policy to survive.[399] The court distinguished the case from *Lee* in three respects: (1) students, not clergy, would deliver the prayers, if any; (2) the students were "selected by academic performance, a purely neutral and secular criterion;" and (3) students had autonomy over the content of their speeches.[400] The court also pointed to Justice Souter's footnote in *Lee*, which stated, "It would have been harder to attribute an endorsement of religion to the state" if the graduation speakers were chosen by "secular criteria," as in the instant case.[401]

The court found no violation under the *Lemon* test. The school's proposed purpose, "to grant top students the autonomy to deliver an uncensored message," was one which the court was "unwilling to trivialize" given "the importance of bestowing responsibility on young adults at this significant moment in their student careers."[402] According to the court, the plaintiff's excessive focus on the possibility of prayer which the policy permitted would lead to the invalidation of all government accommodations of religion.[403] There was no primary effect of advancing religion on the face of the policy since the Board of Trustees was not endorsing religion but only recognizing the right of individual students to express their views, be they social, political, or religious.[404]

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396. *Id.* at 835 n.5.

397. *Id.* at 834.

398. *Id.*

399. *Madison*, 147 F.3d at 834-35.

400. *Id.* at 835.

401. *Id.* (quoting *Lee*, 505 U.S. at 630 n.8 (Souter, J., concurring)). The court distinguished *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 761 (9th Cir. 1981) in which the Ninth Circuit found that a public school could not permit the student council to open assemblies with prayer because this would be impermissible state sponsorship of religious activity. In *Collins*, the school was not sufficiently neutral because the school itself selected students from the social mainstream for the specific purpose of leading prayers. 644 F.2d at 762. In the earlier *Harris* decision, the Ninth Circuit depended heavily on *Collins*. *Harris*, 41 F.3d at 454-59.

402. *Madison*, 147 F.3d at 836-37.

403. *Id.* at 837.

404. *Id.* at 837-38.

Although the court thought that the graduation was not a public forum, it nevertheless cited *Widmar* in its discussion of the excessive entanglement prong of *Lemon*.[405] The court emphasized *Widmar's* concern, "[t]he school 'would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech."' Such an effort would force the school into the 'impossible task' of deciding which words and activities fall within the concept of religion."[406] The court also noted the danger of greater entanglement between the state and religion if the school attempted to censor religious expression out of student speeches. "[T]he school would more likely become entangled with religion if it tried to eradicate all religious content from student presentations; such an attempt would likely require the school to censor the student speech before the ceremony and to interrupt any renegade student who autonomously initiated sectarian solemnizing."[407] The court's concern with renegade students is prophetic of the recent attempts of valedictorians such as McComb to include religious expression in their speeches despite the censorship of school authorities.

Madison is a strong, succinct statement. However, in summarily stating that the graduation is not a public forum and in never applying public forum analysis, *Madison* does not provide a basis for the free speech rights which it assumes the students have.[408] On the other hand, even though it addresses the Establishment Clause claim, the opinion does not consider the possibility of student speeches which proselytize to such an extent that the student speaker converts the graduation podium into a pulpit and the graduation ceremony into a religious activity.

2. Cole v. Oroville Union High School District

Cole v. Oroville Union High School District is the first case that squarely addressed the valedictorian issue.[409] Though the court may have decided rightly to support the school's censorship of Niemeyer's proselytizing valedictory speech on Establishment Clause grounds, the reasoning of the court went further than previous courts in minimizing the free speech rights of students at graduation.[410]

405. *Id.* at 838.
406. *Id.* (quoting *Widmar*, 454 U.S. at 272 n.11).
407. *Id.* at 838.
408. *Madison*, 147 F.3d at 838.
409. 228 F.3d 1092 (9th Cir. 2000).
410. *Id.*

Two graduating seniors, Chris Niemeyer and Ferrin Cole, filed suit claiming a violation of their rights of free speech at their graduation ceremony.[411] Cole was selected by student vote to give a "spiritual" invocation at graduation.[412] Niemeyer was the valedictorian; so chosen because he had the highest grade point average in the graduating class.[413] The court never mentions this last fact, which is surprising given the Souter footnote in *Lee*.[414] Since 1985, the principal of the school reviewed the speeches and had the final say as to their content.[415]

In the fall of 1997, the school informed Niemeyer that he was co-valedictorian of his class, and in April, 1998, the senior class selected Cole to offer the invocation.[416] Both were late in submitting drafts of their speeches to school officials.[417] Upon reviewing the drafts, the school's counsel advised that both speeches were impermissibly sectarian and proselytizing, so the principal attempted to persuade the students to delete their sectarian references.[418] The two refused to compromise, and on the day before graduation, they filed a suit in district court seeking a temporary restraining order to prevent the school from denying them access to speak.[419] The district court denied the motion for lack of time to study the issue.[420] At the graduation itself, Niemeyer attempted to deliver his original speech, but the principal refused to let him do so.[421] Eventually, the district court dismissed all the claims, and the plaintiffs appealed.[422]

The court began its analysis of the substantive claims by indicating that the public forum issue would not affect its holding: "Even assuming the Oroville graduation ceremony was a public or limited public forum, the district's refusal to allow the students to deliver a sectarian speech or prayer . . . was necessary to avoid violating the Establishment Clause under the principles applied in *Santa Fe Independent School District v.*

411. *Id.* at 1095.

412. *Id.* at 1095-96.

413. Appellants' Opening Brief at 5, Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092 (9th Cir. 1999) (No. 99-16550), 1999 WL 33621186, ("Since 1990, Oroville High School has requested that the graduating senior(s) with the highest grade point average, the Valedictorian, address his class and the audience at graduation.").

414. *Lee*, 505 U.S. at 630 n.8. (Souter, J., concurring) (referring to the difficulty of finding government sponsorship in the speech of a speaker chosen by secular criteria).

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

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.* at 1096-97.

420. *Id.*

421. *Cole*, 228 F.3d at 1096-97.

422. *Id.*

Doe and *Lee v. Weisman*."[423] The court never determined whether Oroville had created a public forum within the confines of the invocation or the valedictory because of the court's position that the issue was irrelevant to its holding. To properly evaluate the opinion, however, it is necessary to assume that the graduation ceremony was a type of public forum. If this assumption makes the court's holding unsustainable, the court was then wrong to sidestep the public forum question.

The court followed the Supreme Court's reasoning in *Santa Fe* to rather quickly dispatch the issue of Cole's invocation.[424] Turning to the speech of the valedictorian, the court acknowledged that Niemeyer's speech was a closer question than Cole's invocation because the school's policy neither encouraged him to make a religious speech nor did a majority of students elect him to lead them in prayer.[425] The Ninth Circuit then developed a basis for censoring this speech by relying upon the reasoning of previous graduation prayer cases which assigned importance to the extent of school control over the graduation ceremony in general and the valedictory speech in particular. Here is the passage in full:

> [W]e conclude the District's plenary control over the graduation ceremony, especially student speech, makes it apparent Niemeyer's speech would have borne the imprint of the District. First, the District authorizes the valedictory speech as part of the District-administered graduation ceremony, which is held on District property and financed in part by District funds and in which only selected students are allowed to speak. Second, the principal retains supervisory control over all aspects of the graduation, and has final authority to approve the content of student speeches. Third, the District requires the students to sign

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423. *Id.* at 1101 (citations omitted).

424. *Id.* at 1101-03. The court also used *Collins v. Chandler*, 644 F.2d at 760-62, which *Harris*, 41 F.3d 447, had relied upon and *Madison*, 147 F.3d at 835-36, distinguished.

425. *Cole*, 228 F.3d at 1103. The Ninth Circuit summarized Niemeyer's valedictory speech as follows:

> [It] included a statement that he was going to refer to God and Jesus repeatedly, and if anyone was offended, they could leave the graduation. Niemeyer's proposed speech was a religious sermon which advised the audience that "we are all God's children, through Jesus Christ [sic] death, when we accept his free love and saving grace in our lives," and requested that the audience accept that "God created us" and that man's plans "will not fully succeed unless we pattern our lives after Jesus' example." Finally, Niemeyer's speech called upon the audience to "accept God's love and grace" and "yield to God our lives."

Id. at 1097.

> a special contract obligating them to act and dress in a manner prescribed by the District. Finally, the speech presumably is broadcast to the audience over a school microphone or public address system.[426]

The court's finding that the school district exercised "plenary" control over student speech may have been correct as a practical matter. But such plenary government control of student speech was not consistent with *Cole's* earlier assumption that the graduation could have been a public forum. The dictionary defines "plenary" as "complete in every respect: absolute, unqualified."[427] If Niemeyer were speaking in a public forum, the control the school district and principal exercised over his speech could not have been "complete," "absolute," "perfect," "unqualified," or "plenary," because this control would have been limited at least to the extent that neither the district nor the principal could legally have disapproved or excluded Niemeyer's point of view. According to the court's own logic, Niemeyer's speech bore the imprint of the state because the state exercised plenary control over it.[428] But the court was incorrect in concluding that the state had plenary control over the speech because the court had not excluded the possibility that the graduation was a public forum. Without plenary state control, the speech did not bear the imprint of the state. And without the imprint of the state, the speech would not have violated the Establishment Clause and need not have been suppressed.

Disregarding its own assumption regarding the possible existence of a public forum at the Oroville graduation, the *Cole* court focused exclusively on the school district's control of the graduation to argue that this control converted student speech into government speech. This argument is in fact a tautology. As Caleb McCain explains, "[T]he Ninth Circuit stated that because the school district edited speeches, the 'reasonable dissenter' would feel like the district had approved the speech. But it is a tautology to require censorship to prevent unconstitutional speech that derives its unconstitutionality from that very censorship."[429] To put it more bluntly, the Ninth Circuit argued that the school district had to censor the speech because it censored the speech.

The Ninth Circuit also bootstrapped the school district's requirement that the students sign "a special contract obligating them to act and dress in a manner prescribed by the District" into an agreement that the district

426. *Id.* (internal citations omitted).
427. Merriam-Webster Online Dictionary, *supra* note 40.
428. *Cole*, 228 F.3d at 1103.
429. *Religion in the Valedictory*, *supra* note 193, at 138-39.

may censor the valedictorian's speech.[430] However, if the graduation was a public forum, then the valedictorian had free speech rights. The contract to which the court refers would then amount to a waiver of the student's right of free speech given in exchange for the honor of speaking at the graduation, an honor the student had earned academically. To the high school graduate, the hard-earned honor of delivering the valedictorian speech is likely to be as important as attending the graduation itself. Consequently, if under *Lee* it is unconstitutional "to exact religious conformity from a student as the price of attending her own high school graduation," then it follows that it is equally unconstitutional to force a valedictorian to give up his right of free speech as the price of delivering his own valedictory address.[431]

With or without the government's efforts at control, Niemeyer's speech was private speech, not government speech. It is not reasonable to say that because the government attempted to prevent Niemeyer from saying what he wanted to say, what he wanted to say became government speech. For *Rosenberger* and *Capitol Square*, both of which are cited by *Cole*, such private speech in a public forum does not violate the Establishment Clause. Nor could this speech reasonably be interpreted or even misunderstood as government sponsored. O'Connor's endorsement test assumes a reasonable observer who is knowledgeable about the circumstances of the speech.[432] Here, such an observer would know that the valedictorian, Niemeyer, got to the graduation podium on the basis of his grades, and not because the school district favored the religious message he would give. A knowledgeable observer would also

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430. *Cole*, 228 F.3d at 1103.

431. *Lee*, 505 U.S. at 596. In *Corder v. Lewis Palmer School District No. 38*, 566 F.3d 1219, 1232 n.6 (10th Cir. 2009), the court notes the argument of the National Legal Foundation in its Amicus Brief that denying Corder the benefit of her diploma unless she accepted the sentence which the principal wanted her to include in her email engaged the doctrine of unconstitutional conditions, under which the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (cited by Amicus Brief for National Legal Foundation in Support of Plaintiff-Appellant Supporting Reversal at 3, Corder v. Lewis Palmer Sch. Dist. No. 38, 566 F.3d 1219 (10th Cir. 2008) (No. 08-1293) 2008 WL 5609517 (inner quotation marks omitted) (citations omitted)). Justice Kennedy's concern, in *Lee*, that religious conformity should not be the price of attending one's own graduation is a formulation that reflects the unconstitutional conditions doctrine. However, the doctrine may apply with even more force to the situation in which a student who has earned the benefit of delivering a valedictory speech must waive free speech rights by submitting to the censorship of school authorities, as described in *Cole*.

432. *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.").

know that the opposition, not approval, of school administrators confronted Niemeyer's speech, and if this were not known, a disclaimer, like the one in *Capitol Square*, would make it clear that the government did not endorse the speech.[433] Even if the assumption of a public forum is removed, and the Oroville graduation is assessed as a non-public forum, the court's position is still untenable because in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, the Supreme Court found that the exclusion of religious speech from any forum was viewpoint discrimination.[434] Such discrimination is impermissible, even in a non-public forum.[435]

The Ninth Circuit's reasoning obfuscates the vital distinction between government and private speech articulated by O'Connor in *Mergens*: "[T]here 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."[436] A school's attempt to censor religious expression, by itself, cannot make that religious expression government sponsored and therefore a violation of the Establishment Clause. Nor does permission to express oneself religiously in a public forum normally violate the Establishment Clause.[437] For the contrary notion, the *Cole* court cited the Fifth Circuit's (and notably not the Supreme Court's) *Santa Fe* decision. "[W]hen the school 'permits' sectarian and proselytizing prayers—which, by definition, are designed to reflect, and even convert others to, a particular religious viewpoint . . . —such 'permission' undoubtedly conveys a message not only that the government endorses religion, but that it endorses a particular form of religion."[438] But given the assumption of a public forum, this statement again conflicts headlong with O'Connor in *Mergens*, "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."[439]

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433. *Id.* at 769 ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such.").

434. *Lamb's Chapel*, 508 U.S. at 393-94; *Rosenberger*, 515 U.S. at 832-34; *Good News Club*, 533 U.S. at 107-111.

435. *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 49.

436. *Mergens*, 496 U.S. at 250.

437. *Capitol Square*, 515 U.S. at 770.

438. *Cole*, 228 F.3d at 1103 (quoting *Santa Fe*, 168 F.3d at 817-18).

439. 496 U.S. at 250 (citations omitted). As Foehrenbach Brown points out, *supra* note 41, at 55, the U.S. Department of Education implicitly rejected the *Cole* decision in an administrative statement, U.S. Department of Education Guidance on Constitutionally

A prior restraint is "a governmental restriction on speech or publication before its actual expression."[440] The school's censorship of Niemeyer's speech and refusal to allow him to speak fits this definition.[441] As the Supreme Court said in *New York Times Co. v. United States*, "'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'[442] The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'"[443] The *Cole* tautology fails to carry this burden, but nevertheless provides broad authority for school officials to impose prior restraints and censorship of not only student religious expression, but all student speech that may occur at graduation ceremonies.

The final irony of the *Cole* opinion is that the court's reasoning does not only devalue free speech rights, it also fails to protect Establishment Clause rights. If the school district's control of the graduation ceremony and review of student speech are what create government endorsement of any religious expression that may occur, resulting in an Establishment Clause violation, what is the result if the school does not exercise plenary control over the ceremony and does not review student speeches at all? The implication is that without such control and review, the school does not endorse religious expression, and the valedictorian would then be free to proselytize or lead the audience in a sectarian prayer oblivious to any concern about violating the Establishment Clause.

The *Cole* court erred in not facing up to the public forum issue. This is the only way in which the court could have adequately protected the free speech rights of the speaker and the Establishment Clause rights of

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Protected Prayer in Public Elementary and Secondary Schools, 68 Fed. Reg. 9645-01 (Feb. 28, 2003), which stated:

> School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content.

Id.

440. BLACK'S LAW DICTIONARY 1212 (7th ed. 1999).

441. Erwin Chemerinsky, *Are Student Delivered Graduation Prayers and Religious Speeches Constitutional?*, 5 FALL NEXUS: A JOURNAL OF OPINION 3, 8 (2000) ("Since 1986, the [Oroville] District has required graduation speakers to submit a copy of their speech to the principal for approval. This is a prior restraint that would be intolerable in almost any other setting.").

442. 403 U.S. 713, 714 (1971) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

443. *Id.* (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

dissenters in the audience. Burying the issue by merely assuming the existence of a public forum, without deciding the issue and exploring its implications, is what led to the logical problems that mar the opinion.

3. Lassonde v. Pleasanton Unified School District

The case of *Lassonde v. Pleasanton Unified School District* adds little to *Cole.*[444] The plaintiff claimed that the censorship of his sectarian, proselytizing speech was a violation of his First Amendment free speech right.[445] As in *Cole*, it was due to his grades that the school invited Lassonde to give the salutatorian speech at graduation.[446] The principal, who once again retained control over all aspects of the graduation, reviewed Lassonde's speech and determined that his proselytizing comments were not permissible, though he could include references to God as they related to his own beliefs.[447] Under protest, Lassonde agreed to deliver the speech without the proselytizing passages and to hand out copies of the full text outside the site of the graduation ceremony.[448]

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444. 320 F.3d 979 (9th Cir. 2003).

445. *Id.* at 980.

446. *Id.* at 981.

447. *Id.* In his draft of the speech, he quoted extensively from the Bible to encourage his "fellow graduates to develop a personal relationship with God through Jesus Christ in order to better their lives." *Id.* These were the portions of the speech the school told Lassonde to remove:

> I urge you to seek out the Lord, and let Him guide you. Through His power, you can stand tall in the face of darkness, and survive the trends of "modern society.". . . As Psalm 146 says, "Do not put your trust in princes, in mortal men, who cannot even save themselves. When their spirit departs, they return to the ground; on that very day their plans come to nothing. Blessed is he whose help is the God of Jacob, whose hope is in the Lord his God, the Maker of heaven and earth, the sea, and everything in them – the Lord, who remains faithful forever. He upholds the cause of the oppressed and gives food to the hungry. The Lord sets prisoners free, the Lord gives sight to the blind, the Lord lifts up those who are bowed down, the Lord loves the righteous. The Lord watches over the alien and sustains the fatherless and the widow, but he frustrates the ways of the wicked. . . . For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord." Have you accepted the gift, or will you pay the ultimate price?

Id. The school allowed the Plaintiff to retain several personal references to his religion. For example, his speech began with a dedication to the memory of his grandfather, so the school permitted Lassonde to say his grandfather had gone "home to be with the Lord." *Id.* Plaintiff was also allowed to close his speech with, "Good Luck and God Bless!" *Lassonde*, 320 F.3d at 981.

448. *Id.* at 981-82.

During the speech, when he reached the parts that had to be excised, he told his audience that the speech had been censored.[449]

The court determined there was no significant difference between *Cole* and the instant case.[450] The court recited the *Cole* assumption, "Even assuming the Oroville graduation ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech . . . as part of the graduation was necessary to avoid violating the Establishment Clause."[451] Despite the possibility that the graduation might be a public forum, *Lassonde* faithfully followed the *Cole* tautology, quoting *Cole*, "[P]lenary control over the graduation ceremony, especially student speech, makes it apparent [that the sectarian] speech would have borne the imprint of the District."[452] One page later, the opinion states, "*Cole* held that the school's restriction was 'necessary' to avoid running afoul of the Establishment Clause. . . . as if the school had not censored the speech, the result would have been a violation of the Establishment Clause."[453] Thus, censorship begets endorsement, which begets Establishment Clause violation, which begets censorship.

Lassonde argued that *Cole* did not consider the possibility of providing a disclaimer which could have distanced the school from the proselytizing speech and thus avoid the suggestion of school sponsorship and an Establishment Clause violation. This would be a less restrictive alternative to censorship.[454] The court rejected this argument for the reasons that under *Cole*, the censorship was necessary to prevent the proselytizing speech; and under *Cole* and *Lee*, merely permitting a proselytizing speech at the graduation ceremony would be state coercion to participate in a religious practice; and finally, even though they were not obliged to do so, the defendants provided a less restrictive alternative in allowing Lassonde to distribute copies of his uncensored speech outside.[455]

Unlike *Cole*, the *Lassonde* court frankly conceded that Lassonde earned the invitation to speak as valedictorian on the basis of his academic success.[456] However, the court argued that this basis of selection is not neutral, but rather implies the school's endorsement of the speaker: "Speakers were selected by the school solely because of

449. *Id.* at 982.
450. *Id.* at 983.
451. *Id.*
452. *Id.* (quoting *Cole*, 228 F.3d at 1103).
453. *Lassonde*, 320 F.3d at 984.
454. *Id.*
455. *Id.* at 984-85.
456. *Id.* at 981.

their academic achievement; that is, the school endorsed and sponsored the speakers as representative examples of the success of the school's own educational mission."[457] The statement masks the reality that the school did not select the speaker. Rather, the speaker's academic achievement determined his selection. Moreover, academic achievement in no way implies consistency with the official message of the school or government. To think otherwise is to believe that the valedictorian's academic success proves no more than his ability to parrot what the school tells him to say, or that the exemplar of a school's academic mission is the conformist, not the independent thinker. This statement could not be more contrary to the *Tinker* ideal that students in a free society should be taught to think and speak for themselves: "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."[458]

4. Nurre v. Whitehead

The Henry A. Jackson High School in Everett, Washington, had a graduation custom in which the seniors in the school's wind ensemble selected an instrumental piece to perform at the graduation ceremony.[459] From 2003 to 2005, the ensemble performed "On a Hymnsong of Phillip Bliss" by the composer, David Holsinger.[460] In May, 2006, the wind ensemble selected Franz Biebl's instrumental arrangement of "Ave Maria," a piece which the wind ensemble had previously performed at a school music concert.[461] School district officials then decided to request that all music played at graduation "be entirely secular in nature" and denied the wind ensemble permission to play "Ave Maria," which is the Latin title of the Catholic prayer, the "Hail Mary," in order to avoid the appearance of the music's sectarian name in the graduation program.[462]

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457. *Id.* at 984.

458. *Tinker,* 393 U.S. at 511. The *Tinker* Court emphasized, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* at 512 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)). The Court maintained, "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders *trained* through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" *Tinker,* 393 U.S. at 512.

459. *Nurre,* 520 F. Supp. 2d at 1225.

460. *Id.*

461. *Id.*

462. *Id.* at 1225-26. "[T]he Court [took] judicial notice that 'Ave Maria' means 'Hail Mary.'" *See* WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 141 (1984) (defining "Ave Maria" as "The Hail Mary"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY

Since this was an instrumental piece, the music director asked if the objection could be removed by changing the name of the piece in the program. The principal responded that "it would be unethical to inaccurately or untruthfully list the titles to pieces."[463] The plaintiff students filed suit claiming violations of Free Speech, Establishment, and Equal Protection Clauses.[464]

The court found a good deal of case law strongly supporting the proposition that instrumental music is a form of speech protected by the First Amendment.[465] The court also believed that forum analysis was applicable to the graduation ceremony.[466] Since the defendant's motion for summary judgment was before the court, the court, drawing reasonable inferences in favor of the plaintiff, concluded for purposes of summary judgment that there were "sufficient facts showing that the School District created a limited public forum when it allowed the Wind Ensemble's seniors to choose the piece for performance at the JHS 2006

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150 (1981) (unabridged) (defining "ave maria" as "1. a salutation to the Virgin Mary combined as now used in the Roman Catholic Church with a prayer to her as mother of God").

463. *Nurre*, 520 F. Supp. 2d at 1226.

464. *Id.* at 1227-28.

465. *Id.* at 1228 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989)). The court explained:

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. . . . The Constitution prohibits any like attempts in our own legal order. *Music, as a form of expression and communication, is protected under the First Amendment.*

(emphasis added by *Nurre*)); *Nurre*, 520 F. Supp. 2d at 1229 (quoting Miller v. Civil City of S. Bend, 904 F.2d 1081, 1096 (7th Cir. 1990) (Posner, J., concurring) (citing Reed v. Village of Shorewood, 704 F.2d 943, 950 (7th Cir. 1983)) ("[Defendants] would be infringing a First Amendment right . . . even if the music had no political message – *even if it had no words* – and the defendants would have to produce a strong justification for thus repressing a form of 'speech.'" (emphasis added by *Nurre*))); Bernstein v. U.S. Dep't of State, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996) ("Music . . . is speech protected under the First Amendment."); Steadman v. Tex. Rangers, 179 F.3d 360, 367 (5th Cir. 1999) ("'Speech' as we have come to understand that word when used in our First Amendment jurisprudence, extends to many activities that are by their very nature non-verbal: an artist's canvas, a *musician's instrumental composition*, and a protester's silent picket of an offending entity *are all examples of protected, non-verbal 'speech.'*" (emphasis added by *Nurre*)); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach *the unquestionably shielded* painting of Jackson Pollock, *music of Arnold Schoenberg*, or Jabberwocky verse of Lewis Carroll." (emphasis added by *Nurre*)).

466. *Nurre*, 520 F. Supp. 2d at 1229-30.

graduation."[467] The subsequent analysis has implications for the valedictorian speech because, if permission for students to select music at a graduation creates a genuine issue of material fact over whether the school has created a public forum, so also should permission for students to deliver speeches of their own composition.

The court argued that even if the musical performance was a limited public forum, "defendant's prohibition on the performance of 'Ave Maria' is not a violation of plaintiff's free speech rights if the restriction is viewpoint neutral and reasonable in light of the purpose of the forum."[468] Quoting *Rosenberger*, the court attempted to determine whether the exclusion of "Ave Maria" was "content discrimination, which may be permissible if it preserves the purpose of [the] limited forum, [or] viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."[469] To make the distinction, the "test is whether the government has excluded *perspectives* on a subject matter otherwise permitted by the forum."[470] The court concluded that in requesting that music selections for graduation be entirely secular in nature, the school administration had excluded music with religious content rather than religious perspectives.[471] The exclusion of "Ave Maria" was permissible "content discrimination," as opposed to impermissible "viewpoint discrimination."[472]

It is not clear why the exclusion of Biebl's "Ave Maria" should be an instance of content discrimination rather than viewpoint discrimination. The protection which the Supreme Court afforded religious speech in *Lamb's Chapel*[473] and *Good News Club*[474] indicate that this conclusion is wrong. In *Nurre*, the students' choice to perform Biebl's "Ave Maria" provided a musical commentary on the permissible subject of the instant graduation. Excluding their musical choice was a suppression of the viewpoint or perspective, religious or not, they wished to express.

The court relied on *Faith Center Church Evangelistic Mysteries v. Glover* for the proposition that a blanket restriction on all religions

467. *Id.* at 1231.

468. *Id.*

469. *Id.* (quoting *Rosenberger*, 515 U.S. at 829-30).

470. *Id.* at 1229-30 (quoting Faith Ctr. Church Evangelistic Mysteries v. Glover, 480 F.3d 891, 912 (9th Cir. 2007)).

471. *Nurre*, 530 F. Supp. 2d at 1229-30.

472. *Id.* at 1231.

473. *Lambs Chapel*, 508 U.S. at 393 (holding the exclusion of religious perspectives on family issues and child-rearing is impermissible viewpoint discrimination).

474. *Good News Club*, 533 U.S. at 110 (holding the exclusion of moral instruction using religious story-telling and prayer is viewpoint discrimination).

speech was content discrimination, whereas discrimination against a single religious sect would have been viewpoint discrimination.[475] However, *Glover* made this distinction in regard to religious worship, not music.[476] The performance of religious music in a secular setting such as a graduation or a concert is distinguishable from worship, since in such a setting the audience primarily appreciates the music for its artistic merits, and not as a vehicle to communicate with God.

The plaintiff made exactly this point in explaining why the seniors chose "Ave Maria": "The other seniors and I *did not choose the 'Ave Maria' piece because of any religious message it might convey.* Rather, the seniors chose it because of its beauty, we liked how it sounded and the performance would have made our graduation a memorable one."[477] The court, however, thought that this testimony actually weakened the plaintiff's free speech claim because lack of a religious message indicated that the plaintiffs had no religious viewpoint.[478] According to the court, the absence of religious viewpoint was evidence that this was a case about content exclusion, not viewpoint discrimination.[479] Regarding the plaintiff's Establishment Clause claim, the court also commented that the plaintiff could not "take the position that defendant acted with hostility toward religion or the School District's action fostered 'excessive entanglement with religion' when plaintiff does not assert that the speech that was excluded conveyed a religious message."[480]

The court's comments miss a crucial aspect of the case. Plaintiff's statement was evidence that she did not intend to express anything religious. But just because she did not have a religious viewpoint does not mean that she did not have a musical viewpoint. So hostile were the school authorities to anything that hinted at religion, that they unreasonably suppressed the music chosen by the students merely

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475. *Nurre*, 520 F. Supp. 2d at 1232 (citing *Glover*, 480 F.3d at 915).

476. *See Glover*, 480 F.3d 891. The *Glover* paragraph quoted in *Nurre*:

> If the County had, for example, excluded from its forum religious worship services by Mennonites then we would conclude that the County had engaged in unlawful viewpoint discrimination against the Mennonite religion. But a blanket exclusion of religious worship services from the forum is one based on the content of speech.

Nurre, 520 F. Supp. 2d at 1232 (quoting *Glover*, 480 F.3d at 915). The court excluded the first sentence of the paragraph, "Religious worship, on the other hand, is not a viewpoint but a category of discussion within which many different religious perspectives abound," which underscores what *Glover* is talking about. *Glover*, 480 F.3d at 915.

477. *Nurre*, 520 F. Supp. 2d at 1234-35.

478. *Id.* at 1232 n.15 ("Plaintiff's case is further weakened in this regard by the fact that she appears to have no religious viewpoint on the performance of 'Ave Maria.'").

479. *Id.* at 1232.

480. *Id.* at 1235.

because of its religious name. As the School District's Associate Superintendent for Instruction testified, "[W]e made the decision that because the title of the piece would be on the program and it's Ave Maria and that many people would see that as *religious in nature*, that we would ask the band to select something different."[481]

To object to music at a graduation because it bears a sectarian name is unreasonable hostility to religion and free speech. A name is simply a label which may have no substantive connection at all to the object it identifies. The names of San Antonio and Islamabad may indicate the religion of those who named these cities, but do not indicate that the objects they identify are religious in nature. Few separationists would argue that the names of San Antonio, Corpus Christi, Santa Fe, or Los Angeles must be changed. Like the names of cities, the titles of musical works may have religious associations, but music in and of itself conveys no religious message, content, or viewpoint unless the listener lends such meaning to the sounds.[482] The difference is plain if one compares the musical performance of Biebl's instrumental "Ave Maria" with the proselytizing speeches in *Cole* and *Lassonde*. As a result, in their zeal to extirpate anything religious, school authorities were not suppressing a

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481. *Id.* at 1232. With this testimony, the superintendant betrayed a political reason for suppressing this music. The court elsewhere took note of "complaints from those in attendance and letters to the editor [that] appeared in the Everett Herald (Snohomish County's largest newspaper) as a result of the religious music ['Up Above My Head'] that was performed at the 2005 graduation." *Id.* at 1234. These complaints provided a motivation for school authorities to take a hard line against any religious reference in the 2006 graduation. *See id.* It was the hostility of some members of the public that drove the prohibition against "Ave Maria."

482. That music does not intrinsically possess any religious content or viewpoint is exemplified by another version of "Ave Maria," that of Bach/Gounod. The nineteenth century composer, Charles Gounod, used the music from Bach's Prelude in C major to the First Fugue of the Well-Tempered Clavier to accompany a melody for violin and piano to which he later added the words of the "Ave Maria." 2 BAKER'S BIOGRAPHICAL DICTIONARY OF MUSICIANS 1339 (Nicolas Slonimsky ed., 2001) (1900) ("One of [Gounod's] most popular settings to religious words is *Ave Maria*, adapted to the 1st prelude of Bach's *Well-tempered Clavier*, but its original version was *Méditation sur le premier Prélude de Piano de J.S. Bach* for Violin and Piano (1853); the words were later added (1859)."). The purpose of the Well-Tempered Clavier had nothing to do with religious expression. It was a highly practical musical exercise Bach undertook to show how musical pieces may be written in every key for a keyboard instrument, the clavier, when it is evenly tuned or "tempered." *Id.* at 1:161 ("Bach's system of 'equal temperament' (which is the meaning of 'well-tempered' in the title *Well-tempered Clavier*) postulated the division of the octave into 12 equal semitones, making it possible to transpose and to effect a modulation into any key, a process unworkable in the chaotic tuning of keyboard instruments before Bach's time."). That Gounod could apply music composed for this purpose to a prayer demonstrates that music really consists of an aesthetic arrangement of sounds with scant correspondence to lexical meaning.

religious viewpoint, but rather were suppressing the artistic viewpoint reflected in Biebl's "Ave Maria."

The court argued that "the Wind Ensemble's performance of 'Ave Maria' would have appeared to be the School District's speech, not the 'private speech' of the plaintiff or the Wind Ensemble."[483] For this the court cited *Hazelwood's* discussion of expressive activities which students, parents, and members of the public might take to "bear the imprimatur of the school."[484] But if the court was assuming the musical performance of the graduation to be a limited public forum for purposes of the defendant's summary judgment motion, *Hazelwood's* holdings regarding a curricular newspaper should have been distinguishable, for in *Hazelwood*, the Court found no evidence "to demonstrate the 'clear intent to create a public forum.'"[485] Moreover, if the performance of "Ave Maria" did carry the imprimatur of the school, the school should have forbidden the performance of this music at the earlier school concert, which fits much better than graduation ceremonies into the school-sponsored events identified by *Hazelwood*.[486]

The court also made use of the suspect reasoning already noted in *Cole* and *Lassonde*: "[T]he District's plenary control over the graduation ceremony, especially the student speech, makes it apparent [that the sectarian] speech would have borne the imprint of the District."[487] *Cole's* reasoning—that the censorship the school exercised over the performance justified the censorship of the performance—did not lose its circularity in *Nurre*. Rather, the logical problem is more evident because *Nurre* explicitly analyzed the musical performance at graduation as a

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483. *Nurre*, 520 F. Supp. 2d at 1237-38.

484. *Id.* at 1238 (citing *Hazelwood*, 484 U.S. at 271).

485. *Hazelwood*, 484 U.S. at 270 (citing *Cornelius*, 473 U.S. at 802).

486. A school-sponsored concert is precisely the kind of event which *Hazelwood* identifies as an expression of the school and therefore subject to school censorship:

> The question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge and skills to student participants and audiences.

Id. at 270-71.

487. *Nurre*, 520 F. Supp. 2d at 1238 (quoting *Cole*, 228 F.3d at 1103).

limited public forum, and did not bury the issue in a fleeting assumption as did *Cole* and *Lassonde*.

The court's finding "that defendant's action was motivated by an effort to avoid a potential Establishment Clause violation," raises a highly prejudicial problem in the consistency of the court's analysis.[488] The court viewed the plaintiff's testimony, that the seniors did not select Biebl's "Ave Maria" in order to convey a religious message, as damaging to the plaintiff's free speech case since it indicated the plaintiffs had no religious viewpoint for the state to have excluded.[489] If the court were to treat the testimony consistently, the court would have to find that the absence of a religious message also indicated that there could be no Establishment Clause violation, for how could there be such a violation without a religious message?

It is possible that even though the plaintiffs did not intend to convey a religious message, a reasonable person may have perceived such a message endorsed by the school. If there was such a disconnect, the court should have addressed the question of whether the appearance of "Ave Maria" in the commencement program could have been an Establishment Clause violation. A reasonable observer with basic knowledge about the Henry A. Jackson High School graduation ceremony would not have interpreted the appearance of "Ave Maria" in the graduation program or its performance as school-endorsed because such an observer would know that the graduating seniors in the wind ensemble, not school authorities, selected the music according to school custom. The observer would know that to the extent the music expressed anything at all, it was private, not government expression. Thus, even if there were a religious message in the title of the music despite the non-religious intentions of the plaintiffs, it could not have constituted an Establishment Clause violation. This is consistent with the *Widmar/Mergens* line of cases which held that once a school has created a public forum, it may not discriminate against a religious speaker because of the speaker's religious viewpoint.

The plaintiff also had an equal protection claim which the court dismissed because the court believed the plaintiff did not clearly show that the school had discriminated against her on the basis of a suspect classification or of denying her a fundamental right.[490] The school only needed to show the exclusion had a rational relationship to a legitimate state interest to justify its decision. For the court, avoidance of the

488. *Id.* at 1234.
489. *Id.* at 1232 n.15.
490. *Id.* at 1236.

potential Establishment Clause violation provided this relationship.[491] However, the court undercut its own reasoning with this statement:

> [G]iven the School District's Establishment Clause concerns over the performance of "Ave Maria" at the graduation ceremony, the Court finds that defendant had a rational basis for treating the 2006 Wind Ensemble's selection of "Ave Maria" differently from the 2003-2005 Wind Ensemble's selection of David Holsinger's "On a Hymnsong of Philip Bliss."[492]

The objection to "Ave Maria" was based on its religious title. However, the title of the music previously performed at the high school contains the word "hymn" which is defined by the Merriam-Webster Online Dictionary as "1(a): a song of praise to God; (b) a metrical composition adapted for singing in a religious service."[493] Holsinger and Bliss are well-known composers of Christian religious music.[494] If the "Hymnsong" did not need to be excluded despite the religious allusiveness of its title and authorship, why then was "Ave Maria" treated differently?[495]

The exclusion of music merely because of its religious name is a disturbing limitation on the discourse students are permitted at graduation. There are many ideas which originate in various religions that significantly contribute to discussions that are mostly secular in nature. Consider the following hypothetical. Suppose a student wished to address the morality of an ongoing war in a valedictory speech. To do so,

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491. *Id.*

492. *Id.*

493. Merriam-Webster Online Dictionary, *supra* note 40.

494. Philip Bliss (1838 to 1876) "is the second most famous Christian song writer in history." The Life and Ministry of Philip Bliss, Christian Biography Resources, http://www.wholesomewords.org/biography/biobliss.html (last visited Nov. 4, 2009). His hymns include titles such as, *Dare to Be a Daniel*; *Hallelujah, 'Tis Done!*; *Hallelujah, What a Savior!*; *Jesus Loves Even Me*, and many others. *Id.* David R. Holsinger (b. 1945) is a composer who has written many musical works with Christian themes. *See* David R. Holsinger, http://www.davidrholsinger.com (last visited Nov. 4, 2009). He is currently Composer and Director of Wind Ensemble at Lee University, which describes itself as a Christ-Centered Liberal Arts University, located in Cleveland, Tennessee. Lee University, http://www.leeuniversity.edu (last visited Nov 4., 2009). His titles include *Liturgical Dances* and *The Easter Symphony*. *See Holsinger*, *supra*; and *Lee University*, *supra*.

495. The court noted, "[P]laintiff suggests that defendant's alleged hostility toward the performance of 'Ave Maria' was the result of defendant's religious beliefs." *Nurre*, 520 F. Supp. 2d at 1233 n.18. The court acknowledges the difficulties of school administrators who "run the risk of being whipsawed by the First Amendment's Free Speech and Establishment Clauses." *Id.* at 1239.

the student refers to Saint Thomas Aquinas's theory of the just war and identifies the source of this theory.[496] Under the *Nurre* approach, school officials could exclude not only references to the religious figure of Thomas Aquinas, but also Aquinas's just war theory even if the student offered to suppress the source, simply because the theory has a name betraying a sectarian source. Suppose the valedictorian wished to discuss the religious background to the abolitionist movement of Great Britain,[497] or the role of the black church in the American civil rights movement,[498] or the religious reverence Native Americans feel toward the natural environment.[499] Do the religious backgrounds of these subjects also make them Establishment Clause violations in the context of a public school graduation ceremony?

In *Nurre*, the state did not censor religious expression; rather, it suppressed artistic expression for no good reason—because of the religious name that merely identified the piece of music. This was not, therefore, a case about the suppression of religious expression. It was a case about the suppression of artistic expression which the state unreasonably perceived as religious. The Supreme Court has repeatedly affirmed that the study of religious texts as literature or history in the public schools is not an Establishment Clause violation.[500] There was no

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496. THOMAS AQUINAS, SUMMA THEOLOGICA, Part 2, Question 40, Of War (Benziger Bros., ed. 1940), *available at* http://ethics.sandiego.edu/Books-/Texts/Aquinas/JustWar.html. *See* 14 NEW CATHOLIC ENCYCLOPEDIA 636 (2d ed. 2003) (describing the importance of Aquinas on the history of the just war theory).

497. *See* ERIC METAXIS, AMAZING GRACE: WILLIAM WILBERFORCE AND THE HEROIC CAMPAIGN TO END SLAVERY (2007). Wilberforce was a British politician and advocate of the evangelical wing of the Church of England in the late eighteenth and early nineteenth centuries. *Id.*

498. The role of the black church in the American civil rights movement is well known. *See, e.g.*, ALDON, D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE 4 (1984) ("The black church functioned as the institutional center of the modern civil rights movement. Churches provided the movement with an organized mass base; a leadership of clergymen . . . ; an institutionalized financial base . . .; and meeting places . . . .").

499. The link between Native-American spirituality and respect for the environment is a commonplace. *See, e.g.*, Åke Hultkrantz, *Religion and Ecology Among the Great Basin Indians*, *in* THE REALM OF THE EXTRA-HUMAN: IDEAS AND ACTIONS 137-50 (Agehananda Bharati ed., 1976); N. SCOTT MOMADAY, *Native American Attitudes Towards the Environment*, *in* SEEING WITH A NATIVE EYE: ESSAYS ON NATIVE AMERICAN RELIGION 79-85 (Walter Holden Capps & Ernst F. Tonsing eds., 1976); Hultkrantz, *An Ecological Approach to Religion*, 31 ETHNOS 131-50 (1966).

500. *See, e.g., Lynch*, 465 U.S. at 679-80; Stone v. Graham, 449 U.S. 39, 42 (1980) ("[T]he Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."); *Edwards*, 482 U.S. at 606-08 (Powell, J., concurring). The court stated:

evidence to support the idea that the selection of "Ave Maria" for performance at the high school's graduation was anything other than an artistic choice.

The *Nurre* case demonstrates how the emphasis the graduation cases have placed on the Establishment Clause and their consequential deemphasis of free speech lead to a thoroughgoing clampdown on religious reference of any kind. It is not unique.[501] If the Supreme Court were ever to affirm a case like *Nurre*, a great deal of genuinely nonreligious as well as religious expression might be banished from public school graduations in order to erase any hint of sectarian reference that may offend hypersensitive dissenters. At this point, Establishment Clause righteousness becomes more than a protection against religious conformity; it becomes an excessive limitation on the free exchange of speech, knowledge, and ideas to which students should have access at graduation.

> As a matter of history, schoolchildren can and should properly be informed of all aspects of this Nation's religious heritage. I would see no constitutional problem if schoolchildren were taught the nature of the Founding Father's religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government. Courses in comparative religion of course are customary and constitutionally appropriate. In fact, since religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events. In addition, it is worth noting that the Establishment Clause does not prohibit *per se* the educational use of religious documents in public school education. . . . the [Bible] is, in fact, "the world's all-time best seller" with undoubted literary and historic value apart from its religious content; . . .

Id.; In *Abington*, 374 U.S. at 225, the court stated:

> [O]ne's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

Id.

501. *Cf.* Ashby v. Isle of Wight County Sch. Bd., 354 F. Supp. 2d 616 (E.D. Va. 2004) (holding that a compelling interest in preventing an Establishment Clause violation justified a high school principal's decision to exclude a student's performance of Celine Dion's "The Prayer").

III. PART II—A HISTORICAL EXCURSUS: GRADUATION CEREMONIES AS FORUMS

A. The Valedictorian Tradition

As related above, in 1989 a Northern District of Iowa court stated in *Lundberg*, "Graduation ceremonies have never served as forums for public debate or discussions, or as a forum through which to allow varying groups to voice their views."[502] The court provided no authority, legal or historical, for this statement. Subsequently, several courts addressing the issue of whether graduation ceremonies are public forums have cited or quoted this statement from *Lundberg*, so that with each repetition it has grown in apparent judicial authority. *Brody*, a Third Circuit opinion, quoted the statement from *Lundberg*, but did so only to qualify it with the observation that a school could have a policy that made its graduation a public forum.[503] However, *Brody* did not otherwise disagree or attempt to correct *Lundberg's* statement.

The authority of the *Lundberg* statement then began to take off. The *Black Horse* court, also in the Third Circuit, presented the precise quotation to support its argument that the school district's policy did not have a secular purpose.[504] But the court attributed the statement only to the *Brody* appellate opinion, not *Lundberg's* district court opinion, and did not include *Brody's* qualification.[505] *Black Horse* also proffered a modified version of the statement, to which this Article will return in a moment.

The quotation next showed up in the Fifth Circuit opinion for *Doe v. Santa Fe Independent School District*.[506] And like the Third Circuit, the court only cited *Brody* and no other historical record or study to support its holding that the Santa Fe graduation could not be any kind of public forum. The dissent rightly criticized the majority for this misleading attribution.[507] But the majority's weak authority did not prevent it from ridiculing the possibility that a school graduation could ever be a public forum.[508] Next, the majority in the Eleventh Circuit's first *Adler* opinion

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502. *Lundberg*, 731 F. Supp. at 339. The court continued, "Schools hold graduation ceremonies for very limited secular purposes – to congratulate graduates of the high school." *Id.*

503. *Brody*, 957 F.2d at 1120 ("[I]t is certainly possible that the commencement exercises at Downingtown Senior High School could qualify as a public forum, . . .").

504. *Black Horse*, 84 F.3d at 1484 (quoting *Brody*, 957 F.2d at 1118).

505. *Id.* at 1484. The *Black Horse* court noted it had omitted the citation. *Id.*

506. *Santa Fe*, 168 F.3d at 820 (citing *Brody*, 957 F.2d at 1119-20).

507. *Id.* at 832 n.12 (Jolly, J., dissenting) (citations omitted).

508. *Id.* at 822.

quoted the modified *Lundberg* statement as it appeared in *Black Horse*, but did not cite to *Brody* or *Lundberg*.[509] The last case to quote the *Lundberg* statement as modified by *Black Horse* was *Ashby v. Isle of Wight County School Board* in 2004, citing to *Black Horse*, *Santa Fe*, and *Brody*, but not *Lundberg*.[510] At this point, *Lundberg's* pronouncement appeared in the opinions of two district courts and two circuit courts that are still good law (and in another circuit court opinion vacated on other grounds). Many would regard this as pretty solid authority.

It was noted above, that besides the verbatim quote from *Lundberg*, the *Black Horse* court presented a modified version of the statement: "High School graduation ceremonies have not been regarded, either by law or tradition, as public fora where a multiplicity of views on any given topic, secular or religious, can be expressed and exchanged."[511] The modified version, while close enough to the original *Lundberg* statement to be evidently derived from it, is framed with language more precisely reflecting the technicalities of forum analysis. In place of *Lundberg's* "[g]raduation ceremonies have never served as forums for public debate or discussions,"[512] *Black Horse* has "High School graduation ceremonies have not been regarded, either by law or tradition, as public fora."[513] Whereas *Lundberg* appears to be saying straightforwardly that graduations have never been places where the expression of diverse views occurred, *Black Horse* uses terms of art derived from public forum analysis to indicate that no legal authority has found graduations to be any type of public forum, neither the type created by tradition, nor the type designated by law. In other words, graduation ceremonies do not resemble the streets or parks that courts have identified as traditional public forums, and no court had as ever recognized a graduation ceremony to be a designated forum. The *Black Horse* modification is slightly misleading, however, in its suggestion that settled legal opinion has rejected the proposition that graduations could be public forums. As mandatory federal authority, public forums have only existed since 1983 when the Supreme Court adopted public forum analysis in its *Perry* opinion.[514] *Brody*, the only federal appellate opinion before *Black Horse* to consider the issue, entertained the possibility that

509. *Adler*, 174 F.3d at 1250.

510. *Ashby*, 354 F. Supp. 2d at 629 (citing *Black Horse*, 84 F.3d at 1478; *Santa Fe*, 168 F.3d at 822; *Brody*, 957 F.2d at 1119-20).

511. *Black Horse*, 84 F.3d at 1478.

512. *Lundberg*, 731 F. Supp. at 339.

513. *Black Horse*, 84 F. 3d at 1478.

514. *See Perry*, 460 U.S. at 45-46.

graduations could be limited public forums.[515] Later, the Ninth Circuit in *Cole* and *Lassonde* spoke of assuming the possibility, and, for purposes of a summary judgment motion, *Nurre* assumed that a segment of the graduation ceremony was a limited public forum.[516] However, to the extent *Lundberg's* original statement and subsequent reiterations of the statement, verbatim or modified, suggest that graduations have never been places for the debate and discussion of diverse views, the statement is historically wrong, in spite of the authority which judicial repetitions have later given it.

The subject of graduation custom is difficult to research, for, in spite of the familiarity everyone has with high school graduations, little has been written on the customs and traditions of graduation ceremonies, especially the valedictory speech. Although this author is not familiar with any in-depth study of the subject, and such a study is beyond the scope of this Article, an examination of some historical sources might be sufficient to show *Lundberg's* often-quoted, cited, and relied upon statement to be incorrect.

Commencement exercises took place at Oxford University and other European universities as early as the twelfth century.[517] In 1642, Harvard University presented its first graduation program.[518] This first commencement included speeches and presentations of student work.[519]

> The president opened with a short prayer; a member of the graduation class gave a salutatory oration in Latin; then there were Latin and Greek orations and declamations, and Hebrew analysis, grammatical, logical, and rhetorical, of the Psalms; and their answers and disputations in logical, ethical, physical, and metaphysical questions.[520]

Other American universities adopted the practice, as did the New England Latin grammar school, and later the American public high schools during the course of the nineteenth century.[521]

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515. *Brody*, 957 F.2d at 1119-20.

516. *Cole*, 228 F.3d at 1101; *Lassonde*, 320 F.3d at 983; *Nurre*, 520 F. Supp. 2d at 1230-31.

517. WILLIAM LEROY FINK, EVALUATION OF COMMENCEMENT PRACTICES IN AMERICAN PUBLIC SECONDARY SCHOOLS 17 (1940) (quoting WARD G. REEDER, AN INTRODUCTION TO PUBLIC SCHOOL RELATIONS 218 (4th ed. 1953) (1937)).

518. *Id.* (citing PAUL MONROE, ed., 2 A CYCLOPEDIA OF EDUCATION 141 (8th ed. 1968) (1911-1913)).

519. *Id.*

520. *Id.* (quoting MONROE, *supra* note 518, at 141) (internal quotation marks omitted).

521. *Id.* at 17-19.

The public high school commencements developed from the annual public exercises of the Latin grammar school in which students were examined on the school curriculum.[522] Frequently, these exercises were accompanied by public exhibitions of student work.[523] By the 1840s, public schools were following the pattern established by the universities in conducting commencement programs in which the graduating students recited essays and delivered speeches.[524] For example, "[i]n 1846, the Central High School of Philadelphia, Pennsylvania, presented a commencement program consisting of an honor essay, forty-six additional essays, an alumni address, the conferring of testimonials, and a valedictory address."[525] Accounts abound of graduations that included musical performances and poetry readings as well.[526] In the early nineteenth century, all members of the graduating class delivered an address, but the growing size of graduating classes made this increasingly prohibitive, so that certain students were chosen on the basis of their scholarship to deliver the salutatory and valedictory addresses.[527] Schools may have modified this custom in various ways, but as reflected in the common definition of a valedictorian, it is still a common practice for students with the best academic records to speak at graduation.[528]

"High School graduation . . . became a major public event by the 1850s."[529] Graduations in many places were "enormously popular occasions."[530] "By the late 1850s, approximately four thousand spectators attended the graduation exercises at Philadelphia's Central High School – and twice that number was turned away."[531] Eight to ten thousand citizens arrived for the event in Cleveland in the 1870s."[532] It was often the case that thousands came to see only a handful of students

522. *Id.* at 17-18 (citing EMIT D. GRIZZELL, ORIGIN AND DEVELOPMENT OF THE HIGH SCHOOL IN NEW ENGLAND BEFORE 1865, 333 (1923)).

523. *Id.* at 19.

524. FINK, *supra* note 517, at 19.

525. *Id.* at 19 (quoting Program, Central High School, Philadelphia, Pennsylvania, February 12, 1846).

526. *Id.* at 18-21. Early programs of graduation ceremonies indicate that aside from the valedictory address, students would recite poetry and essays, and there would be musical interludes. *Id.*

527. *Id.* at 25.

528. *See* Merriam Webster On-Line Dictionary, *supra* note 40.

529. WILLIAM J. REESE, THE ORIGINS OF THE AMERICAN HIGH SCHOOL 237 (1995).

530. *Id.* at 242.

531. *Id.*

532. *Id.* ("In small places, too, citizens packed the opera house, church hall, or school auditorium. In Adrian, Michigan, the opera house, the largest public hall in the city, capable of seating 1,200 persons, [was] always crowded to its utmost capacity, while large numbers [were] obliged to retire for want of standing room." (internal quotation marks omitted)).

graduate.[533] The event attracted many members of the community. At "[t]he first graduation exercises for the Girls' High School of Atlanta, held at the Hall of the House of Representatives in 1873," assembled with the graduates on stage were "Protestant ministers, school officials, the high school principal, and other dignitaries. . . . [s]tudents read essays and joined in singing, and then the audience heard various speeches by town notables."[534]

In 1940, William L. Fink published a book which presented a survey of the graduation practices of three hundred and thirty-two high schools from all over the United States.[535] The book largely consists of answers the author received in response to an extensive questionnaire. One area of interest was student participation in graduation ceremonies. Fink presents the following table defining varying degrees of student participation in planning graduations and the number of schools which placed themselves in each of the categories of student participation:

Pupil Participation in Planning Program	Number of Schools
I. Class had no voice in planning the program	93
II. Class had some voice in planning the program	128
III. Class had considerable voice in planning the program	80
IV. Program was entirely class planned	20
V. Any other method	5
VI. No information	6
Total	332[536]

As the author points out, "schools in which pupils have at least some voice in planning the commencement program outnumber more than two to one schools in which the pupils have no such privilege."[537] In addition, schools in which students either had a considerable voice in planning or planned the entire program themselves made up thirty percent of the schools that responded.[538]

From the high schools that responded, Fink selected one from each of the then forty-eight states and asked the principals of these schools to

533. *Id.*
534. *Id.* at 243.
535. FINK, *supra* note 517, at 30.
536. *Id.* at 89.
537. *Id.*
538. *Id.*

list their objectives in arranging for the graduation exercises.[539] He received one hundred fifty-five objectives in response, and eventually reduced these to seventeen categories of objectives which he called "master objectives."[540] Under each of the seventeen master objectives, Fink listed activities he collected from the literature on commencements, from his survey, and from twenty high school commencements he personally attended during the years 1938 and 1939, all located in Pennsylvania.[541] For example, under the first master objective, "[t]o strengthen community-school relations," Fink provided the following activity: "Problems of vital community concern *are discussed without bias during the exercises*."[542] The graduates from a school in Birmingham, Alabama, took surveys and reported their findings about housing conditions within twenty-four blocks of the school.[543] The next graduation activity under the category of strengthening community-school relations is: "Such problems are sometimes suggested by individuals or groups in the community."[544] Fink listed schools from nineteen states that received suggestions from their communities for subjects to be discussed at commencement.[545] Fink's next activity is: "Persons or organizations in the community are consulted for facts with which to solve such problems."[546]

Other objectives and the corresponding activities in Fink's survey included:

> Objective VI: To offer an opportunity for active pupil participation.
>
> 1. Members of the class have a voice in choosing the commencement theme.

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539. *Id.* at 41.

540. *Id.* at 42-67. First, Fink grouped the one hundred fifty-five objectives into twenty-one master objectives. FINK, *supra* note 517, at 47-48. After having a panel he assembled check the grouping, he verified that these objectives were found in the literature concerning graduations, and added three more he found in the literature. *Id.* at 48-56. He then did a second mailing to the principals of forty-eight other schools selected from each of the states at random and found no new objectives to add. *Id.* at 56-62. He then had a jury of college professors who taught education courses rank the twenty-four master objectives and, as a result of the ranking, excluded seven objectives leaving a total of seventeen. *Id.* at 62-67.

541. *Id.* at 71-113.

542. *Id.* at 75 (emphasis added).

543. FINK, *supra* note 517, at 75.

544. *Id.*

545. *Id.* at 75-76.

546. *Id.* at 76.

2. They participate actively in planning the program.

3. The program is presented wholly by the class, except for the presentation of diplomas and awards.[547]

Under VI.1, Fink cites an instance in which students from a Long Island school decided to incorporate an assembly program of discussions into the graduation exercises so that "[*a*] *panel discussion prepared for assembly became the basis of a commencement program. . . .*"[548]

Objective VII: To encourage creative effort in a large range of activities.

1. [T]he class is permitted to plan a program which is truly representative of the philosophy of the class . . .

Seniors in Plymouth, Massachusetts planned a commencement program featuring a New England Town Meeting.

2. The program reflects the degree of originality which the class possesses.

Seniors in Chambersburg, Pennsylvania presented a drama.

3. The script of the program represents a creative work in English composition.

4. Composing, harmonizing, or rendering musical compositions challenges creative effort.

547. *Id.* at 88-89.

548. *Id.* (emphasis added). Among the twenty Pennsylvania schools whose commencements Fink attended in 1938-1939, Fink indicates that two had graduation programs consisting of panel discussions, and three had symposia. FINK, *supra* note 517, at 71-72. In his questionnaire to the high schools, under Question V.A, Fink asks the high schools to check their type of program, and among the choices are "Panel discussion: unified theme," and "Symposium, unified theme."

> Students in Muhlenberg Township, Pennsylvania, presented a commencement program featuring "Indian, Pilgrim and Negro music."[549]

This list goes on with many other activities and corresponding practices that would elicit creativity, opinions, and discussion from students.[550]

In 1931, Harry C. McKown wrote a book with suggestions for the planning of commencement ceremonies.[551] He argued that school officials should not dictate to the class. "The event belongs to the seniors; it is their party and they should be the ones who decide the major matters concerning it. . . . The organization of a 'commencement committee,' composed of representatives of the class and of the faculty, is a good practice."[552] McKown later states, "Student addresses should represent student and not teacher activity."[553] He recommended teacher assistance in planning, writing, and delivering the address, "but the teacher assisting the student and the student assisting the teacher are two entirely different matters."[554] He recommended close supervision; however, he states that the addresses should "represent the work of the students and not of their teachers or parents."[555]

A modern scholar specializing in the history of public high schools, William J. Reese, acknowledges that the preference among school officials was to avoid controversial topics, but such avoidance was sometimes breached.[556] "Few criticized bourgeois tenets or condemned racism, sexism, or social injustice. . . . Occasionally, however, the barriers broke. Final grades recorded, diplomas in hand, a few young people spoke their minds."[557] For example, the opera house in Terre Haute, Indiana, had an audience in which "the wealthiest men and most elegantly dressed ladies" sat and stood next to "the swarthy mechanic and ladies in modest attire."[558] Miss Belle Cory read an essay in which

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549. *Id.* at 90-91.

550. *Id.* at 72-113.

551. HARRY C. MCKOWN, COMMENCEMENT ACTIVITIES (1931).

552. *Id.* at 28 ("The principal, faculty, board of education, ministerial association, alumni, community, and tradition frequently dictate the policies and determine the details of the commencement week schedule and programs. That is not right.").

553. *Id.* at 30.

554. *Id.*

555. *Id.* at 48.

556. REESE, *supra* note 529, at 244 ("Rowdiness and political heterodoxy sometimes visited the event. Although schoolmen wanted conventional, polite readings or declamations from the pupils, and quiet, appreciative behavior from the audience, some well-made plans went awry.").

557. *Id.*

558. *Id.*

she "greatly deplored the indications of the ever-present aristocracy of money, and thought the tendency of the times was to make the rich richer, the poor, poorer."[559]

The foregoing historical data provides evidence that the tradition of American graduation ceremonies included student participation in planning the ceremony and made graduation a place for student speeches, discussions, and debates about matters of public interest and for creative and artistic expression. It may be true that school officials have always had supervisory control over graduation, and it is likely that school officials could and often did prohibit topics and discussions they thought were inappropriate. However, in the wake of Supreme Court decisions such as *Tinker* and the public forum cases that have provided students with an interest in free speech, the courts should oblige school authorities to take this interest into account before suppressing student speech. The bottom line is that graduation ceremonies evince purposes far beyond handing out diplomas or congratulating students. As opposed to the absolute or "plenary" control which the courts assert that schools have always exercised at graduation, particularly over the valedictorian speech, the historical record presents a picture of permitting, if not encouraging, student governance, debate, and discussion at graduation.

There is a highly relevant literary account of a valedictorian's struggle to speak freely in Richard Wright's autobiographical novel, *Black Boy*.[560] In 1925, Wright was chosen on the basis of his academic work to be the valedictorian of the segregated Smith-Robertson Junior High School in Jackson, Mississippi.[561] The principal summoned him to his office:

> "Well, Richard Wright, here's your speech," he said withsmooth bluntness and shoved a stack of stapled sheets across his desk.
>
> "What speech?" I asked as I picked up the papers.
>
> "The speech you're to say the night of graduation," he said.
>
> "But, professor, I've written my speech already," I said.
>
> He laughed confidently, indulgently.
>
> "Listen, boy, you're going to speak to both *white* and colored people that night. What can you alone think of saying to them? You have no experience . . ."
>
> I burned.

559. *Id.*

560. RICHARD WRIGHT, BLACK BOY: A RECORD OF CHILDHOOD AND YOUTH (Harper & Brothers 1945) (1937). I am indebted to Professor Reese for this reference.

561. JOAN URBAN, RICHARD WRIGHT: AUTHOR 44 (1990).

> "I know I'm not educated, professor," I said. "But the people are coming to hear the students, and I won't make a speech that you've written,"[562]
>
> Confronted with the stubbornness of the young man, the principal became angry and threatened,
>
> "Suppose you don't graduate?"
>
> "But I passed my examinations," I said.
>
> "Look mister," he shot back at me, "I'm the man who says who passes at this school."
>
> . . .
>
> "Then I don't graduate," I said flatly.[563]

The principal tempted young Wright. "I was seriously thinking of placing you in the school system, teaching. But, now, I don't think that you'll fit."[564] And later, "Wake up, boy. Learn the world you're living in. You're smart and I know what you're after. . . . I'll help you to go to school, to college."[565] But Wright didn't back down.

His uncle read his speech and the speech the principal wrote for him and told him the principal's speech was better.[566] Wright replied, "I don't doubt it. . . . But why did they ask me to write a speech if I can't deliver it?"[567] The other student who spoke at the graduation accepted the speech the principal wrote for him, and students who heard about the clash between Wright and the principal criticized Wright, calling him a fool.[568] Nevertheless, Wright gave his speech, and after graduating got a job as a porter in a clothing store that sold "cheap goods to Negroes on credit."[569] He knew he could now expect no help from his school to further his education.

The principal comes off rather unfavorably in this episode. However, in the context of a segregated middle school in the deep South during the 1920s, his desire to control student speech at graduation was very reasonable. It was likely that white school officials and other influential whites who favored black education would attend the graduation. Their support might have been crucial for the future funding and functioning of the school. In that regard, an offensive remark by a student could have been a disaster. However, even under those circumstances, and much

562. WRIGHT, *supra* note 560, at 152-53.
563. *Id.* at 153.
564. *Id.* at 154.
565. *Id.*
566. *Id.* at 155.
567. *Id.*
568. WRIGHT, *supra* note 560, at 155.
569. *Id.* at 156-57.

more so absent those circumstances, the story presents a strong moral argument that a valedictorian's speech should be his own.

A more recent incident involving a struggle between a valedictorian and a school administration is the case of Tiffany Schley.[570] Ms. Schley attended the High School of Legal Studies in the Bushwick section of Brooklyn, New York.[571] It was one of three small schools that were carved out of the Eastern District High School in an effort to address the school's difficulties with the area's violence and academic failure.[572] Ms. Schley submitted a speech, part of which was critical of the school. Among her complaints were: "four principals in four years, overcrowded classes, a shortage of textbooks and other basic materials, unqualified teachers, unstable staffing and uncaring administrators."[573] The assistant principal rewrote the speech so that it would have her praising the school instead.[574] At the graduation ceremony on June 24, 2004, Ms. Schley began to give her original speech, but before she could get to her positive comments, the assistant principal cut her microphone.[575] When she and her mother came to the school the next day to pick up her diploma, school officials refused to hand it over unless Ms. Schley apologized. Having declined to do so, she and her mother were escorted out of the building.[576]

When *The Daily News* broke the story, there was a public outcry. Ms. Schley received messages of support from across the country.[577] Mayor Michael R. Bloomberg asked, "What bozo tried to hold back a diploma in a country where freedom of speech is so prized?"[578] He said, "It was a bonehead thing to do by somebody."[579] Donna Lieberman, the executive director of the New York Civil Liberties Union, said, "The fact that a school principal would even consider withholding a diploma, based on a student's viewpoint expressed in a graduation speech, . . . is a sad commentary on the understanding of students' rights."[580] Needless to

570. Joe Williams, *Speech Costs Grad: Valedictorian Who Ripped School Denied Diploma*, N.Y. DAILY NEWS, June 26, 2004, at 3.

571. *Id.*

572. *Id.*

573. *Id.*

574. Veronica Belenkaya, Helen Peterson, Tracy Connor & Kerry Burke, *Diploma for Teen: Ed Bigs Cave after Speech*, N.Y. DAILY NEWS, June 27, 2004, at 2.

575. *Id.*

576. Williams, *supra* note 570.

577. Belenkaya, Peterson, Connor & Burke, *supra* note 574.

578. Lisa L. Colangelo, Warren Woodberry, Jr., & Allison Gendar, *Bloomy Blasts Diploma "Bozo,"* N.Y. DAILY NEWS, June 28, 2004, at 2.

579. Elissa Gootman, *A Valedictorian Loses, Then Regains, Her Diploma*, N.Y. TIMES, June 29, 2004, at B4.

580. *Id.*

say, New York City's Department of Education quickly reversed itself and arranged for a private graduation ceremony at which Ms. Schley would receive her diploma.[581]

School officials could argue that criticism of the school by the valedictorian compromises their authority and credibility as educators, and therefore compromises the pedagogical mission of the school. However, the efforts of school officials to suppress Ms. Schley's speech and punish her for it, once exposed to the clear light of day, had the effect of compromising their own credibility and authority far more than anything she had wanted to say. Aside from this, the story of Tiffany Schley illustrates two important points that courts should take into consideration in assessing the free speech rights of the valedictorian. First, courts may well regard the comments and postures that supported Ms. Schley as highly political and therefore of no consequence to the objective reasoning which the courts must adopt. However, the support she received reveals there is a wide gulf between the freedom of speech which the public believes the valedictorian should have and the extremely limited description of that freedom which courts have developed. Secondly, a corollary to the public's support for Ms. Schley and the free speech rights of a public school valedictorian is the public's clear understanding that the speech of the valedictorian is not the official speech of the school. There should be little doubt that the public does not regard the valedictory speech as government-sponsored. As young Richard Wright observed, people who come to graduations come to "hear the students."[582]

Both the historical and popular notion of the valedictorian's prerogative to speak freely, then, is one that spans time and place from the segregated Mississippi of the 1920s to Brooklyn in the twenty-first century. Unfortunately, today it is far removed from the narrow view that the courts have espoused. It is important to recognize that *Lundberg's* statement and its derivative in *Black Horse* are wrong despite frequent repetition in case law. These misrepresentations have implications for student free speech beyond religious expression alone. If the Supreme Court were to accept the *Lundberg* statement, a school principal could censor more than religious content in a valedictorian's speech, and with impunity silence a Richard Wright or Tiffany Schley along with the religiously-minded valedictorian.

581. *Id.*

582. WRIGHT, *supra* note 560, at 153.

B. Corder v. Lewis Palmer School District No. 38

Erica Corder is the Colorado valedictorian mentioned in the Introduction to this Article who strayed from the speech that had been approved by her principal.[583] Her case is the most recent judicial pronouncement on the issue of free speech and the Establishment Clause at public school graduations. Corder was one of fifteen valedictorians at Lewis Palmer High School who were allowed to decide that each of them would speak for thirty seconds on one general theme.[584] None were allowed to speak without submitting his or her proposed speech to the principal for review and approval.[585] Though school policy prohibited slander and profanity and speech that tended "to create hostility or otherwise disrupt the orderly operation of the educational process," neither the policy nor the principal said anything about religion.[586] The speech which Corder presented to the principal did not mention her faith or Jesus,[587] but in her actual speech she spoke of Christ's death and resurrection and encouraged the audience to learn more about Christ's sacrifice so that they could "have the opportunity to live in eternity with Him."[588] At the end of the ceremony, an assistant principal told Corder that she would not receive her diploma that day and was to see the principal.[589] At that meeting a few days later, Corder understood the principal to indicate that "she would not receive her diploma unless she publicly apologized for her valedictory speech."[590] In the statement Corder prepared, she made it clear that her remarks were not approved by the principal.[591] Nevertheless, the principal still denied her the diploma unless she included the following sentence: "I realize that, had I asked ahead of time, I would not have been allowed to say what I did."[592] The statement was distributed by email, and Corder received her diploma.[593]

Corder filed claims for violations of free speech, equal protection and freedom of religion.[594] The district court granted the school's motion

583. *See* Introduction, *supra*.
584. *Corder*, 566 F.3d at 1222.
585. *Id.*
586. *Id.*
587. *Id.*
588. *Id. See* Introduction, *supra*, for a fuller quotation of the speech.
589. *Corder*, 566 F.3d at 1222.
590. *Id.*
591. *Id.* at 1222-23.
592. *Id.* at 1223.
593. *Id.*
594. *Id.* at 1223.

for judgment on the pleadings and Corder appealed.[595] The Tenth Circuit affirmed.[596] In examining the *Tinker* line of cases, the appellate court argued that *Bethel* and *Morse*, unlike *Tinker*, did not apply the substantial disruption standard in finding that school officials could discipline students for lewd speech and speech encouraging drug use respectively.[597] The court then maintained that at school-sponsored activities, *Hazelwood* "permitted school regulation of student speech that is 'reasonably related to legitimate pedagogical concerns.'"[598]

The court relied heavily on a two-pronged application of *Hazelwood*, which the Tenth Circuit had previously developed in *Fleming v. Jefferson County School District R-1*.[599] *Fleming* concerned a project adopted in the wake of the Columbine tragedy to change the appearance of the Columbine High School by having students, their families, and employees design artwork for tiles that would be installed in the molding throughout the school.[600] The school rejected tiles with religious symbols prompting a suit alleging a violation of free speech.[601] The Tenth Circuit held, first, that the tiles constituted school-sponsored speech because the level of school involvement in the project, which included supervision and the permanent placement of the tiles in the school building, determined that the expression was so closely tied to the school as to bear the school's imprimatur.[602] Secondly, in accord with *Hazelwood*, the Tenth Circuit held that the prohibition was reasonably related to the concept of pedagogy which included discipline, courtesy, and respect for authority, besides learning.[603]

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595. Corder v. Lewis Palmer Sch. Dist. No. 38, 568 F. Supp. 2d 1237 (D. Col. 2008).

596. *Corder*, 566 F.3d 1219.

597. *Id.* at 1227. "[*Bethel*] established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach [*Bethel*] employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*." *Id.* (internal citations omitted); *see also Hazelwood*, 484 U.S. at 271 n.4 (disagreeing with the proposition that there is "no difference between the First Amendment analysis applied in *Tinker* and that applied in [*Bethel*]," and noting that the holding in [*Bethel*] was not based on any showing of substantial disruption).

598. *Corder*, 566 F.3d at 1227 (quoting *Hazelwood*, 484 U.S. at 273).

599. *Id.* at 1228 (citing Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918 (10th Cir. 2002)).

600. *Id.* (citing *Fleming*, 298 F.3d at 920-21). The Columbine tragedy was the killing of twelve students and one faculty member at Columbine High School by Eric Harris and Dylan Klebold before they killed themselves on April 20, 1999. *Fleming*, 298 F.3d at 920.

601. *Id.* at 921-22.

602. *Corder*, 566 F.3d at 1228 (citing *Fleming*, 298 F.3d at 925, 930-31).

603. *Id.* at 1228 (quoting *Fleming*, 298 F.3d at 925 ("The universe of legitimate pedagogical concerns is by no means confined to the academic for it includes discipline, courtesy, and respect for authority." (internal quotation marks omitted) (alterations

In regard to the first prong, the court found a close connection between the school and Corder's speech because the school "chose" Corder to be a valedictorian and had a policy to review and supervise the valedictorian speeches.[604] The reasoning is similar to the idea of plenary control found in *Cole* and *Lassonde*, though the Tenth Circuit never refers to them. However, the Tenth Circuit may have borrowed something from *Lassonde* when it said, "[t]he school limited the giving of speeches to the valedictorians [including Corder], who were chosen because of their 4.0 grade point average."[605] As in *Lassonde*, the phrasing obscures reality.[606] The school did not choose Corder. Rather, her grade point average determined that she should be a valedictorian speaker. In obfuscating this point, the court ignored the Souter footnote from *Lee*, that if the state had chosen the graduation speakers by "wholly secular criteria," and a speaker who is not a state actor had chosen to give a religious message, "it would [be] harder to attribute an endorsement of religion to the State."[607]

The court found the second prong to be satisfied because the school policy made the speeches closely related to learning. "The giving of a speech in a community graduation ceremony certainly is a learning opportunity. A graduation ceremony is an opportunity for the School District to impart lessons on discipline, courtesy, and respect for authority."[608] Thus, even though the valedictorian speech is not part of the school's curriculum or even its regular extra-curricular activities, it is nevertheless subject to tight control by school authorities "to preserve neutrality on matters of controversy within a school environment."[609] Under these circumstances, "[a] school must . . . retain the authority to

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omitted)). The court distinguished *Corder* from *Adler* because, first, according to the court, the school, rather than the graduating seniors chose Corder to be a commencement speaker, and second, in reviewing the valedictory speeches beforehand, the speech policy of the Lewis Palmer High School differed from that of the Duval County School District in *Adler*. *Id.* at 1229 n.5.

604. *Id.* at 1229.

> [T]he graduation ceremony was supervised by the school's faculty and was clearly a school-sponsored event: Corder's complaint states that she 'qualified' as a valedictorian, . . . that the valedictorians were instructed by the principal on how to organize their speech, . . . that the principal required the valedictorians to submit their speeches to him for review for content, . . . and that Corder was 'escorted by a teacher' to see the assistant principal after the conclusion of the graduation ceremony . . . .

Id.

605. *Id.*

606. *See* discussion on *Lassonde*, *supra* Part I.E.3, for a similar turn of phrase.

607. *Lee*, 505 U.S. at 630 n.8.

608. *Corder*, 566 F.3d at 1229-30.

609. *Id.* at 1230.

refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order,' . . . or to associate the school with any position other than neutrality on matters of political controversy."[610] Therefore, the First Amendment did not require that the school "affirmatively promote" Corder's speech.[611]

Subtly, but unmistakably, the court relegated Corder's religious expression to a category of speech which includes advocacy of illicit drug use, irresponsible sex, and other undesirable behavior.[612] Moreover, for the purpose of preserving school neutrality, the Tenth Circuit would also allow the school to exclude anything that is politically controversial from the valedictory speech.[613] This appears rather out of step with the protection of the controversial student protest of the Vietnam War afforded by *Tinker*. No robust exchange in the marketplace of ideas here.[614] Nor concern with conformity of thought or totalitarianism.[615] Under *Corder*, not only can school authorities decide what speech is sufficiently religious to warrant exclusion, but also what speech is sufficiently controversial to suppress. Moreover, the *Corder* court replaced public forum analysis[616] with an assessment of when student speech is school-sponsored based on the school's control of the event and the relationship of the speech to pedagogy (broadly defined to include discipline, courtesy, and respect for authority).[617] The last of these, "respect for authority," appears to allow school officials to forbid

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610. *Id.* (quoting *Hazelwood*, 484 U.S. at 272); *id.* (noting that "several other courts have established that the pedagogical test may be satisfied 'simply by the school district's desire to avoid controversy within a school environment.'") (citing *Fleming*, 298 F.3d at 925-26). The predictable invocation of *Hazelwood* under these facts is revealing. In this case, as in many others, the court makes no effort to distinguish the level of school endorsement that might exist in this particular event as opposed to others. The student speech at a school assembly, play, or graduation is all accorded the same level of school sponsorship the Supreme Court accorded student speech in the curricular journalism course of *Hazelwood*. For an argument that courts should adopt a sliding-scale approach to school events in which courts recognize varying degrees of endorsement for various school-sponsored events and hence varying degrees of free speech rights for student speech, see Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63 (2008).

611. *Corder*, 566 F.3d at 1230.

612. *Id.*

613. *Id.*

614. *Tinker*, 393 U.S. at 512.

615. *Id.* at 511.

616. *Corder*, 568 F. Supp. 2d at 1243-45 (rejecting, summarily, the proposition that the valedictorian speeches constituted a public forum).

617. *Corder*, 566 F.3d at 1229-30.

any student speech at any event they decide is school-sponsored merely based on their "authority."

In reviewing a valedictorian speech, it may be reasonable for teachers to advise the student to avoid controversy or, indeed, any religious expression. That advice is the school's official speech. However, the valedictorian's speech itself is not the school's speech. It is the student's speech, or, more accurately, it is the graduate's speech. A graduate is no longer a student, nor an employee, nor an agent of the school who might reasonably appear to speak for the school. The valedictory is a public speech, the first public statement of the new graduate at the end of her time as a student, addressed not only to the school community, but to the community of which the school is only a part. The student is expected to say what the student thinks, not what school officials think. If the student's thoughts are controversial, it may be useful, important, or even vital for the community to hear that message. If, on the other hand, the valedictorian speech is simply a learning opportunity that permits the school to censor anything controversial the student has to say, there is very little point in having the student speak. The valedictory speech might as well be another lecture delivered by a teacher from the school.[618] As young Richard Wright put it, "[W]hy did they ask me to write a speech if I can't deliver it?"[619]

What is noteworthy about the student speech policy of Lewis Palmer High School is how carefully contrived it is for avoiding controversial speech. Fifteen valedictorians had to agree to a theme and each of them had only thirty seconds to deliver a speech that had to be preapproved by the principal.[620] That doesn't leave much opportunity to be controversial. One student departed from this scheme, and the court concluded that, in effect, the school may punish the student to avoid the appearance of promoting this one speech, even though the speech is evidently different from the other fourteen and obviously contrary to the school policy of avoiding religious expression. At this point, the idea that the school has promoted, sponsored or endorsed this speech operates like a routine legal fiction to be applied to any student's religious or controversial speech no matter how evident it may be that the school opposes and has attempted to suppress its utterance.[621]

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618. The appellate court was apparently persuaded by *Corder*, 568 F. Supp. 2d at 1245 (agreeing with defendant's argument "that the graduation ceremony has pedagogical concerns as a 'final lesson' for departing seniors"); *see also* Foehrenbach Brown, *supra* note 41, at 67 (characterizing the school's final lesson as "unsatisfactory from a constitutional perspective").

619. *See* WRIGHT, *supra* note 560, at 155.

620. *Corder*, 568 F. Supp. 2d at 1240-41.

621. *See* Foehrenbach Brown, *supra* note 41, at 65-66. Brown stated:

The *Corder* court allowed the punishment of denying the student her diploma until she apologized, and okayed the compulsion of forcing her to make statements dictated by the principal as if they were her own.[622] This approval flows from the court's holding that Corder's speech was school-sponsored and not her private speech.[623] The court also thought that the punishment was reasonable.[624] But that leaves open the outer boundaries of what a school official might do to suppress student speech at graduation. Suppose Corder had refused to apologize or include the statement the principal demanded? Would it then have been reasonable not to give her the diploma at all? Or refuse to certify her transcripts? For a month? Or a year? The threat which the court found acceptable punishment is a potent weapon that school administrators may now choose from the arsenal of methods already evident in this case to control valedictorian speech. This punishment was not a lesson in civility or sensitivity,[625] as much as it was a lesson in intimidation. In effect, the

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> To conclude that school administrators have a duty to prevent a valedictorian from speaking religiously, the courts in *Cole, Lassonde* and *Corder* proceed from flawed readings of *Lee v. Weisman* and *Santa Fe v. Doe*. The valedictorian speech opinions ignore the critical distinction between personal and official religious speech, a distinction recognized in *Lee* and affirmed in *Santa Fe*.

Id.

622. *Corder*, 566 F.3d at 1230-32.

623. *Id.* at 1231 ("[I]f the School District may censor Corder because her speech is school-sponsored rather than private, then so may the School District tell her what to say when she disregards the School District's policy regarding the school-sponsored speech, as long as the compulsion is related to a legitimate pedagogical purpose.").

624. *Id.* at 1231-32. The court stated:

> Corder's forced apology is also reasonably related to the School District's pedagogical concerns. . . . The discipline chosen by the School District for Corder's giving a speech different from the one she submitted for review was to require her to write an apology before she could receive her diploma. The disciplinary action, taken in response to Corder's violation of the review policy, was certainly reasonable.

Id. However, the court supports the reasonableness of this discipline with a quotation from *Bethel* in regard to lewd speech:

> The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. . . . Indeed, the fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or highly threatening to others.

Id. at 1231-32 (quoting *Bethel*, 478 U.S. at 681-83). Again, this suggests that Corder's religious expression was akin to lewd, socially inappropriate, and threatening behavior.

625. *Id.* at 1232 (citing Wildman ex rel. Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 771 (8th Cir. 2001)) (finding no constitutional violation in requiring a student to

Tenth Circuit aligned itself with the principal who threatened young Richard Wright, "Suppose you don't graduate?"[626] and with the New York City Board of Education officials who refused to give Tiffany Schley her diploma unless she apologized.[627] Under these circumstances, the most likely lesson being taught and learned is not one of free speech, but rather the old lesson to say only what those who have power over you wish you to say.

IV. PART III—THE LIMITS OF FREE SPEECH AND THE ESTABLISHMENT CLAUSE

Historically, graduation ceremonies have been places for discussion and debate. It is appropriate, then, for courts to consider what parameters of free speech rights and Establishment Clause rights circumscribe the customary valedictorian speech at a public school graduation ceremony. Traditionally, the valedictory speech is given by one student who is chosen on the basis of having the highest grade point average in the class, though several students might certainly be selected to speak on the basis of their academic achievement.[628] "Valedictory" comes from the Latin words "vale dicere," to say farewell.[629] The speech then is a goodbye from the graduating class.[630] Although the valedictorian in some sense speaks for the class, the class usually does not elect the valedictorian, so the student is not necessarily expressing what the class as a whole might wish to say. In fact, the valedictorian often might say things with which the class, as well as the administration, would disagree. Typical themes of valedictory addresses include a reminiscence of the educational experience the class has shared, commentary on conditions in the world the class now faces, or advice for the future.[631] This array of subjects is very open-ended and invites perspectives from virtually any area of human thought, including religious thought.

In the Supreme Court's jurisprudence, there are two lines of cases that support student free speech: the *Tinker* line and the *Widmar/Mergens*

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issue an apology for distributing an insubordinate letter as a condition for staying on a sports team). Thus, the court considered Corder's speech insubordinate as well.

626. *See* WRIGHT, *supra* note 560, at 153.

627. *See* Williams, *supra* note 570; Belenkaya, Peterson, Connor & Burke, *supra* note 574; Colangelo, *supra* note 578; Gootman, *supra* note 579.

628. *See* Merriam-Webster Online Dictionary, *supra* note 40.

629. *Id.* (providing the etymology of valedictorian as, "Latin *valedicere* to say farewell, from *vale* farewell + *dicere* to say").

630. *Id.* (defining "valediction" as "an act of bidding farewell").

631. I base these comments on my own personal experience witnessing valedictorian speeches on the college and law school level over the years.

line. They are distinct because the Court issued *Tinker* before it developed its public forum analysis, and the two lines provide rather different rationales for affording free speech to students.

A. Tinker *and* Hazelwood

As indicated above, *Tinker* provides a strong affirmation of the free speech rights of students in which the classroom is the "marketplace of ideas"[632] and must never be an "enclave[] of totalitarianism."[633] Under the facts of *Tinker*, students may passively express ideas in the classroom through what they wear.[634] Although *Tinker* maintained that "discomfort or unpleasantness" are not sufficient reason to curtail this right, the Court indicated that student speech may be limited if it "materially and substantially" interfered with the school's discipline or operation or impinged upon the rights of other students.[635] Justice Black, however, wrote a significant dissent in which he lamented "the new era in which the power to control pupils" has been transferred from state-elected officials and teachers "to the Supreme Court."[636] His dissent foreshadowed the cases in which the Court found exceptions and limitations to the *Tinker* holding: *Bethel*, *Hazelwood*, and *Morse*. In the last of these, the Court held there was no violation of free speech where a principal suspended a student for unfurling a banner that read, "Bong hits 4 Jesus," a likely pro-marijuana message, in sight of other school students.[637] Justice Thomas wrote a concurrence in which he argued that "*Tinker* . . . is without basis in the Constitution."[638] "In light of the history of American public education, it cannot seriously be suggested that the First Amendment 'freedom of speech' encompasses a student's right to speak in public schools."[639] Thomas supported the outcome of *Morse*, that a school may prohibit speech advocating illegal drug use, but only because it "erodes *Tinker's* hold in the realm of student speech, . . . by adding to the patchwork of exceptions to the *Tinker* standard."[640]

Nevertheless, the other concurring and dissenting opinions of *Morse* make it evident that, in spite of the subsequent limitations placed on

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632. *Tinker*, 393 U.S. at 512.
633. *Id.* at 511.
634. *Id.* at 505. The *Tinker* decision permitted students who were protesting the Vietnam War to wear black armbands symbolic of their protest in the classroom.
635. *Id.* at 509.
636. *Id.* at 515 (Black, J., dissenting).
637. *Morse*, 551 U.S. at 397-98.
638. *Id.* at 410 (Thomas, J., concurring).
639. *Id.* at 419.
640. *Id.* at 422.

student speech, *Tinker* still has the support of most of the court. Justices Alito and Kennedy joined in a concurrence to clarify that the opinion's limitation on speech did not go beyond its instant facts,[641] and the four dissenters had objections regarding even those limitations *Morse* placed on student speech.[642] The substantive exceptions to *Tinker* which the Court found in *Morse* (no student right to advocate the use of illegal drugs),[643] *Bethel* (no student right to utter offensively lewd or indecent speech),[644] and even *Hazelwood* (no student right to publish scandalous material in a student newspaper)[645] would not be quite the same as an objection to religious expression. Illegal drug use in school presents a problem for the discipline and order of a school, making it reasonable under *Tinker* to allow limitations on the advocacy of such activity. There was evidence that the lewd speech in *Bethel* caused a disturbance to school discipline, justifying punishment under the *Tinker* standard.[646] Even in *Hazelwood*, the articles detailing the sexual behavior and family problems of students who were identifiable from details in the articles

641. *Id.* at 422-25 (Alito, J., concurring).

> I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, . . .

Id.

642. *E.g.*, *Morse*, 551 U.S. at 426 (Breyer, J., concurring in the judgment in part and dissenting in part) (expressing concerns that the holding could in fact authorize further viewpoint-based restrictions, such as prohibiting speech that would encourage the underage consumption of a legal drug such as alcohol, or speech in which a student suggests that glaucoma sufferers should smoke marijuana to relieve the pain, or speech in which a student advocates the legalization of an illegal drug as opposed to disregarding existing drug laws, and would have simply held that qualified immunity barred the student's claim for monetary damages); *id.* at 435 (Stevens, J., dissenting) (joined by Souter, J., Ginsburg, J.) (arguing that "the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This nonsense banner does neither, and the Court does serious violence to the First Amendment in upholding – indeed, lauding – a school's decision to punish Frederick for expressing a view with which it disagreed."). Both Breyer and Stevens cited *Tinker* approvingly. If the issue of religious expression in the valedictory speech were ever to come before the Supreme Court, it may create a dilemma for both liberals and conservatives. Liberals tend to support free speech, but also tend to be separationists. Conservatives like Thomas, tend to be accommodationists, and less supportive of free speech in schools. Thus, the liberals may decide to abandon their support of free speech to maintain the separation of church and state, while conservatives may support free speech to accommodate religious expression.

643. *Morse*, 551 U.S. at 397.

644. *Bethel*, 478 U.S. at 685.

645. *Hazelwood*, 484 U.S. at 276.

646. *Bethel*, 478 U.S. at 677-78.

reasonably involved issues of discipline at school.[647] Religious expression, however, is in the core of speech protected by the First Amendment. Nevertheless, *Hazelwood* does present an issue.

As noted above, several courts have cited *Hazelwood* as authority for distinguishing the classroom from forums in which the school promotes student expression, such as "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[648] According to the Court, these activities constitute non-public forums in which school authorities may exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[649]

Not all school-sponsored events project the same level of sponsorship for the student speech that may occur.[650] There are good reasons to distinguish *Hazelwood's* student newspaper and writers and the student speakers at other extra-curricular events from the graduation ceremony and the valedictorian. First, the valedictory speech is not part of the school curriculum as was the school publication in *Hazelwood.*[651] The student who delivers the valedictory address is not doing so for a grade and therefore is not academically subject to the correction of a teacher or school official. It is true that the *Hazelwood* Court extended the authority of school officials to edit student speech to extra-curricular activities involving student expression, but only that expression which might be reasonably taken as school-sponsored.[652] Aside from this extension being dicta, the valedictorian's speech cannot be reasonably taken to carry the imprimatur of the school because it is known to be the student's speech, not the school's, which the student has earned the right to deliver, not through any subjective choice by school administrators,

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647. *Hazelwood*, 484 U.S. at 262-64.

648. *Id.* at 271.

649. *Id.* at 273.

650. Waldman, *supra* note 610.

651. *Hazelwood*, 484 U.S. at 268. The court explained:

> The Hazelwood East Curriculum Guide described the Journalism II course as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." . . . Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course. . . . School officials did not deviate in practice from their policy that production of the Spectrum was to be part of the educational curriculum and a regular classroom activit[y].

Id. (internal citations omitted).

652. *Id.* at 273.

but through the student's objective achievement of securing the best academic record in the class.[653]

A second distinguishing characteristic of the valedictorian speaker is that the valedictorian is no longer under the authority of the school. If the graduation were merely a curricular or extra-curricular activity, the student participants would be subject to the grades which teachers may assign for their work, or the discipline which school authorities might impose for disobedience. But at the point of commencement, the valedictorian, as a member of the graduating class, should have met all the requirements for graduation. Reception of the diploma is only a formality.[654] In fact, the valedictorian, like other graduates, usually does not need to attend commencement at all in order to graduate.[655] Nor does the valedictorian become an agent of the school or government by accepting the invitation to speak. The valedictorian receives no stipend, wages, or work privileges which might be withheld or reduced. To withhold grades or the diploma for anything other than the most outrageous disruption of the ceremony is a punishment that cannot be justified because the valedictorian is a private actor under no duty to the school or government to articulate the government line. Because of these distinct aspects of the valedictorian address, *Hazelwood's* holding does not limit the valedictorian's free speech rights at graduation.[656]

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653. Courts may differ on this point. However, *Adler* argues cogently in its remand opinion that there is no government endorsement of a student speech when students are informed that the speaker was chosen and the speech composed independently of school officials. *Adler*, 250 F.3d at 1333. The court stated:

> While schools may make private religious speech their own by endorsing it, schools do not endorse all speech that they do not censor. We cannot assume . . . that Duval County seniors will interpret the school's failure to censor a private student message for religious content as an endorsement of that message-particularly where the students are expressly informed as part of the election process that they may select a speaker who alone will craft any message. . . . No religious result is preordained.

Id. (quoting *Adler*, 206 F.3d at 1084).

654. It is well-known that schools and employers generally do not ask to see a diploma as proof the student has graduated, but rather accept an official transcript of a student's record which certifies the student has completed all the requirements for graduation.

655. *See Lee*, 505 U.S. at 595 (observing that attendance at graduation is not required for a degree only to make the point that, "[e]veryone knows that in our society and in our culture high school graduation is one of life's most significant occasions"). Consequently, "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation." *Id.* at 596.

656. This analysis of *Hazelwood* is consistent with the Supreme Court's forum analysis and Establishment Clause jurisprudence. The government may restrict speech in a non-public forum "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. The rule for non-public forums in schools is similar. In a non-public

Probably the most important limitation the *Tinker* cases place on student expression at graduation, which, though occurring at a school-sponsored event, is not curricular and not reasonably interpreted as school-promoted, is found in *Tinker* itself. School authorities may limit student speech where it "materially and substantially interfere[s]" with the school's discipline or operation or impinges upon the rights of other students.[657] As to interfering with the school's educational mission, a school administrator could argue that by their very nature, religious references in the valedictory speech cause religious dissenters in the audience to feel they are outsiders from the school community, and cause those who believe as the student does to feel they are insiders. This divisiveness is contrary to a plausible purpose of a graduation ceremony: to foster community among the students as they prepare to separate and embark on their individual life journeys. In response, however, there are many other political or social positions the valedictorian could take which have nothing to do with religion, but which might have the same divisive effect on dissenters and the graduation. Disagreement alone does not compromise school discipline or operation. Rather, it falls into the category of creating discomfort among some members of the audience, which *Tinker* says is an insufficient reason to suppress student speech.[658]

School administrators might advance a stronger argument to suppress speech if they had evidence that the valedictorian's religious expression would create protests or disorder at the graduation or the school. Perhaps those who disagree with the religious message would stand and turn their backs, verbally respond to the speaker, or react violently so that fights between religious adherents and non-adherents might break out. Credible evidence that the religious expression proposed for the valedictory speech would disrupt school discipline and operation at the school's graduation and beyond would, under *Tinker*, be a reason for censoring the speech. The *Tinker* limitation could give religious dissenters willing to protest religious expression at the graduation a veto on the valedictorian's freedom of speech. Thus, *Tinker*

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forum that can reasonably be seen as school-sponsored, school officials may restrict speech "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. It stands to reason that a non-public forum created by a school would have pedagogical concerns that constitute the particular purposes of the school-sponsored forum, and on account of which the school may restrict speech.

657. *Tinker*, 393 U.S. at 509.

658. *Id.*

makes the valedictorian's free speech right less extensive than that of a non-student adult in another venue.[659]

The other reason for which *Tinker* permits speech limitations, that the speech violates the rights of other students, engages the issues presented by the Establishment Clause. In order to suppress the religious expression in the valedictorian's speech, it must generate an actual violation, not a perceived one.[660] Determining whether such speech can have this effect requires a discussion of forum analysis in conjunction with the Establishment Clause.

B. Public Forum Analysis

The custom of valedictory speeches developed long before the formulation of forum analysis, so that the custom might not fit very neatly into the categories which the Supreme Court has developed. Customarily, one or more students are selected on the basis of academic performance to deliver the valedictory speech or speeches. If, then, the teachers honestly assign grades on the basis of performance, school authorities do not control who the speaker will be. Ostensibly, the student composes the speech, though it may be subject to review by school authorities.[661] In the absence of any definitive legal mandate, the speech can and has led to clashes between the valedictorian and school authorities over content.[662] However, the stories of Richard Wright and

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659. Terminiello v. City of Chicago, 337 U.S. 1, 4-5 (1949) ("[F]reedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." (internal citations omitted)). In school, speech may be censored when the speech "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). The Supreme Court has held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel*, 478 U.S. at 682 (citing New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985)).

660. *Widmar*, 454 U.S. at 271-74. When confronted with the claim that it would violate the Establishment Clause for a university to make its facilities accessible for a religious student group on the same basis as for other student groups, the Supreme Court in *Widmar* demonstrated no violation would occur, thus implying that it would be necessary to prove the violation would occur in order to justify discriminatory treatment towards the religious group. *Id.* at 270-72.

661. MCKOWN, *supra* notes 551-555.

662. This assessment is based on the various instances noted throughout this paper in which school officials and valedictorians have been at odds over valedictory speeches. However, both sides would appear to have reasons to compromise and reach agreement on the content of the speech. School officials are likely to want a graduation ceremony without controversy, and valedictorians are likely to want to preserve their privilege.

Tiffany Schley and the books of McKown and Fink suggest that the general public holds the practice of school-composed or censored valedictory speeches in disdain.[663] Furthermore, as Reese suggests, because valedictorians are no longer subject to the authority of the school after the graduation ceremony, such speakers often take the liberty of speaking their minds.[664] Thus, in regard to the substantive content of the speech, the circumstances of the custom withdraw some control from the school and provide some level of freedom to the valedictorian.

Undoubtedly, the graduation ceremony of a public school is a government space.[665] In such a space, a public forum could exist by tradition or by government designation.[666] Though the valedictory speech is a tradition, the space in which it takes place does not resemble the parks and sidewalks which the courts associate with the traditional public forum.[667] The issue, then, is whether the school, in observing the practices typical of the valedictory address, has taken the actions or implemented the policies required for creating a designated public forum.[668]

In order to determine whether a forum is open or closed, the courts examine: (1) the intent of the government; and (2) the extent of the use granted.[669] Intent may be discerned from the school's policy and practice. "[T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum."[670] The court also considers "the nature of the property and its compatibility with expressive activity to discern the government's intent."[671]

The intent of a school to permit a valedictorian speech is generally that of allowing a graduating student the opportunity and responsibility of speaking to the class about their past experiences, their future challenges, and the world they face at this pivotal moment in their lives. A good example is the intent the court found in *Madison School District*:

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663. *See supra* notes 517-527, 535-550, 551-555, 560-581 and accompanying text.

664. *See* REESE, *supra* note 524; and *supra* notes 529-534 and accompanying text.

665. All the courts agree that a public school graduation is a public place.

666. *Perry*, 460 U.S. at 45.

667. On what constitutes a traditional public forum, *see* Michael L. Friedman, *Dazed and Confused, Explaining Judicial Determination of Traditional Public Forum Status*, 82 TUL. L. REV. 929 (2008).

668. *Cornelius*, 473 U.S. at 802 ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.").

669. *Gregoire*, 907 F.2d at 1371.

670. *Cornelius*, 473 U.S. at 802.

671. *Id.*

"[T]he school's graduation policy on its face was motivated . . . by a number of secular purposes, including a desire to grant top students the autonomy to deliver an uncensored speech."[672] The court was "[u]nwilling to trivialize the importance of bestowing the responsibility on young adults at this significant moment in their student careers" and agreed that this was a credible purpose.[673] Whether the speech is representative of the collective concerns of the students or the particular observations of the individual selected to speak, the purpose for giving this platform to the outstanding student(s) of the class is in no way religiously inspired or a subterfuge for injecting religion into the ceremony, the custom having arisen long before religious expression at graduation ceremonies became a legal controversy. Nor, as the court noted, should this intent be dismissed lightly, because the responsibility of speaking to the class is reflective of the adult responsibilities the students are now poised to undertake.[674] Most important in regard to forum analysis is that the school's intent is not to convey any particular message. Rather, the intent is for an individual student to convey a message that comes from outside the school administration, but redounds to the benefit of debate and discussion about issues that are of vital concern to the class, the school, the community, or the individual speaker. In the interests of the free exchange of ideas, this intent is not only an acceptable, but also a laudable, basis for creating a public forum.

In regard to the extent of use granted, courts examine whether the government's policy and practice is to maintain the forum open to all comers or whether access is limited by well-defined standards tied to the nature and function of the forum.[675] "[S]elective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum."[676] It is on this prong that courts have often rejected the proposition that a student graduation speech constitutes a public forum. The number of speakers or points of view permitted on the occasion are usually, though not always, limited to one. Though the school could have more speakers, there is no access for others who disagree or for members of the audience to participate.[677] The valedictorian may then appear to be merely a part of a formal ceremony orchestrated by school officials, and to be delivering an officially sanctioned message. In the view of the Fifth Circuit in *Clear Creek*, "[t]he limited number of speakers, the

672. *Madison Sch. Dist.*, 147 F.3d at 837.
673. *Id.*
674. *Id.*
675. *Cornelius*, 472 U.S. at 804-05.
676. *Id.* at 805.
677. In *Madison*, for example, there were four valedictory speakers. 147 F.3d at 834.

monolithically non-controversial nature of graduation ceremonies, and the tightly restricted and highly controlled form of 'speech' involved, all militate against labeling such ceremonies as public fora of any type."[678]

The Fifth Circuit's rejection of graduation ceremonies as public forums, however, loses its force upon the realization that virtually every descriptive assertion the court made about such ceremonies in the above-quoted passage is wrong. According to the historical records provided by Fink, past graduations have provided for multiple speakers, as many graduation exercises do today.[679] Nor is "monolithically non-controversial" an accurate description of graduation ceremonies. As the dissent in the Fifth Circuit's *Santa Fe* opinion pointed out, every year many controversial outside speakers are invited to address graduation audiences.[680] The case of Tiffany Schley is an example of a valedictorian who wished to convey a controversial message that school officials wished to suppress.[681] Another look at Fink's record of graduation ceremonies in which debates and discussions about issues of local interest occurred puts to rest the Fifth Circuit's characterization of the "tightly restricted and highly controlled form of 'speech'" which supposedly reigns at graduation ceremonies.[682] Fink's evidence also shows that, despite the pronouncements of the courts, graduation ceremonies have historically been thought of as quite compatible with expressive activities because school authorities intentionally allowed students to debate and discuss topics of public interest at graduation.[683]

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678. *Santa Fe*, 168 F.3d at 822.

679. *See supra* notes 535-550 and accompanying text.

680. *Santa Fe*, 168 F.3d at 831-32 (Jolly, J., dissenting). The dissent stated:

> In arguing that [the school district] has not created a "true" forum, the majority states its *ex cathedra* view that a graduation ceremony is not an appropriate place for communication of views on issues of political and social significance. Historical facts, of course, contradict the majority's view. . . . they almost always include speakers attempting to impart wisdom and reflect on life's higher (that is, morally superior) goals. Furthermore, graduation ceremonies often play host to controversial public figures. . . . . In sum, graduation ceremonies have often presented a forum for expressing the most profound of thoughts on society, politics, religion, and the nature of humankind.

Id. (internal citations omitted) (footnotes omitted).

681. *See supra* notes 570-581 and accompanying text.

682. *See supra* notes 535-550 and accompanying text.

683. Foehrenbach Brown, *supra* note 41, at 67. Brown describes the constitutional status of the valedictorian speech well:

> A valedictorian would appear to be a speaker chosen according to wholly secular criteria and therefore credibly differentiated from the government for Establishment Clause purposes. The valedictory speech can be best characterized as a forum within the ceremony, a speech opportunity offered to high achieving students in recognition of their academic accomplishments. The

School authorities do not in fact "select" a particular student to be valedictorian. Rather, the student earns the privilege on the basis of the student's academic effort and success. Access to the valedictorian's podium is open to all students at the school. Only one, or perhaps a handful, achieve the honor because it is not possible to allow every student to speak, a limitation that resembles a time, place, and manner restriction which the school may impose on a public forum.[684] And though there may be only one valedictorian speaker each year, because of the traditional nature of the annual event, courts ought to take a long term view of the custom in which, over the course of the years, many valedictorians take their turns expressing various views which both change over time and reflect the change of the times.[685] The valedictory speech provides the opportunity for expression to many speakers of diverse views over the years creating a dialogue which takes place over time from one class to the next. It affords the opportunity for students to begin to exchange their ideas with the public, a dialogue which, because of the traditional nature of the valedictorian's speech, takes place over years rather than one evening. For the reasons recounted above, courts ought to accord the valedictorian speech at least the protection of a limited public forum. But even if the forum is no more than a non-public forum, school officials still cannot exclude a perspective or point of view on a permitted subject just because the perspective or point of view is religious.

> speech is not properly understood as official speech because the valedictorian does not speak as the school's delegate delivering an official message.

Id.

684. In response to the majority's concern over the principal's refusal to permit a speaker to talk at graduation about safe sex, the dissent in *Black Horse*, 84 F.3d at 1491, argued that the school could place limitations on speakers and speeches on the basis of appropriateness, time, place and manner, and content. "Certainly the school . . . could restrict all speeches as to time and indeed as to appropriateness-here, to 'solemnizing' speech; [the school board policy's] subject matter and speaker restrictions do not constitute viewpoint expression or suppression." *Id.* at 1491 n.4 (internal citations omitted) ("Even if this particular graduation ceremony were converted into a public forum or limited public forum, an issue we need not reach, it would be subject to reasonable time, place and manner restrictions, and to content-based restrictions necessary to serve a compelling state purpose.").

685. *See* John C. Eastman, *We Are a Religious People, Whose Institutions Pre-Suppose a Supreme Being*, 5 FALL NEXUS: A JOURNAL OF OPINION 13, 21 (2000). Eastman wrote:

> That only one student each year is able to speak in the forum should not render the forum non-public because, over time, numerous students would participate in the forum. . . . The opportunity to give the valedictory address is therefore a limited public forum, open over time to every student who finishes first in his or her class.

Id.

Courts have objected to school policies that would permit uncensored student religious expression at graduation because the school ultimately controls the graduation ceremony. *Harris* exemplifies this approach well. "Significantly, all of the parties in this case agree that the seniors have authority to make decisions regarding graduation only because the school allows them to have it."[686] According to this line of thought, because the school has this ultimate authority, it is responsible if students devote any of the freedom of speech granted by the school to religious expression. However, any time a government entity designates a forum for purposes of free speech, the government is still in ultimate control of that space. As the Eleventh Circuit indicated, to make the government responsible for any private speech which might be uttered in a designated public forum is the equivalent of making all such speech government speech.[687] This approach would very likely chill free speech, for if all speech in designated public forums were government speech, the government would then have reason either to shut down the forum or censor this speech so that private speakers do not express views with which the government disagrees or which it may not legally express. By finding the public school to be responsible for student speech in the graduation ceremony, courts have actually encouraged school officials to withdraw what freedom of speech school officials have given students in the past and to censor student speech. The effect is that the courts are motivating school officials to make the graduation ceremony what the courts have mistakenly perceived it to be: an exclusively government controlled ritual with a government controlled liturgy.

It is quite true that the school administration might require any speaker at the graduation podium to parrot whatever the administration wishes to convey. But this would simply not be any kind of valedictory speech. It would be analogous to a decision by the municipal government of Columbus, Ohio, to cease accepting proposals from community groups to mount displays in Capitol Square, and instead simply select volunteers to mount government dictated displays.[688] Certainly the city may do this. But the city would have done away with the forum. In that case, Capitol Square would be a platform for the expression of pure government speech, and since the government was speaking, religious displays would be a violation of the Establishment Clause. But as long as

686. *Harris*, 41 F.3d at 454.
687. *See Adler*, 206 F.3d at 1080.
688. *See Capitol Square*, 515 U.S. at 757-59.

the city invited proposals, the city could not discriminate among them on the basis of religious viewpoint or dictate what they may say.[689]

> The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. . . . Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.[690]

Once the municipal government in *Capitol Square* opened a forum, it could not arbitrarily close it to a particular applicant it didn't like, or to a particular message it didn't care for. It would have to close the forum for all private speakers.

Similarly, as long as a school has a tradition of inviting the most outstanding student to write and deliver a speech and promotes this speech as the student's own work, which is the traditional understanding of the valedictory address, the school has created a limited public forum with free speech rights for the student. School officials and teachers may review the speech and make recommendations, but they may not impose substantive changes except for the limited reasons permitted by law.[691] If, on the other hand, the school has the student recite the school's official message, the school has, in effect, abolished the forum and along with it the valedictory custom. If the school dictates to the valedictorian what to say and not say, then the speech would indeed be the school's speech, not the student's, and religious expression under such circumstances is likely to violate the Establishment Clause. Such a charade would defeat the whole purpose of the valedictory speech, which is a presentation of the genuine work and thought of the student. The device would make the disclaimer in the title of this Article appropriate.

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689. *See id.* at 770 ("Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms. Those conditions are satisfied here, and therefore the State may not bar respondents' cross from Capitol Square.").

690. *Perry*, 460 U.S. at 45-46 (citing *Widmar*, 454 U.S. at 269-70).

691. *See Madison*, 147 F.3d at 834 ("In no case may the school administration 'censor any presentation or require any content.' At most, it can 'advise the participants about the appropriate language for the audience and occasion'; but the student-speaker is free to reject the advice."). On limitations of student speech at a public school graduation, see *infra* notes 778-779.

C. The Establishment Clause Interest at the Expense of Free Speech

Ordinarily, only speech spoken or approved by the government can violate the Establishment Clause. If, then, the valedictorian's speech resides in a limited public forum, if it reflects the perspectives of the student and not the school, in short, if it is free speech, then, it is difficult to argue that it should be suppressed to avoid a violation of the Establishment Clause. In order to protect dissenters from the religious expression of the valedictorian, courts have fashioned arguments to degrade the free speech interest of the valedictorian or to make it appear that by censoring the valedictorian's speech, the school is really attempting to control its own speech. This Article has shown how courts have developed this strategy: by presenting unsupported, unhistorical, and incorrect depictions of graduation ceremonies; by arguing that the very efforts to censor the student's speech justify the censorship of the speech; by claiming the speech is school-sponsored when it isn't; or could be reasonably understood to be endorsed by the state, when it can't. Whatever basis there may be for finding an Establishment Clause interest at a public school graduation, that basis should not depend upon arguments that minimize the free speech interest of the valedictorian or students in general. However, in the effort to vindicate Establishment Clause interests, commentators, like the courts, have also adopted strategies to degrade free speech in favor of the Establishment Clause.

In arguing that the Establishment Clause interest trumps the free speech interest at graduation, Professor Erwin Chemerinsky maintains that the free speech rights of students at graduation are minimal.[692] For example, he compares the invitation of students to speak at graduation to the invitation of the two major party candidates to participate in a debate sponsored by a government-owned television station.[693] In *Arkansas Educational Television v. Forbes*, the Supreme Court found the debate to be a non-public forum in which it was permissible to exclude the other minor party candidates.[694] However, the Court said nothing about censoring the speech of the two invited candidates. If either or both of them wished to deliver a religious message, nothing in *Forbes* would forbid that.

Chemerinsky also raises *Hazelwood*, which has been discussed and distinguished *supra*.[695] He further argues that a neutral prohibition on religious speech which would apply to Christian, Jewish, and Islamic

692. Chemerinsky, *supra* note 441, at 6-7.
693. *Id.*
694. *Id.* at 7 (citing Arkansas Educ. Television v. Forbes, 523 U.S. 666 (1998)).
695. *Id.* (citing *Hazelwood*, 484 U.S. at 260).

messages would be permissible, citing the Court's approval of a municipal regulation that permitted commercial advertisements, but not political ones, on city buses in *Lehman v. Shaker Heights*.[696] Advertising space is hardly comparable to a valedictorian speech, where the student may address a range of political, social, and moral issues rather than try to sell a product. If a blanket prohibition of religious perspectives on these subjects were permissible in a limited public forum or non-public forum, the Supreme Court would have approved the exclusions of *Lamb's Chapel*, *Rosenberger*, and *Good News Club* which would have applied to all religious perspectives, regardless of the particular religion that wished to use the school property.[697]

Finally, Chemerinsky compares the discretion the Court granted schools in *Bethel* for punishing the lewd speech of a student at a school assembly to the discretion a school might exercise in censoring religious expression at a graduation.[698] If indeed a school presented evidence that the religious expression was contrary to the discipline or mission of the school, as was demonstrably the case with the lewd speech in *Bethel*,[699] Chemerinsky's argument would have legs. But in the absence of such a showing, the principles of *Tinker* do not permit censorship of the valedictorian speech, which is delivered, incidentally, by a graduating student at graduation as opposed to a continuing student at a school assembly.[700]

Professor Alan Brownstein also pursues a strategy of minimizing the free speech interests of students at graduation, though his analysis, if applied somewhat more narrowly than he suggests, provides a solution

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696. *Id.* at 7-8 (citing Lehman v. Shaker Heights, 418 U.S. at 298 (1974)).

697. *Cf. Lamb's Chapel*, 508 U.S. 384; *Rosenberger*, 515 U.S. 819; *Good News Club*, 533 U.S. 98.

698. Chemerinsky, *supra* note 441, at 8 (citing *Bethel*, 478 U.S. 675).

699. As recounted by the Court, Fraser delivered a nominating speech for an elective student office at a school assembly.

> During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor. . . . a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in the respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.

Bethel, 478 U.S. at 677-78. This appears to have been a disruption of the school's academic discipline.

700. *Tinker*, 393 U.S. at 511 ("Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.").

that might respect both free speech and Establishment Clause rights.[701] Brownstein acknowledges that this category of student speech, "unsupervised student speakers selected under neutral criteria," presents "a difficult state action question" that "cannot be resolved clearly under current authority."[702] Nevertheless, he begins by emphasizing the "complete control" that a school has over graduation exercises: "Student speakers, such as valedictorians, are only permitted to deliver speeches that the school authorities accept as furthering the goals and objectives of the graduation ceremony."[703] He maintains that nothing in the Constitution suggests otherwise.[704] School authorities "can decide that the only students permitted to speak will recite the principal's favorite poem."[705] In support of his view, Brownstein repeatedly cites the Fifth Circuit's *Santa Fe* and *Black Horse* decisions, cases which depend on *Lundberg's* unsupported and unhistorical claim that graduations have never been forums for debate or discussion of public issues.[706]

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701. Brownstein, *supra* note 38.

702. *Id.* at 70.

703. *Id.* at 61-62.

704. *Id.* at 62.

705. *Id.*

706. *Id.* at 64. He writes:

> Indeed, given the formal nature of a commencement ceremony, the sharply limited number of speakers, the clear prohibition against questions or responses to what is said, and the stringent restrictions that are imposed on any expression outside of the carefully planned and orchestrated activities that make up the program, graduations lack more of the structural features of a public forum than most public places and events. Not surprisingly, virtually all of the lower courts that have addressed the issue concur in this conclusion.

Brownstein, *supra* note 38, at 64 n.27 (citing *Santa Fe,* 168 F.3d at 819; *Black Horse*, 84 F.3d at 1477-78; *Brody*, 957 F.2d at 1119-20.). In fairness, he also advises the reader to confer with Judge Jolly's dissenting opinion in *Santa Fe*, 168 F.3d at 831-32. Then, he states, "Prior to the Supreme Court's decision in *Lee v. Weisman*, most graduation ceremonies operated as school programs and school officials tightly monitored and reviewed any student expression that was to take place." *Id.* at 64. Brownstein cites *Black Horse*, 84 F.3d at 1484; *Santa Fe*, 168 F.3d at 810; *Brody*, 957 F.2d at 1120; and *Lundberg,* 731 F. Supp. at 337. Brownstein, *supra* note 38, at 64 n.30. These, of course, are the very cases that claimed, mistakenly, without any historical evidence, that graduations were never forums for public debate or discussions. Brownstein goes so far as to suggest that a public school graduation may not be a forum of any kind. *Id.* Indeed, forum analysis would not be applicable for a property that is private (Cyber Promotions, Inc. v. American Online Inc., 948 F. Supp. 436, 442 (E.D. Pa. 1996) (finding forum analysis not applicable to email system of private online company)), or for a government property which is not intended to be a channel for communication (Student Gov't Ass'n. v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 476 (1st Cir. 1989) (finding forum analysis not applicable to university's legal services office because it is not a channel of communication)). A public school graduation is obviously not the former. It is difficult to

The example of making a student speaker recite the principal's favorite poem is instructive, because a school does much the same when it censors a valedictorian's speech or forces the valedictorian to say what school authorities wish. If a student speaker is forced to recite the principal's favorite poem, the audience should be told as much (the audience would probably know anyway). But if the student's speech purports to be the student's speech, as the traditional understanding of the valedictorian speech entails, then the school has likely created a limited public forum and the principal may not insist upon the exclusive reading of a favorite poem, or censoring the speech, or rewriting the speech.

Brownstein posits three related constitutional principles which, he argues, determine that the conferral of unfettered religious expression upon the valedictorian, even one selected by neutral criteria, violates the Establishment Clause: (1) when a mandate of constitutional equality is at issue, the courts often define any state action that facilitates the violation of that mandate expansively, so that, in the context of graduation, the state would be responsible for private speech that vitiates Establishment Clause protections; (2) the Establishment Clause is partly an equality mandate protecting minority religious views; and (3) even when the state acts with neutrality towards religious expression, it still violates the Establishment Clause if a religious message may be perceived by a neutral observer as state-sponsored.[707]

In regard to the first principle,[708] state action, rather than private action, is usually necessary in order for an act to be declared unconstitutional. However, Brownstein points to cases such as *Shelley v. Kraemer*,[709] *Burton v. Wilmington Parking Authority*,[710] and *Edmonson*

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argue that it is the latter when, historically and currently, public school graduations present speeches by students and outside speakers.

707. Brownstein, *supra* note 38, at 71.

708. Brownstein recognizes that a just exposition of the three principles would require more than a brief discussion, and he provides the following references: MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.09[D], at 4-100 to -105 (1984); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 18-1 to -7 (2d ed. 1988); Robert J. Glennon & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221 (1976); Ira Nerkin, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 364-65 (1977). Brownstein, *supra* note 38, at 71 n.68.

709. 334 U.S. 1 (1948) (refusing to enforce a racially discriminatory restrictive covenant).

710. 365 U.S. 715 (1961) (granting injunctive relief for the refusal to serve minorities by the operator of a restaurant leased in a state-owned building).

v. Leesville Concrete Company.[711] In these equal protection cases, the Court assigned an expansive significance to the state action that would enforce or permit the racial discrimination practiced by private entities, so as to render constitutionally illegal the private racial discrimination as if it were the result of state action.[712] Brownstein compares the government domination which the courts construed to be present in *Edmonson*, for example, to a school's domination or control of a graduation ceremony, highlighting the public school's funding and planning of the event, the reliance of the student speaker on the school's assistance in arranging the event, and the extent to which the Establishment Clause injury is aggravated by the school's participation.[713]

The problem with this line of argument is that there is no real standard in the cases Brownstein cites for determining when the state really dominates in an instance of private discrimination. As Glennon and Nowak, whom Brownstein cites, argue, the Supreme Court's ostensible expansion of state action in equal protection cases is actually an exercise in which the court decides whether or not the government should enforce a private discriminatory practice, not by measuring the level of state involvement in the practice against any principled standard, but rather by balancing the constitutional harm done by a discriminatory private practice against the rights of the private party to indulge in the practice.[714] The existence of government domination is really a legal

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711. 500 U.S. 614 (1991) (holding that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race).

712. Brownstein, *supra* note 38, at 71-72.

713. *Id.* at 72. Brownstein quotes *Edmonson*: "[A]though the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints." *Id.* (quoting *Edmonson*, 500 U.S. at 620). He then recites the indicia of government authority one might find at a graduation ceremony. *Id.* He adds two other factors supportive of finding state action, which *Edmonson* provides: "[T]he extent to which the actor relies on governmental assistance and benefits . . . and whether the injury caused is aggravated in a unique way by the incidents of governmental authority." *Id.*

714. Glennon & Nowak, *supra* note 710, at 224. The authors explain that under the classic view of state action, in order for the Supreme Court to find that the acts of a private party violate the Fourteenth Amendment, it must decide the issue of "whether sufficient state contact(s) factually do or do not exist. If the Court finds a sufficient quantum of state connection(s) to a particular activity, then that activity is subject in theory to the limitations of the Fourteenth Amendment, even though performed by a private party." *Id.* Noting inconsistencies in the Court's decisions under this theory, and noting that such decisions usually involve a conflict between the rights of a party to perform the practice that allegedly violates the Constitution and the rights of the party alleging the violation, the authors state, "It is our thesis that the Court decides state action

fiction. This is evident because of inconsistencies in the Court's assessment of the state's involvement in the objectionable private practices found in these cases.[715] The state cannot realistically be said to dominate private decisions to make discriminatory restrictive covenants, or to refuse service to minorities at a restaurant leased by a private party from a government agency, or to exclude minorities from a jury in a private civil trial. Regarding the graduation ceremony, the government withdraws its domination when a school allows students to organize and make decisions about the event. In the area of speech, courts have generally found that when the state withdraws its domination of a government property to allow private parties to speak, the state creates a limited public forum where free speech rights exist. In the context of a graduation ceremony, the real issue is not assessing the level of government dominance over the event, but the issue is properly that of balancing the constitutional harm done to Establishment Clause rights by the valedictorian's religious expression against the value of the free speech rights the valedictorian wishes to exercise.

Brownstein does not point to any instance in which a court has expanded the meaning of state action to protect Establishment Clause

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cases by balancing the values which are advanced or limited by each of the conflicting private rights." *Id.* at 228-29. The authors' theory has implications for the issue under discussion, particularly in regard to Brownstein's approach. If the Court is actually balancing constitutional interests when it makes a finding of state action, the finding of sufficient state action is then really a legal fiction. *Id.* at 226-27. Recognizing this, the authors note,

> The fiction performs a disservice because there may exist some positive value in allowing the individual freedom to engage in the [constitutionally objectionable] activity. Disregarding the private nature of the practice and using the standards derived for testing official governmental acts would result in failing to consider the value of that freedom.

Id. at 231. That is precisely the claim of this Article, that in pursuit of protecting Establishment Clause rights, courts and commentators have ignored the value of the free speech right for students at graduation ceremonies. Adoption of the state action approach, which Brownstein advocates, combined with the argument that the free speech rights of students at graduation are virtually nonexistent, leads to disregard of the value of the students' right to free speech at graduation.

715. *Id.* at 221-22.

> [T]here are no generally accepted formulas for determining when a sufficient amount of government action is present in a practice to justify subjecting it to constitutional restraints. Although several tests for finding state action have emerged from Supreme Court decisions, none is adequate to predict whether state action will be found in a new case. The lack of predictability stems from the Court's repeated insistence that state action depends in each case on "sifting facts and weighing circumstances."

Glennon & Nowak, *supra* note 710, at 221-22 (quoting *Burton*, 365 U.S. at 722).

interests.[716] There are cases, however, in which the Supreme Court expanded the level of state action to protect free speech rights to the detriment of other rights. One such example is *New York Times v. Sullivan*.[717] The Court decided that the chilling of free speech in the news media due to fear of a libel suit was of more constitutional importance than the vindication of a private party's reputation.[718] The Court therefore heightened the standard for damages in a libel claim brought against a public official so that defamation plaintiffs could not so easily use courts to chill free speech in the news media.[719] An even more pertinent example is *Marsh v. Alabama*, in which the Supreme Court vindicated the free speech rights of a member of the Jehovah's Witnesses to proselytize on the privately owned property of a company town.[720] The Court decided that the free speech rights of the preacher were of greater weight than the private property rights of the company that owned the town.[721] The Court therefore construed as constitutionally illicit the police action that would suppress the religious speech of the preacher in order to enforce the property rights of the company.[722] Applied to the

716. Brownstein, *supra* note 38, at 72 (arguing that the finding of state action under an expansive definition of state action may be extended from the equal protection cases to this particular Establishment Clause situation).

717. 376 U.S. 254 (1964).

718. *Id.* at 279-80.

719. *Id.* The Court stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not . . . .

Id.

720. 326 U.S. 501 (1946).

721. *Id.*

722. *Id.* at 509.

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. . . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand.

Id. Such balancing is evident in cases of government funding. For example, in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236 (1968), the Court overcame Establishment Clause objections to a New York State statute that required school districts to purchase and loan textbooks to parochial school as well as public

graduation context, these cases imply that the free speech rights of the valedictorian are as worthy of protection from state-construed private action as the Establishment Clause interests of religious dissenters.[723]

The second principle to which Brownstein refers, that the Establishment Clause mandate is an equality mandate,[724] which, like equal protection, invites the expansion of state action, is unobjectionable by itself. However, the Free Speech Clause is also an equality mandate protecting the expression of minority points of view that may be unpopular.[725] The courts, then, should be at least as concerned about state

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school students; however, in *Norwood v. Harrison*, 413 U.S. 455 (1973), a Mississippi statutory program, which similarly required the state to purchase and loan textbooks to private school students, was held unconstitutional when it was applied to private schools with racially discriminatory policies. Likewise, in *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Court upheld an IRS policy to deny tax-exempt status to a university that practiced racially discriminatory policies against a challenge under the religion clauses. These cases indicate that the Court perceives equal protection violations on the basis of race to be of greater consequence than Establishment Clause violations.

723. While courts readily enumerate the indicia of state power in assessing a violation of the Establishment Clause through the religious expression of a student speaker, no court notes such indicia in assessing the violation of free speech through censorship of the valedictorian address. Certainly the level of state action is far greater when the state actively uses its power to censor a student's speech than when the state passively permits a valedictorian selected by objective criteria to express religious views. The domination of the school over the graduation ceremony, the reliance of school officials on that domination to censor the valedictorian's speech, and the aggravation of harm to the valedictorian attributable to state authority in censoring such speech, are factors that readily support judicial protection of the valedictorian's free speech from state action without any need to resort to the legal fiction of expanding state action. The legal fiction of finding state action, however, is quite necessary to protect Establishment Clause rights from the religious ideas that the state would passively allow the valedictorian to express.

724. Brownstein, *supra* note 38, at 71.

725. For the Establishment Clause, see, for example, *Wallace v. Jaffree*, 472 U.S. 38, 61 n.51 (1985) ("Moreover, this Court has noted that '[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.'" (quoting *Engel*, 370 U.S. at 431)); *Lynch*, 465 U.S. at 701. The Court stated:

> The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. It was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit . . .

Id.; and Patrick M. Garry, *The Democratic Aspect of the Establishment Clause: A Refutation of the Argument that the Clause Serves to Protect Religious or Nonreligious Minorities*, 59 MERCER L. REV. 595, 595 (2008) ("A survey of Establishment Clause doctrines and commentary reveals that the Clause is often interpreted as a minority rights provision, protecting religious and nonreligious minorities from being exposed in certain ways to society's dominant religions."). Garry's article goes on to disagree with this

action that limits free speech directly as they are with state action that may violate the Establishment Clause indirectly.

Brownstein's application of the third principal relies largely on Justice O'Connor's concurring opinion in *Capitol Square Review*, which argued that there are possible exceptions to the rule that private speech from a government platform can never violate the Establishment Clause.[726] On the basis of the endorsement test, she asserted,

> that the Establishment Clause imposes affirmative obligations that may require a State . . . to take steps to avoid being perceived as supporting or endorsing a private religious message. . . . [It] forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.[727]

Thus, regardless of government neutrality, "when the reasonable observer would view a government practice as endorsing religion, . . . it is our *duty* to hold the practice invalid."[728] If then, an observer could reasonably perceive the valedictorian's religious expression as a government endorsement of religion, the government would then have an obligation to avoid such a perception, by censoring the valedictory speech as needed.

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common interpretation and portrays "the Establishment Clause as a structural provision of the Constitution, concerned with democratic processes and limited government, much like the doctrines of federalism and separation of powers." *Id.* In regard to free speech, *see Perry*, 460 U.S. at 57-58.

> The First Amendment's prohibition against government discrimination among viewpoints on particular issues falling within the realm of protected speech has been noted extensively in the opinions of this Court. . . . to allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment.

Id. (internal quotation marks omitted) (citations omitted)); and Drew C. Ensign, *The Impact of Liberty on Stare Decisis: The Rehnquist Court From Casey to Lawrence*, 81 N.Y.U.L. REV. 1137, 1161 (2006). Ensign wrote:

> The Court has repeatedly served as a protector of unpopular minorities whose constitutional rights are threatened by popular majorities. This protective role has perhaps been most evident in the Court's free speech and equal protection jurisprudence. In these fields, the Court has lent support to deeply unpopular and outright oppressed minorities in a manner now celebrated by many commentators.

Id.

726. *Capitol Square*, 515 U.S. at 772-94 (O'Connor, J., concurring).

727. Brownstein, *supra* note 38, at 73-74 (quoting *Capitol Square*, 515 U.S. at 777 (O'Connor, J., concurring)).

728. *Capitol Square*, 515 U.S. at 777 (O'Connor, J., concurring).

O'Connor's position was criticized from both the right and the left of the Court. In the plurality opinion of *Capitol Square*, Justice Scalia quoted O'Connor's dictum from *Mergens* about there being 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."[729] He then remarked that to find government endorsement of private speech when there is in fact no government endorsement is to contradict the dictum, "saying in effect that the 'difference between *government* speech . . . and *private* speech' is not 'crucial.'"[730] On the left, Justice Stevens criticized O'Connor's application of the reasonableness aspect of the endorsement test:

> [H]er reasonable observer is a legal fiction, "'a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'" The ideal human Justice O'Connor describes knows and understands much more than meets the eye. Her "reasonable person" comes off as a well-schooled jurist, a being finer than the tort-law model.[731]

The combined criticism indicates that O'Connor's approach engenders a standard that is highly elastic in it application. By focusing on the indicia of government control, one can fashion the argument that it is reasonable to perceive government sponsorship of religious expression regardless of how independent, even contradictory, the private speech in a limited public forum may be to any message or interests the government actually may wish to convey. To find government sponsorship of religious expression in a valedictory speech would be to ignore what every student knows about the speech: that the student was not chosen by the school, but rather qualified by means of academic performance; or that the school is not likely to have approved the speech at all, but rather opposed it. Such basic knowledge about the valedictory speech would not require the idealized Stevens' caricature of

729. *Id.* at 765-66 (quoting *Mergens*, 496 U.S. at 250).

730. *Id.* at 766 n.2.

731. *Id.* at 800 n.5 (Stevens, J., dissenting). Later, Stevens adds,

> Despite the absence of any holding on this point, Justice O'CONNOR assumes that a reasonable observer would not impute the content of an unattended display to the government because that observer would know that the State is required to allow all such displays on Capitol Square. Justice O'CONNOR thus presumes a reasonable observer so prescient as to understand legal doctrines that this Court has not yet adopted.

Id. at 804 n.7 (internal citations omitted).

O'Connor's reasonable observer. As Justice Souter, whose position is very close to that of O'Connor's, has stated, "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker . . . ."[732]

Brownstein concedes that "unsupervised student speakers selected under truly neutral criteria may be able to offer prayers or religious proselytizing in the time allotted to them in the graduation program without violating constitutional constraints."[733] "At least," he continues, "this is an open question . . . ."[734] He believes that his approach would not result in the exclusion of all religious references.[735] "The Establishment Clause prohibition . . . does not preclude a student from acknowledging the important role that religion plays in his life."[736] Nor does it prohibit "a discussion that includes religious perspectives," or "solemnizing of the event through personal prayer."[737] This view comes very close to the one supported in this Article. However, in contrast to this Article, Brownstein expresses strong misgivings about extending free speech protections to students at graduation to protect such religious expression:

> [S]tructuring graduation ceremonies so that student speakers are protected by free speech doctrine substantially increases the likelihood that some graduates and members of the audience will be seriously and unnecessarily offended. . . . If Chris Niemeyer can call people to Christ in his graduation speech, then school officials have no basis for restricting the remarks of another student who intends to urge members of the commencement audience to renounce their commitment to Christ. From the perspective of free speech doctrine, both viewpoints are equally

732. *Id.* at 786 (Souter, J., concurring). In the context of graduation ceremonies, the application of O'Connor's view that the state should take affirmative steps to avoid the reasonable perception that the government has endorsed private religious expression would likely have a decided chilling effect on the free speech that would include such expression. To avoid the appearance of such illicit endorsement, school officials would eradicate any suggestion of private religious expression at graduation fearing it could be interpreted as state sponsored. The effect of O'Connor's approach, then, would encourage school control of student speech at graduation.

733. *See* Brownstein, *supra* note 38, at 77.

734. *Id.*

735. *Id.* at 80.

736. *Id.*

737. *Id.*

> deserving of protection if either one is permitted to be expressed.[738]

Although the application of free speech rights to the valedictory speech creates the likelihood of *offense* in regard to religious as well as non-religious expression, offense is not a constitutional violation, especially when it emanates from private as opposed to government speech. On the other hand, if courts construe the free speech interest out of graduation ceremonies, including the valedictory speech, then there is no protection for the valedictorian to articulate any unpopular religious or non-religious perspective, or any point of view to which school authorities object.[739] There are those who are offended at the slightest hint of a religious reference or perspective.[740] In *Nurre*, the court noted complaints about religious music at the high school graduation which likely led to the school district's prohibition of an instrumental piece of music merely because of its sectarian name.[741] Without the application of the free speech protection against viewpoint discrimination, there is nothing to protect any religious references and perspectives from those who cannot tolerate any religious expression whatsoever despite the historical, social and political importance of religion to America's history and to civilization in general. Whatever artistic, historical, and moral value these perspectives have to offer can be banished at the political whim of the local school board.

D. The Establishment Clause Interest Not at the Expense of Free Speech

The valedictorian at a graduation ceremony can lay claim to a First Amendment right of free speech on at least two bases: the *Tinker* holding[742] and public forum analysis.[743] The difficulty with the claim that the valedictorian's religious expression violates the Establishment Clause rights of those who dissent is that such rights are violated only when the

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738. *Id.* at 79.

739. See the discussion concerning Tiffany Schley, *supra* notes 570-581 and accompanying text, and the discussion concerning the *Nurre* case, *supra* Part III.D.4 and *infra* note 743 and accompanying text.

740. This is particularly true where the majority of the audience does not care for the perspective of a student who belongs to an unpopular minority religion.

741. *Nurre*, 520 F. Supp. 2d at 1239.

742. *Tinker*, 393 U.S. at 740 (finding that the school house gate does not divest public school students of their free speech rights, as long as the speech they practice does not disrupt the school's order, discipline or mission or compromise the rights of other students).

743. *See, e.g., Perry*, 460 U.S. at 45-46 (protecting the free speech rights of a private speaker where the government has created a limited public forum by practice or policy).

government speaks or sponsors the religious expression. Under the circumstances of a valedictory speech in which the public school does not select or influence the valedictorian to use religious expression, the government is not speaking or sponsoring the speech or opinion of the valedictorian, so that the government is not violating the rights of those who disagree with the valedictorian about religion.

Neither the *Lemon* test nor the endorsement test will produce an Establishment Clause violation when the school selects the valedictorian by objective criteria and allows the student the freedom to deliver a religious message if the student so chooses. Under the *Lemon* test, "First, the [government action] must have a secular legislative purpose; Second, its principal or primary effect must be one that neither advances nor inhibits religion; Third, the statute must not foster an excessive government entanglement with religion."[744] Giving a graduating senior the freedom and opportunity to express the student's perspective to the members of the class and their families teaches responsibility and discretion in addressing the public and allows the audience to hear what the new graduates are thinking. This is an unobjectionable secular purpose. The primary effect of the custom neither advances nor inhibits religion because the valedictorian is as free to express an anti-religious point of view as a pro-religious point of view, or no religious view at all. Finally, the school avoids excessive entanglement with religion by not attempting to censor the speech in order to exclude religion. There would be more entanglement if the school attempted to censor religious expression.

The widest range of the endorsement test identifies a violation when a reasonable observer would perceive government sponsorship of religion in the valedictory speech.[745] But if it is well-known that the valedictorian is responsible for the speech, then the reasonable observer would have to assign endorsement of the speech to the private speaker rather than to the government.

It is only the coercion test that provides a principled argument that would protect the Establishment Clause interest without necessarily disturbing the valedictorian's free speech right to engage in religious expression. Under the coercion test, two prongs must be satisfied: (1) state action, and (2) government coercion.[746] In *Lee*, the facts that support each of these prongs are clearly separate from one another. Here, however, where the state action must be construed expansively, the elements and the facts supporting the elements overlap to a much greater

744. *Lemon*, 403 U.S. at 612-13 (internal citations omitted).

745. *See supra* note 730 and accompanying text.

746. *Lee*, 505 U.S. at 586.

extent, making them more difficult to separate. However, overlapping though the elements may be, they are not indivisible.

In regard to coercion, courts and commentators have observed that the graduation audience is a captive audience. As noted above, this distinction regarding graduation ceremonies is not unassailable in that *Mergens* explicitly allowed the recruiting efforts of student religious groups in school through "the school newspaper, bulletin boards, public address system, and the annual Club Fair,"[747] which may include assemblies that school children are required to attend without the presence of parents who can protect them from religious ideas which the parents find objectionable. Under these circumstances, there exists a level of peer pressure which, apparently, can be tolerated. However, it is clear that school officials may not allow further pressure or influence on students to attend the meetings of these groups where extensive proselytizing or religious ritual may take place. This limited exposure to religious expression may indicate a solution for the graduation ceremony in which the valedictorian, having a right of free speech, may present a religious perspective, but not to the extent where the expression becomes a religious activity that is imposed on the captive audience. Using the public forum to force such activities upon the religious dissenters in the audience would create much the same burden that the State is forbidden to impose under *Lee*.[748]

There is a difference in that the dissenters know that a student rather than the government has imposed this burden. However, the student's conscription of government power to do this before a captive audience warrants closer scrutiny. If the student were preaching or praying in a traditional public forum, such as a park or a street, the religious dissenter, upon hearing and understanding the message to be religious, can walk away. Similarly, in a designated public forum, the dissenter can turn away from a display or choose to leave, not attend, or not listen to a particular address. Or, if the rules of the forum permit, the dissenter may voice disagreement. But as *Lee* has it, "[e]veryone knows that in our society and in our culture high school graduation is one of life's most significant occasions."[749] The imposition of a religious activity places a burden on the graduate's desire to attend the graduation. To walk away,

747. *Mergens*, 496 U.S. at 247.

748. *Lee*, 505 U.S. at 596. The dissenting student is forced to choose between appearing to participate in a religious ceremony or missing the student's graduation ceremony.

749. *Id.* at 595.

leave, or not attend a graduation ceremony is difficult. To protest may not be permitted.[750]

Under Supreme Court precedent, then, the valedictorian's religious expression meets the coercion requirement if a religious activity is imposed on the audience. This leads to the issue of state action. Under the circumstances in which the school chooses a valedictorian by neutral academic criteria, and the valedictorian speaks freely, the government has acted neutrally. It is the valedictorian who speaks, not the government. If the valedictorian expresses a religious point of view, the government is not advancing religion, nor endorsing it. However, if the valedictorian uses the government platform to coerce the audience into attending a religious activity, the valedictorian has made the government complicit in the coercion on account of its role in sponsoring the graduation ceremony.

There is a suggestion from the Supreme Court's public forum cases as to when private speech breaches the Establishment Clause despite the government's ostensible neutrality. In *Widmar v. Vincent*, the Supreme Court held that when a public university establishes an open forum in which student groups use university facilities for expressive activities, the university does not violate the Establishment Clause by permitting a religious student group to use its facilities on an equal basis with other groups.[751] However, upon this approval for the religious use of public facilities, the Court placed the condition that religious groups not dominate the forum. "At least in the absence of empirical evidence that religious groups will dominate [the university's] open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's 'primary effect.'"[752] This condition is mentioned by Justice

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750. *See* Paul E. McGreal, *Social Capital in Constitutional Law: The Case of Religious Norm Enforcement Through Prayer at Public Occasions*, 40 ARIZ. ST. L.J. 585, 637 (2008) (presenting a theory on how prayer on public occasions projects the social power of religious groups). "Religious communities can use public prayer to monitor adherence to the community's norms of belief and behavior. The public prayer is a religious test, with those who object or abstain from participation in the prayer receiving a failing grade." *Id.*

751. *Widmar*, 454 U.S. at 274-75.

752. *Id.* at 275. Steven G. Gey, *When Is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379, 445 (2000) (proposing an "opt out rule" in which private religious speech in a government forum may be limited when it so dominates the forum that "dissenters will feel . . . obliged to opt out of the forum to avoid subjecting themselves to a hostile religious exercise"). He further proposes four elements that indicate when private religious speech in a government space violates the Establishment Clause:

> (1) the scale of the religious exercise is such that it essentially monopolizes a significant portion of a particular forum; (2) the religious speech is repetitive and frequent, thus constantly reinforcing the perceived link

Souter in his dissent in *Good News Club*,[753] and by Justice O'Connor in her concurrences in *Rosenberger* and *Capitol Square*.[754] It appears to be behind the belief of these justices that an Establishment Clause violation can occur even when the government has done nothing to endorse a religious message.

In reference to the graduation context, the *Widmar* condition should apply if religious students, given the freedom to plan or speak at graduation, so dominated the graduation with religious expression that the public forums at the graduation ceremony became religious activities in tone or substance. If that were to occur, the religious dissenters could point to the *Widmar* condition in complaining of an Establishment Clause violation.[755]

Of course, usually only one individual, as opposed to several groups, is involved in the valedictory speech. Nevertheless, when there is only one valedictorian permitted to speak, that individual speaker dominates the public forum created by the valedictory portion of the graduation ceremony. As noted earlier, in vindicating the rights of students to engage in genuinely student-initiated religious speech at school, the Eleventh Circuit made an exception: "[A] student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience."[756]

> between the government forum and the religious perspective; (3) the religious speech takes a form that is especially intrusive on unwilling observers; and (4) the religious speech alters the forum in a way that draws attention to the relationship between religion and government.

Id.

753. *Good News Club*, 533 U.S. at 142 (Souter, J., dissenting).

754. *Rosenberger*, 515 U.S. at 851 (O'Connor, J., concurring); *Capitol Square*, 515 U.S. at 777-78 (O'Connor, J., concurring in part and concurring in judgment). In his *Capitol Square* concurrence, Justice Souter argued that *Mergens* arrived at its conclusion that private student speech in a limited public forum did not violate the Establishment Clause not by "applying an irrebuttable presumption," that this could never happen, but by "making a contextual judgment taking account of the circumstances of the specific case." *Id.* at 788-89. Justice Brennan also quotes the condition in his *Lynch* dissent, 465 U.S. at 702 (Brennan, J., dissenting).

755. Whether Justice Scalia would agree to this limitation is uncertain. He would recognize an Establishment Clause violation only if there is some element of government complicity with religious expression:

> [O]ne can conceive of a case in which a governmental entity manipulates its administration of a public forum close to the seat of government (or within a government building) in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement *that is in fact accurate.*

Capitol Square, 515 U.S. at 766.

756. *Chandler*, 180 F.3d at 1265.

If courts may expand their construction of the state power involved on the basis of balancing the value of the private practice against the harm the private practice does to a constitutional interest, then courts might construe the school's permission for the valedictorian to speak as sufficient state action to satisfy the state action prong of the coercion test, but only where the balance between free speech rights and Establishment Clause rights tips in favor of the latter. And that would be where the speech imposes a religious activity on the audience. As the Eleventh Circuit indicated in *Chandler*, "[W]e must fulfill the constitutional requirement of *permitting* students freely to express their religious beliefs without allowing the machinery of the government . . . to be used to command prayer."[757] In managing this student expression, the first of several operating principles that Foehrenbach Brown has recommended may be helpful: "[A] student will not be required to conceal or suppress critical elements [of her identity] such as religious beliefs . . . , but a student may have to modulate such expression in order to avoid turning the expression of personal beliefs into a demand that others adopt them; . . ."[758] The task is to draw the line where religious expression does so much constitutional harm to Establishment Clause rights that these rights outweigh the value of the free speech right.

This resolution of the conflicting claims of free speech and the Establishment Clause makes use of Brownstein's approach of expanding state action, but limits the approach in at least two distinct ways.[759] First, this approach does not denigrate the free speech interest of the valedictorian speech in order to protect the Establishment Clause interest. Rather, this solution attempts to give both rights their due. The Establishment Clause does not completely prevail, nor does free speech. Application of any expansion of state action to meet the first prong of the coercion test would be limited to the area of speech which coerces the audience to be present at a religious practice they do not wish to attend. Secondly, although such an expansive construction of the state domination involves a balancing, the solution recommended here invests the balancing with some principles derived from Supreme Court case law. The solution does not leave the courts with the wide open task of balancing the constitutional harm done by religious expression to a captive audience against the value of the private exercise of free speech in a limited public forum. Rather, the solution indicates the area of speech where the constitutional harm occurs to be where the free speech so dominates the forum that it commandeers government power to coerce

757. *Id.* at 1263-64.

758. Foehrenbach Brown, *supra* note 41, at 32.

759. *See* Brownstein, *supra* note 38.

the audience. This is the only area of private religious expression which is subject to censorship.

E. A Proposal

In deciding how much religious expression a valedictorian may be permitted at graduation, there are three obvious choices. The first is to allow virtually no religious expression. A second is to allow the valedictorian complete freedom of religious expression. The third is to draw a line between what is permissible and what is not.

The first two choices would, in some ways, be far easier to implement than the third. To completely eliminate religious expression would for the most part clearly eliminate the likelihood of an Establishment Clause violation. However, the suppression would create tensions and frustrations for valedictorians who are prevented from discussing what they genuinely think is most important in life. [760] Such strict censorship, suggestive of intolerance for religion, is not congenial to a democratic society in which free speech is valued and religion respected. What knowledge or wisdom religious views may offer could not be included even for their secular value. Under a regime of complete censorship, the schools and courts will entangle themselves with the task of deciding what constitutes religious expression.[761]

Allowing unfettered religious expression in the valedictorian speech, though it may be even simpler to implement, only mirrors the first solution in elevating the free speech interest to the detriment of the Establishment Clause interest. Such license would lead to situations in which sectarian prayer or advocacy will not only offend, but force members of the audience to attend something resembling a religious observance.[762] The same freedom would have to be extended to all individuals who qualify to be valedictorians, so that religious members of the audience in their turn might have to hear the anti-religious arguments of the earnest atheist or the diabolical musings of the brilliant Satanist.

Ironically, the current rulings of the courts seem to allow only these extreme choices to school officials. If the school officials choose to review the valedictory speech, it takes on the endorsement of the state, so

760. *See* the examples of Brittany McComb, *supra* notes 1-25 and accompanying text; Erica Corder, *supra* notes 28-30 and accompanying text; and Megan Chapman, *supra* notes 31-34 and accompanying text.

761. *See Adler*, 206 F.3d at 1090 n.11.

762. *See* the example of Shannon Spaulding, *supra* notes 34-37 and accompanying text.

that any religious expression may violate the Establishment Clause and therefore must be censored. If, on the other hand, school officials do not review the speech, there is no state endorsement of religious expression, and the valedictorian may impose proselytizing speech and prayer upon the audience with no limit.

Difficult though it may be, drawing a line is the most desirable solution, or the least undesirable. This is because both free speech and Establishment Clause interests are involved. Neither one should unduly suffer for the purpose of respecting the other. There would then be an area of religious expression in which the interests of free speech would predominate, and an area of religious expression in which the interests of the Establishment Clause would prevail. It is only when the valedictorian's speech shades into imposing a religious activity on the audience that the valedictorian would be leaving the area of protected free speech and straying into a prohibited area where the Establishment Clause interest is uppermost.

Religious expression that does not impose a religious activity on the audience would then be permissible. The valedictorian may speak about religion in the context of literature, or history, or art.[763] The valedictorian may quote the scripture of a religion for a moral lesson, or speak of her personal religious experience, faith and beliefs, even if this involves sectarian references.[764] The valedictorian, however, may not lead the graduation audience in a group prayer because a group prayer would be a kind of religious observance or ritual. The valedictorian may, perhaps, recite a brief personal prayer, as long as it does not engage audience participation.

Proselytizing speech is the most difficult area to categorize and police. As Christian M. Keiner has pointed out, many jurists prohibit this speech at graduation ceremonies without defining what exactly it is. [765] The Merriam Webster Online Dictionary defines the intransitive form of the verb as "1: to induce someone to convert to one's faith; 2: to recruit someone to join one's party, institution, or cause."[766] Proselytizing speech, then, is a type of advocacy or persuasive speech. It could be construed broadly, so that it could include any speech presenting a

763. *Supra* note 500.

764. *Supra* notes 307 and 735.

765. Christian M. Keiner, *Preaching from the State's Podium: What Speech is Proselytizing Prohibited by the Establishment Clause?* 21 BYU J. PUB. L. 83 (2007). Keiner's view that the intent of the speaker should identify proselytizing speech is too broad because it could go so far as to include the speaker's intent to present her religion in a positive light in the hope that some may consider it. The standard of assessing intent would also be difficult to apply.

766. Merriam-Webster Online Dictionary, *supra* note 40.

positive view of religion. It could also be construed narrowly, so that only aggressive or lengthy advocacy is included. Proselytizing might impose a message that the person does not care to hear. However, such speech does not force a person to attend a religious activity unless the advocacy itself is sufficiently aggressive or extensive to qualify as a religious activity by itself. To the extent a dissenter is forced to listen to the proselytizing speaker, the dissenter is then coerced to participate in the religious activity of listening to preaching.

The valedictorian, on the other hand, has an interest in free speech, a right to express a religious viewpoint or perspective. The Supreme Court has generally regarded proselytizing speech as core free speech protected by the First Amendment.[767] The government cannot completely protect religious dissenters from hearing a proselytizing message in a traditional or designated public forum, though, as indicated earlier, the dissenter generally has the option of ignoring the message by walking away or not listening. But these are not options that members of a captive audience can easily execute, so that a limit on proselytizing speech before a captive audience is appropriate.[768] Just as a person who enters a traditional or designated public forum may be subject to hearing some proselytizing speech, but is not forced to continue listening, in the designated public forum of the valedictory speech, the valedictorian may

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767. *Cole* argues with some validity that proselytizing is a religious activity, so that permitting Niemeyer to give his proselytizing speech would have had a coercive effect prohibited by *Lee*. *Cole*, 228 F.3d at 1103. "Including Niemeyer's sectarian, proselytizing speech as part of the graduation ceremony also would have constituted District coercion of attendance and participation in a religious practice because proselytizing, no less than prayer, is a religious practice." *Id.* at 1104. However, the Supreme Court has protected proselytizing under the Free Speech Clause from Establishment Clause attack. Consider *Good News Club*:

> What is at play here is not coercion, but the compulsion of ideas-and the private right to exert and receive that compulsion (or to have one's children receive it) is *protected* by the Free Speech and Free Exercise Clauses, . . . not banned by the Establishment Clause. A priest has as much liberty to proselytize as a patriot.

Good News Club, 533 U.S. at 121. And *Capitol Square*: "Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, or even acts of worship." 515 U.S. at 760 (internal citations omitted).

768. Although the Supreme Court protected religious prayer and advocacy from viewpoint discrimination in *Good News Club*, participation in these activities was voluntary. 533 U.S. at 101-03. A court could carve out an exception to what would otherwise be viewpoint discrimination for speech which imposes group prayer or proselytizing on an audience that is captive within a government sponsored event.

be permitted to express a proselytizing viewpoint, but not to express this viewpoint in an aggressive manner, which would threaten or demean other beliefs, or to expand on the proselytizing view to where the religious expression becomes sermonizing or preaching.

Drawing this line is indeed a matter of setting the rules of constitutional etiquette. Unfortunately, free speech is not generally a matter of etiquette.[769] Protected speech can be rude and offensive. Religiously committed valedictorians may believe that the promulgation of their beliefs should trump any rules of etiquette. As noted above, the *Tinker* line of cases permits the limitation of student speech which is materially and substantially disruptive of the school's educational mission or discipline or is violative of the rights of other students. Therefore, under *Tinker*, religious expression which is explicitly threatening or aggressive, for example, in raising fears of eternal punishment or criticizing other beliefs, can justly be relegated to the category of speech which may be limited because it undermines the educational mission of the school to cultivate the unity and solidarity of the student body and to avoid rancor and resentment at an event such as graduation.[770] Also under *Tinker* and its progeny, a lengthy doctrinal speech, to the extent it imposes a religious activity, like a sermon, on the audience, may be prohibited because it would violate the Establishment Clause rights of other students via the coercion test.[771] Under public forum analysis, the valedictorian's religious expression ceases to have the protection of free speech when it becomes aggressive and lengthy because at that point, with the complicity of the state, such speech places a material burden on the Establishment Clause rights of dissenters that outweighs the free speech rights of the valedictorian. Thus, the school may permit the valedictorian to speak of the benefits of her faith, even to the point of inviting the audience to consider her beliefs. But the valedictorian may not go beyond a brief, non-aggressive statement of her proselytizing point of view because doing so would be a form of coercive sermonizing.[772]

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769. *See* Brownstein, *supra* note 38.

770. *See Tinker*, 393 U.S. at 508-09.

771. *See id.*

772. Brownstein, *supra* note 38 at 105-07. The Supreme Court has stated, "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content based restrictions on speech." *Capitol Square*, 515 U.S. at 761-62 (citing *Lamb's Chapel*, 508 U.S. at 394-95). However, "[I]t is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination." *Good News Club*, 533 U.S. at 113 (citing *Lamb's Chapel*, 508 U.S. at 394-95). *Compare* Kathleen A. Brady's baseline rules for treating "grey area" religious speech: (1) "when student religious expression is entirely student-initiated and the school

There will be many challenges in applying this solution. There will be disagreements on what speech is sufficiently aggressive or lengthy to merit censorship. An approach of reasonableness might allow school officials some discretion in making decisions about what to permit. Hence, school officials will not be violating the Constitution if they allow a proselytizing statement that is reasonably respectful of other beliefs and brief, and that does not threaten, overawe or elaborate at length. Nor will they be violating the Constitution if they censor a speech which can reasonably be perceived as critical or condemnatory of other beliefs, or long-winded or protracted beyond a short statement of the speaker's proselytizing view. It will still be difficult to monitor a clever student who might use the permissible area of religious expression to broadly imply, rather than state outright, that everyone should accept a particular religion or reject another. The tendency to proselytize will be strong for a student who passionately believes in converting others as opposed to one who can speak about religion with dispassionate objectivity.[773]

This line-drawing approach involves censorship and at least some of the ills that have been discussed earlier. But what would be censored is not religious expression per se, but rather aggressive and lengthy religious expression. Thus, school officials would not be censoring a sectarian reference on sight, but rather they would be censoring proselytizing speech or prayer that goes somewhat beyond the statement of a viewpoint so as to coerce the audience into attending a religious activity.

Some religious groups may complain that the suppression of aggressive and lengthy religious advocacy disfavors religions which place an emphasis on conversion while it favors others which do not. However, the standard envisioned here would prohibit religious expression only to the extent that it impinges on the rights others have

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has not taken any action to provide the opportunity for religious speech, the expression should receive the same protections that secular speech does;" (2) "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." Brady, *supra* note 250, at 1225-27. Brady also suggests that "[s]chools should be allowed to restrict religious speech where it is primarily designed to proselytize a specific student audience and is delivered from a school stage or other type of school platform or 'pulpit.'" *Id.* at 1231. Aside from religious expression that is "primarily proselytizing," Brady suggests that "schools should not interfere with student religious expression even if the speech has proselytizing elements." *Id.* at 1232.

773. *See* DELFATTORE, *supra* note 139, at 229-54, on how public school efforts to teach the Bible as history degenerated into doctrinal teaching of the Bible as revealed religion.

under the Establishment Clause to be free of speech that imposes a religious ritual or proselytizing speech on the captive audience at a public ceremony. It is hoped that the protection that this approach does afford to some religious expression will make it easier for religiously-minded valedictorians and school officials to compromise and reach agreement on the content of the valedictory speech.

Some might argue that any review by school officials that would permit religious expression would be an automatic government endorsement of that expression. This would be true if the advice the student received from the reviewing school employee encouraged the religious expression. However, if the review limited itself to the elements of grammar, style, rhetorical efficacy, and even recommended the avoidance of controversial subjects such as religious expression, these recommendations, to the extent they are government speech, would be constitutionally acceptable as long as the school employees are not influencing the student towards religious expression. Furthermore, school officials may not demand changes or censor the speech unless it contains expression that would not be protected by the First Amendment,[774] or by *Tinker*,[775] or religious expression that would violate the Establishment Clause as defined above. Aside from this, the student makes the decision of what advice and instruction to accept, and the final product is the student's speech, not the government's.

Unless the speaker egregiously violates rules of decorum in departing from the reviewed speech, there should be no need to cut off the microphone of such a speaker, or escort her from the stage, or withhold her diploma or transcripts. School officials may disclaim the speech. A disclaimer would not suffice, indeed, would not make any sense, if the speech were endorsed by the school. But if the speech is genuinely private speech not under the control of school officials because it is the student's own point of view or because the student is extemporizing, school officials should be able to disclaim it as they are not responsible for it.[776]

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774. Examples of speech that the Free Speech Clause does not protect include: fighting words, incitement to crime, obscene matter. *See* 16A AM. JUR. 2D *Constitutional Law* §§ 502-04.

775. Under *Tinker*, to censor student speech, it must "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "impinge upon the rights of other students" to "be secure and to be let alone." 393 U.S. at 508-09. *See also Bethel*, 478 U.S. 675 (adding limitations for lewd speech); *Hazelwood*, 484 U.S. 260 (limiting speech reasonably bearing the imprimatur of the school); *Morse*, 127 S. Ct. 2618 (prohibiting speech encouraging the use of illegal drugs).

776. This rule, admittedly, would make it safer for school officials to allow the extemporizing speech, since stopping it could involve liability for violating free speech

There is a case that is supportive of this result. In *Doe ex rel. Doe v. The School District of the City of Norfolk*, the Eighth Circuit addressed a graduation at the Norfolk Senior High School in which the school board agreed to remove nonsectarian prayers from the graduation program as a result of a lawsuit threatened by the ACLU.[777] The president of the school board announced the change and the reasons for it at the beginning of the ceremony.[778] At some point during the ceremony, a member of the school board who was the father of one of the graduates asked for and was given permission to address the audience.[779] During his speech, he recited the Lord's Prayer.[780] Although no school official interrupted him or disclaimed his recitation, there was "no evidence that any School District officials knew about [his] intentions prior to the speech."[781] In fact, the school officials were "shocked and surprised."[782] Despite the speaker's school board membership, the court found, "The complete absence of any involvement by the School District in determining whether [the speaker] would deliver a speech as well as the complete autonomy afforded to [him] in determining the content of his remarks indicates a lack of state-sponsorship of his recitation."[783] In conclusion, "There being no affirmative sponsorship of the practice of prayer in this case, no constitutional violation has occurred."[784] The circuit court agreed with the district court that the speaker acted in circumvention of the school district's policy.[785]

The opinion does not support the freedom of a valedictory speaker to lead a prayer from a government platform.[786] Nor would it take school officials off the hook had they known ahead of time what the speaker in this case intended to say.[787] However, it does clear the school district of

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rights if school officials were wrong in their spur of the moment assessment that the speech violated the Establishment Clause. The rule would also weaken the censorship authority of school officials, since a student could agree to a revision, but then give the objectionable version anyway. School officials, however, should not be held liable for violating the Establishment Clause when a student, without notice, breaks an agreement about the content of the speech.

777. 340 F.3d 605, 607 (8th Cir. 2003).

778. *Id.* at 607-08.

779. *Id.* at 608.

780. *Id.*

781. *Id.*

782. *Id.*

783. *Doe ex. rel. Doe*, 340 F.3d at 612.

784. *Id.* at 613.

785. *Id.* at 615.

786. In his concurrence, Judge Riley emphasized that the speaker had acted privately, without the knowledge of the rest of the school board. *Id.* at 616 (Riley, J., concurring).

787. In his dissent, Judge Arnold argued that the speaker acted officially as a consequence of his membership on the school board. *Id.* at 617 (Arnold, J., dissenting).

sponsorship for the speech, even by a member of the board, where the speech was contrary to the school's policy and practice. The same should be true for religious expression delivered by the extemporizing valedictorian. Indeed, if the valedictory speech really does provide an opportunity for a student to exercise responsibility, it is the student who is responsible for the speech, particularly where the student has defied those who, until that moment, had authority over the student. If the student has offended some members of the audience, experiencing the protest and controversy might teach the student a valuable lesson about the rights and feelings of others. Such a lesson derived from freedom of speech and experience of the result may be much more enlightening to the valedictorian than a regime of censorship, punishment, or the termination of the valedictorian custom. For such lessons to be learned, however, there would have to be some limit on the liability to which a school may be exposed for allowing the judgment and responsibility of an eighteen year old to be tested.[788]

V. CONCLUSION

On January 20, 2009, the Reverend Rick Warren delivered the invocation at the inauguration of President Barack Obama.[789] He addressed "God, our Father," and quoted from Jewish, Christian, and Muslim scripture.[790] In closing, he prayed to Jesus and recited the Lord's Prayer: "I humbly ask this in the name of the one who changed my life, Yeshua, Isa, Jesus, Jèsus, who taught us to pray, Our Father, who art in heaven. . . ."[791]

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788. *See* Charles I. Russo, *Prayer at Public School Graduation Ceremonies: An Exercise in Futility or a Teachable Moment?*, 1999 B.Y.U. EDUC. & L.J. 1, 20 (Winter, 1999) ("One can only wonder how educators can expect to foster an appreciation of diversity in all of its manifestations if we cannot tolerate expressions of religious or other beliefs that may not be shared by all members of an audience or community.").

789. Transcript of Rick Warren's Inaugural Invocation, January 20, 2009, *available at* http://www.lifesitenews.com/ldn/2009/jan/09012003.html (last visited Nov. 4, 2009).

790. *Id. See also Warren's "Inclusive" Prayer Ignites Reaction: Pastor Quotes from Jewish, Christian, Muslim Scriptures*, WorldNetDaily, *available at* http://www.worldnetdaily.com/index.php?fa=PAGE.view&pageId=86640 (last visited Nov. 4, 2009).

> The compassionate, the merciful is . . . a reference to the invocation at the beginning of every chapter of the Qur'an except one . . . . Warren also included the foundational Jewish prayer Shema Ysrael, "Hear, O Israel, the Lord is our God, the Lord is one," and the prayer beginning with the words "Our Father," revered by Christians as the Lord's Prayer.

Id.

791. Transcript of Rick Warren, *supra* note 792.

Under the thinking the courts have articulated in regard to private religious expression at school-sponsored graduations, how is this invocation at a government-sponsored event distinguishable? Courts have pointed to the indicia of government sponsorship at graduations, the ownership or rental of the space, the control of the sound system, and the assembly of school officials.[792] But these are pathetically Lilliputian in comparison to the indicia of government sponsorship at a president's inauguration, at which members of legislative, judicial, and executive branches of government are present, not to mention municipal, state, and federal police, the FBI, the Secret Service, and indeed the U.S. Armed Forces, to protect an event observed at the nation's seat of power.

Courts have pointed to the captive audience at public school graduations.[793] Admittedly, most of those who witness the inauguration of the U.S. president are doing so voluntarily, but thousands of civil servants attend a president's inaugural because they must, and millions of school children across the nation watch the inauguration on television in classes which they are required to attend. True, prayer at the inauguration, being a long-standing tradition, might fall into the *Marsh* exception for legislative prayer, but prayer at graduation is also traditional.[794] Unlike graduations in which parents are present and may advise their children about any objectionable religious expression to which the children are exposed, children who view the president's inauguration in school do not have their parents present.

In essence, it seems anomalous that for a fraction of the religious expression which Reverend Warren could voice at a presidential inauguration, an eighteen-year-old valedictorian, speaking at her high school graduation, would have her microphone summarily cut off. If there is a constitutional etiquette which requires speakers at public events to take into consideration the feelings of those who would dissent from their religious views, then there should exist a corresponding constitutional etiquette requiring some degree of tolerance on the part of dissenters for the private speech of the speaker who feels compelled to draw from religion in comprehending the event.[795]

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792. *See, e.g., Santa Fe*, 530 U.S. at 307-08.

793. *See, e.g., Harris*, 41 F.3d at 456.

794. *Marsh*, 463 U.S. at 792. In his *Lee* dissent, Justice Scalia says the decision "lays waste a tradition that is as old as public school graduation ceremonies themselves, . . ." *Lee*, 505 U.S. at 632 (Scalia, J., dissenting).

795. *See* Brownstein, *supra* note 38, at 61.