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Those Dangerous Student Prayers.

Kelly J. Coghlan

THOSE DANGEROUS STUDENT PRAYERS

KELLY J. COGHLAN*

* Kelly J. Coghlan is an attorney in Houston, Texas, a *cum laude* and *Order of the Coif* graduate of the Southern Methodist University School of Law and a *cum laude* and M Award graduate of the Southern Methodist University School of Business. His principle areas of practice are litigation, school law, and constitutional law. He is a Fellow of the Houston Bar Association and a Fellow of the College of the State Bar of Texas. Mr. Coghlan represented 159 Santa Fe High School students and parents *pro bono* as *amici curiae* before the United States Supreme Court in *Santa Fe Independent School District v. Doe* and continues to represent Marian Ward *pro bono* in *Ward v. Santa Fe Independent School District*, having obtained the first injunction issued by a federal court to prevent a school district from punishing a student for praying. Mr. Coghlan was named an Impact Player of the Year in 1999 by The Texas Lawyer for his work in school law matters. His website, www.saferschools.org, focuses on school law/constitutional issues.

Author's Notes: After this Article went to press, the United States Supreme Court issued its ruling in *Good News v. Milford Central School*, 121 S. Ct. 2093 (2001). The Court's opinion reinforces the analytical approach presented in this Article. Additionally, the Eleventh Circuit issued an *en banc* ruling in *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001) (*en banc*), further supporting the analytical approach of this Article.

As is demonstrated in the Article, First Amendment matters are extremely fact sensitive and do not lend themselves to a fixed *per se* rule. This Article makes no warranties or representations, express or implied, nor do the contents of the Article constitute legal advice. Anyone seeking legal advice should contact an attorney directly and seek a detailed analysis of their particular facts and applicability of the law to those particular facts.

I. INTRODUCTION

Picture an early September evening in small town America. Spectators are filling the high school football stadium, the band is warming up, and the first football game of the season is soon to begin. The energized crowd anxiously awaits the pregame ceremonies and kick-off. In the press box, a student steps to the microphone and says, "Let us have a safe game tonight; please stand for the National Anthem." One week later, the hometown crowd again gathers for the second game of the season. A second student steps to the microphone and gives the identical message as the first student, except for the addition of one word, saying: "God, let us have a safe game tonight; please stand for the National Anthem."

The topic of both messages is the same—safety. Should it matter constitutionally that the first student's approach stems from a secular-based viewpoint, and the second student's approach stems from a faith-based viewpoint? What is it about the second student's "prayer" that would cause some to consider the speech offensive or even "dangerous"? Is there danger in allowing genuinely voluntary, faith-based speech to coexist in public schools on an equal playing field with secular speech addressing similar subjects?[1]

If the students voluntarily made both expressions without the government highlighting prayer as a favored practice, does the Constitution require discrimination[2] against the second student and

1. *See God and Man and W.*, WALL ST. J., MAY 23, 2001, at A26 ("'The least that can be expected from a university graduate,' Harvard President Nathan Pusey once said, is an ability to 'pronounce the name of God without embarrassment.' These days, of course, you pronounce the name of God at a high school football game and somebody calls in the Supreme Court"); *see also* John Stossel, *You Can't Say That! What's Happening to Free Speech?* (ABC television broadcast, July 27, 2000) (proclaiming that "words are words, and bullets are bullets, and it's important to our freedom that we keep them apart").

2. Such discrimination might include, *inter alia*, censorship and perhaps punishment for publicly expressing a faith-based viewpoint on the topic of safety. It is undisputed that school districts have the authority to prohibit and/or punish obscene speech. *See* Ginsberg v. New York, 390 U.S. 629, 635 (1968). The use of vulgar terms and offensively lewd and indecent speech can also be prohibited by schools. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683, 685 (1986). Students' actions that materially and substantially disrupt the work and discipline of the school, or substantially disrupt or materially interfere with school activities, can be prohibited by schools. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513-14 (1968). Expressing a faith-based view of an otherwise includable subject, however, does not fall within the parameters of any of these proscriptions.

his or her faith-based point-of-view?[3] As shown in this Article, the Constitution requires school districts to treat both students and both viewpoints with impartiality and neutrality. It is not the government's proper role to use its persuasive power to discriminate against religious students and their preferred view in favor of secular students and their preferred view.

This Article sets forth a framework from which judgments may be made concerning legal questions such as the one posed above as well as other related faith-based/school-law issues. The suggested analytical approach utilized herein is based on the current state of the law, the latest legal precedent, and the latest legal thinking among constitutional attorneys who practice in this area. Part II includes a historical review of faith-based expression within government forums, including a discussion of the historical setting of the First Amendment, the Framers' original intent, and the state of the "wall of separation between church and state." Part III reviews the judicial development and application of the First Amendment to faith-based matters prior to the United States Supreme Court's decision in *Santa Fe Independent School District v. Doe*.[4] Part IV analyzes the Court's decision in *Santa Fe*, discusses the guidance the decision offers to school districts in addressing school prayer and other faith-based issues, and analyzes recent appellate cases that have interpreted and applied *Santa Fe*. Finally, Part V sets forth new student speaker policies, targeted to comply with *Santa Fe*, drafted by the author for adoption as guidelines by the Texas State Board of Education.

II. HISTORICAL BACKGROUND

"[A] page of history is worth a volume of logic."[5]

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3. Selecting the correct answer affects more than 47 million students attending public schools in America. "Nation-wide more than 52 million children are enrolled in school . . . 89 percent go to public schools . . . . " NBC Nightly News: NBC News in Depth (NBC television broadcast, Feb. 10, 1999). "The federal government said the nation's elementary and secondary schools will enroll a record 53 million students this fall, continuing a decadelong [sic] rise. Officials expect that number to jump to 94 million by the end of the 21st century." *U.S. Schools Break Enrollment Record*, HOUS. CHRON., Aug. 22, 2000, at 1A, 2000 WL 24506197.

4. 530 U.S. 290 (2000).

5. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

A. *The First Amendment—The Twenty-Two Words That Really Matter*

Issues concerning prayer and other faith-based expression in public schools center on the meaning and application of the first twenty-two words of the First Amendment to the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ."[6] The Supreme Court has interpreted the Fourteenth Amendment to the Constitution as imposing First Amendment limitations not only on Congress but also on the legislative power of the states and the states' political subdivisions.[7] As political subdivisions of the states, the Fourteenth Amendment subjects public school districts to the provisions of the First Amendment.

B. *Prayer and Other Faith-Based Speech in Government Forums*

The original intended meaning of the First Amendment can only be ascertained in its historical context. America's founders, many of whom were responsible for drafting and passing the Declaration of Independence,[8] the Constitution, and the Bill of Rights, recognized the historical tradition[9] and benefits, as well as the evident legality, of public prayer, public recognitions of God, and other public faith-based speech proclaimed in government forums.[10] The earliest American private and public schools used such faith-based

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6. U.S. CONST. amend. I.

7. *See* U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"); Wallace v. Jaffree, 472 U.S. 38, 49-50 (1985) (affirming that the Fourteenth Amendment "impose[s] the same substantive limitations on the States' power to legislate that the First Amendment ha[s] always imposed on the Congress' power").

8. *See* THE DECLARATION OF INDEPENDENCE para. 1, 2, 32 (U.S. 1776) (recognizing "nature's God," "Creator," "Supreme Judge," and "Divine Providence").

9. The historical roots of public prayer occurring over groups of people can be traced back to at least the Mosaic era under Jewish law. According to the fourth book of the *Torah*, prayers and blessings were commanded to be vocally and publicly spoken over gatherings of people, and the promise was that, "I [God] *then* will bless them." *See Numbers* 6:27 (Torah) (emphasis added).

10. *See* Appendix A: Historical Notes.

textbooks as the *New England Primer*.[11] The Supreme Court has

11. *See* EARLY AMERICAN TEXTBOOKS 1775-1900, at 71-72 (U.S. Dep't of Educ., 1985). The *New England Primer* was a reading textbook used in the earliest American private and public schools. *Id.* An English edition of the New England Primer was printed by Benjamin Harris in Boston by at least 1690. *See* THE NEW ENGLAND PRIMER, A HISTORY OF ITS ORIGINS AND DEVELOPMENT, *at* Introduction and Plate V illustration (Paul Leichster Ford ed., New York, Dodd, Mead & Co. 1897). The *New England Primer* contained, *inter alia*, The Lord's Prayer, a rhyming alphabet, An Alphabet of Lessons for Youth, hymns, and The Shorter Catechism—employing memory rhymes such as, "In Adams fall, we sinned all," the alphabet accompanied by a *Bible* memory verse for each letter, hymns of "Praise to God" by Rev. Dr. Watts, and a list of questions and answers for students to learn, such as, "What is required in the fourth commandment?" For the 1777 version *see* THE NEW ENGLAND PRIMER (Boston, Edward Draper, 1777), *at* http://my.voyager.net/jayjo/primer.htm. For the 1805 version *see* THE NEW ENGLAND PRIMER 1-71 (Albany, Whiting, Bacrus & Whiting 1805), *at* http://www.gettysburg.edu/~tshannon/his341/nep1805contents.html.

Not only the *New England Primer*, but the *Bible* and *Dr. Watts's Hymns* were used as stand-alone reading texts in the earliest of America's schools. Washington D.C.'s first public schools are illustrative. By amended charter of 1804, Congress authorized the city of Washington, D.C. to provide "for the establishment and superintendence of schools." *See* HISTORY OF THE PUBLIC SCHOOLS OF WASHINGTON CITY, D.C., 1805-1875, at 1 (Samuel Yorke Atlee ed., Washington, M'Gill & Witherow 1876). On December 4, 1804, the first public schools were established by act of City Council, stating: "Impressed with the sense of the inseparable connection between the education of youth and the prevalence of pure morality, and with the duty of all communities to place within the reach of the poor, as well as the rich, the inestimable blessings of knowledge . . . [we hereby establish] Public Schools." *Id.* In July, 1805, Thomas Jefferson, while President of the United States, was elected as an original trustee, and on August 6, 1805 was elected the first president of the first school board of the Washington, D.C. public schools. *Id.* at 2-3. (recording "the election of Thomas Jefferson President" on Aug. 5, 1805, and acknowledging the "letter from President Jefferson accepting the office of President of the Board" dated August 14, 1805). The act establishing the public schools provided that the "President shall remain in office until a new election of President shall take place at the pleasure of the Board." *Id.* at 1. The board's minutes from 1805-1813 do not indicate another election to replace Jefferson as president of the board during this period. *Id.* at 1-12. Jefferson's letter dated September, 1807 confirms that Jefferson was re-appointed to continue serving as president of the school board after having already served from 1805-1807. *See* Letter from Thomas Jefferson to Robert Brent (Sept. 19, 1807), *in* 11 THE WRITINGS OF THOMAS JEFFERSON 372 (Andrew A. Lipscomb ed., 1904) (recording Jefferson's statement, "the Board of Trustees for the public school in Washington had unanimously re-appointed me their President"). It is uncertain how many terms Jefferson served as president of the school board. It is certain that the *Bible* and *Dr. Watts's Hymns* were used as reading texts in the Washington, D.C. public schools from at least February 10, 1812, and most likely prior. *See* HISTORY OF THE PUBLIC SCHOOLS OF WASHINGTON CITY, D.C., 1805-1875, at 12 (Samuel Yorke Atlee ed., Washington, M'Gill & Witherow 1876) (recording a report to the board on February 10, 1813, concerning the progress of school students during the previous twelve months, stating, "Fifty-five have learned to read in the Old and New Testaments, 26 are now learning to read Dr. Watts's Hymns . . . . Out of 59 . . . who did not know a single letter, 20 read in the Bible, 29 in Watts's Hymns . . . . "). This is the first mention of the identity of the textbooks used in the Washington, D.C. public schools, and there is nothing in the board's records to

poignantly acknowledged that "[w]e are a religious people whose institutions presuppose a Supreme Being."[12] From a historical context, those who passed the First Amendment clearly had no intention of proscribing faith-based speech in either the public or private sector.[13]

From 1789 to the present, history has observed all three branches of the government carrying out the original intent of the First Amendment.[14] We can observe today that the Legislative, Judicial, and Executive branches of the federal government place little restriction on their use of public prayer and other faith-based expression in government forums. For instance, Congress, opens every Legislative session with vocal, public prayer.[15] This practice has

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indicate the *Bible* and *Dr. Watts's Hymns* had not been used continually as reading textbooks from the inception of the school in 1805 and during the tenure of Thomas Jefferson as president of the board. Since no board records indicate that there had been a change in textbooks between 1805 and 1813, the implication is that the textbooks mentioned in the 1813 report were the same used from the inception of the public schools.

12. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

13. *See* Lynch v. Donnelly, 465 U.S. 668, 674 (1984). The Court stated:

> It is clear that neither the seventeen draftsmen of the Constitution who were Members of the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of congressional Chaplains to offer daily prayers in the Congress . . . . It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers.

Id.; *see also* Marsh v. Chambers, 463 U.S. 783, 788 (1983) (observing that "the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment"). Strictly from a historical perspective it is not difficult to understand why many would contend that the Founders would have had no intention of proscribing voluntary, public prayer or other faith-based speech by young citizens attending government administered schools.

14. *Lynch*, 465 U.S. at 674 ("There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789"). Why would anyone believe that courts should restrict students' faith-based speech to whispers when the federal government does not restrict its own use of daily, vocal prayers and other faith-based expression to the same standard? The Supreme Court has already acknowledged that high school students are "mature enough" to appreciate the difference between "government speech endorsing religion . . . and private speech endorsing religion." *See* Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990). Thus, arguments focusing on age and impressionability provide no cogent constitutional distinction. Surely the Constitution applies with equality to State governmental subdivisions, such as public schools, as to the three branches of the federal government. That which is constitutionally allowable faith-based speech within the various halls of federal government is surely no less constitutionally allowable when voluntarily expressed by student speakers in public schools.

15. *See Marsh*, 463 U.S. at 786 (noting that "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradi-

continued without interruption since the First Congress.[16] Each day throughout the federal court system, federal law clerks open the sessions with a public, vocal proclamation that ends with the prayer: "God, save the United States and this Honorable Court."[17] Additionally, presidential inaugurations include public prayers,[18] sometimes sectarian and proselytizing,[19] as well as the President-elect placing his hand on the *Bible* while taking an oath of office that ends with the prayerful supplication, "[S]o, help me God."[20] Furthermore, it is not unprecedented for a President, acting in his official capacity as head of the Executive branch, to pray publicly and vocally.[21]

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tion of this country"); *see also Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (explaining that such things as legislative prayers, Thanksgiving holidays, our national motto of "In God We Trust," and federal court supplications of "God save the United States of America," serve "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society").

16. *Marsh*, 463 U.S. at 788 (noting, "the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress").

17. *See* Lee v. Weisman, 505 U.S. 577, 635 (1992) (Scalia, J., dissenting) (noting that the Supreme Court opens its sessions with supplications to God); *see also Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). In fact, some might argue that citizens whose presence is required before the Supreme Court and other federal courts are "captive audiences" to such governmental prayerful speech, yet the courts continue daily, public requests of "God" to "save the United States" and to save the courts.

18. *See generally Lee*, 505 U.S. at 633 (Scalia, J., dissenting) (recognizing the tradition that began with George Washington's inaugural address in which he "made a prayer a part of his first official act as President").

19. *See, e.g.*, Reverend Franklin Graham, Inaugural Invocation at the Inauguration of President George W. Bush (Jan. 20, 2001), *at* http://www.angelfire.com/in/HisName/invocationbenediction.html. Reverend Graham's opening prayer concluded with:

> Now, O Lord, we dedicate this presidential inaugural ceremony to you. May this be the beginning of a new dawn for America as we humble ourselves before you and acknowledge you alone as our Lord, our Savior and our Redeemer.
>
> We pray this in the name of the Father, and of the Son—the Lord Jesus Christ—and of the Holy Spirit. Amen.

Id. Reverend Caldwell's closing prayer concluded with the following: "We respectfully submit this humble prayer in the name that is above all other names, Jesus the Christ. Let all who agree, say Amen." Reverend Kirbyjon Caldwell, Benediction Prayer at the Inauguration of President W. Bush (Jan. 20, 2001), *at* http://ww.angelfire.com/in/HisName/invocationbenediction.html.

20. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

21. *See* George Bush, Inaugural Address of George Bush (Jan. 20, 1989), *at* http://www.cnn.com/ALLPOLITICS/inauguration/2001/story/transcripts/gbush.html. As his "first act as President," George Bush prayed at his inauguration saying:

C. *Wall of Separation Between Church and State*

Contrary to popular belief, the phrase "separation between Church and State" is found neither in the text of the Constitution nor in the months-long congressional debates surrounding the passage of the First Amendment.[22] The Supreme Court first used the phrase "wall of separation between Church and State" as applicable to an Establishment Clause action in the 1947 case of *Everson v. Board of Education.*[23] The Court adopted the phrase found in a short, private note of courtesy written by President Thomas Jefferson to the Danbury Baptist Association.[24] Jefferson's note was in response to concerns that the inclusion of the Religion Clauses in the Constitution would indicate that religious liberties were deemed government-given, as opposed to God-given, inalienable rights, thereby providing the government with the ability to some-

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> Heavenly Father, we bow our heads and thank You for Your love. Accept our thanks for the peace that yields this day and the shared faith that makes its continuance likely. Make us strong to do Your work, willing to heed and hear Your will, and write on our hearts these words: "Use power to help people." For we are given power not to advance our own purposes, nor to make a great show in the world, nor a name. There is but one just use of power, and it is to serve people. Help us to remember it, Lord. Amen.

Id. Cf. Lee, 505 U.S. at 633-34 (Scalia, J., dissenting) (noting, "Thomas Jefferson, for example, prayed in his first inaugural address . . . . In his second inaugural address, Jefferson . . . invited his audience to join his prayer").

22. *See* 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 440-949 (Joseph Gales ed., Washington, Gales & Seaton 1834) (debates regarding passage of the First Amendment from June 8, 1789 to Sept. 24, 1789).

23. 330 U.S. 1, 16 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'") (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).

24. *See* Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a Committee of the Danbury Baptist Association (Jan. 1, 1802), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 281-82 (Andrew A. Lipscomb ed., Library ed. 1903). The note stated, in pertinent part:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," *thus building a wall of separation between Church and State.* Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

Id. (emphasis added).

day interpret the clauses in a way to "punish" or regulate religion or the religious.[25] To allay the Association's fears, Jefferson responded that a "wall" protects the religious from such concerns, arguing that the Religion Clauses "tend to restore to man all his natural rights."[26] In context, Jefferson intended the "wall" as a

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25. *See* Letter from Danbury Baptist Association to Thomas Jefferson (Oct. 7, 1801) (Thomas Jefferson Papers Manuscript Div., Library of Congress) (on file with the *St. Mary's Law Journal*). The Association wrote to Jefferson the following:

> Our sentiments are uniformly on the side of religious liberty . . . that no man ought to suffer . . . on account of his religious opinions [and] that the legitimate power of civil government extends no further than to punish the man who works ill to his neighbor. But sir, our constitution [sic] of government is not specific . . . therefore what religious privileges we enjoy (as a minor part of the State) we enjoy as *favors granted, and not as inalienable rights.*

Id. (first alteration in original) (emphasis added). Although the Supreme Court has looked to Jefferson as an authority on the Establishment Clause, Jefferson was living in France at the time the First Amendment was drafted and approved by Congress. *See* Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting). Jefferson was not consulted about the language of the First Amendment. *See id.* Jefferson's letter to the Danbury Baptist Association was written more than twelve years after Congress passed the First Amendment. *See id.*

26. Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a Committee of the Danbury Baptist Association (Jan. 1, 1802), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 281-82 (Andrew A. Lipscomb ed., Library ed. 1903). Recent discoveries concerning the Danbury letter indicate that Jefferson's principle motive behind the substance of his reply was to mount a political counterattack against his Federalist enemies—currency of a political controversy rather than judicial dogma. *See* James H. Hutson, *Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined*, 56 WM. & MARY Q. 775, 776 (1999) (revealing that Jefferson's reply to the Danbury letter was heavily edited by Jefferson as a result of input from several friends and that the portions blotted out have recently been restored, lending new light to the meaning of the letter):

> New evidence about the Danbury Baptist letter has recently been made public . . . . [T]he FBI discoveries showed that Jefferson's principal motive in writing the Danbury Baptist letter was to mount a political counterattack against his Federalist enemies . . . degrad[ing] the wall of separation metaphor from a judicial dogma to the common currency of political controversy . . . .

Id. As further evidence that modern court's have misconstrued the meaning of Jefferson's reply, it should be noted that: "Jefferson appeared at church services in the House [of Representatives] on Sunday, January 3, [1802] two days after recommending in his reply to the Danbury Baptists a 'wall of separation between church and state.'" *Id.* at 785. "'Jefferson during his whole administration, was a most regular attendant' at House services.'" *Id.* at 786. "Since church services were also held in the Supreme Court between 1801 and 1809, it is accurate to say that on Sundays during Jefferson's administration the state became the church." *Id.* "Jefferson's action on January 3, 1802, less than forty-eight hours after issuing the Danbury Baptist letter, must be considered a form of symbolic speech that completes the meaning of that letter. That he supported throughout his life the principle of government hospitality to religious activity (provided always that it be voluntary and of-

metaphor to describe the fortress protecting the religious from government, not a prison keeping the religious quarantined.[27]

The Supreme Court has acknowledged that the "wall" metaphor "is not a wholly accurate description."[28] The Court has more aptly described the separation as "dimly perceived"[29] and "a blurred, in-

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fered on an equal-opportunity basis) indicates that he used the wall of separation metaphor in a restrictive sense." James H. Hutson, *Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined*, 56 WM. & MARY Q. 775, 789 (1999).

27. Jefferson's metaphor "languished in relative obscurity" from 1801 until 1947. James H. Hutson, "Nursing Fathers:" the model for church-states relations in America from James I to Jefferson 1 (May 2001) (unpublished manuscript, available through Manuscript Division, The Library of Congress, in the offices of Dr. James H. Hutson, Chief of the Manuscript Division and Curator of the Library of Congress's exhibit "Religion and the Founding of the American Republic"). The idea "that religion should be partitioned off from government by a 'wall of separation,' [creating] an enforced estrangement [was a novel idea] that most Americans in the Founding period would have found repugnant." *Id.* at 12. During the Founding period, the most widely used metaphor for describing church/state relations was that of governments as "nursing fathers." *Id.* at 10-11; *see also id.* at 1 (describing the metaphor of "nursing fathers" as having its roots in *Isaiah* 49:23 and as generally entailing a "conviction that the government of any state must form a nurturing bond with religious institutions within its jurisdiction, that it must, in fact, become the 'nursing father'" to protect religious institutions and the religious as a father would protect his children). *Id.* Jefferson's "'wall' formulation has had a short and controversial run of only fifty years [since 1947] compared to the two hundred and fifty years in which the nursing fathers metaphor dominated the church-state dialogue in the Anglo-American world.'" James H. Hutson, "Nursing Fathers:" the model for church-states relations in America from James I to Jefferson 1 (May 2001) (unpublished manuscript, available through Manuscript Division, The Library of Congress, in the offices of Dr. James H. Hutson, Chief of the Manuscript Division and Curator of the Library of Congress's exhibit "Religion and the Founding of the American Republic"). Use of the "nursing fathers" metaphor would have come much closer to an enlightened understanding of the original intent of the Establishment Clause than use of the novel and obscure "wall of separation" metaphor. *Id.* at 10-11 (arguing that "a strong case [can] be made that in 1789 or at any time between 1776 and 1800 a substantial majority of the American people believed that relations between government and religion should be described by the venerable nursing father metaphor . . . [and] at a minimum, all agreed that the state should have warm, paternal feelings for its religious institutions, and that civil authorities, in so far as the law allowed, should be friends, helpers and protectors of the churches, should treat them as any good father would treat his children").

Indeed, Jefferson himself "played the part" of "nursing father" while President by, *inter alia*, "conscientiously attending church services in the House of Representatives" and permitting churches "to conduct services in government facilities, specifically, in the State Department and War Office buildings." *Id.* at 11.

28. Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (recognizing that institutions within society do not exist in a vacuum).

29. *Id.* at 612.

distinct, and variable barrier."[30] Furthermore, the Court has noted that the First Amendment does "not call for total separation between church and state."[31] As stated in *Lynch v. Donnelly*:[32] "'It has never been thought either possible or desirable to enforce a regime of total separation.' Nor does the Constitution require complete separation of church and state."[33] Chief Justice Rehnquist has referred to the "wall" concept as "a mistaken understanding of constitutional history . . . [and] Jefferson's misleading metaphor."[34] Significantly, the Court made no reference to the "wall" or to "separation between church and state" in the most recent school prayer case—*Santa Fe Independent School District v. Doe.*

To the extent the "wall" was ever interpreted or perceived as "high and impregnable,"[35] the "wall between church and state is crumbling."[36] In an era when religious identity competes on an equal basis with race, sex, and ethnicity as aspects of how Americans define themselves, "it seems like discrimination—the only unforgivable sin in a multicultural age—to forbid people to express their religious beliefs in an increasingly fractured public sphere."[37] Whereas "[s]trict separationism, during its brief reign, made the mistake of trying to forbid not only religious expression by the state, but also religious expression by citizens on public property,"[38] the Supreme Court increasingly appears headed toward "replacing the principle of strict separation" with a "principle that demands equal treatment for religion."[39]

Even if the "wall of separation between church and state" were an ideal metaphor in the public school context, the First Amend-

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30. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (stating that total isolation between church and state is impossible).

31. *Id.*

32. 465 U.S. 668 (1984).

33. *Lynch*, 465 U.S. at 673 (citing Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973)) (citation omitted).

34. Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

35. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach").

36. Jeffrey Rosen, *Is Nothing Secular?*, N.Y. TIMES, Jan. 30, 2000, at 1, http://www.nytimes.com/library/magazine/home/2000013mag-rosen2.html.

37. *Id.* at 12.

38. *Id.*

39. *Id.* at 2.

ment is not a wall between religious and nonreligious students. Nor is it a wall between minority religions and majority religions.[40] Rather, if anything, it is a wall between the *government* and *all students*. As long as members of the government do not "jump over the wall" and attempt to influence students' religious expressions (either instigating or stifling) the "wall" is not breached.

III. First Amendment Application to Faith-Based Issues—Pre-*Santa Fe*

A. *Students' Faith-Based Speech (Private Action), As Opposed to Government's Faith-Based Speech (State Action), Is Constitutionally Protected Speech*

To properly discern students' rights to faith-based speech, courts must understand and acknowledge the fine distinctions inherent in the clauses of the First Amendment. The Establishment Clause prevents government from engaging in religious acts.[41] The Free Exercise and Free Speech Clauses protect religious speech and actions on the part of private actors.[42] In the public school context, students are private actors, and public school officials are government actors.[43] The First Amendment regulates what public school

40. Majority and minority religions are all on the same side of the "wall"—a *fortiori*, there is no longer a single majority religion in America. *See* Albert R. Hunt, *Most Americans Remain Wary of Religion in Politics*, Wall St. J., *reprinted in* Portland Oregonian, Mar. 12, 2000, at E01 (reporting a Wall Street Journal/NBC Poll that Protestants are declining and no longer constitute a majority in America in comparison to "[a] half-century ago, [when] Protestants constituted two-thirds of Americans," and noting that "there are more Muslims in America than Episcopalians or Presbyterians"), 2000 WL 5385015.

41. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978) (noting that "most rights secured by the Constitution are protected only against infringement by governments"); *see also* Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982).

42. *See* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) ("The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion").

43. *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"). Nor can it be argued that students become state actors when they walk through the schoolhouse gate. *See* Chandler v. James, 180 F.3d 1254, 1261-62 (11th Cir. 1999) ("Chandler I"), *vacated sub nom.* Chandler v. Siegelman, 530 U.S. 1256, *opinion reinstated*, 230 F.3d 1313 (11th Cir. 2000), *and cert. denied*, 69 U.S.L.W. 3702 (U.S. June 18, 2001) (No. 00-1606) ("Religious speech by students does not become forbidden 'state action' the moment the students walk through the schoolhouse door"). As further noted in *Chandler I*: "First, students are not state

officials may and may not do, not what students may and may not do. Thus, the First Amendment does not prohibit voluntary, non-government-instigated, faith-based student expression. Correspondingly, any constitutional analysis of a school prayer issue must necessarily focus on the government's actions, not on the students' actions.

Although it is unconstitutional for the government to require, instigate, or highlight prayer as a favored practice in public schools,[44] the Supreme Court has never prohibited student-initiated and student-led voluntary prayer in public schools. To the contrary, the Court recently held all voluntary student prayer is protected speech.[45] Thus, voluntary student prayer that incidentally advances religion in some sense, cannot itself violate the Es-

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actors and, therefore, by definition, their actions cannot tend to 'establish' religion in violation of the Establishment Clause. Second, the Free Speech and Free Exercise Clauses of the First Amendment require the State to *tolerate* genuinely student-initiated religious speech in schools." *Id.* at 1258 (quoting with approval the school district's legal contentions).

44. *See generally* Lee v. Weisman, 505 U.S. 577, 588 (1992) (rejecting as unconstitutional a school's practice of allowing the principal to select and direct a clergyman to give "*prayers*" at graduation); Engel v. Vitale, 370 U.S. 421 (1962) (declaring as unconstitutional a policy under which school officials composed "official *prayers*" to be recited aloud by students in each class at the beginning of each school day) (emphasis added); Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 277 (5th Cir. 1996) (holding as unconstitutional a statute highlighting "*invocations, benedictions or . . . prayer*") (emphasis added); ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1474 (3d Cir. 1996) (rejecting as unconstitutional a school board policy permitting students to vote on whether to have "*prayer*" at graduation) (emphasis added); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 404, 406 (5th Cir. 1995) (finding unconstitutional a school's practice of having active initiation and active "participation in . . . [students'] *prayers*" by a coach acting in official capacity at basketball games and practices) (emphasis added); Harris v. Joint Sch. Dist., 41 F.3d 447, 457 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1155 (1995) (holding as unconstitutional a school policy permitting students to lead "*prayer*") (emphasis added); Jager v. Douglas County Sch. Dist., 862 F.2d 824, 835 (11th Cir. 1989) (rejecting as unconstitutional a policy authorizing student-led "*invocations*" and only invocations at school sporting events) (emphasis added); Hall v. Bd. of Sch. Comm'rs, 656 F.2d 999, 1000 (5th Cir. 1981) (finding unconstitutional a school policy permitting "*devotionals*" and only devotionals) (emphasis added); Karen B. v. Treen, 653 F.2d 897, 899, 902-03 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (invalidating regulations and school guidelines requiring teachers to ask if any student wishes to volunteer a "*prayer*" and allowing teachers to offer a "*prayer*" if no student volunteers) (emphasis added); Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 760-61 (9th Cir. 1981) (rejecting school's practice of authorizing "*prayers*" only) (emphasis added).

45. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000) (holding that "voluntarily praying at any time" by students is constitutionally protected speech).

tablishment Clause.[46] The Establishment Clause does not ban prayer; the Establishment Clause bans state prayer.[47] The Court has consistently recognized "that a government [body] 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].'"[48]

These key principles are perhaps most clearly articulated in *Wallace v. Jaffree*.[49] *Jaffree* involved an Alabama statute authorizing a moment of silence "for meditation or voluntary prayer," which replaced the state's previous statute authorizing a moment of silence "for meditation."[50] Although the Supreme Court spoke favorably of the prior law, the Court held the new statute unconstitutional because "[t]he addition of 'or voluntary prayer' indicates that the State intended to *characterize prayer as a favored practice*."[51] The Court noted that the previous law "contain[ed] nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation," but did so without highlighting "prayer" as governmentally favored.[52]

In *Jaffree*, the state's action of "characteriz[ing] prayer as a [governmentally] favored practice" made the law unconstitutional, not the fact that students prayed.[53] If a school district, acting through its policies or practices, requires or highlights prayer as a governmentally favored practice, this state action violates the Establishment Clause. In the absence of such unconstitutional state action, voluntary faith-based student speech—even publicly stated—

46. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 337 (1987) (holding that "to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence").

47. *Chandler I*, 180 F.3d at 1258 (repeating the legal concession made by Plaintiff's in Plaintiff's Reply Brief, quoting with approval, "[t]he Establishment Clause does not ban prayer. It bans state prayer").

48. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 546 (1987) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

49. 472 U.S. 38 (1985).

50. Wallace v. Jaffree, 472 U.S. 38, 40 (1985) (discussing the history of the new state statute allowing "meditation or voluntary prayer").

51. *Id.* at 60 (emphasis added).

52. *Id.* at 59.

53. *Id.* at 60.

should receive treatment no different than publicly stated, voluntary, secular-based student speech.

B. *Failing to Censor Faith-Based Speech Is Not Endorsement*

> "The proposition that schools do not endorse everything they fail to censor is not complicated."[54]

If highlighting prayer as a governmentally *favored* practice violates the Establishment Clause,[55] then highlighting prayer as a governmentally *disfavored* practice must also violate the Establishment Clause to no less a degree. Both positions are equally non-neutral—albeit operating at opposite ends of the Establishment Clause spectrum. One policy promotes religion; the other policy promotes anti-religion (or atheism). Governmental neutrality is achieved through neither.[56]

Permitting students to speak publicly in a school setting does not place a public school district in a position of either supporting or opposing a student's viewpoint on any particular subject, including prayers or other faith-based messages.[57] School districts must not be presumed to know the viewpoint any particular student speaker will express.[58] If a student voluntarily expresses a faith-based viewpoint, the Establishment Clause does not require school districts to censor, stifle, or punish the student's speech—in fact, the Constitu-

54. Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

55. *Jaffree*, 472 U.S. at 59-61.

56. Nowhere does the First Amendment imply that government must be Jehovah-phobic. Governmental acts of hostility toward religion send a strong message to youth—that there is something wrong, sinister, or untoward about holding and expressing a faith-based view. This, the Constitution does not permit.

57. *See* Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982) (expressing that mere acquiescence in the actions of private individuals is not sufficient to create state action).

58. Predicting the direction of a herd of cats might prove a more precise science than predicting the voluntarily selected views of unpredictable teenagers.

tion protects such speech.[59] Consider the Eleventh Circuit's opinion in *Chandler v. James* ("*Chandler I*"):[60]

> Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's—either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.[61]

If a student may express a secular-based view on a topic, neutrality dictates that a student may express a faith-based view on the same topic.[62] The state has neither a positive duty nor an express authority to censor faith-based student speech. What is crucial is that a school district's policy or practice not communicate "a message of government endorsement or disapproval of religion."[63] As the Eleventh Circuit's *Chandler I* opinion succinctly states, "The suppression of student-initiated religious speech is neither necessary to, nor does it achieve, constitutional neutrality towards religion. For that reason, the Constitution does not permit its suppression."[64]

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59. *See* Zorach v. Clauson, 343 U.S. 306, 314 (1952) (stating that the First Amendment does not require the "government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence"); *see also Mergens*, 496 U.S. at 250 (stating, "a school does not endorse or support [religious] speech that it merely permits on a nondiscriminatory basis"); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). If endorsement of religion is unconstitutional because it "sends a message to nonadherents that they are outsiders," *disapproval* is unconstitutional because it "sends the opposite message." *Id.*

60. 180 F.3d 1254 (11th Cir. 1999).

61. *Chandler I*, 180 F.3d at 1261.

62. Whether the topic is patriotism, safety, fair play, school spirit, a "thought for the day," a message to pay tribute to an occasion or to those in attendance, a message to pay tribute to a deceased student or teacher, a message to focus the audience on the purpose of an event or to bring an audience to order, or on any number of other topics, a voluntary faith-based viewpoint is just as valid as a secular-based viewpoint and must be treated with impartiality by the government. *See Mergens*, 496 U.S. at 253 (stating, "a denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech. . . ."); *see also* Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981) (recognizing that the attempt to exclude religious issues would require a "continuing need" to monitor the compliance of group meetings). To avoid this problem, the government must "pursue a course of 'neutrality' toward religion." Comm. for Publ. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973).

63. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

64. *Chandler I*, 180 F.3d at 1261.

A school district "may not favor one speaker over another" based on viewpoint.[65] The Court has acknowledged that "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[66] The Court has defined viewpoint discrimination as "an egregious form of content discrimination," noting that such discrimination is presumed unconstitutional.[67] Failing to censor speech in a public forum does not link the governmental entity to sponsorship or endorsement of the speech.[68] For instance, when the city of New York issues a parade permit to the Ku Klux Klan to march on government owned streets and property, this does not indicate that the city endorses or sponsors the views expressed by the Ku Klux Klan speakers.

Even in a nonpublic forum, a school district may not engage in viewpoint discrimination.[69] The government violates the Free Speech Clause by denying access to a nonpublic forum solely to suppress a speaker's point of view "on an otherwise includible subject."[70] The Supreme Court has held that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[71] Because faith-based speech is constitutionally protected speech, the government may not censor the speech.

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65. Rosenberger v. Rector & Visitors, 515 U.S. 819, 828 (1995).

66. *Id.* at 828-29 (citations omitted); *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) ("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'"); Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985) (recognizing, "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").

67. *See Rosenberger*, 515 U.S. at 828-29.

68. *See* Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990); *see also* Chabad-Lubavitch of Ga. v. Miller, 5 F.3d 1383, 1391-92 (11th Cir. 1993) (stating that "the failure to censor is not synonymous with endorsement").

69. *See Cornelius*, 473 U.S. at 806 (asserting that it is a violation of the First Amendment if the government denies access to a nonpublic forum "solely to suppress the point of view" of a speaker); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (holding that if a state opens a public facility for the purpose of facilitating public expression, then "it is bound by the same standards as apply in a traditional public forum").

70. *Cornelius*, 473 U.S. at 806.

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

As stated in *Lynch*, "the Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[72] The government "may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech."[73] First Amendment precedent, taken as a whole, supports the tenet that "genuinely student-initiated religious speech must be *permitted*."[74]

In 1992, the Supreme Court decided the landmark graduation prayer case of *Lee v. Weisman*.[75] In *Lee*, the Court held unconstitutional the school's practice of government officials selecting and directing clergy to pray at graduation ceremonies. However, the Court sent a clear invitation to non-governmental persons—which, in the context of the case, refers to students—to undertake the "task" of formulating "prayers" themselves.[76] The Court stated:

> If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the *government to stifle prayers* which aspire to these ends, neither does it permit the government to undertake that task for itself.
>
> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either *proscribed or prescribed* by the State.[77]

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72. Lynch v. Donnelly, 465 U.S. 668, 673 (1984); *see also* Comm. for Pub. Educ. Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973); Zorach v. Clauson, 343 U.S. 306, 312-15 (1952).

73. Chandler v. James, 180 F.3d 1254, 1266 (11th Cir. 1999), *vacated sub nom.* Chandler v. Siegelman, 530 U.S. 1256, *opinion reinstated*, 230 F.3d 1313 (11th Cir. 2000), *and cert. denied*, 69 U.S.L.W. 3702 (U.S. June 18, 2001) (No. 00-1606).

74. *Id.* at 1264.

75. 505 U.S. 577 (1992). In *Lee*, a principal unilaterally decided to include a prayer at graduation, selected a clergyman to pray, and directed the clergyman to pray in accordance with guidelines provided by the principal. *See Lee*, 505 U.S. at 581. Although the issue presented the *Lee* Court with the opportunity to broadly hold unconstitutional all vocal, public prayer at a public school event involving a government-organized audience on government-controlled property using government-owned equipment, the court refused to so hold. *Id.* at 587. Instead, the Court authored a lengthy but narrow opinion holding that the particular circumstances of the case caused the policy to be unconstitutional. *Id.* at 586, 597-98 (limiting the applicability of the holding to the "dominant facts" of the case).

76. *Id.* at 589.

77. *Id.* (emphasis added).

It is clear from the factual context of *Lee* that the Court is speaking of vocal "prayers" at school events, on school property, using school equipment—because this was the context of the clergyman's graduation prayer in *Lee*. The Court's language appears to direct school districts to permit the student body "to undertake that task for itself."[78] Regarding such efforts by students, the Court directs that "the First Amendment does not allow the government to stifle prayers which aspire to these ends."[79]

If schools and lower courts prevent students from undertaking the "task," such action renders the Supreme Court's words in *Lee* meaningless. A school district's policy or practice *prohibiting* public student prayer at school events would surely be as unconstitutional as a policy *requiring* public student prayer at school events. Would these not be the two extremes of the same unconstitutional non-neutrality described in *Lee*?[80]

A policy that allows only secular-based speech, while prohibiting faith-based speech, is not neutral. Such a policy gives preference to those students who do not believe in religion over those students who do.[81] The Eleventh Circuit's *Chandler I* decision clearly denounces such discrimination: "'Cleansing' our public schools of all religious expression . . . inevitably results in the 'establishment' of disbelief—atheism—as the State's religion. Since the Constitution requires neutrality, it cannot be the case that government may prefer disbelief over religion."[82] The twin doctrines of tolerance and neutrality do not require, or allow, the government to elevate atheism over belief. The First Amendment requires that school districts "tolerate both, while establishing neither."[83] Students,

78. *Id.* Although the majority opinion in *Lee* does not state which students should "undertake the task," three of the Justices in a concurring opinion written by Justice Souter indicate a speaker "chosen on wholly secular criteria." *Id.* at 630 n.8 (Souter, J., concurring) ("If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State").

79. *Id.* at 589.

80. *Lee*, 505 U.S. at 589 (recognizing that state action that either "proscribe[s] or prescribe[s]" "religious expression" is unconstitutional).

81. Zorach v. Clauson, 343 U.S. 306, 314 (1952).

82. Chandler v. James, 180 F.3d 1254, 1261 (11th Cir. 1999), *vacated sub nom.* Chandler v. Siegelman, 530 U.S. 1256, *opinion reinstated*, 230 F.3d 1313 (11th Cir. 2000), *and cert. denied*, 69 U.S.L.W. 3702 (U.S. June 18, 2001) (No. 00-1606).

83. *Id.* at 1261 n.11.

however, should enjoy the freedom both to prefer one or the other—belief or disbelief—and to express that preference wherever they are permitted to speak."[84]

C. *Judicial Censorship or Scripting of Voluntary, Student-Led, Student-Initiated, Faith-Based Speech Violates Students' Consciences, Amounts to Viewpoint Discrimination, and Creates a Preferred State Religion*

1. Limiting Faith-Based Speech to Solemn, Once-In-A-Lifetime Occasions

If voluntary, non-governmentally instigated faith-based speech by students enjoys constitutional protection, may the government limit the faith-based expression to solemn, significant, once-in-a-lifetime events such as graduations? Although the Supreme Court has never adopted such a restriction on religious expression, some lower courts have done so.[85] In *Santa Fe*, the Supreme Court declined the Fifth Circuit's invitation to employ this restrictive legal analysis. It is probable, therefore, that this line of reasoning has run its course and will not be followed.

2. Limiting Faith-Based Speech to Nonsectarian and Non-Proselytizing Viewpoints

If voluntary, non-governmentally instigated faith-based speech by students is constitutionally protected, may the government limit the expression to only nonsectarian and non-proselytizing viewpoints? The Supreme Court has never adopted this rationale, although some lower court judges have reasoned that within a public school context, the Constitution permits *only* "nonsectarian and

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84. *Id.* It should be noted, however, that the same reasonable restrictions that apply to student secular speech equally apply to student faith-based speech. *See id.* at 1265 ("The school may impose the same reasonable restrictions on the time, place, and manner of religious speech as it does on secular student speech").

85. *See, e.g.*, Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 823 (5th Cir.), *cert. granted in part*, 528 U.S. 1002 (1999), *aff'd on other grounds*, 530 U.S. 290 (2000) (holding that "*football games* [are] hardly the sober type of annual event that can be appropriately solemnized with prayer"); *see also* Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406-07 (5th Cir. 1995) (distinguishing basketball games and basketball practices from "a significant, once-in-a-lifetime event that could be appropriately marked with a prayer").

nonproselytizing" student prayers.[86] Permitting only nonsectarian and non-proselytizing prayers, however, creates a preferred creed and "official or civic religion" of the judiciary's invention.[87] First, courts and school districts would have to determine what constitutes a "prayer," and then would have to define what speech is "nonsectarian and non-proselytizing."[88] Government control over the content of citizens' prayers and other faith-based speech would require schools and courts to police and monitor the newly created civic religion to assure adherence to the new dogma and to punish aberrant utterances by the unfaithful.[89] Furthermore, for the government to prohibit faith-based speech in the student's words of choice may not only cause the student to violate his or her conscience, but, as to at least one religion, may cause the student to violate a basic tenet of his or her faith.[90]

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86. *See Santa Fe*, 168 F.3d at 816 (concluding that a policy "that does not limit speakers to nonsectarian, nonproselytizing invocations and benedictions violates the dictates of the Establishment Clause"); *see also Duncanville*, 70 F.3d at 406-07 (linking "non-sectarian and non-proselytizing" favorably to the Establishment Clause).

87. *See* Lee v. Weisman, 505 U.S. 577, 590 (1992) ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted"); *see also* Engel v. Vitale, 370 U.S. 421, 430 (1962) (holding that the "government in this country . . . is without power to prescribe by law any particular form of prayer"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").

88. "To everything, turn, turn, turn; There is a season, turn, turn, turn; And a time to every purpose under heaven." *See, e.g.*, THE BYRDS, *Turn! Turn! Turn!*, *on* TURN! TURN! TURN! (Columbia Records 1965). If a student speaker were to prayerfully express this, would it be nonsectarian and non-proselytizing since it is from a popular rock song? Or would it be sectarian and proselytizing since it is from the Old Testament? *See Ecclesiastes* 3:1. Would the fact it refers to "heaven" make it off limits, or would the fact the song was a protest against the Vietnam War save it? Similarly, if a student speaker were to express as part of a prayer, "Blessed be He who has set in heaven constellations, and has set among them a lamp, and an illuminating moon," would this statement be nonsectarian and non-proselytizing or would it be judged sectarian and proselytizing since it is a quote from the Koran? 2 THE KORAN INTERPRETED 61 (Arthur J. Arberry trans., Macmillan Publ'g Co. 1986).

89. Bd. of Educ. v. Mergens, 496 U.S. 226, 253 (1990) (noting that "denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech"); *see also* Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981) (suggesting that to enforce the exclusion of religious teaching and religious worship would create a greater risk of entanglement problems).

90. *See John* 16:24, 26-27; *cf. John* 14:13-14, 15:16; *Colossians* 3:17 (supporting that the phrase, "in Jesus' name," is not a tag line added to prayers to proselytize or offend but rather a phrase Christians use in order to obey a basic tenet of their faith).

3. Failure of Public Policy Arguments Supporting Governmental Discrimination Against Faith-Based Speech

Many seem to have adopted the philosophy, "I am offended, therefore I am."[91] One who claims offense by the expression of another's faith may simply be showing intolerance.[92] If all speech, songs, and expression that offended *someone* were prohibited from the marketplace of ideas, there would be little left to say, sing, or express (or pray).[93]

The test for free speech is not whether a particular message makes everyone comfortable. Such is the price for living in a country that values free expression and a free flow of ideas. Silencing others simply because we do not agree with their viewpoint is antithetical to a free society. Governmentally forced ideological homogenization of ideas and viewpoints concerning faith-based expression is not an attractive alternative to freedom of thought and freedom to articulate such thought, even—or perhaps especially—in public schools. Employing the machinery of government to stifle, silence, or criminalize voluntary, student-led, student-initiated prayerful speech when secular speech on similar topics is permitted, unfairly discriminates against those students who share the sentiments of Benjamin Franklin, George Washington, and the

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91. Paul McMasters, *Trying to Shut Out the Light by Banning Books*, *at* http://www.freedomforum.org/templates/document.asp?documentID=3628 (last visited May 24, 2001) ("Descartes' dictum in 1637 was, 'I think; therefore I am.' The new, updated version is, 'I am offended; therefore I am'") (on file with the *St. Mary's Law Journal*).

92. *See* Bill Maher, *Politically Incorrect* (ABC television broadcast, June 16, 1999) (asserting, "In this country, it seems to me that we are ruled by the tyranny of the sensitive") (on file with the *St. Mary's Law Journal*). There are those who would seek to enforce that "tyranny" on everyone else through employment of the machinery of government as a bulldozer for social engineering.

93. *See generally* Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), *vacated sub nom.* Chandler v. Siegelman, 530 U.S. 1256, *opinion reinstated*, 230 F.3d 1313 (11th Cir. 2000), *and cert. denied*, 69 U.S.L.W. 3702 (U.S. June 18, 2001) (No. 00-1606). The court stated:

> Accommodation of religious beliefs we do not share is . . . a part of everyday life in this country. . . . Respect for the rights of others to express their beliefs, both political and religious, is the price the Constitution extracts for our own liberty. This is a price we freely pay. It is not coerced. Only when the speech is commanded by the State does it unconstitutionally coerce the listener.

Id. at 1263 (citation omitted).

First Congress[94] and would not be in keeping with a fair interpretation of the Establishment Clause.

IV. *SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE*

The Supreme Court last addressed school prayer in *Santa Fe Independent School District v. Doe.* The Court granted *certiorari* on the question of "[w]hether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."[95] The Court, however, never reached, and therefore never directly answered, this question because the Court found that due to the school district's coercive pro-prayer history, acts, and policies, no resulting prayer had the possibility of ever truly qualifying as "student-led, student-initiated prayer."[96] The Court addressed a "narrow question"[97] focusing on the text[98] and history[99] of the Santa Fe school district's October 1995 policy.

A. Santa Fe *Policy Held Unconstitutional—Analysis of Court's Decision*

The Court provided a number of fact-specific reasons for finding Santa Fe's October 1995 policy unconstitutional. The Court began

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94. *See* Appendix A: Historical Notes (recording, *inter alia*, the sentiments of Benjamin Franklin, George Washington, and the First Congress concerning religious expression in government forums).

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

96. *See id.* at 316-17.

97. *Id.* at 315 ("The *narrow question before us* is whether implementation of the *October [1995] policy* insulates the continuation of such prayers from constitutional scrutiny") (emphasis added).

98. *Id.* at 298-99 n.6. The pertinent text of the October 1995 policy is as follows:

> The board has chosen to permit students to deliver a brief *invocation* and/or message to be delivered during the pregame ceremonies of home varsity football games to *solemnize* the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an *election*, by the high school student body, by secret ballot, to determine whether such a statement or *invocation* will be a part of the pregame ceremonies and if so, shall *elect* a student, from a list of student volunteers, to deliver the statement or *invocation*. The student volunteer who is selected by his or her classmates may decide what message and/or *invocation* to deliver, consistent with the goals and purposes of this policy.

Id. (emphasis added).

99. *Id.* at 309.

by affirming the seminal constitutional principle "that 'there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'"[100] The Court found that the student speech allowed under the particular terms of the October policy could not truly be "private speech" because, *inter alia*, the policy highlighted "invocations"—a term the Court defined as "primarily . . . an appeal for divine assistance"[101]—as a governmentally favored practice.[102] The Court therefore concluded that any religious message resulting from the October policy "would be attributable to the school, not just the student."[103] The Court recognized, however, that "not every message delivered under such circumstances [of having pregame messages by students] is the government's own."[104]

Second, the Court found that the October 1995 policy did not establish a limited public forum for "private" speech.[105] The Court recognized previous instances in which it had found "an individual's contribution to a government-created *forum* was not government speech."[106] The Court drew a distinction, however, between the forums created in those cases and the forum created under the October policy. The Court concluded that the October policy evidenced no intent by the school district to create a public forum for voluntary student speech. The Court implied, however, that an expressed intent by the school to have created a public forum may have been outcome determinative on this particular issue or, at the very least, a helpful guide.[107] Without the District's intent being clear, the Court looked to the text and found that the student majoritarian election process "guarantees, by definition, that mi-

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100. *Santa Fe*, 530 U.S. at 302 (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990)).

101. *Id.* at 306-07.

102. *Id.* at 310 ("The delivery of such a message—. . . pursuant to a school policy that explicitly and implicitly *encourages public prayer*—is not properly characterized as 'private' speech") (emphasis added); *see also* Wallace v. Jaffree, 472 U.S. 38, 60 (1985) ("The addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice").

103. *Santa Fe*, 530 U.S. at 316 n.23.

104. *Id.* at 302.

105. *Id.* at 316 n.23.

106. *Id.* (emphasis added).

107. *Id.* at 303 n.13 ("A conclusion that the District had created a public forum would help shed light on whether speech is public or private").

nority candidates will never prevail and that their views will be effectively silenced."[108] Such a result "allows only one student, the same student for the entire season, to give the invocation,"[109] evidencing the absence of intent to have created a public forum. Significantly, the Court did not hold that a school district can *never* create a limited public forum for vocal "private" student speech, but only that the "type" of forum created under the October policy by Santa Fe did not qualify as a public forum.

Third, the Court found the school district's majoritarian elections were "a device the District put in place that determines whether religious messages will be delivered."[110] Essentially, the school district asked students to cast votes regarding two issues: (1) whether a student would deliver an "invocation and/or message" at football games; and (2) which student would deliver any such message.[111] The Court held that this election "impermissibly imposes upon the student body a majoritarian election on the issue of prayer."[112] The Court noted that the school district had stipulated to facts admitting the elections constituted a determination of whether the school would have "prayer" at football games.[113] The Court also found that students understood that the purpose of the October policy was "to encourage selection of a religious message."[114]

Fourth, the Court held that "the text of the October policy alone reveals . . . an unconstitutional purpose"[115] as evidenced by use of the words "solemnize" and "invocation" as terms that encourage and highlight prayer as a governmentally favored practice.[116] Such

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

109. *Id.* at 303. The Court stated that such "elections are insufficient safeguards of diverse student speech." *Id.* at 304.

110. *Id.* at 311.

111. *Id.*

112. *Id.* at 316.

113. *Santa Fe*, 530 U.S. at 317 n.24. The Court recognized:

> [T]he District has stipulated to the facts that the most recent election was held "to determine whether a student would deliver *prayer* at varsity football games," that the "students chose to allow a student to say a *prayer* at football games," and that a second election was then held "to determine which student would deliver the *prayer*." Furthermore, the policy was titled "*Prayer* at Football Games."

Id. (citations omitted).

114. *Id.* at 306.

115. *Id.* at 314.

116. *Id.* at 306-07 ("The policy itself states that the purpose of the message is 'to solemnize the event.' A religious message is the most obvious method of solemnizing an

a conclusion moved the Court to state that "the expressed purposes of the policy encourage the selection of a religious message."[117] The Court's reasoning followed *Jaffree*, focusing on the government's highlighting prayer as a favored practice, rather than faulting prayer itself.[118]

Fifth, the Court concluded that based on the October policy's peculiar text and history,[119] a prayer given pursuant to the October policy created a situation where "an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[120] In reaching this result, the Court considered "'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.'"[121] The Court answered in the affirmative, holding that under the particular circumstances of the case, "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship."[122] The Court effectively held that the school district's orchestration of prayer was so pervasive and obvious that students[123] and the general public[124] would understand the prayers as

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event." And, "the only type of message that is expressly endorsed in the text is an 'invocation'—a term that primarily describes an appeal for divine assistance").

117. *Id.* at 307.

118. *See* Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (holding the state may not "characterize prayer as a favored practice").

119. *Santa Fe*, 530 U.S. at 308 ("The text and history of this policy . . . reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school").

120. *Id.*

121. *Id.* (quoting *Jaffree*, 472 U.S. at 73, 76 (O'Connor, J., concurring)).

122. *Id.* at 312. The Court stated that "'the *government* [Santa Fe] may no more use social pressure to enforce orthodoxy than it may use more direct means.'" *Id.* (citing Lee v. Weisman, 505 U.S. 577, 578 (1992) (emphasis added)). Significantly, the Court did not hold that all pregame prayers would have this same coercive effect. The Court's focus was not on the prayer, but on the government's coercive role in intentionally instigating and thereby affirmatively sponsoring the prayer. *See id.* at 313 (stating, "the Constitution is abridged when the State *affirmatively sponsors* the particular religious practice of prayer") (emphasis added). Note that the Court did not simply use the term "sponsors" but rather "affirmatively sponsors," indicative of affirmative acts by the government to highlight prayer as a governmentally favored practice as opposed to merely providing a forum in which students are allowed to speak. *See id.*

123. *Id.* at 315 (holding that "every Santa Fe High School student understands clearly—that this policy is about prayer"); *id.* at 307 (finding that "students understood that the central question before them was whether prayer should be a part of the pregame

affirmatively government sponsored, and, thus, governmentally coercive.[125]

Sixth, in reviewing the policy's evolution,[126] the Court found that "the District's direct involvement with school prayer exceeds constitutional limits."[127] Specifically, the Court found that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation."[128] In so holding, the Court analogized Santa Fe's unconstitutional prayer policy to Alabama's moment of silence statute that the Court invalidated in *Wallace v. Jaffree*.[129] The Court noted that, as in *Jaffree*, Santa Fe's policy could not survive a facial challenge.[130] The Court held unconstitutional the school district's "direct involvement" in highlighting and "endorsing school prayer" as a governmentally favored practice.

Finally, as a significant counter-balance to what the Court held as unconstitutional state action by the Santa Fe school district, the Court announced broad constitutional protection for voluntary student prayer in public schools, thereby creating a new, or additional,

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ceremony); *id.* (stating that "the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy").

124. *Santa Fe*, 530 U.S. at 308 ("In this context [i.e., the text, history, majoritarian election, and the setting of the event with no disclaimers indicating the student message is not the school district's official view] the members of the listening audience must perceive . . . approval of the school administration").

125. Significantly, the Court introduced coercion as a constitutional factor only upon linking pregame prayers to the "'use [of] social pressure to enforce [the government's] orthodoxy.'" *Id.* at 312. Notably, coercion is not linked to any potentially voluntary faith-based expression by a student. A student speaker's voluntarily stated, non-governmentally-endorsed viewpoint expressed to an audience informed of such facts should have no coercive effect on the audience—for one student's personal views are no more important than any other student's personal views.

126. *Id.* at 294-98. Prior to the October 1995 policy, elected student council chaplains delivered prayers before every football game. *Id.* at 294. In August, 1995, the district enacted a policy entitled "Prayer at Football Games" that allowed students to determine if "invocations" should be delivered. *Id.* at 297. Finally, the district enacted the October 1995 policy which omitted the word "prayer" from its title and added the words "messages" and "statements" to its text but retained the word "invocation." *Id.* at 298.

127. *Id.* at 315.

128. *Id.* at 315-16.

129. *Santa Fe*, 530 U.S. at 316.

130. *See id.* (stating that "even if no Santa Fe High School student were ever to offer a religious message, the October policy fails a facial challenge because the attempt by the District to encourage prayer is also at issue").

Establishment Clause/Free Exercise Clause/Free Speech Clause test for analyzing public school prayer issues:

> By no means do these commands impose a prohibition on all religious activity in our public schools . . . . Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from *voluntarily* praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State *affirmatively sponsors* the *particular* religious practice of prayer.[131]

This sweeping and significant pronouncement by the Court represents a paradigm shift in analysis. The new key word is "voluntarily." Although the Court had the opportunity of qualifying and limiting constitutionally protected voluntary prayers to whispers or to non-publicly spoken expressions, the Court did not do so. The single limit placed by the Supreme Court upon any prayerful expression is that such expression must be that of a "student . . . *voluntarily* praying."[132]

Reading *Santa Fe* in the context of this standard leads to the following conclusion: if a school district's policies or actions highlight prayer as a governmentally favored practice, the courts will deem involuntary any resulting student prayer. Additionally, the courts will presume that governmental coercion compromised students' free will, thereby preventing the possibility of genuine voluntary prayer or genuine private expression by students. However, if a school district's policies and actions do not highlight prayer as a governmentally favored practice, then voluntary student-led, stu-

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131. *Id.* at 313 (citations omitted) (emphasis added).

132. *Id.* (emphasis added). Although the Court did not expressly say so, it is certain that the same reasonable restrictions that would apply to the time, place, and manner for the expression of student secular speech would equally apply to student faith-based speech. Faith-based speech need not enjoy special treatment, but it does enjoy equal treatment. *See* Chandler v. James, 180 F.3d 1254, 1261-62 (11th Cir. 1999), *vacated sub nom.* Chandler v. Siegelman, 530 U.S. 1256, *opinion reinstated*, 230 F.3d 1313, 1317 (11th Cir. 2000), *and cert. denied*, 69 U.S.L.W. 3702 (U.S. June 18, 2001) (No. 00-1606) (stating that the government "may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech *which exceed those placed on students' secular speech*") (emphasis added). When school officials hear one student say, "Let us have a safe game tonight," and hear another student say, "God, let us have a safe game tonight," the phrases should ring the same in the ears of government officials. One view is not the step-child to the other. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (holding, "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression").

dent-initiated prayer should be achievable and should be deemed as constitutionally permissible and protected under *Santa Fe* and prior Supreme Court precedent.

B. *Epilogue to* Santa Fe

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, filed a dissenting opinion in *Santa Fe*. In response to the Chief Justice's criticism that the Court's holding "essentially invalidates all student elections,"[133] the Court expressly limited its holding in *Santa Fe* to the following:

> We concluded that the resulting religious message under this policy would be *attributable to the school*, not just the student. For this reason, we now hold *only* that the District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violates the Establishment Clause.[134]

Although Chief Justice Rehnquist believed the majority erred in holding unconstitutional the October policy,[135] *Santa Fe* provides new and significant illumination and guidance for students, school districts, and attorneys concerning issues of prayer and other faith-based speech in public schools. Throughout the opinion, the Court directed its ire toward the government for instigating prayer, not toward students, and not toward voluntary prayer. *Santa Fe* provides a lesson to school districts, *to wit*: school districts' and school officials' actions can undermine the otherwise voluntary aspects of students' choices, thereby causing those choices to become government choices. Ironically, by the time *Santa Fe* reached the Supreme Court, the Santa Fe school district had switched from a pro-prayer policy to an anti-prayer/punish-prayer policy.[136] By Sep-

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133. *Santa Fe*, 530 U.S. at 321.

134. *Id.* at 316 n.23 (emphasis added).

135. *Id.* at 318 (summarizing the 6-3 majority opinion as follows: "The Court distorts existing precedent . . . . [b]ut even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause . . . .").

136. *See* Affidavit of Marian Ward (Sept. 2, 1999) at 1-5, Affidavit of Marian Lynn Ward (Mar. 31, 2001) at 1-7, and Affidavit of Majorie M. Ward (Mar. 30, 2001) at 1-8, Ward v. Santa Fe Ind. Sch. Dist., No. G-99-CV-0556 (S.D. Tex. filed Sept. 2, 1999). Between August 25, 1999 and September 2, 1999, the following occurred: On August 26, 1999, Marian Ward heard about the statement attributed to SFISD Superintendent Richard Ownby,

tember, 1999, the Santa Fe school district was threatening punishment of student speakers for making "any references to a deity," prompting a Houston federal court to enjoin the school district.[137] This juxtaposition of the two opposing Santa Fe school district policies illustrates the danger school districts face in mistaking neutral-

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"If they do pray, they would be disciplined just as if they had cursed." Affidavit of Marian Lynn Ward (Mar. 31, 2001) at 2. On August 25, 1999, Stephanie Vega, the student elected to give the pregame messages, resigned, and Marian Ward was asked to take her place. *Id.* at 1. On August 31, 1999, Marian Ward was summoned to the principal's office where she was met by Principal Gary Causey and Superintendent Richard Ownby and given "Guidelines for Student Messages at Football Games (1999)" stating, "Prayers, blessings, invocations, and references to a deity are prohibited." *Id.* at 2. Marian Ward was instructed to read the Guidelines while Causey and Ownby watched and was then instructed to write out her proposed "message" and submit it to Principal Causey the day before the football game "in case anything needs to be edited." *Id.* at 3. On September 1, 1999, three Santa Fe High School teachers confronted Marian in the hall and warned her of the consequences of violating the Guidelines. *Id.* at 4. On September 2, 1999, Marian Ward was called out of class by a teacher who for almost forty-five minutes warned Marian of the dire consequences of violating the Guidelines, warning that she would be "breaking the law" if she offered a religious message. *Id.* at 5. Also, on September 2, 1999, in a meeting between Principal Causey, Marian Ward, and Majorie Ward, Principal Causey stated that he was not going to require Marian to show him her proposed remarks but that "he would discipline [Marian]" if she "chose to pray or mention God in any way in her pre-game message." Affidavit of Majorie M. Ward (Mar. 30, 2001) at 4.

137. *Id.* On September 2, 1999, Marian Ward filed suit against the Santa Fe Independent School District requesting a temporary restraining order. Plaintiff's Original Complaint at 1, Ward v. Santa Fe Indep. Sch. Dist., No G-99-CV-0556 (S.D. Tex. filed Sept. 2, 1999). On September 3, 1999, the federal district court granted a temporary restraining order against the Santa Fe school district ruling, in pertinent part, as follows:

> If, as it appears from this record, secular speech is allowed at games over the public address system by students, then the Court concludes that the "free speech" clause of the Constitution prohibits the School District from discriminating against similar speech simply because it contains a prayerful component freely chosen by the student, even one that invokes a deity. Even in a non-public forum a government cannot discriminate against speech because of the viewpoint expressed by the speaker.
>
> The "establishment" clause of the First Amendment requires neutrality by government in matters of religion. Just as a school policy requiring student prayer would run afoul of the "establishment" clause, a school policy prohibiting prayer also runs afoul of the "establishment" clause because it amounts to state-sponsorship of atheism, i.e., state establishment of disbelief in a God instead of belief in a God.

Transcript of Sept. 3, 1999 Hearing Before the Honorable Sim Lake, Excerpt at 2-3, Ward v. Santa Fe Indep. Sch. Dist., No. G-99-CV-0556 (S.D. Tex. filed Sept. 2, 1999). On October 6, 1999, the district court granted plaintiffs a preliminary injunction that continued throughout the 1999-2000 football season. Preliminary Injunction at 1-2, Ward v. Santa Fe Indep. Sch. Dist., No. G-99-CV-0556 (S.D. Tex. filed Sept. 2, 1999). Under the federal court's protection, Marian Ward was permitted to give a pregame message of her choice at all Santa Fe home football games. *See generally id.*

ity toward religion for either affirmative-sponsorship or affirmative-prohibition of prayer and other faith-based expression.

The Supreme Court does not hold that students may not speak over school microphones or that school districts may not enact policies providing for student speakers. Nor does the Court express or even imply that a school district may prevent a student from, or punish a student for, engaging in voluntary faith-based speech. Although the Court had the ideal opportunity to hold *per se* unconstitutional any student prayer spoken over a school owned microphone, on government property, at a school sponsored event, before a government organized audience, the Court did not so hold.[138] Rather, the Court found that the history and text of the October 1995 policy did not allow for genuinely voluntary, student-led, student-initiated expression at all. As a result, prayer did not doom the October 1995 policy, the peculiar history and text doomed the October 1995 policy.

C. *Post*-Santa Fe *Judicial Interpretations*

The Supreme Court issued its opinion in *Santa Fe* on June 19, 2000. Subsequently, two significant federal appellate court decisions have interpreted and applied *Santa Fe* to fact scenarios involving faith-based expression in public schools. The Ninth and the Eleventh Circuits have offered divergent applications of *Santa Fe* which are difficult, but perhaps not impossible, to reconcile. The Ninth Circuit issued the first of the two in *Cole v. Oroville Union High School District.*[139] The Eleventh Circuit followed with *Chandler v. Siegelman.*[140]

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138. There is no *per se* rule to apply to school prayer cases. *See* Lee v. Weisman, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one"); *id.* at 598 ("Our jurisprudence in this area is of necessity one of line drawing"); Lynch v. Donnelly, 465 U.S. 668, 678 (1984) ("In each case, the inquiry calls for line-drawing; no fixed *per se* rule can be framed"). Slightly different facts can be outcome determinative in First Amendment cases. *Compare* County of Allegheny v. ACLU, 492 U.S. 573, 598-600 (1989) (holding that the county's display of just one religious symbol violates the Establishment Clause), *with Lynch*, 465 U.S. at 685-86 (holding that a city's display of a religious symbol among nonreligious symbols does not violate the Establishment Clause).

139. 228 F.3d 1092 (9th Cir. 2000).

140. 230 F.3d 1313 (11th Cir. 2000).

1. *Cole v. Oroville Union High School District*

In *Cole v. Oroville Union High School District*, the Ninth Circuit upheld a school district's decision to ban two student speakers' remarks at graduation ceremonies when such remarks were not going to be "'nondenominational' and inclusive of all beliefs."[141] The court found that under the school's peculiar symbiotic policy, the school district's refusal "did not violate the students' freedom of speech" but "was necessary to avoid violating the Establishment Clause."[142]

Two Oroville Union High School seniors filed suit in 1998 against the school for censoring their planned faith-based remarks at graduation ceremonies.[143] The school district had an unusually restrictive policy, which required the principal to review, approve, and authorize the content of all student speeches and invocations for graduation.[144] The speaker policy, however, did not "specifically enumerate what types of content are prohibited."[145] When Cole and Niemeyer submitted their proposed comments, the principal rejected both on the basis that the comments contained "proselytizing and sectarian religious references."[146]

The court held that *Santa Fe* expressly applied to Cole's invocation for two primary reasons. First, the court recognized the "invocation" was an expressly government "authorized . . . part of the graduation ceremony," and noted that "an invocation policy by its very terms appears to reflect an impermissible state purpose to encourage a religious message."[147] As such, the invocation policy undermined the possibility of private speech by Cole. Second, the court found significant the majoritarian election held to elect the invocation speaker.[148] The court concluded that under these facts "the District's refusal to allow Cole to deliver a sectarian invoca-

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141. Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1096, 1101 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (U.S. Mar. 5, 2001) (No. 00-1074).

142. *Id.* at 1101.

143. *Id.* at 1096-97. Cole was elected by his peers to deliver an "invocation." *Id.* at 1096. Niemeyer, as co-valedictorian, was to deliver a valedictory speech. *Id.*

144. *Id.* at 1096.

145. *Id.*

146. *Cole*, 228 F.3d at 1101.

147. *Id.* at 1102.

148. *Id.*

tion . . . was necessary to avoid an Establishment Clause violation."[149]

The court then addressed the valedictory address. Recognizing that the valedictory address presented a more difficult question, the court noted that as to the valedictorian, the "speech policy neither encourages a religious message nor subjects the speaker to a majority vote."[150] The court held, however, that "an objective observer familiar with the *District's policy and its implementation* would have likely perceived that the speech carried the District's seal of approval,"[151] and that because the speech was attributable to the school, it was not private speech.[152]

The court reached this result by focusing on the school district's "plenary control . . . especially over student speech" at the graduation ceremony, the school district's requirement of "a special contract obligating them to act . . . in a manner prescribed by the District," and the requirement of the principal having "final authority to approve the content of student speeches."[153] The court relied heavily on the district's peculiar and extremely restrictive student speaker policy allowing, essentially, only government speech. Due to the court's significant emphasis and reliance on the fact that "approval of the content of student speech was required,"[154] any court inclined to apply *Cole* will likely apply it narrowly only to school districts having student speaker policies as extreme and as content/viewpoint restrictive—requiring govern-

149. *Id.*

150. *Id.* at 1103.

151. *Cole*, 228 F.3d. at 1103 (emphasis added). This argument, however, presumes the audience has no common sense. If a school, for instance, allows a valedictorian to opine that a monarchy is superior to a democracy, would anyone in the audience believe that this is government speech endorsed by the school district? It is unlikely that a reasonable person would mistake the student's point-of-view for that of the government's (particularly in connection with a valedictory address in which most would presume the student has earned the right to give his or her own speech).

152. *Id.* ("Allowing Niemeyer to give his proposed valedictory speech . . . would have constituted government endorsement of religious speech similar to the prayer policies found unconstitutional in *Santa Fe* and *Lee*").

153. *Id.* (emphasis added) ("Because *District approval* of the content of student speech *was required*, allowing Niemeyer to make a sectarian, proselytizing speech as part of the graduation ceremony would have lent District approval to the religious message of the speech").

154. *Id.*

mental preauthorization of every word—as the student speaker policies in *Cole*.[155]

Reconciling *Cole* with *Santa Fe* is difficult. One must conclude that under Oroville Union's peculiar policy, the graduation ceremony constituted a closed forum in which speakers could express only government's words, causing every student speaker to become a mere government surrogate mouthing only government's thoughts and views. Even so, the school district seemed to single out only faith-based speech for censorship.[156]

When a school district affirmatively fights to prohibit or censor student religious expression, as in *Cole*, it is axiomatic that the school district is not attempting to establish religion in violation of the Establishment Clause—other than perhaps establishing non-religion or atheism. The *Santa Fe* Court held that a school district acts improperly by highlighting prayer as favored, thereby affirmatively sponsoring prayer. *Cole*, however, presented the opposite scenario, with the school district overtly prohibiting and/or censoring faith-based speech that the valedictorian wished to state. By upholding the school's right to discriminate against a student's faith-based speech in favor of secular-based speech, the court appeared to affirm governmental viewpoint discrimination and hostility toward religion.

The *Cole* court seemed to ignore decades of precedent requiring governmental neutrality and accommodation of religious expression. The court further appeared to ignore the Supreme Court's directives in *Santa Fe* that schools permit students to pray voluntarily "at any time before, during, or after the schoolday."[157] Although the Supreme Court denied *certiorari* in *Cole*, such denials are common soon after the Court has issued an opinion on the same issue. The Court normally allows time for the appellate courts to grapple with and interpret the Court's new precedent.[158]

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155. Ninth Circuit decisions are applicable to the Western States of California, Washington, Oregon, Nevada, Montana, Idaho, Arizona, Alaska, and to Hawaii, Northern Mariana Islands, and Guam.

156. *Cole*, 228 F.3d at 1096 ("Until the class of 1998 graduation, the principal had needed to change the content of speeches only for grammatical errors").

157. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000).

158. *See generally* Lee v. Weisman, 505 U.S. 577, 580 (1992) (granting *certiorari* on the issue of "whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amend-

Cole, hopefully, will prove a post-*Santa Fe* aberration representing the last vestiges of governmental discrimination against faith-based viewpoints.

2. *Chandler v. Siegelman*

Chandler v. Siegelman ("*Chandler II*") is the most recent school-prayer federal appellate case to interpret and apply *Santa Fe*. *Chandler I* and *Chandler II* involved a federal district court order that "enjoined the school district from *permitting* any prayer in a *public* context at any school function."[159] On remand from the Supreme Court, the Eleventh Circuit reconsidered its earlier decision in *Chandler I*,[160] and concluded that *Chandler I* is "complementary rather than inconsistent [with *Santa Fe*]."[161] The court reaffirmed its previous opinion and reinstated its judgment in *Chandler I*—relying on the Supreme Court's analysis in *Santa Fe* to affirmatively protect students' rights to engage in voluntary prayer.[162] In reaffirming *Chandler I*, the court stated that "a policy which *tolerates* religion does not improperly *endorse* it."[163] The court concluded that "[t]he Free Exercise Clause does not permit the state to confine religious speech to whispers or banish it to broom closets."[164] The court directed the district court "to revisit

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ment . . . ."). Immediately following its decision in *Lee*, the Court denied *certiorari* in *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied* 508 U.S. 967 (1993). After *Lee*, nine years passed before *certiorari* was again granted concerning a public school prayer case. *See Santa Fe*, 530 U.S. at 294.

159. Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), *vacated sub nom.* Chandler v. Siegelman, 530 U.S. 1256, *opinion reinstated*, 230 F.3d 1313, 1316 (11th Cir. 2000), *and cert. denied*, 69 U.S.L.W. 3702 (U.S. June 18, 2001) (No. 00-1606).

160. 180 F.3d 1254 (11th Cir. 1999).

161. Chandler v. Siegelman, 230 F.3d 1313, 1315 (11th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3702 (U.S. June 18, 2001) (No. 00-1606) (stating that "*Santa Fe* condemns school *sponsorship* of student prayer. *Chandler* condemns school *censorship* of student prayer. . .[and] the cases are complementary rather than inconsistent"). *Id.*

162. *Id.* at 1316-17. The court noted:

> [I]f '[n]othing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday,' then it does not prohibit prayer aloud or in front of others, as in the case of an audience assembled for some other 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 is protected

Id. (citation omitted).

163. *Id.* at 1317.

164. *Id.* at 1316.

its injunction in order to ensure that it did not command the school district to actively prohibit—censor—genuinely student-initiated religious speech."[165] The court also instructed the district court to guarantee that the injunction did not "apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech."[166] *Chandler I* and *Chandler II* support the constitutional proposition that wherever students are allowed to express secular viewpoints, students must also be allowed to voluntarily express faith-based viewpoints without governmental censorship, scripting, or discrimination. On June 18, 2001, the Supreme Court denied *certiorari* in *Chandler II* thereby letting stand the holdings of *Chandler I* & *Chandler II* affirming students' rights to engage in publicly stated, voluntary prayer in public schools.

V. THE NEXT STEP FOR SCHOOL DISTRICTS: BAN STUDENT SPEAKERS OR DRAFT POLICIES TARGETED TO COMPLY WITH *SANTA FE*

Santa Fe essentially leaves school districts with two general options: (1) forbid, or drastically curtail, the use of school public address systems by students, or (2) enact new student speaker policies targeted to comply with *Santa Fe*. Silencing all student speakers presents a possible option that school districts might select,[167] as long as there is no unconstitutional motivation for doing so.[168] To silence or curtail public student speech, however, provides students with less involvement and ownership in their own student activities and seems antithetical to the educational process. Numerous secular educational reasons justify providing a forum for public student

165. *Id.* at 1317.

166. *Chandler II*, 230 F.3d at 1317.

167. Defendant's Response in Opposition to Plaintiff's Request for Attorneys Fees, Expenses, and Court Costs at 6, Ward v. Santa Fe Indep. Sch. Dist., No. G-99-CV-0556 (S.D. Tex. filed Sept. 2, 1999). After *Santa Fe*, the Santa Fe school district adopted a "no student messages" policy. *Id.* All student speaker policies were rescinded and eliminated. *Id.* The school board's new policy was changed to read: "There will be no student messages of any kind at future football games." *Id.*

168. *See generally* Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 25-34 (2000) (discussing the protections under the Free Exercise Clause against governmental "religious bigotry"). If a school district's motivation for prohibiting or curtailing student speech is to prevent voluntary faith-based speech from occurring this could form the basis of a constitutional challenge to such policy. *Id.*

speech. *Santa Fe* provides a roadmap for drafting constitutionally targeted student speaker policies.

A. *Looking to* Santa Fe *for Guidance*

Santa Fe provides significant new illumination for analyzing First Amendment issues in the public school context. The Court raised several principles, both expressed and implied, that can assist public schools and their attorneys in navigating a neutral course with respect to public, faith-based student expression. By complying with *Santa Fe*, school districts can avoid significant legal problems, while still providing students with the opportunity to freely speak.

First, school districts should eliminate from all student speaker policies the words "prayer," "invocation," "benediction," "solemnization," and other terms that explicitly or implicitly suggest that prayer constitutes a governmentally favored practice of the school district. Courts will consider the use of such terms as a school district's highlighting, suggesting, encouraging, and coercing students to pray,[169] and, as in *Santa Fe*, any resulting student prayer will be deemed the product of governmental prompting rather than voluntary prayer. Secular terms such as "message," "remarks," "talk," "oral presentation," and the like have no religious implication. A student speaker must feel no pressure or prompting from the school or from the text of the school's policies, suggesting that the student must or should pray or offer a faith-based viewpoint as his or her choice of speech.

Second, school districts should create a limited public forum for voluntary student speech by expressly stating so in its student speaker policies. Districts should then include provisions in the policies that evidence and support the creation of a true limited public forum. Recall in *Santa Fe*, the Court noted that the school

169. A governmentally highlighted or coerced prayer, by definition, is not voluntary speech and, thus, not considered "private speech," but, rather, "government speech." Students are private citizens, and their prayers can qualify as "private speech," but only when expressed voluntarily as a student's choice. Voluntary student prayers, irrespective of size or lack of an audience, should be viewed as constitutionally protected forms of speech. As stated in *Santa Fe*: "nothing in the Constitution as interpreted by this Court prohibits any public school student from *voluntarily* praying *at any time* before, during, or after the schoolday." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000) (emphasis added). This is a broad constitutional pronouncement issued by the Supreme Court. The key constitutional issue is whether the student is being allowed by the school district to truly "voluntarily" pray without governmental pressure to do so.

district had not specified the type of forum it created.[170] To eliminate second guessing, school districts should specifically designate the type of forum.

Third, school districts should develop neutral policies for selecting speakers. As evidenced by the judiciary's distaste for majoritarian elections that are held specifically to elect speakers, schools should not use this method. Rather, schools should select student speakers based upon neutral, secular criteria. The following are possible examples: volunteering students selected by lot; students selected based on holding a position or achieving an honor resulting from particular skills or abilities such as captain of the football team; students selected due to high class ranking or grade point average. Selection by lot may constitute the safest method, however, since the Justices specifically discussed this method during oral argument in *Santa Fe*.[171]

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170. *Santa Fe*, 530 U.S. at 303 n.13 ("A conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private").

171. During oral argument in *Santa Fe*, Justice Kennedy (who voted with the majority against the Santa Fe policy) suggested that if student speakers are chosen by lot or by other neutral criteria methods, and the word "invocation" is dropped from the policy, there may be no constitutional problem with such a policy:

> [Justice Kennedy's] Question: So you would say that even if these speakers were chosen by lot, and they were widely representative speakers on a statistical basis, that if, by chance, one out of five were giving prayers, that it would be an unlawful exercise one—that one-fifth of the time?
>
> Mr. Griffin [ACLU attorney]: It depends on, Justice Kennedy, what the policy would say. If it says, you're chosen by lot to give a message and/or invocation, absolutely right, the policy still fails.
>
> [Justice Kennedy's] Question: [What if] [t]hey're chosen by lot to represent the school and give the school a good name.
>
> Mr. Griffin: Tougher question. I think they can—they—if they're chosen by lot to give the school a good name, then I think that's a tougher question. It may be an as-applied case. In other words, we look at the history and see how it's applied.

Official Transcript of Proceedings Before the Supreme Court of the United States at 38, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (No. 99-62).

And in this exchange with another Justice:

> Mr. Griffin: . . . I would not have a problem if it was a diversity of views. I would not have a problem if it opened the forum up consistent with *Mergens*, consistent with *Lamb Chapel*, [sic] and opened the forum up to create a diversity of views.
>
> [Justice's] Question: Okay, students chosen by lot, then. A rotation of students.
>
> Mr. Griffin: It gives both—
>
> [Justice's] Question: In the course of the year, 180 students could speak.

Public statements, messages, and speeches to school audiences by the student body president, prom king or queen, and other students similarly elected to positions of leadership and honor appear unaffected by *Santa Fe*.[172] Apparently students in these categories may voluntarily publicly pray without falling subject to claims of affirmative government sponsorship. The fact that the Supreme Court expressly addressed this group of students and appeared to exclude them from its holding further supports the principle that students' publicly stated prayers do not in themselves raise problems, but that it is the governmental favoring of prayer that breaches the Establishment Clause.

Fourth, the history, circumstances, and expressions by school board members and other school officials preceding passage of new student speaker policies must not evidence that the school district intended to highlight prayer as a governmentally favored practice. If a school district has had a past history of encouraging prayer, however, *Santa Fe* suggests that the district can "purge" its past and begin with a fresh start.[173] From that point, school districts should

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Mr. Griffin: By lot, by grade point average, by, you know—.

Id. at 42 (emphasis added).

172. *See Santa Fe*, 530 U.S. at 321 (Rehnquist, J., dissenting) (raising the question of whether, in the majority's view, "a newly elected student body president, or even a newly elected prom king or queen, [using] opportunities for public speaking to say prayers . . . violates the Establishment Clause"). In answering this question, the majority distinguishes the scenario raised by Chief Justice Rehnquist, stating, "the election of the speaker *only after* the majority has *voted on her message* identifies an obvious distinction between this case and the typical election of a 'student body president, or even a newly elected prom king or queen.'" *Id.* at 304-05 n.15 (emphasis added); *see also id.* at 316 n.23 (stating that "THE CHIEF JUSTICE accuses us of 'essentially invalidat[ing] all student elections.' This is obvious hyperbole. We have concluded that the resulting message under *this policy* would be *attributable to the school*, not just the student") (alteration in original) (citation omitted) (emphasis added).

173. *See* Official Transcript of Proceedings Before the Supreme Court of the United States at 40, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (No. 99-62). During oral argument in *Santa Fe*, Justice Ginsburg (who voted with the majority against the Santa Fe policy) suggested that a school district can purge its past history of promoting school prayer:

> [Justice Ginsburg] Question: So you can never purge the past [?] If you put even a policy that looks like it has nothing to do with religion—
>
> Mr. Griffin: I think you can purge the past. I would never say that, and Chief—excuse me, Justice Ginsburg, I would never say that.

See id.; *see also* Kreisner v. City of San Diego, 1 F.3d 775, 784 (9th Cir. 1993) (stating that "the City's past sponsorship of the [overtly religious] display does not mandate a different conclusion. We will not punish the Committee for the City's past mistakes").

proceed forward with neutrality toward religion when enacting new student speaker policies.

Fifth, school districts should consider employing disclaimers.[174] Recall that in *Santa Fe*, the Court was concerned that, under the circumstances of the case, an "objective observer" would perceive affirmative state endorsement of the content of the student's message.[175] Districts can help dispel incorrect perceptions by addressing potential concerns through verbal and/or printed disclaimers. Such disclaimers can help prevent objective observers from mistakenly linking students' expressions to affirmative sponsorship by school districts.[176] Disclaimers not only reinforce the understanding of the reasonable, informed observers but also alert the uninformed observers as well, such as members and fans of visiting teams and guests at graduation ceremonies.

While a disclaimer is not dispositive standing alone, if the statements in the disclaimer are true, such statements bolster the audiences' perception of no government endorsement and provide information to dispel wrong perceptions. Until the courts indicate that disclaimers are unnecessary, it would be prudent to use them in connection with student speaker policies. When an audience is informed, such knowledge can dispel wrong perceptions that the content and viewpoint of a student's speech is instigated, encouraged, or affirmatively sponsored or endorsed by the school.[177] Under such circumstances, it would be difficult to imagine an objective observer successfully arguing that he or she felt coerced by the government into agreeing with a student's voluntary, personal, and independently selected view.

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174. When an audience is informed that a student speaker has been selected on wholly secular criteria and the content of the student's message has been selected solely by the student, the issue of perceived government endorsement is largely dispelled since the endorsement test focuses on the perception of "a reasonable, informed observer," "deemed aware of the community and forum" as opposed to the awareness level of a person who is merely "some passerby." *Pinette*, 515 U.S. at 773, 779-80 (O'Connor, J., concurring).

175. *Santa Fe*, 530 U.S. at 308.

176. *See* Doe v. Madison Sch. Dist., 147 F.3d 832, 835 n.5 (9th Cir. 1998) (referring, with approval, to a school's policy that "requires that the audience be informed who controls the content of the student presentation"). The court stated that "[w]hile the existence of a disclaimer is not 'dispositive,' it 'reinforces the reasonable observer's perception of no government sponsorship.'" *Id.* (citing *Kreisner*, 1 F.3d at 784 n.5).

177. Of course, if a school district highlights prayer as favored, the disclaimers will be false and will not shield the district from a constitutional challenge.

B. *Model Student Speaker Policies Adopted As Aids for School Districts by Texas State Board of Education*

On September 15, 2000, the Texas State Board of Education passed a Resolution calling upon all Texas public school districts to bring their policies into compliance with *Santa Fe* and recommending, for consideration, new policy language in the form of three "model policies."[178] The State Board mailed copies of the Resolution and model policies to each Texas school district. The three model student speaker policies have received positive commentary and analysis from a wide variety of diverse interests.[179]

C. *Secular Purposes of Student Speaker Policies*

In public schools, students participate in numerous recurring activities having natural beginnings and endings, such as sporting events, graduations, assemblies, and the school day itself. Just prior to the start of each activity, there is usually noise, walking around, and talking. Attaining attention, silence, and focus nor-

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178. *See* RESOLUTION OF THE TEXAS STATE BOARD OF EDUCATION (Sept. 2000). The Texas State Board of Education's Resolution and model policies are reproduced in Appendix B.

179. *See* Texas Education News, Vol. 3, Issue 31, Oct. 9, 2000, (TASA/TASB Convention, Sept. 22-25, 2000) (noting that TASB attorney, Shellie Hoffman, Director of Legal Services, stated that: "This is as close as I've seen anything yet to a solution. . . . It is as close as I've seen to not being school-sponsored"); Letter from Mark Weldon Whitten, President of the Greater Houston Area Chapter of Americans United for Separation of Church and State, and author of THE MYTH OF CHRISTIAN AMERICA (1999), to Kelly Coghlan (Feb. 12, 2001) (stating, "I see nothing that bothers me in any constitutionally-interested sense") (on file with the *St. Mary's Law Journal*); Edward Piña, President of the San Antonio Chapter of the ACLU and Vice President of Legal Affairs for the ACLU of Texas, remarks at law Symposium "From the Schoolhouse to the Courthouse," St. Mary's University School of Law (Feb. 23, 2001) (stating, "I see no problem with these policies") (noted remarks on file with the St. Mary's Law Journal); Schwartz & Eichelbaum, P.C., *Student Speaker Policy Alert August* 2000, *at* http://www.edlaw.com/What'sNew/ClientAlerts/StudentSpeakerPolicy.htm (last visited Nov. 21, 2000) (on file with the *St. Mary's Law Journal*) ("The policy Coghlan suggests appears to be constitutional on its face"). Schwartz & Eichelbaum further state:

> We believe the Student Speaker Policy goes quite a distance in meeting the courts' concerns: it eliminates the "majority rule" election process; it appears to create a forum for many kinds of messages other than prayers; and the public disclaimer meets the concern that permitting student prayers at school-sponsored events, on school property, using a school-operated and controlled PA system implies school endorsement of the religious message.

Id.

mally requires some act to mark the beginning of each occasion. In America, formal ceremonial expressions traditionally have been used to achieve this end. Methods and content vary, but most provide a moment conducive to reflection, focusing, and calming.[180]

School activities obviously exist for the benefit of students, not for the benefit of school officials. High school students in the final stages of their required formal education are already deemed by school districts as being mature enough to run their own student government, elect their own officers and representatives, take college level courses, plan and carry out school events, and organize and lead student clubs. Furthermore, society, in general, believes high school students are mature enough to drive automobiles, and, upon reaching majority age, to vote and, in time of war, to be drafted to fight for our country. The Supreme Court has acknowledged the maturity level of students by the time they reach high school.[181] No compelling reasons exist for school officials or judges to conduct or script the introductions of student activities when students may capably do so themselves. Allowing student participation in this respect provides a logical progression of other responsibilities already entrusted to high school age students and does not put the government in a position of endorsing anything other than student participation, student choice, and the many secular educational benefits of doing so. Allowing such participation sends a message to students that the school district believes them capable, mature, and intelligent enough to handle more responsibilities in connection with student activities. Additionally, such active participation provides significant educational benefits to students by providing exposure to public speaking and educational opportunities in, among other subjects, speech, English, grammar,

180. While ceremonial prayer has been used as a method of opening events, it is certainly not the only method by any means. A moment of silence, reciting a quote, singing the National Anthem or other song, leading the Pledge of Allegiance, offering words of welcome, and various other methods have also been used. A targeted elimination of one method of formalizing the beginning of events simply because it encompasses a faith-based viewpoint is not in keeping with "a course of 'neutrality' toward religion." Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 793 (1973).

181. Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

drama, and civics.[182] Students in the audience also potentially benefit.[183]

Other reasons, in addition to those already mentioned, also support the particular appropriateness of having student speakers set a positive tone at high school sporting events. Not only do sporting events pose a potential for physical injuries to young players, the events regularly involve longstanding rivalries between schools and towns. These games present potential for conflict, poor sportsmanship, and violence.[184] A moment of formal ceremonial expression, which often focuses attention on something positive, historically has gone far to soothe turbulent atmospheres at high school sport-

182. Speech, English, grammar, drama, and civics are all educational subjects worthy of hands-on application in high school. Rather than merely learning *about* these subjects academically, the process involves students in the actual practice of the subjects. Students involved in speaking at events have to organize their thoughts, author, prepare, practice, and deliver a concise oral presentation before a live audience, providing these students with valuable opportunities for learning and application of public speaking and presentation skills. *See* Emily Shartin, *The Holly Fest: A Time to Speak Clearly*, BOSTON GLOBE, Dec. 7, 2000, at 8 (discussing the benefits of public speaking and how the process and practice of articulating one's thoughts before an audience help high school students in other academic areas and in exam taking), 2000 WL 3358387. It would be wasteful to allow these events and activities to pass week after week without the school utilizing them as ideal opportunities for its students to advance their communicative skills—which would surely prove important to them in whatever they choose to do after high school. The author can attest from personal experience that having to speak at programs, assemblies, and football games during one's high school years is as educational and beneficial as any academic class one can take in high school, college, or graduate school. Effective student speaker policies will increase the number of and diversity of students beyond those few who have traditionally been afforded the opportunity of speaking before school audiences, thus, casting a broader educational net.

183. Because, as a general observation, it appears that teens are more influenced by their peers than by adults, positive student expression could have a constructive impact on the attitudes of fellow students and promote a positive tone and atmosphere in the school. Additionally, exposure to diverse student speakers could be educational for those in the audience, also promoting tolerance for other's ideas, expressions, and cultural differences. Finally, students could not help but feel a greater sense of ownership in their own student activities and a sense that they are collectively deemed mature enough to handle the additional responsibilities.

184. *See, e.g.*, Eric Slater, *Expulsions Won't Be Revoked for Illinois Teens in Fracas*, AUSTIN AM.-STATESMAN, Jan. 12, 2000, at A5 (reporting that a federal judge upheld the expulsion of six students for fighting at a high school football game), 2000 WL 7326343; *see also* Edward Wong, *New Rules for Soccer Parents: 1) No Yelling. 2) No Hitting Ref.*, N.Y. TIMES, May 6, 2001, at A1 (reporting that "thousands of referees . . . have left high school and youth sports in recent years because of poor sportsmanship on the part of spectators, said Bob Still, a spokesman for the National Association of Sports Officials. But this is only one of many results of . . . a rising tide of misbehavior at high school and youth sports").

ing events and other school activities, and has throughout the years fostered calm, reflection, and good behavior.[185]

D. *Secular Motivation Required by School Officials in Enacting Student Speaker Policies*

Private citizens are free to argue that they want student speaker policies enacted because they hope that a student might decide to pray at some event. Likewise, private citizens are free to argue that they oppose student speaker policies because they do not want even the possibility that a student might pray at some event.

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185. The author can attest, from personal high school experiences, that student speakers can help defuse potentially dangerous situations. During the author's senior year at Longview High School in 1970-71, federally ordered integration occurred. There was a fight on a Friday afternoon before one of the first high school football games. There were injuries, and the rumors were that the racial unrest would be continued at the football game that night. Before the game began, however, a student stepped to the microphone and made a short prayerful statement addressing how all are equal, how love of each other must prevail, and asking for peace and goodwill among all in attendance. The mood changed, tensions seemed to melt, and there were no fights.

Have the schools of today become safer than the schools of 1970? Consider Pearl, Mississippi, October 1, 1997, two dead, seven wounded; West Paducah, Kentucky, December 1, 1998, three dead, five wounded; Jonesboro, Arkansas, March, 1998, five dead, ten wounded; Springfield, Oregon, May, 1998, four dead, twenty-one wounded; Littleton, Colorado, April 20, 1999, thirteen dead, twenty-three wounded; Conyers, Georgia, May 20, 1999, six wounded; Fort Gibson, Oklahoma, Dec. 6, 1999, four wounded. *See Other School Shootings*, THE SEATTLE TIMES, Mar. 1, 2000, at A3, LEXIS, Nexis Library, News Group File; *see also 2 Teens Die in Rampage on Campus*, HOUS. CHRON., Mar. 6, 2001, at 1 (Santee, California, two dead, thirteen wounded); *6 Shot in New Campus Violence*, HOUS. CHRON., Mar. 23, 2001, at 1A, E1 (Cajon, California, Mar. 22, 2001, 6 wounded).

It is ironic that the one form of speech seemingly most targeted for elimination from public schools is the one form of speech that a number of scientific studies support as being helpful. *See generally* Larry Dossey, M.D., *Healing Words: The Power of Prayer and the Practice of Medicine*, (1st ed., HarperCollins 1993); Larry Dossey, M.D., *Prayer Is Good Medicine: How to Reap the Healing Benefits of Prayer*, (1st ed., HarperCollins 1996); Dale A. Matthews, M.D. & Connie Clark, *The Faith Factor: Proof of the Healing Power of Prayer*, (Penguin Group 1998). Some argue that prayer only creates a placebo effect. *But see World Wide*, WALL ST. J., May 24, 2001, at A1 (reporting a new study: "The 'placebo effect' was called into question by a Danish study in the New England Journal of Medicine. Researchers found no indication that the power of patients' minds produced a response to dummy treatments"). *See also* 20/20: *Adopting a Nun* (ABC television broadcast, May 5, 1999) ("You may remember a small, but astonishing study in 1998 that showed that AIDS patients who did not know they were being remembered in the prayers of others were healthier a few months latter than a control group of AIDS patients who had received no prayers").

Whether expressions are secular-based or faith-based, student speaking opportunities could help foster an atmosphere of calm, focus, and composure, promoting the secular goal of, *inter alia*, producing safer sporting events and safer schools.

School officials, on the other hand, may not be motivated by either of these positions and are prohibited by law from advancing or considering either.[186]

Whether or not a student would ever use a speaking opportunity to express a faith-based viewpoint is pure speculation regarding which the school board must not indulge. School officials are required to remain neutral in matters of religion, and such speculations should not enter into deliberations when a school board considers adoption of student speaker policies. School officials must be "color blind" to the faith-based versus secular-based views that students might express under such policies.

A school board member must base support for student speaker policies on secular, not religious or pro-prayer grounds. Likewise, a school board member must base opposition to student speaker policies on secular, not anti-religion or anti-prayer grounds. Thus, each board member must vote based upon whether he or she believes the proposed policies can potentially promote worthy educational goals and other secular purposes. This must be the focus of the discussions and decision-making process.[187]

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186. It is arguably just as constitutionally problematic for a school board to reject student speaker policies for the purpose of preventing student prayer as it would be for the school board to adopt student speaker policies for the purpose of promoting prayer. These actions would represent the two extremes of the same governmental non-neutrality. In the first instance, the impermissible governmental purpose would be to discourage and prohibit the free exercise of religion, implicating the Free Exercise and Free Speech Clauses, and in the second instance, the impermissible governmental purpose would be to encourage and establish religion, implicating the Establishment Clause. *See generally* Douglas Laycock, *The Supreme Court and Religious Liberty,* 40 CATH. LAW. 25, 25-34 (2000) (discussing protections under the Free Exercise Clause against governmental "religious bigotry").

187. When student speaker policies come before the school board for a vote, there will likely be citizens wanting to speak to the issue. The reading of a disclaimer by the school board or its attorney could begin the educational process toward assuring that an "objective observer acquainted with the text, legislative history, and implementation of the statute" will understand that the board intends to strictly comply with *Santa Fe.* A general example of the possible content of such a disclaimer might read as follows:

> Citizens who address this board are free to express their personally held views, but as to the issue of student speaker policies, this board can take into account only secular-based contentions for or against passage of these policies and cannot consider matters in the realm of faith-based or anti-faith-based arguments or appeals. As government officials operating within the parameters of the First Amendment to the United States Constitution, this board will act with strict neutrality toward such matters and will make its decisions based solely upon secular considerations, as required by law.

E. *"As Applied" Issues After Adoption of Student Speaker Policies*

Following enactment of new student speaker policies, schools must still take measures to apply the policies in a constitutional manner. Therefore, government officials must continue a course of neutrality, saying and doing nothing to suggest that students should use speaking opportunities to pray or express religious viewpoints. If a student speaker expresses a religious viewpoint, the idea of expressing such viewpoint must originate with the student. Governmental pressure, direct or indirect, on the student by a board member, teacher, coach, or other school official will taint the constitutionality of a student's otherwise voluntary speech because the courts will assume the government pressure caused the student to pray or to express a faith-based view. If a district adopts the student speaker policies suggested for consideration by the Texas State Board of Education, that district should take steps to educate teachers, coaches, and other school officials in the art of remaining neutral—neither proscribing nor prescribing prayer or other faith-based student speech.

Providing a number of speaking opportunities, such as openings for the school day, pep rallies, assemblies, programs, sports events, and the like, would likely tend to demonstrate a good faith attempt by a school district to provide an opportunity for a diversity of views from a diverse group of students. As one Supreme Court Justice suggested during oral argument in *Santa Fe*, "In the course of the year, 180 students could speak" or "a student a week."[188] Preferably, there will be some diversity in the messages and viewpoints of student speakers. At least some diversity, although not determinative, will provide additional evidence that the school district has not highlighted one view as favored.[189]

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188. Official Transcript of Proceedings Before the Supreme Court of the United States at 42, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (No. 99-62). The Justice was exploring remedies to the concern that only one student, the same student, was expected by the school district to give invocations for the entire season under the *Santa Fe* policy.

189. To satisfy several of the present Supreme Court Justices, it could be desirable that there be some diversity in the viewpoints expressed by students rather than every student giving the identical message. In the 1995 case of *Capitol Square Review Advisory Board v. Pinette*, the Justices disagreed over whether a bystander's misperception that private speech was government speech was enough to constitute an Establishment Clause

However, the fact that a number of students, or even a majority of students, ultimately choose to voluntarily voice a viewpoint aligned with the views of most other students in the school does not make those speakers' rights to speak any less legitimate. A majority view stands just as valid as a minority view. Otherwise, the minority could silence the majority simply as a matter of personal predilection.[190] If a school district has proceeded in a constitu-

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violation. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763-70 (1995). There was not a majority agreement on the issue, however. In fact, a plurality of four Justices said that what a bystander might mistakenly believe about governmental endorsement of a citizen's private religious expression is not a factor to be considered. *Id.* at 765. This plurality of four stated that any test that "would attribute to a neutrally behaving government *private* religious expression, has no antecedent in our jurisprudence, and would better be called a 'transferred endorsement' test." *Id.* at 764. The plurality noted that "[b]y its terms [the Establishment] Clause applies only to the words and acts of *government.* It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Id.* at 767.

Justice O'Connor, however, writing for three Justices, advocated using an "endorsement test" that would apply "even where a neutral state policy toward private religious speech in a public forum is at issue." *Id.* at 772 (O'Connor, J., concurring). In the view of these three Justices, the test would take into account the objective "perception of a reasonable, informed observer." *Pinette*, 515 U.S. at 773. As an example of their view, the three Justices opined that "a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval." *Id.* at 777.

The student speaker policies recommended for consideration by the Texas State Board of Education call for disclaimers to be communicated to the audience so that all will understand that viewpoints expressed are solely those of the student speakers and not endorsed by the school district. *See* RESOLUTION OF THE TEXAS STATE BOARD OF EDUCATION (Sept. 2000). This should decrease the risk of a "reasonable, informed observer" mistakenly believing the content of a student's speech is that of the government's. Additionally, with the American student population becoming increasingly diverse, and with a student speaker policy giving all students an equal opportunity to participate, it is unlikely that a single "private religious group [would] dominate the public forum" or that all students would express an identical viewpoint.

190. The First Amendment's focus is on the rights of the speaker rather than the listener. The fact that a student may express a viewpoint held by a majority of listeners should not run afoul of the Constitution. The Court has opined:

> [T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense . . . . "[W]e are often 'captives' outside the sanctuary of the home and subject to objectionable speech." The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority [or minority] to silence dissidents simply as a matter of personal predilections.

Cohen v. California, 403 U.S. 15, 21 (1971) (citations omitted). Constitutionally speaking, a majority view is just as valid as a minority view. Any broader view "would effectively

tional manner, it would seem unlikely that a court would require governmental clairvoyance as to the views students might ultimately choose to voluntarily express.[191] If schools properly enact and apply appropriate student speaker policies, the process can prove to be an exciting, interesting, and educational experience for students, and, as a byproduct, likely foster a reflective, focused, calming atmosphere conducive to safer schools.

VI. CONCLUSION

The First Amendment does not convert public schools into religion-free zones.[192] As stated in *Lee*, "religious beliefs and religious expression are too precious to be either *proscribed* or *prescribed* by the State."[193] If the Establishment Clause were interpreted to outlaw voluntary, public, faith-based speech in public schools, this would have the effect of turning school officials into prayer police, religious students into enemies of the state, and public schools into institutions of religious apartheid.

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empower" the minority "to silence dissidents simply as a matter of personal predilections." *Id.*

191. With *Santa Fe*, the new emphasis is on whether a student's expression is truly "voluntarily" made. *See Santa Fe*, 530 U.S. at 313 n.14. The *Santa Fe* Court does not qualify its constitutional protection as being applicable to students who are "voluntarily praying" only in the event that not too many other students are expressing the same viewpoint by "voluntarily praying." If viewpoint diversity were to become a test for permitting the continuation of voluntary student speech, then such rule itself would have a coercive effect on students' choices of expression (i.e., if students want to have the chance to speak, they know that they must express a viewpoint that is "diverse" so that the school and courts will approve). Such a rule would undermine the very essence of voluntary, private student choice, and, by definition, would cause the choice to be something other than voluntary.

192. President William J. Clinton, Remarks by the President on Religious Liberty in America at James Madison High School, Vienna, Virginia (July 12, 1995), *at* http://www.ed.gov.PressReleases/07-1995/religion.html. As President William Clinton said in an address on the topic of religious liberties in public schools:

> The First Amendment . . . does not convert our schools into religion-free zones . . . [and] does not require students to leave their religion at the schoolhouse door. . . . It protects freedom of religion by allowing students to pray, and it protects freedom of religion by preventing schools from telling them how and when and what to pray.

Id.

193. Lee v. Weisman, 505 U.S. 577, 589 (1992) (emphasis added). Prohibiting prayer would surely be as unconstitutional as requiring prayer—both would be equally non-neutral policies.

Building upon forty years of legal precedent, the Supreme Court, in *Santa Fe,* expressed a new paradigm from which to judge public-school/faith-based issues. The Court drew the constitutional line as between: (1) a student voluntarily praying,[194] which is constitutionally protected speech that a school district may not prohibit, and (2) a student praying as a result of a school district's "characteriz[ing] prayer as a favored practice,"[195] thereby "affirmatively sponsor[ing] the particular religious practice of prayer,"[196] causing any resulting prayer to lose its otherwise "voluntarily praying"[197] and "private speech"[198] status, with the end result being a finding of unconstitutional state action by the school district. Although the demarcation is different, this line is consistent with prior Supreme Court precedent.[199] It is the highlighting of prayer as a governmentally favored practice, not prayer itself, that violates the Constitution.[200] Prayer is merely a compilation of words just as any other form of speech.[201] Prayerful words are not "First Amendment orphan[s]" to secular words. To the contrary, prayer-

194. *Santa Fe*, 530 U.S. at 313.

195. Wallace v. Jaffree, 472 U.S. 38, 59-60 (1985) (noting that Alabama's statutory modification led to a constitutional violation of the Establishment Clause by "characteriz[ing] prayer as a favored practice").

196. *Santa Fe*, 530 U.S. at 313.

197. *Id.*

198. *Id.* at 302.

199. *See* Lee v. Weisman, 505 U.S. 577, 587-88 (1992) (holding that a principal who decides there will be a prayer at graduation, selects a clergyman to pray, and provides prayer guidelines to the selected clergyman amounts to governmentally instigated prayer and for this reason is unconstitutional); Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (noting the "crucial difference" between governmental religious speech and religious speech by private citizens); *Jaffree*, 472 U.S. at 60 (noting that unconstitutionality is found not in the students' prayer but in the school district's "characteriz[ing] prayer as a favored practice"); Engel v. Vitale, 370 U.S. 421, 430 (1962) (holding that prayers composed by school officials for daily recitation by students is unconstitutional).

200. *See Jaffree*, 472 U.S. at 59-60 (distinguishing between the constitutional protection of a student's right to voluntarily pray and the state's characterization of prayer as a governmentally favored practice).

201. Consider once again the opening scenario of this Article. What if a student says, "God, let us have a safe game tonight," or "In God we trust," with the intent of merely expressing a patriotic message rather than a prayer? Does a student's intent for choosing to use certain words have a constitutional impact? No, it should not. A student's intent for selecting particular words should be irrelevant to an analysis of whether the expression is constitutional. One person may interpret the words as a religious act of worship while another might interpret the words as merely a traditional, secularized, boilerplate method of beginning a football game. Turning courts and school officials into "thought police" is not required by the Establishment Clause of the Constitution and has no antecedent in the

ful words and secular words must be treated with equal dignity by the government.[202] Public schools may not discriminate against voluntary faith-based speech.

Santa Fe offers fresh guidance to public school districts as to how to draft constitutional policies that will permit public, student-led, student-initiated speech—whether secular-based or faith-based. More student speaking opportunities, not fewer, are needed in public schools. If students use these opportunities to inspire their peers with positive words of welcome, or uplifting thoughts for the day, or thoughtful quotes from Abraham Lincoln or others, then their expressions will have been of value. Under neutral student speaker policies, it is speculation and conjecture to attempt to guess whether or not any student will ever voluntarily choose to express a faith-based, prayerful viewpoint. If one does, however, such expression just might prove that "those dangerous student prayers" were not so dangerous after all.[203]

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law. School officials must be "color blind" as to religious verses secular viewpoints. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).

202. *Id.*

203. Dennis Prager, *The Dennis Prager Show: School Prayer* (Fox Network Original television broadcast, Dec. 12, 1994) (In support of voluntary prayer in schools, Mr. Prager argued, "I am not a Christian; I am a Jew. And of course I am for secular government; *but I don't want a secular society* . . . . Let me just be blunt. The percentage of people in prison for murder, for rape, for violent crimes, who had been regular church or synagogue attenders is infinitesimally small. You have a better chance of producing good people with religion, and I'll give you one simple way of discovering that: Imagine you are walking alone in a bad area. It's about midnight. You're in a dark alley. And ten men start walking toward you. Would you, or would you not, be relieved to find out that they had just attended a *Bible* class? I suspect that you would be rather relieved") (on file with author).

APPENDIX A
HISTORICAL NOTES

On June 28, 1787, at a crucial juncture in the proceedings of the Constitutional Convention—noting "[t]he small progress we have made, after four or five weeks' close attendance, and continual reasonings with each other" and "our different sentiments on almost every question"—Benjamin Franklin addressed the delegates:

> In the beginning of the contest with Britain, when we were sensible of danger, we had daily prayers in this room for Divine protection. Our prayers, sir, were heard,—and they were graciously answered. . . . And have we now forgotten that powerful Friend? or [sic] do we imagine we no longer need its assistance? I have lived, sir, a long time, and the longer I live the more convincing proofs I see of this truth, *that* GOD *governs in the affairs of men.* And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, sir, in the sacred writings that "except the Lord build the house, they labor in vain that build it." I firmly believe this, and I also believe that without his concurring aid we shall succeed in this political building no better than the builders of Babel. . . .
>
> I therefore beg leave to move—
>
> That henceforth prayers, imploring the assistance of Heaven and its blessings on our deliberations, be held in this assembly every morning before we proceed to business; and that one or more of the clergy of this city be requested to officiate in that service.

11 BENJAMIN FRANKLIN, THE WORKS OF BENJAMIN FRANKLIN 376-78 (John Bigelow ed., Fed. ed. 1904). *See* 2 JAMES MADISON, THE PAPERS OF JAMES MADISON 984-86 (Henry D. Gilpen ed., Washington, Langtree & O'Sullivan 1840) (1797) (recording Franklin's speech).

There are conflicting accounts as to whether a vote was taken on Franklin's motion. *See* Letter from William Steele to Jonathan D. Steele (Sept. 1825), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 467, 472 (Max Farrand ed., rev. 1966) (noting "the motion for appointing a chaplain was instantly seconded and carried" and describing a subsequent session several days later in which "the chaplain had closed in prayer"). *But see* 2 JAMES MADISON, THE PAPERS OF JAMES MADISON 986 (Henry D. Gilpen ed., Washington, Langtree & O'Sullivan 1840) (1834) (indicating the motion was made too "late" and "the Convention had no funds

[to pay a chaplain]" so there was "adjournment without any vote on the motion"). However, it appears that the Convention may have included prayer at subsequent meetings. *See* Luther Martin's Address to the Legislature of the State of Maryland (Jan. 27, 1788), *in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 373 (Jonathan Elliot ed., 2d ed. 1996) (explaining that during the Constitutional Convention, "we had appealed to the *Supreme Being* . . . [and] we scarcely had *risen from our knees*, from supplicating his aid and protection, *in forming our government*") (emphasis added).

One year and nine months later, on April 7, 1789, one day after the Senate of the First Congress convened with a quorum, the Senate appointed a committee "to take under consideration the manner of electing Chaplains." 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 18 (Joseph Gales ed., Washington, Gales & Seaton 1834). On April 9, 1789, the House appointed a similar committee. *Id.* at 109. On April 25, the first Senate chaplain was elected, and on May 2, the first House chaplain was elected. *Id.* at 24 and 242, respectively. On August 7, 1789, the *Northwest Ordinance* was signed into law (after having originally been enacted in 1787 under the Articles of Confederation) for the governance of new States, stating at Art. III: "*Religion*, morality and knowledge, being necessary to good government and the happiness of mankind, *schools and the means of education* shall forever be encouraged." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 n.(a) (emphasis added). On September 22, 1789, Congress passed the statute providing for payment of chaplains. 2 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, app. 2237-38 (Joseph Gales ed., Washington, Gales & Seaton 1834).

On September 24, 1789, the House approved the final wording of what would become the First Amendment (referred to throughout as "First Amendment"). 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 947-48 (Joseph Gales ed., Washington, Gales & Seaton 1834). On September 25, 1789, the Senate approved same, and final agreement was thereby reached on the language of the First Amendment. *Id.* at 89-91; *see also* Marsh v. Chambers, 463 U.S. 783, 786-89 (1983) (reciting many legislative activities of the First Congress). On September

25, 1789, the House passed a Resolution calling for a Thanksgiving Proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God. . . ." 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 949-50 (Joseph Gales ed., Washington, Gales & Seaton 1834). On September 25, 1789, the Senate joined in the Thanksgiving Proclamation Resolution. *See id.* at 89-91. On October 3, 1789, George Washington issued the Thanksgiving Proclamation per Resolution of the House and Senate. *See* 30 GEORGE WASHINGTON, THE WRITINGS OF GEORGE WASHINGTON 427-28 (John C. Fitzpatrick ed., George Washington Bicentennial ed. 1933) (Oct. 3, 1789), stating in part:

> Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore. . . protection and favor.
>
> Now, therefore, I do recommend . . .
>
> . . . .[T]hat we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations . . . to enable us all . . . [t]o promote the knowledge and practice of true religion and virtue. . . .

Id.

The evidence supports the proposition, that from a historical perspective, the First Congress perceived no conflict between the Establishment Clause and vocal, public prayer and other faith-based speech and proclamations in a governmentally organized setting on government property. *See Marsh*, 463 U.S. at 787-89; *see also*.Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) (stating that an Act "passed by the first congress [sic] assembled under the constitution [sic], many of whose members had taken part in framing that instrument . . . is contemporaneous and weighty evidence of its true meaning").

Presidents George Washington, John Adams, and James Madison issued federal Thanksgiving Proclamations calling for public prayers and acknowledgements of God. *See* George Washington, *Proclamation*, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 64 (James D. Richardson ed., n.p., Authority of Congress 1899), and George Washington, *Proclamations*, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 179-80 (James D. Rich-

ardson ed., n.p., Authority of Congress 1899) (recording George Washington's Proclamations calling for days of thanksgiving and prayer, October 3, 1789 and January 1, 1795, respectively); John Adams, *Proclamations*, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 268, 269 (James D. Richardson ed., n.p., Authority of Congress 1899), and John Adams, *Proclamations*, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 284, 285 (James D. Richardson ed., n.p., Authority of Congress 1899) (recording John Adams' Proclamations calling for "a day of solemn humiliation, fasting, and prayer . . . [and] fervent thanksgiving . . . ," March 23, 1798 and March 6, 1799, respectively); James Madison, *A Proclamation*, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 513 (James D. Richardson ed., n.p., Authority of Congress 1899) (recording James Madison's July 9, 1812 Proclamation calling for a day of "rendering the Sovereign of the Universe and the Benefactor of Mankind the public homage due to His holy attributes . . . offering fervent supplications"); James Madison, *Proclamation*, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 532-33 (James D. Richardson ed., n.p., Authority of Congress 1899) (recording James Madison's July 23, 1813 Proclamation calling for a day "to render Him thanks for the many blessings He has bestowed . . . [with] devout thankfulness"); James Madison, *Proclamations*, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 558 (James D. Richardson ed., n.p., Authority of Congress 1899) (recording James Madison's November 16, 1814 Proclamation calling for a day of "devout thankfulness for all which ought to be mingled with their supplications to the Beneficent Parent of the Human Race").

As a member of Virginia's legislature and then as Governor of that state, Thomas Jefferson also issued calls and proclamations for days of prayer, fasting, and thanksgiving, but did not do so as President as he believed the "power to prescribe any religious exercise . . . *must then rest with the States*" rather than with the Federal Government (emphasis added). Letter from Thomas Jefferson to Rev. Mr. Millar (Jan. 23, 1808), *in* 4 MEMOIR, CORRESPONDENCE, AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON at 103-04 (Charlottesville, 1829); *see also* James H. Hutson, *Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined*,

56 WM. & MARY Q. 775, 788 (1999) (stating that "Jefferson's views on the relationship between religion and government are often misconstrued because his commitment to federalism is overlooked; what for him was permissible at the state level of government was frequently off-limits at a higher, federal level"). *See* 1 THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON 9 (Andrew A. Lipscomb ed., Library ed. 1903) (relating that, as a Virginia legislator, Jefferson urged "a day of fasting, humiliation, and prayer, to implore Heaven"); *see also* 10 DICTIONARY OF AMERICAN BIOGRAPHY 18 (Dumas Malone ed., 1933) (describing Jefferson as "one of the champions of the resolution for a fast day"). In 1779, as Governor of Virginia, Jefferson appointed "a day of public [sic] and solemn thanksgiving and prayer to Almighty God." *See* 2 OFFICIAL LETTERS OF GOVERNORS OF THE STATE OF VIRGINIA 64-66 (H.R. McIlwaine ed., Virginia State Library 1928).

George Washington in his Farewell Address wrote: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars. . . . And let us with caution indulge the supposition that morality can be maintained without religion." George Washington, *Farewell Address*, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 213, 220 (James D. Richardson ed., n.p., Authority of Congress 1899).

Reverend Ethan Allen, in *Allen's History*, records that Thomas Jefferson was once asked why he attended church to which Jefferson replied, "'No nation has ever yet existed or been governed without religion. Nor can be. The Christian religion is the best religion that has been given to man and I as chief Magistrate of this nation am bound to give it the sanction of my example.'" *See* James H. Hutson, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 96 (1998) (quoting Reverend Ethan Allen, manuscript on file with the Manuscript Division of the Library of Congress, MMC Collection 1167); *see also* Joseph Loconte, *Our 'Culture of Disbelief' Can Be Transformed; Have Faith*, HOUS. CHRON., Feb. 4, 2001, at 1 (quoting Jefferson's remarks), 2001 WL 2997002. Contrary to popular belief, Jefferson maintained he was a Christian—not a Deist and not an atheist: "I am a real Christian, that is to say, a disciple of the doctrines of Jesus." Letter from Thomas Jefferson to Charles Thompson (Jan. 9, 1816), *in* 14 THE

WRITINGS OF THOMAS JEFFERSON 385 (Andrew A. Lipscomb ed., Library ed. 1903); *see also* Letter from Thomas Jefferson to John Adams (Apr. 11, 1823), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 425 (Andrew A. Lipscomb ed., Library ed. 1903) (emphasis added) (stating, "[Calvin] was indeed an atheist, which I can never be.... The Being described in his five points, is not the God whom you and I acknowledge and adore, the Creator and benevolent Governor of the world....").

Formal church services were held in the United States House of Representatives from 1802 until the Civil War. *See* Hon. Roy S. Moore, *Religion in the Public Square*, 29 CUMB. L. REV. 347, 359 (1999).

APPENDIX B
MODEL POLICIES

RESOLUTION

WHEREAS the United States Supreme Court decision in *Santa Fe Independent School District v. Doe*, 530 U.S. ___ (2000) ("*Doe*"), provides significant new illumination for the formulation of constitutional student speaker policies; and

WHEREAS in *Doe*, the Supreme Court had before it an October 1995 Santa Fe Independent School District pre-game policy that it found to be an unconstitutional pro-prayer policy for several specific reasons peculiar to the text and history of the particular 1995 policy ("the narrow question before us," as the Supreme Court expressed); and

WHEREAS the Supreme Court did not rule that public/vocal "student-led, student-initiated prayer" is unconstitutional, but, instead, the Court concluded that the particular Santa Fe policy did not provide for genuinely voluntary, student-led, student-initiated expression, but, rather, for government-initiated, government-encouraged prayer; and

WHEREAS the Supreme Court did not hold that *all* policies permitting students to speak over school microphones would be unconstitutional, nor did the Supreme Court hold that a school district may constitutionally prevent a student from, or punish a student for, engaging in voluntary prayerful or religious speech when similar secular speech is permitted; and

WHEREAS the Supreme Court observed broadly that all voluntary student prayer is protected, without differentiation between public/vocal and personal/silent prayers, thus, "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday." *Doe*, slip op. at 21. The Constitution continues to require strict school district neutrality that neither "proscribe[s]" nor "prescribe[s]" "religious beliefs and religious expression" by students. *Lee v. Weisman*, 505 U.S. 577, 589 (1992); and

WHEREAS each Texas school district should review all present policies (written or practiced) allowing for student speakers at school sponsored activities, and bring those policies into compliance with *Doe*; and

WHEREAS the attached policies are based largely upon concepts raised by Supreme Court Justices during oral argument in *Doe* and appear to be in compliance with the rulings and holdings of *Doe*, now, therefore, be it

RESOLVED, That the State Board of Education recommends that each Texas school district review all student speaker policies/practices and adopt written policies that comply with *Doe*. To this end, the attached model policies are offered as aids for each school district's consideration. The Board directs that a copy of this Resolution and attachments be mailed to each Texas school district.

WITNESS our signatures this fifteenth day of September, two thousand, in Austin, Texas.

[signature lines omitted]

MODEL POLICIES

The three model policies mailed to school districts by the Texas State Board of Education are as follows:

SCHOOL BOARD POLICY ON STUDENT SPEAKERS

(Santa Fe Indep. Sch. Dist. v. Doe)

The School District intends to comply fully with the United States Supreme Court case of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. ___ (2000). Consequently, the School District hereby rescinds any and all policies and practices to the extent inconsistent with the holdings of the case. The School District shall not establish, require, instigate, or endorse prayer or other religious expression by students.

Nothing in *Santa Fe Indep. Sch. Dist. v. Doe*, however, abrogates the legal duties placed upon the School District under other applicable U.S. Supreme Court precedent requiring the District to maintain neutrality and not suppress, forbid, interfere with, discourage, or disparage voluntary prayer or other voluntary religious expression by students. *Santa Fe Indep. Sch. Dist. v. Doe*, slip op. at 21 ("nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

Due to changes and/or clarifications of the law under *Santa Fe*, and since the obligation to maintain governmental neutrality remains in force, the District has revised its policies to accomplish the goal of complying with *Santa Fe* and other Supreme Court cases prohibiting either hostility or favoritism regarding voluntary prayer and other voluntary religious expression by students. The School Board instructs that any future policies regarding student speakers at school sponsored events be targeted to comply with all pertinent Supreme Court rulings. To this end, the District adopts the following policies: (1) Policy: Student Speakers at School Sponsored Events; and (2) Policy: Student Speakers at Graduation Ceremonies.

POLICY: STUDENT SPEAKERS AT SCHOOL SPONSORED EVENTS

The School District intends to create, and does hereby create, a limited public forum consisting of an opportunity to speak for up to ___ minute(s) at the beginning of school sponsored events and programs.

The District adopts this policy for several reasons: to comply with *Santa Fe Indep. Sch. Dist. v. Doe* and other pertinent United States Supreme Court cases; to provide a method for marking the opening of school events that provides student participation and involvement; to provide a method for bringing the audience to order; to focus the audience on the purpose of the event; to present educational opportunities for students in the areas of speech, English, grammar, drama, and civics; to give students experience with speaking in public, organizing their thoughts, and presenting a concise oral presentation before a live audience; to promote education in and tolerance for diversity of viewpoints and appreciation of cultural differences; to give students a greater sense of ownership in their school's activities and events through student participation and involvement; to promote a continuation of student maturity, growth, and education through placing additional responsibilities upon older students in the final phase of their formal required education; to increase the number of and diversity of students beyond those few who have traditionally been afforded an opportunity to speak before school audiences, thus, providing this valuable educational experience to more students.

The designated forum shall be limited in the following ways:

1. only students of the subject high school shall be eligible to use the limited public forum; and,

2. the topic of the messages must be related to the purpose of the school sponsored event and to the purpose of marking the opening of the event, bringing the audience to order, and focusing the audience on the purpose of the event. For example, but without limitation, the following types of expression, or combinations thereof, would serve the purpose of the forum if selected by a student: words of welcome; a patriotic message; reciting a famous quotation; a "thought for the day;" leading the singing of the National Anthem and/or school song; leading the Pledge of Allegiance; giving a short tribute to the occasion or to those in attendance; or a non-verbal expression of a moment of silence.

Although a topic has been designated for the forum and a student must stay on the designated topic, the District will not engage in viewpoint discrimination.

Any volunteering student wishing to participate as a speaker under this policy must turn his/her name into the High School Student Council during an announced three-day period of time near the beginning of the school year. After the three-day period, the names of all such volunteering students will be randomly drawn by the President of the Student Council until all names have been selected. This process shall be witnessed by at least one other student and one school official (who shall be present only to assure the fairness of the drawing and the accurate listing of names drawn). The students' names will be listed in the order drawn and matched chronologically to the occasions for student messages in the order in which they arise. The volunteering students will be notified by the Student Council of the particular occasion for which he/she will be asked to give an opening student message. If there are more speaking occasions than there are volunteers, once each volunteering student has been matched to a speaking occasion, the same list of students, in the same order, will be repeated as many times as necessary to fill all occasions.

At each event and program in which a student will deliver a message, a disclaimer will be either: (1) printed in the program for the event; or (2) stated by a student or school official prior to the stu-

dent message; or (3) stated by the student speaker prior to the message. In each instance the following information should be given:

> [*Name of Student*] is a volunteering student selected at random to give a short opening message of [his/her] choice for [tonight's/today's] [name of event]. The content of the message is the private expression of the student, does not reflect any official position of the School District, and is not endorsed by the School District.

Certain students who hold or have attained special positions of honor within the school structure have traditionally addressed school audiences from time to time, but only as a tangential component of their achieved positions of honor (such as the Captain of the football team, Captains of other various sports teams, student council officers, class officers, homecoming kings and queens, etc.). Students who hold such positions of achievement and honor are selected to these positions based upon neutral criteria wholly unrelated to what the students might say at some future school function. Thus, nothing in this policy is intended to abrogate the continuation of the practice of having such students address school audiences in the normal course of their respective positions of honor.

Nothing in this policy abrogates the District's right to prohibit and/or punish obscene speech, which is not protected by the First Amendment (*Ginsberg v. New York*, 390 U.S. 629, 635 (1968)), the use of vulgar terms and offensively lewd and indecent speech (*Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683, 685 (1986)), and students' actions that materially and substantially disrupt the work and discipline of the school, or substantially disrupt or materially interfere with school activities (*Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 513, 514 (1968)).

POLICY: STUDENT SPEAKERS AT GRADUATION CEREMONIES

I.
Opening and Closing of Graduation Ceremonies

The School District intends to create, and hereby does create, a limited public forum consisting of an opportunity for a student to speak for up to ___ minute(s) to begin high school graduation cere-

monies and another student to speak for up to ___ minute(s) to end high school graduation ceremonies.

The designated forum shall be limited in the following ways:

1. only student speakers who are Seniors and whose selection is based upon neutral criteria (such as class ranking, holding a class office, or holding an office in the Student Council) shall be eligible to use this limited public forum; and,

2. the topic of the opening and closing messages must be related to the purpose of the graduation ceremonies and to the purpose of marking the opening and closing of the event, bringing the audience to order, and focusing the audience on the purpose of the event.

Students eligible to volunteer to give the opening and closing messages include: Seniors having the three highest grade point averages, Seniors who are class officers, and Seniors who are Student Council officers. Any student, however, who will otherwise have a speaking role in the graduation ceremonies is ineligible to volunteer. The names of the eligible volunteering students will be randomly drawn. The first name drawn will present the opening message, and the second name drawn shall present the closing message.

II.
Valedictorian, Salutatorian and Others

Certain students who hold or have attained special positions of honor within the school structure have traditionally had a speaking role at graduation ceremonies, but only as a tangential component of their achieved positions of honor. Students who hold such positions of achievement and honor are selected to those positions based upon neutral criteria wholly unrelated to what they might say at graduation. Nothing in this policy is intended to abrogate the continuation of the practice of having such students speak at graduation ceremonies.

The Valedictorian, Salutatorian [and any other students who will be addressing the audience such as Senior Class President, President of the Student Council, etc.] will each be permitted to address the audience for a reasonable length of time at graduation ceremonies. For this purpose, the School District creates a limited public forum for the students to deliver such addresses. The topic of the

addresses must be related to the purpose of the graduation ceremonies.

III.
Disclaimer

A written disclaimer shall be printed in the graduation program that states the following:

> The students who will be speaking at the graduation ceremonies were selected based upon neutral criteria to deliver messages of their own choice. The School District does not require, suggest, or endorse the content of the messages. The content of each student speaker's message is the private expression of the individual student and does not reflect any position of the School District, its Board of Trustees, administration or employees, or indicate the views of any other graduate. No person is compelled to participate in or agree with the selection of content made by the student speakers, nor should anyone feel compelled to do so.

IV.
Viewpoint Neutrality

Although topics have been designated for the forums and students must stay on the designated topics, the District will not engage in viewpoint discrimination.

Nothing in this policy abrogates the District's right to prohibit and/or punish obscene speech, which is not protected by the First Amendment (*Ginsberg v. New York*, 390 U.S. 629, 635 (1968)), the use of vulgar terms and offensively lewd and indecent speech (*Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683, 685 (1986)), and students' actions that materially and substantially disrupt the work and discipline of the school, or substantially disrupt or materially interfere with school activities (*Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 513, 514 (1968)).

This policy supersedes all others regarding these matters and shall become effective immediately.

As a result of input from attorneys of the Texas Association of School Boards ("TASB") to school officials, (as well as input from other sources, the model policies have been formatted and modified by the author from their original passed form. Any future revisions to the policies may be reviewed at www.saferschools.org. The three model policies in their most current form are as follows:

MISCELLANEOUS INSTRUCTIONAL POLICIES: RELIGION IN THE SCHOOLS	EMI (LOCAL)
STUDENT SPEAKERS	The District intends to comply fully with the United States Supreme Court decision of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) ("Santa Fe"). Consequently, the District rescinds any and all policies and practices to the extent inconsistent with the holdings of the case. The District shall not affirmatively sponsor, establish, require, instigate, or endorse prayer or other religious expression by students. Nothing in *Santa Fe*, however, abrogates the legal duties placed upon the District under applicable U.S. Supreme Court precedent requiring the District to maintain neutrality and not suppress, forbid, interfere with, discourage, or disparage voluntary prayer or other voluntary religious expression by students. *Good News Club v. Milford Central School*, 121 S. Ct. 2093 (2001) ("speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the grounds that the subject is discussed from a religious viewpoint"); *Santa Fe*, 530 U.S. at 313 ("nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Lynch v. Donnelly*, 465 U.S. 668 (1984). Due to changes and/or clarifications of the law under *Santa Fe*, and since the obligation to maintain governmental neutrality remains in force, the District has revised its policies and practices to accomplish the goal of complying with *Santa Fe* and other Supreme Court decisions prohibiting either hostility or favoritism regarding voluntary

prayer and other voluntary religious expression by students. The Board instructs that any future policies regarding student speakers at school sponsored events be targeted to comply with all pertinent Supreme Court rulings.

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STUDENT ACTIVITIES FM (LOCAL)

STUDENT SPEAKERS AT SCHOOL-SPONSORED EVENTS

The District intends to create, and does hereby create, a limited public forum consisting of an opportunity for a student to speak for a maximum of___ minute(s) at the beginning of school-sponsored events and programs.

The District adopts this policy to:

Comply with Santa Fe Indep. Sch. Dist. v. Doe and other pertinent United States Supreme Court decisions;

Provide a method for marking the opening of school events that provides student participation and involvement;

Provide a method of bringing the audience to order;

Focus the audience on the purpose of the event;

Present educational opportunities for students in the areas of speech, English, grammar, drama, and civics;

Give students experience with speaking in public, organizing their thoughts, and making a concise oral presentation before a live audience;

Promote education in and tolerance for diversity of viewpoints and appreciation of cultural differences;

Give students a greater sense of ownership in their school's activities and events through student participation and involvement;

Promote a continuation of student maturity, growth, and education through placing additional responsibilities upon older students in the final phase of their formal required education;

Increase the number of and diversity of students beyond those few who have traditionally been afforded an opportunity to speak before school audiences, thus providing this valuable educational experience to more students.

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STUDENT ACTIVITIES — FM (LOCAL)

STUDENT SPEAKERS AT SCHOOL-SPONSORED EVENTS (CONTINUED)	The designated forum shall be limited in the following ways: (1) Only students of the high school shall be eligible to use the limited public forum; and (2) The topic of the message must be related to the purpose of the school-sponsored event and to the purpose of marking the opening of the event, bringing the audience to order, and focusing the audience on the purpose of the event. For example, but without limitation, the following types of expression, or combinations thereof, would serve the purpose of the forum if selected by a student: Words of welcome; a patriotic message; reciting a famous quotation; a "thought for the day;" leading the singing of the National Anthem and/or school song; leading the Pledge of Allegiance; giving a short tribute to the occasion or to those in attendance; or a non-verbal expression of a moment of silence.
VIEWPOINT NEUTRALITY	Although a topic has been designated for the forum and a student must stay on the designated topic, the District will not engage in viewpoint discrimination.
SELECTION OF SPEAKERS	Any student wishing to participate as a speaker under this policy shall submit his or her name to the school student council during an announced three-day period near the beginning of the school year. After the three-day period, the names of all such volunteering students shall be randomly drawn by the president of the student council until all names have been selected. This process shall be witnessed by at least one other student and one school official (who shall be present only to assure the fairness of the drawing and the accurate listing of names drawn).

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STUDENT ACTIVITIES FM (LOCAL)

SELECTION OF SPEAKERS (CONTINUED)

The students' names shall be listed in the order drawn and matched chronologically to the occasions for student messages in the order in which they arise. Each volunteering student shall be notified by the student council of the particular occasion for which he or she is asked to give an opening student message.

If there are more speaking occasions than there are volunteers, once each volunteering student has been matched to a speaking occasion, the same list of students, in the same order, shall be repeated as many times as necessary to fill all occasions.

DISCLAIMER

At each event and program in which a student will deliver a message, a disclaimer shall be:

1. Printed in the program for the event; or
2. Stated by a student or school official prior to the student message; or
3. Stated by the student speaker prior to the message.

In each instance the following information should be given:

> "[Name of Student] is a volunteering student selected at random to give a short opening message of [his/her] choice for [tonight's/today's] [name of event]. The content of the message is the private expression of the student, does not reflect any official position of the District, and is not endorsed by the District."

OTHER STUDENT SPEAKERS

Certain students who hold or have attained special positions of honor within the school structure have traditionally addressed school audiences from time to time, but only as a tangential component of their achieved positions of honor (such as the captain of the football team, captains of other various sports teams, student council officers, class officers, homecoming kings and queens, and the like).

STUDENT ACTIVITIES

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OTHER STUDENT SPEAKERS (CONTINUED)	Students who hold such positions of achievement and honor are selected to these positions based upon neutral criteria wholly unrelated to what the students might say at some future school function. Thus, nothing in this policy is intended to abrogate the continuation of the practice of having such students address school audiences in the normal course of their respective positions of honor.
RESTRICTIONS TO STUDENT SPEECH AND ACTIONS	Nothing in this policy abrogates the District's right to prohibit and/or punish obscene speech, which is not protected by the First Amendment [(*Ginsberg v. New York*, 390 U.S. 629, 635 (1968)], the use of vulgar terms and offensively lewd and indecent speech [(*Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683, 685 (1986)], and students' actions that materially and substantially disrupt the work and discipline of the school, or substantially disrupt or materially interfere with school activities [(*Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 513, 514 (1968)].

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ACADEMIC ACHIEVEMENT:

COMMENCEMENT

EIG (LOCAL)

STUDENT SPEAKERS AT COMMENCEMENT, OPENING AND CLOSING

The District intends to create, and hereby does create, a limited public forum consisting of an opportunity for a student to speak for a maximum of ___ minute(s) to begin high school graduation ceremonies and another student to speak for a maximum of ___ minute(s) to end high school graduation ceremonies.

The designated forum shall be limited in the following ways:

1. Only students who are graduating seniors and whose selection is based upon neutral criteria (such as academic ranking in the top three, holding a class office, or holding an office in the student council), and who will not otherwise be delivering a graduation address, shall be eligible to use this limited public forum; and
2. The topic of the opening and closing messages must be related to the purpose of the graduation ceremonies and to the purpose of marking the opening and closing of the event, bringing the audience to order, and focusing the audience on the purpose of the event.

Students who are eligible based on such neutral criteria and who volunteer to give the opening and closing messages for the graduation ceremonies shall be selected by random draw. The first name drawn will present the opening message, and the second name drawn will present the closing message.

VALEDICTORIAN, SALUTATORIAN, AND OTHERS

In addition to the students giving the opening and closing messages, there are certain students who have attained special positions of honor based upon neutral criteria who have traditionally had speaking roles at graduation ceremonies (such as valedictorian, salutatorian, and sometimes class officers, student council officers, and the like). Nothing in this policy shall affect the ability of continuing same.

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ACADEMIC ACHIEVEMENT:
COMMENCEMENT

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VALEDICTORIAN, SALUTATORIAN, AND OTHERS (CONTINUED)	The valedictorian, salutatorian, and any other students who may be addressing the audience, such as class officers, student council officers, and the like, shall each be permitted to address the audience for a reasonable length of time at graduation ceremonies. For this purpose, the District creates a limited public forum for the students to deliver such addresses. The topic of the addresses must be related to the purpose of the graduation ceremonies.
DISCLAIMER	A written disclaimer shall be printed in the graduation program that states the following: "The students who will be speaking at the graduation ceremonies were selected upon neutral criteria to deliver messages of their own choice. The District does not require, suggest, or endorse the content of the messages. The content of each student speaker's message is the private expression of the individual student and does not reflect any position of the District, its Board of Trustees, administration, or employees, or indicate the views of any other graduate. No person is compelled to participate in or agree with the selection of content made by the student speakers, nor should anyone feel compelled to do so."
VIEWPOINT NEUTRALITY	Although topics have been designated for the forums and students must stay on the designated topics, the District shall not engage in viewpoint discrimination.
RESTRICTIONS TO STUDENT SPEECH AND ACTIONS	Nothing in this policy abrogates the District's right to prohibit and/or punish obscene speech, which is not protected by the First Amendment [(*Ginsberg v. New York*, 390 U.S. 629, 635 (1968)], the use of vulgar terms and offensively lewd and indecent speech [(*Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683, 685 (1986)], and students' actions that materially and substantially disrupt the work and discipline of the school, or substantially disrupt or materially interfere with school activities [(*Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 513, 514 (1968)].

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