Are Student Delivered Graduation Prayers and Religious Speeches Constitutional?

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I. The Conflict Between Freedom of Speech and the Establishment Clause

Inescapably, at times, constitutional rights will conflict with one another. The newspaper's right to publish stories about a pending trial may jeopardize a criminal defendant's right to a fair trial.[1] A group's right to decide who is a member as part of its freedom of association collides with the government's goal of advancing equality in enacting laws preventing private groups from discriminating.[2] No matter how it is finessed there is a choice to be made between constitutional values.

For a long time, it was thought that there was a serious conflict between the free exercise clause and the establishment clause.[3] Government actions to advance free exercise can be challenged as an establishment clause violation; the government's choice to refrain from certain activities to avoid violating the establishment clause might be objected to as infringing free exercise. However, the Supreme Court's decision in *Employment Division v. Smith* gutting the free exercise clause greatly reduces the conflict.[4] *Smith* held that the free exercise clause is not violated by neutral laws of general applicability, no matter how much these government actions burden religion. After *Smith*, relatively little violates the free exercise clause so that there are far fewer occasions in which it will come into conflict with the establishment clause.

During the last decade, however, the Supreme Court greatly enhanced the protection for religious speech in government settings. In recent years, a number of cases concerning the establishment clause have involved free speech claims. Specifically, these cases concern situations where the government chooses to restrict private religious speech on government property or with government funds because of a desire to avoid violating the establishment clause. The Supreme Court consistently has held that excluding such religious speech violates the First Amendment's protection of freedom of speech because it is an impermissible content-based restriction of expression.

For example, in *Widmar v. Vincent*, the Supreme Court declared unconstitutional a state university's policy of preventing student groups from using school facilities for religious worship or religious discussion.[5] The Court concluded that this was impermissible discrimination against religious speech based on its content. Similarly, in *Lamb's Chapel v. Center Moriches Union Free School District*, the Court fol-

lowed this reasoning and declared unconstitutional a school district's policy of excluding religious groups from using school facilities during evenings and weekends.[6] The Court expressly followed the reasoning in *Widmar* and said that once the government chose to open its facilities to community groups it could not discriminate against those engaging in religious speech unless strict scrutiny was met.[7]

Perhaps most dramatically, in *Rosenberger v. Rector and Visitors of University of Virginia* the Court declared unconstitutional a state university's refusal to give student activity funds to a Christian group that published an expressly religious magazine.[8] Justice Kennedy wrote the opinion for the majority in the 5-4 decision and was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas. The Court concluded that denying funds to the religious student group was impermissible content-based discrimination against religious speech. Kennedy said:

> [v]ital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression.[9]

Until the last decade, the issue presented in *Niemeyer v. Oroville Union School District* would have been analyzed entirely as an establishment clause issue. Is the delivery of an explicitly religious speech at a public school graduation a violation of the establishment clause? In *Lee v. Weisman*, the Supreme Court held that clergy-delivered prayers at public school graduations violate the establishment clause.[10] No Justice even mentioned the possibility that the government was impermissibly restricting the speech of the rabbi based on its content.

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But after recent decisions such as *Lamb's Chapel* and *Rosenberger*, Ferrin Cole and Chris Niemeyer object that their free speech rights were infringed by the exclusion of sectarian religious content. The government maintains that to allow such explicit appeals to a particular religion would violate the establishment clause. Freedom of speech and the establishment clause collide in this case. There is just no way to avoid the need to resolve the tension between these two important constitutional provisions.

In this essay, I present my views of how the case should be resolved. Simply put, I believe that under current law, the free speech interests in the case are minimal, while the establishment clause interests are great. Phrased slightly differently, I believe that avoiding violation of the establishment clause is a compelling interest that justifies the restriction on freedom of speech.

II. Resolving the Tension Between Freedom of Speech and the Establishment Clause

A. Examining the Conflict

Both the free speech clause and the establishment clause of the First Amendment are concerned with the expression of messages. The Supreme Court repeatedly has held that the free speech clause limits the government's ability to restrict the expression of messages based on their content.[11] The establishment clause restricts the ability of the government to express certain

messages of support for religion. For instance, the Court has ruled that the government cannot place a nativity scene on public property unless it is accompanied by symbols of other religions and secular symbols because it conveys a message of government endorsement of religion.[12] Similarly, a government declaration of an official religion would be an expression that certainly would violate the establishment clause.

All expression involves both a speaker and an audience. Although most free speech cases focus primarily on the speaker's rights, the Court also at times has recognized the rights of the audience. For instance, the Court has spoken of the government's interest in shielding captive audiences from unwanted messages.[13] Generally, though, the Court has been clear that the government cannot stop a message in order to prevent the audience from being offended.[14]

In contrast, in establishment clause cases, the focus generally has been on the audience. Indeed, the "symbolic endorsement" test that has been used by many of the Justices in the last decade focuses almost entirely on the audience's reaction to a particular message. Under this view, the government violates the establishment clause if it symbolically endorses a particular religion or if it generally endorses either religion or secularism. For example, Justice O'Connor has written that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."[15] In other words, unlike the free speech clause, protecting the audience from being offended by the message is not only permissible in the name of the establishment clause, but required by it.

Although the symbolic endorsement test focuses on the audience, there is also an interest of the government as speaker in not expressing a religious message. Government officials often are speakers, either directly in what they say or indirectly in who they invite to speak and on what topics. Government officials, as speakers, choose to express or not express certain messages.

Yet, restricting religious messages in the name of the establishment clause also has an effect on the part of the audience that might want to hear them. In his dissenting opinion in *Lee v. Weisman*, Justice Scalia concluded by defending the permissibility of clergy-delivered prayers because of the interests of the audience that wishes to hear them. He wrote:

> The reader has been told much in this case about the personal interest of [the plaintiffs], and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is not that, and has never been.[16]

Therefore, in considering the conflict between free speech and the establishment clause in the *Niemeyer* case it is useful to recognize that both clauses are about expression and it is important to be clear as to the many competing interests. On one side of the analysis, are the speaker's interests. There is the student's interest in expressing the message of their choice, an explicitly sectarian religious message. The student's might present this under both the free speech clause and the free exercise clause of the First Amendment. Even under *Employment Division v. Smith*, government action that targets religion for less favorable treatment violates the free exercise clause unless the government meets strict scrutiny.[17] Competing with this is

the interest of government officials, as speakers, to choose not to express a religious message.

On the other side of the balance are the interests of the audience. There is the interest in not being subjected to sectarian religious messages; this can be argued under both the free speech clause and the establishment clause. As the Court recognized in *Lee v. Weisman*, the graduation audience is a captive one, compelled either formally or by the occasion to be present. But there also is the interest of those in the audience who want to hear such a message.

The point is that the conflicts in the *Niemeyer* case are not only between freedom of speech and the establishment clause; there is tension within each of these clauses between the rights of speakers and the rights of the audience. The conflicts in the *Niemeyer* case are deep and intractable. Inescapably, a value choice must be made in this situation as to whether to favor those who wish to express and hear religious messages or those who wish not to hear and not to have such messages expressed at a public school graduation.

My conclusion is that the rights of the audience to not hear such a message should be favored over the rights of the speaker to express religious content and the rights of those in the audience who want to hear it. In part, this is because the free speech interests of the speaker are relatively minimal, especially under current law, in the public school graduation context. Indeed, under Supreme Court precedent, the student's free speech rights are so limited as to make this a much easier case than I think it should be. More importantly, I believe that the government has a compelling interest in adhering to the establishment clause and that this justifies restricting freedom of speech in government settings, such as public school graduations. Section B presents the former argument, as to why free speech interests are minimal in public school graduations. Section C presents the latter argument, as to why the establishment clause is a compelling interest that justifies restrictions on speech.

B. The Students' Free Speech Rights Are Minimal

Under current free speech doctrines, the students in *Niemeyer v. Oroville Union High School* have a very weak case for claiming that the government has violated their First Amendment right to freedom of speech. First, high school graduations are surely non-public forums and the government can regulate speech in a non-public forum so long as the regulation is reasonable and viewpoint neutral. The Supreme Court, over the past few decades, has developed three categories of government properties: public forums, limited public forums, and non-public forums.[18] Public forums are government properties that the government constitutionally must make available for speech. Limited, or designated, public forums are government properties that the government could close to speech, but which the government chooses to open to speech. Finally, non-public forums are government properties in which the government can and does restrict speech. The Supreme Court has described non-public forums by explaining: "Public property which is not by tradition or designation a forum for public communication is governed by different standards. . . . [T]he state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[19]

There seems little doubt that public school graduations are non-public forums. They certainly are "not by tradition or des-

ignation a forum for public communication." In Oroville Union High School, the school chooses the graduation speaker and the individual is required to submit a copy of his or her address for the principal's approval. Nor does the school's inviting a few students to speak convert the place into a limited public forum. In the recent decision, *Arkansas Educational Television Commission v. Forbes*, the Supreme Court held that a political debate sponsored by a government-owned television station is a non-public forum.[20] The Court concluded that it was permissible for the station to invite the two major party candidates, while excluding the minor party candidates. The Court expressly rejected the argument that the government's choice to hold the debate or to invite some speakers converted the place into a designated public forum. Furthermore, the Court ruled that selecting major party, but not minor party candidates, was viewpoint neutral.

There is an even stronger argument that high school graduations are non-public forums than there is as to political debates. The latter are created by the government primarily to be a forum for the expression of diverse and competing viewpoints. Graduation ceremonies, though, obviously have a much different goal. Indeed, the Supreme Court has previously refused to find official school functions to constitute a public forum. In *Hazelwood School District v. Kuhlmeier*, the Court concluded that a high school newspaper was a non-public forum and that therefore the principal could censor articles about teenage pregnancy and divorce.[21] Justice White, writing for the Court, concluded that the school newspaper was a nonpublic forum and that as a result, "school officials were entitled to regulate the contents of [the school newspaper] in any reasonable manner."[22]

The Court emphasized the ability of schools to control what occurs at official school functions. Justice White wrote:

> The question whether the First Amendment requires a school to tolerate particular student speech — the question that we addressed in *Tinker* — is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.[23]

Under this analysis, high school graduations seem unquestionably to be non-public forums. The government can regulate speech in non-public forums so long as the regulation is reasonable and so long as it is viewpoint neutral. At the very least, the government has a reasonable interest in excluding religious messages because of concerns about being perceived as endorsing religion, subjecting a captive audience to religious messages, offending those who are of different religions, and avoiding violation of the establishment clause.

Additionally, the government regulation is viewpoint neutral. The Supreme Court has held that in non-public forums the government can regulate speech based on its subject matter, but not its viewpoint. For example, in *Lehman v. Shaker Heights*, the Court upheld a city regulation that permitted commercial advertisements, but outlawed political ones on city buses.[24] Viewpoint neutral means that the government cannot regulate speech based on the ideology of the message.[25] The Oroville Union High School District regulation was viewpoint neutral: it would have applied equally to expression of a Jewish message, an Islámic

message, or that from any other religion. There seems little doubt that the school principal would not have allowed a message expressing satanism any more than the Niemeyer's one expressing love of Jesus. The exclusion was based on the religious subject matter, not the particular viewpoint expressed. This is permissible in a non-public forum.

Public school graduation's status as non-public forums is sufficient to justify the exclusion of overtly religious messages. Additionally, it must be recognized that the Court has greatly deferred to schools in regulating speech in official settings. It is notable that the students do not appear to challenge the Oroville Union High School District's policy as an impermissible prior restraint. Since 1986, the District has required graduation speakers to submit a copy of their speech to the principal for approval. This is a prior restraint that would be intolerable in almost any other setting.

Yet, it is permitted in the school context. In *Bethel School District No. 403 v. Fraser*, the Court broadly held that the government may regulate speech at school assemblies.[26] In *Bethel*, the Court ruled that a school could punish a student, including prohibiting the student from speaking at graduation exercises as scheduled, because of indecent comments he made at a school assembly. The Court emphasized the need for deference to school officials and said that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[27] In *Lee v. Weisman*, the Court concluded that high school graduations are official and important school activities. Thus, the choice by school officials to exclude prayer deserves the same deference as courts have given to schools in other official contexts.[28]

My point in this section has been to argue that even apart from the establishment clause, under current constitutional doctrine, the free speech claim of the speakers is quite weak. My discomfort in doing so is that I am very critical of the decisions that I have relied on in this section. I believe that *Arkansas Educational Television Commission v. Forbes* was wrongly decided in that choosing major party over minor party candidates is clearly about their viewpoint. I strongly disagree with *Hazelwood* and *Bethel* in their failure to adequately protect student speech.[29] However, my argument in this section is descriptive, that under existing law the students should lose their First Amendment claims. In the next section, I argue that even if free speech law were different, the school district still should prevail because of the establishment clause.

C. Student Delivered Prayers and Religious Speeches at Public School Graduations Violate the Establishment Clause

In *Lee v. Weisman*, the Supreme Court held that clergy-delivered prayers violate the establishment clause of the First Amendment.[30] Justice Kennedy, writing for the Court, said: "[T]he controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here .... The State's involvement in the school prayers challenged today violates these central principles [of the establishment clause.]"[31]

Justice Kennedy stressed the inherent coercion in allowing prayer at graduations. Although no student was required to attend graduation, it is an important event in a person's life and students likely feel psychological pressure not to absent themselves during the prayer. He wrote:

[t]here are heightened concerns with pro-

> tecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. [What] to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.[32]

Justice Blackmun, in a concurring opinion joined by Justices Stevens and O'Connor, emphasized that prayers in public schools are unconstitutional even in the absence of coercion. He said that "it is not enough that the government restrain from compelling religious practices: It must not engage in them either.... Our decisions have gone beyond prohibiting coercion."[33] Likewise, Justice Souter, in a concurring opinion joined by Justices Stevens and O'Connor, argued that the establishment clause is violated by prayers at public school events regardless of whether there is a finding of coercion.[34]

Student delivered prayers and religious expression are indistinguishable from the clergy-delivered prayer in *Lee v. Weisman*. As described above, the focus of the establishment clause is on the audience. For the audience, there is no meaningful difference between the student delivering the prayer and the clergy member delivering the prayer.

First, the government's symbolic endorsement of religion is the same. In the Oroville Union High School District, as described earlier, each speaker is required to submit a copy of his or her address to obtain the principal's approval. The presentation of a religious message thus is likely to be understood by the reasonable listener to be accepted, and indeed endorsed, by the school. Justice O'Connor has explained that "[w]here the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated."[35]

Second, the effect of the student prayer or religious speech on the audience is the same as the clergy-delivered prayer: both make those of different religious beliefs feel profoundly unwelcome. The speech proposed by Chris Niemeyer was even more sectarian than the benediction and invocation that would have been delivered by the rabbi in *Lee v. Weisman*. Niemeyer proposed to say, in part:

> I believe as a whole, we share one distinct similarity - the one and only, perfect God created us. Each of us has value. We are all God's children, through Jesus Christ's death, when we accept his free love and saving grace in our lives.... We have all been given our lives by God, in order to glorify him. I believe that God has a plan for each of our lives — a plan to prosper and give us a hope for the future.... But whatever our plans and dreams, I believe they will not fully succeed unless we pattern our lives after Jesus' example.... God seeks a personal relationship with each of us, as he longs for us to live forever with Him. Jesus wants to be our best friend. While others let us down — He will not. If we let Him direct our lives, He will give us the desires of our heart. Do you look to the future with uncertainty or confidence, fear or peace? Whether a graduate, family member, teacher or friend, I encourage you to accept God's love and grace. We must yield to God our lives and let Him direct our future paths. For with God, you will find eternal happiness and absolute success in all you do.

What is the effect of such a statement on audience members who are not Christian or who are of Christian faiths, but don't share these views? They will feel not only extremely uncomfortable, but unwelcome at the graduation ceremony. Being told at a government function, a public school graduation, that a

person cannot succeed except by following "Jesus' example" tells all of different faiths that they are in the wrong place.

Protecting the audience, especially a captive audience, from such expression in government forums is the core of what the establishment clause is all about. Justice O'Connor has explained: "Direct government action endorsing religion or a particular religion is invalid because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[36]

Consider the most blatant violation of the establishment clause: a city or state declares a particular religion, say Catholicism, to be the official religion. Assuming that the government took no actions to limit free exercise by those of other faiths, why is such a declaration unacceptable? The pronouncement that Catholicism is the official religion makes all of a different faith feel unwelcome. They are made to feel that they are tolerated guests, not equal members of the community. In Justice O'Connor's words, nonadherents unquestionably are made to feel like they are outsiders and adherents are made to feel like insiders.

In other words, the very core of the establishment clause prevents the government from taking actions that divide people in this way. The focus of the establishment clause is thus very much centered on the effect that the message has on the audience. This helps to explain why Justice Scalia is simply wrong in his dissent in *Lee v. Weisman* where he expresses the need to protect the majority in the audience who want to hear a prayer. The establishment clause is about preventing the majority, through government power, from making those of other religious faiths feel unwelcome. If the majority of the audience wants to hear prayers, of course it may do so; but not at an official government function, especially one where the audience is compelled to be present.

Therefore, the establishment clause, at times, will limit speech by preventing the expression of religious messages in government settings. As the Court in *Lee v. Weisman* explains, the need for this restriction is greatest in the school setting and particularly one, such as a graduation, where students are formally or informally compelled to be present. Phrased another way, the establishment clause can be seen as a compelling interest that justifies some content-based restrictions on speech. Even if free speech law were different and the Niemeyers' had a far stronger First Amendment claim, they still should not prevail because their expression would violate the establishment clause.

Throughout this paper, I have drawn no distinction between a prayer and a religious speech. Defining what is a prayer is difficult, if not impossible, and likely would pose major First Amendment problems in itself. Functionally, for the audience, there is no difference between a formal prayer and the Niemeyer's speech. Both are the expression of religion at an official government function. Both will have the same effect on the audience. In fact, the Niemeyer's speech was far more religious in content than the non-sectarian invocation and benediction in *Lee v. Weisman*.

Conclusion

Constitutional values, at times, collide. Sometimes a choice simply must be made to prefer one over the other. Sometimes, though, analysis can be aided by phrasing both sides of the conflict in terms of the same interests and values. For example, when free speech and the establishment conflict, it is useful to see both as involving the expression of messages and both focusing on

the interests of speakers and audiences.

Under current law, student speakers at public school graduations have minimal free speech rights. But audiences at public school graduations have a right, assured by the establishment clause, not to be subjected to certain messages. The establishment clause is properly viewed as being about protecting the audience from certain messages by the government, endorsed by the government, and at government settings.

Thus, in *Niemeyer v. Oroville Union High School*, the Ninth Circuit should affirm the ruling of the district court in favor of the defendant.

Notes

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1 *See, e.g.*, Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976).

2 *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984).

3 *See, e.g.*, Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 Sup. Ct. Rev. 123 (arguing that the tension between the free exercise clause and the establishment clause is inherent and difficult to resolve).

4 494 U.S. 872 (1990).

5 454 U.S. 263 (1981).

6 508 U.S. 384 (1993).

7 *Id.* at 394.

8 515 U.S. 819 (1995).

9 *Id.* at 835.

10 505 U.S. 577 (1992).

11 *See, e.g.*, Police Department of Chicago v. Mosley, 408 U.S. 92, 95-6 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its subject matter, or its content.").

12 *See* County of Allegheny v. American Civil Liberties Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

13 *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451 (1952); *see* Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 Hastings Const. L.Q. 85 (1991).

14 *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971).

15 Lynch v. Donnelly, 465 U.S. 668, 694 (1984).

16 *Id.* at 645.

17 *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (declaring unconstitutional a city ordinance that prohibited ritual sacrifice of animals because it was directed solely at a particular religious sect).

18 *See* Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983).Professor Brownstein suggested to me that there is a fourth type of government property that is not a forum at all. If so, then the school would prevail without even needing "forum" analysis.

19 *Id.* at 44-46. The Court found that the school mail system was a non-public forum and that the regulation was constitutional because it was reasonable and viewpoint neutral.

20 523 U.S. 666 (1998).

21 484 U.S. 260 (1988).

22 *Id.* at 270.

23 *Id.* at 270-71

24 418 U.S. 298 (1974).

25 *See* Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 Yale L.J. 1209, 1220 (1993).

26 478 U.S. 675 (1986). The issue of speech rights in public schools is discussed in more detail in §11.4.4.

27 *Id.* at 683.

28 *See, e.g.,* Wiemerslage v. Maine Township High School District 207, 29 F.3d 1149 (7th Cir. 1994) (upholding school loitering rule); Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989) (upholding the ability of the school to exclude a student from the student council race because he made a rude comment about the assistant principal).

29 *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights At the School House Gates: What's Left of Tinker?*, forthcoming Drake L.Rev. (2000).

30 505 U.S. 577 (1992).

31 *Id.* at 586-87.

32 *Id.* at 592.

33 *Id.* at 604, 606 (Blackmun, J., concurring).

34 *Id.* at 618-19 (Souter, J., concurring).

35 Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753, 777 (1995) (O,Connor, J., concurring in the judgment).

36 Capitol Square Review Commission v. Pinette, 515 U.S. 753, 775 (O'Connor, J., concurring in the judgment), quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment).