ANALYSIS: THE RELIGIOUS VIEWPOINTS ANTIDISCRIMINATION ACT

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I. INTRODUCTION

Texas Governor Rick Perry signed into law the Religious Viewpoints Antidiscrimination Act, also called the Schoolchildren's Religious Liberties Act, on June 8, 2007.[1] According to the Author's Statement of Intent, the Act "clarifies the [F]irst [A]mendment rights of students at school by codifying current court decisions regarding religious expression and by authorizing the school district to adopt and implement a policy that establishes a limited public forum, provides certain disclaimers, and sets forth permissible forms of religious

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1. TEX. EDUC. CODE ANN. §§ 25.151-25.156 (2008) (hereinafter "RVAA").

expression by students."[2]

There are three main provisions of the RVAA, as well as a Model Policy incorporating those three provisions to be implemented by local school boards. Two provisions, which relate to student religious expression in homework assignments and student participation in extracurricular religious groups on school grounds, accomplish the Act's stated purpose and accurately restate the law protecting the religious liberty of schoolchildren.

The remaining provision is likely to be controversial: the legislature has created a role for potential sectarian prayer and proselytizing at all events with student speakers by preventing schools from interfering with student religious speech at those events. This provision of the RVAA appears designed to circumvent the Fifth Circuit and Supreme Court's decisions in *Santa Fe Independent School District v. Doe*.[3] The provision relies on the tactic of defining "all school events at which a student is to publicly speak" as "limited public forum[s]."[4] This definition is intended to trigger the operation of the Free Exercise and Free Speech clauses of the First Amendment, rather than the Establishment Clause. What is remarkable about this tactic is that such events, which explicitly include even daily opening announcements (i.e., over the intercom to a captive student audience)[5], lack the characteristic features of limited public forums—features crucial to the applicable anticensorship principles.

In this note, I will first give a brief overview of the requirements of the Establishment Clause and the Free Exercise Clause in Texas. Then, I will describe how the provisions of the RVAA relating to homework and extracurricular activities accurately restate the law. Finally, I will argue that the Fifth Circuit should find the remaining provision, which creates limited public forums, to be unconstitutional under the Establishment Clause.

II. OVERVIEW OF ESTABLISHMENT AND FREE EXERCISE PRECEDENT IN TEXAS

A. Establishment

Federal courts in Texas have identified and followed three tests

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2. Charlie Howard, *Bill Analysis*, *available at* http://www.legis.state.tx.us/tlodocs/80R/analysis/html/HB03678S.htm (last visited August 22, 2008).

3. 168 F.3d 806 (5th Cir. 1999); 530 U.S. 290 (2000) (invalidating student prayer at football games).

4. TEX. EDUC. CODE ANN. § 25.152.

5. *Id.* § 25.156.

used by the Supreme Court to determine whether a school, statute, or policy violates the Establishment Clause. The Fifth Circuit refers to these as the *Lemon* test, the coercion test, and the endorsement test, and has collapsed these tests into a unified framework under the overarching *Lemon* test.[6]

Under the *Lemon* test, a policy must (1) have a legitimate secular purpose, (2) have a primary effect that neither advances nor inhibits religious beliefs, and (3) not result in an excessive entanglement of government with religion.[7] All three prongs of the *Lemon* test must be satisfied for the policy to survive.[8] The Texas Supreme Court has questioned the future of *Lemon*.[9] Nonetheless, the *Lemon* test has continued to guide the analysis of both Texas state[10] and federal[11] courts. The United States Supreme Court reaffirmed the test in 2000 in the *Santa Fe* decision,[12] which affirmed the Fifth Circuit's decision in that case.[13]

The first prong of the *Lemon* test is violated when the government enacts a policy with an impermissible religious purpose.[14] The Fifth Circuit has held that whether a policy has an impermissible religious purpose "is appropriately determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency."[15] Recognizing that multiple purposes can underlie a statute, the Fifth Circuit has determined that a religious purpose must not "predominate" or "wholly motivate" the policy.[16] Furthermore, the government's stated secular purpose, while given deference, must be sincere and not a "sham."[17]

The Fifth Circuit has evaluated the *Lemon* test's second prong of whether a policy's primary effect is to advance or inhibit religion with the "coercion" and "endorsement" tests.[18] Under the coercion test, the Supreme Court asks whether the school places students in a situation where a reasonable dissenting student would feel coerced by the school and by peers into participating in objectionable religious exercises.[19] The

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6. *See* Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 468 (5th Cir. 2001).

7. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

8. *Id.*

9. Williams v. Lara, 52 S.W.3d 171, 190 (Tex. 2000) (noting that the test "has been criticized by a majority of the current justices" but nonetheless applying the first two prongs of *Lemon* in making its decision). Since the decision, Justices Roberts and Alito have replaced Justices Rehnquist and O'Connor on the Supreme Court.

10. *E.g.*, *id.*

11. *E.g.*, *Beaumont*, 240 F.3d at 468.

12. 530 U.S. 290, 314 (2000).

13. Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999).

14. *See* Doe v. Ouchita Parish, 274 F.3d 289, 293 (5th Cir. 2001).

15. *Id.*

16. *Id.* Contrast the Fourth Circuit's approach, in which any secular purpose will suffice to satisfy the first prong of *Lemon* regardless of whether it predominates. Brown v. Gilmore, 258 F.3d 265, 276 (4th Cir. 2001).

17. Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987).

18. *See* Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 468 (5th Cir. 2001).

19. Lee v. Weisman, 505 U.S. 577, 593 (1992).

coercive pressure felt by students is the "effect" justifying the Fifth Circuit's decision to explicitly place the test under the second prong of *Lemon*.[20]

While the coercion test was originally formulated as an alternative to the *Lemon* test,[21] the endorsement test has long concerned the Court in evaluating both the first and second prongs.[22] The Court asks whether the government is "conveying or attempting to convey that religion or a particular religious belief is *favored* or *preferred*."[23] The answer depends on what viewers fairly understand the message to be.[24] Justice O'Connor is sometimes credited with formalizing the endorsement test by defining endorsement as government action that makes "adherence to a religion relevant in any way to a person's standing in the political community."[25]

The third prong of the *Lemon* test, that the government must not become too "entangled" with religion, is rarely applied in Supreme Court jurisprudence. The government triggers the entanglement prong if it engages in day-to-day surveillance or administration of religious activities.[26] The existence of political divisiveness along religious lines as a result of a policy may be evidence of institutional entanglement, but it is not an independent test of constitutionality.[27] The entanglement prong may be underrepresented not because of judicial indifference, but because policies that violate the Establishment Clause are likely to be found unconstitutional under one of the other prongs first, ending the Court's inquiry.[28]

B. Free Exercise

The law treats religious activities of the government quite differently than those of individuals. "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."[29]

The extent of constitutional protection turns on the type of forum in

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20. *See Beaumont*, 240 F.3d at 469 (stating that in the context of a school program allowing clergy to counsel students in schools, the second prong of the *Lemon* test "dovetails" with the coercion test).

21. *Id.* at 587.

22. *See* County of Allegheny v. ACLU Greater Pittsburgh Ch., 492 U.S. 573, 592 (1989) (discussing alternative coercion tests).

23. *Id.* at 593, *citing* Wallace v. Jaffree, 472 U.S. 38, 70 (1985).

24. *ACLU Greater Pittsburgh Ch.*, 492 U.S. at 595.

25. *See* Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

26. Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 253 (1990).

27. *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring).

28. Debbie Kaminer, *Bringing Organized Prayer in through the Back Door: How Moment of Silence Legislation for the Public Schools Violates the Establishment Clause*, 13 STAN. L. & POL'Y REV. 267, 314 (2002).

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

which religious speech is made.[30] The Supreme Court has identified three types of forums.[31] Traditional public forums, such as streets and parks, lie "[a]t one end of the spectrum."[32] Here, the "rights of the state to limit expressive activity are sharply circumscribed."[33] Nontraditional or nonpublic forums such as schools, where the State may reserve the forum for an intended purpose and reasonably regulate speech, are at the other end of the spectrum. Finally, limited public forums, in which the government opens a nontraditional forum for public discourse, are in the middle. In such limited public forums, the government may place reasonable time, place, and manner restrictions, but may not engage in content-based restrictions absent a compelling state interest.[34] A school is a nonpublic forum unless school authorities open it as a limited forum for public discourse.[35]

Students have the right to pray, share their religious faith, and express their beliefs in school, because pure student expression that merely happens to occur on school premises must be tolerated unless it is likely to interfere with school activities.[36] Student expression is not "pure", however, if it is school-sponsored.[37] Whether or not a school is required "affirmatively to promote" student speech through sponsorship is different from the question of whether the Free Speech and the Free Exercise clause require a school to tolerate incidental student speech.[38]

When student or teacher expression can be reasonably perceived as "bearing the imprimatur" of the school, the school may censor the expression to respond to legitimate pedagogical concerns or to ensure that individual views are not attributed to the school if these views may create the appearance that the school is violating neutrality.[39] Activities overseen by faculty or designed to impart knowledge and skills to students (such as a school publication or theatrical production) bear the imprimatur of the school.[40]

To draw the fine line between a public and a nonpublic forum, and between permitted and restricted student speech, it is instructive to examine two cases lying closely on either side of that line. In *Bannon*, the school invited students to paint murals on construction panels as part of a beautification project.[41] One student painted proselytizing Christian messages at various places in the school, which caused controversy and

30. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-45 (1983).
31. *See id.* at 45-46.
32. *Id.*
33. *Id.*
34. *Id.*
35. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 261 (1988).
36. Bannon v. Sch. Dist. of Palm Beach County, 387 F.3d 1208, 1213 (11th Cir. 2004).
37. *Hazelwood*, 484 U.S. at 270-73.
38. *Id.*
39. *See id.* at 271-72.
40. *Id.* at 271.
41. *Bannon*, 387 F.3d 1210.

disruption.[42] The school directed the student to censor the religious messages.[43] The Eleventh Circuit upheld the school's decision, finding the creation of the murals to be in the context of a nonpublic forum.[44] Because the messages were placed in prominent locations on the walls of the school building and occurred in a curricular context overseen by faculty, they bore the imprimatur of the school and the school had a right to remove them.[45]

In a limited public forum, school censorship is permitted when it confines the forum to the purpose for which it was created, but the censorship must be viewpoint-neutral and reasonable in light of the purpose of the forum.[46] In contrast to *Bannon*, the school in *O.T. ex rel Turton v. Frenchtown Elementary School District Board of Education* established a limited public forum when it sponsored an after-school talent show, because the school opened a forum for public discourse and there was no faculty oversight beyond general screening for obscenity.[47] The school violated a student's First Amendment rights by refusing to allow her to perform the song "Awesome God" because 1) it discriminated on the basis of viewpoint, and 2) the student performances did not bear the imprimatur of the school.[48]

III. THE TWO UNCONTROVERSIAL PROVISIONS OF THE RELIGIOUS VIEWPOINTS ANTIDISCRIMINATION ACT

In section 25.153, the RVAA provides that students may not be penalized or rewarded on the basis of any expression of religious beliefs in homework assignments and that homework must be graded by ordinary academic standards of substance, relevance, and other legitimate pedagogical concerns.[49] This provision is uncontroversial and accurately restates the common law, because private student expression endorsing religion is protected under the Free Exercise and Free Speech clauses of the First Amendment.[50] It should be noted that religious expression in such homework assignments does not immunize a student from receiving a poor grade—lack of relevance or failure to meet academic standards is a valid basis for penalizing a student under the Act, regardless of religious expression.[51]

42. *Id.*
43. *Id.* at 1211.
44. *Id.* at 1212-14.
45. *Id.*
46. Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 280 (3d Cir. 2004).
47. 465 F. Supp. 2d 369, 372 (D.N.J. 2006).
48. *Id.* at 376-78.
49. TEX. EDUC. CODE ANN. § 25.153 (2008).
50. *See* Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990).
51. TEX. EDUC. CODE ANN. § 25.153.

In section 25.154, the RVAA provides that students may organize extracurricular religious groups and activities "to the same extent" that students are permitted to organize "other noncurricular student activities and groups."[52] This section of the RVAA appears to merely restate the first subsection of the federal Equal Access Act of 1984, drawing on much of the same language and conceptual framework.[53]

The Equal Access Act of 1984 protects extracurricular student meetings at federally funded public high schools that have established "limited open forums."[54] When a limited open forum has been created, the school may not discriminate or deny equal access to student groups on the basis of "religious, political, philosophical, or other content of the speech [that would occur] at such meetings."[55] A limited open forum is created when the school allows any noncurriculum-related student group to meet on school premises during noninstructional time.[56] The term "noncurriculum-related" is interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school.[57] Thus, a French club in a school that teaches French or an orchestra in which participation results in academic credit would not trigger the application of the Equal Access Act, but a chess club normally would.[58] The RVAA mirrors this concept and much of this language when it specifies that religious extracurricular organizations are only protected "to the same extent" as other "noncurriculum-related" groups.[59]

There is, however, an important difference between the federal Equal Access Act and the RVAA. The Equal Access Act includes protections to prevent government entanglement and ensure that the imprimatur of the school is not attached to student activity: protected meetings must be voluntary, student-initiated, and nondisruptive; meetings must not be directed, conducted, controlled, or regularly attended by nonschool persons; and schools may not sponsor the meeting, influence or control the content of religious activity, expend funds beyond the provision of the meeting space, allow employees to participate in religious exercises, or compel employees to attend.[60] These protections appear designed to prevent potential Establishment Clause infractions. For example, if employees were allowed to conduct

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52. *Id.* § 25.154.

53. *Id.*; *see* 20 U.S.C. § 4071 (2007).

54. In this context, "limited open forum" is doctrinally distinct from "limited public forum." *Mergens*, 496 U.S. at 242. Limited open forums appear to be a precisely defined subset of limited public forums, both having stemmed from the same court decision. *See id.* at 234. Limited open forums are only those that conform to the precise definition set forth in the Equal Access Act. 20 U.S.C. § 4071(b) (2007).

55. 20 U.S.C. § 4071(a).

56. *Id.* § 4071(b).

57. *Mergens*, 496 U.S. at 239.

58. *Id.* at 240.

59. *See* TEX. EDUC. CODE § 25.154 (2008).

60. 20 U.S.C. § 4071(c)-(d) (2007).

religious exercises with students, their participation would attach the imprimatur of the school to that activity.[61] The RVAA includes none of these protections. Does that render it unconstitutional?

The Equal Access Act was challenged in *Mergens*[62] and found constitutional because, tracking the three prongs of *Lemon*,[63] 1) it has the secular purpose of preventing viewpoint discrimination; 2) there are sufficient protections to prevent the appearance of school endorsement or coercion; and 3) the prohibition on school interference or influence prevents entanglement.[64] Indeed, "a denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech."[65]

If the section of the RVAA protecting extracurricular student meetings were to be challenged as the Equal Access Act was challenged in *Mergens*, the reasoning of the *Mergens* Court would not apply: There are not analogous protections within the RVAA itself to prevent the appearance of school endorsement or coercion; nor is there any sort of prohibition on school interference or influence preventing entanglement.[66] It is important, however, to keep the purpose of the RVAA in mind: It purports to establish limited public forums and otherwise merely codifies existing law.[67] The RVAA clearly intends to codify the decision in *Mergens*.[68] By failing to restate the various protections and prohibitions of the Equal Access Act, the RVAA is poorly written and restates the law incompletely. But that does not render it unconstitutional; the same protections rendering the Equal Access Act constitutional operate regardless of whether they are restated in the Texas Act.

School activity that violates the Equal Access Act could still be challenged under federal law and under the Establishment Clause generally. The RVAA's restatement is incomplete, but it is accurate to the extent that it partially restates relevant law. So long as the Equal Access Act and the Establishment Clause independently protect against school entanglement and coercion, there is no argument that the RVAA's failure to specify these particular exceptions to its general restatement renders it unconstitutional. Therefore, section 25.154 of the RVAA is constitutional.

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61. *See* Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406 (5th Cir. 1995) (holding that coach's prayer with basketball team violates the Establishment Clause).

62. 496 U.S. at 247.

63. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

64. *See Mergens*, 496 U.S. at 248-53.

65. *Id.* at 253, *discussing* Widmar v. Vincent, 454 U.S. 263, 272 (1981).

66. *See generally* TEX. EDUC. CODE §§ 25.151–25.156 (2008).

67. Howard, *supra* note 2.

68. *See Mergens*, 496 U.S. 296 (1990).

IV. "LIMITED PUBLIC FORUMS" IN THE RELIGIOUS VIEWPOINTS ANTIDISCRIMINATION ACT

In section 25.152, the RVAA purports to authorize the creation of limited public forums for students to express religious viewpoints free from discrimination at "all school events at which a student is to publicly speak."[69] These events include football games, daily opening announcements, graduation ceremonies, and "any additional events designated by the district."[70] Speakers are chosen on the basis of objective standards such as academic and athletic achievement or election to leadership positions[71] including student body president and football captain. Disclaimers are required for as long as "a need exists to dispel confusion over the district's nonsponsorship of the student's speech."[72]

Because the tactic of labeling student speech as occurring in a limited public forum in order to allow sectarian, proselytizing prayer at official functions was squarely addressed by the Fifth Circuit in *Doe v. Santa Fe Independent School District*,[73] this provision of the Act is best understood as a response to *Santa Fe*. Fifth Circuit precedent would appear to be extremely unfavorable towards that tactic.[74] In this section, I will first show how the RVAA responds to and contradicts the Fifth Circuit's decision in *Santa Fe*. I will then catalogue reasons one might distinguish the school board's failed attempt to open a limited public forum from the legislature's similar attempt. Finally, I will refute those reasons.

The Fifth Circuit was not inclined to agree with the school board in *Santa Fe* that it had opened a limited public forum by allowing students to elect speakers to deliver prayers at football games.[75] It excoriated the school board for misusing constitutional language: "SFISD asserts that its July Policy survives constitutional scrutiny because through this policy it has created a "limited public forum" . . . . We disagree with these assertions for the simple reason that as a matter of law SFISD has not created a limited public forum."[76] The Fifth Circuit characterized the school's argument as "running for the protective cover of a designated[77]

69. TEX. EDUC. CODE ANN. § 25.152 (2008).

70. *Id.* § 25.156.

71. *Id.*

72. TEX. EDUC. CODE ANN. § 25.152.

73. 168 F.3d 806, 809 (5th Cir. 1999) *aff'd*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

74. *See infra* notes 74-80 and accompanying text.

75. 168 F.3d 806 (5th Cir. 1999) *aff'd*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

76. *Id.* at 819.

77. There is confusion among the Circuits as to whether there is a difference between a designated and a limited public forum, and, if so, what that difference may be. Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 345-46 (5th Cir. 2001). At the time of *Santa Fe*, the Fifth Circuit had not yet taken care to distinguish the two. In *Santa Fe*, the Court referred to the school board's position

public forum" to "evade the requirements of the Establishment Clause."[78] The court "view[ed] skeptically SFISD's own self-serving assertion of its intent and examine[d] closely the relationship between objective nature of the venue and its compatibility with expressive activity."[79] The relevant inquiry was: "Does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance?"[80]

The opportunity among participants to give and receive ideas is central to the nondiscrimination and anticensorship principles appertaining to limited public forums. A formal, structured event where no general invitation is extended, where the school has selected the few people with the opportunity to speak, and where everyone else must sit in obedient silence with no opportunity to exchange or rebut ideas, is not a limited public forum.[81] Under the policy of both the school board and the legislature, the forum is not opened for *public discourse*—a phrase that implies debate and the exchange of ideas, not one student lecturing everyone else.[82] For example, the Fifth Circuit, holding that a graduation ceremony is not a limited public forum *as a matter of law*, said that "a graduation ceremony comprises but a single activity which is singular in purpose, the *diametric opposite of a debate or other venue for the exchange of competing viewpoints*."[83] Fifth Circuit precedent therefore directly rejects the contention that the "school events at which a student is to speak"[84] contemplated by the RVAA objectively are all limited public forums.

There are a number of arguments that the RVAA may nonetheless be distinguished from the policy of the local school board in *Santa Fe*.

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as claiming the protection of "limited public forum" at some points and as claiming the protection of a "designated public forum" at others. 168 F.3d at 819 (characterizing school board position as claiming the protection of "limited public forum"); *id.* at 820 (characterizing school board position as claiming the protection of "designated public forum"). It is clear that both a designated and a limited public forum occupy the middle ground between a public and a nonpublic forum. *Chiu*, 260 F.3d at 345-46. The Fifth Circuit has suggested that a limited public forum is a subset of designated public forums and that within that subset, judicial scrutiny of speech regulation is relaxed from a strict scrutiny to a heightened scrutiny standard. *Id.* at n.12. To the extent that this distinction affects the analysis, it should serve only to strengthen the contention that schools may regulate student speech to conform to the neutrality requirements of the Establishment Clause within whatever it is that the legislature has created, since judicial scrutiny of such regulation is relaxed in a limited public forum.

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

79. *Id.*

80. *Id. (discussing* Estiverne v. La. State Bar Assoc., 863 F.2d 371, 378-79 (5th Cir. 1989)).

81. *Cf. id.* at 821 ("[E]ven though the government may designate a forum only for particular speakers... SFISD's restrictions so shrink the pool of potential speakers and topics that the graduation ceremony cannot possibly be characterized as a public forum—limited or otherwise—at least not without fingers crossed or tongue in cheek.") (internal citations omitted).

82. *See* Ark. Educ. Television Com'n v. Forbes, 523 U.S. 666, 677 (1998).

83. Doe v. Santa Fe, 168 F.3d 806, 820 (5th Cir. 1999) (emphasis added).

84. *See* TEX. EDUC. CODE ANN. § 25.152 (requiring school districts to designate "all school events at which a student is to speak" as "limited public forums")

None, however, survive close scrutiny. Reasons to distinguish the two may include the following: 1) The Texas legislature is a body with much greater authority than a local school board; 2) The Texas legislature has labeled the venues in question as limited public forums before litigation, perhaps changing their character, whereas the school board only tried to use that language after litigation had commenced and the character of the forums was fixed in the record;[85] 3) The Act of the legislature provides for student speakers to be selected on the basis of neutral criteria, rather than engineering student elections to determine a prayer-giver with no other responsibilities; and 4) The Act of the legislature provides for disclaimers of school sponsorship.

I have listed these possible bases for distinguishing the school board's policy from the legislature's in the order of the ease with which they may be refuted. The first is the easiest: a state statute is no more capable of overruling the requirements of the Constitution than is the policy of a local school board.[86] The relatively greater authority of the legislature is no basis for distinction when what is in question is the constitutionality of the policy.

The second possible basis, that the legislature attempted to open a limited public forum before litigation, also fails to distinguish between the two policies. If the RVAA is understood as a response to the litigation in *Santa Fe*, it does not predate relevant litigation any more than the school board policy does. Of course, the government may open a previously nonpublic forum for public discourse at any time, thereby creating a limited public forum.[87] But that is not what the legislature has done. The legislature has preserved the "essential character" of the nonpublic forums in question, doing nothing to seriously alter the character of the forums in order to make them "an appropriate place for the communication of views on issues of political and social significance" or to make them more similar to a "debate or other venue for the exchange of competing viewpoints."[88] Instead, it has simply labeled the same nonpublic forums as limited public forums without changing them in any significant way.

What the Texas legislature has attempted is unique: no other state statute explicitly attempts to create a limited public forum by legislative fiat.[89] "Limited public forum" is a term created and normally used by the *judiciary* to categorize the type of forum that the government, by its policy, *actually* has created. It is a designation that is applied following an examination of the objective characteristics of the forum itself. Fifth

85. *See Santa Fe*, 168 F.3d at 818-19 (school board alternatively argues to the court that it has created limited public forum *through* its policy).

86. *See* U.S. CONST. art. VI, § 2.

87. *See Forbes*, 523 U.S. at 677; *see also Santa Fe*, 168 F.3d at 820.

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

89. In my research, I was only able to find one other state statute in the United States that even mentions a limited or a designated public forum: a Missouri statute declaring that personalized license plates are *not* limited public forums. *See* MO. ANN. STAT. § 301.144 (West 2008).

Circuit precedent holds as a matter of law that the forums in question lack those characteristics.[90] The Texas legislature has not given the forums those characteristics. "Limited public forum" is not a string of magic words that a legislature may recite in order to commandeer the constitutional doctrines following from that designation without the underlying characteristics essential to the reasoning behind those doctrines. The RVAA is an assault not only on the Establishment Clause, but also on the ability of the judiciary to use a consistent terminology to structure its analysis of government action. The Fifth Circuit should not allow such a cynical manipulation and misapplication of a term of art to change the substantive protections of the Establishment Clause.

Third, there is an argument that the legislature's attempt to ensure greater neutrality by having speakers selected on the basis of neutral criteria meaningfully distinguishes the RVAA from the school board policy. But a nonpublic forum is not transformed into a venue for the exchange of competing ideas appropriate for "communication on issues of social and political significance"[91] merely because a different method is used to exclude the vast majority of students from participation. In fact, the neutral criteria used by the school may arguably result in greater school endorsement than an independent student election. In *Lassonde v. Pleasanton Unified School District*, the school's use of such achievement-related criteria was a factor further entangling the school with a student's proselytizing speech: "[T]he school endorsed and sponsored the speakers as *representative examples of the success* of the school's own educational mission."[92] Similarly, here the school holds up the student speakers as representative examples of success to be emulated by their audience.

Also, under the RVAA, students may still be electing prayer-givers, because some of the "neutral criteria" to be used in selecting student speakers include election to student offices such as student body president.[93] Student body presidents will speak at least at some of the events contemplated by the RVAA. Thus, the RVAA makes prayer-giving one potential function of an elected student leader. The policy converts previously nonexistent election issues, such as whether a candidate is willing to give prayers and which prayers they plan to give, into factors informing the voting decisions of the student body. Under the endorsement test, a policy is unconstitutional if it makes "adherence to a religion relevant in any way to a person's standing in the political community."[94] In *Santa Fe*, the precise issue was the constitutionality of

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

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

92. 320 F.3d 979, 984 (9th Cir. 2003) (emphasis added).

93. TEX. EDUC. CODE § 25.156 (2007).

94. Lynch v. Donnelly, 465 U.S. 663, 687 (1984) (O'Connor, J., concurring). It is important to distinguish between the significance of religion to a person's political standing as a result of private preferences from the significance of religion as the result of official policy. Obviously, everyone in

a school board policy under which students elected a prayer-giver. That policy allowed the majority faith to seize control of government resources (such as the public address system) for religious purposes.[95] That policy violated the Establishment Clause.[96] Merging the functions of prayer-giver into another elected position would not meaningfully distinguish the RVAA from the school board policy ruled unconstitutional in *Santa Fe*.

Finally, the RVAA includes the requirement that disclaimers renouncing school sponsorship be given "for as long as a need exists to dispel confusion over the district's nonsponsorship of the student's speech."[97] This disclaimer provision is unrelated to the issue of whether the events featuring student speakers are nonpublic or limited public forums. If the events were limited public forums, there would be no need for a disclaimer renouncing school sponsorship. The disclaimer provision appears to be a failsafe intended to salvage the RVAA if and when the Fifth Circuit rules that the RVAA has not in fact created anything resembling a limited public forum.

If anything will save the policy from being held unconstitutional under the Establishment Clause, it is the disclaimer provision—but the RVAA's chances are still poor. The issue of a disclaimer's effect upon the constitutionality of a policy otherwise violating the Establishment Clause would be one of first impression for the Fifth Circuit. The use of official disclaimers is a relatively novel tactic employed by those who want a greater role for religion in schools. Other circuits that have considered the issue have reached inconsistent results.[98] Nevertheless, even under the most permissive precedent interpreting a disclaimer's effect on a policy allowing religious speech in schools, the RVAA violates the Establishment Clause.

The most persuasive argument that the disclaimer fails to salvage the RVAA is that, even if it were to be given its full intended effect, it could only ever pretend to resolve concerns under some of the manifold requirements of the *Lemon* test. As the Ninth Circuit explained persuasively in *Lassonde*,

> Even if a disclaimer were given, and even if it could dissolve governmental "entanglement" sufficiently, a disclaimer could not address the other ground underlying both *Cole* and *Lee*: permitting a proselytizing speech at a public school's graduation ceremony would amount to coerced participation

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any election, whether for student body president or President of the United States, may consider the candidate's religion in forming a voting preference. But in this case, the significance of religion is elevated by an official government policy advantaging candidates of the majority faith.

95. 168 F.3d at 810 (describing use of the public address system as a fact among those "of greatest significance to this case").

96. *Id.*

97. TEX. EDUC. CODE § 25.152(b).

98. I describe and compare the conclusions of the Third, Fourth, and Ninth circuits in this section. *See infra* discussion.

> in a religious practice. Regardless of any offered disclaimer, a reasonable dissenter still could feel that there is no choice but to participate in the proselytizing in order to attend high school graduation. Although a disclaimer arguably distances school officials from "sponsoring" the speech, it does not change the fact that proselytizing amounts to a religious practice that the school district may not coerce other students to participate in, even while looking the other way.[99]

In other words, the disclaimer could never resolve concerns under the coercion test even theoretically, but could only ever pretend to resolve concerns under the endorsement and entanglement inquiries.

I would take this argument further: though the disclaimer might "disentangle" the school from religious speech at an annual graduation event, it could never accomplish disentanglement in the context of a daily opening announcement, in which the RVAA also purports to allow student prayer. The entanglement prong is triggered when the government is engaged in "day-to-day surveillance or administration of religious activities."[100] The very existence of the disclaimer itself would amount to "day-to-day surveillance or administration of religious activities," since the school would have to perform some sort of daily surveillance to gain knowledge as to whether there was a religious activity and then perform the administrative function of disclaiming it.[101]

Holdings from other circuits also support the contention that disclaimers can only mitigate unconstitutional establishment of religion but not eliminate it completely. The circuit split is primarily over the extent of this mitigating effect. In *ACLU of New Jersey v. Black Horse Pike Regional Board*,[102] the Third Circuit held that a school board's disclaimer renouncing sponsorship of student prayer at graduation "does not weigh so heavily as to neutralize the counterweight of the advantage the policy gives religious speech over secular speech. Despite the printed disclaimer, the reasonable observer here could not help but conclude that the Board favors the inclusion of prayer."[103] And while the Fourth Circuit held in *Peck v. Upshur County Board of Education* that a disclaimer was sufficient to allow an outside group to make Bibles passively available to older students for a single day, it refused to extend the reasoning to give effect to a disclaimer aimed at younger students:

> In elementary schools, the concerns animating the coercion

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99. 320 F.3d at 984-85, *discussing* Cole v. Oroville Union High Sch., 228 F.3d 1092 (9th Cir. 2000) and Lee v. Weisman, 505 U.S. 577 (1992).

100. Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 253 (1990) (emphasis added).

101. Disclaiming the prayer is administrative in nature because it implements law under the RVAA. Separately, the entire student opening announcement is administered because it requires the management and implementation of resources, namely the intercom system.

102. 84 F.3d 1471 (3d Cir. 1996).

103. *Id.* at 1487.

> principle are at their strongest because of the impressionability of young elementary-age children. Moreover, because children of these ages may be unable to fully recognize and appreciate the difference between government and private speech . . . the County's policy could more easily be (mis)perceived as endorsement rather than as neutrality.[104]

Even under this permissive reasoning, the RVAA's disclaimer would be at least partially ineffective: the policy's failure to distinguish between older and younger children[105] would ensure that it violates the Establishment Clause with respect to events attended by children in lower grade levels.[106] And under the reasoning of the Third or Ninth Circuits,[107] the disclaimer would have a small mitigating effect insufficient to render any part of the policy constitutional.

V. CONCLUSION

The RVAA accomplishes its stated purpose admirably with respect to its provision on student homework assignments and somewhat less admirably with respect to its provision protecting extracurricular religious groups. The RVAA fails, however, in its attempt to create limited public forums enabling students to use school property to subject classmates to unwanted sectarian and proselytizing prayer every time a student address is given. Far from "clarifying"[108] constitutional law, the Texas legislature in section 25.152 has attempted to rewrite it. Because a government policy preventing regulation of proselytizing, sectarian prayer at school-sponsored events occurring in objectively nonpublic forums must not be allowed to stand under the Establishment Clause, section 25.152 of the RVAA will likely be held unconstitutional.

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104. 155 F.3d 274, 277 (4th Cir. 1998).

105. The sole distinction between older and younger students contained in the RVAA pertains to who shall deliver speeches at official functions, not who shall attend and listen. *See* TEX. EDUC. CODE § 25.156 (2007).

106. This is not to concede that the Fourth Circuit would find the RVAA constitutional with respect to events attended only by older students. Of the three circuits discussed, the Fourth Circuit has indeed given the largest mitigating effect to official disclaimers. But although this effect was deemed sufficient to allow an outside group to place Bibles on a hallway table one day out of the year with no oral communication to students permitted, it remains to be seen whether the Fourth Circuit would extend the mitigating effect to encompass a policy such as the one under consideration, which purports to allow unrestricted and frequent oral prayer as part of official school functions.

107. *See supra* notes 100-107 and accompanying text.

108. *See* Howard *supra* note 2.