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Codifying Commonsense: Religious viewpoint antidiscrimination acts and the free speech rights they protect

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CODIFYING COMMONSENSE: RELIGIOUS VIEWPOINT ANTIDISCRIMINATION ACTS AND THE FREE SPEECH RIGHTS THEY PROTECT

The Supreme Court has held that a student's right to free speech warrants protection and, thus, is not shed at the schoolhouse doors. Students whose religious viewpoints are discriminated against at school are likely unaware of their constitutional rights. The Religious Viewpoints Antidiscrimination Act or Student Religious Liberties Act—passed in Tennessee, Mississippi, South Carolina, and Texas—aims to protect students' right to free speech. The Acts reaffirm constitutionally protected rights to free speech in classroom assignments, homework, and other interactions while at school.

The Acts also advocate for the establishment of a limited public forum at all school-sponsored events where students may speak. This policy ensures both that students can speak at any school-sponsored event without fear of discrimination and that schools do not run afoul of the Establishment Clause's proscriptions. The Acts pass scrutiny under both the Lemon *test and the endorsement test and are, therefore, constitutionally sound. The Acts promote a policy that protects students' free speech rights, including the right of religious expression, and provide teachers and administrators with a clear policy that will prevent costly litigation.*

I. INTRODUCTION

When a fifth-grader in Tennessee was told by her teacher to write about whomever the student admired most, she was told that she could not write about God. In Texas, a group of cheerleaders were banned from holding banners mentioning Christ at a football game. A South Carolina Valedictorian offered the Lord's Prayer during graduation despite a recent ban on the use of prayer at high school graduations. A Texas Valedictorian decided to attribute his success to Christ while speaking at graduation and quickly had his microphone turned off by school officials. All of these stories reveal a problem with

student religious expression in public schools. The problem most typically arises when a student speaks about religion in school; because of its perceived influence or impact on other students, the student is silenced. While it would be unwise to label, at least in all cases, this censorship the result of hate or maliciousness, it is rooted in a misunderstanding and misapplication of the United States Constitution. Teachers and school officials are not properly instructed on students' free speech rights and, therefore, choose to err in favor of no expression in order to avoid violating the Establishment Clause.

In an effort to protect students' free speech rights, legislation was passed in Texas, Mississippi, South Carolina, and most recently Tennessee. The legislation is known as the Student Religious Liberties Act ("SRLA") or Religious Viewpoint Anti-discrimination Act ("RVAA") [hereinafter "the Act(s)" or "the Antidiscrimination Act(s)"]. The Antidiscrimination Acts provide guidance on student speech in schools and especially in school-sponsored events such as graduation, pep rallies, assemblies, and sporting events. The Acts reinforce teachers' and administrators' understanding of students' freedom of speech rights in classwork, homework, private conversation, and particularly in school-sponsored events where students may speak.

The Antidiscrimination Acts call for the creation of limited public forums for all school-sponsored events. These forums are the key to understanding how students can express themselves at school-sponsored activities without violating the Establishment Clause. The Acts, in many aspects, were drafted with recent Supreme Court decisions on school-sponsored prayer and other related issues in mind. This is evidenced in at least three major ways. First, the Antidiscrimination Acts do not have a religious purpose or effect, do not inhibit or advance religion, and do not cause entanglement between the government and students. Next, the Acts do not endorse religion; they merely seek to protect students' viewpoint expressions and facilitate the expressions regardless of whether they are religious or irreligious. Finally, when a student speaks at a school-sponsored event, the Acts do not encourage or facilitate coercion. While critics argue that the Acts might erode the constitutionally mandated separation of church and state, the Acts provide much needed protection of

free speech rights and policy direction.

This Comment advances a commonsense argument that will discuss the Acts and the relevant Supreme Court cases. These discussions include free speech and Establishment Clause cases (Part I); why the Antidiscrimination Acts are needed to protect the freedom of speech in schools (Part II); how the Acts avoid violating the Establishment Clause (Part III); and, lastly, policy suggestions on application of the Acts (Part IV).

II. BACKGROUND

A. The Problem of Viewpoint Discrimination in Schools

Students' free speech rights, particularly students' rights to *religious* speech and expression, are violated regularly while at school. The First Amendment to the United States Constitution contains two important clauses, known commonly as the Establishment and Free Speech Clauses.[1] Respectively, these clauses state that "Congress shall make no law respecting an establishment of religion" and "Congress shall make no law . . . abridging the freedom of speech."[2] While these rights should be afforded to all citizens, enforcing the proscriptions of the Establishment Clause has increasingly been given greater priority, especially in public schools.[3] The following two examples serve as illustrations of violations of students' rights to free speech under a misguided application of the Establishment Clause.

In East Texas, Kountze Independent School District officials ordered that high school cheerleaders stop displaying banners containing religious messages and bible verses.[4] The school administrator claimed that the messages violated the Establishment Clause.[5] Parents soon filed suit complaining of free speech and free exercise violations.[6] The suit recently

[1] U.S. CONST. amend. I.

[2] *Id.*

[3] Fear of Establishment Clause violations have left administrators and teachers without a practical understanding of the extent to which that right and the Free Exercise right interact.

[4] Kountze Indep. Sch. Dist. v. Matthews, No. 09-13-00251-CV, 2014 Tex. App. LEXIS 4951, at *3–5 (Tex. App. Beaumont May 8, 2014).

[5] *Id.* at *5.

[6] *Id.*

made it to the Court of Appeals of Texas, where the Court simply deemed the case moot because the litigated issues had been resolved.[7] The Court found that the school district had changed its policy to the following: "Based on the evidence, including oral and written testimony, submitted to the Board, the Board concludes that school personnel are not required to prohibit messages on school banners, including run-through banners, that display fleeting expressions of community sentiment solely because the source or origin of such messages is religious."[8]

The court concluded its opinion, noting that the school district had made the necessary changes to the policy so that the cheerleaders could utilize religious speech on the banners.[9] The school changed the policy about seven months after the complaint was filed.[10]

Another case, *Rusk v. Crestview Local School District*, arose in response to a school's practice of distributing flyers to students through mailboxes.[11] Claiming it violated the Establishment Clause, a parent brought suit to challenge the practice of distributing flyers that made reference religious activities or that contained religious messages.[12] The lower court concurred with the parent, finding that this practice violated the Establishment Clause and issuing a permanent injunction against the school.[13]

On appeal, however, the court found that the policy did not offend the Establishment Clause and addressed the appellee's contention that the school was endorsing religion.[14] The court stated, "[N]o reasonable observer could conclude that by distributing the flyers at issue here, Crestview is endorsing religion."[15] The court also addressed the "'heightened concerns' about the impressionability of elementary school students" stemming from Supreme Court precedent.[16] However, the court reasoned that "the [Supreme] Court has never ruled that a

[7] *Id.* at *11–12.
[8] *Id.* at *12.
[9] *Id.* at *24.
[10] *Id.* at *12.
[11] 379 F.3d 418, 419 (6th Cir. 2004).
[12] *Id.*
[13] *Id.*
[14] *Id.* at 424.
[15] 379 F.3d 418, 421 (6th Cir. 2004).
[16] *Id.*

school's practice might amount to an impermissible endorsement of religion because of the impressionability of the school's young students."[17]

These examples demonstrate schools' inability to correctly construe and apply the prohibitions of the Establishment Clause. The ensuing result is costly litigation and violation of students' rights to free speech. Had Antidiscrimination Acts and better policies been in place, the constitutional rights of religious expression for the above-mentioned students' might never have been infringed and litigation might have been avoided.

B. Statutory Provisions and Policy Assessment of the Antidiscrimination Acts

The Antidiscrimination Acts have been adopted in at least four states: Texas (2007), South Carolina (2010), Mississippi (2013), and, most recently, Tennessee (2014).[18] The Acts vary slightly from state to state, but carry the same broad antidiscrimination message.[19] While the titles of the Antidiscrimination Acts specifically mention religious expressions, the spirit of the Acts encompasses all expressions, religious or secular. Though not necessarily presented in this particular order, there are four main provisions in each of the Acts, discussed below in turn.[20]

1. Students' right to free speech

The first part of the Acts state, in pertinent part, that "[a] school district shall treat a student's voluntary expression . . . in the same manner the district treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the

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[17] *Id.*

[18] TEX. EDUC. CODE §§ 25.151-.157 (2013); S.C. CODE ANN. §§ 59-1-435, 59-1-441, 59-1-442 (2013); MISS. CODE ANN. §§ 37-12-3–12-15 (2014); TENN. CODE ANN. §§ 49-6-1801–05 (2014).

[19] Tennessee's RVAA includes "promotes illegal drug use" under the Establishment of a limited public forum section. *Id.* § 49-6-1803. Additionally, the states vary on whether the schools must or may adopt a policy that establishes a limited public forum. Texas and Mississippi require that schools adopt a policy that requires the establishment of a limited public forum at all events where students will speak. These two states also include a model policy as part of the statute.

[20] *See supra* note 18.

student based on a religious viewpoint . . . ."[21] The Representative that sponsored the Tennessee bill repeatedly referred to this as a way to "level the playing field."[22] In this way, the Acts are not meant to place a student's religious speech above another's secular speech, but rather both are afforded equal protection.

2. Students' right to free speech in assignments

Next, the Antidiscrimination Acts protect students' expressions in classwork and homework. The Acts state, "Students may express their written beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content."[23] Additionally, students' "[h]omework and classroom assignments shall be judged by ordinary academic standards of substance and relevance and against other legitimate academic concerns . . . [and] [s]tudents may not be penalized or rewarded based on the religious content of [their] work."[24] In light of the anecdote related above (i.e., where, in an assignment to write about a person the student admired most, a fifth grader in Tennessee was forbidden from writing about God), this provision has more than proved its need.[25]

3. Students have the freedom to organize groups

The third provision of the Antidiscrimination Acts states that "students in public schools may pray or engage in religious activities or expressions before, during and after the school day in the same manner and to the same extent that students may engage in nonreligious activities or expressions. It continues, "[s]tudents may organize prayer groups, religious clubs . . . or other religious gatherings before, during and after school to the same extent that students are permitted to organize other noncurricular student activities and groups."[26] Additionally, the

[21] TEX. EDUC. CODE § 25.151 (2013).

[22] H.B.1547, 108th Gen. Assembly (Tn. 2014), *available at* http://www.capitol.tn.gov/Bills/108/Bill/HB1547.pdf (last visited Oct. 1, 2015).

[23] TENN. CODE ANN. § 49-6-1804 (2014).

[24] *Id.*

[25] Suzi Parker, *Will Tennessee's New Religious Viewpoints Legislation Protect Bullying in School?*, YAHOO! NEWS (Mar. 28, 2014), http://news.yahoo.com/tennessees-religious-viewpoints-legislation-protect-bullying-school-010041312.html.

[26] MISS. CODE ANN. § 37-12-7 (2014).

Acts allow for any religious group to advertise its events to the same extent as any secular group.[27]

4. The establishment of limited public forums for school-sponsored events

The final part of the Acts deals with the establishment of a limited public forum whenever students are speaking publicly at school events.[28] This provision protects both the school and the student. The school is protected because the policy should "eliminate any actual or perceived affirmative school sponsorship or attribution to the [school] of a student's expression of a religious viewpoint."[29] The main concern under the Establishment Clause when a student expresses religious sentiments publicly is whether the school supported that expression in an official capacity.

To protect both the students and the school, the school should: (1) establish a forum that does not discriminate against a student's voluntary expression; (2) select student speakers using neutral criteria;[30] (3) limit the subject matter so that obscene, vulgar, offensively lewd, indecent or promoting of illegal drug use is prohibited;[31] and (4) read and sign a disclaimer that removes the school's hand from the speech.[32]

Both the Mississippi and Texas Legislatures codified a model policy with the Act.[33] The model policy provides further details on the use of the limited public forum at both graduation events and non-graduation events.[34]

5. Policy assessment and suggestions

While the First Amendment right to free speech is well

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[27] TENN. CODE ANN. § 49-6-1805 (2014).

[28] *Id.* at § 1803.

[29] *Id.*

[30] Both the Texas and Mississippi statutes include several examples of neutral criteria. *See* TEX EDUC. CODE §§ 25.151-.157 (2013); MISS CODE ANN. §§ 37-12-3 to -15 (2014).

[31] This specifically differs from statute to statute. Tennessee's refers to drug use while the other three do not. Still, all the schools have the right and responsibility to make sure that students are not misusing the forum and can do so without discriminating against their religious viewpoints.

[32] TENN. CODE ANN. § 49-6-1803 (2014); *see also* MISS. CODE ANN. § 37-12-9 (2014).

[33] MISS. CODE ANN. § 37-12-9(5); *see also* TEX. EDUC. CODE § 25.156 (2013).

[34] *Id.*

established, the provisions of the Antidiscrimination Acts help school administrators and teachers promote rather than prevent those rights in public schools.[35] Opponents to the Acts argue that an increase in litigation will result because schools will try to facilitate more religious speech.[36] However, the passage of time has largely eroded and discredited this argument, since—in the months and years following the passage of the Acts—hardly any litigation has been brought on the Acts. In fact, since its passage in 2007, the courts have only mentioned the Act once.[37] Moreover, since Texas originally enacted the Act, at least three other states have adopted similar Acts, further supporting the notion that additional litigation is not likely a concern.

Another issue arises after the legislature enacts the law and schools must begin to apply the new policy. School districts, including administrators, teachers, and additional staff, will likely need training on the updated policies.

Finally, to ensure that students' rights are protected, every state that adopts the Acts should require—rather than merely suggest—the establishment of a limited public forum. Doing this will, as mentioned above, protect students and schools.

C. Supreme Court Precedent

The Supreme Court has not ruled or made any statements regarding the various state Antidiscrimination Acts. As a result, it is impossible to say—with certainty—how (or if) the Acts fit within recognized First Amendment jurisprudence. However, the Court's past decisions as to Free Speech and the Establishment Clause provide insight into how the Acts could be validly put into practice. Therefore, this Comment will discuss and consider the results and analysis of the Court in the prominent Free Speech and Establishment Clause cases.

1. Cases where free speech is protected and viewpoint

[35] Symposium, *The Texas Religious Viewpoints Antidiscrimination Act and the Establishment Clause*, 42 U.C. DAVIS L. REV. 939, 1021 (2009).

[36] *Id.*; *see also* Sarah Posner, *Using Texas' model, more states mull 'religious viewpoints' in schools law,* ALJAZEERA (April 24, 2014), http://america.aljazeera.com/articles/2014/4/24/religion-expressionschools.html ("When the [RVAA] passed in 2007 [speaking about the Texas Statute] 'we were certain it would lead to lawsuits rather than prevent them . . . .'").

[37] Symposium, *supra* note 35, at 1022; *see also* Does 1-7 v. Round Rock Indep. Sch. Dist., 540 F. Supp. 2d 735, 744 n.4 (W.D. Tex. 2007).

discrimination discouraged

The First Amendment guarantees certain free speech rights to adults, but do schoolchildren retain these rights while at school? The simple answer is yes. However, the Supreme Court has provided several restrictions on free speech in schools.

a. *Tinker* and the protection of free speech in public schools.

The first free speech case to provide clear direction on students' rights in school was *Tinker v. Des Moines Independent Community School District*.[38] The Supreme Court ruled seven to two that the First Amendment freedom of speech protection applied to schoolchildren.[39] The majority famously stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[40] Protesting the then ongoing conflict in Vietnam, a group of adults and students decided to wear black armbands.[41] The school responded to the plan and adopted a policy against wearing the armband.[42] After the students wore the armbands anyway and were suspended for violation of the policy, the students filed suit.[43]

The Court's decision marked a new standard for student speech at school.[44] The Court protected student speech that did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[45] The Court was, however, sensitive to the fact that schools are not a typical public forum for speech and that normal free speech standards do not always apply within schools as they do elsewhere.[46]

Several cases that followed *Tinker* established various restrictions on free speech in schools.[47] These include: *Bethel*

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[38] 393 U.S. 503 (1969).

[39] *Id.*

[40] *Id.* at 506.

[41] *Id.* at 504.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 503.

[45] *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[46] *Id.* at 506–07, 509; *see also* Mark W. Cordes, *Making Sense of High School Speech After* Morse v. Frederick, 17 WM. & MARY BILL RTS. J. 657, 663 (2009).

[47] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (establishing that the

School District No. 403 v. Fraser,[48] *Hazelwood School District v. Kuhlmeier*,[49] and *Morse v. Frederick*.[50]

b. Free speech protected again under *Rosenberger* despite religious content.

In 1995, the Supreme Court decided *Rosenberger v. Rector & Visitors of the University of Virginia*.[51] The case came to the Court as an Establishment Clause case but left as a free speech case.[52] A University of Virginia student decided to produce a publication through his organization, Wide Awake Productions ("WAP").[53] The organization qualified as a Contracted Independent Organization ("CIO") at the school and therefore was eligible to submit funding requests for a student publication.[54] The Student Activities Fund ("SAF") denied WAP's request for funding and the University denied further recourse.[55] The SAF claimed that the publication was considered "religious activity" and, therefore, was ineligible for publication funding.[56]

In the judicial proceedings that followed, both the district court and the court of appeals found that the University had a compelling interest in maintaining separation of church and state and, therefore, upheld the University's decision.[57] However, the Supreme Court found that the Establishment Clause concerns were not sufficient in this case to justify the

school could limit lewd or profane language at school-sponsored activities); Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) (providing additional restraints on printed material that bore the school's name and endorsement); Morse v. Frederick, 551 U.S. 393 (2007) (establishing additional limits on drug promotion and endorsement in school speech).

[48] *Bethel*, 478 U.S. at 678 (concluding that the school should balance a student's right "to advocate unpopular and controversial views in school" and the school's interest in teaching students the boundaries of socially appropriate behavior.").

[49] *Hazelwood*, 484 U.S. at 260 (reversing and drawing a line between the school's toleration of speech and the promotion of speech.).

[50] *Morse*, 551 U.S. at 393 (finding that the speech was not protected under the First Amendment because of the unique problems schools face in combatting drug use. Though *Morse* restricted student speech, the majority made a point to emphasize that students' right to free speech in schools under *Tinker* remains mostly intact.).

[51] 515 U.S. 819 (1995).

[52] *Id.*

[53] *Id.* at 825.

[54] *Id.* at 826–27.

[55] *Id.* at 827.

[56] *Id.*

[57] *Id.* at 827–28.

SAF's viewpoint discrimination against the petitioner's publication.[58] The court observed that the distinction between content discrimination (permissible) and viewpoint discrimination (impermissible) "is not a precise one."[59] The Court continued, "[T]o cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life."[60] The Court made the point that a "sweeping restriction on student thought" would go beyond the University's ability to effectually regulate which students the School would fund for publication.[61]

As a result, the Court held that the school's limit on the student's speech was impermissible viewpoint discrimination. The majority stated that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[62]

2. The Establishment Clause in schools

The Supreme Court's decisions in this section show a pattern of protecting students' speech when the appropriate forum exists and when the school has successfully separated itself from the speech.

a. *Mergens* and the Equal Access Act.

The Supreme Court heard a constitutional challenge to the Equal Access Act ("EAA") in 1990 in *Board of Education v. Mergens*.[63] Bridget Mergens attempted to establish a Christian club at her high school, but her request was denied because—as the school claimed—such an organization would violate the Establishment Clause.[64] Later, after the suit was filed in district court, Mergens argued that the refusal to allow the club violated the EAA.[65] Under the EAA, a school that receives

[58] *Id.* at 835, 839.
[59] *Id.* at 831.
[60] *Id.* at 836.
[61] *Id.*
[62] *Id.* at 829.
[63] 496 U.S. 226 (1990).
[64] *Id.* at 233.
[65] *Id.*

federal aid and "maintain[s] a limited open forum" would be subject to the EAA.[66] The school argued that it was not operating a limited public forum since it only allowed "curriculum-related" clubs to organize.[67] Since this term is fairly ambiguous, the Court sought to provide further clarification.[68] As a result, the Court determined that "curriculum-related" clubs are "any student group that . . . relate[s] to the body of courses offered by the school."[69]

Since the school allowed clubs that did not fall under this definition, the school had established a limited public forum for student clubs.[70] The Court also rejected the notion that allowing the club would violate the Establishment Clause and argued that the EAA has the secular purpose of preventing discrimination against religious and other types of speech.[71]Justice O'Connor relied on the Court's decision in *Widmar v. Vincent*, stating, "an open-forum policy including nondiscrimination against religious speech would have a secular purpose and would in fact avoid entanglement with religion."[72]

b. The lack of a limited public forum in *Lee* and *Santa Fe* and the students' loss of protection.

The Supreme Court in *Lee v. Weisman* found that this particular school's policy and practice regarding prayer at graduation violated the Establishment Clause.[73] The 1992 case involved a school policy that allowed the school administration to dictate who gave the prayers and what language the prayers would include. The Court found that the policy violated the Establishment Clause because the government was coercing individuals "to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or

[66] *Id.*

[67] *Id.*

[68] *Id.* at 238.

[69] *Id.* at 239.

[70] *Id.* at 247.

[71] *Id.* at 248.

[72] *Id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)) (internal quotation marks omitted). Justice O'Connor also said—speaking of secondary school students—"[they] are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Id*. at 250.

[73] 505 U.S. 577 (1992).

religious faith, or tends to do so.'"[74] The Court felt that prayer at graduation was coercive because of the captive audience. The Court recognized the significance of the event and that many students, though not required, would feel obligated to attend the graduation ceremonies.[75] The Court stated that the "prayers bore the imprint of the state and thus put school-age children who objected in an untenable position."[76]

Eight years after *Lee*, the Court ruled on *Santa Fe Independent School District v. Doe*, another school prayer case.[77] In this case, the school's policy allowed students to vote on (1) whether there would be a prayer at football games and (2) who would give the prayers.[78] The school administration assumed that—because it had turned the process over to the students—that it would avoid the problems raised in *Lee*. However, the Court recognized the "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."[79] In this case, the state's involvement in the creation and carrying out of the policy fell into the former category of government speech endorsing religion.

The Court made it clear that the First Amendment did not ban all religious expression in public schools.[80] In fact, the Court stated that "nothing in the Constitution .†.†. prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday."[81]

c. How the limited public forum in *Rosenberger* avoided violating the Establishment Clause.

A second aspect of the aforementioned *Rosenberger* case—which revolved around whether there was viewpoint discrimination in denying a student, religiously affiliated

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[74] *Id.* at 587.

[75] *Id.* at 586. The majority rejected the argument that the graduation was voluntary and said that the graduation ceremony was, "in a fair and real sense obligatory." *Id.*

[76] *Id.* at 590.

[77] 530 U.S. 290 (2000).

[78] *Lee*, 505 U.S. at 590.

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

[80] *Id.* at 313.

[81] *Id.*

publication funding—deals with the concept of a limited public forum. Even though the university had created a forum for such expression, it was concerned that printing religious content would violate the Establishment Clause.[82] The majority in *Rosenberger* stated, "It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups . . . ."[83] Further, "[t]here is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf."[84] The Court acknowledged the university's concern, but suggested that the university was sufficiently separated from the student publications to avoid any claims of endorsement.[85]

Finally, the Court detailed the constitutional standard governing a school's decision to grant or restrict access to a limited public forum.[86] Whereas a school or other state entity may establish a forum where it may "preserve the property under its control for the use to which it is dedicated,"[87] it cannot exclude speech where its distinction is not "reasonable in light of the purpose served by the forum,"[88] nor may it discriminate against speech on the basis of its viewpoint.[89]

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[82] The Court stated, "Government neutrality is apparent in the State's overall scheme in a further meaningful respect. The program (University) respects the critical 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.'" Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 841 (1995) (quoting *Mergens*, 496 U.S. at 250)).

[83] *Id.* at 842.

[84] *Id.* at 843.

[85] *Id.* at 844 ("By paying outside printers, the University in fact attains a further degree of separation from the student publication, for it avoids the duties of supervision, escapes the costs of upkeep, repair, and replacement attributable to student use, and has a clear record of costs."). The Court continued to point out that the money, therefore, was not attributable to tax payers but to the SAF, avoiding any direct financial support from the State. *Id.*

[86] *Id.* at 829.

[87] *Id.* (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch.*, 508 U.S. 384, 390 (1993)).

[88] *Id.* (quoting *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 804–06 (1985)).

[89] *Id.* (quoting *Lamb's Chapel*, 508 U.S. at 392–93).

d. *Good News Club* and the protection of free speech and equal access through a limited public forum.

The Supreme Court ruled on *Good News Club v. Milford Central School* in 2001.[90] This case revolved around the use of school property for a club meeting where religious activities took place. The school district restricted the use of the school property "by any individual or organization for religious purposes."[91] The main question before the Court was whether the limited public forum that was established should allow religious content.[92] The School's policy allowed groups to use the facilities as long as the events related to the "welfare of the community" and contributed to the "development of character and morals from a religious perspective."[93] However, the school did not allow groups to give "religious instruction" or engage in activities that were "religious in nature."[94] The Court found, as it did in *Rosenberger*, that this was impermissible viewpoint discrimination.[95]

III. ANTIDISCRIMINATION ACTS ARE NEEDED TO PROTECT THE FREEDOM OF SPEECH IN SCHOOLS

A. Recent Disturbing Patterns of Viewpoint Discrimination in Schools

Students' right to free speech—particularly religious speech—is under attack and the need for stronger policies protecting students has never been greater. The following are real examples from across the country where students' free speech rights were in danger of violation.

In New York, an intermediary school "indefinitely suspended a student for wearing rosary beads for religious reasons in violation of a dress code. The student sued, and after the court issued an injunction, the case was settled, with the school clearing the student's record and paying nearly $25,000

[90] 533 U.S. 98 (2001).

[91] *Id.* at 103.

[92] *Id.* at 108.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 109. The majority stated, "[I]t is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination." *Id.* at 113.

in damages, fees, and costs."[96]

Another example occurred in Hawaii where parents were invited "to include messages to their children in the yearbook but [the school] refused to include one parent's encouraging Bible quote. The principal ultimately agreed to include the Bible quote in the yearbook.[97]

A third example comes from Indiana where a principal did not allow a "student to pass out religious flyers to other students that contained . . . e-mail address[es] and website[s] where students could submit prayer requests, although other students had been allowed to pass out flyers with secular content. The superintendent ultimately granted approval for the student to pass out the religious flyers."[98]

These examples illustrate that schools—acting to ensure a separation of church and state is observed—have infringed the free speech rights of schoolchildren on countless occasions. The trend is likely to continue. Enactors of the Antidiscrimination Acts, like the RVAA, have sought to statutorily protect children's rights to religious expression. While only four states have adopted this legislation, it is the Author's hope that more states will enact similar protections in the near future.

B. The Court Recognizes the Importance of Free Speech Rights for Students in Public Schools

The freedom of speech is a fundamental right and should be protected in schools.[99] As illustrated by Supreme Court jurisprudence on this matter, public school attendees share most of the same free speech rights that normal citizens enjoy, with only minor differences.[100] However, since the current public school atmosphere has become hostile toward religious expressions, the Antidiscrimination Acts are critical to protecting these rights.

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[96] Jay Alan Sekulow, *Religious Liberty and Expression Under Attack: Restoring America's First Freedoms*, THE HERITAGE FOUNDATION (Oct. 1, 2012), http://www.heritage.org/research/reports/2012/10/religious-liberty-and-expression-under-attack-restoring-americas-first-freedoms#_ftn36.

[97] *Id.*

[98] *Id.*

[99] *Rosenberger*, 515 U.S. at 834.

[100] *Tinker*, 393 U.S. at 506. Justice Fortas argues, "It can hardly be argued that either teachers or students shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." *Id.* at 506.

1. The importance of protecting student speech in general

The Court's decision in *Tinker* established broad speech rights for students not engaged in school-sponsored activities.[101] Though later cases have suggested some restrictions on student speech rights, the Court has consistently maintained and reaffirmed the fundamental free speech rights that students have while in school.[102] The Court's analysis in *Tinker* included two considerations. First, the Court noted that the speech did not disrupt normal school activities.[103] Second, the Court was perturbed that the school sought to limit a particular message, in essence attempting to discriminate against a viewpoint.[104] These considerations show that the Court desired to protect free speech without unduly burdening the school in fulfilling its intended purpose of providing education.

In later cases, the Court sought to emphasize these rights and suggested that "permissible restrictions on student speech are the exceptions, not the rule."[105] Indeed, the decision in *Morse* established a general balancing test between (1) the nature of the speech restriction, (2) the type of speech involved and (3) the strength of the asserted school interest.[106]

Though the body of Supreme Court jurisprudence has made clear that the First Amendment protects religious speech, the use of such speech in schools—for some—remains an open question. While, unquestionably, schools must respect the Establishment Clause, they may not trample upon free speech.

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[101] *Id.* at 505.

[102] *Bethel,* 478 U.S. at 685 (ruling that lewd or profane language was not protected by First Amendment); *Hazelwood*, 484 U.S. at 272 (ruling that the school could restrict sensitive material in student publication); *Morse*, 551 U.S. at 397 (holding that school could restrict speech that promoted drug use).

[103] *Tinker*, 393 U.S. at 508–09. The Court continued to say that the speech did not involve "disruptive action or even group demonstrations" but was only "a silent, passive expression of opinion" which was "akin to pure speech." *Id.* at 508.

[104] *Id.* at 510–11. "Thus, *Tinker* tailored its analysis and holding to the problem of viewpoint discrimination, saying that viewpoint restrictions on student speech are constitutionally permissible only when necessary to avoid a substantial interference with the operation of a school or when the speech would invade the rights of other students." Cordes, *supra* note 46, at 663.

[105] Cordes, *supra* note 46, at 674. *See also Morse*, 551 U.S. at 422 (Alito, J., concurring) ("But I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court.") (speaking of *Tinker*, *Hazelwood*, and *Bethel*). Justice Alito goes on to say that the majority does not provide any further justifications for speech restrictions in schools. *Id.*

[106] *Id.* at 395.

Justice Kennedy, in *Rosenberger*, aptly stated, "More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design."[107] Public schools are not exempt. The Court's analysis in *Tinker* emphasizes the protection of speech, including religious speech, in schools.

2. Establishing a limited public forum protects students' free speech rights

Particularly when students speak at school-sponsored events, a limited public forum would protect students' free speech rights and would protect the administration against Establishment Clause violations. Such a forum would ensure that student speech at school-sponsored activities is considered private speech and not government speech.[108] A limited public forum differs from a typical public forum in that the entity establishing the forum can control subject matter. Subject matter restrictions typically take the form of broad rules about what can be said but do not affect the speaker's ability to express viewpoints.

Viewpoint discrimination is never permissible in any forum, especially one that has been opened up for expression. In *Rosenberger*, the Court stated,

> In determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between . . . content discrimination, which may be permissible if it preserves the purposes of that limited forum, and . . . viewpoint discrimination, which is presumed impermissible when directed against speech . . . .[109]

The Court has recognized only a few categorical restrictions on student speech at school-sponsored events, including using profane and crude speech or encouraging drug use.[110] However,

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[107] *Rosenberger*, 515 U.S. at 834.

[108] The Court stated, "We have held . . . that an individual's contribution to a government-created forum was not government speech." *Santa Fe*, 530 U.S. at 302 (citing *Rosenberger*, 515 U.S. 819).

[109] *Rosenberger*, 515 U.S. at 829.

[110] *Bethel*, 478 U.S. at 680. The Court determined that the school had a legitimate interest in regulating the speech since it was crude and graphic. *Id.* at 689;

the decisions in both *Lee* and *Santa Fe* demonstrate that students' rights are not the only critical aspect to consider. In both of those cases the Court did not restrict students' rights to free speech, but rather the policies that the school had established to govern the speech.[111] And while the school may not endorse or entangle itself with religious activities at these sorts of events, students still retain free speech rights, including the right to religious expression, when they speak at such an event.[112]

The *Rosenberger* Court differed because the University's policy was directly in line with the Constitution. The majority stated, "The University has taken pains to disassociate itself from the private speech involved in this case."[113] Furthermore, it argued that a limited public forum must protect viewpoint expressions once a forum has been established.[114] While viewpoint cannot be restrained once a forum has been established, subject matter may be regulated.[115] Viewpoints are typically considered "[the] substantive content or the message . . . convey[ed]."[116] The Court's analysis, though directed at a university, is applicable to high schools and potentially elementary schools since these too are organizations sponsored or run by the government, in addition to being places of learning and development.[117] In *Rosenberger*, the Court protected speech in a metaphysical forum where the school funded printing costs.[118] The Court looked at any involvement

see also Lee, 505 U.S. at 577.

[111] *Lee*, 505 U.S. at 577; *Santa Fe*, 530 U.S. at 302.

[112] *Rosenberger*, 515 U.S. at 829.

[113] *Id.* at 841.

[114] *Id.* at 839.

[115] *Id.* at 828–29.

[116] *Id.* at 828; *see also* Police Dept. of Chicago v. Mosly, 408 U.S. 92, 96 (1972).

[117] *Rosenberger*, 515 U.S. at 836. The Court says, speaking of universities, "to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life . . . ." *See, e.g.*, Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools,* 32 PEPP. L. REV. 647, 655 (2005) (arguing that "students will try to assert their developing religious and political identity by a variety of methods, many of which we call speech.") The author continues, "if schools silence such self-assertion without good reason . . . [then] *Tinker* [and arguably *Rosenberger*] can . . . be viewed as protecting a student's right to push back . . . for the purpose of maintaining or developing identity free from state interference." *Id.*

[118] *Rosenberger*, 515 U.S. at 830. Again, another logical extension of the Court's analysis here is beneficial. While the Court is deciding the case based on a "metaphysical" forum, the forum analysis applies just as aptly to schools. *Id.*

the school may have with the publications that it provided funds to and determined that there was no evidence to suggest that the school endorsed the publications.[119]

C. Antidiscrimination Acts Protect Students' Free Speech Rights

The Antidiscrimination Acts encourage schools to adopt a policy that would protect basic free speech rights. Discrimination against free speech is unlikely a result of bigotry or hate, but rather it arises as a result of teachers' and administrators' lack of knowledge and expertise regarding First Amendment rights. The Acts seek to provide that knowledge to teachers and administrators.

1. The right to voluntary religious expressions in general and in classwork or homework

Students have the general right to freely express their views while at school.[120] The Antidiscrimination Acts state that "a school district shall treat a student's voluntary expression of a religious viewpoint . . . in the same manner the district treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject."[121]

Students also have the right to express themselves in a similar manner in all classwork and homework assignments. The Acts state that students may express their written beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of the student's submissions.[122] Teachers and administrators have the right to judge a student's work under "ordinary academic standards."[123]

2. The right to organize religious groups and to receive equal access

Students also have the right to organize religious groups and to meet on school property to the same extent other non-

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[119] *Id.* at 841–45.
[120] *Tinker*, 393 U.S. at 511.
[121] TEX. EDUC. CODE § 25.151 (2013).
[122] TENN. CODE ANN. § 49-6-1804 (2014).
[123] *Id.*

academic groups organize and meet.[124] After the Supreme Court's decision in *Widmar v. Vincent,* Congress passed the Equal Access Act in 1984.[125] In essence the Equal Access Act and the Antidiscrimination Acts accomplish a similar goal: preventing discrimination based on religious content. The Acts state that "students may organize religious student groups, religious clubs, 'see you at the pole' gatherings, or other religious gatherings before, during, and after school to the same extent that students are permitted to organize other noncurricular student activities and groups."[126]

3. The acts' policy of establishing limited public forums for school events will foster students' free expression and protect the school

The Antidiscrimination Acts suggest the establishment of a limited public forum for school-sponsored activities, which, in turn, protects both students' free speech rights and the administration from Establishment Clause violations. The Acts also encourage a forum "that does not discriminate against a student's voluntary expression of a religious viewpoint on an otherwise permissible subject."[127] Further, the Acts encourage the school to establish subject matter restrictions in the forum against any "obscene, vulgar, offensively lewd, or indecent speech."[128]

The school may require that the speech relate to the event for which they are speaking. For example, school administrators may ask graduation speakers to limit their speech to graduation-related subject matter. If the event is a pep-rally, the school may wish that the student speakers restrict their remarks to those subjects related to winning, school spirit, sports, etc.

The Antidiscrimination Acts provide a framework for a limited public forum similar to the one approved by the Court in *Rosenberger*, wherein student speech is protected and the

[124] *Mergens*, 496 U.S. at 235 (holding that the Equal Access Act is constitutional and does not violate the Establishment Clause).

[125] Symposium, *supra* note 35, at 970.

[126] TENN. CODE ANN. § 49-6-1805 (2014).

[127] MISS. ANN. CODE § 37-12-9(1)(a) (2014).

[128] TEX. EDUC. CODE § 25.152(a)(3) (2013); S.C. CODE ANN. § 59-1-441(B) (2013); MISS. CODE ANN. § 37-12-9(1)(c) (2014); TENN. CODE ANN. § 49-6-1803(b)(3) (2014). Tennessee's Act includes "promotes illegal drug use" in the list of restricted speech.

school is not considered to be endorsing the speech. To help disassociate student speech from the school, the Acts suggest that schools "[s]tate, in writing or orally, or both, that the student's speech does not reflect the endorsement, sponsorship, position, or expression of the [school]."[129] Additionally, two of the Acts provide a model policy that schools can reference when establishing their own policy.[130]

All high schools currently have student speakers for graduation and in many cases for other school-sponsored events. When the school allows the students to speak, the school is understandably concerned about violating the Establishment Clause. However, "[m]ore than once [the Supreme Court has] rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design."[131] The Antidiscrimination Acts will provide policy and practices that protect the First Amendment rights of students whilst simultaneously protecting schools from any claims that—by allowing such speech—its has violated the Establishment Clause.

IV. ANTIDISCRIMINATION ACTS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE

The Antidiscrimination Acts protect free speech without drastically increasing the chances of Establishment Clause violations. The Supreme Court has determined that there are several ways to violate the Establishment Clause. Most of these are listed below along with explanations on how the Acts do not violate this constitutional provision.

A. Antidiscrimination Acts Pass the Lemon Test

In the 1971 *Lemon v. Kurtzman* case, the Supreme Court struck, as unconstitutional, two state statutes, which provided supplemental funding to teachers at church-related educational institutions.[132] The Court applied what is now known as the

[129] TENN. CODE ANN. § 49-6-1803(b)(4) (2014).

[130] TEX. EDUC. CODE § 25.156 (2015); MISS. CODE ANN. § 37-12-9(5) (2013).

[131] *Rosenberger*, 515 U.S. at 839.

[132] Lemon v. Kurtzman, 403 U.S. 602, 607 (1971).

Lemon test, which provides that to pass constitutional muster a statute must (1) have a secular legislative purpose; (2) be one that neither advances nor inhibits religion; and (3) does not foster an excessive government entanglement with religion.[133] The Court found both that the legislature had a secular purpose when it passed the statute and that the statute's principal effect neither advanced nor inhibited religion, but found that the statute raised Establishment Clause concerns as to the third prong: government entanglement.[134] While the Court acknowledged that complete separation between church and state is not absolute, it determined the entanglement was excessive after examining the (1) character and purposes of the institutions that it benefitted, (2) the nature of the aid that the State provided, and (3) the resulting relationship between the government and the religious authority.[135]

1. Protection of free speech is a secular purpose

The Antidiscrimination Acts protect student free speech, which is a secular purpose under the *Lemon* test.[136] While the Acts reach beyond religious speech, they do specifically provide for the protection of the same.[137] Critics of the Acts have argued that, because the legislation is deliberately aimed at protecting religious speech, the Acts could be invalidated under the Establishment Clause.[138] Indeed, at least one opponent of the Acts has suggested that the Acts could be ruled unconstitutional under the *Lemon* test's purpose prong,[139] especially given the fact that certain legislators that passed the Texas and Tennessee Acts expressed their interests in protecting religious speech. This, the critic argues, supports the notion that the Acts have a religiously motivated purpose. However, as mentioned in *Board of Education v. Mergens*, a subjectively religious motivation on the part of the legislature

[133] *Id.* at 612–13.

[134] *Id.* at 614–15.

[135] *Id.*

[136] *Id.* at 663. "Our cases also recognize that legislation having a secular purpose and extending governmental assistance to sectarian schools in the performance of their secular functions does not constitute "law[s] respecting an establishment of religion" forbidden by the First Amendment merely because a secular program may incidentally benefit a church in fulfilling its religious mission." *Id.*

[137] *See supra* note 18.

[138] Symposium, *supra* note 35, at 977–78.

[139] *Id.* at 1018.

"alone would not invalidate [a statute], because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law."[140] Thus, the critic only hints at the idea that the Acts would be unconstitutional because, the fact is, the protection of religious speech *is* a secular purpose.[141]

2. The acts neither inhibit nor advance religion in schools but simply protect free speech

Instead of seeking to advance or inhibit religion, the Antidiscrimination Acts pass the second prong of *Lemon* because they protect the accommodation of religion.[142] In *Cutter v. Wilkinson*, speaking about the relationship between the Free Exercise and Establishment Clauses, the Supreme Court found that "there is room for play in the joints between the Clauses."[143] Justice Thomas argued that under both the first and the second prong of *Lemon*, "[a] discredited test," "any accommodation of religion – might well violate the [Establishment] Clause."[144] Clearly the Antidiscrimination Acts would not fail both the first and second prongs of the *Lemon* test simply because they protect a religious policy, an important point in *Cutter*.[145]

3. Protection of free speech reduces government entanglement with religious speakers

Finally, the Antidiscrimination Acts do not bring about any serious entanglement issues with the state. The third prong of the *Lemon* test requires more in-depth analysis because it deals with the actual implementation of the Acts.[146] In *Agostini v. Felton*, the Court stated, "[n]ot all entanglements . . . have

[140] *Mergens*, 496 U.S. at 249.

[141] Symposium, *supra* note 35, at 1019; *see also* Cutter v. Wilkinson, 544 U.S. 709, 731 (2005) (arguing that the Establishment Clause does not mandate complete legislative avoidance of religion but merely prohibits Congress from making laws establishing religion); *see also Mergens*, 496 U.S. at 250.

[142] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[143] *Cutter*, 544 U.S. at 719. Justice Ginsburg continues, "Our decisions recognize that 'there is room for play in the joints' between the Clauses, some space for legislative action neither compelled by the free Exercise Clause nor prohibited by the Establishment Clause." *Id.*

[144] *Id.* at 726 n.1.

[145] *Id.* at 709.

[146] *Lemon*, 403 U.S. at 612–13.

the effect of advancing or inhibiting religion. Interaction between church and state is inevitable . . . [and] must be 'excessive' before it runs afoul of the Establishment Clause."[147] The Court in *Lemon* found that the statutes in question involved excessive entanglement and as a result would violate the Establishment Clause.[148] Also, in *Agostini* the Court found that the "pervasive monitoring by public authorities" of the activities of religious organizations caused excessive entanglement.[149] The Antidiscrimination Acts will not require any pervasive monitoring by the state beyond the normal interactions that happen in public schools currently.[150] The Acts will simply codify existing First Amendment rights.[151]

Additionally, in *Lemon*, the Court compared the present case to previous cases where the state provided "secular, neutral, nonideological services, facilities, or materials."[152] The Court had no problem with the state providing these materials because the "potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not."[153] Therefore, when compared to the materials, funding a teacher would cause the state to face a significantly greater risk. Teachers, however, can be regulated through workplace rules or regulations. Though schoolchildren may pose additional risks, schoolchildren are drastically different because they are not state employees or state funded. While a child's "handling of a subject" (i.e., speaking at a school-sponsored event) may also be indeterminable, the Acts do not fund student speech and as a result do not require the state to pervasively monitor the speech.[154]

B. Creation of Limited Public Fora in Which Religious Speech May Occur Is Consistent with the Establishment Clause

Establishing a limited public forum at all school-sponsored events where students speak will help avoid Establishment

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147 Agostini v. Felton, 521 U.S. 203, 233 (1997).
148 *Lemon*, 403 U.S. at 614.
149 *Agostini*, 521 U.S. at 233.
150 *See supra* note 18.
151 *Id.*
152 *Lemon*, 403 U.S. at 616.
153 *Id.* at 617.
154 *Id.*; *see also supra* note 18.

Clause violations and—equally as important—will protect free speech rights. *Lee v. Weisman* and *Santa Fe v. Doe*, two important Supreme Court cases, are prime examples of school-led prayers, where a limited public forum may have been beneficial.[155]

In *Weisman*, the school traditionally had a policy that allowed the school to invite ministers of various sects to pray at the school's graduation ceremony.[156] The Court questioned whether that policy violated the Free Exercise and Establishment Clauses of the First Amendment.[157] The Court concluded, "[t]hese dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools."[158] Additionally, the Court addressed the concern that attending the graduation ceremony became "participation in a state-sponsored religious activity" that felt "in a fair and real sense obligatory."[159]

In *Santa Fe*, the Court was presented with a similar concern at a different venue, a high school football game.[160] As in *Weisman*, *Santa Fe* was a fact-intensive case where the school administration had established prayer policies.[161] In *Santa Fe*, the school attempted to make the speech attributable to students by establishing an election process.[162] However, the Court found that, as in *Weisman*, the school's involvement in the prayer created the Establishment Clause concern.[163]

The Antidiscrimination Acts escape the first problem of school-directed prayer with ease.[164] They suggest the use of a limited public forum and require the student speaker to either orally or in writing waive the school of liability for involvement in the speech.[165] The Acts would protect prayer-like speech in the context of a graduation ceremony where a student chose to

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[155] *Le*e, 505 U.S. at 577; *see also Santa Fe*, 530 U.S. at 290.
[156] *Id.* at 580.
[157] *Id.*
[158] *Id.* at 586.
[159] *Id.*
[160] *Santa Fe*, 530 U.S. at 90.
[161] *Id.* at 296–99.
[162] *Id.*
[163] *Id.* at 301.
[164] Symposium, *supra* note 35, at 999; *See* TEX. EDUC. CODE § 25.152 (2013).
[165] *Id.*

express religious speech within the bounds of the forum.[166] In the end, the graduation attendees in *Weisman* and those attending a school in a state with these Antidiscrimination Acts may hear similar speech; the crucial difference is the lack of endorsement and state involvement.[167]

1. A limited public forum for individual student speech does not endorse religion

While opponents of the Antidiscrimination Acts argue that this type of legislation would deteriorate the Establishment Clause and ultimately cause discrimination, the Antidiscrimination Acts protect against discrimination and help prevent Establishment Clause violations.[168] The endorsement test, originally used in *Lynch v. Donnelly*, asked whether a reasonable observer would find that the state's purpose or effect was to endorse or inhibit religion.[169] The endorsement test largely centers around two principles from the *Lemon* test, the purpose and effect prongs.[170] The *Lynch* Court did not find endorsement of religion because the purpose and effect of including a Nativity scene in an annual Christmas display were both secular.[171]

Similarly, in schools, the Antidiscrimination Acts do not endorse or inhibit religion. The purpose and effect are both secular. The Court in *Lynch* made it clear that "[t]he effect prong asks whether, irrespective of the state's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[172] While the Antidiscrimination Acts may protect religious speech, they do not convey a message of endorsement. The Acts clearly state that any religious speech should be treated "in the same manner in which the [school] treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject .

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[166] *Id.*

[167] *Lee*, 505 U.S. at 609; *see also* Symposium, *supra* note 35, at 999.

[168] Symposium, *supra* note 35, at 978; *See also*, letter from ACLU to TN Governor Bill Haslam *available at* http://www.aclu-tn.org/pdfs/ACLU-TN%20RVAA%20Veto%20Letter.pdf (last visited Oct. 2, 2015).

[169] Lynch v. Donnelly, 465 U.S. 668, 690 (1984).

[170] *Id.* at 690–92.

[171] *Id.* at 685, 694.

[172] *Id.* at 690.

. . ."[173]

2. A limited public forum protects student speech and does not coerce participation in school-sponsored speech

While students are not forced to attend all school events such as graduation, pep rallies, and sporting events, the Supreme Court has expressed concern that students will feel obligated or pressured to attend to the point where the event is considered mandatory.[174] The limited public forum, suggested by the Antidiscrimination Acts, addresses this concern.[175] As discussed above, once the state has established a forum for student speech, the state cannot discriminate against a viewpoint expression.[176]

The coercion problem, addressed in *Lee v. Weisman*, involved a school that was organizing prayer at graduation ceremonies. The school officials were the catalysts for the prayer. The Court made it clear, that "[s]tate's involvement in the school prayers . . . violates these central principles" of the Establishment Clause.[177] Removing the school's hand in the speech would also remove any problems with coercion.

V. CONCLUSION

In the seven years since the Antidiscrimination Act was first passed in Texas, at least five other states have considered similar legislation and three others have enacted their own versions of the Act. The antagonistic attitude toward religious free speech in public schools has not improved since 2007. This Comment has shown that school districts can adopt and implement the Antidiscrimination Acts without violating the central tenants of the Establishment Clause.

The Acts successfully protect student speech in (1) in-class voluntary expressions, (2) expressions in homework/school

[173] TENN. CODE ANN. § 49-6-1802 (2014).

[174] The Court pointed out that even though most students have the choice to attend the football game, others are required, such as the band, cheerleaders, and the athletes. *Lee*, 505 U.S. at 594–95; *see also Santa Fe*, 530 U.S. at 311–12.

[175] *See supra* note 18.

[176] *Rosenberger*, 515 U.S. at 829.

[177] The state's participation in the planning of the prayer was at the heart of the decision to remove the prayer. Nothing in this decision suggests that students in a limited public forum could not express their religious viewpoints. *Lee*, 505 U.S. at 587.

assignments, (3) and group speech settings through the establishment of a limited public forum (which provides protection for both the school and the student). By establishing a limited public forum, not only will students' rights be protected, but also schools can avoid the pitfalls of an Establishment Clause violation if and when a student shares a religious viewpoint.

The Acts effectively address real areas of concern for students and schools. Students that are discriminated against or simply restricted from sharing views because of their religious content have recourse in the First Amendment. Unfortunately, those students may not be afforded the protection they deserve. The Acts, with accompanying policies, if enacted in more states and adopted by schools, will protect students and schools in preventing burdensome litigation, prohibiting unwarranted discrimination, and, most importantly, ensuring that the First Amendment rights of students are guaranteed. Adopting legislation that accomplishes these aims is simply commonsense.

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