We are a Religious People Whose Institutions Presuppose a Supreme Being

John C. Eastman
“We are a Religious People, Whose Institutions Presuppose a Supreme Being”

John C. Eastman*

Nearly 40 years ago, the Supreme Court of the United States found a non-denominational prayer composed by the New York Board of Regents for recitation in public schools to be an unconstitutional establishment of religion. Engel v. Vitale, 370 U.S. 421 (1962). Eight years ago, the Court also invalidated a public school’s practice of inviting a member of the local clergy, on a rotating basis, to deliver a commencement invocation as unconstitutional, in part because in the Court’s view the very importance of the graduation ceremony compelled graduates to attend and therefore psychologically coerced them to participate in the government-sponsored religious exercise. Lee v. Weisman, 505 U.S. 577 (1992). By implication, it would seem that a graduation valedictory address containing an overtly religious message and a student-led invocation would likewise run afoul of the Establishment Clause. So the district court held in the case under consideration in this volume of the Chapman University’s NEXUS - A Journal of Opinion Law Review, Cole v. Oroville Union High School, No. 98-1037 (N.D. Cal. 1999). Such is now thought to be the command of our Constitution.

Yet, for most of our nation’s history, the opposite was true. Not only was religion not barred from the public schools, it was thought to be a necessary component of public education and, indeed, of public life generally. The Establishment Clause of the First Amendment was designed simply to prevent the federal government from establishing a national church—that is, from giving preference by federal law to one religious sect over others with tax funds or otherwise, or from compelling attendance at such a church. It did not prevent non-sectarian prayer in public schools or aid to religion generally; that was an error in interpretation suggested in dictum by the Supreme Court more than 150 years after the Amendment was ratified but subsequently treated as constitutional gospel. Everson v. Board of Ed. Of Ewing Township, 330 U.S. 1, 15 (1947) (erroneously noting that neither a state nor the Federal Government “can pass laws which aid one religion, aid all religions, or prefer one religion over another” (emphasis added).

The first Congress, for example, saw no conflict between the Establishment Clause and the Northwest Ordinance, which served as the charter of government for the territories northwest of the Ohio River (the present states of Ohio, Indiana, Illinois, Michigan and Wisconsin). The Ordinance included the following provision supporting the teaching of religion in public schools: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be
encouraged.” An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, Art. 3, 1 Stat. 51, 52 n. a (July 13, 1787, readopted Aug. 7, 1789). Although the ordinance was initially passed in the summer of 1787 before the Constitution itself was adopted and ratified, it was re-adopted by the first Congress—the same Congress that approved the First Amendment and sent it (along with the remainder of the Bill of Rights) to the States for ratification. Id. Significantly, Congress changed certain provisions to “adapt the [ordinance] to the present Constitution,” but it left the religion clause intact.

Other public pronouncements routinely acknowledged God. In his first official Act as President, for example, George Washington prayed that the “Almighty Being who rules over the universe” would “consecrate” the government formed by the people of the United States. George Washington, First Inaugural Address (April 30, 1789), reprinted in George Washington: A Collection 460-61 (William B. Allen ed., Liberty Classics 1988). And his proclamation of a day of thanksgiving, which we still celebrate, is an elegant national prayer, requested by the very Congress that drafted the Establishment Clause of the First Amendment:

Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor, and Whereas both Houses of Congress have by their joint Committee requested me “to recommend to the People of the United States a day of public thanks-giving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God, especially by affording them an opportunity peaceable to establish a form of government for their safety and happiness.” Now therefore I do recommend and assign Thursday the 26th day of Novem-

ber next to be devoted by the People of these States to the service of that great and glorious Being, who is the beneficent Author of all the good that was, that is, or that will be. That we may then all unite in rendering unto him our sincere and humble thanks, for his kind care and protection of the People of this country previous to their becoming a Nation, for the signal and manifold mercies, and the favorable interpositions of his providence, which we experienced in the course and conclusion of the late war, for the great degree of tranquillity, union, and plenty, which we have since enjoyed, for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national One now lately instituted, for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge and in general for all the great and various favors which he hath been pleased to confer upon us.

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations and beseech him to pardon our national and other transgressions, to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually, to render our national government a blessing to all the People, by constantly being a government of wise, just and constitutional laws, discreetly and faithfully executed and obeyed, to protect and guide all Sovereigns and Nations (especially such as have shown kindness unto us) and to bless them with good government, peace, and concord. To promote the knowledge and practice of true religion and virtue, and the encrease of science among them and Us, and generally to grant unto all Man
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kind such a degree of temporal prosperity as he alone knows to be best.


These founding-era public affirmations of God and religion are not at all uncharacteristic or surprising, for the Founders believed that a virtuous citizenry was both a precondition for republican government and a continuing necessity for its perpetuation. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides “[t]hat no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.” VA. CONST. OF 1776, BILL OF RIGHTS, Sec. 15, reprinted in Francis Newton Thorpe, 7 THE FEDERAL AND STATE CONSTITUTIONS 3812, 3814 (William S. Hein & Co., 1993) (1909) (“Thorpe”). The Massachusetts Constitution of 1780 echoes the sentiment: “[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality . . . .” MASS. CONST. OF 1780, Pt. 1, Art. 3, reprinted in 3 Thorpe 1888, 1889. The Pennsylvania Constitution of 1776 went even further, asserting: Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution. And all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning . . . shall be encouraged . . .


But perhaps the clearest example of the Founders’ views was penned by James Madison, writing as Publius in the 55th number of The Federalist Papers:

“Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.”


Although some of the passages just recited speak primarily of virtue and morality rather than religion itself, the fostering of virtue was, for the Founders, a task intimately tied to religion. As President Washington noted in his Farewell Address, “reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.” George Washington, Farewell Address, reprinted in GEORGE WASHINGTON: A COLLECTION 521 (William B. Allen ed., Liberty Classics 1988).

In sum, the Founders thought religion and virtue were both necessary to the perpetuation of republican institutions, and that it was the duty of government to foster such religious virtue in the citizenry. The Establishment Clause barred the federal government from providing tax support.
to one religious sect to the exclusion of all others, or from mandating adherence to such a nationally "established" religion, but it did not prohibit the federal government from providing aid to religion generally, or even from issuing public non-sectarian religious proclamations.

Moreover, the Establishment Clause, like the rest of the Bill of Rights, did not apply to the States at all. See, e.g., Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (Marshall, C.J.). In fact, the clause forbade the federal government from interfering with existing state established churches. See, e.g., W. Katz, Religion and American Constitutions 8-10 (1964) (cited in G. Stone et al., CONSTITUTIONAL LAW, 2d Ed., at 1460 (1991)). The initial language proposed by James Madison during the first Congress would merely have prohibited the federal government from establishing a national religion. See 1 Cong. Reg. 427 (June 8, 1789), reprinted in The Complete Bill of Rights 59-60 (Neil H. Cogan, ed., Oxford Univ. Press 1997) ("nor shall any national religion be established"). After several members of Congress expressed concern that the proposed language did not do enough to protect existing state established religions, the language was eventually amended to prohibit the federal government from making any law "respecting" an establishment of religion, thus accomplishing the twin purposes of prohibiting the establishment of a national religion and of preventing federal interference with the existing state churches.¹

¹The actual words of the First Amendment bear repeating: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. Amend. I (emphasis added). The uninitiated reader might well question, therefore, how an amendment that on its face speaks only of "Congress" even applies to the Oroville, California school board. The short answer, of course, is that the Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment, which does apply to state and local governments, as incorporating various of the liberties protected by the Bill of Rights, including the liberties protected by the religion clauses of the First Amendment. This interpretation was not "discovered" by the Court until half a century after the Fourteenth Amendment was adopted, however, and it was flatly rejected by the Court shortly after the Amendment was passed. Compare Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming that the First Amendment's free speech and press clauses were among the liberties protected by the Due Process clause of the Fourteenth Amendment), with United States v. Cruikshank, 92 U.S. 542, 552 (1876) (holding that it was "too late to question the correctness of[the] construction" that the Bill of Rights applied only to the federal government); see also Twitchell v. Pennsylvania, 7 Wall. 321, 326 (1869); Eilenbecker v. District Court, 134 U.S. 31, 34 (1890); Brown v. Walker, 161 U.S. 591, 606 (1896); Brown v. New Jersey, 175 U.S. 172, 174 (1899); Bolln v. Nebraska, 176 U.S. 83, 87 (1900).

Although it is too late in the day to credibly contest this Incorporation Doctrine, honest scholars must nevertheless concede that the Incorporation Doctrine is at its weakest in the Establishment Clause context. By applying the Establishment Clause to the states, the courts have found implicit in the Fourteenth Amendment the very power to interfere with religion in the states that was explicitly prohibited to the federal government by the First Amendment. Such is a strained reading, at the very least.

To the Founders, this expansive reading of the Establishment Clause would have been particularly troubling. In the federal system they designed, the States were to be the repository of the bulk of gov-

Supreme Court Justice William O. Douglas acknowledged the Founders’ views when, in the 1952 case of Zorach v. Clauson, he wrote: “We are a religious people, whose institutions presuppose a Supreme Being.” 343 U.S. 306, 313 (1952). The very legitimacy of government by consent is based on the self-evident truth articulated in the Declaration of Independence (by Thomas Jefferson, no less) that all men, all human beings, are created equal. Declaration of Independence, para. 2, 1 Stat. 1 (U.S. 1776). And the very idea that people have rights that precede and are superior to government is based on the claim in the Declaration of Independence that human beings “are endowed, by their Creator, with certain unalienable rights,” including the rights to life, liberty, and the pursuit of happiness. Id.

This understanding of God as the source of the rights of mankind is more than merely of historical interest. Every one of the original States, and every one of the current fifty, continues to acknowledge God in its constitution. The preamble to California’s constitution is typical: “We, the people of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution.” Cal. Const. of 1879, Preamble, reprinted in 1 Thorpe 412. The Massachusetts Constitution of 1780 provided for “public instructions in piety, religion and morality” because “the happiness of a people, and the good order and preservation of civil government, essentially depend upon . . . the public worship of God.” Mass. Const. of 1780, Pt. 1, Art. 3, reprinted in 1 Thorpe 1888, 1889-90. Although Massachusetts eliminated its established church in 1833, its constitution continues to recognize that “the public worship of GOD and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government.” Mass. Const., Amend. XI (ratified Nov. 11, 1833), reprinted in 3 Thorpe 1888, 1914, 1922. Indeed, many of the state constitutions recognize that the public worship of God is a duty of mankind, even while they expressly protect against formal sectarian establishments and provide for the free exercise of religion. See, e.g., Del. Const. of 1897, Art. I, Sec. 1, reprinted in 1 Thorpe 600, 601 (“Although it is the duty of all men frequently to assemble together for the public worship of Almighty God; . . . yet no man shall or ought to be compelled to attend any religious worship”); Md. Const. of 1776, Art. 33 (“That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty”); Mass. Const. of 1780, Pt. I, Art. II, reprinted in 3 Thorpe 1888, 1889 (“It is the right as well as the Duty of all men in society, publickly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe”).

Of course, a state constitution cannot trump the requirements of the federal Constitution. But because of the mechanism by which new states are added to the national union, see U.S. Const., Art. IV, §3, we can assess whether Congress viewed state constitutional provisions that invoked God or encouraged public worship as contrary to the First Amendment. The first Congress, comprised of the same elected officials who drafted the First Amendment, admitted Vermont as a new State, with a constitution that provided: “every sect or denomination of Christians ought to observe the Sabbath or Lord’s day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.” Vt. Const. of 1786, Ch. 1, Art. 3, re-
printed in 6 Thorpe 3749, 3752.

If one looks instead to the time period of the adoption of the 14th Amendment (which is the more relevant time period, given that the 14th Amendment, via the Incorporation Doctrine, is the means by which the Court made the Establishment Clause applicable to the states), the same holds true. **Nebraska’s Constitution** of 1866 contains the following preamble: “We, the people of Nebraska, grateful to Almighty God for our freedom, do establish this constitution.” **Neb. Const.** of 1866, Preamble, reprinted in 4 Thorpe 2349. Even more significantly, the Nebraska Bill of Rights, after recognizing freedom of conscience, contains the following passage, modeled after the Northwest Ordinance:

Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship and to encourage schools and the means of instruction.

**Neb. Const.** of 1866, Art. I, sec. 16, reprinted in 4 Thorpe 2350. The language was repeated verbatim in the 1875 constitution, after adoption of the Fourteenth Amendment. See **Neb. Const.** of 1875, Art. 1, sec. 4, reprinted in 4 Thorpe 2361, 2362. These passages are particularly significant because the enabling act for Nebraska specifically required that the state’s constitution “shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence,” and “that perfect toleration of religious sentiment shall be secured.” Enabling Act for Nebraska, 38th Cong., 1st Sess., sec. 4, reprinted in 4 Thorpe 2343, 2344.

Explicit religious invocations are also found in the “reconstruction” constitutions of the southern states, adopted after passage of the Fourteenth Amendment by Congress as those states were petitioning the same Congress for readmission to the Union. Georgia’s 1868 Constitution, for example, “acknowledg[es] and invo[kes] the guidance of Almighty God, the author of all good government,” in its preamble, even while protecting “perfect freedom of religious sentiment.” **Ga. Const.** of 1868, Preamble; Art. I, sec. 6, reprinted in 2 Thorpe 822. The preamble to North Carolina’s 1868 Constitution reads like a prayer: “[G]rateful to Almighty God, the sovereign ruler of nations, for the preservation of the American Union and the existence of our civil, political, and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity.” **N.C. Const.** of 1868, Preamble, reprinted in 5 Thorpe 2800. See also, e.g., **Va. Const.** of 1870, Preamble, reprinted in 7 Thorpe 3871, 3873 (“invoking the favor and guidance of Almighty God”); **Ala. Const.** of 1867, Preamble, reprinted in 1 Thorpe 132 (same).

Thus Congress—the very Congress that adopted the Fourteenth Amendment—saw no Establishment Clause problem with states’ constitutions that acknowledged God, gave thanks to God, and even encouraged the public worship of God. Nor did it see such acknowledgments as inconsistent with the Free Exercise and Establishment clauses of the U.S. Constitution or with comparable clauses in the state’s own constitution.

Subsequent Congress and Presidents also found no Establishment Clause problem with state constitutional acknowledgments of God. All of the states created out of the Dakota Territory in 1889 were admitted with constitutions containing similar acknowledgements of God and similar prohibitions of establishment. The people of Idaho, for example, announced in their first constitution that they were “grateful to Almighty God for [their] freedom,” even though the constitution also provided that “no person shall be required to attend or support
any ministry or place of worship, religious sect or denomination, or pay tithes against his consent.” Id. CONST. of 1889, Preamble; Art. 1, sec. 4, reprinted in 2 Thorpe 913, 918. Congress admitted Idaho to statehood on July 3, 1890, after finding that the proposed constitution was “republican in form and . . . in conformity with the Constitution of the United States,” a constitution that had included the Fourteenth Amendment for more than twenty years. See An Act For Admission of Idaho Into the Union, 1890, reprinted in 2 Thorpe 913, 918. Wyoming's constitution announced that its people were “grateful to God” for their “civil, political, and religious liberties,” even while it declared that “the free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this State.” WYO. CONST. of 1889, Preamble; Art. 1, sec. 18, reprinted in 7 Thorpe 4118. Congress admitted Wyoming to statehood after finding that its constitution was “in conformity with the Constitution of the United States.” An Act For The Admission of Wyoming In To The Union, 1890, reprinted in 7 Thorpe 4111, 4112.

Montana, South Dakota, and Washington were all admitted to statehood in 1889 by Presidential proclamation rather than directly by act of Congress. Before the President was authorized to issue the proclamation of statehood, however, he had to find that their constitutions were “not repugnant to the Constitution of the United States and the principles of the Declaration of Independence.” See Act of Feb. 22, 1889. Montana's preamble expressed gratitude “to Almighty God for the blessings of liberty” even while the constitution elsewhere barred “preference . . . to any religious denomination or mode of worship.” MONT. CONST. of 1889, Preamble; Art. III, sec. 4, reprinted in 4 Thorpe 2300, 2301. President Benjamin Harrison found the constitution consistent with the United States Constitution and proclaimed Montana a state on November 8, 1889. See Proclamation of Nov. 8, 1889, reprinted in 4 Thorpe 2299-2300. Similar provisions are found in the first constitutions of South Dakota and Washington. S.D. CONST. of 1889, Preamble and Art. VI, sec. 3, reprinted in 6 Thorpe 3357, 3370; WASH. CONST. of 1889, Preamble and Art. I, sec. 11, reprinted in 7 Thorpe 3973, 3974. Both received Presidential approval. Proclamation of Nov. 2, 1889, reprinted in 6 Thorpe 3355-57 (admitting South Dakota to statehood); Proclamation of Nov. 11, 1889, reprinted in 7 Thorpe 3971-73 (admitting Washington to statehood).

Even more significantly because of the fight over polygamy and its free exercise of religion overtones, the Utah Constitution of 1895 contained one of the most strongly-worded anti-establishment provisions: The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; ... There shall be no union of church and state, nor shall any church dominate the State or interfere with its functions. UTAH CONST. of 1895, Art. I, sec. 4, reprinted in 6 Thorpe 3702. Despite this strong anti-establishment language, the preamble of the same constitution acknowledges that the people of Utah were “grateful to Almighty God for life and liberty.” Id. President Grover Cleveland admitted Utah to statehood after finding that “said constitution is not repugnant to the Constitution of the United States and the Declaration of Independence.” Proclamation of January 4, 1896, reprinted in 6 Thorpe 3700.

In short, neither the President nor Congress found such public acknowledgements of God to be contrary to the Establishment Clause, well after adoption of the Fourteenth Amendment. These and similar constitutional acknowledgements of God re-
main in place to this very day, in nearly
every one of the fifty states. It is a strange
interpretation indeed that prohibits the
very public acknowledgement of God to
which so many of the state constitutions
give voice. With such a long-established
and universal tradition as this, maybe, just
maybe, the Court has been mistaken of
late.

* * *

Even accepting recent precedent,
however, the present case (or at least a
portion of it) can, and should, be dis-
guished, so as not to undermine further the
original command of the First Amendment.
Engel v. Vitale involved a prayer that had
been drafted by the government. 370 U.S.,
at 422-23. In Lee v. Weisman, the school
board chose a member of the local clergy to
deliver a prayer and even provided a pam-
phlet depicting what, in its view, would be a
suitable prayer. 505 U.S., at 587-88. While
neither prayer would have qualified as an
“establishment” of religion in the founders’
view, both indicate government sponsorship
in a way that offended the separationist sen-
sibilities of the modern Court.

By contrast, Ferrin Cole, a graduating
senior at the Oroville, California public
high school, was selected by his peers to
deliver an invocation at graduation because,
in their view, the proper exercise of religion
requires a public acknowledgement of and
thanksgiving to God. The government did
not draft the prayer, as in Engel; it did not
even select Cole to deliver the prayer, as in
Lee. In short, there would have been no gov-
ernmental endorsement of Cole’s prayer, and
hence no Establishment Clause violation
under a narrow reading of Engel and Lee.

But, in all candor, that is probably too
narrow a reading of at least Lee v. Weisman.
The Court in that case was concerned with
the “psychological coercion” that accompa-
nied prayer at graduation ceremonies, not
so much with the fact that it was the gov-
ernment that was choosing the prayer-giver.
The same “coercion” clearly exists whether
or not the prayer is delivered by someone
chosen by the government. Additionally,
while not actually choosing the prayer-giver,
the government does provide a place on the
graduation program for an “invocation,” and
to that extent can probably be said to “spon-
sor” the prayer, unless one rejects the cus-
tomary meaning of the term “invocation” as
the calling upon God for help and direction.

Nor will the non-sectarian character of
a prayer provide grounds for distinguishing
Lee. The prayer that was held to be uncon-
stitutional in Lee was the epitome of a
non-sectarian prayer. In fact, the prayer
guidelines provided by the school board to
Rabbi Gutterman, which the Court found to
be constitutionally “entangling,” was actu-
ally, and ironically, prepared by the National
Conference of Christians and Jews as a guide
book for appropriate, non-sectarian prayers
for public occasions. Rabbi Gutterman’s in-
vocation, in is entirety, was:

God of the Free, Hope of the Brave:
For the legacy of America where diversity
is celebrated and the rights of minorities
are protected, we thank You. May these
young men and women grow up to enrich
it.

For the liberty of America, we thank You.
May these new graduates grow up to guard
it.

For the political process of America in
which all its citizens may participate, for
its court system where all may seek jus-
tice we thank You. May those we honor
this morning always turn to it in trust.
For the destiny of America we thank You.
May the graduates of Nathan Bishop
Middle School so live that they might help
to share it.
May our aspirations for our country and
for these young people, who are our hope
for the future, be richly fulfilled.

AMEN.
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Lee v. Weisman, 505 U.S., at 581-82. In other words, there is little hope of getting on the permissible side of the constitutional line, as interpreted in Lee, by recourse to the content of the prayer.

However, that is not the end of the inquiry, for Lee is not the last word on religious speech in governmental settings. Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995), also, must be considered. In Rosenberger, the Court held that the government could not discriminate against student religious speech in the limited forum of government-funded student newspapers. By analogy, the Oroville School Board cannot discriminate against religious speech if its roster of graduation speakers constitutes a limited public forum.

But does it? If the only speech appropriate for an invocation is a religious prayer, then the invocation slot on the program cannot really be said to be a limited public forum. Rather, it is religious speech sponsored by government, whether or not the content of the specific prayer is dictated by government. As such, it would be unconstitutional under Lee v. Weisman.

That would arguably not be the case, however, if the decision whether or not even to have an invocation was left to the students rather than school officials. The Santa Fe, Texas school board recently adopted a two-step policy for allowing student-initiated prayer at graduation ceremonies that has met constitutional muster. The students first vote on whether or not to have an invocation at all, and if so, an election is then held to determine which student will deliver the invocation. The United States Court of Appeals for the Fifth Circuit upheld the policy in Doe v. Santa Fe Independent School District, 168 F.3d 806 (5th Cir. 1999), and the Supreme Court left that portion of the opinion in place. See 120 S.Ct. 494 (Nov. 15, 1999) (granting certiorari only on the question of whether the 5th Circuit's decision invalidating the parallel policy permitting student-led, student-initiated prayer at football games as a violation of the Establishment Clause was correct). Under the Fifth Circuit's reasoning, the student election severed any governmental sponsorship, thus rendering the resulting prayer constitutionally permissible.

Even absent the election, a religious invocation would be constitutionally permissible, even constitutionally compelled, in some circumstances. If, by “invocation,” Oroville school officials merely provided a forum for a suitably reverent, though not necessarily religious, message, it can rightly be said to have opened a limited public forum without any constitutionally impermissible viewpoint discrimination either in favor of or hostile to religious speech. That only one student each year is able to speak in the forum should not render the forum non-public because, over time, numerous students would participate in the forum. Moreover, because participating students are chosen by their peers rather than by school officials, the government would be neutral as to the religious or non-religious viewpoint expressed in the forum. Indeed, under Rosenberger, the government is constitutionally barred from prohibiting religious speech in such a forum.

Even if the Oroville invocation slot was designed to be available only for religious prayer (and hence probably invalid under Lee v. Weisman), the valedictory address is not so limited. Indeed, the criteria by which the valedictorian is chosen-class standing is free of religious content, and decisions about the content of the valedictory address are made by the student, not by the government. The opportunity to give the valedictory address is therefore a limited public forum, open over time to every student who finishes first in his or her class. Barring religious speech from the forum would be constitutionally pro-
scribed viewpoint discrimination. Under *Rosenberger*, the government cannot be hostile to religious speech in this way.

Moreover, such a prohibition would infringe the putative valedictorian’s free exercise rights, without the “compelling” governmental interest in avoiding state endorsement that was found to be present in *Lee v. Weisman*. For many, perhaps most, adherents of religious faith, religion is not simply a “purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one’s room,” to quote Justice Scalia’s dissenting opinion in *Lee v. Weisman*, 505 U.S., at 645. It must be publicly affirmed, with proper acknowledgement given to God, especially at important milestones in life such as graduation. As Justice Scalia further noted:

Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the “protection of divine Providence,” as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington’s first Thanksgiving Proclamation put it, the “Great Lord and Ruler of Nations.”

Id. Our founders, who declared their independence from Great Britain with an appeal to “nature and nature’s God,” who grounded their claim of the justness of their action in the inalienable rights bestowed on all mankind “by their Creator,” and who appealed to the “Supreme Judge of the world” for the rectitude of their intentions, surely agreed. And our forebears in the several states, who one after another acknowledged Almighty God as the source of our rights and freedom, surely agreed as well.

* * *

Ferrin Cole was selected by his peers to deliver an invocation at the Oroville High School graduation and Chris Niemeyer intended to give a valedictory address acknowledging the importance of God and religion in his life because, in their view, the proper exercise of religion requires a public acknowledgement of and thanksgiving to God. No one would have been compelled to join the prayer or agree with the sentiments of the two speakers. Non-believers were not taxed to erect a church or pay a minister’s salary. Even if non-believers simply must attend and, therefore, listen because of the importance of the graduation ceremony, silent toleration of the religious speech of others would never have been viewed by our Founders as an establishment problem. Quite the contrary, a government restriction on religious speech would have been viewed by the Founders as both an infringement on the free exercise of religion and a dangerous undermining of the virtue necessary to the republic.

It would be strange indeed to interpret the Establishment Clause of the First Amendment in a way that not only severely abridges the free exercise of religion but actually prohibits acknowledgement of the very source of the rights claimed by those who oppose the student-led prayer. The Supreme Court has already traversed too far down this path. A renewed respect for the original mandate of the First Amendment should prevent it from proceeding further.

**Notes**

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1 See, e.g., 2 Cong. Reg. 194-97 (Aug. 15, 1789), reprinted in The Complete Bill of Rights 59-60 (Neil H. Cogan, ed., Oxford Univ. Press 1997) (Mr. Sylvester expressing concern that the language "might be thought to have a tendency of abolishing religion altogether"); Id. (Mr. Huntington expressing fear "that the words might be taken in such latitude as to be extremely hurtful to the cause of religion").

2 The initial California constitution contained the same preamble, minus the words "and perpetuate." Cal. Const. of 1849, Preamble, reprinted in 1 Thorpe 391.

3 Virtually identical language first appeared in the Delaware Constitution of 1792, Art. 1, Sec. 1, reprinted in 1 Thorpe 568.

4 Maryland's first constitution limited free exercise to "all persons professing the Christian religion," and authorized the legislature to "lay a general and equal tax for the support of the Christian religion." Md. Const. of 1776, Decl. of Rights, Art. 33, reprinted in 3 Thorpe 1686, 1689. These provisions were dropped in 1851. The 1776 constitution also mandated "a declaration of a belief in the Christian religion" as a qualification for office. Md. Const. of 1776, Decl. of Rights, Art. 35, reprinted in 3 Thorpe 1690. That provision was retained in the 1851 constitution, amended to accommodate Jews: "and if the party shall profess to be a Jew, the declaration shall be of his belief in a future state of rewards and punishments." Md. Const. of 1851, Decl. of Rights, Art. 34, reprinted in 3 Thorpe 1712, 1715. The provision was again amended in 1864, apparently to accommodate other non-Christian faiths. See Md. Const. of 1864, Decl. of Rights, Art. 37, reprinted in 3 Thorpe 1741, 1745 (requiring "a declaration of belief in the Christian religion, or in the existence of God, and in a future state of rewards and punishments").