

Brigham Young University Journal of Public Law

Volume 21 | Issue 1


Article 4

3-1-2007

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Recommended Citation

Christian M. Keiner, *Preaching from the State's Podium: What Speech is Proselytizing Prohibited by the Establishment Clause?*, 21 BYU J. Pub. L. 85 (2007).
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Preaching from the State's Podium: What Speech is Proselytizing Prohibited by the Establishment Clause?

Christian M. Keiner*

I. INTRODUCTION

Public schools, like other public institutions, continue to wrestle with difficult problems posed by potential proselytizing in publicly-sponsored activities.¹ The fundamental First Amendment question is whether particular religious-oriented speech or conduct is protected by the Free Speech Clause or prohibited by the Establishment Clause.² Proselytizing is unquestionably expressive activity. Be it verbal or written, a proselytizing religious message would be protected First Amendment speech if the religious content did not raise Establishment Clause concerns.³ Indeed, the position has been successfully argued in several federal court cases that religious expression is precisely that form of speech the “viewpoint discrimination” doctrine, set forth in *Rosenberger v. Rector*⁴ and its progeny, was designed to protect. As this article will show, the term “proselytizing” weaves its way through U.S. Supreme

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1. See Brief of National School Boards Ass’n, et al. as Amici Curiae Supporting Neither Party at 8 n.5, *McCreary County, Ky. v. ACLU*, 125 S. Ct. 2722 (2005) (No. 03-1693), for a comprehensive description of recent church-state conflicts in public schools. A non-school example is the ongoing difficulties with regulating proselytizing at the U.S. Air Force Academy. See, e.g., Mark Mazzetti, *Air Force Chaplain Policy Cited in Faith Bias Case: Guidelines That May Have Encouraged Christian Evangelizing Were Rescinded in August According to a Lawyer for the Service*, L.A. TIMES, Oct. 11, 2005 at A-17.

2. The author has defended public schools in Establishment Clause cases including *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000); *PLANS, Inc. v. Sacramento City Unified School District*, 319 F.3d 504 (9th Cir. 2003); and *Sands v. Morongo Unified School District*, 809 P.2d 809 (Cal. 1991).

3. This article only analyzes proselytizing in State-sponsored or State-controlled activities. Non-government-sponsored proselytizing or evangelical activity by private individuals or churches does not typically raise Establishment Clause concerns.

4. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

Court opinions that analyze both Establishment Clause prohibitions and Free Speech Clause precluded “viewpoint discrimination,” without at any point being adequately defined as an applicable legal standard or test.⁵ Justice Kennedy, in his minority concurrence in *County of Allegheny v. ACLU* suggested “proselytizing” be used as the primary Establishment Clause test⁶ but, not gaining support from his fellow justices, developed a “coercion” test.⁷ Most recently, in the 2005 term Ten Commandments cases, “proselytizing” appeared to evolve into a question of fact, or mixed question of law and fact, rather than a conclusion of law.⁸

The Ninth Circuit Court of Appeals, relying on *Lee v. Weisman*⁹ and *Santa Fe v. Doe*,¹⁰ adopted a “no proselytizing” Establishment Clause rule in two seminal cases (*Cole v. Oroville Union High School District*¹¹ and *Lassonde v. Pleasanton Unified School District*¹²), at least with respect to California public school graduation ceremonies. Other federal circuits, while not so definite, have stated in dicta that proselytizing in State-sponsored or State-controlled activities is beyond First Amendment Free Speech clause protection.¹³

This article will analyze dilemmas posed by proselytizing expression primarily in public school-sponsored activities and will (1) discuss the evolving use of the term “proselytizing” in U.S. Supreme Court opinions culminating in the 2005 term Ten Commandments cases and while doing so, briefly set forth key High Court decisions involving either Establishment Clause prohibited speech or Free Speech Clause protected speech; (2) analyze how the Ninth Circuit interpreted these High Court Establishment Clause cases to adopt a “no proselytizing” rule, and reject the applicability of the “viewpoint discrimination” theory (at least in high

5. See discussion *infra* Part II.

6. *County of Allegheny v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573, 659–64 (1989) (Kennedy, J. concurring).

7. In *Lee v. Weisman*, 505 U.S. 577, 588 (1992) Justice Kennedy articulated a new formulation of the Establishment Clause test known as the “coercion test,” determining that Daniel Weisman and his daughter, middle school graduate, Deborah Weisman were victims of impermissible psychological coercion. Justice Kennedy stated that such coercion exists where school officials conduct formal religious observance at an important ceremonial event creating an environment where “subtle coercive pressures exist and where the student ha[s] no real alternative which would . . . allow[] her to avoid [either] the fact or appearance of participation” in the religious component of the graduation ceremony. *Id.*

8. See generally *McCreary County, Ky. v. ACLU*, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

9. *Lee*, 505 U.S. 577.

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

11. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000).

12. *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003).

13. See discussion *infra* Part IV.A.

school graduation ceremonies); (3) review how other federal circuits have approached such speech situations and attempted to define “proselytizing”; and (4) propose a more certain legal definition that could both mitigate the potential for impinging on free speech rights and avoid violation of the Establishment Clause. Although this article’s focus will be on public schools, the cases and principles discussed are applicable to other government institutions.

Finally, this article will suggest that an ethic of mutual tolerance might serve to resolve practical issues associated with proposed proselytizing in State-sponsored activities.

II. THE SUPREME COURT AND PROSELYTIZING

As set forth below, early U.S. Supreme Court opinions recognized the bedrock concept of “no proselytizing” in publicly-sponsored activities and emphasized that any proselytizing bearing the imprimatur of the State violates the Establishment Clause. However, the concept that government-sponsored proselytizing breaches the Establishment Clause appears so central to the judicial understanding that individual justices never defined the term “proselytize,” much less provided any workable legal test for determining precisely what qualifies as prohibited proselytizing. Despite this definitional lapse, the concept of proselytizing lies at the heart of opinions addressing both Free Speech Clause prohibited “viewpoint discrimination” and Establishment Clause prohibited publicly-sponsored “religious exercise.” The final irony is that the “no proselytizing” concept has been acknowledged and recognized by justices conventionally deemed liberal, conservative, and moderate alike.

A. *Proselytizing and the Establishment Clause*

Proselytizing was first addressed in the public school context in Justice Robert H. Jackson’s 1948 concurrence in *McCullum v. Board of Education*.¹⁴ *McCullum* reversed a state court opinion upholding religious instruction in public schools.¹⁵ In that case, religious classes were held in regular classrooms during the school day.¹⁶ Though students were not required to attend and could go elsewhere in the building for continued “secular instruction,” the Court determined that merely

14. Ill. *ex rel. McCullum v. Bd. of Educ.*, 333 U.S. 203, 235–36 (1948) (Jackson, J., concurring).

15. *Id.* at 212 (majority opinion).

16. *Id.* at 205.

allowing the instruction to take place infringed upon the Establishment Clause.¹⁷ Justice Jackson, in his concurrence, stated, “[we] can at all times . . . forbid forthright proselytizing in the schools” and that “[w]hen instruction turns to proselytizing and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry.”¹⁸ In this early opinion, the Justice acknowledged that while government-sponsored proselytizing is an Establishment Clause violation, there is a subtle inquiry involved in determining which expressive conduct qualifies as proselytizing.

Justice Douglas also discussed proselytizing in his 1962 concurrence in *Engel v. Vitale*.¹⁹ The Court in *Engel* held that New York’s requirement of a daily classroom invocation recounting God’s blessings constituted an unconstitutional “religious activity.”²⁰ The Court determined that though student participation was not mandatory, use of the public school system to encourage recitation of such prayer was “wholly inconsistent” with the Establishment Clause.²¹ In his concurrence, Justice Douglas analyzed how *Engel* differed from *McCullum* and determined that though “New York’s prayer is of a character that does not involve any element of proselytizing as [was the case in] *McCullum*,” it was nonetheless a religious exercise.²² Thus, in Justice Douglas’s view, religious exercises were prohibited even if they did not rise to the level of proselytizing.

Justice Douglas reiterated his version of the “no proselytizing” rule in another concurrence in 1963. In *School District v. Schempp*, the High Court invalidated on Establishment Clause grounds a school district policy requiring a Bible reading before regular instruction began each day.²³ Justice Douglas, again in concurrence, focused on the problem of using public money to support proselytizing in a public institution:

The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools. Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause. Budgets for one activity may be technically separable from budgets for others. But

17. *Id.* at 209–10.

18. *Id.* at 235–36 (Jackson, J., concurring).

19. 370 U.S. 421 (1962).

20. *Id.* at 424.

21. *Id.* at 424, 430.

22. *Id.* at 439 (Douglas, J., concurring).

23. 374 U.S. 203, 211, 224–25 (1963).

the institution is an inseparable whole, a living organism, which is strengthened in proselytizing when it is strengthened in any department by contributions from other than its own members.²⁴

In 1971, Justice Douglas returned to his proselytizing analysis, this time joined by Justice Hugo Black, in the case that set forth the infamous “*Lemon* test.”²⁵ In *Lemon v. Kurtzman*, the majority invalidated on Establishment Clause grounds two state statutes, one from Rhode Island and one from Pennsylvania, that allowed direct state aid, or indirect beneficial aid, to parochial schools.²⁶ In concurrence Justice Douglas stated

“We must . . . be sure that the end result—the effect—is not an excessive government entanglement with religion.”

There is in my view such an entanglement here. The surveillance or supervision of the States needed to police grants involved in these three cases, if performed, puts a public investigator in every classroom and entails a pervasive monitoring of these church agencies by the secular authorities. Yet if that surveillance or supervision does not occur the zeal of religious proselytizers promises to carry the day and make a shambles of the Establishment Clause.²⁷

Justice Douglas’s view was that the Establishment Clause forbids the government from allowing “religious proselytizers” to “carry the day” at taxpayer expense where there is an indication the proselytizing may carry the imprimatur of the government.²⁸

Although Justices Jackson and Douglas recited proselytizing analyses in these early concurrences, it was not until *Marsh v. Chambers* in 1983 that a Court majority alluded to a nascent “no proselytizing” rule.²⁹ In *Marsh*, the Court upheld the historical practice of prayer before a Nebraska legislative session.³⁰ One reason the Court gave for

24. *Id.* at 229 (footnotes omitted).

25. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (requiring that in order to be constitutional (1) “the statute must have a secular legislative purpose”; (2) “[the statute’s] principal or primary effect must be one that neither advances or inhibits religion”; and (3) “the statute must not foster an ‘excessive government entanglement with religion’”) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)). The *Lemon* test has subsequently had detractors and defenders on the High Court and though it has yet to be overruled, it is not always utilized by the Court in its analysis.

26. *Id.* at 606–07.

27. *Id.* at 627 (Douglas, J., concurring) (quoting *Walz*, 397 U.S. at 674).

28. *Id.*

29. 463 U.S. 783 (1983).

30. *Id.* at 784–785, 795.

upholding these prayers as constitutional was the non-proselytizing nature of historical prayers when the First Amendment was adopted.³¹ The Court stated that “the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government’s ‘official seal of approval on one religious view.’”³² Further, the Court added, “[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”³³ Here, the majority, in a frequently quoted statement, makes it clear that if the legislative opportunity for prayer had been exploited to proselytize, the content of the prayer would be of concern to the Court and the practice a potential violation of the Establishment Clause.³⁴

Next, in *Texas Monthly, Inc. v. Bullock*, a publisher of a nonreligious periodical brought suit challenging a Texas statute that provided a sales tax exemption for religious periodicals and not for nonreligious publications.³⁵ The Court held that the statute violated the Establishment Clause and the majority opinion by Justice William Brennan states

The core notion animating the requirement that a statute possess “a secular legislative purpose” and that “its principal or primary effect . . . be one that neither advances nor inhibits religion,” is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.³⁶

Here the Court, echoing Justice Douglas’s earlier position indicates that not only is government proselytizing an Establishment Clause violation, but so is any government support, using tax-payer dollars, of proselytizing done by private individuals which might have an impact on non-adherents.

In *County of Allegheny v. ACLU*, the Court’s use of proselytizing as

31. *Id.* at 792.

32. *Id.* (quoting *Chambers v. Marsh*, 675 F.2d 228, 234 (8th Cir. 1982)).

33. *Id.* at 794–95.

34. In *Hinrichs v. Bosma*, 440 F.3d 393, 398 (7th Cir. 2006), the Seventh Circuit recently cited *Marsh* when addressing whether the speaker of the Indiana House of Representatives could allow the opening of legislative sessions with sectarian prayer. The Seventh Circuit stated that *Marsh* precludes “sectarian prayer.” *Id.* at 399; *See also* discussion *infra* Part V.A.

35. 489 U.S. 1, 5–6 (1989).

36. *Id.* at 9 (citation omitted).

an Establishment Clause rule fell out of majority acceptance and seemed to drive a wedge between the emerging analytic approaches taken by Justices Anthony Kennedy (proselytizing as bottom line) and Sandra Day O'Connor (endorsement test).³⁷ In that case, the High Court determined that a crèche inside a county courthouse violated the Establishment Clause, while menorahs outside city and county buildings did not.³⁸ In his swing opinion, concurring in part and dissenting in part, Justice Kennedy argued that both the crèche and the menorah withstood constitutional scrutiny.³⁹ Justice Kennedy, joined by Chief Justice William Rehnquist and Justices Byron White and Antonin Scalia argued that the High Court should follow the precedent set by *Marsh* and allow the religious symbols because they were “non-proselytizing.”⁴⁰ Further, the Kennedy opinion, which repudiated Justice O'Connor's emerging “endorsement test” in favor of a proselytizing test, would determine whether government practice violated the Establishment Clause by asking whether the activity “would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.”⁴¹ Justice Kennedy argued that both menorah and crèche were constitutional because “[t]here is no realistic risk that the crèche and the menorah represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion.”⁴² However, the majority of the Court joined instead an opinion by Justice Harry Blackmun which vehemently rejected Justice Kennedy's proposed analysis stating that all the suggested proselytizing test proposed to do was “to lower considerably the level of scrutiny in Establishment Clause cases.”⁴³ Justice Blackmun's majority opinion indicated once again, that at the very least, proselytizing was a line that could not be crossed in a State-sponsored activity.

In *Lee v. Weisman*, Justice Kennedy wrote the majority opinion, and shifted from the “no-proselytizing” analysis he utilized in *County of Allegheny* to a coercion-based approach.⁴⁴ Justice Kennedy determined that participation in graduation prayer led by clergy was coerced participation in a “religious exercise.”⁴⁵ This “religious exercise” strand would resurface in *Santa Fe v. Doe*, and subsequently in the Ninth

37. 492 U.S. 573 (1989).

38. *Id.* at 621.

39. *Id.* at 667 (Kennedy, J., concurring in judgment in part and dissenting in part).

40. *Id.* at 664, 665 n.4.

41. *Id.* at 661.

42. *Id.* at 664.

43. *Id.* at 609 (majority opinion).

44. 505 U.S. 577 (1992).

45. *Id.* at 588.

Circuit opinions in *Cole* and *Lassonde*. Ironically, Justice Scalia in his vehement dissent, without using the term “proselytizing,” invoked the same bottom-line standard, stating

[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations, ruled out of order government-sponsored endorsement of religion—even when no legal coercion is present, and indeed even when no ersatz, “peer-pressure” psycho-coercion is present—where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).⁴⁶

In the next key school student prayer case, *Santa Fe v. Doe*, the Court addressed the issue of student-led prayer prior to football games.⁴⁷ In ruling school prayer was an Establishment Clause violation, the majority opinion, penned by Justice Stevens, took note of the election procedures that allowed students first to decide if they wanted a student to deliver a prayer and then allowed them to select the student who would give the prayer.⁴⁸ The Court majority further acknowledged that the series of school district policies and procedures at issue required that any such prayers must be “‘non-proselytizing’ invocations and benedictions for the purpose of ‘solemnizing’” the occasion.⁴⁹ Despite these requirements, the Court majority, applying the same principles set forth in *Lee*, determined that the prayers were unconstitutional.⁵⁰

Thus, pursuant to *Lee* and *Santa Fe*, even non-proselytizing prayer was held impermissible, which indicates that any school policy relating to student conduct which might qualify as school-sponsored religious activity has little chance of withstanding constitutional scrutiny unless it is, at the very minimum, non-proselytizing. Further, returning to Establishment Clause principles, the Court’s opinion in *Santa Fe* combined the “bottom-line” no-proselytizing rule with Justice O’Connor’s endorsement test, stressing that school sponsorship of this proselytizing message was impermissible because it sent the ancillary

46. *Id.* at 641 (citations omitted). This quote identifies Scalia’s “sectarian” or religiously neutral approach. If the State action is neutral towards religion and nonsectarian then, under this approach, it should be upheld.

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

48. *Id.* at 297–98.

49. *Id.* at 296–97.

50. *Id.* at 301–02, 317.

message to members of the audience who are non-adherents “that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”⁵¹

B. Proselytizing and the Free Speech Clause

In contrast to this line of Establishment Clause opinions stands the Free Speech Clause “viewpoint discrimination” cases, where the Court majority ignored proselytizing to affirm the constitutionality of the expression. Ironically, this shift led the liberal wing of the Court to focus on the neglected “no proselytizing” principle in dissent.

For example, in *Capital Square Review and Advisory Board v. Pinette*, Justice Stevens’s dissent turned to the proselytizing principle after the majority held that the State did not violate the Establishment Clause by allowing a private party (the Ku Klux Klan) to display an unattended cross on the grounds of the state capitol.⁵² Justice Stevens argued that

The battle over the Klan cross underscores the power of such symbolism. The menorah prompted the Klan to seek permission to erect an anti-Semitic symbol, which in turn not only prompted vandalism but also motivated other sects to seek permission to place their own symbols in the square. These facts illustrate the potential for insidious entanglement that flows from state-endorsed proselytizing. There is no reason to believe that a menorah placed in front of a synagogue would have motivated any reaction from the Klan, or that a Klan cross placed on a Klansman’s front lawn would have produced the same reaction as one that enjoyed the apparent imprimatur of the State⁵³

Next, in the key case of *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court majority determined that a university

51. *Id.* at 309-10 (citing *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)).

52. 515 U.S. 753 (1995). In that case the Ku Klux Klan (“KKK”) brought suit seeking an injunction requiring the review board to issue a permit allowing the KKK to place a Latin cross in a plaza next to the state capitol. *Id.* at 758-59. The District Court granted the injunction and the Supreme Court held that issuing the permit did not violate the Establishment Clause. *Id.* at 759, 770. Capital Square is a state-owned plaza that has been used for public gatherings, speeches, and festivals over the years. And, the Ohio Administrative Code makes this space freely available for use by the public. The Board has also permitted a variety of unattended displays such as a state-sponsored tree during Christmas and a privately sponsored menorah during Chanukah. *Id.* at 757-58.

53. *Id.* at 811 (Stevens, J., dissenting).

engaged in impermissible “viewpoint discrimination” when it refused to pay the printing costs for a Christian student group that published a newspaper entitled “Wide Awake” out of a fund specifically created by the university to pay such costs for student publications.⁵⁴ In *Rosenberger*, as a practical matter, the Free Speech Clause trumped the Establishment Clause.⁵⁵ Again the dissent authored by Justice Souter and joined by Justices Stevens, Ginsburg, and Breyer returned to a “no-proselytizing” rule arguing that “[t]he Court, accordingly, has never before upheld direct state funding of the sort of proselytizing published in Wide Awake and, in fact, has categorically condemned state programs directly aiding religious activity.”⁵⁶ Here the dissent argued that application of the “no proselytizing” rule is particularly obvious where the magazine is blatantly proselytizing. Yet, the *Rosenberger* majority opinion ignored the dissenter’s focus upon proselytizing, holding there had been no violation of the Establishment Clause, and that the University engaged in “viewpoint discrimination” by not funding the magazine.⁵⁷

The High Court in *Good News Club v. Milford Central School* next held that a school’s refusal to allow a Christian club to use school facilities after school hours was unconstitutional “viewpoint discrimination” that was not necessary to avoid violating the Establishment Clause.⁵⁸ Once again, the Free Speech Clause trumped the Establishment Clause. In dissent, Justice Stevens returned to the “subtle inquiry” Justices Jackson and Douglas had struggled with as early as 1948, and identified three different categories of speech: “First, there is religious speech that is simply speech about a particular topic. . . . Second, there is religious speech that amounts to worship, or its equivalent. . . . Third, there is an intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith.”⁵⁹ According to Justice Stevens, the type of proselytizing activities proposed by Good News Club fell into the third category of prohibited proselytizing speech.⁶⁰ The justice wrote that “[d]istinguishing speech from a religious viewpoint, on the one hand, from religious proselytizing, on the other, is comparable to distinguishing meetings to discuss political issues from meetings whose principal purpose is to recruit new members

54. 515 U.S. 819 (1995).

55. *See id.* at 846.

56. *Id.* at 874–75 (Souter, J., concurring).

57. *Id.* at 845–46 (majority opinion).

58. 533 U.S. 98 (2001).

59. *Id.* at 128 (Stevens, J., dissenting).

60. *Id.* at 133–34.

to join a political organization.”⁶¹ Justice Stevens further wrote that

just as a school may allow meetings to discuss current events from a political perspective without also allowing organized political recruitment, so too can a school allow discussion of topics such as moral development from a religious (or nonreligious) perspective without thereby opening its forum to religious proselytizing or worship.⁶²

In another dissent in *Good News Club*, Justice Souter joined by Justice Ginsberg stated that “Justice Stevens distinguishes between proselytizing and worship and distinguishes each from discussion reflecting a religious point of view. I agree with Justice Stevens that Good News’s activities may be characterized as proselytizing and therefore as outside the purpose of Milford’s limited forum.”⁶³ Responding to the dissent’s critiques in an aside, the majority opinion dismissed both Justices Stevens’s and Souter’s points and responded to Justice Stevens’s view by arguing that even if Good News’s speech “is speech ‘aimed principally at proselytizing or inculcating belief in a particular religious faith,’ [t]his does not, to begin with, distinguish *Rosenberger*, which also involved proselytizing speech.”⁶⁴ But the question unanswered by the majority opinion remains that if both *Rosenberger* and *Good News Club* admittedly approve proselytizing speech, how does that outcome square with previous Establishment Clause principles or precedent barring proselytizing?

Thus, in *Rosenberger* and in *Good News Club*, the High Court gave the “green light” to what would, in other circumstances, be deemed Establishment Clause prohibited expression. The practical conundrum for school officials and teachers who have to enforce these judicial rulings is simple: is religious-oriented student speech or expression protected from “viewpoint discrimination” by the Free Speech Clause, or is it instead proselytizing prohibited by the Establishment Clause? Or, perhaps more simply, under what circumstances does religious expression fall into Free Speech or Establishment Clause territory?

61. *Id.* at 131.

62. *Id.* at 132.

63. *Id.* at 138 n.3 (Souter, J., dissenting) (citation omitted). A “forum” analysis is beyond the scope of this article. Briefly, what level of First Amendment Free Speech Clause protection speech is afforded may depend upon the forum created by the government, which ranges from “open” public forum to a “limited open” to “closed non-public forum.” See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–49 (1983).

64. *Good News Club*, 533 U.S. at 125–26 (citation omitted).

C. The Ten Commandments Cases and Proselytizing

The basic question remains whether a “no proselytizing” rule, including a clearly adopted judicial definition of “proselytizing,” could be the bottom-line which differentiates Establishment Clause prohibitions from Free Speech Clause precluded “viewpoint discrimination.”

Unfortunately, the two Ten Commandments cases from the 2005 term did not provide such a bottom-line test. In these cases, the Justices again took note of the nascent “no proselytizing” rule in both concurring and dissenting opinions, but did little to resolve this doctrinal dilemma. In both cases the Court examined the constitutionality of Ten Commandments displays located on government property. In these cases, the legal principle of “no proselytizing” appears to have been degraded to a question of fact, or mixed question of law and fact, rather than a conclusion of law, in both the concurring and dissenting opinions.⁶⁵

In *Van Orden v. Perry*, the Court upheld as constitutional the display of the Ten Commandments on a monument at the Texas State Capitol.⁶⁶ In his concurring opinion, Justice Scalia stated, “[T]here is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a non-proselytizing manner, venerating the Ten Commandments.”⁶⁷ As in *Lee*, Justice Scalia’s statements indicate that the converse, then, may be true: there is something unconstitutional with a State honoring God in a proselytizing manner. Justice Souter disagreed that the speech qualified as non-proselytizing, noting in dissent:

There is no question that the State in its own right is broadcasting the religious message. When Texas accepted the monument from the Eagles, the state legislature, aware that the Eagles “for the past several years have placed across the country . . . parchment plaques and granite monoliths of the Ten Commandments . . . [in order] to promote youth morality and help stop the alarming increase in delinquency,” . . . expressly approved of the Eagles’ proselytizing, which it made on its

65. Establishment Clause cases are usually decided at the appellate level as a matter of law pursuant to a *de novo* standard. *See, e.g.*, *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). A mixed question of law and fact is usually reviewed *de novo* as well. *See United States v. McConney*, 728 F.2d 1195, 1200-04 (9th Cir. 1984), *abrogated on other grounds by Estate of Merchant v. Comm’r*, 947 F.2d 1390 (9th Cir. 1991). A purely factual issue is subject to the lesser “clearly erroneous” standard of review. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

66. 125 S. Ct. 2854 (2005).

67. *Id.* at 2864 (Scalia, J., concurring).

own.⁶⁸

So, in *Van Orden*, the question remains as to whether Texas acted in a “non-proselytizing manner,”⁶⁹ or had “expressly approved of the Eagles proselytizing.”⁷⁰

In the companion case of *McCreary County v. ACLU*, the Court came to the opposite result and found that the Ten Commandments displays in Kentucky courthouses were unconstitutional.⁷¹ Justice Scalia again discussed proselytizing, this time in dissent, stating that “there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”⁷² This statement again indicates Justice Scalia himself believes that when an opportunity for prayer is used to proselytize, that prayer opportunity cannot withstand constitutional scrutiny. No other opinion in *McCreary* addressed proselytizing, or a “no proselytizing” rule.

D. The Term Proselytizing Has Served As An Ill-Defined Operating Assumption In Supreme Court Opinions

As this review illustrates, from the beginning of modern Establishment Clause case law, public taxpayer sponsored proselytizing stood beyond the pale in judicial opinions and was assumed to be prohibited by the Establishment Clause.⁷³ Even Justice Scalia, in his vehement dissents exemplified in *Lee* and *McCreary*, acknowledges “sectarian” speech goes too far.⁷⁴ Perhaps the high point of an emerging “no proselytizing” rule was Justice Kennedy’s opinion in *County of Allegheny* in which he attempted, but failed, to have the Court formally adopt an explicit “no proselytizing” bedrock rule.⁷⁵ But, almost inexplicably, in the “viewpoint discrimination” line of cases, what was termed “proselytizing” speech by dissenting justices passes muster under the Free Speech Clause, and the government itself is prohibited from engaging in “viewpoint discrimination.”⁷⁶

In summary, the term “proselytizing” in High Court opinions has

68. *Id.* at 2893 n.3 (Souter, J., dissenting).

69. *Id.* at 2864 (Scalia, J., concurring).

70. *Id.* at 2893 n.3 (Souter, J., dissenting).

71. *McCreary County, Ky. v. ACLU*, 125 S. Ct. 2722 (2005).

72. *Id.* at 2753 (Scalia, J., dissenting) (quoting *Marsh v. Chambers* 463 U.S. 783, 794–95 (1983) (internal quotation marks omitted)).

73. See discussion *supra* Part II.A.

74. See discussion *supra* Parts II.A, at p. 10, II.C, at p. 17.

75. See discussion *supra* Part II.A, at pp. 8–10.

76. See discussion *supra* Part II.B.

been used as an operating assumption, e.g., a description of what speech a particular justice believes crosses the Establishment Clause line as a matter of law. But “proselytizing” has never been adequately defined, or adopted as an identifiable legal test, by a majority of the Court. This reality is well illustrated by Justices Scalia and Souter reviewing the same photographs of the Ten Commandments monument in Texas, yet differing as to whether the monument is proselytizing or not.⁷⁷

III. NINTH CIRCUIT: *COLE* AND *LASSONDE*

The Ninth Circuit has built upon the Court’s Establishment Clause precedent to adopt a more certain “no proselytizing” doctrine than either the Court or other federal judicial circuits in *Cole v. Oroville Union High School District*⁷⁸ and *Lassonde v. Pleasanton Unified School District*.⁷⁹ In both cases, the Ninth Circuit made clear that proselytizing student speech is prohibited (at least during public high school graduation ceremonies) by the Establishment Clause and its requirements of separation between church and state.

In *Cole*, the Ninth Circuit confronted a proposed speech by co-valedictorian Chris Niemeyer in a Northern California high school graduation ceremony.⁸⁰ The court analyzed the speech and found it both

77. See discussion *supra* Part II.C. Given this split, it is possible the concept of proselytizing now encompasses mixed determinations of law and fact. This question for practitioners may determine evidentiary burdens at trial and opportunity for success on appeal.

78. 228 F.3d 1092 (9th Cir. 2000).

79. 320 F.3d 979 (9th Cir. 2003).

80. *Cole*, 228 F.3d 1092. Mr. Niemeyer’s second proposed speech was titled “The Key to Success” and stated as follows:

Before I start tonight, I want to extend my gratitude to Oroville High School and its staff for the great learning experience I have had the past four years. Along with the great instruction I have also been introduced to ideas and philosophies that have not corresponded with my own personal beliefs. I now have the opportunity to speak from my heart and share what I know is the key to success. I should warn you that the G-word and J-word may appear in my speech – God and Jesus. If you are harshly offended by my convictions, I would like to give you the opportunity to leave. Any takers? Again, my intent is not to force my ideas or offend anyone, but rather, to encourage everyone on this occasion.

Tonight, as we gather to celebrate this moment in our lives, I want to propose and ask you to respond to three questions; they can apply to all in attendance—who **are we?**, **why are we here?**, and **where are we going?**

Who are we? On this memorable occasion, we are graduates, family, teachers, and friends, most looking toward the future for success. During high school, I have come to believe that there are three types of people in this world. Some see a glass as half full. Others see it as half empty. And then there are those who just don’t see the glass. But we are a people with busy lives and diverse backgrounds, yet deep inside each of us we are all in search of true happiness and something worth living for. Although we strive for perfection, we constantly fall short. Some of us merely exist, some struggle to make it

sectarian and proselytizing.⁸¹ Prior to graduation, Mr. Niemeyer proposed two draft speeches for approval by the principal—an original and a modified version.⁸² Both speeches were rejected by the principal, school superintendent, and legal counsel, and the student eventually sued school officials for damages claiming “viewpoint discrimination” violative of the *Rosenberger* line of cases.⁸³ In addition to the actual language of the speeches in the record, the Ninth Circuit panel was aware that Mr. Niemeyer had admitted in deposition testimony that if an audience member found Jesus or God as a result of his proposed speech, it would be a good result.⁸⁴ Additionally, in his deposition Mr. Niemeyer stated that the fundamental purpose of his speech was to praise God and glorify him through the words.⁸⁵ Mr. Niemeyer also admitted his proposed speech was testifying, witnessing, and preaching.⁸⁶

First, the Ninth Circuit recognized that the school district retained plenary authority over the graduation ceremony.⁸⁷ Thus, restricting the

from one day to the next. Some succeed at most everything we attempt. All of us long for love and acceptance. I believe as a whole, we share one distinct similarity – the one, and only, perfect God created us. Each of us has value. We are all God’s children, through Jesus Christ’ death, when we accept His free love and saving grace in our lives.

Why are we here? What is our purpose for existence? It has been said that until you have found something worth dying for, you are not really living. We have all been given our lives by God, in order to glorify Him. I believe that God has a plan for each one of our lives – a plan to prosper us and give us a hope for the future. As individuals, we have a choice, of whether to choose His perfect will in our lives or our own futile plans.

But whatever our plans and dreams are, I believe they will not fully succeed unless we pattern our lives after Jesus’ example.

Where are we going? We do not know what tomorrow holds. Some of us may leave here tonight and become doctors, lawyers, or teachers. One of us may find a cure for aids or cancer or we may discover a technological breakthrough. Most of us desire to be successful, contribute to society, and make a difference. However, as we leave tonight and go our separate ways, may we remember one thing: God seeks a personal relationship with each one of us, as He longs for us to live forever with Him. Jesus wants to be our best friend. When others let us down - He will not. If we let Him direct our lives, He will give us the desires of our heart. Do you look to the future with uncertainty or confidence, fear or peace? Whether a graduate, family member, teacher, or friend, I encourage you to accept God’s love and grace. We must yield to God our lives and let Him direct our future paths. For with God, you will find eternal happiness and absolute success in all that you do.

Supplemental Excerpts of Record at 187-89, *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000) (Case No. 99-16550) [hereinafter *SER*].

81. *Cole*, 228 F.3d at 1097, 1103–04.

82. *Id.* at 1096.

83. *Id.* at 1096–97, 1101.

84. *SER*, *supra* note 80, at 30, Undisputed Facts ¶ 79.

85. *SER*, *supra* note 80, at 30, Undisputed Facts ¶ 73.

86. *SER*, *supra* note 80, at 30–31, Undisputed Facts ¶¶ 74–77, 84.

87. *Cole*, 228 F.3d at 1103. By finding “plenary authority,” the Ninth Circuit is ruling the forum “closed.” *See supra* note 63 regarding forum analysis.

proposed co-vaedictorian speech was “necessary to avoid violating the Establishment Clause”⁸⁸ because allowing Mr. Niemeyer to give his proposed speech “would have constituted government endorsement of religious speech similar to the prayer policies found unconstitutional in *Santa Fe* and *Lee*.”⁸⁹ The court rationalized that an “objective observer familiar with the District’s policy and its implementation would have likely perceived that the speech carried the District’s seal of approval.”⁹⁰ These principles, set forth in *Santa Fe* and *Lee*, are also consistent with Justice O’Connor’s endorsement test.

Secondly, the Ninth Circuit held “proselytizing, no less than prayer, is a religious practice.”⁹¹ To reach this conclusion, the Ninth Circuit relied upon High Court precedent for the proposition that proselytizing itself is a “religious activity.”⁹² Taking *Santa Fe* and *Lee* to the next step, the court determined that the secondary test is whether a reasonable dissenter could believe that the group religious activity at a major public school event signified his or her own promotion or approval.⁹³ Finally, the court concluded that “allowing the students to engage in sectarian prayer and proselytizing as part of the graduation ceremony would amount to government sponsorship of, and coercion to participate in, particular religious practices.”⁹⁴

Three years later the Ninth Circuit reiterated that *Cole* was binding precedent in *Lassonde v. Pleasanton Unified School District*.⁹⁵ In that case, the court turned aside another “viewpoint discrimination” attack upon school district officials, this time based upon the then recent U.S.

88. *Cole*, 228 F.3d at 1101 (citing *Santa Fe Indp. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)).

89. *Id.* at 1103.

90. *Id.*

91. *Id.* at 1104.

92. *Id.* (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 23 (1989)).

93. *Id.*

94. *Id.* There did exist a slightly different analytical approach to this situation. In *Tinker v. Des Moines Independent Community School District*, the Court held that students retained First Amendment free speech rights, in that case to wear black armbands to protest the Vietnam War. 393 U.S. 503, 504, 514 (1969). However, in *Hazelwood School District v. Kuhlmeier*, the Court held that educators do not violate the First Amendment when exercising control over style and content of student speech in faculty-supervised activities so long as the educator’s actions are “reasonably related to legitimate pedagogical concerns.” 484 U.S. 260, 273 (1988). Speech sponsored by the school is thus subject to “greater control” by school authorities than speech not so sponsored. *Id.* at 271–73. In *Cole*, the District Court below relied upon *Kuhlmeier* to rule that the Oroville Union High School District retained curriculum authority over the graduation ceremony, and could lawfully disapprove the speech. *Cole v. Oroville Union High Sch. Dist.*, No. Civ. S-98-1037, slip op. at 16–17 (E.D. Cal. June 10, 1999). The trial court merely noted school approval of the proposed speech would implicate the Establishment Clause. *Id.* at 19 n.8. Despite briefing and argument on this point, the Ninth Circuit focused solely upon the Establishment Clause.

95. 320 F.3d 979 (9th Cir. 2003).

Supreme Court opinion in *Good News Club*.⁹⁶ In *Lassonde*, another Northern California high school graduation speaker sought to deliver a “proselytizing” speech at his graduation. However, this case differed slightly from *Cole* because the school district excised certain proselytizing language from Mr. Lassonde’s speech, though the student’s counsel had proposed a disclaimer as the appropriate device to deliver the original speech intact.⁹⁷ Eventually the student delivered the excised speech without a disclaimer, with unedited versions available for distribution.⁹⁸ Not satisfied with this result, Mr. Lassonde sued school district officials for damages.⁹⁹

The key argument offered by the student’s counsel in *Lassonde* was that the “viewpoint discrimination” doctrine as applied in *Good News Club* vitiated *Cole*.¹⁰⁰ The Ninth Circuit rejected this approach and ruled “*Good News Club* did not undermine *Cole*.”¹⁰¹ In reaching this conclusion the court restated the “two related, but subtly distinct, reasons” which necessitated the school district’s actions in *Cole* as (1) “[T]he school district had to censor the speech in order to avoid the appearance of government sponsorship of religion”; and (2) “[A]llowing the speech would have had an impermissibly coercive effect on dissenters, requiring them to participate in a religious practice even by their silence.”¹⁰² In rejecting the student’s attempts to distinguish *Cole* based upon the proposed disclaimer, the Ninth Circuit stated that “a disclaimer could not address the other ground underlying both *Cole* and *Lee*: permitting a proselytizing speech at a public school’s graduation ceremony would amount to coerced participation in a religious practice.”¹⁰³ Thus, allowing Mr. Lassonde’s speech during graduation would be enough to coerce the audience into religious participation. Finally, the Ninth Circuit in *Lassonde* distinguished the *Good News* “viewpoint discrimination” holding that after-hours meetings do not bear the imprimatur of the school, while graduation ceremonies require “the participation of all, as a captive audience.”¹⁰⁴

The Ninth Circuit opinion in *Cole* mentioned “sectarian” twenty-nine times and “proselytizing” seventeen times.¹⁰⁵ Similarly, the *Lassonde*

96. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

97. *Lassonde*, 320 F.3d at 981.

98. *Id.* at 982.

99. *Id.*

100. *Id.* at 985.

101. *Id.*

102. *Id.* at 983.

103. *Id.* at 984.

104. *Id.* at 985.

105. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000).

court applied the term “sectarian” six times and “proselytizing” fourteen times.¹⁰⁶ Both decisions squarely rule that proselytizing is a religious exercise, the proposed practice of which required that the school district censor student speech to be delivered to a captive audience in school-sponsored activities.¹⁰⁷ Yet, at no point in either decision is proselytizing defined as a legal term of art, much less as an applicable test. Perhaps this was because the speakers at issue were manifestly proselytizing in the proposed speeches under almost any conceivable meaning given to the word. Yet this definitional omission does carry consequences. Public officials must make the initial judgment call whether speech is prohibited proselytizing. The courts may secondarily review this judgment call. A more certain definition of proselytizing would resolve vexing questions, assist Establishment Clause certainty, and limit unintended incursions into “viewpoint discrimination” by public officials.

IV. TOWARDS A WORKABLE DEFINITION OF PROSELYTIZING

A. Other Federal Circuits Consider Proselytizing

Despite the “no proselytizing” rule outlined in *Cole* and *Lassonde*, as noted earlier, the Ninth Circuit did not define the term in either opinion. Other federal circuit opinions have delved somewhat more deeply into defining the term “proselytizing” as a legal principal when applied to discrete facts.¹⁰⁸

In the Third Circuit decision *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, a religious organization sought an injunction against particular elementary schools that denied that organization access to school grounds to promote meetings and activities.¹⁰⁹ Though that case turned on a forum analysis and whether prohibiting use by the religious group constituted “viewpoint discrimination,”¹¹⁰ the appellate court included a dictionary definition of proselytizing. Using the Webster’s definition, the Third Circuit determined that to proselytize means: “‘to recruit members for an institution, team, or group’ and ‘to convert from one religion, belief,

106. *Lassonde*, 320 F.3d 979.

107. *Cole*, 228 F.3d at 1103–04; *Lassonde*, 320 F.3d at 983–84.

108. *See, e.g.*, *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, 1331 (11th Cir. 2001) (stating that not every speaker at a high school graduation should be considered a state speaker); *Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000) (determining that private speech is constitutionally protected even though it occurs at a school related function).

109. 386 F.3d 514, 522–23 (3d Cir. 2004).

110. *Id.* at 526.

opinion or party to another.”¹¹¹ The appellate court did not adopt a blanket “no proselytizing” rule similar to the Ninth Circuit’s rule articulated in *Cole* and *Lassonde*. However, the Third Circuit analyzed the case under its stated definition and determined the problem with the school district’s practice was that they did not reject non-religious groups that proselytized in the sense of “recruiting members,” but excluded only “religiously affiliated groups that attempt to recruit new members.”¹¹² The Third Circuit held that this stance by the schools constituted impermissible viewpoint discrimination.¹¹³ Because this case did not address student speech, it did not preclude the adoption of a “no proselytizing” rule in that context.

The Third Circuit added to its proselytizing analysis in *Walz v. Egg Harbor Township Board of Education*¹¹⁴ where it reasoned as follows:

Context is essential in evaluating student speech in the elementary school setting. It would seem reasonable that student expression may implicate religion if done out of personal observance as opposed to outward promotion. There is a marked difference between expression that symbolizes individual religious observance, such as wearing a cross on a necklace, and expression that proselytizes a particular view.¹¹⁵

Thus, examining both of these Third Circuit cases together, the court appears to be heading toward a bright line “no proselytizing” rule where student speech is concerned, even though it has yet to be articulated as such.

In the Fifth Circuit opinion in *Santa Fe v. Doe*, the appellate court implicitly adopted the “no proselytizing” rule for graduation speeches.¹¹⁶ The appellate court, in the portion of the case which was not reviewed by the Supreme Court when it granted certiorari, addressed the problem of

111. *Id.* at 528 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1821 (1976)).

112. *Id.*

113. *Id.* The Supreme Court has not settled the question whether a concern about a possible Establishment Clause violation can justify viewpoint discrimination. In *Good News Club*, the Court stated, “We have said that a state interest in avoiding an Establishment Clause violation ‘may be characterized as compelling,’ and therefore may justify content-based discrimination. However, it is not clear whether a State’s interest in avoiding an Establishment Clause violation would justify viewpoint discrimination.” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001) (citation omitted).

114. 342 F.3d 271 (3d Cir. 2003).

115. *Id.* at 278–79 (citing *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1053 (9th Cir. 2003) (footnote omitted)).

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

proselytizing speech in graduation ceremonies.¹¹⁷ In *Santa Fe*, the Fifth Circuit defined “proselytizing prayers” as prayers “designed to reflect, and even convert others to, a particular religious viewpoint.”¹¹⁸ Applying that definition, the Fifth Circuit determined that proselytizing prayer “conveys a message not only that the government endorses religion, but that it endorses a particular form of religion,” a practice which is, at the least, constitutionally questionable.¹¹⁹ Finally, the Fifth Circuit held that “student-selected, student-given, sectarian, proselytizing invocations and benedictions at high school graduations . . . [are] antithetical to the Establishment Clause.”¹²⁰

The Fourth Circuit has also defined proselytizing and attempted to distinguish it from the similar concept of “advancing religion.” In *Wynne v. Town of Great Falls, South Carolina*,¹²¹ the Fourth Circuit addressed prayer during city council meetings and held that those particular prayers run afoul of the Establishment Clause as interpreted by *Marsh*.¹²² In its analysis, the appellate court cited to Webster’s Third New International Dictionary and stated that to “‘proselytize’ on behalf of a particular religious belief necessarily means to seek to ‘convert’ others to that belief.”¹²³ The court reasoned that because *Marsh* prohibits prayers that either “proselytize or advance one . . . faith or belief,”¹²⁴ not only are proselytizing prayers prohibited, but also prohibited are “legislative prayers that have the effect of affiliating the government with any one specific faith or belief.”¹²⁵ Further, the court determined that mere mention of Jesus Christ to the exclusion of other potential deities indicated an effort to advance one faith.¹²⁶ Though the Fourth Circuit has yet to use this definition in its Establishment Clause analysis in the public school arena, as the Supreme Court has repeatedly stated, the Establishment Clause protections are especially heightened in the school context because children and “adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”¹²⁷ Thus, the Fourth Circuit

117. *Id.*

118. *Id.* at 817.

119. *Id.* at 817–18.

120. *Id.* at 818.

121. 376 F.3d 292 (4th Cir. 2004).

122. *Id.* at 298 (citing *Marsh v. Chambers*, 463 U.S. 783, 794 (1983)).

123. *Id.* at 300.

124. *Id.* at 297 (quoting *Marsh*, 463 U.S. at 794–95)).

125. *Id.* (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989)).

126. *Id.* at 301.

127. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 593 (1992)).

would be even more likely to find proselytizing speech, within the public school environment, an Establishment Clause violation.

The Eleventh Circuit, though not defining the term, has also used “proselytizing” as an important factor in determining whether an Establishment Clause violation has occurred. For example, in *Chandler v. Siegelman* the Eleventh Circuit upheld the validity an Alabama statute that permitted non-sectarian and non-proselytizing student-initiated prayer at school-related events.¹²⁸ The court held that where prayer is “genuinely student-initiated” and is not a result of a school policy that “actively or surreptitiously encourages” the speech, that prayer is constitutional.¹²⁹ Nonetheless, the court still recognized the bottom line that even student-initiated proselytizing speech is not constitutionally allowable, stating “Proselytizing speech is inherently coercive and the Constitution prohibits it from the government’s pulpit.”¹³⁰ Additionally, in *Bannon v. School District of Palm Beach County*, another Eleventh Circuit opinion, the court addressed the validity of religious words and symbols painted on murals as part of a school beautification project.¹³¹ The court noted that the appellant’s argument “would have us adopt a reading of [*Rosenberger* and *Lamb’s Chapel*] that would require a school . . . to allow students to use the walls of a public school to proselytize.”¹³² The Eleventh Circuit, appearing to think that this notion was out of the realm of possibility, disposed of this argument in one sentence and held that “neither case mandate[d] such a result.”¹³³

B. Formulating the Definition

If public schools and other public institutions are thus prohibited by the Establishment Clause from sponsoring the religious exercise of proselytizing, the critical question becomes what conduct precisely constitutes proselytizing.¹³⁴ An “I know it when I see it” judicial standard

128. *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), *vacated*, *Chandler v. Siegelman*, 530 U.S. 1256 (2000). The Supreme Court vacated the decision and remanded it to be read in light of *Santa Fe*. On remand, the Eleventh Circuit held that the first *Chandler* opinion was not in conflict with *Santa Fe* and that the *Santa Fe* opinion was limited to the condemnation of school sponsorship of prayer while the *Chandler* opinion condemns school censorship of student prayer. *Chandler v. Siegelman*, 230 F.3d 1313, 1315 (11th Cir. 2000).

129. *Chandler*, 230 F.3d at 1317.

130. *Chandler*, 180 F.3d at 1265.

131. 387 F.3d 1208 (11th Cir. 2004).

132. *Id.* at 1216 (referring to *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), and *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)).

133. *Id.*

134. For example, several distinguished professors and commentators came to quite different conclusions on how the situation in *Cole* should have been addressed. *See, e.g.*, Symposium, *The State Suppression of Student Prayer*, 5 NEXUS 1 (2000).

does nothing to assist school administrators, teachers, or other public officials from being sued for damages after making difficult judgment calls.¹³⁵

Non-court sources appear to muddy, rather than clear, the waters. For example, the Association of International Educators defines proselytizing in its Code of Ethics as “unsolicited, coercive, manipulative and/or hidden persuasion that seeks to influence others to adopt another way of thinking, believing, or behaving.”¹³⁶ Accordingly, “[i]n [r]elationships with [s]tudents, [s]cholars, and [o]thers[,] [m]embers [s]hall: . . . [n]ot use one’s position to proselytize.”¹³⁷ But such an academic definition focuses heavily upon the mental state of the speaker, an approach at odds with the “reasonable observer” judicial standard.¹³⁸ Recent proposed federal legislation regarding specifically the United States Air Force Academy simplistically attempted to restrict “coercive and abusive religious proselytizing.”¹³⁹ This begs the question: how does one define “coercive and abusive” in this context, and can proselytizing at taxpayer expense ever not be at least coercive? Silence does not help: the United States Department of Education Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools makes no mention of the term “proselytizing” or any similar terms such as “evangelizing.”¹⁴⁰

Considering all of these approaches from both the courts and non-legal sources, a concise definition of proselytizing for deciding questions of fact or reaching conclusions of law might be expressive activity which a reasonable observer would perceive attempts to convert the audience from one religious belief, or lack of a belief, to another religious belief, or lack thereof.

135. See, e.g., *Wynne v. Great Falls, S.C.*, 376 F.3d 292 (4th Cir. 2004) (quoting *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)).

136. NAFSA: ASSOCIATION OF INTERNATIONAL EDUCATORS, NAFSA’S CODE OF ETHICS, at 2, 3(f) (Mar. 9, 2003), http://www.nafsa.org/about.sec/governance_leadership/ethics_standards/nafsa_s_code_of_ethics (last visited May 6, 2006).

137. *Id.*

138. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Conner, J., concurring); see also *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378–79 (9th Cir. 1994) (citing *Lee v. Weisman*, 505 U.S. 577, 591–93, 597–99 (1992)).

139. See 151 Cong. Rec. H4761 (daily ed. June 20, 2005) (proposed amendment to H.R. 2863, sponsored by Rep. David R. Obey). After agreeing to the Obey amendment, the amendment failed passage by recorded vote 198–210. *Id.* at H4779.

140. See U.S. DEPARTMENT OF EDUCATION, GUIDANCE ON CONSTITUTIONALLY PROTECTED PRAYER IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS (Feb. 7, 2003), http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited Oct. 16, 2006) (discussing prayer at graduation and stating—contrary to *Cole* and *Lassonde*—that students who offer a religious message at graduation will not violate the establishment clause if the students are chosen using a truly neutral criteria because the speech is not attributable to the school).

C. Applying the Definition: An Objective Standard

The *Cole* case presents the type of factual “real life” conflict any proposed definition of “proselytizing” must adequately address to be of use to public officials and the courts.¹⁴¹ Mr. Niemeyer in that situation was co-valedictorian along with Ms. Delisa Freistadt. Ms. Freistadt was concerned Mr. Niemeyer and Mr. Cole might try to use the graduation ceremony to recruit others to their religious views.¹⁴² Ms. Freistadt’s parents thereafter objected to sectarian references, including reference to Jesus, in the graduation ceremony.¹⁴³ Deposition testimony established unquestionably that Mr. Niemeyer was “testifying,” “witnessing,” and acting as an active evangelical proponent of his faith in attempting to give his speech.¹⁴⁴ Evangelical activity during the school day by Mr. Niemeyer and his Bible study club had negatively affected Ms. Freistadt during her high school tenure.¹⁴⁵ Ms. Freistadt knew the faculty advisors and the school principal must approve all speeches prior to presentation.¹⁴⁶ Ms. Freistadt believed she should have been able “to graduate as co-valedictorian of [her] class without being subjected to offensive religious proselytizing.”¹⁴⁷ Ms. Freistadt and her fellow students would have known that Mr. Niemeyer’s statements received the official government stamp of approval prior to presentation.¹⁴⁸ During such a speech the government would be placing Ms. Freistadt and other members of the audience in the untenable position of feeling like “outsiders.”¹⁴⁹ Such a direct assault upon personal religious sensibilities under the auspices of the State would have been an affront to both Justice Kennedy’s “coercion test” and Justice O’Connor’s “endorsement” test. It would have substantially failed even Justice Scalia’s “sectarian” approach exemplified by his dissent in *Lee*.¹⁵⁰

Thus, to adequately address these types of “real life” conflicts, this article-proposed definition is minimally subjective and primarily

141. *SER*, *supra* note 80, at 60-62, Freistadt Decl. ¶¶ 1-18.

142. *SER*, *supra* note 80, at 27, Undisputed Facts ¶ 47.

143. *SER*, *supra* note 80, at 27, Undisputed Facts ¶ 48.

144. *SER*, *supra* note 80, at 30-31, Undisputed Facts ¶¶ 74-77, 84.

145. *SER*, *supra* note 80, at 61, Freistadt Decl. ¶ 5.

146. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1103 (9th Cir. 2000).

147. *SER*, *supra* note 80, at 62, Freistadt Decl. ¶ 18.

148. *SER*, *supra* note 80, at 61-62, Freistadt Decl. ¶¶ 7-14.

149. *See County of Allegheny v. ACLU, Greater Pittsburg Chapter*, 492 U.S. 573, 625 (1989) (O’Connor, J., concurring) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

150. *See supra* note 46.

objective. Folding this proposed definition into a workable test, public official(s) initially, and the court(s) secondarily, would consider (1) the nature of the expressive activity; (2) to a limited extent, the speaker's purpose, e.g., whether he or she is involved in an effort to convert; and, most conclusively, (3) the potential objective impact upon the reasonable observer.

Based upon current case law involving public school-sponsored activities, if the sponsored expressive activity is per se a religious exercise or practice, e.g., prayer, it is assumed proselytizing as a matter of law and the analysis concludes.¹⁵¹ Next, if the speaker as a factual matter admits intent to convert, as did Mr. Niemeyer in *Cole*, then under the proposed test the expression would violate the Establishment Clause. Finally, if either factor one or two is not conclusive, the public official initially, and the court secondarily, would examine the potential impact upon the audience (or other participants in the activity) from the standpoint of the reasonable observer as a matter of law. This third factor includes whether the particular audience is "captive," and the nature of the precise forum, if any, created by the public agency.¹⁵² This proposed approach to determining what speech or expression is proselytizing and thereby prohibited by the Establishment Clause is consistent with High Court precedent and opinions from *McCullum* to *Santa Fe* set forth above, as well as the federal circuit decisions to date.

V. CONCLUSION

The High Court has declined to accept review of several Circuit decisions in which proselytizing was either key to the case or at least mentioned in the Circuit panel's opinion.¹⁵³ Without a definitive Supreme Court opinion, there remains some room for doubt whether the per se approach prohibiting proselytizing adopted by the Ninth Circuit in *Cole* and *Lassonde* will ultimately prevail. The differing High Court opinions in the two 2005 term Ten Commandment cases shed little light on this question.¹⁵⁴ But, it becomes difficult to envision a different standard towards proselytizing than that mandated by the Ninth Circuit, at least in public schools, so long as *Lee* and *Santa Fe* remain precedent.

151. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003); *Cole*, 228 F.3d 1092.

152. See *supra* note 63, regarding forum analysis.

153. *Cole*, 228 F.3d 1092; *Lassonde*, 320 F.3d 979; *Santa Fe*, 530 U.S. 290; *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000).

154. *McCreary County, Ky. v. ACLU*, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

Why such an assertion? Why should proselytizing at taxpayer expense be treated differently than other forms of Free Speech Clause protected expression? Why does conduct that would in other circumstances be considered protected Free Speech instead become Establishment Clause prohibited activity in public schools or other public institutions? The answer is that proselytizing by its very nature is a direct assault upon the religious identity, or lack of religious identity, of one or more members of an audience by a speaker using a government-sponsored and government-controlled platform.

This conclusion does not presume that the courts or public officials must sanitize religion, or all religious expression, from public or civic life.¹⁵⁵ To the contrary, it is possible to envision personal references to religion in a graduation speech, for example, which are not proselytizing.¹⁵⁶ What it does assert is that proselytizing, by its very nature, goes too far and crosses the Establishment Clause line.¹⁵⁷

Civic life must eventually evolve an acceptable etiquette for public ceremonies.¹⁵⁸ The ethic of tolerance, however described, lies at the heart of such etiquette.¹⁵⁹ An ethic of mutual tolerance pre-supposes the ability to listen to one another without censorship or condemnation.¹⁶⁰ However, it stretches tolerance too far to presume a person must listen to statements from a government-supplied podium that attack his or her very identity as a religious, or non-religious, person. An ethic of mutual tolerance in such circumstances focuses upon the ethical obligations of the speaker and becomes an off-shoot of the Golden Rule: if you do not want someone to directly or indirectly attack your own religion, do not directly or indirectly attack others' religion (or lack thereof). Because such an ethic may be difficult to follow in the heat of the moment, the Establishment Clause would enforce it through the bottom-line "no proselytizing" rule as adopted by the Ninth Circuit.

155. Christian M. Keiner, *A Critical Analysis of Continuing Establishment Clause Flux as Illustrated by Lee v. Weisman*, 112 S. Ct. 2649 (1992) and *Graduation Prayer Case Law: Can Mutual Tolerance Reconcile Dynamic Principles of Religious Diversity and Human Commonality?*, 24 PAC. L.J. 401, 457–60 (1993).

156. An "I" message would be far different than Mr. Niemeyer's "we" message differentiating who is, and who is not, "God's children" directed toward the entire captive audience, e.g., "We are all God's children, through Jesus Christ' death, when we accept His free love and saving grace in our lives." See note 80 above for the entire speech.

157. Keiner, *supra* note 155, at 457.

158. See generally, Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, 5 NEXUS 61 (2000); see also Noah Feldman, *A Church-State Solution*, N.Y. TIMES MAG., July 3, 2005, at 28.

159. Keiner, *supra* note 155, at 457–59.

160. *Id.*