Re: 99-62 Santa Fe Independent School district v. Doe

Dear John:

I am sorry to hold you up in completing work on this opinion. At bottom I agree with you, but there are several places where I hope you will consider making some changes. These suggestions are set forth below:

On pages 11 and 12, I find the paragraph beginning at the bottom of page 11 somewhat confusing. I suggest a minor change:

“Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum. Here, however, Santa Fe’s student election system ensures that only those messages deemed ‘appropriate’ under the District’s policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.”

On pages 14 and 15, in the paragraph beginning on page 14, I suggest eliminating the third sentence, and amending the next sentence to state “a religious message is the most obvious method of solemnizing an event.” I also suggest replacing the fifth and sixth sentences with:

“Moreover, the requirements that the message ‘promote good citizenship’ and ‘establish the appropriate environment for competition’ further narrow the types of message deemed appropriate, suggesting that a solemn, yet non-religious, message, such as a commentary on United States foreign policy, would be prohibited. Indeed, the only type of message that is expressly endorsed in the text is an ‘invocation’—a term that primarily describes an appeal for divine assistance. In fact, as used in the past at Santa Fe High School, an ‘invocation’ has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy.”

At the end of the runover paragraph at the top of page 15, I suggest adding:

“We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions’ significance. But such religious activity in public schools must comport with the First Amendment.”
in the runover paragraph at the top of page 17, I am troubled by the gratuitous commentary on the goal of solemnizing sporting events. I frankly think it is rather patronizing. Would it not strengthen the point by eliminating the sentences in the paragraph beginning with “also questionable ...” and substituting:

“Regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible where, in actuality, it constitutes prayer endorsed by the school. And it is unclear what type of message would be both appropriately ‘solemnizing’ under the District’s policy and yet non-religious.”

I would also eliminate the word “however” in the first sentence of the full paragraph on page 17.

Finally, at the end of Part III at the bottom of page 20, I would like to see added something along the following lines:

“The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. See, e.g., Lamb’s Chapel v. Center Moriches Union Free School Dist., 508 U. S. 384, 395 (1993) (Establishment Clause does not forbid public school district from allowing church group to use classrooms to show religious films); Wallace v. Jaffree, 472 U. S. 38, 59 (1985) (suggesting that statute providing for moment of silence in public school classrooms, during which students could engage in voluntary prayer, would be constitutional); Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U. S. 226 (1990) (federal statute prohibiting public secondary schools that create limited public fora from discriminating against religious student groups does not violate Establishment Clause). Indeed, the common purpose of the Religion Clauses ‘is to secure religious liberty.’ Engel v. Vitale, 370 U. S. 421, 430 (1962). Thus, nothing in the Constitution as interpreted by this Court prohibits public school students from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged where, as here, the state affirmatively endorses the particular religious practice of prayer.”

I apologize for sending you such a laundry list of suggestions, but your consideration of them would enable me to join without adding another separate opinion.

Sincerely,

Sandra

Justice Stevens