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# All Things Not Being Equal: Reconciling Student Religious Expression in the Public Schools

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*The legal issues surrounding student religious expression in the public schools rest on competing, if not inconsistent, theories. First, the United States Supreme Court has been particularly mindful of the coercive risks associated with organized religious expression in the public schools. More recently, however, the Court has expanded on the notion of equal treatment of religious expression in certain public school contexts. As part of this development in the law, the Court has limited the authority of school officials to exclude religious speakers from open forums operated within school environs. Finally, this expansion of free speech jurisprudence has come at a time when the Court has been cutting back on protection for student speech generally. This confused state of the law has led to inconsistent holdings on the right to student religious expression within classrooms and other school-sponsored events. This Article explores these competing strands of First Amendment law and proposes how to reconcile student religious expression within the public schools with the jurisprudence.*

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## INTRODUCTION

Few issues have been as central to modern church-state jurisprudence as those dealing with religious expression in public schools. For more than forty years, the modern United States Supreme Court maintained a firm and consistent stance against devotional religious activity involving students in public schools.<sup>1</sup> Three suppositions or presumptions informed those decisions. First, the Court presumed that organized religious activity would not and could not take place in public schools without the direction, involvement, or approval of public school officials.<sup>2</sup> Second, the Court presumed that corporate religious activity in the schools would place “indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion.”<sup>3</sup> And third, the Court presumed that organized religious activity in schools was a departure from constitutional norms of government neutrality toward religion.<sup>4</sup> The First Amendment stood for the proposition that “neither the power nor the prestige” of the government “would be used to control, support, or influence the kinds of prayer [schoolchildren] can say.”<sup>5</sup> In those early decisions, for schools to be neutral towards religion was for them to be secular, neither advancing nor disparaging religion.<sup>6</sup> The Court equated neutrality with secularity.<sup>7</sup>

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<sup>1</sup> This period extends from *McCullum v. Board of Education*, 333 U.S. 203 (1948), through *Lee v. Weisman*, 505 U.S. 577 (1992).

<sup>2</sup> *McCullum*, 333 U.S. at 212 (noting “invaluable aid” of state-provided private devotional instruction through use of public school buildings and “use of the state’s compulsory public school machinery”).

<sup>3</sup> *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

<sup>4</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (holding that school-sponsored corporate religious exercises violate notions of government neutrality toward religion).

<sup>5</sup> *Engel*, 370 U.S. at 429.

<sup>6</sup> *Abington Twp.*, 374 U.S. at 225; accord *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) (“Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of nonreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”).

<sup>7</sup> Accord *Mitchell v. Helms*, 530 U.S. 793, 879-81 (2000) (Souter, J., dissenting) (describing earlier Court views of neutrality toward religion).

A normative shift in school prayer case law began in 1990 with the Court's decision upholding the Equal Access Act ("EAA").<sup>8</sup> Beginning with *Board of Education v. Mergens*, the Court first questioned the above presumptions, while its concern over coercion became stylized. In that case, and in the free exercise case of *Employment Division v. Smith* during the same term,<sup>9</sup> the Court began to reevaluate understandings of government neutrality toward religion, foreshadowing a shift from what Douglas Laycock has termed a regime of "substantive" neutrality to one of "formal" neutrality.<sup>10</sup> (In actuality, a gradual reevaluation of neutrality had begun ten years earlier in the college access case of *Widmar v. Vincent*, with the Court equating neutrality with evenhanded treatment of religion.<sup>11</sup> Congress applied this new understanding of neutrality to the public school context by passing the EAA in 1984.<sup>12</sup>) After *Mergens*, the presumption that a regime of secularity was neutral toward religion was all but rejected, replaced by an assertion that true neutrality meant evenhanded treatment of religion with its nonreligious counterparts.<sup>13</sup> In addition, the Court similarly discarded the assumption that any organized religious activity in public schools involving students presupposed official school involvement or approval.<sup>14</sup> In its place, the Court instilled a new presumption that in-school religious activity involving students, particularly student-led activity, was student expression, not something attributable to the school. Justice O'Connor announced this new presumption in *Mergens*:

There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to

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<sup>8</sup> 20 U.S.C. §§ 4071-74 (1984); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 226-28 (1990).

<sup>9</sup> 494 U.S. 872 (1990). In *Employment Division*, the Court overturned approximately 30 years of free exercise jurisprudence by holding that religiously neutral laws that burden religious practice were to be evaluated by using mere rationality review, rather than using strict scrutiny. *Id.* at 885-86.

<sup>10</sup> See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999-1006 (1990) (distinguishing form of neutrality that finds its meaning in substantive values that inform the Religion Clauses from one that finds its meaning solely in even-handed treatment of similarly situated entities).

<sup>11</sup> *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) (rejecting university's argument that its secular mission justifying exclusion of religious organization was essentially neutral).

<sup>12</sup> *Mergens*, 496 U.S. at 235.

<sup>13</sup> *Id.* at 248.

<sup>14</sup> *Id.* at 250.

understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.<sup>15</sup>

O'Connor's statement thus merged two new presumptions: that neutrality means equal treatment of religion in public schools rather than a regime of secularity; and that student religious expression is presumptively private speech, not government speech.

This reversal of past jurisprudence was path breaking, although its significance was muted by the facts of the case, which simply involved allowing student religious clubs to meet alongside their nonreligious counterparts.<sup>16</sup> Still, the implications of the *Mergens* holding extended beyond the context of student-led Bible clubs. An allegation of school religious activity involving students, particularly where it was student initiated or student led, was no longer presumed to be invalid. Instead, the claimant was now required to overcome the presumption that the student religious expression was private speech and thus entitled to equal treatment.<sup>17</sup> The possibility remained that some student religious expression could still be attributed to the state,<sup>18</sup> although a minority of the Justices, now led by Justice Scalia, all but dispute this possibility.<sup>19</sup> With the presumption of invalidity now reversed, the burden of demonstrating government attribution (or encouragement, endorsement, support, etc.) would rest with the challenger to the religious activity. Finally, with the possibility of government attribution now cabined, courts adopted a formalistic approach to coercion: whether student peer pressure to participate in religious activity is coercive depends not on the level of pressure, or even on its occurrence in a closed school environment, but on whether a state official has directed or engaged in the coercive activity.<sup>20</sup> In essence, private religious speech cannot coerce other students, even though it takes place at school.<sup>21</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 253 (noting that holding was based on statutory grounds rather than on either Free Exercise or Free Speech grounds).

<sup>17</sup> See Pamela Coyle, *The Prayer Pendulum*, 81 A.B.A. J., Jan. 1995, at 62, 62-66 (1995) (describing rise and impact of student-initiated and student-led religious expression on case law).

<sup>18</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 291-92 (2000).

<sup>19</sup> *Accord id.* at 324 (Rehnquist, C.J., dissenting); see *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 (2001) (Scalia, J., concurring).

<sup>20</sup> A close reading of *Lee v. Weisman*, 505 U.S. 577 (1992), striking graduation prayers due to their subtle coercive quality, indicates that the holding rests on the "school district's supervision and control of [the] high school graduation ceremony." *Id.* at 593.

<sup>21</sup> *Good News Club*, 533 U.S. at 115; *accord* *Adler v. Duval County Sch. Bd.*, 206

Eleven years after *Mergens*, the Court extended both new presumptions to the context of organized religious activity in elementary schools, effectively overruling the 1948 decision of *McCullum v. Board of Education*.<sup>22</sup> In *Good News Club v. Milford Central School*, the Court affirmed that neutrality toward religion in an elementary school context did not mean a preference for secularity, but rather for evenhanded treatment of religion.<sup>23</sup> Religious activity occurring in classrooms immediately following the school day would not be legally attributed to the state (or at least not presumed to be so), and thus, would be allowed. In addition, the Court held, elementary-age students would not confuse the private religious speech for government religious speech, or be coerced to participate in the religious clubs, because their parents, having approved of their participation, would be neither confused nor coerced.<sup>24</sup>

Equal treatment of religious speech has become the prevailing paradigm for student-related expression in the public schools.<sup>25</sup> In some respects, this is a positive advance in First Amendment values. Courts sometimes applied the old presumptions (about attribution and secularity) in an automatic and indiscriminate fashion.<sup>26</sup> Religious faith is a significant component in the lives of many children, forming their identity, values, and sense of self-worth in their developing years. A climate that respects student religious

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F.3d 1070, 1083-84 (11th Cir. 2000); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 969-70 (5th Cir. 1992); see *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) (“[T]he prayer condemned [in *Santa Fe*] was coercive precisely because it was *not* private [citation omitted]. The Court’s holding in *Santa Fe* is only that State-sponsored, coercive prayer is forbidden by the Constitution.”).

<sup>22</sup> *Good News Club*, 533 U.S. at 116 n.6. In *McCullum*, the Court found that a program that released children from classes to attend religious instruction in the school building, conducted by an outside religious group, violated the Establishment Clause. See generally *People ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203. In *Good News*, the Court held that a substantially equivalent program in which the religious instruction took place immediately following the closing school bell did not violate the Establishment Clause. Moreover, the *Good News* Court held that the school could not deny the religious group access to the school building and the schoolchildren, based on free speech principles. 533 U.S. at 120.

<sup>23</sup> *Good News Club*, 533 U.S. at 114.

<sup>24</sup> *Id.* at 115.

<sup>25</sup> *Santa Fe Independent School District* is not to the contrary. There, the religious activity — student-led prayer at football games — was struck primarily because the school policy favored religious messages. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305-06 (2000).

<sup>26</sup> See *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 550-51 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986); *Brandon v. Bd. of Educ.*, 635 F.2d 971, 978 (2d Cir. 1980).

expression enhances their personal and intellectual growth while it advances freedom of expression in the aggregate.

The irony (and inconsistency) of this advance in student religious expression via equality notions is that it has taken place at the same time the Court has been cutting back on protections for student expression generally.<sup>27</sup> This paradox has led to an inconsistent application of rules governing student expression. At times, it has also led to insupportable claims of infringements on the ability of students to express themselves religiously in many school-sponsored contexts beyond the student-initiated, student-led clubs considered in *Mergens* (e.g., on classroom assignments and presentations, or in conjunction with athletic events).<sup>28</sup> In essence, embracing equality as the norm for all religious expression has led to an “equality creep” into public school contexts where it often does not belong: curriculum-related and school-sponsored functions. A prime example of this is a 2007 Texas law, the so-called Religious Viewpoint Anti-Discrimination Act, which mandates Texas schools to permit student religious expression at all school events and in curriculum-related assignments.<sup>29</sup>

The EAA and the principle of evenhanded treatment enunciated in *Widmar* and *Mergens* presupposed the existence of designated forums set aside for personal student speech, apart from instructional activities.<sup>30</sup> When applied in that context, the equality principle is the appropriate constitutional norm. However, equality is the wrong touchstone for student religious speech within many other public school arenas. There has been an unnecessary, and legally confusing, expansion of equality principles into contexts where the inclusion of religious speech is neither pedagogically preferable nor constitutionally supportable. The EAA’s underlying theory of treating student religious speech on an equal basis with similar, nonreligious speech has increasingly been applied in areas that contain a hybrid of official school and personal expression, or involve curriculum and school-sponsored functions.<sup>31</sup> This development has led to an

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<sup>27</sup> See *Morse v. Frederick*, 127 S. Ct. 2618, 2625 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

<sup>28</sup> See *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 202-03 (3d Cir. 2000) (en banc); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406-09 (5th Cir. 1995); *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155-56 (6th Cir. 1995).

<sup>29</sup> See TEX. EDUC. CODE ANN. §§ 25.151-.156 (Vernon 2007).

<sup>30</sup> I use the word “personal” rather than “private” as the latter word connotes expression not made in public arenas. “Personal” here means expression fully attributable to the student(s).

<sup>31</sup> The most significant misapplication of equality principles came in the Supreme Court’s 2001 *Good News Club* case, though it has also occurred in a handful of lower

inconsistent application of the leading curriculum decision — *Hazelwood School District v. Kuhlmeier*<sup>32</sup> — within the context of student religious expression. Lower courts have pulled *Hazelwood* “in so many directions that its underlying standard has lost coherence.”<sup>33</sup> Moreover, this forced extension of evenhandedness has come at the expense of important countervailing values, such as non-coercion of student religious beliefs and the preferences of parents regarding the exposure of their children to possibly conflicting religious influences.<sup>34</sup> At the same time, this cant of evenhandedness ignores the fact that religious perspectives may be qualitatively different from their secular counterparts.<sup>35</sup>

This Article will re-familiarize readers with the history and concerns that informed school prayer jurisprudence before equality became the dominant norm.<sup>36</sup> It will then explain the appropriate context for applying equality principles for student religious speech in the school environment.<sup>37</sup> In the rush to ensure that students — in candor, those with an evangelical perspective — have the same opportunity to express themselves religiously as they or their counterparts do non-religiously, we have lost sight of the countervailing values that dictated school prayer jurisprudence for years. There has been an overextension of equality principles, and it is due for a course correction. Finally, this Article will critique Supreme Court and lower court holdings and the new Texas law that have misapplied equality principles in hybrid or school-sponsored contexts involving student religious expression.<sup>38</sup> In particular, it will assert that the correct reading of *Hazelwood* permits schools to engage in viewpoint preferences regarding curriculum-related activities and in many

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court cases that purport to follow the principles enunciated in *Widmar*, *Mergens*, and *Good News*. See *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 626, 630-31 (2d Cir. 2005); *Chandler v. Siegelman*, 230 F.3d 1313, 1316-17 (11th Cir. 2000); *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1077-78 (11th Cir. 2000); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 968-69 (5th Cir. 1992).

<sup>32</sup> *Hazelwood*, 484 U.S. 260.

<sup>33</sup> Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 65 (2008).

<sup>34</sup> See *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *infra* Part I.

<sup>35</sup> See, e.g., Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 121-23 (2002) (discussing how religious activity may take on both expressive and non-expressive qualities that may be unique to religion).

<sup>36</sup> For simplicity purposes, this Article will use the phrase “school prayer” to designate the larger category of school-sponsored religious expression.

<sup>37</sup> See *infra* Part III.

<sup>38</sup> See TEX. EDUC. CODE ANN. §§ 25.151-.156 (Vernon 2007); *infra* Part IV.



school-sponsored events. Thus, equal treatment of student religious expression in many school contexts is not warranted.

#### I. THE “SCHOOL PRAYER” BACKGROUND

In today’s post-modernist secular culture, one that allegedly promotes a “culture of disbelief,”<sup>39</sup> it is easy to forget that religion historically permeated American public education. In the nineteenth century, the religious complexion of public schooling was stark and unmistakable. Depending on the decade and location, public school officials instructed students in religious doctrines while they conducted “nonsectarian” (i.e., Protestant) worship activities.<sup>40</sup> One of the nation’s first public schools, the New York Free School Society (“Society”) founded in 1805, declared in its inaugural announcement that one of its “primary object[s], without observing the peculiar forms of any religious society, [would be] to inculcate the sublime truths of religion and morality contained in the Holy Scriptures.”<sup>41</sup> Teachers led students in prayers, hymns, and readings and recitations from the Protestant King James Bible. They also engaged students in Calvinist-oriented catechisms and taught moral values from that religiously dominant Protestant perspective. The Society described its curriculum as teaching only “the fundamental principles of the Christian religion, free from all sectarian bias, and also those general and special articles of the moral code, upon which the good order and welfare of society are based.”<sup>42</sup> Still, although eschewing instruction in the particular tenets and beliefs of any denomination, the Society proudly declared the Christian character of its schools. “Special care must be taken to avoid any instruction of a sectarian character,” a Society announcement declared. “[B]ut the teachers shall embrace every favorable opportunity of inculcating the general truths of Christianity, and the primary importance of practical religious and moral duty, as founded on the precepts of the Holy Scriptures.”<sup>43</sup> The Society generally required children of other faiths to participate in the

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<sup>39</sup> See generally STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (Basic Books 1993).

<sup>40</sup> See generally Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65 (2002) (arguing that nonsectarianism arose as alternative to more sectarian Protestant religious exercises in public schools, although it remained distinctly Protestant in character).

<sup>41</sup> WILLIAM OLAND BOURNE, *HISTORY OF THE PUBLIC SCHOOL SOCIETY OF THE CITY OF NEW YORK* 6-7, 636-44 (William Wood & Co. 1870).

<sup>42</sup> *Id.* at 38, 641.

<sup>43</sup> *Id.* at 641.

exercises. If the children refused to do so, the Society either punished them or, at best, excused them from direct participation.<sup>44</sup>

The religious character of the Society's curriculum represented the norm in public education throughout much of the antebellum era.<sup>45</sup> In the first half of the nineteenth century, few educators questioned the importance of religiously based moral training in public education. The only point of departure was how closely that instruction should be tied to the tenets of evangelical Protestantism.<sup>46</sup> Criticism of nonsectarianism arose in the 1830s from the increasing number of Catholic immigrants who viewed the instruction (and the overall school environment) as hostile to their faith.<sup>47</sup> Educators and Protestant leaders responded generally to their complaints with resistance, hostility, and even violence.<sup>48</sup> Catholic schoolchildren were often ridiculed for their faith and sometimes beaten into submission.<sup>49</sup>

Beginning in the 1840s, under the leadership of reformers such as Horace Mann, the Secretary of the Massachusetts Board of Education (1836-1848), public schools began to drop the more doctrinal and devotional aspects of nonsectarian schooling. In their place, schools instituted a system of generic religious instruction that emphasized universal religious principles.<sup>50</sup> Mann's non-doctrinal form of

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<sup>44</sup> See *id.* at 636-44; DIANE RAVITCH, *THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973*, at 17-19 (Basic Books 1974).

<sup>45</sup> See generally WILLIAM KAILER DUNN, *WHAT HAPPENED TO RELIGIOUS EDUCATION? THE DECLINE OF RELIGIOUS TEACHING IN THE PUBLIC ELEMENTARY SCHOOL, 1776-1861* (Johns Hopkins Univ. Press 1958) (documenting prominence of Protestant oriented education in early nineteenth century and its gradual decline in response to nonsectarianism).

<sup>46</sup> See generally LLOYD P. JORGENSEN, *THE STATE AND THE NONPUBLIC SCHOOL, 1825-1925* (1987) (arguing that Protestant leaders of Common School Movement aggressively sought to impose their religious values on public school education); CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860* (1983) (explaining success of common-school reformers was based on backings by majority of leaders from Protestant community); Timothy L. Smith, *Protestant Schooling and American Nationality, 1800-1850*, 53 *J. AM. HIST.* 679 (1967) (explaining how synthesis of religious teachings in American public education forged interdenominational spirit that was distinctly Protestant while alienating other faiths).

<sup>47</sup> See Vincent P. Lannie, *Alienation in America: The Immigrant Catholic and Public Education in Pre-Civil War America*, 32 *REV. POL.* 503, 508-09 (1970).

<sup>48</sup> See sources cited *supra* note 46.

<sup>49</sup> See *Donahoe v. Richards*, 38 *Me.* 379, 1854 *WL* 1994, at \*9 (1854); *Commonwealth v. Cooke*, 7 *Am. Law Reg.* 417, 418-20, 422 (Mass. Police Ct. 1859).

<sup>50</sup> See Feldman, *supra* note 40, at 66 (“[O]ver the course of the nineteenth century, most Americans came to believe that the great purpose of separating church and state was to accommodate religious heterogeneity by keeping government in a posture that came to be called ‘non-sectarian.’ Non-sectarianism, it was thought,

nonsectarianism came to dominate the religious instruction in public schooling for the remainder of the century.<sup>51</sup> Yet, it still utilized readings from the King James Bible and, sometimes, generic prayers. Catholics and Jews complained that the generic instruction was still Protestant-based and infringed on their children's rights of conscience. School officials, when sensitive to the complaints, assumed they had resolved the conflict by excusing dissenting students from the exercises or allowing them to read from their own religious texts. Even with such accommodations, however, dissenting children were not relieved of exposure to the assimilating and acculturating pressures that pronounced generic Protestantism as the source of normative (and republican) values and virtues.<sup>52</sup>

Over time, the religious practices became more rote, with many schools conducting Bible reading without "note or comment," while others discontinued Bible reading entirely.<sup>53</sup> This development elicited criticism from a different quarter. Conservative Protestants, who had put aside their doctrinal differences to support nonsectarian instruction, charged that public schools were rejecting the most important source of moral values and adopting a "religion of secularism" that evinced hostility toward religion.<sup>54</sup> Compounding Protestants' woes, a handful of state courts in the late nineteenth and early twentieth centuries struck down the rote religious exercises as infringing on the conscience rights of religious minorities.<sup>55</sup> In one important case, Ohio Judge Alphonso Taft, father of the future

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would keep the state out of bitter inter-denominational disputes, enable the flourishing of diverse voluntary, private churches, and simultaneously enable the state to take a stance in favor of broadly shared, foundational Christian values.").

<sup>51</sup> See generally DUNN, *supra* note 45 (finding that by Civil War, elementary public schools continued ethical instruction, but almost entirely abandoned Christian doctrinal teachings); NEIL GERARD MCCLUSKY, *PUBLIC SCHOOLS AND MORAL EDUCATION* 11-98 (Columbia Univ. Press 1958) (arguing Mann developed a system of teaching universal moral values to serve heterogeneous religious population).

<sup>52</sup> See sources cited *supra* note 46.

<sup>53</sup> See R. Laurence Moore, *Bible Reading and Nonsectarian Schooling: The Failure of Religious Instruction in Nineteenth-Century Public Education*, 86 J. AM. HIST. 1581, 1589-90 (2000).

<sup>54</sup> In 1844, the *Christian Witness and Church Advocate* attacked Mann and his system of nonsectarian education. Two years later in a series of speeches and letters, orthodox Congregational minister Matthew Hale Smith attacked the Massachusetts schools as "Godless." See READINGS IN PUBLIC EDUCATION IN THE UNITED STATES 202-10 (Ellwood P. Cubberly ed., 1934).

<sup>55</sup> See *People ex rel. Ring v. Bd. of Educ.*, 92 N.E. 251, 254-55 (Ill. 1910); *Bd. of Educ. v. Minor*, 23 Ohio St. 211, 231-32 (1873); *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8*, 44 N.W. 967, 976 (Wis. 1890).

President and Supreme Court Chief Justice, wrote that Bible reading was “an act of worship, and a lesson of religious instruction . . . a symbol of Protestant supremacy in the schools, and as such offensive to Catholics and to Jews.”<sup>56</sup> Despite this early association of school-sponsored religion with notions of religious favoritism and coercion, a majority of the nation’s school districts maintained policies or informal practices allowing for majoritarian religious exercises up until the 1962 and 1963 prayer and Bible reading decisions.<sup>57</sup>

In striking down the school-directed prayers and Bible readings, the Court in these cases took note of the long and sordid history of majoritarian religious exercises in public schools, identifying several attendant concerns. Initially, the Court decried the assumption that the state has the authority “to control, support, or influence the kinds of prayer the American people can say.”<sup>58</sup> The government was “without power to prescribe by law any particular form of prayer,” Justice Black wrote in *Engel v. Vitale*, so it “should stay out of the business of writing or sanctioning official prayers.”<sup>59</sup> The Court frequently repeated this theme, that the state lacks authority over religious matters, in subsequent decisions.<sup>60</sup> In a similar vein, the Court explained that a state compromises the Establishment Clause when it indicates its approval of faith or the importance of religious devotion. This appearance of approval produces two distinct effects, the Court held. First, it tends to “degrade religion” by involving the profane in matters of the sacred.<sup>61</sup> Second, it marginalizes those hearers who do not belong to the approved faith.<sup>62</sup> More recent decisions have used the term “endorsement” of religion. In *Santa Fe Independent School District v. Doe*, the Supreme Court stated that “[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are

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<sup>56</sup> THE BIBLE IN THE PUBLIC SCHOOLS: ARGUMENTS IN THE CASE OF *JOHN D. MINOR, ET AL. VERSUS THE BOARD OF EDUCATION OF THE CITY OF CINCINNATI, ET AL.* 406-08 (Robert G. McCloskey ed., 1964).

<sup>57</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962).

<sup>58</sup> *Engel*, 370 U.S. at 429.

<sup>59</sup> *Id.* at 430, 435.

<sup>60</sup> *Lee v. Weisman*, 505 U.S. 577, 589 (1992); *Wallace v. Jaffree*, 472 U.S. 38, 53-55 (1985); *Schempp*, 374 U.S. at 222.

<sup>61</sup> *Engel*, 370 U.S. at 431-32.

<sup>62</sup> *See id.* at 431.

insiders, favored members of the political community.”<sup>63</sup> The Court found that the power of religious endorsements is particularly heightened within the confined context of a public school where the state exerts “great authority and coercive power [over students] through mandatory attendance requirements and because of the students’ emulation of teachers as role models.”<sup>64</sup> For the Court, the non-endorsement value has stood independent of any express evidence of a deleterious effect. The impression of government endorsement or sponsorship of religion, causing feelings of religious inferiority or alienation, is a sufficient constitutional concern even in the absence of coercion of religious belief.<sup>65</sup>

Feelings of alienation or disfavored status are apt to produce religious divisiveness, another concern the Court has identified with religious expression in public schools.<sup>66</sup> The actual or perceived alignment of schools with any religious ideology may breed resentment and conflict within religiously pluralistic communities.<sup>67</sup> Our own history has demonstrated that “whenever government had allied itself with one particular form of religion, the inevitable result [was] that it had incurred the hatred, disrespect[,] and even contempt of those who held contrary beliefs.”<sup>68</sup> On one hand, it is unlikely that we will again experience the degree of conflict in the 1844 Philadelphia “Bible War” where Protestant and Catholic battles over Bible reading resulted in riots and shooting deaths;<sup>69</sup> on the other hand, modern conflicts over religion in public schools have engendered significant community conflict.<sup>70</sup> While some Justices have recently depreciated the importance of avoiding religious dissension, the effects of religious

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<sup>63</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quoting *Lynch v. Donnelly*, 65 U.S. 668, 688 (1984) (O’Connor, J., concurring)); see also *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); *Wallace*, 472 U.S. at 56.

<sup>64</sup> *Edwards*, 482 U.S. at 584.

<sup>65</sup> *Engel*, 370 U.S. at 430 (“The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operated directly to coerce nonobserving individuals or not.”).

<sup>66</sup> *Id.* at 429; *Santa Fe*, 530 U.S. at 311; *Lee v. Weisman*, 505 U.S. 577, 588 (1992).

<sup>67</sup> *Lee*, 505 U.S. at 588 (“[A] prayer which uses ideas or images identified with a particular religion may foster . . . sectarian rivalry . . .”).

<sup>68</sup> *Engel*, 370 U.S. at 431.

<sup>69</sup> See RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860, A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* 142-65, 220-37 (1938).

<sup>70</sup> See FRANK S. RAVITCH, *SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS* 8-16 (1999).

tribalism was a leading concern during the founding period and is a recurring problem in our present world.<sup>71</sup>

Finally, the Court has expressed concern over the potentially coercive effect of religious expression in public schools.<sup>72</sup> Few would question that the state's direction of religious expression within the school context can result in coercion of faith. Although prevention of compulsion or coercion of belief is at the historical core of the Establishment Clause, the Court has consistently held that evidence of direct coercion within the school environment is not essential.<sup>73</sup> Justice Scalia's doubts aside,<sup>74</sup> most people recognize that even subtle and indirect pressures within public schools can coerce students' religious beliefs. Adolescents and teenagers are impressionable, desiring to conform to popular norms and prevailing trends.<sup>75</sup> Even in the absence of actual direction by school officials, the regimen of the school environment restricts student freedoms, imposing pressures toward conformity. Thus, "[w]hat to most believers may seem nothing more than a reasonable request that [a] nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."<sup>76</sup>

Throughout the modern era, the Court has reaffirmed these principles and concerns, although less frequently over time. They remain relevant and important, despite the rise of evenhanded treatment as the favored norm within the Establishment Clause. These concerns are also not diminished, in the eyes of the Court, merely because students, rather than teachers, school officials, or authority figures, engage in the religious activity. *School District of Abington Township v. Schempp*, the prototypical school prayer case, involved religious exercises led by both teachers and students.<sup>77</sup> In

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<sup>71</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002); *Mitchell v. Helms*, 530 U.S. 793, 825 (2000); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 361 (1996).

<sup>72</sup> *Lee*, 505 U.S. at 592; *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

<sup>73</sup> *Lee*, 505 U.S. at 595; *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224-25 (1963); *Engel*, 370 U.S. at 430.

<sup>74</sup> *Lee*, 505 U.S. at 642.

<sup>75</sup> See *McCullum v. Bd. of Educ.*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) ("The law of imitation operates, and non-conformity is not an outstanding characteristic of children."); see also *Lee*, 505 U.S. at 593; *Schempp*, 374 U.S. at 290-92 (Brennan, J., concurring).

<sup>76</sup> *Lee*, 505 U.S. at 592.

<sup>77</sup> *Schempp*, 374 U.S. at 208; see also *Chamberlain v. Pub. Instruction Bd.*, 377 U.S. 402, 402 (1964); *Karen B. v. Treen*, 653 F.2d 897, 899 (5th Cir. Unit A 1981), *aff'd*,

*Lee v. Weisman*, the Court reaffirmed that the pressure of conformity is as great, if not greater, when exerted by a child's peers.<sup>78</sup> Teenagers and adolescents are keenly aware of social hierarchies and the power of cliques and, as Justice Frankfurter once noted, "nonconformity is not an outstanding characteristic of children."<sup>79</sup> Student appropriation of a school's machinery to exact religious conformity can be as compelling as any official pressure or endorsement.<sup>80</sup>

The long and disreputable practice of majoritarian religion in the public schools did not end with the *Schempp* decision in 1963. Following the initial school prayer decisions, school-sponsored or encouraged religion continued in many parts of the nation, sometimes as a matter of course and other times as part of a pattern of "massive resistance."<sup>81</sup> For example, readings from the King James Bible and devotional prayers were part of my educational experience in the Fort Worth, Texas, public schools in the mid-1970s. These practices took place even though my high school was predominately Latino (and thus heavily Catholic) and had a sizable number of students of Greek descent who attended the nearby Orthodox Cathedral. Despite this cultural and religious diversity, majoritarian religious exercises according to the dominant Texas Southern Baptist tradition (the faith of the principal) took place over the public address system every day.<sup>82</sup>

This is not all ancient history.<sup>83</sup> Up through the recent millennium, school-sponsored or condoned religious activities have continued in

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455 U.S. 913 (1982).

<sup>78</sup> *Lee*, 505 U.S. at 593 ("[A]dolescents are often susceptible to pressure from their peers towards conformity, and that . . . influence is strongest in matters of social convention."); *accord* *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000).

<sup>79</sup> *McCullum*, 333 U.S. at 227.

<sup>80</sup> *Lee*, 505 U.S. at 592-93.

<sup>81</sup> See *Prayer at Public School Graduation: A Survey*, 75 PHI DELTA KAPPAN 125, (1993). See generally Robert E. Riggs, *Government Sponsored Prayer in the Classroom*, 18 DIALOGUE 43 (1985) (documenting ongoing practice of school prayer despite Court decisions).

<sup>82</sup> One day when I was assigned to do the announcements and religious readings (and the principal was carelessly in another room), I read from a secreted copy of the Bhagavad-Gita (a Hindu sacred text), the prank landing me in detention hall. My defense that the Bible reading was unconstitutional fell on deaf ears; the readings from the King James Bible continued, for how long I do not know.

<sup>83</sup> As legal director of Americans United for Separation of Church and State from 1992 to 2001, I received one or two complaints every month about officially sponsored or condoned religious activities in public schools. By and large, these complaints came from children of minority faiths who felt compelled to participate in the activities or were ostracized or harassed for their refusal to participate in the activities based on their faith or lack of faith.

many parts of the nation, more recently under the aegis of student-led or initiated religious activity.<sup>84</sup> Many of these student-led activities have taken place in classrooms, at sporting events, at school assemblies, during music performances, and over the school public address systems.<sup>85</sup> However, at least through the early 1990s, arguments that school officials were simply accommodating the student-led religious expression did not stop courts from finding the existence of coercion or religious favoritism.<sup>86</sup>

Did the early school prayer decisions and their progeny result in a “religion of secularism,” evincing a “hostility to religion” and “preferring those who believe in no religion over those who do believe?”<sup>87</sup> To be sure, some school officials overreacted to the early decisions, excising not only school-sponsored religious activities but also many benign references to religion. Many school-board attorneys failed to read (or follow) those portions of the Court’s decisions reaffirming that schools could teach about religion without transgressing constitutional boundaries.<sup>88</sup> And, undoubtedly, in a handful of cases, overzealous and ill-informed administrators and teachers inappropriately denied opportunities for personal student religious expression or sanctioned students for merely expressing personal religious views. But the reports of wholesale school oppression of evangelical students were apocryphal. A pervasive climate of hostility toward religion or student religious expression has never existed in most of our public schools. The crucible of case law reveals that the contrary situation has been the prevailing rule.<sup>89</sup> The concerns that informed the early school prayer holdings had not vanished when the theory of equal treatment emerged onto the constitutional scene.

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<sup>84</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 295-96 (2000); *Adler v. Ducal County Sch. Bd.*, 250 F.3d 1330, 1333 (11th Cir. 2001); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406-07 (5th Cir. 1995); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 969 (5th Cir. 1992); *Hall v. Bd. of Sch. Comm’rs*, 656 F.2d 999, 1000 (5th Cir. Unit B Sept. 1981); *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 904 (N.D. Miss. 1995).

<sup>85</sup> See JOAN DELFATTORE, *THE FOURTH R: CONFLICTS OVER RELIGION IN AMERICA’S PUBLIC SCHOOLS* 238, 254, 269, 275, 278 (2004); Coyle, *supra* note 17, at 62-66.

<sup>86</sup> See *Duncanville Indep. Sch. Dist.*, 70 F.3d at 406.

<sup>87</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).

<sup>88</sup> *Id.* at 225; *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987); *Stone v. Graham*, 449 U.S. 39, 42 (1980).

<sup>89</sup> See ROBERT S. ALLEY, *WITHOUT A PRAYER: RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS* 103-27 (Prometheus Books 1996); DELFATTORE, *supra* note 85, at 229-314; RAVITCH, *supra* note 70, at 44-73.



## II. THE EMERGENCE OF EQUAL TREATMENT

There are many reasons for the realignment of presumptions about student religious expression in public schools. First, beginning in the late 1970s, religious conservatives, dismayed with the Court's abortion and school prayer decisions, became more outspoken on social and moral issues, urging fellow evangelicals to become politically active.<sup>90</sup> This call for political activism grew into the modern "Religious Right" or "Christian Right," which soon aligned itself with the policies and stances of the Republican Party.<sup>91</sup> Crucial to this rise was the adoption of a rhetoric of dispossession and disinheritance by conservative religious leaders. Reviving a refrain common among Protestant fundamentalists during the early twentieth century, Christian Right leaders argued that mainstream culture and the cultural elite were hostile to religious faith. Relying on biblical typologies of the Children of Israel in captivity in Egypt or Babylon, these leaders depicted evangelicals as the new dispossessed and disinherited class, discriminated against on account of their faith by the prevailing culture, its institutions (e.g., the public schools), and the law.<sup>92</sup> Jerry Falwell, Baptist preacher and founder of the Moral Majority, declared in 1993:

Modern U.S. Supreme Courts have raped the Constitution and raped the Christian faith and raped the churches by misinterpreting what the founders had in mind in the First Amendment of the Constitution. . . . [W]e must fight against those radical minorities who are trying to remove God from our textbooks, Christ from our nation. We must never allow our children to forget that this is a Christian nation. We must take back what is rightfully ours.<sup>93</sup>

Beverly LaHaye, founder and president of Concerned Women of America, made similar claims that the secular culture discriminated against Christians:

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<sup>90</sup> See GLEN H. UTTER AND JOHN W. STOREY, *THE RELIGIOUS RIGHT: A REFERENCE HANDBOOK* 1-30 (ABC-CLIO Pub. 2001).

<sup>91</sup> See DAVID CANTOR, *THE RELIGIOUS RIGHT: THE ASSAULT ON TOLERANCE & PLURALISM IN AMERICA* 57-65 (1994); SARA DIAMOND, *ROADS TO DOMINION: RIGHT-WING MOVEMENTS AND POLITICAL POWER IN THE UNITED STATES* 161-77 (Guilford Press 1995).

<sup>92</sup> See ROBERT MAPES ANDERSON, *VISION OF THE DISINHERITED: THE MAKING OF AMERICAN PENTECOSTALISM* 195-222 (1979); GEORGE M. MARSDEN, *FUNDAMENTALISM AND AMERICAN CULTURE* 184-205 (1980).

<sup>93</sup> Reverend Jerry Falwell, Sermon (Mar. 1993), *reprinted in* CANTOR, *supra* note 91, at 4.

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[T]oday instead of protecting our right to freely exercise our religious faith in public places, publicly honoring our God and Creator as our forefathers did, we are forbidden to speak, to pray aloud, to read the Bible, to even teach Judeo-Christian values in our public schools and other public places because of an imaginary ‘wall of separation’ conjured by non-believers.<sup>94</sup>

As Falwell’s and LaHaye’s statements indicate, claims of discrimination and dispossession often focused on the prohibition of school-sponsored religion in the public schools. In a symposium at the College of William and Mary Law School in 1995, televangelist Pat Robertson asserted that “ignorant or malicious public school teachers and administrators [had] put into effect the religious cleansing in the schools that they believe[d] [had] been mandated by the courts.”<sup>95</sup> Robertson continued:

I will not enumerate the many Court cases from 1962 which did violence to our history or to the clear understanding of the [Establishment Clause]. I protest with all my being the judicial distortions which have forbidden little children to pray or read the Bible in school; which have taken the Ten Commandments from classroom walls; which have denied a Christian teacher the right to have a Bible on his desk; which have implied that religion is a dangerous infection which must be confined, if possible, within the walls of a church.<sup>96</sup>

These arguments of discrimination and dispossession set up an interesting juxtaposition of claims. On one level, conservative Christians were the majority — at least their values represented the prevailing national ethos — and the rightful heirs to the culture. At the same time, however, the secular minority, who also represented the elite, had hijacked the culture and displaced Christians and their values. Despite being the moral *majority*, conservative Christians were now the discriminated class, oppressed by a secular culture that despised their religion. Pat Robertson stated the claim provocatively: “Just like what Nazi Germany did to the Jews, so liberal America is now doing to the evangelical Christians. It is no different . . . . Wholesale abuse and discrimination and the worst bigotry directed

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<sup>94</sup> Fundraising Letter from Beverly LaHaye, founder and president, Concerned Women of Am. (1988), reprinted in CANTOR, *supra* note 91, at 5.

<sup>95</sup> M.G. “Pat” Robertson, *Religion in the Classroom*, 4 WM. & MARY BILL RTS. J. 595, 604 (1995).

<sup>96</sup> *Id.* at 602.

toward any group in America today. More terrible than anything suffered by any minority in our history.”<sup>97</sup> While one must allow for political hyperbole, it is difficult to equate the prayer and Bible reading decisions with the Holocaust. Nonetheless, such rhetoric created a widespread perception among conservative Christians that the Court’s decisions were anti-religious and discriminated against students wishing to express their faith.

Rather than urging evangelicals to separate themselves from the hostile culture as their forebears had done, Christian Right leaders urged confrontation with the culture and its institutions. In addition to advocating political organizing (including electing conservative Christians to school boards),<sup>98</sup> Christian Right leaders supported legal action by creating Christian lawyer organizations modeled after the secular ACLU: the National Legal Foundation, Rutherford Institute, American Center for Law and Justice, Liberty Counsel, Christian Legal Society, and Alliance Defense Fund.<sup>99</sup> Their lawyers, such as John Whitehead, Jay Sekulow, and Matt Staver, all educated in the Post-Civil Rights Era, took lessons from that movement and applied similar rights talk to support claims of religious discrimination in the schools. Free speech and equal protection claims became the primary legal wedge, rather than claims based on the Free Exercise Clause.<sup>100</sup> More recently, conservative Catholic legal groups, such as the Becket Fund and the Thomas Moore Society, have joined the efforts of the Christian Right to end the purported religious discrimination in the public schools.<sup>101</sup>

With this movement in place, four interrelated developments, arising out of five important cases, helped shift the popular and legal rhetoric of school prayer issues, leading to the presumption favoring evenhanded treatment of student religious speech in public schools. The first development occurred in *Widmar* (1981), where the Court applied the

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<sup>97</sup> CANTOR, *supra* note 91, at 4.

<sup>98</sup> RAVITCH, *supra* note 70, at 29-30.

<sup>99</sup> CANTOR, *supra* note 91, at 47-50.

<sup>100</sup> This is not to suggest that the new legal theories the Christian right groups embraced were insincere or legally insupportable. During the 1980s and 1990s, similar equal treatment arguments based on equal protection and free speech principles were being advanced by respected moderate and conservative scholars. See Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 3 (1986); Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146 (1986); Carl H. Esbeck, *A Constitutional Case for Government Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 341, 373 (1999).

<sup>101</sup> CANTOR, *supra* note 91, at 47-50; RAVITCH, *supra* note 70, *passim*.

still-evolving public forum doctrine to rule that a state university could not exclude a student religious club from meeting in campus facilities that were open to non-religious student groups.<sup>102</sup> The free expression aspect of the First Amendment required that the university provide equal treatment of (and equal access for) student religious speech because of the university-created open forum.<sup>103</sup> Moreover, the Court held, the open nature of the forum provided only incidental benefits for religion, thus negating the university's Establishment Clause concerns.<sup>104</sup> Crucial for the later development of equal treatment notions, the Court decided *Widmar* on free speech grounds rather than on free exercise grounds, a point that was not lost on conservative religious activists.<sup>105</sup> The Court found the exclusion of religious speech to be impermissible content-based discrimination.<sup>106</sup>

*Widmar's* holding coincided with two highly publicized appellate decisions where federal courts prohibited student religious clubs from meeting in public schools: *Brandon v. Board of Education* and *Lubbock Civil Liberties Union v. Lubbock Independent School District*.<sup>107</sup> Even though neither school had a prior practice of permitting non-curricular student clubs of any type, and with the lower court in *Lubbock* finding that the student Bible club was a façade for continuing earlier school-directed devotional activity,<sup>108</sup> both decisions became grist for the mill of those charging that public schools discriminated against student religious expression.<sup>109</sup> Politicians also responded. President Ronald Reagan proposed a constitutional amendment to allow school prayer, while moderate senators, led by Oregon's Mark

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<sup>102</sup> *Widmar v. Vincent*, 454 U.S. 263, 270-77 (1981).

<sup>103</sup> *Id.* at 269-70 (finding "discriminatory exclusion from a public forum based on the religious content of a group's intended speech").

<sup>104</sup> *Id.* "[T]he forum is available to a broad class of nonreligious as well as religious speakers; there are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Id.* at 277. The Court never explained why a benefit becomes incidental once it is shared by a broad class of recipients, particularly if the value of the benefit is unaffected by the size of the class.

<sup>105</sup> *Id.* at 273 n.13. Five years earlier, the Delaware Supreme Court made a similar ruling, though holding the exclusion of the student religious group violated the Establishment and Free Exercise clauses. *Keegan v. Univ. of Del.*, 349 A.2d 14, 16, 18-19 (Del. 1975).

<sup>106</sup> *Widmar*, 454 U.S. at 277.

<sup>107</sup> *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1039, 1041-42 (5th Cir. 1982); *Brandon v. Bd. of Educ.*, 635 F.2d 971, 973 (2d Cir. 1980).

<sup>108</sup> *Lubbock*, 669 F.2d at 1045; *Brandon*, 635 F.2d at 978-79.

<sup>109</sup> See John W. Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools*, 16 PEPP. L. REV. 229, 241-42 (1989).

Hatfield, advocated a law requiring equal access for student religious speech.<sup>110</sup> Congressional testimony on this law, the EAA, was highly charged and relatively one-sided in favor of granting access for religious expression.<sup>111</sup> Charges of massive discrimination against student religious speech went largely unchallenged.<sup>112</sup> In the end, the Republican Senate and Democratic House compromised by producing a law that guaranteed equal access to all student clubs, religious and otherwise. As applied to many parts of the country, however, the EAA was a solution in search of a problem. Religious expression in many schools was not ridiculed or operated at a second-class status.<sup>113</sup> The presumption underlying the EAA, however, was that school restrictions on student religious expression generally amounted to impermissible discrimination against religion. With the passage of the EAA, the theory of evenhanded treatment of religious expression had received legislative approval.<sup>114</sup>

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<sup>110</sup> See DELFATTORE, *supra* note 85, at 184-98; Ruti Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools*, 12 HASTINGS CONST. L.Q. 529, 537-49 (1985). Initial versions of the law provided protection only for student religious speech. *Id.* at 556-58.

<sup>111</sup> See *Equal Access: A First Amendment Question: Hearing Before the Comm. on the Judiciary*, 98th Cong. 83 (1983) (statement of Sen. Jeremiah A. Denton) (acknowledging witness imbalance in favor of proposed bill). Some charges of religious discrimination did not involve complaints about denials of equal access for student religious clubs but more general complaints about the ban on school-sponsored and organized religious expression in public schools. See *id.* at 5-59, 66-67 (statements of Richard Ocker, Bible reading over public address system; Stuart Kennedy, religious speaker at school assembly; Reverend Philip D. Jett, Christian entertainer at school assembly; Peter Eagan, Christian professional athletes at school assembly). Testimony on behalf of the bill also came from representatives of evangelical groups that have sought to proselytize on public school campuses. See *id.* at 141-52, 168-71 (testimony of Campus Crusade for Christ and the Fellowship of Christian Athletes). Other testimony indicated uneven treatment of student religious groups by school officials. See *id.* at 43-51 (statement of Lisa Bender).

<sup>112</sup> *Id.* at 2 (statement of Jeremiah A. Denton, S. sponsor) (“We cannot, under a constitutional form of government, permit the existence of policies or practices which single out religious students for invidious discrimination which makes them second-class citizens.”).

<sup>113</sup> See RAVITCH, *supra* note 70, at 98-102.

<sup>114</sup> S. REP. NO. 98-357, at 9 (1984), *reprinted in* Education for Economic Security Act, Pub. L. No. 98-377, 1984 U.S.C.A.N. 2348, 2355 (“The concern with school hours is connected with the Court’s concern that the state, through its compulsory attendance laws, is providing a ‘captive audience’ for any such voluntary religious activity. This fear is, of course, groundless in the case of truly voluntary, student-initiated religious activities at any time . . . .”); see also *id.* at 15-21 (employing charged language such as “unwarranted suppression,” “ridicule,” and “the blackout of religious speech and ideas”).

The third important development was the *Mergens* decision upholding the EAA. As mentioned, in *Mergens* the Court sanctioned Congress's application of the access theory from colleges (*Widmar*) to secondary schools.<sup>115</sup> The more significant aspect of the case was the creation of a firm distinction between "private speech" and "government speech" within an otherwise government-controlled environment, a distinction the *Widmar* Court did not make although it all but presumed it.<sup>116</sup> O'Connor's statement in *Mergens* set up a facile, and misleading, dichotomy. First, it implied that a bright line exists between government and private speech in the school context, without recognizing that students commonly speak under varying degrees of constraint while engaging in classroom activities or other school-controlled events. This distinction conflicts with the prayer cases of *Schempp* and *Karen B. v. Treen* where students often were the ones leading the prayers, albeit under the sanction of school officials.<sup>117</sup> The more troubling part of the dichotomy, however, is the implication that the Free Speech Clause, and possibly the Free Exercise Clause, presumptively protect "private" student religious speech within public school environs. The implication is that protected free exercise and expressive rights pick up at the point at which official speech or the Establishment Clause prohibition drop off. This, of course, is a gross overstatement of First Amendment doctrine, and even O'Connor later acknowledged that the Court was not ruling on the students' free exercise and free speech claims.<sup>118</sup>

The fourth and final significant development was the Court's distinction between viewpoint- and content-based classifications in *Lamb's Chapel v. Center Moriches Union Free School District*.<sup>119</sup> There, the Court voided a decision by public school officials to deny a church access to a school facility in the evening to show a religious film. Employing public forum doctrine, the Court found that the school had a policy of allowing community groups, some of which appeared to be religious, to use school properties for "social, civic, and recreational" purposes after school hours.<sup>120</sup> The Court assumed for the sake of

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<sup>115</sup> Bd. of Educ. v. *Mergens*, 496 U.S. 226, 248 (1990).

<sup>116</sup> *Widmar v. Vincent*, 454 U.S. 263, 272 n.10 (1981).

<sup>117</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 207 (1992); *Karen B. v. Treen*, 653 F.2d 897, 899 (5th Cir. Unit A Aug. 1981).

<sup>118</sup> *Mergens*, 496 U.S. at 253.

<sup>119</sup> 508 U.S. 384 (1993).

<sup>120</sup> *Id.* at 391. By so implying, the Court could have overturned the denial on the ground that the school district discriminated based on viewpoint of an otherwise includable subject ("religion"), rather than creating the legally confusing doctrine of

argument that the school had sought to exclude the *category* of religious speech from its nonpublic forum. However, that action did “not answer the critical question whether [the school] [had] discriminate[d] on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.”<sup>121</sup> The Court answered this question by finding that the film series dealt with an “otherwise permissible” subject and “its exhibition was denied solely because the series dealt with the subject from a religious standpoint.”<sup>122</sup> The Court’s holding that religion could represent a perspective as much as a subject of discussion was crucial. But more important was its determination that there could be a religious perspective for a possibly infinite number of non-religious subjects, thereby blurring the distinction between subject matter and viewpoint categories, and hamstringing the ability of governments to make access and use distinctions based on religion or potentially any other subject matter.<sup>123</sup> The Court reaffirmed the viewpoint quality of religious speech two years later in *Rosenberger v. University of Virginia* when it struck down a university funding program that distinguished between secular and religious student-publications.<sup>124</sup>

The Court’s *Lamb’s Chapel* and *Rosenberger* holdings represented a significant shift in the understanding of viewpoint distinctions.<sup>125</sup> Before those holdings, courts evaluated government entities’ attempts to exclude controversial topics such as religion or politics from government-sponsored forums as forms of content-based restrictions.<sup>126</sup> Depending on the character of the forum, public, designated/limited, or non, the content-based exclusion survived or failed.<sup>127</sup> However, the majorities in *Lamb’s Chapel* and *Rosenberger* reevaluated the putative categorical exclusions of religious speech as amounting to government disapproval of controversial *perspectives*

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protecting the viewpoint presentation of an otherwise excludable subject matter.

<sup>121</sup> *Lamb’s Chapel*, 508 U.S. at 393.

<sup>122</sup> *Id.* at 394.

<sup>123</sup> *Id.*

<sup>124</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995). There, the Court found that the University had not excluded religion as a subject eligible for funding but had discriminated against the student publication based on its religious editorial viewpoints.

<sup>125</sup> See Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 102-03 (1996).

<sup>126</sup> *Id.* at 116-22.

<sup>127</sup> See *Lehman v. Shaker Heights*, 418 U.S. 298, 303-04 (1974) (upholding municipality’s refusal to permit political advertising on its buses).

rather than *subjects*.<sup>128</sup> The *Rosenberger* majority rejected the dissenters' argument that the university's policy was viewpoint neutral because it excluded "an entire class of viewpoints" with respect to religion.<sup>129</sup> As Justice Kennedy wrote, the university's (and Justice Souter's) assertion "reflect[ed] an insupportable assumption that all debate is bipolar and antireligious speech is the only response to religious speech. . . . The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways."<sup>130</sup> One can applaud this advance as preventing the government from avoiding controversial ideas by suppressing broad categories of expression. *Lamb's Chapel* and *Rosenberger*, however, have blurred the line between designated/limited and non-public forums, producing confusion about the government's ability to designate its property for the discussion of particular topics.<sup>131</sup>

In addition to muddling understandings of subject and viewpoint categories, the *Widmar-Mergens-Lamb's Chapel-Rosenberger* line of authority has undermined the traditional approach of viewing religion and religious expression as constitutionally "distinctive."<sup>132</sup> To expound on Justice Kennedy's statement from *Rosenberger*, religion has not simply been considered a perspective but also commonly "a comprehensive body of thought."<sup>133</sup> Religious expression and viewpoints are qualitatively different from other forms of expression. Religion is more than another viewpoint about an includable subject; "it is also ritual and practice."<sup>134</sup> Religion involves matters of "ultimate

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<sup>128</sup> *Rosenberger*, 515 U.S. at 830-31; *Lamb's Chapel*, 508 U.S. at 393-94.

<sup>129</sup> *Rosenberger*, 515 U.S. at 831.

<sup>130</sup> *Id.*

<sup>131</sup> See *The Supreme Court, 1994 Term – Leading Cases*, 109 HARV. L. REV. 111, 215 (1995) (maintaining that after *Rosenberger*, bans on "political" speech must be evaluated as viewpoint-based exclusions).

<sup>132</sup> See generally Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1 (2000) (tracing history of religious liberty in United States); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002) (arguing how religious clauses in Constitution guard against totalitarianism); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000) (contending constitutional tradition suppresses special religious protections); Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83 (tracing Supreme Court's historical views of intersection between religion and U.S. Constitution).

<sup>133</sup> *Rosenberger*, 515 U.S. at 831.

<sup>134</sup> William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 400 (1996).



concerns,” of improvable transcendent realities, and “irrational” faith not subject to the empirical methods of deduction common in modern education.<sup>135</sup> According to Professor William Marshall:

Religion addresses the most important questions at the core of human existence — the existential questions of meaning, morality, and the nature of Truth. It provides many with sustaining meaning for life — and an explanation for death. It is a source for community and decency and is an outlet for charity and education.<sup>136</sup>

Moreover, religion can be inspiring and divisive in ways that other belief systems cannot: “[R]eligion is one of the most positive influences in society; on the other [hand], it is a potentially powerfully destructive force fostering divisiveness and persecution.”<sup>137</sup> It is with religious expression that the Court has expressed concerns about “protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”<sup>138</sup> For better or worse, the First Amendment distinguishes religion from other systems of thought by awarding it special protection and assigning it unique disabilities (i.e., no religious establishments). As Professor Laycock has observed:

Religion is unlike other human activities, or at least the founders thought so. The proper relation between religion and government was a subject of great debate in the founding generation, and the constitution includes two clauses that apply to religion and do not apply to anything else. This debate and these clauses presuppose that religion is in some way a special human activity, requiring special rules applicable only to it.<sup>139</sup>

Thus, particularly within the context of public education, the Court has traditionally viewed religious speech as distinctive from other forms of speech.<sup>140</sup> These distinct qualities do not suddenly dissipate

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<sup>135</sup> *United States v. Seeger*, 380 U.S. 163, 187 (1965); *accord McGowen v. Maryland*, 366 U.S. 420, 466 (1961) (Frankfurter, J., separate opinion) (describing religion as “comprehensive area of human conduct” involving “man’s belief or disbelief in the verity of some transcendental idea and man’s expression in action of that belief or disbelief”).

<sup>136</sup> Marshall, *supra* note 134, at 387.

<sup>137</sup> *Id.* at 386-87.

<sup>138</sup> *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

<sup>139</sup> Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 16.

<sup>140</sup> *Lee*, 505 U.S. at 591; *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987); *Stone v. Graham*, 449 U.S. 39, 41-42 (1980); *Engel v. Vitale*, 370 U.S. 421, 425 (1962). In

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when the speech is characterized as private or student-initiated. The equal treatment theorem, though, undervalues these distinctive qualities of religious expression within the school context.

The above doctrinal developments, coming together, established a regime of evenhandedness for student religious speech within the public school context. This new regime pronounced several interrelated rules: (1) student religious expression was considered private and functionally distinct from government-sponsored religious expression; (2) religious expression involving public school students was no longer presumed to be attributable to the state; (3) student religious expression was to be afforded access similar to student nonreligious expression; and (4) a student's religious statement was presumed to represent a valid perspective about an otherwise includable subject rather than a topic from an excluded category of speech. Implicit within this last determination was the notion that a religious perspective was no different from its nonreligious counterparts. Neutrality meant that all perspectives were of equal merit and of equal (in)distinction. Under this framework, a student's assertion that Jesus was the world's greatest revolutionary was no different than a similar claim about Mao Tse-tung. A presentation about the biblical account of creation was no different from one based on scientific paleontological theory. All were merely perspectives.

The Court's 2001 holding in *Good News Club v. Milford Century School* is a good example of the aggregate impact of these developments. On its face, the case, which involved a request by a religious group for "after-hours" access to a school facility, was arguably factually similar to *Lamb's Chapel*.<sup>141</sup> However, while the expressive interest at stake was that of the adult club-sponsors, elementary school students were the intended audience and participants. In addition, the religious activity — religious songs, Bible drills, and memorizations — would take place immediately following the school day.<sup>142</sup> These facts — the time of day and the participation of schoolchildren in the religious activity — distinguished the case from *Lamb's Chapel*.<sup>143</sup> Yet in Justice Thomas's opinion one sees a complete rejection of the early school prayer

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*Employment Division v. Smith*, the Court appeared to dispute this distinctive quality, but that view has met with notable resistance. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990).

<sup>141</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 103 (2001).

<sup>142</sup> *Id.* at 103-04, 137-38.

<sup>143</sup> *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (noting that access there was not during school day nor directed at schoolchildren).

concerns about compulsion and attribution (and the presumption in favor of secularity) and an embrace of the new equal treatment presumption. Thomas viewed the access issue as the same one presented in *Lamb's Chapel*: the school district operated a limited public forum for a variety of community-related groups and purposes and, like the church in *Lamb's Chapel*, the club sought "to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint."<sup>144</sup> Thomas rejected the school's argument that the worship and evangelizing activities were "quintessentially religious" and constituted a unique activity outside the purposes of the policy, retorting that, "it is quixotic to attempt a distinction between religious viewpoints and religious subject matter."<sup>145</sup> The religious expression, despite its proselytizing quality, was merely another viewpoint and entitled to equal treatment.

It is in the Court's discussion of the Establishment Clause issues — issues that lacked factual findings due to the trial court's issuance of a summary judgment — where the embrace of the evenhanded treatment presumption is most evident. Thomas depreciated the Establishment Clause concerns about potential coercive pressure on students to participate in the after-school clubs and about perceptions of endorsement. Because students could not attend the religious club without the permission of their parents, whom Thomas declared to be the relevant audience, "[the students] [could not] be coerced into engaging in the [club's] religious activities."<sup>146</sup> This formalistic response sidestepped concerns about peer pressure that were central to *Lee*, where the parents not only approved of their children's attendance at graduation, but were also likely to be there in person. In spite of their approval and presence, the parents in *Lee* did not serve as a buffer to the religious coercion there.<sup>147</sup> Thomas's opinion also gave no weight to the acknowledged facts that the club's goal was to proselytize schoolchildren and that it desired to meet immediately following the school day, something no other community group did, to take advantage of the compulsory attendance law (the club sponsors actually requested access to classrooms before the end of instruction so as to be immediately operational at the closing bell).<sup>148</sup>

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<sup>144</sup> *Good News Club*, 533 U.S. at 109.

<sup>145</sup> *Id.* at 111 (citing *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 512 (2d Cir. 2000) (Jacobs, J., dissenting)).

<sup>146</sup> *Id.* at 115.

<sup>147</sup> *Lee v. Weisman*, 505 U.S. 577, 595-96 (1992) (mentioning likely presence of parents at graduation).

<sup>148</sup> *Good News Club*, 533 U.S. at 144 (Souter, J., dissenting).

Despite the parallels to the released-time program struck down in *McCullum* where the Court decried using school machinery to proselytize schoolchildren, Thomas relegated that precedent to a dismissive footnote.<sup>149</sup> Thomas's formalism continued when he held that because the school did not officially sponsor the club's religious activity, it would be impossible for students to perceive official endorsement of religion.<sup>150</sup> Here, the majority built on the *Mergens* dualism: because the expression would be private rather than government speech, perceptions of endorsement could not occur, or would be unreasonable if they did.

Having dispatched the early school prayer concerns, Thomas's opinion revealed how conclusively the equal treatment presumption had become established within the public school context. Impressionable students would not perceive school endorsement of religion through the operation of a religious club in classrooms at the conclusion of regular classes; yet, they would perceive school hostility toward religion if the school excluded the club.<sup>151</sup> Thomas did not explain why he felt students lacked powers of perception with respect to the operation of a religious club but suddenly gained those perceptive powers in the absence of the club's never-before operation, a fact of which most students would not be aware.<sup>152</sup> The implications of this statement are troubling, for they suggest a dualistic approach to addressing religious expression within the school context: the mere absence of religion indicates hostility toward religion rather than simply a regime of secularity. Equally troubling, however, was Thomas's statement that it was the potential perceptions of religious hostility by the "public writ large" — the club organizers and their supporters — that mattered and not the schoolchildren's potential perceptions of religious endorsement.<sup>153</sup> Equal treatment of religious expression in the school context now required the balancing of the perceptions of outsiders, however such perceptions were to be ascertained, with those of impressionable schoolchildren.<sup>154</sup> Most

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<sup>149</sup> *Id.* at 117 n.6 (distinguishing *McCullum* on ground there was "no [similar] integration and cooperation between the school district and Club").

<sup>150</sup> *Id.* at 116-17.

<sup>151</sup> *Id.* at 118.

<sup>152</sup> According to the limited record, no community groups had previously used the school facilities immediately following the school day. Thus, the absence of the club during that period would likely have gone unnoticed. *Id.* at 144 (Souter, J., dissenting).

<sup>153</sup> *Id.* at 118.

<sup>154</sup> *Id.* at 119 ("There are countervailing constitutional concerns related to rights of other individuals in the community. In this case, those countervailing concerns are

likely, those who believe firmly in the value of devotional religious expression in the public schools, and possibly ascribe to feelings of cultural dispossession on account of their faith, will always perceive the exclusion of an adult-run religious club to preserve secularity in the schools (or at least a delay until after hours) as hostility toward their religion. Under *Good News*, this (mis)perception received equal if not greater weight than the possible perceptions of schoolchildren. As Justice Kennedy remarked in *Lee* (though he was painfully silent in *Good News*), this shift “turns conventional First Amendment analysis on its head.”<sup>155</sup>

Justice Scalia took the “countervailing constitutional” rights of outsiders one step further in *Good News*, arguing that that right included the ability to proselytize schoolchildren in the school environment, and the right of parents to have their children proselytized at school.<sup>156</sup> For Scalia, religious peer pressure in the public school context, “when it arises from private activities, [is] one of the attendant consequences of a freedom of association that is constitutionally protected.”<sup>157</sup> Again, the Court has turned the law on its head by privileging the associational rights of outsiders and students who wish to proselytize, over the interests of their potential converts. With the *Good News* holding, bolstered by Scalia’s postscript, the Court enshrined evenhanded treatment as the controlling paradigm (and legal presumption) for analyzing the religious expression of students and outsiders, unless they are acting under the clear direction of school officials.

### III. APPROPRIATE AND INAPPROPRIATE APPLICATIONS OF EQUAL TREATMENT THEORY

As discussed, the equal treatment theorem that emerged from *Mergens* involved a particular set of circumstances. Based on the EAA’s structure, the *Mergens* rule presupposed that the religious clubs were: (1) disassociated from the curriculum; (2) held during non-instructional time; (3) organized and led by students with minimal faculty involvement; (4) part of a larger offering of student-led clubs encompassing a variety of noncurricular issues; and (5) not endorsed

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the free speech rights of the Club and its members.”).

<sup>155</sup> *Lee v. Weisman*, 505 U.S. 577, 596 (1992).

<sup>156</sup> *Good News Club*, 533 U.S. at 121 (Scalia, J., concurring) (“[T]he compulsion of ideas — and the private right to exert and receive that compulsion (or to have one’s children receive it) is *protected* by the Free Speech and Free Exercise Clauses . . .”).

<sup>157</sup> *Id.*

by school officials.<sup>158</sup> This structure convinced the Court that school officials did not actually or seemingly sponsor the on-campus religious activity and that they did not advance but simply accommodated religion. Furthermore, student participation in religious activities was voluntary and not coerced. In addition, the EAA's structure ensured that the student religious expression was truly "private" speech (e.g., represented the personal views of the student speakers), not attributable to the state. Understood in this context, the equal treatment theorem applied in *Mergens* was not only consistent with the concerns enunciated in the earlier school prayer cases but also actually reaffirmed those values. The club students were involved in truly voluntary religious expression *sans* state attribution or endorsement. First Amendment values prevailed: truly voluntary expression is the antidote to coerced expression. The problem with the *Mergens* holding was not with the actual decision but, as discussed above, with the new presumptions it created and how courts have applied those presumptions.<sup>159</sup>

The equal treatment theorem has generally worked within the context of equal access student clubs. It allows those students who seek religious fulfillment and affirmation during the school day to obtain it without relying on official sponsorship or endorsement or the coercive machinery of the state.<sup>160</sup> As a result, the number of cases that have litigated various esoteric applications of the EAA has been somewhat surprising, if not counterproductive.<sup>161</sup> These battles have

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<sup>158</sup> See 20 U.S.C. § 4071(c)(3) (1984) (authorizing faculty monitors, provided they do not participate in religious activities).

<sup>159</sup> As such, Justice O'Connor's dichotomy was unnecessary for the decision. Rather than establishing a new presumption, the Court could merely have asserted that religious clubs pursuant to the EAA were consistent with those aspects of *Engel*, *Schempp*, and *Wallace* holding that the Establishment Clause prohibits school-sponsored or coerced religious activity. See *Wallace v. Jaffree*, 472 U.S. 38, 62 (1985) (Powell, J., concurring) (asserting that neutral moment of silence period where students engage in prayer is constitutional); *id.* at 72-73 (O'Connor, J., concurring in judgment).

<sup>160</sup> To be sure, problems still arise with the operation of student religious clubs, in particular where outside clergy and youth pastors are permitted to attend and turn the clubs into springboards for evangelism in the public schools. The structure provided by the EAA does not address student-on-student peer pressure.

<sup>161</sup> E.g., whether religious clubs can meet during a non-instructional club time at lunch or in the middle of the school day; whether religious clubs can make announcements afforded to nonreligious clubs; whether photographs of religious clubs can appear in student yearbooks. See *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 214 (3d Cir. 2003); *Ceniceros v. Bd. of Trs.*, 106 F.3d 878, 879 (9th Cir. 1997); *Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244, 1246 (3d Cir. 1993).

made many applications of the EAA more constitutionally contentious than necessary. More importantly, they have also resulted in the unintended expansion of equal treatment principles by forcing courts to apply equal access principles at the margins of the EAA.<sup>162</sup>

In contrast, the equal treatment theorem has been problematic in contexts involving student expression controlled by school officials and student expression at school-sponsored events that lack the attributes of an open forum. Several fact patterns are familiar: student-led prayer in classrooms or as part of morning announcements;<sup>163</sup> school officials permitting students to lead prayer, or vote on whether to have student-led prayer, at graduation commencements or athletic events;<sup>164</sup> student in-class presentations or teacher-assigned projects with religious themes;<sup>165</sup> and student in-class distributions of religious items.<sup>166</sup>

Federal appellate decisions demonstrate this troubling trend. In the wake of the *Lee* decision striking down clergy-given prayers at a public school graduation ceremony,<sup>167</sup> school prayer advocates convinced sympathetic school boards that the constitutional conflict would be resolved simply by having students lead the prayers at the school-sponsored events.<sup>168</sup> Proceeding on this tenuous distinction, the Fifth<sup>169</sup> and Eleventh Circuit Courts of Appeals<sup>170</sup> upheld policies that allowed students to vote on whether to have prayers at graduation, or to choose a fellow classmate to deliver “an unrestricted message of her choice,” which traditionally had resulted in prayer.<sup>171</sup> The school districts in both cases had a history of school-sponsored prayers, and

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<sup>162</sup> And such unnecessary resistance to the application of the EAA has only reinforced impressions among religious conservatives of religious discrimination by public school officials.

<sup>163</sup> *Chandler v. James*, 985 F. Supp. 1062, 1064-65 (M.D. Ala. 1997); *Herdahl v. Pontotoc County Sch. Bd.*, 933 F. Supp. 582, 586 (N.D. Miss. 1996).

<sup>164</sup> *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1071 (11th Cir. 2000); *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1474 (3d Cir. 1996); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 404 (5th Cir. 1995).

<sup>165</sup> *C.H. v. Oliva*, 195 F.3d 167, 168-69 (3d Cir. 1999); *DeNooyer v. Livonia Pub. Schs.*, 799 F. Supp. 744, 746-47 (E.D. Mich. 1992), *aff'd mem.*, 12 F.3d 211 (6th Cir. 1993).

<sup>166</sup> *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 273-74 (3d Cir. 2003).

<sup>167</sup> *Lee v. Weisman*, 505 U.S. 577, 577 (1992).

<sup>168</sup> See *Coyle*, *supra* note 17, at 63; Letter from ACLJ (Mar. 29, 1996) (on file with author).

<sup>169</sup> *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 970-72 (5th Cir. 1992) (upholding student-led prayers at graduations).

<sup>170</sup> *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1071 (11th Cir. 2000) (upholding student-led prayers at graduations).

<sup>171</sup> *Id.* at 1071, 1073.

neither district surrendered control of its graduation except to permit students to lead prayers. Not only did both decisions adopt the *Mergens* distinction between private student speech and government speech,<sup>172</sup> but they also indicated that students possessed affirmative free speech rights within the closed forums. Thus, both decisions concluded that the exclusion of religious expression at the school-sponsored events would amount to discrimination against religion.<sup>173</sup>

*Chandler v. James*, which arose from Alabama, was the most troubling application of the equal treatment theorem.<sup>174</sup> The DeKalb County public schools had a long history of promoting evangelical Christianity through activities such as administrator-, teacher-, and student-led prayer and Bible reading in the classrooms, over the public address systems, at graduation commencements, and in school-sponsored assemblies.<sup>175</sup> The district court enjoined all of these activities as well as an Alabama statute that authorized “non-sectarian, non-proselytizing, [student-initiated voluntary prayer, invocation and/or benedictions] during compulsory or non-compulsory school-related student assemblies, [sporting events, graduation or commencement exercises] and other school-related student events.”<sup>176</sup> The problem with the injunction, however, was that in addition to prohibiting school officials and their surrogates from engaging in religious activity, it enjoined them from aiding, commanding, or “permitting” students and non-school persons to do the same. District Judge De Ment was clear that the injunction applied only to school-controlled and sponsored events, and he went out of his way to affirm that students could engage in religious activity during non-instructional time, in equal access clubs, and even in assignments where academically appropriate.<sup>177</sup> Nonetheless, on appeal, the Eleventh Circuit seized on the injunction’s prohibition on

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<sup>172</sup> *Id.* at 1078; *Jones*, 977 F.2d at 969.

<sup>173</sup> See *Adler*, 206 F.3d at 1081 (“Even if we were to construe a graduation ceremony as a ‘nonpublic forum,’ Duval County students still would possess free speech rights there. . . . To unnecessarily classify student speakers as government actors could render Duval County students powerless to express religiously-inspired or religiously-influenced opinions at graduation . . . . [resulting] in viewpoint discrimination . . .”).

<sup>174</sup> *Chandler v. Siegelman*, 230 F.3d 1313, 1314 (11th Cir. 2000). By way of disclosure, I served as an attorney for the plaintiffs in *Chandler*.

<sup>175</sup> *Chandler v. James*, 985 F. Supp. 1062, 1065 (M.D. Ala. 1997). The school district also allowed members of Gideons International to distribute Bibles in classrooms and on school busses and to harass those nonreceptive students. *Id.*

<sup>176</sup> *Chandler v. James*, 958 F. Supp. 1550, 1559-60 (M.D. Ala. 1997).

<sup>177</sup> *Id.* at 1063-65.



“permitting” student religious expression in school-sponsored events.<sup>178</sup> Even though there was no evidence that the school district had ever discriminated against student religious expression (the undisputed facts were to the contrary) or had permitted student personal expression, nonreligious or otherwise, in school-controlled events — classroom instruction, morning announcements, or assemblies — the court applied equal treatment principles to throw out the entire injunction. “Permitting students to speak religiously” in instructional settings is the only “way [that] true neutrality is achieved,” the court declared.<sup>179</sup> Extending the *Mergens* syllogism, the court insisted that “[b]ecause genuinely student-initiated religious speech is private speech endorsing religion, it is *fully protected* by both the Free Exercise and the Free Speech Clauses of the Constitution.”<sup>180</sup> The Eleventh Circuit expanded on its holding after a remand following the *Santa Fe* decision:

If “[n]othing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the school day” [citing *Santa Fe*], then *it does not prohibit prayer aloud or in front of others, as in the case of an audience assembled for some other purpose.* [citation omitted] So long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected.<sup>181</sup>

The court directed its broad declarations, which were understandable within the context of an open expressive forum, to situations involving classroom instruction, official announcements, and school-sponsored events such as assemblies and graduation commencements. This meant that student religious perspectives were to be permitted in

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<sup>178</sup> *Chandler v. James*, 180 F.3d 1254, 1257 (11th Cir. 1999) (“The Permanent Injunction, however, also prohibits DeKalb from ‘permitting’ . . . all prayer or other devotional speech in situations which are not purely private, such as aloud in the classroom, over the public address system, or as part of the program at school-related assemblies and sporting events, or at a graduation ceremony.”).

<sup>179</sup> *Id.* at 1261.

<sup>180</sup> *Id.* (emphasis added). The panel decision not only embraced the equal treatment theorem, but also showed its disdain for the prior regime of secularity. Ignoring the limited scope of the injunction, the court engaged in inflamed rhetoric that the order had resulted in the “[c]leansing” of our public schools of all religious expression, resulting in “the ‘establishment’ of disbelief — atheism — as the State’s religion.” *Id.*

<sup>181</sup> *Chandler v. Siegelman*, 230 F.3d 1313, 1316-17 (11th Cir. 2000) (emphasis added).

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instructional and other school-controlled settings regardless of their coercive quality or pedagogical relevance.

The *Jones*, *Adler*, and *Chandler* line of cases demonstrates a fundamental problem with the current application of the equal treatment presumption: the existence of “private” speech shuts down consideration of the context or the openness of the forum. The forums in *Widmar* and *Lamb’s Chapel* were already open for private and non-school related expression; the requests for access did not create the open characteristics of the forum. In addition, the contexts and forums in *Widmar* and *Lamb’s Chapel* did not involve students otherwise under the control and direction of school officials. However, the courts in *Jones*, *Adler*, and *Chandler* did not bother to analyze the independent qualities of the expressive forums or the degree of official control or direction of the expressive events.

The equal treatment theorem has been advanced (and sometimes applied) in nonstudent contexts such as religious advertisements on school athletic fields and religious statements and symbols incorporated into school walkways and walls. One case involving the last issue concerned an infamous and tragic situation: a memorial to honor the victims of the 1999 shooting at Columbine High School.<sup>182</sup> As part of the healing process, the Jefferson County School District invited students and family members of the victims to design commemorative tiles to affix to the school building. A lawsuit arose over the District’s decision to exclude tiles containing religious statements or symbols.<sup>183</sup> An en banc Tenth Circuit Court of Appeals ultimately upheld the exclusion, rejecting the plaintiffs’ equal treatment argument and public forum claims, holding that permanently affixed tiles would represent “school-sponsored” speech.<sup>184</sup> The court found that the tiles were closely connected to the school’s pedagogical goals and that school officials had never relinquished control over the messages contained therein.<sup>185</sup> Other courts considering similar fact patterns have disagreed with the Tenth Circuit’s decision, holding that public schools have created limited expressive forums through the sale of “to-be-inscribed” bricks placed on school walkways, and so must allow inscribed religious

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<sup>182</sup> *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 920 (10th Cir. 2002).

<sup>183</sup> The District also excluded tiles containing names of students, the date of the attack, and any obscene or offensive language. The District rejected between 80 to 90 out of 2,100 tiles. *Id.* at 921-22.

<sup>184</sup> *Id.* at 925.

<sup>185</sup> *Id.* at 931-32.

messages.<sup>186</sup> These conflicting holdings demonstrate the confusion as to the line between government speech and private religious speech when expression takes place as part of school-sponsored or curriculum-related events.

#### IV. GIVING HAZELWOOD ITS DUE

The state of confusion over applying equal treatment principles is perplexing if one steps back from the religious speech context to consider the Court's more general case law regarding student speech on school property or in conjunction with school-related events. At the risk of oversimplification, the trend in the Court's student speech cases has been to narrow the scope of student expressive rights and to expand those contexts in which school officials may restrict student expression or where the expression is attributed to the state.<sup>187</sup> *Tinker v. Des Moines Independent Community School District*, grand in its pronouncements about student expressive rights not ending at the schoolhouse gate, merely begged the question as to what happens once the student gets inside the schoolhouse door.<sup>188</sup> Personal conversations in the hallways are not the same as responses to teacher questions, even if both are equally nondisruptive of school operations. To be sure, Mary Beth Tinker's "armed" protest against the Vietnam War took place in a classroom. However, her expression was unquestionably personal and did not interfere with or involve aspects of instruction or the curriculum.<sup>189</sup> She did not use the school machinery, literally or figuratively, to communicate her message (other than appropriating a captive audience of fellow students). There was also no danger that her expression would be attributed to the state. *Tinker* was thus a simple case that left many issues unresolved.

In later holdings, the Court has afforded school officials greater deference to determine what types of speech are disruptive of or inconsistent with the school environment.<sup>190</sup> Subsequent decisions

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<sup>186</sup> *Kiesinger v. Mex. Acad. & Cent. Sch.*, 427 F. Supp. 2d 182, 185, 190 (N.D.N.Y. 2006); *Demmon v. Loudoun County Pub. Schs.*, 342 F. Supp. 2d 474, 480-82 (E.D. Va. 2004).

<sup>187</sup> See *Morse v. Frederick*, 127 S. Ct. 2618, 2620-21 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260-61 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 675-76 (1986).

<sup>188</sup> 393 U.S. 503, 506 (1969).

<sup>189</sup> *Id.* at 508.

<sup>190</sup> *Bethel*, 478 U.S. at 678 (noting disruptive consequences of Fraser's speech); see also *id.* at 683 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.").

indicate that officials may exclude entire categories of student expression irrespective of their disruptive qualities: lewd, indecent, offensive, vulgar, and sexually explicit speech, as well as expression “promoting illegal drug use.”<sup>191</sup> *Morse v. Frederick* further indicates that the Court will defer to schools’ determination of when an expressive statement fits within one of those prohibited categories.<sup>192</sup> Despite Justice Alito’s assurances that the *Morse* holding was not expanding on those categories, the majority decision did not foreclose the possible exclusion of other expressive topics deemed inconsistent with the school environment.<sup>193</sup> For example, one would assume that defamation and advocacy of illegal activity would also fit within this category subject to prohibition regardless of its disruptive qualities. More significant, even though *Hazelwood*, *Morse*, and *Bethel School District v. Fraser* elaborated on how the expression in those cases was inconsistent with a learning environment and the maturity level of minor children, none of the holdings suggested that schools were required to justify restrictions with respect to expression that occurred under their direction or control. On the contrary, *Fraser* pronounced that “[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”<sup>194</sup> Finally, only *Hazelwood* bothered to explore whether public forum doctrine might apply within the context of a school-sponsored event or activity, finding that it did not with respect to a student-authored newspaper connected to a journalism class.<sup>195</sup> *Morse* indicates that the Court will again defer to school officials, this time in their determination of what is a school-sponsored event.<sup>196</sup>

Based on these holdings, lower courts have constructed multi-part schemas for classifying religious expression occurring in school environments.<sup>197</sup> On one extreme lies the shrinking world of *Tinker*:

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<sup>191</sup> *Id.* at 683; *Morse*, 127 S. Ct. at 2629.

<sup>192</sup> *Morse*, 127 S. Ct. at 2624-25 (acknowledging that message on Frederick’s banner could be interpreted as “nonsense,” “gibberish” or being “cryptic” or “meaningless,” but deferring to principal’s “reasonable” interpretation that it promoted drug use). See generally Joanna Nairn, *Free Speech 4 Students? Morse v. Frederick and the Inculcation of Values in Schools*, 43 HARV. C.R.-C.L. L. REV. 239 (2008) (arguing *Morse* will lead to increase in school’s ability to regulate content of student speech).

<sup>193</sup> *Morse*, 127 S. Ct. at 2637.

<sup>194</sup> *Bethel*, 478 U.S. at 683.

<sup>195</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

<sup>196</sup> *Morse*, 127 S. Ct. at 2624.

<sup>197</sup> See *Peck ex rel. Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 627 (2d Cir. 2005) (two categories); *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d

nondisruptive personal speech of students (and other people on campus with permission) that “happens to occur on the school premises,” but is otherwise unconnected with the school’s pedagogical functions.<sup>198</sup> This personal student speech is protected as to content and viewpoint, unless it crosses into the second category of expression that causes “substantial disruption of or material interference with school activities” or “impinge[s] upon the rights of other students.”<sup>199</sup> The third category, also involving personal student speech unconnected to the school, is the expression represented by *Fraser* and *Morse*: lewd, indecent, offensive, vulgar, sexually explicit speech, and speech promoting illegal drug use. The fourth category is school-sponsored speech, that is, expression related to the school’s pedagogical functions or goals, which may involve the voices of people other than school officials. The last category is essentially government speech: expression by school officials or people under their direction that communicates a message over which the government has editorial control. *Hazelwood* controls in these final two categories, although *Fraser* has some application in the fourth.<sup>200</sup> As seen in *Hazelwood* and *Fraser*, the final two categories can, and often do, involve speakers other than school officials.<sup>201</sup>

This represents the fulcrum of current controversy: student religious expression that takes place within school-sponsored events or classroom activities. Recent cases have involved restrictions on religious themes in student homework assignments, class presentations, posters/murals, in-class distributions, and inscriptions, and the rejection of religiously themed advertising on school athletic facilities.<sup>202</sup> In all cases, plaintiffs have alleged that school officials have impermissibly discriminated based on viewpoint. Courts have sought refuge in the broad language of *Hazelwood* but have split over whether that holding

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1208, 1213 (11th Cir. 2004) (four categories); *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 923 (10th Cir. 2002) (three or four categories).

<sup>198</sup> See *Fleming*, 298 F.3d at 923.

<sup>199</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509, 514 (1969).

<sup>200</sup> See, e.g., *Fleming*, 298 F.3d at 923 (identifying four categories).

<sup>201</sup> See generally Waldman, *supra* note 33 (proposing analysis of speech by individuals other than school officials that might be perceived to be sponsored by school).

<sup>202</sup> See, e.g., *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003) (distributions); *Fleming*, 298 F.3d at 918 (tiles); *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464 (7th Cir. 2001) (class project); *C.H. ex rel. Z. H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000) (en banc) (class presentation); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999) (athletic field); *Curry ex rel. Curry v. Sch. Dist. of the City of Saginaw*, 452 F. Supp. 2d 723 (E.D. Mich. 2006) (school project).

authorizes school officials to exercise viewpoint control over student expression even when it is part of an assignment or otherwise related to the curriculum.<sup>203</sup> Part of the blame for the confusion rests with *Hazelwood*. The *Hazelwood* Court classified the expression in that case as school-sponsored speech, but in reality, it was government speech involving private speakers.<sup>204</sup> The student-authored newspaper was part of a journalism class, which the board of education financed.<sup>205</sup> As the Court wrote, the censored student articles were part of a “supervised learning experience” and would have appeared in a “school-sponsored newspaper,” the contents of which “the public might reasonably perceive to bear the imprimatur of the school.”<sup>206</sup> The Court emphasized that: “These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.”<sup>207</sup> By any account, this was government expression: a supervised assignment that was part of the curriculum. *Rosenberger* clarifies this distinction: “When the [school] determines the content of the education it provides, it is the [school] speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”<sup>208</sup>

Although *Rosenberger* spoke about the government’s ability to control the content of its message, it made it clear that that privilege extends to perspectives as well. When the government uses “private entities to convey a governmental message, it may take legitimate and

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<sup>203</sup> Compare *Fleming*, 298 F.3d at 920 (reversing lower court’s finding that students’ free speech rights were violated by school guidelines regulating content of tiles), and *C.H.*, 195 F.3d at 172 (finding that *Hazelwood* allows greater restrictions on student expression that is part of school curriculum), and *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (noting that *Hazelwood* allows for viewpoint distinctions), with *Peck ex rel. Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005) (holding that viewpoint discrimination restrictions on school-sponsored speech are unconstitutional even if related to pedagogical interests), and *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1215 (11th Cir. 2004) (stating that *Hazelwood* does not allow viewpoint discriminatory regulations of school-sponsored speech), and *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829-30 (9th Cir. 1991) (finding that First Amendment was not violated because school’s decision to limit access to school newspaper was not viewpoint discrimination).

<sup>204</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

<sup>205</sup> *Id.* at 262.

<sup>206</sup> *Id.* at 270-71.

<sup>207</sup> *Id.* at 271.

<sup>208</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

appropriate steps to ensure that its message is neither garbled nor distorted.”<sup>209</sup> The Court’s recent government employee speech case substantiates the permissibility of viewpoint preferences with respect to government speech.<sup>210</sup> Thus, it should be settled that *Hazelwood* allows schools to exercise viewpoint preferences when the expression involves curriculum-related matters.<sup>211</sup> To be sure, there is a limit to such school authority where a school seeks to impose a “pall of orthodoxy” by suppressing disfavored ideas or perspectives.<sup>212</sup> Animus-inspired suppression of particular viewpoints can never be a legitimate pedagogical purpose, whether it takes place in school libraries, in homework, or in other curriculum-related activity.<sup>213</sup> But aside from situations where viewpoint preferences are motivated by animus against religion, a claim of equal treatment-based religious discrimination should fail when the speech involves class presentations, assignments, or course-related artwork. School officials should be able to say “no religious themes” in curriculum-related activities in response to Kelly DeNooyer’s videotape containing proselytizing songs, Brittney Settle’s research paper about Jesus, Zachery H.’s Bible story about Jacob, and Sarah Harris’s murals containing religious exhortations, provided the reason is not to disparage religion.<sup>214</sup> Reasonable concerns about avoiding perceptions of official endorsement, negating potential peer pressure, or simply maintaining a regime of secularity in the schools, should be sufficient to justify such viewpoint preferences, even if those concerns are occasionally misplaced.

This doctrinal rationale for limiting the equal treatment theorem should suffice for most controversies. However, normative arguments that draw from the early school prayer cases also call for rejecting

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<sup>209</sup> *Id.*

<sup>210</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006).

<sup>211</sup> See Samuel P. Jordan, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555, 1556 (2003); Waldman, *supra* note 33, at 110.

<sup>212</sup> *Bd. of Educ. v. Pico*, 457 U.S. 853, 870 (1982). The *Pico* decision was a plurality decision, however, with Justice Brennan recognizing that school officials have “broad discretion” in “the management of school affairs,” including the selection of curriculum. *Id.* at 863. Justice Brennan also acknowledged that school officials could have removed the books for legitimate reasons other than “the official suppression of ideas.” *Id.* at 871.

<sup>213</sup> *Id.* at 870-71.

<sup>214</sup> *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1210-11 (11th Cir. 2004); *C.H. v. Oliva*, 195 F.3d 167, 169 (3d Cir. 1999); *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 153 (6th Cir. 1995); *DeNooyer v. Livonia Pub. Schs.*, 799 F. Supp. 744, 746 (E.D. Mich. 1992).

equal treatment arguments for requiring religious perspectives in curriculum-related activities. On one hand, young impressionable students may misperceive the school as the owner of the religious messages, particularly when that expression takes place within a structured learning environment. The multiple cases cited in Part I involving school encouragement of student religious expression indicate that perceptions of attribution are often not misplaced. Even where perceptions of official attribution are not in issue, a religious theme in a class presentation or art project may make nonadherent children feel uncomfortable, ostracized, or pressured to conform. While no one is entitled to avoid exposure to unwelcome themes in his or her social interactions, that presumption does not carry over into the controlled learning environment of a classroom.<sup>215</sup> More than anything, religious themes in curriculum-related activities can rarely escape involvement of the state. School officials supervise, evaluate, and grade the activities; thus, the state is necessarily involved.

Turning to the Texas Religious Viewpoint Anti-Discrimination Act, mentioned in the introduction, this law proceeds untethered from any doctrinal foundation.<sup>216</sup> To ensure that schools do not “discriminate against a student’s publicly stated voluntary expression of a religious perspective,” Texas schools are required to establish limited public forums “for student speakers at all school events at which a student is publicly to speak.”<sup>217</sup> Student expression on an otherwise permissible subject matter within these limited forums may not be excluded “because the subject is expressed from a religious viewpoint.”<sup>218</sup> The statute does not define the category of student “publicly stated expression” (i.e., what is “public” expression) nor restrict the reach of such limited public forums. Apparently, classroom instruction counts with respect to both uncertainties, as the statute expressly provides that students can express their religious beliefs “in homework, artwork, and other written and oral assignments.”<sup>219</sup> The model policy contained in the statute provides additional examples of limited public forums, which a student triggers merely by speaking “publicly.”<sup>220</sup> First are football games — this is Texas, after all — followed by other athletic events, assemblies, pep rallies, graduation ceremonies, and

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<sup>215</sup> *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

<sup>216</sup> TEX. EDUC. CODE ANN. §§ 25.151-.156 (Vernon 2007).

<sup>217</sup> *Id.* § 25.152 (a).

<sup>218</sup> *Id.* § 25.152 (c).

<sup>219</sup> *Id.* § 25.153.

<sup>220</sup> In this way, the law conflicts with *Cornelius*, which states that government entities do not create designated or limited public forums by default but by intent.



daily opening announcements, apparently over the public address systems.<sup>221</sup> Yet the operative statutory language apparently applies to any school-sponsored event, regardless of how closely it relates to the school's curriculum or whether it is part of a "supervised learning experience."<sup>222</sup> This, of course, conflicts with the broad authority afforded schools over their curriculum as per *Hazelwood* and *Rosenberger*.<sup>223</sup> Equally problematic, the statute contains no opt-out provision for dissenting students or faculty, and no countervailing protections against potential peer pressure within compulsory school events, perceptions of government attribution of religion, or the expropriation of school machinery for the promotion of religion. In a futile attempt to ameliorate these problems, the statute declares that the limited public forums will "eliminate any actual or perceived affirmative school sponsorship or attribution."<sup>224</sup> The Texas statute is a prime example of how the equal treatment theorem has lost its flooring and is being applied in inappropriate contexts.<sup>225</sup>

Unfortunately, a careful reading of *Hazelwood* does not resolve the issues of what constitutes curriculum-related activity or whether this viewpoint allowance applies to *school-sponsored* activities not directly associated with instruction or curriculum. While the preceding analysis should resolve those issues involving student religious themes in class presentations, assignments, and artwork, it does not answer the more troubling questions about religious expression in non-curricular but school-related activities or religious symbols affixed to fences of athletic fields or on tiles and brick walkways.

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<sup>221</sup> § 25.156.

<sup>222</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988).

<sup>223</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("When the [school] determines the content of the education it provides, it is the [school] speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."); *Hazelwood*, 484 U.S. at 270 ("These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.").

<sup>224</sup> § 25.152 (a).

<sup>225</sup> As such, the Texas Association of School Boards has developed an alternative model policy that it recommends to school districts. This alternative policy limits the situations where students possess the ability to engage in unregulated viewpoints. Even though the Texas statute contains what is termed a "model" policy, the author of the statute has circulated a notice to school districts that the adoption of a policy that varies from the model may put the districts out of compliance with the Act. See [www.ChristianAttorney.com/directive.htm](http://www.ChristianAttorney.com/directive.htm) (last visited Dec. 31, 2008).

As *Hazelwood* demonstrates, the line between school-sponsored expression and government speech is not clear.<sup>226</sup> A school may seek to advance its pedagogical goals not only through curriculum and instruction, properly classified as government speech, but also by sponsoring complementary speech of others, including students. The Tenth Circuit holding regarding the tributary tiles in *Fleming v. Jefferson County*, however, extends the *Hazelwood* government-speech rule, which appropriately allows for viewpoint distinctions, to the category of school-sponsored expression.<sup>227</sup> This is the reason for the confusion and split among lower courts. At present, the First, Third and Tenth Circuits<sup>228</sup> read *Hazelwood* as authorizing viewpoint preferences in school-sponsored events while the Second, Eleventh, and possibly Ninth Circuits claim *Hazelwood* authorizes the opposite.<sup>229</sup> But in all of these cases, the exact nature of the expression — surrogate government speech or school-sponsored speech — was unclear. For example, *C.H. v. Oliva* involved a teacher censoring a first grader from reading a story about the biblical figure Jacob during an award program allowing students to read a favorite story to their classmates.<sup>230</sup> The Third Circuit upheld the action on the basis that *Hazelwood* allows for viewpoint restrictions in school-sponsored activities, though it noted the proposed story was “a part of the school’s curriculum” and was “appropriately characterized as [school] promoted expression.”<sup>231</sup> Although the panel majority seemed uncertain whether Zachery H.’s reading was school-sponsored speech or effectively government speech, for Judge Alito, dissenting to the rehearing en banc, the distinction did not matter. “[E]ven in a closed forum” involving a class discussion or assigned work, “government ‘viewpoint discrimination’ must satisfy strict scrutiny,” Alito wrote. “[D]isfavoring speech because of its religious nature is viewpoint discrimination.”<sup>232</sup> Although Judge Alito failed to convince

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<sup>226</sup> *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 923 (10th Cir. 2002).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 926-28; *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172-73 (3d Cir. 1999); *Ward v. Hickey*, 996 F.2d 448, 452-54 (1st Cir. 1993).

<sup>229</sup> *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 632-33 (2d Cir. 2005); *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1215 (11th Cir. 2004).

<sup>230</sup> *C.H.*, 195 F.3d at 169.

<sup>231</sup> *Id.* at 174. “*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns.” *Id.* at 172-73.

<sup>232</sup> *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 210 (3d Cir. 2000) (en banc) (Alito, J., dissenting). Judge Alito urged that “*Hazelwood* governs only those expressive

a majority of the Third Circuit in *C.H.*, Justice Alito now has the opportunity to advance his interpretation of viewpoint restrictions from the Supreme Court.

Based on the above discussion, the *Fleming* group of circuit courts has the better reading of *Hazelwood*, but only because they take *Hazelwood* at its word that it involved school-sponsored activity rather than surrogate government speech. *Hazelwood* clearly stands for the principle that viewpoint exclusions are expected and appropriate within a closed forum such as classroom instruction and curriculum-related activities. However, these are examples of government speech. The category of “school-sponsored” expression, however, suggests that it is not purely government speech, but rather speech that incorporates the expression of others, including their ideas and emotions. This means that the government seeks to advance its pedagogical goals through a limited expressive forum (after all, a government message may be more powerful when it is reinforced by the voices of private players or agents). In such circumstances, public forum doctrine and disdain for censorship generally call out for viewpoint neutrality. Yet few would deny school officials the authority to impose viewpoint restrictions on a speaker at a school-sponsored assembly discussing drug use. This demonstrates the inappropriateness of applying a forum analysis to most public school contexts.

There is an alternative solution to remedying this dilemma. One approach would be to adopt Professor Alan Brownstein’s category of curriculum and school-sponsored activity as representing a “non-forum,” subject to the same controls as exist with government speech.<sup>233</sup> My proposal is similar to that of Professor Brownstein. Courts should avoid reverting to simplistic formulas (e.g., that all viewpoint distinctions on the basis of religion are per se impermissible<sup>234</sup>), classifying the expression in advance as government speech or school-sponsored speech, or asking whether school officials have created a limited, non-, or closed forum. Rather, courts should consider several context-driven factors: Is the student’s expression a medium for instilling knowledge or advancing learning, either for

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activities that might reasonably be perceived ‘to bear the imprimatur of the school.’” *Id.* at 214 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

<sup>233</sup> Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 UC DAVIS L. REV. 717, 784-819 (2009).

<sup>234</sup> *C.H.*, 226 F.3d at 212 (Alito, J., dissenting) (“School authorities are not permitted to discriminate against student expression simply because of its religious character.”).

herself or her classmates? Does the expressive event (e.g., assignment, presentation, assembly) naturally allow for a variety of perspectives on the selected topic and are a variety of perspectives consistent with the ultimate pedagogical goals? How closely do school officials participate in the selection and preparation of the expressive perspective, as well as its evaluation? Relatedly, how likely is it that the expressive perspective will be attributed to the school? While courts should continue to defer to a school's articulation of its pedagogical goals, courts should temper that deference based on the particular activity and the degree of restriction on the student expression.<sup>235</sup> Courts should also add several inquiries specific to student religious speech to these factors: Is the student seeking to utilize school authority or machinery to proselytize fellow classmates? Does the student's religious perspective make classmates feel uncomfortable about their own beliefs? Does the religious expression, within the context of the school environment, place pressure on classmates to compromise their religious beliefs or actions? These latter factors, employed only when the student expression is religious, are nevertheless appropriate because of the school's obligations to respect and protect the religious preferences of parents and their children and to ensure that the state does not use its authority to indoctrinate students. These inquiries are also relevant because they acknowledge the distinct qualities of religious expression, qualities that do not disappear merely because of the identity of the speaker.<sup>236</sup>

#### CONCLUSION

The Supreme Court's early school prayer decisions stand for the proposition that religious expression within the school context is different from other forms of speech. While school officials may indoctrinate ethical or patriotic values, they may not indoctrinate religious values. While school officials may challenge and redirect students' views about recycling, corporate responsibility, or misogyny, they may not challenge a student's faith.

The difference that accompanies religious expression in a school context does not disappear merely because students, rather than the government, are directing it. It is naïve to think, as Justice Thomas apparently does, that proselytizing speech loses its potentially unwelcoming and coercive quality simply because it comes from

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<sup>235</sup> See Jordan, *supra* note 211, at 1573-76.

<sup>236</sup> See also Waldman, *supra* note 33, at 110-23 (offering helpful proposal for sliding scale approach to applying *Hazelwood* to student expression).

fellow students.<sup>237</sup> In addition, it represents a reordering of values to insist, as Justice Scalia does, that students should bear the costs of proselytizing speech within the school context when it comes from someone other than a school official.<sup>238</sup> Simplistic categories of private speech versus government speech are not sensitive to the constitutional values affirmed in the early school prayer decisions.

Student religious expression has a place in the public schools. The ability to hold and express a religious perspective can be as important as the ability to express one's political views through the wearing of a black armband. Both perspectives can be equally important in the development of a student's personal identity and can advance the crucible of free expression generally. In the *Tinker*-related contexts, equal treatment for religious expression is the appropriate norm. Even within some school-sponsored or curriculum-related contexts, equal treatment of religious perspectives may be the preferred norm where the perspectives are consistent with pedagogical goals and present no Establishment Clause concerns. Thus, religious perspectives in open-ended assignments or art projects may be permitted, although they cannot command a presumption of inclusion. However, the equal treatment theorem should not apply in many other school-sponsored or curriculum-related moments and, certainly, it should not be afforded a legal presumption. Religious perspectives, or political perspectives, for that matter, are not always germane or appropriate. Unfortunately, the artificial private speech versus government speech dichotomy announced in *Mergens* has oversimplified the school educational dynamic while it has cabined important Establishment Clause concerns. It is due for a correction.

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<sup>237</sup> See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001).

<sup>238</sup> *Id.* at 121 (Scalia, J., concurring).