

---

---

# The Texas Religious Viewpoints Antidiscrimination Act and the Establishment Clause

Melissa Rogers\*

*In 2007, the state of Texas enacted the “Religious Viewpoints Antidiscrimination Act” (“RVAA”), a statute that addresses religious expression in public elementary and secondary schools. The statute includes a provision requiring Texas schools to establish “a limited public forum for student speakers at all school events at which a student is to publicly speak,” and prohibiting schools from discriminating against religious viewpoints in this context. Thus, the RVAA requires public elementary and secondary schools to create a multitude of opportunities for prayers or proselytizing from the state’s podium during school events that students are required or encouraged to attend. As a result, the RVAA raises Establishment Clause issues and creates large litigation risks for Texas public schools. Texas legislators should address these problems, and policymakers from other states should reject overtures to adopt legislation similar to the RVAA. At the same time, state policymakers should mandate and fund training on religion-clause issues for teachers and other school officials in order to advance a better understanding of these issues. Further, given the important role religion has played and continues to play in shaping ideas and institutions in our nation and world, schools must do more to find constitutional ways to ensure that the topic of religion is discussed, not dodged, in public education.*

## TABLE OF CONTENTS

INTRODUCTION .....	941
I. BACKGROUND ON THE TEXAS RELIGIOUS VIEWPOINTS ANTIDISCRIMINATION ACT .....	944

---

\* Melissa Rogers is an attorney who formerly served as general counsel to the Baptist Joint Committee on Religious Liberty and as executive director of the Pew Forum on Religion and Public Life. She currently directs the Center for Religion and Public Affairs at the Wake Forest University Divinity School.

A.	<i>Description of the RVAA's Provisions</i> .....	945
B.	<i>Description of Proposed Amendments and Legislative Revisions to the RVAA</i> .....	953
C.	<i>Adoption of Policies Implementing the RVAA by Texas School Districts</i> .....	958
II.	OVERVIEW OF SOME RELEVANT U.S. SUPREME COURT PRECEDENT .....	961
A.	<i>School Prayer Cases</i> .....	962
B.	<i>Equal Access Cases</i> .....	968
III.	THE ESTABLISHMENT CLAUSE AND THE RVAA .....	977
A.	<i>The RVAA's Limited Public Forum Provisions</i> .....	978
1.	Comparing the RVAA's Limited Public Forum Provisions and Supreme Court School Prayer Precedent .....	979
2.	Comparing the RVAA's Limited Public Forum Provisions and Supreme Court Equal Access Precedent .....	993
3.	Establishment Clause Challenges to Applications of the RVAA's Limited Public Forum Provisions .....	998
4.	RVAA Student-Organized Prayer Groups and Religious Clubs .....	1008
5.	RVAA Classwork and Homework Provisions .....	1016
6.	The RVAA on its Face .....	1017
IV.	POLICY ASSESSMENT AND SUGGESTED POLICY ALTERNATIVES .....	1021
A.	<i>Policy Assessment</i> .....	1021
B.	<i>Policy Alternatives</i> .....	1032
	CONCLUSION .....	1037

INTRODUCTION

Many Texans take religion and football seriously. Indeed, it is often said that football is a religion in the Lone Star state.<sup>1</sup> It was hardly surprising, therefore, when the United States Supreme Court's decision in *Santa Fe Independent School District v. Doe* in the year 2000 provoked strong reactions.<sup>2</sup> In *Santa Fe*, the Court struck down a Texas public school district's policy mandating school elections to determine whether students would deliver "a brief invocation and/or message" before high school football games.<sup>3</sup> The policy "establishe[d] an improper majoritarian election on religion, and unquestionably ha[d] the purpose and create[d] the perception of encouraging the delivery of prayer at a series of important school events," the Court said.<sup>4</sup> It found, therefore, that the policy violated the First Amendment's Establishment Clause.

Some religious Texans rejoiced at the outcome, including the Mormon and Catholic students and their families who had brought the lawsuit.<sup>5</sup> They, along with some other people of faith, saw the

---

<sup>1</sup> SCIENTIFIC AMERICAN REFERENCE BOOK 584 (1912).

<sup>2</sup> 530 U.S. 290 (2000).

<sup>3</sup> *Id.* at 298 n.6.

<sup>4</sup> *Id.* at 317.

<sup>5</sup> The Supreme Court noted that "two sets of current or former students and their respective mothers" filed the lawsuit. *Id.* at 294. One family was affiliated with the Church of Jesus Christ of Latter-day Saints, often known as the Mormon church, and the other was Catholic. *Id.* The Court said that "[t]he District Court permitted respondents (Does) to litigate anonymously to protect them from intimidation or harassment." *Id.* Some public school officials "apparently neither agreed with nor particularly respected" the trial court's decision to allow the plaintiffs to sue anonymously. *Id.* at 294 n.1 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 168 F.3d 806, 809 n.1 (5th Cir. 1999)). Accordingly, approximately a month after the lawsuit was filed, the trial court issued an order that read, in part,

"[A]ny further attempt on the part of District or school administration, officials, counsellors, teachers, employees or servants of the School District, parents, students or anyone else, overtly or covertly to ferret out the identities of the Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping', will cease immediately. ANYONE TAKING ANY ACTION ON SCHOOL PROPERTY, DURING SCHOOL HOURS, OR WITH SCHOOL RESOURCES OR APPROVAL FOR PURPOSES OF ATTEMPTING TO ELICIT THE NAMES OR IDENTITIES OF THE PLAINTIFFS IN THIS CAUSE OF ACTION, BY OR ON BEHALF OF ANY OF THESE INDIVIDUALS, WILL FACE THE HARSHTEST POSSIBLE CONTEMPT SANCTIONS FROM THIS COURT, AND MAY ADDITIONALLY FACE CRIMINAL LIABILITY. The Court wants these proceedings addressed on their merits, and not on the basis of

ruling as a victory for the rights of conscience of all people and a mandate for the state to refrain from meddling in religious matters.<sup>6</sup> Other religious Texans, however, perceived the decision as a blow, and they began to look for ways to respond to it.

In 2007, the state of Texas responded by enacting a statute known as the “Religious Viewpoints Antidiscrimination Act” (“RVAA”).<sup>7</sup> The RVAA is aimed at protecting religious expression in public elementary and secondary schools. In part, it provides that “[a] school district shall treat a student’s voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the district treats a student’s voluntary expression of a secular or other viewpoint on an otherwise permissible subject.”<sup>8</sup> The statute requires every Texas school to establish “a limited public forum for student speakers at all school events at which a student is to publicly speak,”<sup>9</sup> and prohibits schools from discriminating against religious viewpoints in this context.<sup>10</sup> The measure requires each of the 1,030 Texas public school districts to adopt policies to implement the statute, and it sets forth a model policy for this purpose.<sup>11</sup>

The RVAA is not just a Texas phenomenon, however. Legislators in two other states have introduced versions of the legislation,<sup>12</sup> and at

---

intimidation or harassment of the participants on either side.”

*Id.* at 294 n.1 (citation omitted).

<sup>6</sup> See, e.g., Amicus Curiae Brief of the Baptist Joint Committee on Public Affairs, J.M. Dawson Institute of Church-State Studies, and General Conference of Seventh-day Adventists in Support of Respondents in Santa Fe Indep. Sch. Dist. v. Doe (filed on January 31, 2000), 2000 U.S. S. Ct. Briefs LEXIS 62 (arguing that Santa Fe prayer policy promoted government-sponsored religious exercises and thus violated First Amendment); Amicus Curiae Brief of the American Jewish Congress, American Jewish Committee, Anti-Defamation League, Jewish Council for Public Affairs, Interfaith Alliance, Soka Gakkai International-USA, and Unitarian Universalist Association, *et al.* in Support of Respondents in Santa Fe Indep. Sch. Dist. v. Doe (filed on February 2, 2000), 2000 U.S. S. Ct. Briefs LEXIS 65 (arguing that Santa Fe prayer policy encouraged government speech endorsing religion, which Establishment Clause forbids, rather than purely private speech endorsing religion, which Free Speech and Free Exercise Clauses protect). The author of this article served as counsel on the amicus brief filed in this case by the Baptist Joint Committee on Public Affairs.

<sup>7</sup> TEX. EDUC. CODE §§ 25.151-.157 (Vernon 2008).

<sup>8</sup> *Id.* § 25.151.

<sup>9</sup> *Id.* § 25.152(a).

<sup>10</sup> *Id.* § 25.152(a)(1)-(2).

<sup>11</sup> *Id.* § 25.155-.156.

<sup>12</sup> In 2008, the Oklahoma legislature passed a version of the RVAA, although the governor subsequently vetoed it. World Capitol Bureau, *Henry Vetoes ‘Religious Viewpoints Antidiscrimination Act’*, TULSA WORLD, June 6, 2008, available at [http://www.tulsaworld.com/news/article.aspx?articleID=20080606\\_1\\_\\_world33430](http://www.tulsaworld.com/news/article.aspx?articleID=20080606_1__world33430).

least one national advocacy group has vowed to push every state to adopt similar legislation.<sup>13</sup>

One question that requires consideration is whether the provisions of the RVAA respect the First Amendment's Establishment Clause. Among other things, the Establishment Clause prohibits the government from coercing citizens into participating in religious exercises, and it bars the state from promoting or denigrating faith or endorsing speech by others that does so.<sup>14</sup> The sponsors of the RVAA insist it is consistent with the Establishment Clause.<sup>15</sup> Indeed, drafters of the statute claim the "RVAA is an adoption and codification" of the *Santa Fe* decision and other Establishment Clause cases, "not an attempt to avoid them."<sup>16</sup> A closer look at the RVAA and Court precedent, however, reveals that this description is inaccurate for at least two reasons. First, while some of the RVAA's provisions articulate accepted constitutional principles, other provisions take provocative stands in unsettled areas of the law. Second, aspects of the statute require public schools to employ a bright-line approach where current law reflects a more nuanced one. As a result, the RVAA raises Establishment Clause issues and creates large

---

The text of H.B. 2633, the Oklahoma "Religious Viewpoints Antidiscrimination Act," may be found at [http://webserver1.lsb.state.ok.us/2007-08bills/HB/HB2633\\_ENR.RTF](http://webserver1.lsb.state.ok.us/2007-08bills/HB/HB2633_ENR.RTF). Another version of the legislation was introduced in the Virginia legislature. See H. B. 1135, 2008 Leg., Reg. Sess. (Va. 2008), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+HB1135>. Thus far, Virginia has enacted only a piece of that legislation. VA. CODE ANN. § 22.1-203.3 (2008).

<sup>13</sup> The American Family Association has vowed to work to ensure that the Texas law "become[s] the model template for legislation in every state." Letter from Donald E. Wildmon, Founder and Chairman of the Am. Family Ass'n (May 17, 2007) (on file with UC Davis Law Review). The AFA has asked its members to contact their state senators and representatives "in support of model legislation for your state like the Religious Viewpoint Anti-Discrimination Act in Texas." AFA — American Family Association — Action Alert, Help Protect Students' Religious Liberties, <http://capwiz.com/afanet/issues/alert/?alertid=11352286&type=ST>.

<sup>14</sup> See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (recognizing difference between Establishment Clause's protection of private speech endorsing religion versus its preclusion of government speech endorsing religion); *Lee v. Weisman*, 505 U.S. 577 (1992) (stating that Establishment Clause prohibits government from coercing acts of religious worship); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (noting that Establishment Clause is intended to guard against government actions that have the purpose or primary effect of advancing religion).

<sup>15</sup> See, e.g., sources cited *infra* note 23 (stating that some attorneys and legislators supporting RVAA claim statute adopts and codifies previous Supreme Court opinions interpreting Establishment Clause).

<sup>16</sup> Kelly Coghlan, *Eichelbaum Article: Setting the Record Straight*, Aug. 10, 2007, <http://www.texasisd.com/lonefinalist/>.

litigation risks for Texas public schools. This Article explores these and other issues.<sup>17</sup>

This Article is divided into four parts. Part I describes the provisions of the RVAA and some of its legislative history. Part II provides a brief overview of some relevant Court precedent. This part summarizes the Court's school prayer decisions and its rulings regarding "equal access" for nongovernmental speakers, including speakers who engage in religious speech, to governmental forums. Part III explores whether the provisions of the RVAA are consistent with Establishment Clause precedent. Finally, Part IV considers the RVAA as a policy matter and suggests some alternative policy proposals.

#### I. BACKGROUND ON THE TEXAS RELIGIOUS VIEWPOINTS ANTIDISCRIMINATION ACT

In 2007, the Texas legislature passed, and Governor Rick Perry signed the RVAA.<sup>18</sup> The RVAA contains a variety of provisions aimed at protecting religious expression in public elementary and secondary schools. It also requires each of the 1,030 Texas public school districts to adopt a policy to implement the statute, and it sets forth a model policy toward this end.<sup>19</sup>

Representatives Charlie Howard and Warren Chisum introduced the RVAA in the Texas House, and Senator Tommy Williams subsequently introduced a version of the bill in the Texas Senate.<sup>20</sup> These legislators claimed that certain public school officials were treating religious expression as "second-class speech, and sometimes worse, in their schools."<sup>21</sup> Supporters of the bill said, "Due to hostility toward religious expression, children are being forced to defend their First Amendment rights in courtrooms all across Texas, and throughout the nation."<sup>22</sup> Legislators who favored the RVAA also insisted that the bill simply codified existing court decisions in this area and provided clear guidance for teachers and administrators.<sup>23</sup>

---

<sup>17</sup> This Article does not consider whether the RVAA is consistent with other provisions of the federal Constitution or the Texas constitution.

<sup>18</sup> TEX. EDUC. CODE §§ 25.151-.157 (Vernon 2008).

<sup>19</sup> *Id.* § 25.155-.156.

<sup>20</sup> Texas Legislature Online, History of HB 3678, Legislative Session 80(R), <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=80R&Bill=HB3678>.

<sup>21</sup> House Committee Report, CSHB 3678, State Affairs Committee Report, <http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=80R&Bill=HB3678>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* For example, Representative Charlie Howard said that the RVAA simply "codif[ies] the legal battles that have already occurred." Clay Robison, *Perry Backs*

The following sections briefly describe the provisions of the RVAA and some of its legislative history.

A. *Description of the RVAA's Provisions*

The provisions of the RVAA apply to elementary and secondary public schools.<sup>24</sup> The statute first announces an overarching principle: schools must treat “a student’s voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner” the school treats similar student expression “of a secular or other viewpoint.”<sup>25</sup> The rest of the RVAA’s provisions essentially implement this broad vision in specific ways. Two of the statute’s sections speak to the treatment of expression from a religious viewpoint in particular contexts — class assignments<sup>26</sup> and the organization of religious clubs and gatherings.<sup>27</sup> Another provision of the RVAA charges schools with establishing “a limited public forum for student speakers at all school events at which a student is to publicly speak.”<sup>28</sup> The final two sections of the statute set forth the model RVAA policy.<sup>29</sup> The paragraphs below describe these sections of the law in more detail.

The part of the statute that addresses religious expression in class assignments says “[s]tudents may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions.”<sup>30</sup> Assignments are to be “judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school district,”<sup>31</sup> and

---

*‘Religious Expression’ Legislation*, HOUSTON CHRON., Apr. 11, 2007, available at <http://www.chron.com/dispatch/story.mpl/special/07/legislature/4703906.html>. Similarly, a private attorney, Kelly Coghlan, who claims to have drafted the statute, describes the “RVAA [as] an adoption and codification” of this and other Supreme Court cases, “not an attempt to avoid them.” Coghlan, *supra* note 16; Kelly Coghlan, *Important Message to Texas School Boards: Immediate Action Needed*, Aug. 6, 2007, <http://www.texasisd.com/lonfinalist/>.

<sup>24</sup> TEX. EDUC. CODE §§ 25.151-.157 (Vernon 2008).

<sup>25</sup> *Id.* § 25.151.

<sup>26</sup> *Id.* § 25.153.

<sup>27</sup> *Id.* § 25.154.

<sup>28</sup> *Id.* § 25.152.

<sup>29</sup> *Id.* §§ 25.155-.156.

<sup>30</sup> *Id.* § 25.153.

<sup>31</sup> *Id.*

---

“[s]tudents may not be penalized or rewarded on account of the religious content of their work.”<sup>32</sup>

Another provision of the RVAA addresses the formation and operation of student “prayer clubs, religious clubs” and other student religious gatherings that meet on school property.<sup>33</sup> It says “[s]tudents may organize prayer groups, religious clubs, ‘see you at the pole’ gatherings, or other religious gatherings before, during, and after school to the same extent that students are permitted to organize other noncurricular student activities and groups.”<sup>34</sup> In some respects, this provision articulates a version of what is often called an “equal access” model for religious expression in public schools. The words “equal access” are drawn from a 1984 federal statute, the Equal Access Act (“EAA”), that requires public secondary schools to allow student-initiated religious groups to meet on school property during noninstructional time if other noncurriculum related student groups are permitted to do so.<sup>35</sup> But this RVAA provision differs from the EAA in some significant ways, most notably in its application to elementary as well as secondary public schools. The RVAA also sets forth an equal treatment provision regarding announcements and advertisements of the meetings of student noncurricular groups. The relevant provision says, “If student groups that meet for nonreligious activities are permitted to advertise or announce meetings of the groups, the school district may not discriminate against groups that meet for prayer or other religious speech.”<sup>36</sup> Schools may disclaim sponsorship of these groups and their associated events, the RVAA notes, as long as they do so “in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.”<sup>37</sup>

The provisions of the RVAA that have drawn the most attention are the ones requiring the establishment of limited public forums for student speakers at school events. The statute requires every Texas school district to adopt a policy requiring the establishment of “a limited public forum for student speakers at all school events at which a student is to publicly speak.”<sup>38</sup> Those policies, the statute says, must not discriminate against religious viewpoints on an “otherwise permissible subject,” and they must “provide a method, based on

---

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* § 25.154 (Vernon 2008).

<sup>34</sup> *Id.*

<sup>35</sup> 20 U.S.C. §§ 4071-74 (2006).

<sup>36</sup> TEX. EDUC. CODE § 25.154.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* § 25.152(a) (Vernon 2008).



neutral criteria, for the selection of student speakers at school events and graduation ceremonies.”<sup>39</sup> According to the statute, a school district is required to ensure that student speakers “do[] not engage in obscene, vulgar, offensively lewd, or indecent speech,”<sup>40</sup> and it is obligated to disclaim any endorsement or sponsorship of this speech, either orally or in writing, or both.<sup>41</sup>

While the RVAA says a school must create “a limited public forum for student speakers at all school events at which a student is to publicly speak,”<sup>42</sup> it does not define the terms “limited public forum,” “school events,” or “publicly speak.” Read literally, the RVAA’s mandate that schools must establish limited public forums at all school events where students “publicly speak” would make the law impossible to administer. Students speak throughout the day, including in the classroom and the lunchroom, on the playing field and the stage, and during academic competitions and trips. If a school had to establish limited public forums in all of these situations, it would never accomplish anything else. The model policy specifically mentions a more narrow set of circumstances, such as when students speak at graduation, sporting events, school announcements, school assemblies, pep rallies, homecoming events, class meetings, and student government assemblies.<sup>43</sup> But the model policy also emphasizes that this list of events is illustrative, not exhaustive. In short, the statute’s failure to define key terms creates questions about exactly how far these mandates extend.

As for the term “limited public forum,” the statute appears to attempt to draw on the articulation of that concept in *Good News Club v. Milford Central School*.<sup>44</sup> In that case, the Court explained that the state is not obligated to allow people to engage in all types of speech when it opens such forums.<sup>45</sup> Rather, the state may reserve the forum for the discussion of particular topics or for particular groups.<sup>46</sup> But the restrictions the state places on speech in that context must not discriminate on the basis of viewpoint and must be reasonable in relationship to the purpose of the forum.<sup>47</sup> Thus, while the statute is

---

<sup>39</sup> *Id.* § 25.152(a)(1)-(2).

<sup>40</sup> *Id.* § 25.152(a)(3).

<sup>41</sup> *Id.* § 25.152(a)(4).

<sup>42</sup> *Id.* § 25.152(a).

<sup>43</sup> *See id.* § 25.156 (Vernon 2008).

<sup>44</sup> 533 U.S. 98, 106-07 (2001).

<sup>45</sup> *Id.* at 106.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 106-07.

clear about the nondiscrimination obligations that apply to such forums, it does not provide much guidance about how to establish them. If a school does not establish a limited public forum and permits students to offer prayers, evangelism, critiques of particular faiths, or anti-religious diatribes from the state's podium, that speech may be attributed to the school and thus create an Establishment Clause violation.<sup>48</sup> Part III addresses these issues at greater length.

While the RVAA's model policy also does not provide any definitions of these statutory terms, it does provide highly detailed directions for schools in other respects.<sup>49</sup> The model policy consists of five articles tracking other sections of the statute. The first article restates the overarching nondiscrimination policy of the RVAA.<sup>50</sup> The second article is titled "Student Speakers at Nongraduation Events,"<sup>51</sup> and the third is titled "Student Speakers at Graduation Ceremonies."<sup>52</sup> These provisions set forth policies that are broader than the relevant provisions of the statute in certain ways. For example, while the statute itself does not dictate to public schools when students must be allowed to speak (in a manner that triggers the requirement for the establishment of a limited public forum), the model policy does so. It instructs schools to create limited public forums at graduation ceremonies, football games and other athletic events, morning announcements, and other assemblies and rallies organized by the school.<sup>53</sup> Thus, if a public school district adopts the model policy contained in the statute, it will have to establish limited public forums at these school events.

Also, while the RVAA itself does not specify a particular method for choosing student speakers at these events (as long as the method employs "neutral criteria"),<sup>54</sup> the model policy sets forth particular selection processes.<sup>55</sup> With regard to "nongraduation events," the policy defines the pool of students who are appropriate speakers at these events as "[o]nly those students who are in the highest two grade levels of the school" and who hold certain "positions of honor based on neutral criteria."<sup>56</sup> It defines those positions as "student

---

<sup>48</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

<sup>49</sup> TEX. EDUC. CODE § 25.156 (Vernon 2008).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* § 25.152(a)(2) (Vernon 2008).

<sup>55</sup> *Id.* § 25.156.

<sup>56</sup> *Id.*

council officers, class officers of the highest grade level in the school, captains of the football team, and other students holding positions of honor as the school district may designate.” The model policy then provides a detailed process for selecting student speakers from this pool.<sup>57</sup> The most significant part of that process is that school officials are to draw speakers’ names randomly from the pool. The model policy says each selected student may offer all of the introductions of events for a week, rotate with other student speakers, or follow some other system the school devises.<sup>58</sup>

In addition to repeating the bans against obscene and vulgar speech, the model policy offers some other instructions regarding the content of the students’ remarks in this setting. It says student introductions must relate to the event’s purpose and “honor the occasion, the participants, and those in attendance” as well as bring the event to order.<sup>59</sup> The model policy further provides that the school must

---

<sup>57</sup> This part of the policy provides,

An eligible student shall be notified of the student’s eligibility, and a student who wishes to participate as an introducing speaker shall submit the student’s name to the student council or other designated body during an announced period of not less than three days. The announced period may be at the beginning of the school year, at the end of the preceding school year so student speakers are in place for the new year, or, if the selection process will be repeated each semester, at the beginning of each semester or at the end of the preceding semester so speakers are in place for the next semester. The names of the volunteering student speakers shall be randomly drawn until all names have been selected, and the names shall be listed in the order drawn. Each selected student will be matched chronologically to the event for which the student will be giving the introduction. Each student may speak for one week at a time for all introductions of events that week, or rotate after each speaking event, or otherwise as determined by the district. The list of student speakers shall be chronologically repeated as needed, in the same order. The district may repeat the selection process each semester rather than once a year.

*Id.*

<sup>58</sup> *Id.* More specifically, this section states, in part, “Each selected student will be matched chronologically to the event for which the student will be giving the introduction. Each student may speak for one week at a time for all introductions of events that week, or rotate after each speaking event, or otherwise as determined by the district.” *Id.*

<sup>59</sup> *Id.* More specifically, this section states, in part,

The subject of the student introductions must be related to the purpose of the event and to the purpose of marking the opening of the event, honoring the occasion, the participants, and those in attendance, bringing the audience to order, and focusing the audience on the purpose of the event. The subject [for the speech] must be designated, [and] a student must stay

designate a subject for the speech and that the student's remarks must address that subject.<sup>60</sup>

The section of the model policy addressing nongraduation events also refers to other talks it says student leaders traditionally give at school events, and it calls for the application of the limited public forum provisions there as well.<sup>61</sup> The model policy notes that certain students "such as the captains of various sports teams, student council officers, class officers, homecoming kings and queens, prom kings and queens" and others who have been selected for their positions based on "neutral criteria" should continue to be permitted to speak at school events.<sup>62</sup> Schools must establish limited public forums at these events, the policy says.

Regarding graduation ceremonies, the model policy says the limited public forum in that setting must "consist[] of an opportunity for a student to speak to begin graduation ceremonies and another student to speak to end graduation ceremonies."<sup>63</sup> The pool of eligible student speakers in this context is graduating students who are student government officers, the top three graduates according to grades, or a list of student leaders designated by the school.<sup>64</sup> No student who

---

on the subject . . . .

*Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> This section of the model policy provides,

Certain students who have attained special positions of honor in the school have traditionally addressed school audiences from time to time as a tangential component of their achieved positions of honor, such as the captains of various sports teams, student council officers, class officers, homecoming kings and queens, prom kings and queens, and the like, and have attained their positions based on neutral criteria. Nothing in this policy eliminates the continuation of the practice of having these students, irrespective of grade level, address school audiences in the normal course of their respective positions. The school district shall create a limited public forum for the speakers and shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the district treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

*Id.*

<sup>63</sup> *Id.*

<sup>64</sup> The text of this section of the model policy reads as follows:

Only students who are graduating and who hold one of the following neutral

already has a speaking role at graduation exercises should be eligible for these additional speaking roles, the policy says. It directs speakers' names to be drawn randomly from the eligible pool.

As far as the content of these remarks is considered, in addition to prohibiting obscene or vulgar speech, the model policy for graduation events is similar to the one articulated for nongraduation events. It says student introductions "must be related to the purpose of the graduation ceremony" and "honor[ ] the occasion, the participants, and those in attendance" as well as bring the event to order.<sup>65</sup> The model policy further provides that the school must designate a subject for the speech and that the student's remarks must stay on that subject.<sup>66</sup>

This section of the model policy also addresses the practice of allowing other students to speak at graduation. It notes that valedictorians, for example, frequently speak at graduation ceremonies.<sup>67</sup> The model policy requires the establishment of a limited public forum for these student speakers as well.

---

criteria positions of honor shall be eligible to use the limited public forum: student council officers, class officers of the graduating class, the top three academically ranked graduates, or a shorter or longer list of student leaders as the school district may designate. A student who will otherwise have a speaking role in the graduation ceremonies is ineligible to give the opening and closing remarks. The names of the eligible volunteering students will be randomly drawn. The first name drawn will give the opening and the second name drawn will give the closing.

*Id.*

<sup>65</sup> *Id.* More specifically, this section states, in part,

The topic of the opening and closing remarks must be related to the purpose of the graduation ceremony and to the purpose of marking the opening and closing of the event, honoring the occasion, the participants, and those in attendance, bringing the audience to order, and focusing the audience on the purpose of the event. . . .

The subject must be designated for each student speaker, the student must stay on the subject, and the student may not engage in obscene, vulgar, offensively lewd, or indecent speech. The school district shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the district treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

*Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

---

---

The statute requires the school to make disclaimers when it establishes limited public forums, and the model policy provides one for nongraduation events and another for graduation exercises. Regarding nongraduation events, the language of the disclaimer is as follows: “The student giving the introduction for this event is a volunteering student selected on neutral criteria to introduce the event. The content of the introduction is the private expression of the student and does not reflect the endorsement, sponsorship, position, or expression of the school district.”<sup>68</sup> According to the model policy’s provisions on graduation, the school must print the following disclaimer in graduation programs:

The students who will be speaking at the graduation ceremony were selected based on neutral criteria to deliver messages of the students’ own choices. The content of each student speaker’s message is the private expression of the individual student and does not reflect any position or expression of the school district or the board of trustees, or the district’s administration, or employees of the district, or the views of any other graduate. The content of these messages were prepared by the student volunteers, and the district refrained from any interaction with student speakers regarding the student speakers’ viewpoints on permissible subjects.<sup>69</sup>

The final two articles of the model policy address class assignments and the organization of religious clubs and gatherings.<sup>70</sup> These provisions are similar to the statutory sections to which they coincide.<sup>71</sup> They do, however, add a couple of examples explaining how each of these provisions should apply. The example regarding class assignments says that if a teacher asks students to write a poem and a student submits a psalm, then that prayer “should be judged on the basis of academic standards, including literary quality, and not penalized or rewarded on account of its religious content.”<sup>72</sup> The example regarding student group meetings says that if school officials allow nonreligious student groups to advertise in a student newspaper or make announcements over the school’s public address system, then

---

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* §§ 25.153-.154 (Vernon 2008).

<sup>72</sup> *Id.* § 25.156.

school officials “may not discriminate against groups that meet for prayer or other religious speech.”<sup>73</sup>

The provisions of the RVAA are aimed at protecting speech from a religious perspective. It is important to note, however, that when public schools open forums for speech from religious viewpoints, the First Amendment will require them to open those forums to speech from anti-religious viewpoints as well.<sup>74</sup> Thus, just as Methodist, Mormon, and Muslim students will be able to use RVAA forums to seek to win converts to their beliefs, so too will atheists.

The RVAA requires a school district to “adopt and implement a local policy regarding a limited public forum and voluntary student expression of religious viewpoints.”<sup>75</sup> If a school district adopts and implements the model policy contained in the RVAA, the statute says the district will be deemed to have complied with the law.<sup>76</sup>

#### *B. Description of Proposed Amendments and Legislative Revisions to the RVAA*

During legislative consideration of the RVAA in the Texas House and Senate, legislators made certain revisions to the bill. Only one of these revisions occurred because of the many amendments to the bill proposed on the floor by Texas legislators, and even that one change was subsequently deleted from the bill. The sponsors of the bill rebuffed their fellow legislators’ proposed changes to the bill by arguing that “a cadre of constitutional legal experts from across the country” drafted the bill over a five-year period, and that “[e]ach word [of the RVAA] was carefully researched and selected to reflect Supreme Court holdings using specific Supreme Court language.”<sup>77</sup> This “cadre” may have reflected a fair amount of geographic diversity, but it evidently did not reflect much diversity of thought about the relevant constitutional issues.<sup>78</sup>

---

<sup>73</sup> *Id.*

<sup>74</sup> *See, e.g.,* *Rosenberger v. Rector*, 515 U.S. 819, 850 (1995) (finding university could not refuse to fund printing of religious group’s newspaper when it funded printing of other student publications, including one that satirized Christianity).

<sup>75</sup> TEX. EDUC. CODE § 25.155 (Vernon 2008).

<sup>76</sup> *Id.*

<sup>77</sup> “Why H.B., 3678 House amendment censoring religious viewpoints on ‘sex, race, age, sexual preference, or religious beliefs’ had to be removed to retain constitutionality of the bill,” handout presented by Senator Tommy Williams at State Affairs Committee Hearing on May 17, 2007 at 3, available at <http://www.senate.state.tx.us/75r/Senate/commit/c530/handouts07/0517-HB3678-Senator-Williams.pdf>.

<sup>78</sup> According to Senator Williams’ handout, the “cadre” included attorneys for the

The bill's sponsors appear to have taken the tack of resisting all proposed changes to the bill by their fellow legislators — either by defeating amendments, tabling them, or stripping them out in committee meetings. When they did so, they insisted that “[w]e need to stick with the thoroughly researched and constitutionally supported language” of the bill as presented by the sponsors.<sup>79</sup> At the same time, the sponsors of the bill in both the House and Senate implemented other changes in the bill that they supported when they introduced substitute versions of the bill in their respective committees. A number of these changes became part of the legislation that both chambers ultimately passed. The following paragraphs describe these matters in greater detail.

Representatives Charlie Howard and Warren Chisum initially introduced the RVAA in the Texas House of Representatives in March 2007.<sup>80</sup> Howard later introduced a committee substitute version of the bill in the Committee on State Affairs.<sup>81</sup> A notable difference between these two versions of the legislation is that the committee substitute version of the bill deleted a severability clause that appeared in the initial legislation.<sup>82</sup>

---

Alliance Defense Fund, Coghlan & Associates, and Liberty Legal Institute, all of whom favor a more restrictive reading of the First Amendment's Establishment Clause than precedent reflects. For example, attorneys from the Liberty Legal Institute and Coghlan & Associates sided with the losing party in the *Santa Fe* case. See Mark Babineck, *Texas Town Rethinking School Prayer*, ASSOCIATED PRESS, June 20, 2000, available at <http://www.beliefnet.com/News/2000/06/Texas-Town-Rethinking-School-Prayer.aspx> (noting that Kelly Shackelford, chief counsel of Liberty Legal Institute, served as an attorney for Santa Fe school district and quoting him describing *Santa Fe* ruling as “the first case in the history of the country that the courts will censor or gag religious expression of a private citizen.”); Kelly Coghlan, *Those Dangerous Student Prayers*, 32 ST. MARY'S L. J. 809, 809 (2001) (noting that Coghlan filed *amicus curiae* brief with Supreme Court on behalf of group of Santa Fe students and parents who supported school policy). The Alliance Defense Fund has criticized Supreme Court decisions such as *ACLU v. McCreary County*, 545 U.S. 844, 860 (2005), in which the Court struck down Ten Commandments displays in Kentucky courthouses because they had a “predominantly religious purpose.” See Website of the Alliance Defense Fund, Status quo: Supreme Court OKs Ten Commandments Displays in Some Circumstances, June 27, 2005, <http://www.alliancedefensefund.org/news/story.aspx?cid=3470>

<sup>79</sup> Williams, *supra* note 77, at 4.

<sup>80</sup> H.B. 3678, 80th Sess., at 1 (Tex. 2007), available at <http://www.legis.state.tx.us/tlodocs/80R/billtext/pdf/HB03678F.pdf>.

<sup>81</sup> C.S.H.B. 3678, 80th Sess., at 1 (Tex. 2007), available at <http://www.legis.state.tx.us/tlodocs/80R/billtext/pdf/HB03678H.pdf>.

<sup>82</sup> H.B. 3678, at 9. That clause said, “If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this Act, and to this end the provisions of this Act are severable.” *Id.*



The Texas House of Representatives considered the committee substitute version of the bill in April 2007. At that time, various lawmakers offered a number of amendments to the bill. Representative Yvonne Davis offered an amendment that proposed revising the limited public forum provisions of the bill to provide that “student speech may not promote discrimination on the basis of another individual’s sex, race, age, sexual preference[,] or religious belief.”<sup>83</sup> Representative Howard moved to table this amendment, a motion that failed by a vote of 70-63. The House then adopted the amendment by a vote of 86-48.<sup>84</sup>

When the Senate sponsor of the bill, Senator Tommy Williams, introduced his committee substitute version of the bill, however, he deleted this amendment from the legislation. A legislative report indicates that Senator Williams claimed the Texas Attorney General’s office “warned [that this amendment] would subject school districts to lawsuits. . . .”<sup>85</sup> Another report indicated that some of the supporters of the RVAA opposed the Davis amendment because they believed “that students should be allowed to express religious [convictions] regarding sexual preference or whether their religion is superior to others.”<sup>86</sup>

Representative Lon Burnam offered another amendment to address his concern about captive student audiences at school events. Burnam’s amendment proposed stating that the rights to engage in prayer or the discussion of religious issues did not include “the right to have a captive audience listen to or to compel other students to participate.”<sup>87</sup> It added that school officials had a duty to ensure that students were not coerced to participate in these kinds of religious activities. This language is taken verbatim from guidance on religion

---

<sup>83</sup> Tex. H.J., 80th Leg., Reg. Sess. 2472 (2007).

<sup>84</sup> *Id.* at 2474. Two members voted “Present, not voting.” *Id.*

<sup>85</sup> Jim Vertuno, *Senate Approves Religious Expression Measure*, DALLAS MORNING NEWS, May 24, 2007, <http://www.dallasnews.com/sharedcontent/APStories/stories/D8PAIQF80.html>.

<sup>86</sup> Associated Press, *House OKs Religion in School*, DALLAS MORNING NEWS, May 28, 2007, <http://www.dallasnews.com/sharedcontent/dws/dn/religion/stories/052707dntswrelexpress.2ed82b.html>.

<sup>87</sup> Tex. H.J., 80th Leg., Reg. Sess. at 2647. The amendment read,

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

*Id.*

and the public schools President Bill Clinton's administration offered in 1995.<sup>88</sup> It reflects the notion that schools have obligations to protect students' rights to express their faiths and to ensure that the school does not coerce or appear to endorse such expression. Once again, one of the House sponsors of the RVAA moved to table the amendment as a way of ending any consideration of it. Representative Howard's motion to table this amendment carried by a vote of 90-54.<sup>89</sup>

Representative Scott Hochberg also offered a series of amendments to the bill, all of which were tabled. One of his amendments proposed striking the limited public forum provisions of the bill.<sup>90</sup> When Representative Howard moved to table the motion, the House approved the motion by a vote of 94-45.<sup>91</sup>

Representative Burnam proposed an amendment in the House that called for adding a section to the bill that would have required teacher training regarding First Amendment rights and responsibilities in public schools.<sup>92</sup> Representative Howard also moved to table this amendment, and that motion carried by a vote of 97-37.<sup>93</sup>

Representative Burnam offered a third amendment for the bill that would have required replacing the words "religious viewpoints" in the bill with "all viewpoints."<sup>94</sup> Once again, the sponsor of the bill, Representative Howard, moved to table the amendment, and the House agreed to the motion by a vote of 105-30.<sup>95</sup>

---

<sup>88</sup> Dep't of Educ., *Religious Expression in Public Schools*, <http://www.ed.gov/Speeches/08-1995/religion.html>. In relevant part, this guidance states,

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

*Id.*

<sup>89</sup> Tex. H.J., 80th Leg., Reg. Sess. at 2647. One legislator voted "Present, not voting." *Id.*

<sup>90</sup> Tex. H.J., 80th Leg., Reg. Sess. at 2651.

<sup>91</sup> *Id.* One member voted "Present, not voting."

<sup>92</sup> Tex. H.J., 80th Leg., Reg. Sess. at 2652. The amendment read, "TEACHER TRAINING. (a) A school district shall provide professional development training to teachers regarding the First Amendment to the United States Constitution and the right of a student to express a religious viewpoint." *Id.*

<sup>93</sup> *Id.* One member voted "Present, not voting."

<sup>94</sup> Tex. H.J., 80th Leg., Reg. Sess. at 2653.

<sup>95</sup> *Id.* One member voted "Present, not voting."

Two significant items were added to a committee substitute bill that was introduced in the Senate Committee on Education in May 2007.<sup>96</sup> The first addition was an enforcement section that essentially stated that a person could bring a civil cause of action against a public school or school official for violating the RVAA.<sup>97</sup> It also noted that the remedies available to prevailing parties would include equitable relief, compensatory damages, and award of costs and reasonable attorney's fees. This section said the Texas Attorney General could enforce the law and seek appropriate remedies for violation of it.

Surprisingly, in the Senate Committee hearing on May 17, 2007, Senator Williams said he had not noticed the addition of this language to the committee substitute bill before he introduced it. Williams indicated that he was not enthusiastic about the inclusion of these provisions in the legislation.<sup>98</sup> They gave citizens a new cause of action against schools, Williams said, and that would make the bill difficult to move through the Senate.<sup>99</sup> In the Senate hearing on the bill, Kelly Coghlan, the attorney who claims to have authored the bill, objected, arguing that, without this enforcement provision, schools would have no incentive to respect the law.<sup>100</sup> If the Committee felt it must strip the private right of action from the bill, Coghlan said, it should retain the second provision regarding the enforcement power of the Attorney General. Nevertheless, the entire enforcement section was stripped from the committee substitute. Even though the statute does not reference the power of the Texas Attorney General to enforce the law, he or she presumably has that authority under the general

---

<sup>96</sup> Audio tape: Hearing Before the Texas Senate Committee on Education (May 17, 2007), <http://www.senate.state.tx.us/75r/senate/commit/c530/c530.html>.

<sup>97</sup> The amendment stated as follows:

Section 25.157. Enforcement.

(a) A person injured by a violation of this subchapter may bring a cause of action for civil relief against a governmental entity or a person, including an employee, servant, or agent of a governmental entity, who violates this subchapter. Remedies available in a civil suit include equitable relief and compensatory damages. A plaintiff who prevails in a cause of action under this section is entitled to costs, including reasonable attorney's fees.

(b) The attorney general may enforce this subchapter and seek all remedies provided by law.

TEX. COMM. ON EDUC., COMM. SUBSTITUTE FOR H.B. 3678, 80th Sess., at 11 (2007), available at <http://www.legis.state.tx.us/tlodocs/80R/billtext/pdf/HB03678S.pdf>.

<sup>98</sup> Audio, *supra* note 96.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

constitutional mandate saying that the Attorney General shall “perform . . . duties as may be required by law.”<sup>101</sup>

Senator Williams’s committee substitute version of the bill also added a significant provision to the model policy of the legislation. He changed the model policy to require schools to allow students to introduce football games and morning announcements.<sup>102</sup> Previous versions of the model policy had been less specific.

The Texas Senate passed the Senate committee substitute version of the RVAA by a vote of 27-3 on May 23, 2007,<sup>103</sup> and on May 26, 2007, the House approved that version of the bill by a vote of 107-28.<sup>104</sup> The law took effect on June 7, 2007, and Governor Rick Perry “ceremonially signed” it on August 14, 2007.<sup>105</sup>

### C. Adoption of Policies Implementing the RVAA by Texas School Districts

As noted above, the RVAA requires each Texas public school district to adopt a policy to implement the statute.<sup>106</sup> The statute includes a model policy and indicates that if a school district adopts that policy, it will be deemed to be “in compliance” with the RVAA.<sup>107</sup> The statute does not require school districts to adopt the model policy as set forth in the RVAA, however. Indeed, during the consideration of this bill in the Texas House of Representatives, one of the bill’s sponsors, Representative Howard, referred to the model policy as optional and said that schools “can adopt any policy they want to.”<sup>108</sup>

However, when the Texas Association of School Boards (“TASB”) drafted a policy for implementing the RVAA that differed from the model policy, the sponsors of the RVAA began to change their tune.<sup>109</sup>

---

<sup>101</sup> TEX. CONST. art. IV, § 22.

<sup>102</sup> COMM. SUBSTITUTE FOR H.B. 3678, *supra* note 97, at 2.

<sup>103</sup> Tex. S.J., 80th Leg., Reg. Sess. 3343 (2007).

<sup>104</sup> Tex. H.J., 80th Leg., Reg. Sess. at 6632. Two members voted “Present, not voting” on this motion. On May 25, 2007, a motion to suspend all necessary rules and consider the bill with the Senate amendments failed to achieve the necessary two-thirds vote, with 93 voting in favor of the motion and 50 opposing it. One member voted “Present, not voting.” *Id.* at 6436.

<sup>105</sup> *Id.* at 6638. Press Release, Office of the Governor Rick Perry, Gov. Perry Ceremonially Signs Religious Viewpoints Anti Discrimination Act (August 14, 2007), available at <http://governor.state.tx.us/news/press-release/2179/>.

<sup>106</sup> TEX. EDUC. CODE § 25.155 (Vernon 2008).

<sup>107</sup> *Id.*

<sup>108</sup> Tex. H.J., 80th Leg., Reg. Sess. at 6631.

<sup>109</sup> Tex. Ass’n of Sch. Bds., Student Rights and Responsibilities: Student Expression (unpublished policy, on file with the UC Davis Law Review).

Representative Howard accused the TASB of trying to rewrite the statute.<sup>110</sup>

One difference between the TASB policy and the RVAA model policy is that the TASB policy defines the words “to publicly speak.” This phrase appears in the provision of the statute requiring the school to establish “a limited public forum for student speakers at all school events at which a student is to publicly speak.”<sup>111</sup> The TASB policy says a student “publicly speaks” when the student uses his or her “own thoughts and words,” not when the student delivers a message written by school officials or reads from a book or script.<sup>112</sup>

The TASB policy also defines a “school event” as an event or activity that is not part of required instruction, whether the event occurs during or after the school day.<sup>113</sup> The policy says students are eligible to speak in these situations if they volunteer and are not in “disciplinary placement.”<sup>114</sup> In addition, students may not engage in speech in this context that is “obscene, vulgar, offensively lewd, or indecent,” or “[c]reates reasonable cause” to believe that the expression “would result in material and substantial interference with

---

<sup>110</sup> Martha Deller and Jessamy Brown, *School Boards in Legal Limbo over Expression Law*, FT. WORTH STAR-TELEGRAM, Aug. 10, 2007. Howard said that he “underst[oo]d that the Texas Association of School Boards wants to rewrite the law, which is not their prerogative.” *Id.* On second-thought, Howard said, “it might have been better for the Legislature to mandate the model policy because some ‘renegade administrators may think they don’t have to follow the law.’” *Id.*

<sup>111</sup> TEX. EDUC. CODE § 25.152 (Vernon 2008).

<sup>112</sup> Texas Association of School Boards Policy, *supra* note 109. The TASB policy definition of the statutory term “to publicly speak” reads as follows:

[T]o address an audience at a school event at which a student is expected to use the student’s own thoughts and words. A student is not using his or her own thoughts and words when the student: is reading or performing from an approved script, book, or performance piece; is reading or performing under a prescribed set of rules in a competition, curriculum-related school event, non-curriculum related school event, or classroom discussion; is delivering a message that has been written or scripted by school officials; or is making brief introductions or announcements written by school officials. This definition is not intended and shall not be used by school officials to limit the public speaking opportunities that students have traditionally had available to them in the District.

*Id.*

<sup>113</sup> *Id.* The TASB policy definition of the statutory term “school event” is “a school-sponsored event or activity that does not constitute part of the required instruction for a segment of the school’s curriculum, regardless of whether the event takes place during or after the school day.” *Id.*

<sup>114</sup> *Id.*

school activities or the rights of others” or “[c]ontains defamatory statements about public figures or others.”<sup>115</sup>

The legislative authors of the RVAA in the House, Representatives Howard and Chisum, took vigorous issue with the TASB policy. They wrote a letter to all Texas superintendents and school board trustees on this subject. In their letter, these legislators said the TASB policy contained “significant deviations” from the RVAA’s model policy.<sup>116</sup> The legislators complained that the TASB policy “adds definitions outside of RVAA, which are not in the text of RVAA, and which conflict with the clear words, meaning, and legislative history of RVAA.”<sup>117</sup> These definitions, the legislators said, “have the effect of narrowing and restricting the applicability of RVAA.”<sup>118</sup> The legislators took particular issue with the TASB’s definition of the statutory term “to publicly speak.”<sup>119</sup> The definition significantly narrowed the application of the RVAA, they said. The legislators wrote, “Since all student introductions and speeches are ‘supervised by school officials’ and since a school could begin requiring that all student introductions and speeches be reviewed and ‘approved in advance,’ application of RVAA could be entirely avoided.”<sup>120</sup> The legislative authors insisted that the statute provided a “broad” definition of the statutory term “publicly speak” — it meant whenever something is “publicly stated” by a student, they said.<sup>121</sup> TASB’s definition of the term “school event” improperly narrowed the scope of the events contemplated by legislators, according to Howard and Chisum. The legislators concluded their letter with a warning: if public schools followed the TASB policy, they would be violating RVAA.<sup>122</sup>

The Howard Chisum letter also makes some claims about the enforceability of the TASB policy by the Texas Attorney General. It says that, if a school adopted the model policy, that “should assure” the school of the state Attorney General’s assistance if a party challenged the policy on its face.<sup>123</sup> But, the letter continues, if schools

---

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

<sup>116</sup> Letter from Charlie Howard and Warren Chisum, Representatives, to Superintendents and Sch. Bd. Trustees of Tex. (Aug. 10, 2007), <http://www.tea.state.tx.us/taa/strep081007.html>.

<sup>117</sup> *Id.*

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

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> TEX. EDUC. CODE § 25.152 (Vernon 2008); Letter, *supra* note 116.

<sup>122</sup> Letter, *supra* note 116.

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

did not adopt the model policy, they would be “on [their] own” to defend their policies in the event of lawsuits.<sup>124</sup>

Thus, the legislative joint authors of the RVAA argued that, in certain circumstances, the Texas Attorney General should automatically come to the aid of those who adopted the model policy, and warned that those who adopted other policies might have to expend their own resources in the event of RVAA litigation. Others, however, have disputed this claim. At least one school district attorney, Randy Stout, has said that “the state attorney general would defend a district sued on constitutional grounds regardless of which policy it adopted.”<sup>125</sup> The Texas Attorney General’s office does not appear to have offered any formal statement on these issues yet.<sup>126</sup>

So far, Texas public school districts have had a variety of reactions to the RVAA’s mandate to develop policies in this area. The TASB reports that, as of February 2008, 585 of the 1,030 Texas public school districts have adopted a policy intended to implement the RVAA. Of that number, 153 school districts have adopted the state’s model policy, and 213 have adopted a policy similar to the one drafted by the TASB. Two-hundred nineteen have adopted other policies.<sup>127</sup>

## II. OVERVIEW OF SOME RELEVANT U.S. SUPREME COURT PRECEDENT

Two lines of Supreme Court precedent are particularly relevant to the consideration of the RVAA under the First Amendment’s Establishment Clause: the school prayer decisions and the equal access cases.

---

<sup>124</sup> *Id.*

<sup>125</sup> Lowell Brown, *Religious Speech Policy in Works: Denton School Board Members Hold First Vote Ahead of State Deadline*, DENTON REC.-CHRON., Aug. 16, 2007, available at [http://www.dentonrc.com/sharedcontent/dws/drc/localnews/stories/DRC\\_DISD\\_religious\\_0816.3afc5806.html](http://www.dentonrc.com/sharedcontent/dws/drc/localnews/stories/DRC_DISD_religious_0816.3afc5806.html).

<sup>126</sup> The only formal response from Texas Attorney General Greg Abbott to this law so far appears to be a letter in response to a request about whether a permanent injunction that applies to a public school is in conflict with the RVAA, and, if so, what law controls. See Attorney Opinion Request from Robert Scott, Acting Comm’r of Educ., Tex. Educ. Agency (Sept. 11, 2007), available at <http://www.oag.state.tx.us/opinions/opinions/50abbott/rq/2007/pdf/RQ0622GA.pdf>. Attorney General Abbott said his office could not provide an opinion on this matter because it was “subject to the continuing jurisdiction of a court.” See Tex. Op. Att’y Gen. No. GA-0609 (2008), available at <http://www.oag.state.tx.us/opinions/opinions/50abbott/op/2008/htm/ga-0609.htm>. Thus, Abbott said, “[i]t is for that court to determine whether the [RVAA] poses any conflict with the court’s order.” *Id.*

<sup>127</sup> Conversation with Joy Baskin of TASB (Feb. 2008).

---

---

A. School Prayer Cases

The Supreme Court first ruled on prayer in public schools in the 1962 case of *Engel v. Vitale*,<sup>128</sup> which involved a prayer written by the state. In its entirety, the prayer said, “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”<sup>129</sup> State policy required classes to recite this prayer at the beginning of each school day.<sup>130</sup> The Court struck down the practice, finding that the Establishment Clause “at least mean[s] that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”<sup>131</sup> Even if the prayer was nondenominational and students could be excused from the classroom during the prayer, that did not obviate the constitutional problem, the Court said. Writing for the Court, Justice Hugo Black explained that the Establishment Clause did not require a showing that government coerced citizens to engage in religious practices.<sup>132</sup> Justice Black said, “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”<sup>133</sup>

Responding to the notion that its enforcement of the Establishment Clause would be understood as “hostility toward religion or toward prayer,”<sup>134</sup> the Court said, “It is neither sacrilegious nor antireligious to say that [government] should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.”<sup>135</sup> In short, the government’s refusal to meddle in religion in this way was a sign of respect for the autonomy of faith, not a symptom of state antagonism toward religion.

One year later, in *Abington Township v. Schempp*, the Supreme Court confronted a case involving school policies that required Bible readings before each school day, followed by a recitation of the Lord’s Prayer.<sup>136</sup> The Court found the purpose and primary effect of these

---

<sup>128</sup> 370 U.S. 421 (1962).

<sup>129</sup> *Id.* at 422.

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

<sup>131</sup> *Id.* at 425.

<sup>132</sup> *Id.* at 430-31.

<sup>133</sup> *Id.* at 431.

<sup>134</sup> *Id.* at 434.

<sup>135</sup> *Id.* at 435.

<sup>136</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 206-07 (1963).



policies were to advance religion, and thus they ran afoul of the Establishment Clause: “These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools.”<sup>137</sup> As in the *Engel* case, the Court said the fact that students could be excused from these religious activities upon parental request provided “no defense to a claim of [the policy’s] unconstitutionality under the Establishment Clause.”<sup>138</sup>

Writing for the Court, Justice Tom Clark also addressed the school’s arguments that, if the religious exercises were not permitted, then a “‘religion of secularism’ [would be] established in the schools.”<sup>139</sup> The Court found no merit in this claim. The government must never prefer irreligion over religion, it said. But the Court did not do so here. Clark added, “[I]t might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization.”<sup>140</sup> Further, Clark explained, “It certainly may be said that the Bible is worthy of study for its literary and historic qualities.”<sup>141</sup> The Court made it clear that nothing in its opinion should be read to foreclose such studies in school, as long as those pursuits were “presented objectively as part of a secular program of education.”<sup>142</sup>

The Court also rejected the argument that striking down these policies would violate students’ free exercise rights. The Free Exercise Clause “has never meant that a majority could use the machinery of the State to practice its beliefs,” the Court said.<sup>143</sup> Thus, while the government must protect individuals’ rights to practice their faiths, it usually is neither required nor permitted to turn over state resources to support religious practices.<sup>144</sup>

The Supreme Court twice revisited the issue of prayer in public schools in the last decade of the twentieth century.<sup>145</sup> Both of these

---

<sup>137</sup> *Id.* at 222.

<sup>138</sup> *Id.* at 224-25.

<sup>139</sup> *Id.* at 225 (internal citation omitted).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 226.

<sup>144</sup> The military chaplaincy would be one obvious exception from this general rule. See *Katcoff v. Marsh*, 755 F.2d 223, 231-32 (2d Cir. 1985) (recognizing that government may hire chaplains to serve in military settings in which individuals would not otherwise have access to religious counsel and services).

<sup>145</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505

cases involved prayers offered during school events outside of the regular school day — a middle school graduation ceremony and high school football games. In 1992, the Court decided *Lee v. Weisman*, a case involving graduation ceremonies at a public middle school in Providence, Rhode Island.<sup>146</sup> The policy and practice of the school had been to invite ministers to offer prayers at the beginning and end of each middle and high school graduation ceremony. In preparation for these events, the school typically provided clergy members with a pamphlet entitled “Guidelines for Civic Occasions” prepared by the National Conference of Christians and Jews.<sup>147</sup> These guidelines recommended that prayers given on such occasions be inclusive and sensitive to diverse perspectives on the matter of religion.<sup>148</sup> The school principal also advised the rabbi who was to give the prayer that his remarks should be “nonsectarian.”<sup>149</sup>

After the rabbi offered prayers at this middle school graduation ceremony, a parent of a student sued in his capacity as a taxpayer and on behalf of his minor daughter.<sup>150</sup> The Court struck down the school’s prayer policy as unconstitutional, citing the fact that school officials directed a religious exercise and essentially required graduation attendees to participate in that exercise. “These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools,” the Court said.<sup>151</sup> The decisions to include prayers in the program and to invite a clergyperson to offer those prayers were certainly attributable to the state, the Court noted.

Writing for the majority, Justice Anthony Kennedy explained that, at minimum, the Constitution prohibits the government from coercing individuals “to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”<sup>152</sup> The Court found that the school’s prayer policy violated this principle. The school’s involvement in the prayers and assembling of a captive audience made it clear that the prayers bore the state’s imprimatur “and thus put school-age children who

---

U.S. 577 (1992).

<sup>146</sup> *Weisman*, 505 U.S. at 580.

<sup>147</sup> *Id.* at 581.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See id.* at 583-84.

<sup>151</sup> *Id.* at 586.

<sup>152</sup> *Id.* at 587 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

objected in an untenable position.”<sup>153</sup> Justice Kennedy emphasized the “heightened concerns with protecting freedom of conscience from subtle coercive pressure in elementary and secondary schools.”<sup>154</sup> This setting would tend to make students feel as if they were giving assent to the prayers unless they protested against them, which would be terribly uncomfortable for students.

The Court also specifically addressed the argument that attendance at graduation was voluntary. For this reason, the school argued, it was not placing any pressures, subtle or otherwise, on students to attend the ceremony and participate in the prayer. In rejecting this argument, the Court said attendance at the ceremony and participation in this state-sponsored prayer was “in a fair and real sense obligatory” even though there was no formal attendance requirement.<sup>155</sup> The Constitution bars the school from forcing students to choose between safeguarding their consciences and attending their graduation ceremonies, the Court held.<sup>156</sup> While some might view a request that students give respectful attention to a prayer as a reasonable and minimal one, dissenters could view such a request in this context as “an attempt to employ the machinery of the State to enforce a religious orthodoxy.”<sup>157</sup>

The Court recognized that schools were certainly not religion-free zones. But it said that these issues were not before the Court: “The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform.”<sup>158</sup> The Court found that none of its precedents indicated that schools could require or pressure students to participate in such prayers.<sup>159</sup>

Eight years later, in 2000, the Supreme Court heard *Santa Fe Independent School District v. Doe*, a related case involving prayers before football games at a Texas public high school.<sup>160</sup> In this case, the Supreme Court examined a policy with a long and convoluted history. The first school policy regarding its football games was that the student council chaplain delivered a prayer over the public address system before every varsity game. After court challenges to this and

---

<sup>153</sup> *Id.* at 590.

<sup>154</sup> *Id.* at 592.

<sup>155</sup> *Id.* at 586.

<sup>156</sup> *Id.* at 596.

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

<sup>158</sup> *Weisman*, 505 U.S. at 599.

<sup>159</sup> *Id.*

<sup>160</sup> 530 U.S. 290, 171 (2000).

related policies, the school adopted another policy that authorized two student elections, the first to determine whether a student would offer “invocations” at football games, and the second to determine which student would deliver those prayers. The school subsequently altered that policy to remove the word “prayer” from its title and to add references to “messages” as well as “invocations” in the body of the policy.<sup>161</sup> It was this policy that the Supreme Court considered and declared facially unconstitutional under the Establishment Clause.

The Court noted “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.”<sup>162</sup> It concluded that the speech at issue was government-sponsored speech rather than private speech. It also determined that this speech had a coercive effect on the audience that assembled for football games.<sup>163</sup>

At the same time, the Court acknowledged that simply because a message occurred in this context did not necessarily make it a government-endorsed message.<sup>164</sup> It discussed cases in which the government had created a forum and welcomed nongovernmental speakers.<sup>165</sup> The Court distinguished the Santa Fe policy from these cases, saying that school officials did not indicate through their words or actions that they intended to open the space for “indiscriminate use’ . . . by the student body generally.”<sup>166</sup> “[S]elective access,” the Court observed, “does not transform government property into a public forum.”<sup>167</sup> Only one student speaks, the Court noted, and that same student speaks for the entire football season.<sup>168</sup> Further, the school restricted the student’s speech. Those who drafted the speech restrictions intended to steer the message toward prayer. Public

---

<sup>161</sup> *Id.* at 298 n.6. The policy stated in part, “The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.” *Id.*

<sup>162</sup> *Id.* at 302 (quoting *Bd. of Educ. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990)).

<sup>163</sup> *Id.* at 312.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995)).

<sup>166</sup> *Id.* at 302-03 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

<sup>167</sup> *Id.* (quoting *Perry Ed. Ass’n. v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 47 (1983)).

<sup>168</sup> *Id.* at 303.

schools could not “hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of [their] actions,” the Court said.<sup>169</sup> Even if it had found that a public forum existed, the Court noted, that would not obviate the need for examining whether the policy violated the Establishment Clause.<sup>170</sup>

A number of other factors led the Court to conclude that the speech in the *Santa Fe* case was government-endorsed. For example, the school was deeply involved in the speech, the Court said. The school authorized the election and resulting speech. The speech occurred on school property, took place at a school-sponsored event, and was broadcast over the school’s public address system. The Court also emphasized other aspects of school sponsorship in this setting, including the presence of students in sporting and cheerleading uniforms, banners with school slogans and mascots, and fans with school logos and flags. This is the setting in which the school “has chosen to permit” an elected student to offer a prayer or message, the Court noted.<sup>171</sup> “[A]n objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval,” the Court concluded.<sup>172</sup>

The history of the policy also was a factor in its undoing, as was the fact that some students were required to attend football games and many more wanted to do so. There was significant peer pressure in this context not to voice dissent against messages that were part of the school program, the Court said. In sum, the *Santa Fe* Court held that the prayer policy was facially invalid “because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.”<sup>173</sup>

At the same time, the Court emphasized that the First Amendment certainly did not ban all religious expression and activity in public schools.<sup>174</sup> It said, “[N]othing in the Constitution as interpreted by

---

<sup>169</sup> *Id.* at 307 n.21 (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O’Connor, J., concurring in part and concurring in judgment)).

<sup>170</sup> *Id.* at 303 n.13 (stating “[a] conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private . . . . [W]e also note that we have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause.” (citing *Capitol Square*, 515 U.S. at 772 (O’Connor, J., concurring in part and concurring in judgment))).

<sup>171</sup> *Id.* at 308.

<sup>172</sup> *Id.* at 308.

<sup>173</sup> *Id.* at 317.

<sup>174</sup> *Id.* at 313 (citation omitted).

this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday.”<sup>175</sup> The First Amendment protects religious liberty by making room for this sort of religious expression at school, the Court noted. But it also protects religious freedom by barring public schools from sponsoring or promoting prayer.<sup>176</sup>

### B. Equal Access Cases

In the early 1980s, the Supreme Court began to address a number of cases that dealt with nongovernmental groups or individuals that wished to speak on government property.<sup>177</sup> Some of these cases involved school campuses at the post-secondary as well as the secondary and elementary level.<sup>178</sup> Other cases involved government property outside the public school context.<sup>179</sup> This Article addresses these cases in the order the Court handed them down.

The 1981 case of *Widmar v. Vincent* involved an evangelical Christian student group that wished to use campus facilities at a state university for its meetings. The group’s meetings included “prayer, hymns, Bible commentary, and discussion of religious views and experiences.”<sup>180</sup> The university refused to allow the student religious group to use university property in this way, even though it had created “a forum generally open for use by student groups.”<sup>181</sup> The Court determined that the state had discriminated against the religious content of the group’s speech, and thus had to justify that exclusion from this forum with a narrowly tailored compelling interest. The university claimed a compelling interest in ensuring that the state did not violate the Establishment Clause of the First Amendment and a comparable provision in the state’s constitution. The Court agreed

---

<sup>175</sup> *Id.* (internal citation omitted).

<sup>176</sup> *Id.*

<sup>177</sup> See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 264-65, 277 (1981) (ruling state university policy excluding student religious groups but not other student groups from university facilities violated requirement of content-neutrality in government regulation of speech).

<sup>178</sup> See, e.g., *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (ruling New York school district policy denying religious groups but not other groups use of district facilities during nonschool hours violated First Amendment viewpoint-neutrality requirement).

<sup>179</sup> See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (allowing private party to erect cross on state capital grounds).

<sup>180</sup> *Widmar*, 454 U.S. at 265 n.2.

<sup>181</sup> *Id.* at 267.

that that interest was indeed compelling, but it found that that interest would not be undermined by allowing the student religious group to hold its meetings on state property.<sup>182</sup>

The Court applied what is known as the *Lemon v. Kurtzman* three-prong test.<sup>183</sup> Drawn from a case involving government aid and religious schools, this test requires government action to meet three tests to pass muster under the Establishment Clause: it must have a secular purpose, must have a primary effect “that neither advances nor inhibits religion,” and must refrain from causing excessive church-state entanglement.<sup>184</sup> The Court held that affording religious groups equal access to the forum in the *Widmar* case met the requirements of this test.<sup>185</sup> The purpose of the forum was to allow students to exchange ideas without promoting any of those ideas. The Court also said any benefit to the student religious group from the use of the property would be incidental and thus would not violate the Establishment Clause. It came to that conclusion for two reasons. The Court noted that the university did not put its stamp of approval on speech simply by permitting it to occur in an open forum.<sup>186</sup> The state would not be endorsing religion any more than it would be endorsing any of the other causes or activities practiced by the nonreligious student groups that met on campus. It also noted that university-level students are young adults, not children who are more impressionable.<sup>187</sup> Further, the Court explained, given the large number of student groups that met on campus on equal terms, it would not be reasonable for students to infer that the university supported the speech of particular student groups.<sup>188</sup>

The *Widmar* Court also emphasized the fact that a wide range of nonreligious as well as religious speakers had access to the forum. It

---

<sup>182</sup> *Id.* at 271.

<sup>183</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1972). In this 1972 case, the Court said,

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster “an excessive government entanglement with religion.”

*Id.* at 612-13 (citations omitted).

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

<sup>185</sup> *Widmar*, 454 U.S. at 271-75.

<sup>186</sup> *Id.* at 274.

<sup>187</sup> *Id.* at 274 n.14.

<sup>188</sup> *Id.*

noted that there were more than 100 student groups at the university that could meet on campus. The Court thus determined that “[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect.”<sup>189</sup> Given the lack of evidence that religious groups would dominate the forum, advancing religion was not its primary effect.<sup>190</sup> Calling the decision a “narrow one,” the Court ruled that the university’s exclusion of this religious speech was not justified under relevant constitutional standards.

After this decision, Congress passed and President Ronald Reagan signed the EAA in 1984, which essentially applied the *Widmar* principle to public secondary schools.<sup>191</sup> As noted above, the EAA provides that a public secondary school that creates a “limited open forum” for noncurriculum related student groups to meet on campus during noninstructional time cannot deny the same access to student groups “on the basis of the religious, political, philosophical, or other content of the speech at such meetings.”<sup>192</sup> It also provides that student club meetings must be “voluntary and student-initiated.”<sup>193</sup> School officials who are present at the meetings of student religious clubs must do so only in a “nonparticipatory capacity,” and “nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.”<sup>194</sup>

---

<sup>189</sup> *Id.* at 274.

<sup>190</sup> *Id.* at 275.

<sup>191</sup> 20 U.S.C. §§ 4071-74 (2006).

<sup>192</sup> *Id.* § 4071(a).

<sup>193</sup> *Id.* § 4071(1).

<sup>194</sup> *Id.* § 4071(3)-(5). Professor Doug Laycock has flagged “a statutory glitch” in this section of the EAA. Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 42-45 (1986). Laycock explains that the statute says a school must meet five criteria that fall into two different categories in order to be deemed to have offered equal access:

The first three [criteria] arise from establishment clause restrictions on religious meetings: the meeting must be voluntary and student initiated, there can be no sponsorship by the school, and school employees cannot participate. The other two criteria protect legitimate interests of the school: the meeting may not interfere with education, and nonschool persons may not regularly attend. The school need not be required to impose these last two criteria, but most schools would probably want to impose them on all groups, secular as well as religious.

The Act should say that schools must impose the first three criteria on religious groups, and that they may apply any of the criteria to all groups. Unfortunately, the first three criteria and the last two criteria are tacked on to the same introductory clause, even though they are wildly nonparallel. Most troubling, the introductory clause says that the school has offered a fair



The Supreme Court heard a constitutional challenge to the EAA in 1990 in *Board of Education v. Mergens*.<sup>195</sup> A public high school claimed that the First Amendment's Establishment Clause justified its denial of official recognition to a student Christian club. The Court rejected the challenge, with a plurality finding that "the logic of *Widmar* applies with equal force to the Equal Access Act."<sup>196</sup> The EAA has the secular purpose of preventing discrimination against religious and other types of speech, the Court said. Even assuming some legislators supported the legislation because they believed religious speech was particularly valuable, the Court plurality said, that would not invalidate the Act.<sup>197</sup> Instead, the constitutional focus should be on "the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law."<sup>198</sup>

The Court next addressed the "primary effect" prong of the *Lemon* test. The petitioners argued that the EAA had the impermissible primary effect of advancing religion. Because the students held their meetings under school auspices and compulsory attendance laws brought students to school, a reasonable secondary school student would believe the school supported student religious clubs, they

---

opportunity [for student clubs] to meet if it "uniformly provides" for these five criteria. The restriction on participation by school employees applies by its own terms only to religious meetings. But there is no similar qualifier in the requirement that meetings be student initiated and without school sponsorship. Read literally, the effect is to apply to all meetings two criteria that are essential only to religious meetings. That is, the statute seems to say that [a religious group] has been offered a fair opportunity to meet only if the school "uniformly provides" that non-curriculum-related student meetings are student initiated and without school sponsorship.

Any court interested in avoiding absurd results would recognize this as a statutory glitch. There is no federal interest in forbidding schools to sponsor any group not related to the curriculum. Surely what Congress meant to say is that student religious groups must be student initiated and without school sponsorship, and [a student religious group] cannot complain that the lack of school sponsorship denies it a fair opportunity to meet. It is bizarre to provide that school sponsorship of the chess club denies [a student religious group] a fair opportunity to meet. "Uniformly" is one of those misleading statutory modifiers . . . that even a firmly committed textualist will ignore in the interest of sensible construction.

*Id.* at 43-44.

<sup>195</sup> 496 U.S. 226 (1990).

<sup>196</sup> *Id.* at 248.

<sup>197</sup> *Id.* at 249.

<sup>198</sup> *Id.* (italics in original).

said.<sup>199</sup> Writing for the Court plurality, Justice O'Connor rejected this argument. Secondary school students, O'Connor wrote, "are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."<sup>200</sup> The plurality also noted that the EAA limited participation by school officials in the meetings of student religious groups and required these meetings to occur during "non-instructional time." Thus, she said, the EAA did not run into problems related to compulsory attendance requirements.<sup>201</sup> O'Connor did not deny the reality of peer pressure. She said, however, there was little or no risk of government endorsement of coercion along religious lines "where no formal classroom activities are involved and no school officials actively participate."<sup>202</sup> The plurality noted that the broad spectrum of student clubs at the school would cut against any message of school sponsorship or preference for religion. O'Connor stressed that, when a student religious club is simply one of many different student clubs, there is no message of government sponsorship of religion.<sup>203</sup>

The Court next faced related issues in the 1993 case of *Lamb's Chapel v. Center Moriches Union Free School District*.<sup>204</sup> In *Lamb's Chapel*, a school opened its property during nonschool hours for a wide range of social and civic activities. However, its policy prohibited any use of the property for religious purposes. When an evangelical church sought to use a room at the school to show a film series dealing with family and parenting issues, the school board refused, citing this policy. The church sued, claiming violation of its Free Speech and Free Exercise rights, among others.

In this case, the Supreme Court assumed without deciding that the relevant forum was a "limited public forum," and thus any restriction on the use of the forum had to be viewpoint neutral and reasonable in light of the forum's purposes.<sup>205</sup> While the school argued its regulations were viewpoint neutral because they treated all religious uses of the property the same, the Court saw things differently. It said the lecture or film the religious group wished to show was a bona fide civic or social use, and thus fell within the subject matter covered by the forum. Further, the Court found that the school had turned away

---

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 250.

<sup>201</sup> *Id.* at 251.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 252.

<sup>204</sup> 508 U.S. 384 (1993).

<sup>205</sup> *Id.* at 390-93.

the group simply because its materials commented on these topics from a religious viewpoint. Accordingly, the Court invalidated the school's restriction.<sup>206</sup>

Permitting such a use of government property would not violate the First Amendment's Establishment Clause, the Court said. The state simply had not carried the burden of proving that the situation threatened Establishment Clause values. Writing for the Court, Justice Byron White emphasized that the religious group wanted to show the film during nonschool hours, the school did not sponsor the event, and the event would have been open to the public. Further, Justice White explained, many different nongovernmental organizations used the property on numerous occasions. White concluded, "Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the [school] was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental."<sup>207</sup>

In 1995, the Supreme Court decided two equal access cases. In *Capitol Square Review & Advisory Board v. Pinette*,<sup>208</sup> the Court held that a nongovernmental group could temporarily erect an unattended religious symbol on a plaza surrounding the Ohio statehouse. A plurality of the Court noted that "giving sectarian religious speech preferential access to a [government] forum . . . would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination)."<sup>209</sup> It also said that "one can conceive of a case in which a governmental entity manipulates its administration of a public forum . . . in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement *that is in fact accurate*."<sup>210</sup> But, the plurality emphasized, the government had not shown favoritism for religion in this case.<sup>211</sup> The plurality advocated a *per se* rule in these situations. It said, "Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."<sup>212</sup>

Three justices, Justices O'Connor, Souter, and Breyer, concurred in part and concurred in the judgment in this case. While these justices

---

<sup>206</sup> *Id.* (citations omitted).

<sup>207</sup> *Id.* at 395.

<sup>208</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

<sup>209</sup> *Id.* at 766.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 770.

agreed that the display should be permitted, they rejected the *per se* rule advanced by the Court plurality. In her opinion, which Justices Souter and Breyer joined, Justice O'Connor noted that even where there was a neutral government policy toward private religious expression in a public forum, it was still necessary to ask whether the case gave rise to an impression that the government was endorsing religion.<sup>213</sup> Accordingly, O'Connor said, "I see no necessity to carve out, as the plurality opinion would today, an exception to the endorsement test for the public forum context."<sup>214</sup>

In his opinion, which Justices O'Connor and Breyer joined, Justice Souter also deemed the plurality's *per se* rule a misguided move that would "create[] a serious loophole in the protection provided by the endorsement test."<sup>215</sup> Souter said, "[A]n impermissible message of [government] endorsement [of religion] can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism."<sup>216</sup> He noted that in cases such as *Mergens*, which involved no governmental favoritism for religious speech, the Court nonetheless scrutinized the context in which the speech occurred. This scrutiny included an examination of the relevant audience for the expression (secondary school students), the range of groups using the forum, and the school's effort to distance itself from any religious messages.<sup>217</sup> These justices also emphasized that in the *Lamb's Chapel* and *Widmar* cases, the Court undertook a similar inquiry to determine whether speech by private actors in a government forum constituted government-endorsed speech.<sup>218</sup> Justice Souter explained that he understood the plurality's view as saying that the government violates the Establishment Clause in this context only when it intentionally endorses religion or manipulates the forum in favor of religious groups or religious expression. Souter surmised that this would seem to allow religious groups or speech to dominate the forum. Further, Justice Souter said, "[b]y allowing government to encourage what it cannot do on its own, the proposed *per se* rule would tempt a public body to contract out its establishment of religion, by encouraging the

---

<sup>213</sup> *Id.* at 772 (O'Connor, J., concurring in part and concurring in the judgment) (internal citation omitted).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 791 (Souter, J., concurring in part and concurring in the judgment).

<sup>216</sup> *Id.* at 774.

<sup>217</sup> *Id.* at 789.

<sup>218</sup> *Id.* at 790.

private enterprise of the religious to exhibit what the government could not display itself.”<sup>219</sup>

Finally, although these justices found that the state could have drafted an adequate disclaimer in this case, they noted that a disclaimer of government endorsement of private religious speech is not a silver bullet.<sup>220</sup> A disclaimer could not “neutralize a governmental message of endorsement,” for example, when other evidence pointed toward government support for a religious message.<sup>221</sup>

The other relevant case handed down by the Court in 1995 is *Rosenberger v. Rector & Visitors of the University of Virginia*.<sup>222</sup> This case involved a student group that sought access to a share of university-collected and administered student funds. This particular student group wanted to use those funds for avowedly religious activities. The university had rejected the student group’s request for the funds, citing concern about violating the Establishment Clause, among other reasons.

Writing for the Court, Justice Kennedy said that “[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”<sup>223</sup> The Court held that the university’s student activities fund was a forum of sorts and that the school’s refusal to allow the religious student group access to those funds along with other student groups constituted viewpoint discrimination. Even so, the Court was careful to evaluate arguments that the Establishment Clause prohibited the extension of this aid to student groups promoting religion. It found the university had violated the students’ rights to free speech.<sup>224</sup> But it also said, “It remains to be considered whether the violation following from the University’s action is excused by the necessity of complying with the Constitution’s prohibition against state establishment of religion.”<sup>225</sup>

If the Establishment Clause was to be taken seriously, the Court said, there must be a case-by-case determination of the purpose and effect of government action and then an inquiry “into the practical

---

<sup>219</sup> *Id.* at 791-92.

<sup>220</sup> *Id.* at 794 n.2 (citations omitted).

<sup>221</sup> *Id.*

<sup>222</sup> 515 U.S. 819 (1995).

<sup>223</sup> *Id.* at 829.

<sup>224</sup> *Id.* at 830. The Court found that, although the forum at issue was “more in a metaphysical than in a spatial or geographic sense . . . the same principles [were] applicable,” including the prohibition on viewpoint discrimination. *Id.*

<sup>225</sup> *Id.* at 837.

details of the program's operation."<sup>226</sup> It concluded that there was no Establishment Clause violation here because the program was neutral toward religion. A state university does not offend the Establishment Clause by allowing a wide variety of student groups, including student religious groups, access to this forum, the Court said.<sup>227</sup> In its ruling, the Court also emphasized the nature of the university as an important factor in its decision-making. For example, Justice Kennedy characterized colleges and universities as "vital centers for the Nation's intellectual life," and thus places where viewpoint discrimination was particularly odious.<sup>228</sup>

The most recent Supreme Court case dealing with private religious expression in a government forum is the 2000 case of *Good News Club v. Milford Central School*.<sup>229</sup> This case involved an elementary school that opened its property for a wide range of nongovernmental uses. When a Christian organization that sponsored after-school Bible clubs sought to use the property, the state refused, citing a rule against the use of the property for religious purposes.

In this case, the parties agreed that the forum was a limited public forum, so the Court assumed that was true without deciding the issue. Therefore, the Court said, the state could restrict the forum to the discussion of certain topics or for certain groups, but its regulation had to be reasonable in light of the purposes of the forum and the state could not discriminate based on viewpoint. The Court found that the state engaged in viewpoint discrimination. The Christian student club taught morals and character development, which was a permissible purpose under the school's policy, the Court said.<sup>230</sup> The club simply did so from a religious perspective.<sup>231</sup> The Court also rejected the state's argument that its exclusion of the Christian club was necessary to meet the requirements of the Establishment Clause. "[I]t is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination," the Court said.<sup>232</sup> It found however, that it did not have to decide this issue because the school had no legitimate Establishment Clause concerns in this case.<sup>233</sup>

---

<sup>226</sup> *Id.* at 838-39.

<sup>227</sup> *Id.* at 842.

<sup>228</sup> *Id.* at 836.

<sup>229</sup> 533 U.S. 98 (2001).

<sup>230</sup> *Id.* at 108.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 113 (internal citations omitted).

<sup>233</sup> *Id.*

The Club met after school hours, and the school did not sponsor the meetings, the Court noted.

When the state claimed that this case was different from *Lamb's Chapel* and *Widmar* because it involved elementary school children, the Court rejected the argument.<sup>234</sup> The policy was neutral toward religion, the Court said.<sup>235</sup> To the extent the coercion analysis was relevant here, the parents, not the schoolchildren, were the appropriate community upon which to focus because children could not attend the club without the permission of their parents.<sup>236</sup>

The Court distinguished cases involving “the content of the curriculum taught by state teachers *during the schoolday* to children required to attend.”<sup>237</sup> In the *Good News Club* case, the Court said, “individuals who are not schoolteachers are giving lessons after school to children permitted to attend only with parental consent.”<sup>238</sup> Further, “there [was] simply no integration and cooperation between the school district and the Club.”<sup>239</sup> Rather, the relevant activities took place after school.<sup>240</sup> Finally, the Court said that given the club’s important free speech rights, “[w]e decline to employ Establishment Clause jurisprudence using a modified heckler’s veto, in which a group’s religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.”<sup>241</sup>

These are among the Supreme Court decisions upon which the RVAA relies. The next section explores whether RVAA principles are consistent or inconsistent with some of the principles announced in these cases.

### III. THE ESTABLISHMENT CLAUSE AND THE RVAA

Do the provisions of the RVAA avoid the constitutional difficulties identified in the school prayer cases and align with the equal access policies the Court has upheld in the face of Establishment Clause challenges? Is the RVAA otherwise consistent with the First Amendment’s Establishment Clause? The sponsors and drafters of the

---

<sup>234</sup> *Id.* at 114-20.

<sup>235</sup> *Id.* at 114.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 117.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 116 n.6.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 119.

RVAA insist that the answer to these questions is “yes.”<sup>242</sup> Indeed, they argue that the RVAA is simply a codification of current law in this area that does not raise any constitutional concerns.<sup>243</sup> A closer look at the RVAA and Court precedent, however, reveals that this characterization of the statute is inaccurate.<sup>244</sup>

This part of the Article addresses these issues. It begins by exploring the similarities and differences between the limited public forum provisions set forth in the RVAA and the school prayer and equal access policies the Court has considered.<sup>245</sup> In light of these comparisons, it next examines some avenues whereby Establishment Clause challenges may be brought regarding applications of the RVAA’s limited public forum provisions.<sup>246</sup> The Article then considers some Establishment Clause questions that may arise regarding various applications of the RVAA’s provisions to student-organized religious clubs, homework, and class work.<sup>247</sup> The final section of this part of the Article briefly examines the issue of whether the RVAA is facially constitutional under the Establishment Clause.<sup>248</sup>

#### A. *The RVAA’s Limited Public Forum Provisions*

The RVAA says public school districts must adopt policies that require “the establishment of a limited public forum for student speakers at all school events at which a student is to publicly speak.”<sup>249</sup> Those policies, the statute says, must not discriminate against religious viewpoints and they must “provide a method, based on neutral criteria, for the selection of student speakers at school events and graduation ceremonies.”<sup>250</sup> According to the statute, student speakers may not engage in obscene or vulgar speech, and schools should disclaim any endorsement or sponsorship of such speech.<sup>251</sup>

---

<sup>242</sup> See *supra* note 23.

<sup>243</sup> See *supra* note 23.

<sup>244</sup> This Article does not address challenges that might be brought to the RVAA under provisions of the federal Constitution other than the Establishment Clause or under the provisions of the Texas constitution.

<sup>245</sup> See *infra* notes 249-348.

<sup>246</sup> See *infra* notes 348-407.

<sup>247</sup> See *infra* notes 408-53.

<sup>248</sup> See *infra* notes 454-72.

<sup>249</sup> TEX. EDUC. CODE § 25.152(a) (Vernon 2008).

<sup>250</sup> *Id.* § 25.152(a)(1)-(2).

<sup>251</sup> *Id.* § 25.152(a)(3)-(4).



1. Comparing the RVAA's Limited Public Forum Provisions and Supreme Court School Prayer Precedent

If implemented as drafted, the RVAA's limited public forum provisions would avoid some of the constitutional defects the Court identified in the prayer policies it has considered. For example, the RVAA does not direct public schools to create a special place for prayer or other religious expression in school policies and programs.<sup>252</sup> In contrast, all of the prayer policies the Court has examined did so in varying ways. In the *Weisman* case, for example, the Court noted, "A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that prayers must occur."<sup>253</sup> In the *Santa Fe* case, the school board policy said it had chosen to permit students to deliver "a brief invocation and/or message" before football games.<sup>254</sup> The RVAA, however, directs schools to create forums that may include religious speech by student speakers, but it does not require such speech or explicitly encourage it.<sup>255</sup> According to the terms of the RVAA, it is students, not the state, who would initiate any prayers or other religious expression.

Similarly, the RVAA does not involve the state in drafting prayers. As the Court said in *Engle v. Vitale*, at minimum, the Establishment Clause bars the government from "compos[ing] official prayers for any group of the American people to recite as a part of a religious program carried on by government."<sup>256</sup> Under the RVAA, public schools would not present students with prayers to say.

The RVAA also does not direct schools to organize votes on prayer, which was one of the objectionable elements in *Santa Fe*.<sup>257</sup> In that case, the Court found that school-sponsored votes on prayer connected the school to the prayers.<sup>258</sup> In these ways, the RVAA avoids some of the problems raised in the Supreme Court's prayer cases.

However, a number of other factors the Court found problematic in these cases also would be present in some of the situations created by

---

<sup>252</sup> See, e.g., *id.* §§ 25.151-.157 (Vernon 2008) (requiring religious viewpoints to be treated same as secular viewpoints).

<sup>253</sup> *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

<sup>254</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. at 298 n.6.

<sup>255</sup> TEX. EDUC. CODE § 25.152.

<sup>256</sup> *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

<sup>257</sup> 530 U.S. at 298 n.6.

<sup>258</sup> *Id.*

the RVAA's limited public forum provisions.<sup>259</sup> For example, the RVAA's provisions apply to situations involving captive student audiences assembled by the state. In the Court's most recent prayer cases, it recognized there was significant pressure or desire to attend the school events in question (graduation and, to a lesser extent, football games) even when attendance at those events was not officially required by the school.<sup>260</sup> This was a factor that led the Court to conclude that the prayers offered in these settings constituted governmental coercion on religious matters or state-sponsorship of religious practices or both.<sup>261</sup>

Part of the difficulty created by the schools' policies involved in these Supreme Court cases was that schools created incentives for students to attend events that included prayers. The same sometimes will be true of the RVAA. Students want to attend events like graduation and athletic games. If students participate in these events, they sometimes will necessarily hear prayers or proselytizing, whether that proselytizing is intended to win converts to a faith or turn people against religion.<sup>262</sup>

---

<sup>259</sup> See *supra* notes 128-76.

<sup>260</sup> In *Lee v. Weisman*, the Court noted that, while graduation exercises were not mandatory, "it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary,' for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." *Lee v. Weisman*, 505 U.S. 577, 595 (1992). Likewise, in the *Santa Fe* case, the Court said, "To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is 'formalistic in the extreme.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000).

<sup>261</sup> See *supra* notes 145-76.

<sup>262</sup> Of course, there will be many times at which there will be no controversy or constitutional problem when students speak about religion at school events. For example, a student may be selected to speak at a graduation ceremony due to academic achievement and he or she may discuss the role a pastor or rabbi has played in helping him or her to succeed in life. Alternatively, a student selected to speak at graduation may reference the fact that he or she is not religious but has found inspiration in the human spirit of achievement.

It is often a different kettle of fish, however, when student speech involves prayer or proselytizing and such speech is offered before a captive audience. Remarks of this nature in this context will usually cause controversy and sometimes raise Establishment Clause concerns. The RVAA is clearly intended to protect such speech in this context. For example, the legislative history of the statute makes it plain that prayer is covered by the RVAA. See *supra* notes 87, 96. And, in their opposition to an amendment that would have barred student speech that discriminated on the basis of religion, some RVAA supporters reportedly argued that "students should be allowed to express religious beliefs [about] whether their religion is superior to others." Associated Press, *supra* note 86. Further, as previously noted, while the statute limits

One may also read the RVAA to apply to school activities like morning announcements and assemblies, events schools typically require all students to attend. In these contexts, the captive-audience concerns will be even more serious. Families place a great deal of trust in public schools to educate their children. They do so, however, “on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family,” according to the Court.<sup>263</sup> “Students in such institutions are impressionable and their attendance is involuntary,” the Court has said.<sup>264</sup> Whether the school directs prayers or proselytizing messages or merely presides over them, the fact remains that compulsory education laws will often be the means by which children receive messages under the RVAA.

Schools might allow objecting students to opt-out of morning announcements or school assemblies in these situations, but that opt-out could come at a significant cost: students could miss important information about school activities or valuable educational experiences. If students seek to opt-out of only the portion of the program that includes students’ remarks, schools may balk, believing it would cause too much disruption. If so, a school would force a student to forfeit an educational experience to avoid prayers, proselytizing, or anti-religious speech that he or she cannot in good conscience participate in, including participating by maintaining respectful silence.<sup>265</sup>

Alternatively, a student may wish to opt-out of fellow students’ remarks only when such speech will contain remarks that violate his or her conscience. But therein lies a problem. It seems highly unlikely that students will have advance warning about the nature of a fellow student’s remarks in this setting in the majority of cases. Thus, while they might have wanted to absent themselves from the room for certain types of expression had they known about the nature of the speech in advance, many times they will be taken by surprise, and schools usually do not honor spontaneous opt-out requests.<sup>266</sup> Further, whenever a

---

itself to protecting “a student’s publicly stated voluntary expression of a religious viewpoint,” if a school opens up limited public forums and permits student speakers to promote their faith, it would be unconstitutional for the school to bar others from criticizing that faith or faith in general. *See supra* note 74. This Article focuses on these more controversial types of speech.

<sup>263</sup> *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

<sup>264</sup> *Id.*

<sup>265</sup> *See infra* notes 497-503.

<sup>266</sup> *See infra* notes 473-525 for further discussion of this issue as a policy matter.

student has to request permission to opt-out of school activities, that student runs the risk of stigmatization by his or her peers.<sup>267</sup>

Some have argued that there can be no captive audiences under the RVAA because, according to its provisions, students speak rather than the government.<sup>268</sup> This misplaces the focus of the inquiry. For purposes of determining whether a captive audience exists, the focus is on the nature of the event, not the nature of the speaker.<sup>269</sup> Graduation ceremonies, football games, morning announcements, and school assemblies are events schools either require or encourage students to attend.

When a court assesses whether a school is coercing students along religious lines or sponsoring religious or anti-religious speech, the captive-audience concern will play at least some role in its analyses. Further, as described below, the presence of a captive student

---

<sup>267</sup> See *Abington v. Schempp*, 374 U.S. 203, 289-90 (1963) (Brennan, J., concurring). In his concurring opinion in the *Schempp* decision, Justice Brennan wrote,

[B]y requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the [opt-out] procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused. Thus the excusal provision in its operation subjects them to a cruel dilemma. In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.

*Id.* (footnote omitted); see also *id.* at 224-25 (stating “[n]or are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause”); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (finding that prayer policy allowing students to be excused from classroom during prayer did not remove Establishment Clause concerns).

<sup>268</sup> In an opinion-editorial, lawyer Kelly Coghlan, who claims to have written the RVAA, argues,

If a student does express a religious view on an otherwise permissible subject, it's simply one student's opinion. It has no endorsement from the school. The required disclaimers will make that clear. Since it is not government speech, there is no “captive audience” argument to be made; it is simply one student's opinion expressed to others with no imprimatur of the government. Students are free to ignore each other's opinions and often do.

Kelly Coghlan, *Law Justifiably Protects Students' Rights to Voluntary Expression*, DALLAS MORNING NEWS, Sept. 6, 2007, [http://www.txcn.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-coghlan\\_06edi.ART.State.Edition1.421585a.html](http://www.txcn.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-coghlan_06edi.ART.State.Edition1.421585a.html).

<sup>269</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307-08 (2000).

audience may be significant to a court's decision about whether a forum exists.<sup>270</sup>

Another way in which speech pursuant to the limited public forum provisions is like the speech at issue in the Supreme Court's prayer cases is that it often will involve the school broadcasting and presiding over student expression, including religious and anti-religious speech. Signs and symbols of state authority would usually be associated with these sorts of expression. For example, the Court in *Santa Fe* noted that the football games were "school-sponsored function[s] conducted on school property" and that "[t]he message is broadcast over the school's public address system, which remains subject to the control of school officials."<sup>271</sup> The Court also noted that the prayers would be nested within "the traditional indicia of school sporting events" including school uniforms and colors.<sup>272</sup> It concluded, "[r]egardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."<sup>273</sup>

To be sure, the Santa Fe policy specifically referenced "invocation[s]," whereas the RVAA policy does not on its face reference invocations or any sort of prayer.<sup>274</sup> But the RVAA policy does require schools to preside over student speech delivered in a variety of contexts where there are at least as many signs and symbols of state control as were present in the *Santa Fe* case. For example, typical morning announcements in a public school utilize the school intercom or closed-circuit video system and include items like the recitation of the Pledge of Allegiance, references to school values or mottos, notification about school events and programs, and messages from various teachers and administrators. Schools usually require students to stay in their seats and give respectful attention to all of these messages. Even if students initiate and deliver these messages, the inclusion of prayers, proselytizing or anti-religious remarks at least raises questions about whether these messages — like the ones that come before and after them — would appear to have the state's stamp of approval or to utilize state authority to coerce students into participating in a religious or anti-religious experience.

Some federal appellate courts have said religious or anti-religious speech cannot be seen as government-endorsed or coerced simply

---

<sup>270</sup> See *infra* notes 349-86.

<sup>271</sup> *Santa Fe*, 530 U.S. at 307.

<sup>272</sup> *Id.* at 308.

<sup>273</sup> *Id.*

<sup>274</sup> See *supra* notes 24-76.

because a school essentially holds a student audience captive and presides over an event where students pray or proselytize from the state's podium.<sup>275</sup> For example, in the *Adler v. Duval County* case, the Eleventh Circuit Court of Appeals said as much when it considered a public school policy that allowed graduating students to vote on whether a student would deliver a message entirely of the student's choosing at the opening or closing of a high school graduation ceremony.<sup>276</sup> In this case, the Eleventh Circuit rejected the argument that the religious content of a student's graduation speech was attributable to the school merely because the school sponsored and controlled the event.<sup>277</sup> In other words, the Eleventh Circuit found that more was required — at least in the graduation context — to conclude that the government had endorsed religious speech or coerced participation in religious exercises, and it argued that the Supreme Court's opinion in *Lee v. Weisman* stood for this proposition. Likewise, the Fourth Circuit Court of Appeals has read Supreme Court precedent to say that governmental coercion on religious matters happens only “when the government singled out a religious group for a special benefit not afforded to other similarly situated non-religious groups and advanced an inherently religious activity, such as prayer.”<sup>278</sup>

But others courts have disagreed. For example, the Ninth Circuit Court of Appeals has said that “permitting a proselytizing speech at a public school's graduation ceremony would amount to coerced participation in a religious practice” and government sponsorship of religious speech.<sup>279</sup> Similarly, when the Fifth Circuit Court of Appeals considered *Doe v. Santa Fe Independent School District.*, it noted that “[p]rayers that a school ‘merely’ permits will still be delivered to a government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event, thereby clearly raising substantial

---

<sup>275</sup> *Child Evangelism Fellowship v. Montgomery County Pub. Schs.*, 373 F.3d 589, 597 (4th Cir. 2004); *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, 1341 (11th Cir. 2001) [hereinafter *Adler II*]; *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1080 (11th Cir. 2000) (en banc) *vacated and remanded in light of Santa Fe*, 530 U.S. 290 [hereinafter *Adler I*].

<sup>276</sup> *Adler II*, 250 F.3d at 1342; *Adler I*, 206 F.3d at 1073.

<sup>277</sup> *Adler I*, 206 F.3d at 1080.

<sup>278</sup> *Child Evangelism Fellowship*, 373 F.3d at 597.

<sup>279</sup> *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984 (9th Cir. 2003); see also *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1104 (9th Cir. 2000) (noting that “allowing the students to engage in sectarian prayer and proselytizing as part of the graduation ceremony would amount to government sponsorship of, and coercion to participate in, particular religious practices”). See also *infra* notes 298-313.

Establishment Clause concerns.”<sup>280</sup> Further, the dissenters in *Adler* argued that the *Weisman* Court did not make it clear that the state had to single out religious speech as well as preside over and assemble a captive audience for it in order for the state to be constitutionally responsible for such speech. The dissenters cited the following statement from *Weisman*: “The sole question presented is whether a religious exercise may be conducted at a graduation ceremony where, as we have found, young graduates who object are induced to conform.”<sup>281</sup> The Eleventh Circuit dissenters drew on that and other passages from the *Weisman* case to conclude that three factors led the Court to find governmental coercion in *Weisman*: the fact that attendance at graduation was, for all practical purposes, mandatory; the control the school had over the graduation program; and the susceptibility of teens to peer pressure.<sup>282</sup> These three factors also would be true of prayers or proselytizing (whether religious or anti-religious) pursuant to RVAA policies.

The point here is not to say that the Supreme Court will agree with one side or the other in this debate. Rather, the point is that the Supreme Court has not yet decided this issue. Until the Court settles it, both sides may make credible arguments, at least in the context of high school graduation ceremonies. It is important to note that the Supreme Court has not yet considered these issues in the context of events occurring in the midst of the school day, such as morning announcements and assemblies. Given the fact that these events are often officially mandatory and even more tightly controlled by the school may mean the Court will be much more likely to find Establishment Clause problems in these settings. Further, as discussed in more detail below, because the RVAA applies to elementary as well as secondary schools, courts will have to address the perceptions of less mature children of activities that occur at school-controlled events they are required or encouraged to attend.<sup>283</sup>

Another factor the Court has considered in determining whether the government endorsed prayers offered by students at school events is whether the public school encouraged prayers by the way it framed its speech policies. For example, in the *Santa Fe* case, the Court noted that the school’s narrow and specific definition of the speech that was

---

<sup>280</sup> *Doe v. Santa Fe Indep. Sch. Dist.* 168 F.3d 806, 817 (5th Cir. 1999), *aff’d*, 503 U.S. 290 (2000).

<sup>281</sup> *Adler I*, 206 F.3d at 1096 (Kravitch, J., dissenting) (quoting *Lee v. Weisman*, 505 U.S. 577, 599 (1992)).

<sup>282</sup> *Id.* at 1096-97 (internal citations omitted).

<sup>283</sup> *See infra* notes 314-17.

appropriate before football games had the effect of encouraging students to offer prayers.<sup>284</sup> Thus, the RVAA's description of the kind of remarks permitted in these forums may be considered by the court when it determines whether the school has encouraged student prayer.<sup>285</sup> For example, the model policy on student speakers at graduation ceremonies says there must be an opening and closing speaker, and that the student's remarks must honor the occasion, bring the audience to order, and focus the audience on the purpose of the gathering.<sup>286</sup> One could argue that this kind of policy subtly encourages students to give invocations and benedictions. To be sure, if implemented as the statute instructs, RVAA policies would not explicitly mention prayer.<sup>287</sup> But that would not necessarily prevent a court from considering the effect of the school's framing of the speech as a factor in its Establishment Clause analysis.

In *Santa Fe*, the Court also noted that the school retained the authority to ensure that the student speech was "consistent with the goals and purposes of [its] policy," and that was a factor in its decision to strike down the policy.<sup>288</sup> The RVAA states that the school district must "ensure a student speaker does not engage in obscene, vulgar, offensively lewd, or indecent speech,"<sup>289</sup> and its model policy says speeches by student speakers must relate to the purpose of the event and stay on the designated subject.<sup>290</sup> At the same time, the model policy's written disclaimer for graduation events requires schools to say that they "refrained from any interaction with student speakers regarding the student speakers' viewpoints on permissible subjects."<sup>291</sup> It is not clear how this model policy provision — which only applies to graduation ceremonies — relates to the other model policy requirements about ensuring that a student marks the occasion appropriately and stays on subject.<sup>292</sup>

The RVAA does not instruct school officials to refrain from reviewing student speech in advance of the forums. When public schools have done so, it has cut in favor of a finding that the school did not endorse

---

<sup>284</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306-307 (2000).

<sup>285</sup> See TEX. EDUC. CODE § 25.155 (Vernon 2008).

<sup>286</sup> *Id.*

<sup>287</sup> See *id.* §§ 25.151-.157 (Vernon 2008).

<sup>288</sup> *Santa Fe*, 530 U.S. 290, at n.6.

<sup>289</sup> TEX. EDUC. CODE § 25.152(a)(3).

<sup>290</sup> *Id.* § 25.156. The RVAA model policy contains similar guidance regarding the content of student remarks offered at graduation events. *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> See *supra* notes 38-68.



the student speech. For example, the *Adler v. Duval County* case involved an explicit, categorical, and uniform commitment by Duval County schools to refrain from reviewing or editing students' remarks in any way.<sup>293</sup> That policy provided, "If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County school board, its officers or employees."<sup>294</sup> Thus, the Eleventh Circuit concluded that, in this context, if the graduating class decided to ask a student to offer a message, the student would have complete freedom to say what he or she pleased, "without review or censorship by agents of the state or, for that matter, the student body."<sup>295</sup> Given those facts, the court said, it would be unreasonable to view the message as one that the state endorsed.<sup>296</sup> The *Adler* court noted, "The ability to regulate the content of speech is a hallmark of state involvement."<sup>297</sup>

Likewise, in a couple of recent cases, the Ninth Circuit held that public schools were responsible for any student speech they reviewed in advance.<sup>298</sup> One case was *Cole v. Oroville Union High School District* in 2000, and the other case was *Lassonde v. Pleasanton Unified School District* in 2003.<sup>299</sup> The facts of these cases differ, but both involve class valedictorians who sought to give what the court called "proselytizing" or "sectarian" speeches as part of their graduation ceremonies.<sup>300</sup> As school

---

<sup>293</sup> In the *Adler* case, the Eleventh Circuit also distinguished the *Santa Fe* decision on one other ground. It said,

Critical to the Supreme Court's conclusion was its finding that the speech delivered by students pursuant to the Santa Fe policy was state-sponsored rather than private. In reaching that conclusion, the Court relied in substantial part on two facts: (1) the speech was "subject to particular regulations that confine the content and topic of the student's message"; and (2) the policy, "by its terms, invites and encourages religious messages[.]" Those two dispositive facts are not present here, and that makes all the difference.

*Adler* II, 250 F.3d 1330, 1336 (11th Cir. 2001) (internal citations omitted). Again, the RVAA does not explicitly invite or encourage religious messages.

<sup>294</sup> *Id.* at 1332.

<sup>295</sup> *Id.* at 1337.

<sup>296</sup> *Id.* at 1337-38.

<sup>297</sup> *Id.* at 1337.

<sup>298</sup> *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984 (9th Cir. 2003); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1103 (9th Cir. 2000).

<sup>299</sup> *Lassonde*, 320 F.3d 979; *Cole*, 228 F.3d 1092.

<sup>300</sup> In the *Lassonde* case, the Court noted that the fact patterns at issue in that case and the *Cole* case were "almost identical." *Lassonde*, 320 F.3d at 983.

policies dictated, school officials reviewed the speeches in advance of the ceremonies and deleted some religious references. The students then sued the schools for censoring their speeches, claiming viewpoint discrimination. The court rejected their claims.

In the *Lassonde* case, the Ninth Circuit ruled that, even assuming that the graduation ceremonies were public or limited public forums, the Establishment Clause required the school to prohibit students from delivering what the schools considered “sectarian” or “proselytizing” speeches at those ceremonies.<sup>301</sup> In both cases, the Ninth Circuit held that, if the schools had not censored the students’ speech in these cases, it would have appeared that the government was sponsoring religion and coercing other students into participating in religious practice.<sup>302</sup> The court cited the schools’ “plenary control” over the state-financed graduation ceremonies by presiding over those ceremonies. It also noted that the schools authorized the speeches as part of their educational missions. Further, the court found that the schools had reviewed and approved the speeches beforehand and retained final authority over the content of the student speeches.<sup>303</sup>

Some have argued that the school review and approval policy involved in *Cole* was “unusually restrictive” because it “required the principal to review, approve, and authorize the content of all student

---

<sup>301</sup> *Id.* at 983-85. In *Lassonde*, the Ninth Circuit said,

Even assuming the Oroville graduation ceremony was a public or limited public forum, the District’s refusal to allow the students to deliver a sectarian speech . . . as part of the graduation was necessary to avoid violating the Establishment Clause under the principles applied in *Santa Fe Independent School District v. Doe*, and *Lee v. Weisman*. See *Rosenberger v. Rector and Visitors of the Univ. of Va.* (analyzing whether a university’s viewpoint discrimination was excused by the necessity of complying with the Establishment Clause); *Capital Square Review & Advisory Bd. v. Pinette*, (“There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.”) . . .

*Id.* (citations omitted).

<sup>302</sup> *Id.* at 984 (noting that “if the school had not censored the speech, the result would have been a violation of the Establishment Clause”); *Cole*, 228 F.3d at 1103 (allowing student to give his proposed valedictory speech at public school graduation would have constituted government endorsement of religious speech and governmental coercion of students to participate in religious practice).

<sup>303</sup> In the *Cole* case, for example, the Ninth Circuit said, “Because [the school’s] approval of the content of student speech was required, allowing [the student speaker] to make a sectarian, proselytizing speech as part of the graduation ceremony would have lent [the school’s] approval to the religious message of the speech.” *Cole*, 228 F.3d at 1103.

speeches and invocations for graduation.”<sup>304</sup> Thus, the argument goes, it is necessary to distinguish that policy from other cases in which schools review student speech in advance.<sup>305</sup> In *Cole*, the school’s policy said “all student speeches and invocations for graduation are reviewed by the principal, who has the final say regarding their content.”<sup>306</sup> It is not clear, however, that the kind of pre-review of student speech that the schools did in these Ninth Circuit cases will be so different from the kind some schools might do of certain student speech under the RVAA.<sup>307</sup> And, as explained below, courts also may consider a school’s advance review of student remarks relevant to their determinations of whether the school had established a limited public forum.<sup>308</sup>

---

<sup>304</sup> Kelly Coghlan, *Those Dangerous Student Prayers*, 32 ST. MARY’S L. J. 809, 841 (2001). In his piece, Coghlan argues,

[The Ninth Circuit in the *Cole* case] relied heavily on the district court’s peculiar and extremely restrictive student speaker policy allowing, essentially, only government speech. Due to the court’s significant emphasis and reliance on the fact that ‘approval of the content of student speech was required,’ any court inclined to apply *Cole* will likely apply it narrowly only to school districts having student speaker policies as extreme and as content/viewpoint restrictive — requiring governmental preauthorization of every word — as the student speaker policies in *Cole*.

*Id.* at 842-43 (internal footnote omitted).

<sup>305</sup> *Id.*

<sup>306</sup> *Cole*, 228 F.3d at 1096. It also required all students to sign a contract requiring them to act in accordance with school directions. *Id.* at 1103. The Ninth Circuit said nothing about any such contracts in the subsequently decided *Lassonde* case. *Lassonde*, 320 F.3d at 984.

<sup>307</sup> See *supra* notes 38-69.

<sup>308</sup> See *infra* notes 344-86. Further, some have argued that if a student’s remarks at a graduation ceremony are to be seen as purely private rather than government-endorsed, a school will have to do more than simply refrain from reviewing the speech in advance. Professor Alan Brownstein makes some powerful arguments about the messages that are sometimes imparted when schools feature student speech including prayers and speech that makes use of religious language exclusive to one faith. Brownstein says,

[W]hen school districts allow student speakers complete discretion in their graduation speeches in the name of student autonomy, they are making an overt choice among competing values. This choice is particularly clear when students express religious messages that exclude or offend audience members of minority faiths or who adhere to no religion. If such messages are expressed and the school continues its policy, it is clearly suggesting that student autonomy outweighs the concerns expressed by non-believers about the impact of such remarks. In a school environment in which student autonomy is generally esteemed as a value of great importance, the school’s value priorities at graduation may not communicate a message about the status of religious groups in the community. If the school environment

Supporters of the RVAA may point to its disclaimer provisions as a difference between the Supreme Court prayer cases and the RVAA that cuts in favor of the constitutionality of the statute's application in particular cases.<sup>309</sup> Disclaimers never harm — and they sometimes help — a governmental body's efforts to distance itself from speech by nongovernmental actors.<sup>310</sup> However, the Supreme Court has indicated that attempts by the state to attribute speech to nongovernmental actors through disclaimer provisions do not cure situations when a government endorsement of a religious message is otherwise clear.<sup>311</sup> For example, in the *Lassonde* case, the Ninth Circuit held that a disclaimer by the schools would not have changed its rulings. It explained that, even if a disclaimer had been offered, “a reasonable dissenter still could feel that there is no choice but to participate in the proselytizing in order to attend high school graduation.”<sup>312</sup> A disclaimer might help diminish the sense that the school sponsored or endorsed the speech, the court said, but “it does not change the fact that proselytizing amounts to a religious practice that the school district may not coerce other students to participate in, even while looking the other way.”<sup>313</sup>

When comparing the RVAA with prayer policies from Supreme Court cases, it is also important to note differences between the two that could cut against the constitutionality of RVAA speech. Unlike the prayer policies the Court has considered in recent years, the RVAA applies not only to secondary schools but also to elementary schools, and not only to school events where attendance is encouraged but also to events

---

generally places a relatively low value on student autonomy (what I believe to be the normative reality in most public schools), then a very different message is communicated. The message is one of non-endorsement or more literally non-recognition — that the feelings and concerns of members of minority faiths count for so little that they are easily outweighed by the most marginal of competing values.

Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, 5 NEXUS 61, 76 (2000). The Court's endorsement test is structured to be able to take account of such messages.

<sup>309</sup> TEX. EDUC. CODE § 25.152(4)(b) (Vernon 2008).

<sup>310</sup> See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (O'Connor, J. & JJ. Souter and Breyer, concurring in part and concurring in the judgment) (noting that “a disclaimer [on an unattended religious display] helps remove doubt about state approval of respondents' religious message”).

<sup>311</sup> See, e.g., *Allegheny County v. ACLU*, 492 U.S. 573 (1989) (noting disclaimers will not relieve state of liability when religious endorsement is apparent).

<sup>312</sup> *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984 (9th Cir. 2003).

<sup>313</sup> *Id.* at 984-85.

where attendance is mandated.<sup>314</sup> The Court will be likely to find it much more troubling when an elementary student issues an invitation to prayer or offers an evangelizing sermon or anti-religious diatribe during instructional time, when students are legally required to be present. In contrast to the fact pattern at issue in *Weisman*, students, rather than an adult religious representative chosen by the public school, would offer this religious expression. And, unlike *Weisman*, religious speech would not be singled out for favorable treatment, and it may be only one of several speeches that occur as part of a forum. Nevertheless, the coercion concept articulated in that case would seem to apply with even greater force to the elementary school setting.

The Court has repeatedly recognized that children are especially impressionable and that their school attendance is involuntary.<sup>315</sup> Thus, it interprets the Establishment Clause's restrictions with particular care in this context.<sup>316</sup> It also has noted that there is a spectrum of maturity — ranging from kindergarteners to college students — and that it is appropriate, and sometimes necessary, to take age into account when assessing Establishment Clause concerns.<sup>317</sup> In its failure to distinguish between students as different as kindergartners and high school seniors, the RVAA ignores these concerns.

Another difference between the school prayer cases and the RVAA is that the RVAA would protect speech considered “sectarian” or “proselytizing.” While the RVAA justifies school prevention of speech that is “obscene, vulgar, offensively lewd, or indecent . . . ,”<sup>318</sup> the statute would not prevent evangelism, critiques of certain faiths, or attacks on religion in general. Instead, it would protect such speech.<sup>319</sup> For example, under the RVAA, a student would be free to

---

<sup>314</sup> See *supra* notes 145-76.

<sup>315</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (noting importance of Establishment Clause compliance in schools due to unique environment).

<sup>316</sup> *Id.*

<sup>317</sup> For example, in his concurring opinion in the *Schempp* case, Justice Brennan wrote, “The susceptibility of school children to prestige suggestion and social influence within the school environment varies inversely with the age, grade level, and consequent degree of sophistication of the child.” *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 293, 291 n.69 (1963) (Brennan, J., concurring). Likewise, in *Walker-Serrano v. Leonard*, the Third Circuit noted that “there can be little doubt that speech appropriate for eighteen-year-old high school students is not necessarily acceptable for seven-year-old grammar school students.” 325 F.3d 412, 416-17, 419 (3d Cir. 2003).

<sup>318</sup> TEX. EDUC. CODE § 25.156 (Vernon 2008).

<sup>319</sup> See *infra* note 24-76. The RVAA model policy would not require a different result. Any believer in these points of view could argue that his or her purpose, as the RVAA model policy requires, is simply “honoring the occasion, the participants, and those in attendance, bringing the audience to order, and focusing the audience on the

---

---

ask his or her fellow students to join in prayer to accept Jesus Christ as their personal Savior so that they may have eternal life. Or a student would be free to tell his or her fellow students that Jesus was not God's son or that the Bible is a book of myths. Alternatively, a student might talk about why Catholics or Mormons are not Christians. These kinds of statements are a far cry from the prayers offered in *Weisman*<sup>320</sup> and *Engel*.<sup>321</sup> That is certainly not to say that

---

purpose of the event." TEX. EDUC. CODE § 25.156. He or she could say, "What better way to honor the occasion and the participants than to disabuse the participants of their false beliefs about faith?" Further, the statute prohibits discriminating on the basis of religious viewpoint. *Id.* §§ 25.151-.157 (Vernon 2008).

<sup>320</sup> In the *Weisman* case, Rabbi Gutterman offered the following prayers:

INVOCATION

God of the Free, Hope of the Brave:

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

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

For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

BENEDICTION

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN

sectarian and proselytizing speech is inherently problematic from a constitutional standpoint. When sectarian and proselytizing speech is purely nongovernmental, it deserves the same protection other high-value speech receives. But there would be something problematic about any government endorsement of such statements.

2. Comparing the RVAA's Limited Public Forum Provisions and Supreme Court Equal Access Precedent

The RVAA's supporters also argue that the statute's limited public forum provisions are indistinguishable for constitutional purposes from the equal access policies the Court has upheld in the face of Establishment Clause challenges.<sup>322</sup> To be sure, there are some similarities. In the equal access cases, for example, nongovernmental actors, including students, engaged in religious speech. Likewise, the RVAA protects such expression by students. Also, in the equal access cases, the speech occurred on government property. The RVAA requires schools to establish limited public forums on their campuses for certain student speech.

Any fair analysis of the RVAA, however, will quickly acknowledge striking differences between the religious speech that occurred in the equal access policies cases and the RVAA limited public forum provisions. The most important difference is that the public school equal access cases examined activities that occurred outside

---

*Lee v. Weisman*, 505 U.S. 577, 581-82 (1992).

<sup>321</sup> The prayer offered in the *Engel* case read as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Engel v. Vitale*, 370 U.S. 421, 422 (2000).

<sup>322</sup> See, e.g., Kelly Coghlan, *A New Act: Students' Religious Rights Clarified*, <http://www.kellycoghlan.com/> (last visited Nov. 30, 2008). In this memo, Coghlan, who claims to have drafted the RVAA, see *supra* note 23, says, in part,

Section 25.152 [of the RVAA] requires the "establishment of a limited public forum for student speakers at all school events at which a student is to publicly speak" in order to, *inter alia*, "eliminate any actual or perceived affirmative school sponsorship or attribution to the district of a student's expression of a religious viewpoint, if any." The 2001 Supreme Court case of *Good News v. Milford Central School* holds: "[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint . . . . [Excluding a] religious perspective constitutes unconstitutional viewpoint discrimination." Thus, the Texas statute, by using the limited public forum format simply codifies the language of the Supreme Court.

*Id.*

instructional time or school events, whereas the RVAA provisions apply to activities that occur during instructional time or school events.

This difference is significant for at least two reasons. First, unlike the equal access cases, the prayers, proselytizing or anti-religious speech under the RVAA occur under the auspices of school programs and activities. In the equal access cases, no public school officials presided over the activities of student-organized religious clubs or after-school community religious group meetings, and no other school business occurred in the midst of those activities.<sup>323</sup> For these and other reasons, the Court found it easy to determine that the state in no way endorsed the speech that occurred in these forums. As the Court observed in the *Widmar* case, the school did not sponsor the message of any student group by allowing it to participate in the forum.<sup>324</sup> Once the school opened the forum to the religious group, the same would be true.<sup>325</sup> Similarly, a Court plurality said in *Mergens* that, while the possibility of peer pressure to attend student-organized religious clubs was ever-present, “there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate.”<sup>326</sup> Likewise, the Court emphasized in *Good News Club* that “there [was] simply no integration and cooperation between the school district and the Club.”<sup>327</sup>

In contrast, prayers as well as other devotional or anti-religious speech pursuant to the RVAA will be nested within other official school activities, such as teachers or administrators calling classes or assemblies to order and school announcers broadcasting information about the school day. Especially given the fact that various Establishment Clause theories turn on the way an audience understands and experiences an event, this difference could be

---

<sup>323</sup> Under the EAA, “employees or agents of the school or government are [to be] present at religious meetings only in a nonparticipatory capacity.” 20 U.S.C. § 4071(c)(3) (2006).

<sup>324</sup> *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). The Court said,

[A]n open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy “would no more commit the University . . . to religious goals” than it is “now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,” or any other group eligible to use its facilities.

*Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990).

<sup>327</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 116 n.6 (2001).



significant.<sup>328</sup> Further, as described below, this factor also could influence a court's determination about whether a school had established a forum for student speech.<sup>329</sup>

The second way in which RVAA cases will differ from equal access cases is that the prayers and certain other devotional or anti-religious speech under the RVAA often will occur before captive audiences of public school students. The EAA, unlike the RVAA, involves situations in which students may go home after school or attend other activities or clubs during the school day.<sup>330</sup> In this context, the school does not coerce or pressure students in any way to participate in religious activities. Likewise, in the *Good News Club* case, which involved community religious groups and the use of school property, the Court stressed that “[t]he Club’s activities take place *after* the time when the children are compelled by state law to be at the school.”<sup>331</sup> The Court also was careful to note that, unlike *Lee v. Weisman*, “the school facilities are being used for a nonschool function and there is no government sponsorship of the Club’s activities.”<sup>332</sup> Further, the Court emphasized that the fact pattern at issue in *Good News Club* did not involve “mandatory attendance requirements.”<sup>333</sup> When such requirements are involved, the Court said, it “meant that State advancement of religion in a school would be particularly harshly felt by impressionable students.”<sup>334</sup>

The Third Circuit Court of Appeals drew a similar distinction in a case involving a school's refusal to allow an equal access club to meet during an activity period at the beginning of the school day.<sup>335</sup> During this activity period, the school permitted students to do things such as attend club meetings, study hall, tutoring programs, or student government meetings, or to play in the gym or remain in their classrooms. However, the school did not permit students to leave campus during this time.<sup>336</sup> The Third Circuit rejected an argument that requiring the school to allow student religious clubs to hold

---

<sup>328</sup> See *infra* note 401.

<sup>329</sup> See *infra* notes 349-86.

<sup>330</sup> See 20 U.S.C. § 4071(b) (2006) (stating “[a] public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time”).

<sup>331</sup> *Good News Club*, 533 U.S. at 116 n.6.

<sup>332</sup> *Id.* at 116.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 223 (3d Cir. 2003).

<sup>336</sup> *Id.* at 214.

meetings during this period would cause the school to violate the Establishment Clause. The court said, “It is not mandatory attendance at the school, but mandatory attendance *at the [religious student] group’s meeting* that raises Establishment Clause concerns.”<sup>337</sup>

Under certain circumstances, the RVAA’s limited public forum provisions will effectively require students to attend the equivalent of a portion of these religious group meetings. In other words, when a student chooses to pray, evangelize, or critique one or all faiths under the RVAA limited public forum provisions, other students often will be required to be present for such speech because the force of law requires them to be in school.<sup>338</sup>

The Ninth Circuit made similar points when it rejected the students’ argument in the *Lassonde* graduation case. The Supreme Court’s ruling in the *Good News Club* case did not support the students’ arguments, the Ninth Circuit said.<sup>339</sup> Unlike the facts involved in *Good News Club*, the Ninth Circuit noted, a “graduation ceremony was a school-sponsored function that all graduating seniors could be expected to attend.”<sup>340</sup> The two cases were “materially different,” the Ninth Circuit said.<sup>341</sup> The *Good News Club* case involved a community club meeting after school hours that had no state sponsorship or involvement.<sup>342</sup> On the other hand, the school actually sponsored, and was deeply involved in, graduation ceremonies, including the selection

---

<sup>337</sup> *Id.* at 224.

<sup>338</sup> As noted above, if students are permitted to opt-out of those experiences due to the religious or anti-religious speech that occurs, they may have to forego important parts of their educational experience. *See supra* notes 265-67.

<sup>339</sup> *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 985 (9th Cir. 2003).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* Likewise, the Fifth Circuit recognized these differences in its consideration of the *Santa Fe* case:

There is . . . a crucial distinction between the speech involved in *Mergens* and the speech that [Santa Fe Independent School District’s] policy would allow. In *Mergens*, the Court held that permitting the Christian student organization to meet on school grounds after class and to recruit members through the school newspaper, bulletin boards, and public address system, did not violate the Establishment Clause. Thus, the organization was not permitted to deliver a religious message directly to the student body. The religious organization did not use any of the various methods of communication controlled by the school to proselytize — or to deliver religious messages of any nature — but rather confined such activities to meetings held after class with virtually no trace of governmental imprimatur.

*Santa Fe Indep. Sch. Dist. v. Doe*, 168 F.3d 806, 831 n.11 (5th Cir. 1999).

<sup>342</sup> *Lassonde*, 320 F.3d at 985.

of the ceremonies' student speakers.<sup>343</sup> Further, while students participated in Good News Club activities only by choice and with parental permission, students serve essentially as a captive audience for devotional or anti-religious expression that occurs at graduation.<sup>344</sup> Unlike the equal access cases, and like the school graduation cases, schools will create captive student audiences for messages delivered under the RVAA. Indeed, it may be that speech pursuant to the RVAA occurs in many cases where student attendance is not simply effectively required but formally mandated.

A related difference between speech pursuant to the RVAA limited public forum provisions and the religious speech in the equal access cases is that the state basically does not regulate the latter. It would be inappropriate, for example, if a school sought advance review of remarks a student planned to give in his or her after-school equal access Bible club.<sup>345</sup> Because it is so plain that the state is not responsible for the speech in the equal access context, the school essentially has no need (and no right) to restrict it. In contrast, speech under the RVAA's limited public forum provisions will often, if not always, undergo some advance school review, and schools may retain significant authority to edit the remarks. Further, if the RVAA model policy is any indication, these speech opportunities will not be times for free-wheeling discussion and debate, as the meetings of equal access clubs often are.<sup>346</sup> Instead, they will be moments to offer a brief thought or a prayer.<sup>347</sup> In short, previous court determinations that public schools had established limited public forums in the equal-access context provide no guarantee that courts will find RVAA speech opportunities meet the same standards.

Another difference between the equal access cases and the RVAA is that, to the extent they involved public schools, the equal access cases focused on student clubs at the secondary level or involved community groups that met on elementary school property during nonschool hours.<sup>348</sup> Given the fact that age matters in Establishment Clause jurisprudence, the RVAA makes a questionable leap when it applies some of the principles articulated in secondary school cases to instructional activities and school events within the elementary school context.

---

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *See supra* notes 177-241.

<sup>346</sup> *See supra* notes 38-66 describing model policy's limits on the content of student expression in limited public forums.

<sup>347</sup> *Id.*

<sup>348</sup> *See supra* notes 177-241.

### 3. Establishment Clause Challenges to Applications of the RVAA's Limited Public Forum Provisions

Will the fact that a public school selects student speakers by neutral criteria and declares that it has established a limited public forum ensure that student speech is not government-endorsed or otherwise violative of the Establishment Clause? The answer is “no” for several reasons. First, courts look beyond such declarations to examine things like the access and latitude the government gives speakers and whether the character of the venue is conducive to a free exchange of views.<sup>349</sup> Second, in certain cases, courts may consider some of the things the RVAA instructs a school to do to undercut the school's argument that it has established a forum.<sup>350</sup> For a variety of reasons, courts may find schools have failed to establish forums and thus attribute the views expressed by students to the schools, which could give rise to Establishment Clause violations. Finally, even if courts find that schools have established forums, they still will consider whether there is state sponsorship of the speech or state coercion along religious lines that would justify the imposition of restrictions on student speech.

As noted above, the RVAA does not define the term “limited public forum.” This is unfortunate because, as the Seventh Circuit Court of Appeals has noted, “[t]he forum nomenclature is not without confusion.”<sup>351</sup> It is beyond the scope of this Article to describe and wrestle with this confusion and other complexities that currently

---

<sup>349</sup> See *infra* notes 351-86.

<sup>350</sup> *Id.*

<sup>351</sup> *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 865 n.2 (7th Cir. 2006). Here's how the Seventh Circuit explained the confusion:

Court decisions also speak of “limited public” fora; most recently this phrase has been used interchangeably with “nonpublic” fora, which means both are subject to a lower level of scrutiny. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (identifying limited public fora as subject to the same test as nonpublic fora described in, for example, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993)). But “limited public forum” has also been used to describe a subcategory of “designated public forum,” meaning that it would be subject to the strict scrutiny test. See, e.g., *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 427 (1992) (Stevens, J. concurring); *Cornelius v. NAACP Legal Def. & Educ. Fund., Inc.*, 473 U.S. 788, 796 (1985) (noting that appellate court did not decide whether forum in question was a limited public forum or nonpublic forum); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 566 (7th Cir. 2001).

*Id.* This Article assumes that the RVAA uses the term “limited public forum” as the *Good News Club* Court did.

surround forum doctrine. Nevertheless, this section touches on the nature of the limited public forum for the purpose of discussing how various applications of the RVAA could be challenged under the Establishment Clause.

The RVAA appears to attempt to draw on the notion of the limited public forum as described in the *Good News Club* case.<sup>352</sup> In that case, the Court explained that the state is not obligated to allow people to engage in all types of speech when it opens such forums.<sup>353</sup> Rather the state may reserve the forum for discussion of particular topics or for particular groups.<sup>354</sup> But the restrictions the state places on the speech in that context must not discriminate on the basis of viewpoint and must be reasonable in relationship to the purpose of the forum.<sup>355</sup> The limited public forum provisions of the RVAA attempt to codify this standard.<sup>356</sup> But while the RVAA specifies the relevant nondiscrimination requirements that apply once a school establishes this kind of forum, it does not provide much guidance to a public school about what it must do to establish a limited public forum. And yet, a school's failure to establish a forum could be costly. If a forum is not established and a school permits students to offer prayers and proselytizing speech from the state's podium, that speech may be attributed to the government and thus give rise to Establishment Clause violations.<sup>357</sup>

One place to look for guidance about what a public school must do to create a limited public forum for student speech at school events is the Fifth Circuit's decision in the *Santa Fe* case.<sup>358</sup> At the time the Fifth Circuit considered the litigation, it involved school policies allowing students to vote on whether student volunteers would offer unrestricted invocations and benedictions as part of graduation exercises and football games.<sup>359</sup> In this case, the public school argued that it had established limited public forums for student speakers before graduation and football games. Thus, the school said, the First Amendment protected, rather than prohibited, prayers offered in these contexts, as they were purely private speech.

---

<sup>352</sup> *Good News Club*, 533 U.S. at 106-07.

<sup>353</sup> *Id.* at 106.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* at 106-07.

<sup>356</sup> See TEX. EDUC. CODE § 25.152 (Vernon 2008).

<sup>357</sup> *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

<sup>358</sup> *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 818-822 (5th Cir. 1999).

<sup>359</sup> *Id.* at 812. These policies also provided that, if the school district was enjoined by court order from enforcing these policies, students would then only be permitted to offer "nonsectarian, nonproselytizing invocations and benedictions." *Id.*

Focusing first on the graduation policy, the Fifth Circuit rejected this argument, finding that the school had not established a limited public forum.<sup>360</sup> Such a forum “is limited to a specified class of speakers or to discussion of specified subjects.”<sup>361</sup> The Fifth Circuit noted that “two factors are key” when determining whether the state has transformed a venue into a limited public forum: governmental intent to open the space and the “extent of the use granted” to the space.<sup>362</sup>

With regard to the first factor, the Fifth Circuit noted that “[t]he nature of the State property and its compatibility with expressive activity are important indicia of intent.”<sup>363</sup> The court was skeptical, to say the least, of the public school’s argument on this score. The Fifth Circuit explained that the court needed to look beyond the school’s description of its intent in this case.<sup>364</sup> The Fifth Circuit said it must “view skeptically [the school’s] own self-serving assertion of its intent and examine closely the relationship between the objective nature of the venue and its compatibility with expressive activity.”<sup>365</sup>

Rather than focusing on the government’s asserted intent, the court asked whether the nature of the place and the population of speakers made it “an appropriate place for communication of views on issues of political and social significance[.]”<sup>366</sup> The Fifth Circuit concluded that the school’s prayer policy “flunk[ed] this test hands down.”<sup>367</sup> It found that graduation programs were not well-suited for debates about public issues.<sup>368</sup> The court also found that the school district had not come close to granting “general access” to student speakers at its graduation exercises.<sup>369</sup> Instead, the court said, the school “ha[d] simply concocted a thinly-veiled surrogate process” whereby a very small number of speaker would deliver prayers.<sup>370</sup>

While noting that the school certainly could create a legitimate limited public forum, the Fifth Circuit said that the school’s “restrictions so shrink the pool of potential speakers and topics that

---

<sup>360</sup> As noted below, the Fifth Circuit also struck down the school prayer policy regarding football games, albeit for somewhat different reasons. *Id.* at 822-23.

<sup>361</sup> *Id.* at 819.

<sup>362</sup> *Id.* at 819-20.

<sup>363</sup> *Id.* at 819.

<sup>364</sup> *Id.* at 820.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* (quoting *Estiverne v. La. State Bar Ass’n*, 863 F.2d 371, 378-79 (5th Cir. 1989)).

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

the graduation ceremony cannot possibly be characterized as a public forum — limited or otherwise — at least not without fingers crossed or tongue in cheek.”<sup>371</sup> In its concluding remarks on this subject, the court, once again, was particularly tough on the school’s attempt to claim the constitutional high ground of the limited public forum when the facts did not match its rhetoric. The Fifth Circuit said that the school could not “escape” the command of *Weisman* “by piously wrapping itself in the false banner of ‘limited public forum.’”<sup>372</sup> The small number of graduation speakers, the tradition of keeping graduation programs non-controversial, and the careful control the school exerted over the ceremonies led the court to conclude that the school had not created a forum of any kind. Thus, the First Amendment’s prohibition on viewpoint discrimination did not apply.<sup>373</sup> In short, the court said, “Absent feathers, webbed feet, a bill, and a quack, this bird just ain’t a duck.”<sup>374</sup>

The Fifth Circuit’s opinion is a good reminder that there are no words that a public school can magically utter to create a bona fide limited public forum. Rather, the facts have to match the rhetoric, and courts will look carefully at those facts. Further, some of the issues highlighted by the Fifth Circuit may have even more bite in certain circumstances affected by the RVAA. The RVAA applies to school events beyond graduation and football games, including morning announcements and school assemblies. Some of these events may be even more tightly controlled and less conducive to debate than the graduation exercises and sporting events at issue in the *Santa Fe* litigation.

To be sure, the policies at issue in *Santa Fe* involved votes on whether students would offer prayers at graduations and football games, something the RVAA does not authorize. But the Fifth Circuit indicated that its concerns went beyond these specific aspects of the case.<sup>375</sup> If schools bound by the RVAA engage in conduct like the *Santa Fe* Independent School District, courts may similarly rebuke their efforts.

This leads to even more fundamental questions about the RVAA’s limited public forum provisions. For example, the RVAA requires schools to permit student speakers to address captive audiences. To

---

<sup>371</sup> *Id.* at 821.

<sup>372</sup> *Id.* at 822.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> See, e.g., *id.* at 817 (noting that “if subjecting a prayer policy to a student vote were alone sufficient to ensure the policy’s constitutionality,” there would be no constitutional problem when students “select[] a formal religious representative, such as the rabbi in *Lee v. Weisman*], to present a graduation prayer”).

what extent will this factor undermine the notion that the school has created a forum for student speakers? The Seventh Circuit Court of Appeals has said that “the captivity of an audience is relevant in determining whether the government intended to dedicate a given forum to expressive activity.”<sup>376</sup> Likewise, in a case involving the Gideons’ distribution of Bibles in public school classrooms or school assemblies, the Seventh Circuit found that the forum concept does not apply when a speaker (in this case, the Gideons) seeks access to a captive audience rather than simply to state property.<sup>377</sup> The Seventh Circuit drew a sharp distinction between this case and the *Widmar* case.<sup>378</sup> In *Widmar*, the religious group sought to access to classrooms when classes were not in session.<sup>379</sup> In contrast, the Gideons sought access to classrooms during class time.<sup>380</sup> In short, while there was no captive audience in *Widmar*, the school did hold children captive for the Gideons’ message.<sup>381</sup>

By permitting the Gideons to distribute Bibles at public schools, the state was “relying on the state’s compulsory public school machinery, to disseminate religious material to fifth graders,” the Seventh Circuit found.<sup>382</sup> On its face, the RVAA does not mandate special or preferential access for religion.<sup>383</sup> In addition, the RVAA only protects speech by students, not speech by nonschool actors.<sup>384</sup> But the RVAA relies on the state’s compulsory public school machinery to create captive student audiences. Students may deliver prayers, evangelism, and critiques of particular religions or faith in general courtesy of that

---

<sup>376</sup> *Air Line Pilots Ass’n v. Dep’t of Aviation*, 45 F.3d 1144, 1153 n.3 (7th Cir. 1995) (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974)).

<sup>377</sup> *Berger v. Rensselaer Cent. Sch.*, 982 F.2d 1160, 1166-67 (7th Cir. 1993). A brief of Americans United for Separation of Church and State in *Milwaukee Deputy Sheriffs Ass’n v. Clarke*, No. 08-1515 (filed May 23, 2008), brought this case to my attention.

<sup>378</sup> *Berger*, 982 F.2d at 1166-67.

<sup>379</sup> *Id.* at 1166.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.* at 1167.

<sup>382</sup> *Id.* at 1168. Likewise, in his dissenting opinion in *Ceniceros v. Board of Trustees*, Judge Lay said, “I question whether a true limited public forum is possible during a time of the school day when attendance is compulsory or effectively compulsory.” *Ceniceros v. Bd. of Trs.*, 106 F.3d 878, 892 n.16 (9th Cir. 1997) (Lay, J., dissenting) (holding that lunch period where no instruction took place and students were free to leave campus constituted “noninstructional time” under Equal Access Act). One can disagree with Judge Lay’s specific conclusion in that case and still believe that his concern has force in the context of school events like classroom activities and school assemblies.

<sup>383</sup> TEX. EDUC. CODE §§ 25.151-.157 (Vernon 2008).

<sup>384</sup> *Id.*



machinery in certain circumstances. This factor may be significant to courts' analyses of whether schools have created forums.

Similarly, schools' tight control over the event and retention of some authority over students' remarks may cut against the notion that the schools have established forums.<sup>385</sup> Courts may find it difficult to believe that a public secondary school, much less an elementary school, can shoehorn a free speech forum into tightly controlled school events like morning announcements and assemblies.

The following hypothetical illustrates how some of these concerns could unfold. Assume an elementary school tries to create a limited public forum during morning announcements because it allows students to participate in making those announcements. Accordingly, it selects students to speak on a neutral basis. The school refrains from discriminating based on students' viewpoint regarding religion. The school chooses one student to serve as the speaker for a full week of morning announcements. The school broadcasts the student's comments, like all other parts of morning announcements, over its public address system to every classroom (kindergarten through sixth grade) in the school. A teacher chooses a first-grade student to serve as the student speaker for a given week. That student invites all non-Muslim students to renounce their faiths or unbelief and accept Islam as the one true faith. A student in the captive audience might then sue the school, claiming the school violated the Establishment Clause by allowing such speech in this context. The school would attempt to defend itself under the RVAA and the Free Speech Clause. A court may find that the school failed in its attempt to establish a forum for a variety of reasons. For example, it could cite the fact that only one student spoke all week in this setting, the presence of a captive student audience, and the fact that the school retained close control over the event as a whole. If the court finds that the school did not successfully establish a forum, then the court may attribute the speech to the school, giving rise to an Establishment Clause violation.<sup>386</sup>

---

<sup>385</sup> See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267-73 (1988) (concluding that school newspaper was not a forum for private student speech but part of school curriculum that school properly controlled).

<sup>386</sup> It is also worth noting that there are many ways in which a school might violate both the terms of the RVAA and the Establishment Clause. For example, it would violate both the RVAA and the Establishment Clause if the school's process for selecting speakers reflected any religious bias. It also would violate the statute and the Constitution if a school attempted to pressure student speakers to deliver religious or anti-religious messages. As the Court said in 1968, "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The government

At other times, however, courts may find that schools have successfully established limited public forums and met the other requirements of the RVAA in administering those forums, including selecting student speakers by neutral criteria. If a student prays or proselytizes in this context, would it be unnecessary to examine this speech for possible violations of the Establishment Clause? The RVAA appears to assume that the answer is “yes.”<sup>387</sup> In other words, the RVAA seems to rely on the notion that such speech is always purely private rather than government-endorsed. Supreme Court precedent, however, indicates otherwise.<sup>388</sup>

Consider the 1995 case of *Rosenberger v. Rector & Visitors of the University of Virginia*, a case involving a university that denied a religious student group access to a share of university-collected and administered student funds.<sup>389</sup> The Court determined that the state had discriminated against the student speakers in the forum based on their viewpoint. Then the Court said, “It remains to be considered whether the violation following from the University’s action is excused by the necessity of complying with the Constitution’s prohibition against state establishment of religion.”<sup>390</sup> Likewise, in the *Santa Fe* case, the Court noted that it had “never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause.”<sup>391</sup> The fact that the student speaker selected by neutral criteria delivers a religious message in the context of a limited public forum does not obviate the need to consider whether there is state sponsorship of the speech or state coercion along religious lines.

The RVAA’s apparent assumption that Establishment Clause scrutiny would be unnecessary under these conditions harkens back to the Court’s plurality opinion in the *Capitol Square Review & Advisory Board v. Pinette* case.<sup>392</sup> The plurality said, “Religious expression cannot violate the Establishment Clause where it (1) is purely private

---

cannot play favorites on religious matters without violating the Constitution. The Article generally does not focus on these kinds of concerns, however. Instead, it mostly focuses on the ways in which schools could violate the Establishment Clause not by violating the dictates of the RVAA, but by following them.

<sup>387</sup> The RVAA simply says that a school must not discriminate against a student’s expression of a religious viewpoint on a permissible subject in a limited public forum. See, e.g., TEX. EDUC. CODE § 25.152 (describing school district policy against religious discrimination and religious endorsement). It recognizes no exceptions from that rule.

<sup>388</sup> See *infra* notes 389-98.

<sup>389</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

<sup>390</sup> *Id.* at 837.

<sup>391</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 n.13 (2000).

<sup>392</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995).

and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms.”<sup>393</sup> By purely private, the plurality appeared to mean speech that comes from the mouths of people who are not acting as governmental officials or employees.

As noted above, however, the Justices who provided the votes needed to reach the result in the *Pinette* case — Justices O’Connor, Souter, and Breyer — agreed with the judgment in that case, but they emphatically rejected this bright-line rule, calling it an unwarranted exception to the endorsement test.<sup>394</sup> They recognized that a court could find an Establishment Clause violation even when a nongovernmental actor spoke in a governmental forum.<sup>395</sup>

It is true that the Court in the *Good News Club* case said it found it unnecessary to confront the issue of whether a state’s interest in avoiding an Establishment Clause violation would justify viewpoint

---

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 772. In her concurring opinion in the *Pinette* case, Justice O’Connor expounded on this point:

The [Establishment] Clause is more than a negative prohibition against certain narrowly defined forms of government favoritism; it also imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message. That is, the Establishment Clause forbids a State from hiding behind the application of formally neutral criteria and remaining studiously oblivious to the effects of its actions. Governmental intent cannot control, and not all state policies are permissible under the Religion Clauses simply because they are neutral in form.

Where the government’s operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated. This is so not because of . . . mistaken attribution of private speech to the State, but because the State’s own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, *actually convey* a message of endorsement. At some point, for example, a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval. Other circumstances may produce the same effect — whether because of the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue, among others. Our Establishment Clause jurisprudence should remain flexible enough to handle such situations when they arise.

*Id.* at 777-78 (O’Connor, J., concurring in part and concurring in the judgment) (citations omitted). The controlling opinion in a case is the one that provides the crucial votes for the result on the narrowest ground supporting the result. *Marks v. United States*, 430 U.S. 188, 193 (1977).

<sup>395</sup> See *id.*

discrimination.<sup>396</sup> But the Court's statement in the *Rosenberger* case remains: an Establishment Clause violation would "excuse" viewpoint discrimination by the state.<sup>397</sup> Accordingly, even assuming schools establish limited public forums and select student speakers based on neutral criteria, it is necessary to consider whether any proselytizing speech (whether religious or anti-religious) that occurs in these contexts violates the Establishment Clause.<sup>398</sup>

When evaluating whether certain religious or anti-religious speech pursuant to the RVAA creates an Establishment Clause violation, courts may use one or more of a variety of legal tests the Supreme Court has articulated. Courts may ask, for example, whether the government has "coerce[d] [someone] to support or participate in religion or its exercise, or otherwise act[ed] in a way that 'establishes a [state] religion or religious faith, or tends to do so.'"<sup>399</sup> They also may scrutinize the relevant facts and circumstances to determine whether the speech is government-endorsed speech advancing or denigrating

---

<sup>396</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001).

<sup>397</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 837 (1995).

<sup>398</sup> It is also worth noting that some commentators have questioned the utility of forum doctrine in the public school context outside circumstances involving EAA-type situations. For example, Professor Kristi Bowman has noted that, "of the Supreme Court's four student speech cases (including *Morse v. Frederick*, 127 S. Ct. 2618 (2007)) only one — *Hazelwood [Sch. Dist. v. Kuhlmeier]*, 484 U.S. 260 (1988) — explicitly engages in a forum analysis." Kristi Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 199 n.51 (2007). Likewise, John E. Taylor has argued that "the applicable Supreme Court precedents do not require running every student speech through the mill of public forum doctrine." John E. Taylor, *Why Student Speech is Speech*, 110 W. VA. L. REV. 223, 233 (2007). Taylor says that, when considering "student speech that occurs during the school day while school is in session," the "public forum doctrine tends to be either superfluous or pernicious." *Id.* Professor Taylor concludes,

Few doctrines have been so heavily and uniformly criticized [as forum doctrine] . . . . Completely absent [in forum doctrine analysis when applied to speech that occurs during the school day in public schools] is any consideration of what I think is the right question: do schools need the ability to engage in viewpoint discrimination to carry out their educational missions? In the main run of student speech cases, courts would do better to focus on this type of question and forget about the categories of public forum doctrine.

*Id.* at 235-36 (footnotes omitted). Taylor does say, however, that "forum doctrine retains whatever usefulness it generally has in cases involving after-hours access to school property for community and student groups," and "where non-student groups seek to distribute literature by coming onto school property or using school distribution channels." *Id.* at 233 n.35 (citations omitted).

<sup>399</sup> *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

religion, which the Establishment Clause prohibits.<sup>400</sup> Similarly, courts may ask whether an objective observer, knowing the circumstances, including the history of the policy, would conclude that the government's action constituted state endorsement or denigration of a particular religion or religion in general.<sup>401</sup> Finally, courts also may seek to determine whether the government's action had a predominantly religious purpose or the primary effect of advancing or denigrating religion.<sup>402</sup> As part of this inquiry, courts may consider the degree to which religion (or a religion) dominates the speech the RVAA provisions foster.

This Article generally does not attempt to predict how courts will decide particular RVAA cases. The RVAA's provisions could trigger a great variety of speech in a multitude of school settings, and Establishment Clause analyses are quite fact-sensitive, making most predictions in this area difficult. This Article does make one prediction, however: if schools enforce the RVAA as written, they will create large litigation risks for themselves.<sup>403</sup> The RVAA is not simply a codification of current law. Instead, in some respects, the RVAA's limited public forum provisions take sides in areas of the law that are unclear and deeply contested. For example, if a student speaks publicly at school, these provisions will require the school to allow students to present messages — including prayers, evangelism, critiques of certain faiths or anti-religious diatribes — from the state's podium, where captive student audiences are present, and where schools control the overall event and, to some degree, the content of the student's speech. These factors do not guarantee that public schools will transgress the limits of the Establishment Clause, but they at least mean that the threat of Establishment Clause violations cannot be dismissed. Courts will find some Establishment Clause challenges to the RVAA meritorious, while rejecting others.

Further, one context to which the RVAA applies deserves special emphasis: public elementary schools. The RVAA's limited public forum provisions, like the statute as a whole, are fully applicable to elementary as well as secondary schools. Indeed, the RVAA does not attempt to distinguish between these two basic levels of schools.

It is certainly true that there are instances in which very young children can readily distinguish between government-sponsored speech endorsing religion and private speech endorsing religion. For

---

<sup>400</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000).

<sup>401</sup> *Allegheny County v. ACLU*, 492 U.S. 573, 677 (1989).

<sup>402</sup> *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005).

<sup>403</sup> *See infra* notes 473-89 for further discussion of this issue.

example, as Professor Kathleen Brady has said, it is usually clear to young students that the school does not endorse many things students say during teacher-led classroom discussions.<sup>404</sup> But, as Professor Brady also notes, elementary school students may perceive school endorsement of messages that occur when the school instructs children to make presentations to their classmates and a student engages in an act of worship (such as prayer), preaches a sermon, or tells his or her classmates about the reasons he or she believes Christianity or Judaism or all religion is bunk.<sup>405</sup>

The RVAA does not address these concerns in any way. If students are permitted to speak in public school elementary classrooms, assemblies, and other school events, and students are selected according to neutral criteria, the RVAA prohibits any discrimination against student expression from a religious viewpoint.<sup>406</sup>

Thus, the RVAA could require the youngest public school students to hear attacks on their faith or religion in general simply because these students attend school.<sup>407</sup> The elementary school setting is not the only context where following the dictates of the RVAA will sometimes be likely to cause a school to cross an Establishment Clause line. It is simply the most obvious context where that will be the case.

#### 4. RVAA Student-Organized Prayer Groups and Religious Clubs

Under the heading of “Freedom to Organize Religious Groups and Activities,” the RVAA says students may organize religious clubs or gatherings before, during and after school to the same degree that students may organize other “noncurricular student activities and groups.”<sup>408</sup> The same provision requires schools to allow students to

---

<sup>404</sup> Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 *FORDHAM L. REV.* 1147, 1183 (2002).

<sup>405</sup> *Id.*

<sup>406</sup> TEX. EDUC. CODE § 25.152 (Vernon 2008).

<sup>407</sup> *Id.* § 25.156 (Vernon 2008) (stating model policy requires schools to create limited public forums for student speakers at events including athletic events, morning announcements, assemblies, and pep rallies).

<sup>408</sup> *Id.* § 25.154 (Vernon 2008). The full provision states,

Students may organize prayer groups, religious clubs, “see you at the pole” gatherings, or other religious gatherings before, during, and after school to the same extent that students are permitted to organize other noncurricular student activities and groups. Religious groups must be given the same access to school facilities for assembling as is given to other noncurricular groups without discrimination based on the religious content of the students’ expression. If student groups that meet for nonreligious activities are permitted to advertise or announce meetings of the groups, the school

advertise or announce their religious meetings and activities, if schools allow student to announce and advertise non-religious meetings and activities.<sup>409</sup> Finally, the provision notes that schools may disclaim sponsorship of student meetings in ways that do not favor or disfavor student religious groups or activities.<sup>410</sup>

The first provision under this heading is similar to the federal EAA, which Congress enacted in 1984 and the Court subsequently upheld in the face of an Establishment Clause challenge.<sup>411</sup> The rest of the provisions under this heading, however, go farther than the EAA. The RVAA also applies to a wider range of students than does the EAA. While the EAA applies only to secondary schools, all of the provisions of the RVAA apply to both elementary and secondary public schools.

In the *Mergens* case, the Court plurality discussed the age of the relevant population of students while considering an Establishment Clause challenge to the EAA. It rejected that challenge, due partially to maturity of secondary school students. In that opinion, Justice O'Connor noted that secondary school students were equipped to understand that "a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."<sup>412</sup> She said the minimal difference between the ages of high school and college students made breaking with *Widmar* unnecessary.<sup>413</sup>

Could kindergartners make the necessary distinction between state-endorsed religious activities and student-organized religious activities? In the context of the EAA, Professor Doug Laycock has argued that

---

district may not discriminate against groups that meet for prayer or other religious speech. A school district may disclaim school sponsorship of noncurricular groups and events in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

*Id.*

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> 20 U.S.C. §§ 4071-74 (2006).

<sup>412</sup> *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (citations omitted). In the *Good News Club* case, the Court said that the *Mergens* opinion made "no statement about how capable of discerning endorsement elementary school children would have been in the context of *Mergens*, where the activity at issue was *after school*." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 117 n.7 (2001). Thus, the *Good News Club* ruling did not decide or comment on the issue of whether any Establishment Clause issues would be raised if a student club similar to the *Good News Club* met on elementary school property after school. It did suggest, however, that a student religious club that met on elementary school property during school hours would present some different issues.

<sup>413</sup> *Mergens*, 496 U.S. at 250.

elementary students can do so.<sup>414</sup> Laycock explains that elementary school students obviously have less sophisticated judgment about these matters than secondary school students.<sup>415</sup> At the same time, Laycock says, elementary school students' "ability to understand that exclusion of religion reflects disestablishment rather than hostility is diminished to the same degree."<sup>416</sup> Accordingly, Professor Laycock suggests schools take the issue of student age into account when deciding whether to create a forum in the first place, rather than creating forums at the elementary school level and excluding religious groups from them.<sup>417</sup>

The RVAA, however, mandates the creation of forums for student-organized clubs and gatherings at both the elementary and secondary school levels rather than leaving this matter up to a school's discretion. To what extent, then, can it be fairly said that elementary school students organize clubs or events? It seems safe to say that children as young as five or six could not in any meaningful sense organize a student club or gathering; they would need help and supervision. If nonstudents provide this kind of help and supervision, however, the clubs or meetings likely could not be deemed student organized, although some would argue otherwise. Thus, the RVAA may provoke litigation about what the term "organize" means. And, if teachers help organize and lead student clubs, including student religious clubs, this, in turn, will give rise to claims that the school is endorsing and advancing religion in violation of the Establishment Clause.<sup>418</sup>

---

<sup>414</sup> See Laycock, *supra* note 194, at 51.

<sup>415</sup> *Id.* at 52.

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> The EAA avoids these difficulties by articulating certain restrictions that ensure that religious clubs are student run, rather than administered by teachers or other outsiders. The EAA provides, for example, that "employees or agents of the school or government [must be] present at religious meetings only in a nonparticipatory capacity" and that "nonschool persons may not direct, conduct, control, or regularly attend activities of student groups." 20 U.S.C. § 4071 (c)(3), (5) (2006). Professor Laycock has explained the reasoning undergirding the restrictions on teacher participation:

Religious groups made up entirely of teachers are constitutionally entitled to meet on the teachers' personal time during times that the teachers are entitled to be in the building. The sticky issue is whether such a group of teachers, or a single teacher, can meet jointly with a student religious group. The teachers would have to join in their personal capacity and not in their role as teachers; they would have to be ordinary members of the group and not the school's monitors. And they would have to make these role distinctions clear to students.



Another difference between the EAA and the RVAA is that the EAA applies only to student group meetings during “noninstructional time,” whereas the RVAA says that students may organize clubs that meet during school “to the same extent that students are permitted to organize other noncurricular student activities and groups.”<sup>419</sup> To explore this difference, it is necessary to look at some of the ways the statute and the courts have defined the EAA term “instructional time.”

The EAA defines the term “noninstructional time” as “time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.”<sup>420</sup> The EAA requires schools to allow student religious clubs to meet during noninstructional time when other noncurricular student groups meet.<sup>421</sup> It is clear that this term encompasses time before the school day begins and after it ends. There has been some debate, however, about whether it also includes some time that occurs within the school day.

Some courts have found that the EAA does include some such time. For example, the Ninth Circuit has ruled that a lunch period where no instructional activities occur and where students could leave campus was noninstructional time under the EAA.<sup>422</sup> It later held, however, that a “student/staff time” was not noninstructional time because, while “no formal classroom instruction [took place], except on a voluntary, individual basis,” student attendance was taken.<sup>423</sup> The Ninth Circuit

---

Teachers probably cannot meet these requirements. The Equal Access Act’s ban on teacher participation is a prophylactic rule based on that judgment. It is one thing for students to understand the role of a nonparticipating faculty monitor; his conduct reflects his role. It would be much harder for students to remember that a participating teacher was acting in one capacity at the prayer group and in a different capacity in the classroom half an hour later. It is unlikely that even the teachers could keep their roles straight. There would be no visible evidence of the change in roles. Few, if any, students or teachers have had any experience with teachers joining student organizations in their personal capacity as ordinary members. Lack of precedent would make the role change harder to understand. Lack of precedent also would mean that a religious group’s demand for joint membership is more than merely a demand for equal access.

Laycock, *supra* note 194, at 31 (footnotes omitted). The EAA, however, only applies to public secondary schools.

<sup>419</sup> TEX. EDUC. CODE § 25.154 (Vernon 2008).

<sup>420</sup> 20 U.S.C. § 4072(4) (2006).

<sup>421</sup> *Id.* § 4071.

<sup>422</sup> *Ceniceros v. Bd. of Trs.*, 106 F.3d 878, 892 n.16 (9th Cir. 1997) (finding lunch period where no instruction took place and students were free to leave campus constituted “noninstructional time” under EAA).

<sup>423</sup> *Prince v. Jacoby*, 303 F.3d 1074, 1087-89 (9th Cir. 2002).

said, “The legislative history [of the EAA] makes clear that once student attendance is required, ‘actual classroom instruction’ begins.”<sup>424</sup>

In contrast, the Third Circuit Court of Appeals has held that an activity period was not instructional time under the statute, even though students were required to attend school during that time and some might take make-up tests, seek tutoring, or attend standardized test clinics during that period.<sup>425</sup> The appellate court said the fact that some students sought instruction during this period did not convert the period into instructional time for all students.<sup>426</sup> It concluded, “Simply because the period may fall within the more general parameters of the school day does not indicate that all time within those parameters necessarily constitutes actual classroom instruction.”<sup>427</sup>

The Third Circuit also determined that, if it concluded that any period of time in which students were required to be in school was “instructional time,” it would undermine the statutory language and purpose of the EAA.<sup>428</sup> Congress crafted the EAA to avoid the Establishment Clause infirmities of the school prayer cases, which required student attendance at activities where prayers and worship would occur. Thus, the Third Circuit observed, “It is not mandatory attendance at the school but mandatory attendance *at the group’s meeting* that raises Establishment Clause concerns.”<sup>429</sup>

If schools interpret the RVAA simply to permit noncurricular groups to meet during noninstructional time, then the only apparent difference between the EAA and the RVAA would seem to be that the RVAA says schools and courts should not deem all the time students are required to be in school as instructional time.<sup>430</sup> If schools permit noncurricular clubs to meet during some instructional times, however, the RVAA might open up more time for student religious clubs to meet during the school day than the EAA permits. If students have a

---

<sup>424</sup> *Id.* at 1088. The court went on to hold, however, that the Free Speech Clause required the school to allow student religious clubs to meet during this period when other student clubs were allowed to do so, and that the Establishment Clause did not forbid such a requirement. *Id.* at 1090-94.

<sup>425</sup> *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 222-24 (3d Cir. 2003).

<sup>426</sup> *Id.* at 223.

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> *Id.* at 224.

<sup>430</sup> The model policy says, in part, “Students may organize prayer groups, religious clubs, ‘see you at the pole’ gatherings, or other religious gatherings before, during, and after school to the same extent that students are permitted to organize other noncurricular student activities and groups.” TEX. EDUC. CODE § 25.154 (Vernon 2008) (emphasis added).

variety of attractive ways to spend their time and schools do not require or otherwise pressure students to attend religious gatherings or events, then it seems likely that courts will not find that schools are coercing students to attend religious clubs or endorsing those clubs.<sup>431</sup>

As noted above, the RVAA and the EAA also differ in that the EAA does not address the issue of disclaimers. The RVAA's statement about disclaimers may be helpful in some cases, but it would not make a difference where a school endorsement is otherwise apparent. For example, a disclaimer by a school would not cure the Establishment Clause violation that would occur if an elementary school teacher served as the leader of a "Jesus Loves Me Club" comprised of kindergartners, which meets at a table in the school cafeteria during lunchtime.

---

<sup>431</sup> See, e.g., *Donovan*, 336 F.3d at 227 (noting "[t]he varied options available [to school students,] the voluntariness of student participation, and the fact that any religious speech engaged in would be initiated by students themselves militate against any government endorsement or entanglement with religion if [a student religious club] were to have been able to meet during the activity period").

Some have asserted that the Supreme Court "has never departed from the premise that the Establishment Clause forbids student religious activities in the public school building during periods when students are compelled by law to attend school in that building." *Prince v. Jacoby*, 303 F.3d 1074, 1099 (9th Cir. 2002) (Bezon, J., dissenting) (citing *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948)). The majority and concurring opinions in this case, however, seemed to have the better of the argument on this point. See *supra* note 423. For example, the judge who concurred in this case said,

*McCullum v. Board of Education*, 333 U.S. 203 (1948)] does not stand for anything near so broad a principle as that "the Establishment Clause forbids student religious activities in the public school building during periods when students are compelled by law to attend school in that building." Dissent at p. 13546. Nor do any of the other cases cited by the dissent focus on fact patterns in which students are merely permitted to attend club meetings during school hours. Rather, they focus on situations in which students were coerced by mandatory attendance policies or other official pressures to be exposed to religious instruction or exercises. See *Lee v. Weisman*, 505 U.S. 577, 581, 586 (1992) (prayer at graduation ceremony for which attendance was "in a fair and real sense obligatory"); *Edwards v. Aguillard*, 482 U.S. 578, 581, 586-88 (1987) (statute requiring teaching creationism whenever evolution is taught); *School Dist. of Abington [Twp.] v. Schempp*, 374 U.S. 203, 205 (1963) (law requiring school day to begin with recitations from the Bible). Like *McCullum* itself, these cases support the more modest proposition that schools may not administer programs during the school day that are for the purpose of advancing religion. Thus, the fact that the Supreme Court has not elaborated a doctrine to underpin the dissent's argument that any religious activities must be banned from school grounds during the school day is not surprising — it has never adopted such a position.

*Prince*, 303 F.3d at 1095 (Hall, J., concurring).

The final difference between the RVAA and the EAA is that the RVAA rules require non-discrimination by the school in its advertising and announcements of the meetings of student religious clubs. However, this distinction may not make a difference because the Court has essentially read this requirement into the EAA. For instance, in its decision in the *Mergens* case, the Court noted that the religious club sought “equal access in the form of official recognition by the school,” which included “allow[ing] student clubs to be part of the student activities program and carry[d] with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair.”<sup>432</sup> The Court held that the school must recognize the student club in these ways given the EAA.<sup>433</sup> Likewise, in the case of *Prince v. Jacoby*, the Ninth Circuit held that the EAA required a school to provide a religious club the same access to a public address system and bulletin boards that other noncurricular groups enjoyed.<sup>434</sup>

These cases, however, did not involve prayers or proselytizing in the relevant advertising and announcements. For example, the Ninth Circuit in the *Prince* case was careful to note that its decision was “not to say that [the student religious club] ha[d] the right to pray or proselytize in any manner through the school’s public dissemination systems.”<sup>435</sup> To the extent a school permits religious club representatives to offer prayers or proselytizing remarks over the school public address system, these provisions may trigger Establishment Clause challenges.<sup>436</sup> There could be similar Establishment Clause litigation over student religious groups “advertising in a student newspaper, putting up posters, making announcements on a student activities bulletin board . . . , [and] handing out leaflets,” all things contemplated by the RVAA model policy.<sup>437</sup> But if schools require all representatives of student clubs to keep their remarks “brief and factual,” they likely will be able to avoid lawsuits.<sup>438</sup>

With respect to the issue of distribution of religious literature regarding student clubs and gatherings, it is worth noting that the Fourth Circuit Court of Appeals held in 2004 that a public elementary

---

<sup>432</sup> Bd. of Educ. v. Mergens, 496 U.S. 226, 247 (1990).

<sup>433</sup> *Id.*

<sup>434</sup> *Prince*, 303 F.3d at 1086-87.

<sup>435</sup> *Id.* at 1087.

<sup>436</sup> See *supra* notes 349-407.

<sup>437</sup> TEX. EDUC. CODE § 25.156 (Vernon 2008).

<sup>438</sup> Laycock, *supra* note 194, at 35 (finding captive audience concern argues for keeping announcements of student club meetings “brief and factual, but it is not a reason to ban private religious speech in the school”).

school must allow a Christian evangelical group to obtain access to a forum established for the distribution of take-home flyers.<sup>439</sup> In this case, *Child Evangelism Fellowship v. Montgomery County Public Schools*, the Fourth Circuit found that the Free Speech Clause required, and the Establishment Clause did not prohibit, such access.<sup>440</sup> Teachers or teachers' aides typically distributed these flyers to students at the end of the school day.<sup>441</sup> Although the case involved a community-organized rather than a student-organized religious group, the principles the court articulated would seem to apply to cases in which student clubs distribute religious literature.

Emphasizing that the school would distribute the flyers during noninstructional time (at the end of the school day) and that they were not part of instructional activities in any way, the Fourth Circuit found no Establishment Clause concerns.<sup>442</sup> It rejected the school's charge that requiring students to pick up the evangelical group's flyers and bring them home involved the school in coercing students to participate in religious activities.<sup>443</sup> The court noted that the school did not require students to listen to religious messages or prayers and that the Christian club's flyers "contain[ed] no evangelical or overtly religious language."<sup>444</sup> To the extent that the content of the flyers and the mode of distribution of those materials under the RVAA are similar, they will be on safer Establishment Clause ground. Flyers with proselytizing messages may raise different issues.

With respect to student distribution of religious literature during the school day, some courts have drawn broad-brush distinctions. For example, courts have found that the Establishment Clause does not forbid students from distributing religious material (including proselytizing material) during noninstructional periods,<sup>445</sup> but they have sometimes permitted public schools to disallow the distribution of such

---

<sup>439</sup> *Child Evangelism Fellowship v. Montgomery County Pub. Sch.*, 373 F.3d 589, 594 (4th Cir. 2004).

<sup>440</sup> *Id.* at 592.

<sup>441</sup> *Id.*

<sup>442</sup> *Id.* at 597.

<sup>443</sup> *Id.* at 599 (internal citations omitted).

<sup>444</sup> *Id.*

<sup>445</sup> See, e.g., *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 112-14 (D. Mass. 2003) (finding school policies preventing Bible club from distributing religious literature to students during noninstructional time likely unconstitutional). This case involved high school students who were members of a student-organized Bible club. The court issued a preliminary injunction protecting the students' rights to distribute candy canes with religious messages on school property during noninstructional time. *Id.*

literature in the context of classroom activities.<sup>446</sup> If schools do so because they have reservations that are “reasonably related to legitimate pedagogical concerns,” courts have generally deferred to them.<sup>447</sup>

In sum, the RVAA section on student religious gatherings at public schools raises some Establishment Clause questions. But it also articulates some settled principles of law and poses far fewer Establishment Clause concerns than the RVAA limited public forum provisions.

##### 5. RVAA Classwork and Homework Provisions

The RVAA provision regarding religious expression in school assignments says students may express their religious beliefs in homework and classwork, and that schools must not discriminate against them based on the religious content of their work.<sup>448</sup> The provision instructs teachers to judge such assignments “against ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school district.”<sup>449</sup> Finally, it says schools may not reward or penalize students based on the religious content of their work.<sup>450</sup>

The RVAA statement on this issue is similar to guidelines issued by President Clinton’s administration in 1995 regarding religion in public schools. The Clinton guidelines, however, also made it clear that students’ rights to religious expression at school do not “include the right to have a captive audience listen, or to compel other students to participate.”<sup>451</sup>

---

<sup>446</sup> *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 280-81 (3d Cir. 2003) (citations omitted). In this case, a court deferred to a school’s judgment that it was inappropriate for an elementary school student to distribute candy canes with religious messages to classmates during an in-class winter holiday party. *Id.* The Third Circuit noted, however, that school officials “permitted [the student] to distribute the candy canes in the hallway outside the classroom, at recess, or after school as students were boarding buses.” *Id.* at 274.

<sup>447</sup> *Id.*

<sup>448</sup> TEX. EDUC. CODE § 25.153 (Vernon 2008).

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

<sup>451</sup> Dep’t of Educ., *supra* note 88. In relevant part, this guidance states,

Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classwork should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

The Clinton guidelines stressed that school officials must ensure that students are not “in any way coerced to participate in religious activity.”<sup>452</sup> The RVAA intentionally lacks any similar caveats.<sup>453</sup>

From an Establishment Clause perspective, the RVAA’s reference to assignments delivered orally is the most controversial part of this provision. Certain classroom presentations could trigger Establishment Clause lawsuits. For example, assume a teacher asks his or her classroom of second-graders to write brief essays about “What is Special About Me” and to read those essays before the class. Assume further that one student writes an essay about the fact that her family does not believe in God, and that they believe that all religions are make-believe stories. If a school permits a student to make such a presentation in class, a reasonable second-grader may feel that the school is coercing her along religious lines and that the school in some way endorses this message.

#### 6. The RVAA on its Face

Does the RVAA violate the Establishment Clause on its face? Courts have differentiated between a challenge to a statute on its face and challenges to specific applications of a statute.<sup>454</sup> A facial challenge argues that the statute as a whole is unconstitutional, whereas “as applied” challenges merely charge that specific applications of the statute are unconstitutional.<sup>455</sup>

The most common facial attack the Supreme Court has considered under the Establishment Clause is whether a statute has the predominant purpose of advancing religion.<sup>456</sup> A statute whose predominant purpose is to promote religion violates the government’s obligation of neutrality between religion and nonreligion.<sup>457</sup> The

---

Another section of the Clinton guidance states,

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

*Id.*

<sup>452</sup> *Id.*

<sup>453</sup> *See supra* notes 87-89.

<sup>454</sup> *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988).

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*

<sup>457</sup> *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (stating “[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there

Supreme Court has said that a governmental action has such an impermissible purpose when “openly available data support[] a commonsense conclusion that a religious objective permeated the government’s action.”<sup>458</sup> When the Court considers whether a governmental action violates this standard, the government’s “stated reasons [for its actions] will generally get deference, [but] the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.”<sup>459</sup>

Some may argue that parts of the RVAA’s legislative history raise questions about the law’s predominant purpose.<sup>460</sup> For example, in a hearing on the bill, a school-age child told the Texas House Committee on State Affairs that she would like legislators to help pass the bill because “it would help us talk about Jesus.” One legislator responded, “I’m very pleased that you know about God and Jesus and all that because that’s very special to me and these members up here. And we will do what we can to help you be able to talk about that.”<sup>461</sup> To the extent that some argue that the predominant purpose of the RVAA is to advance religion generally or Christianity specifically, they will be sure to cite this kind of remark.

It is important to remember, however, that some members of the Court have taken pains to distinguish between particular legislators’ motives and the intended purpose of a statute. For example, when the Court considered the constitutionality of the EAA, the Court plurality noted that some legislators may have been prompted to support the Act because they believed religious speech was especially valuable.<sup>462</sup>

---

being no neutrality when the government’s ostensible object is to take sides”).

<sup>458</sup> *Id.* at 863.

<sup>459</sup> *Id.* at 864.

<sup>460</sup> A law whose purpose is to advance one religion over another would be clearly unconstitutional. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (stating “[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion”).

<sup>461</sup> Archived Audio Broadcast: Texas House Committee on State Affairs (Texas House of Representatives Video/Audio Services Apr. 12, 2007) (<http://www.house.state.tx.us/committees/broadcasts.php?session=80&committeeCode=450>).

<sup>462</sup> *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990). Another group of Justices have advocated abandoning the “purpose test” or employing a more lenient interpretation of it. For example, in his dissenting opinion in the *McCreary* case, Justice Antonin Scalia, joined by Chief Justice William Rehnquist and Justice Clarence Thomas, set forth the following argument:

In all but one of the five cases in which this Court has invalidated a government practice on the basis of its purpose to benefit religion, it has first declared that the statute was motivated entirely by the desire to advance religion. See *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308-



“[T]hat alone would not invalidate [a statute], because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law, the Court said”<sup>463</sup> There are many statements in the legislative record asserting that the goal of the RVAA is to prevent discrimination against private religious expression, a permissible secular purpose.<sup>464</sup> The right of a student to express his or her faith at school free from governmental sponsorship or discrimination is a right the state must protect.<sup>465</sup> While there are times when public schools may or must treat religious speech differently than nonreligious expression, there also are situations in which it would constitute unconstitutional discrimination for the state to prohibit a student from expressing a religious viewpoint.<sup>466</sup>

---

309 (2000) (dismissing the school district’s proffered secular purposes as shams); *Wallace [v. Jaffree]*, 472 U.S., [38,] 56 [(1985)] (finding “no secular purpose”); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (*per curiam*) (finding that “Kentucky’s statute requiring the posting of the Ten Commandments in public school rooms has *no secular legislative purpose*”) (emphasis added); *Epperson [v. State of Ark.]*, 393 U.S. [97,] 107-109 [(1968)]. In *Edwards [v. Aguillard]*, 482 U.S. 578 (1987), the Court did say that the state action was invalid because its “primary” or “preeminent” purpose was to advance a particular religious belief, [*id.*] at 590, 593, 594, but that statement was unnecessary to the result, since the Court rejected the State’s only proffered secular purpose as a sham. See *id.*, at 589.

I have urged that *Lemon*’s purpose prong be abandoned, because . . . even an *exclusive* purpose to foster or assist religious practice is not necessarily invalidating. But today’s extension makes things even worse. By shifting the focus of *Lemon*’s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record.

*McCreary County v. ACLU*, 545 U.S. 844, 901-02 (2005) (Scalia, J., dissenting).

<sup>463</sup> *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990).

<sup>464</sup> *Mergens*, 496 U.S. at 250 (stating “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”).

<sup>465</sup> As the Court said in the *Santa Fe* decision: “[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.” *Santa Fe*, 530 U.S. at 313.

<sup>466</sup> See, e.g., *O.T. v. Frenchtown Elementary Sch. Dist. Bd.*, 465 F. Supp. 2d 369, 381-84 (D.N.J. 2006) (finding public school could not forbid second-grade student from singing song “Awesome God” at school-sponsored talent show that occurred after-school hours, was voluntary for students, and subject to “limited school

Some may argue that the RVAA on its face represents a failure of the state to maintain neutrality between religion and nonreligion.<sup>467</sup> In other words, the argument would be that the terms of the statute favor religious over nonreligious speech. One failed attempt to amend the bill highlights this concern. As discussed earlier, the House tabled a bill that would have required the replacement of the words “religious viewpoints” in the bill with the words “all viewpoints.”<sup>468</sup>

Nevertheless, it is possible to read the statute as an attempt to equalize the treatment of religious and nonreligious speech rather than prefer religious speech over nonreligious speech.<sup>469</sup> As Professor Doug Laycock has written, “[s]tate efforts to alleviate discriminatory or state-imposed burdens on religious exercise are consistent with neutrality, even though any such effort, considered in isolation, will appear to aid religion.”<sup>470</sup> The question of whether there are enough instances of unconstitutional discrimination against religious viewpoints to warrant the enactment of this nondiscrimination statute

---

oversight”); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 129 (Mass. Dist. Ct. 2003) (finding high school students who were members of student-organized Bible club were permitted to distribute candy canes with religious messages on school property during noninstructional time).

<sup>467</sup> *Epperson*, 393 U.S. at 104 (stating “[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion”).

<sup>468</sup> See *supra* note 94. In this same vein, some opponents of the legislation point to the way in which the bill singles out religious expression “while not specifying that students are also entitled to express themselves politically or artistically at the same venues.” Jeffrey Weiss, *Bill Seeks to Define Boundaries for Religion in Schools*, DALLAS MORNING NEWS, June 2, 2007, <http://www.dallasnews.com/sharedcontent/dws/dn/religion/stories/060207dnmetreligioninschool.39cd72e.html>. Supporters of the RVAA, however, claim that the statute “did not specify political or artistic expression — also protected in a ‘limited public forum’ — because those forms of expression are not being repressed. . . .” *Id.*

<sup>469</sup> This argument also was raised in the *Mergens* case. *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990). The Court plurality concluded, “Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act’s purpose was not to ‘endorse or disapprove of religion.’” *Id.* at 249. The EAA states that it is unlawful for a public secondary school that receives federal aid and has opened a limited public forum to deny equal access to or discriminate against “any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.” 20 U.S.C. § 4071 (2006). In contrast, the RVAA does not affirmatively seek to protect nonreligious speech. TEX. EDUC. CODE § 25.151 (Vernon 2008). However, it does say that it seeks to equalize the treatment of speech from nonreligious and religious perspectives.

<sup>470</sup> Laycock, *supra* note 194, at 21.

is certainly a question worth pondering.<sup>471</sup> But the argument that there is not such a record would constitute a policy argument against the adoption or retention of the RVAA rather than an argument for finding it facially invalid as a constitutional matter.

Finally, it is important to recall a general rule of statutory construction: as between a reading that would make a statute constitutional and a reading that would make it unconstitutional, the former is always preferred. The Court has said, “the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”<sup>472</sup> In keeping with this canon of judicial interpretation, courts would likely view the RVAA as an attempt to equalize religious and nonreligious speech rather than to prefer the former over the latter.

#### IV. POLICY ASSESSMENT AND SUGGESTED POLICY ALTERNATIVES

Apart from the question of whether the RVAA comports with the Establishment Clause is the question of whether the RVAA is good public policy. This section of the Article analyzes this question. It also suggests policy alternatives that would address some of the concerns that have led to the embrace and enactment of this legislation.

##### A. Policy Assessment

To some extent, the RVAA articulates settled principles of constitutional law.<sup>473</sup> Given that the law already reflects these principles, however, one must ask whether the RVAA adds anything helpful. The statute may make some positive contributions in helping public schools understand selected aspects of constitutional law. But the statute’s defects and the impact those defects are likely to have on public schools and their communities far outweigh those contributions.

Chief among the RVAA’s defects is that it creates large litigation risks for school districts. The statute does not simply codify current

---

<sup>471</sup> See *infra* notes 473-525.

<sup>472</sup> *Hooper v. California*, 155 U.S. 648, 657 (1895); see also *INS v. Enrico St. Cyr*, 533 U.S. 289, 299-300 (2001) (finding that “if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems”).

<sup>473</sup> Some examples of this are the aspects of the RVAA provisions that require public secondary schools to allow students religious gatherings to meet on campus during noninstructional time, and the part of an RVAA provision that instructs teachers to judge all homework and classwork, including work that reflects a religious perspective, by academic standards. See *supra* notes 30-37.

constitutional principles.<sup>474</sup> Rather, it articulates some principles in areas of the law that are unsettled and deeply contested. These issues will not be resolved until the Supreme Court decides them. It is impossible to predict when (and how) the Court will reach and resolve these issues, but the process will almost certainly be a long one. In the meantime, the RVAA will invite litigation. The fact that the statute attempts to force a bright-line rule where current law reflects a more fact-sensitive approach also heightens the risk of lawsuits. Indeed, one Texas federal district court has already noted the great potential for the RVAA to spur litigation. In an opinion written in December 2007 regarding graduation prayers, the court found the facts of the case did not require the court to make any judgment about the RVAA's constitutionality or "reasonableness."<sup>475</sup> Nevertheless, it said, "The [c]ourt doubts whether the new statute will do much to resolve the issue of prayers at graduation, but expects the new legislation will be quite effective at keeping attorneys in fees for the foreseeable future."<sup>476</sup>

The RVAA's supporters, however, argue that the measure will decrease the litigation load of public schools. For example, *The Houston Chronicle* described Representative Howard as saying that the legislation was "needed to protect school districts from lawsuits costing taxpayers hundreds of thousands of dollars to defend against allegations that schools violate a student's freedom of expression."<sup>477</sup> Even assuming the RVAA reduces one type of lawsuits, it will likely increase another. Roughly speaking, public schools are subject to two sorts of lawsuits in this area. One type includes lawsuits brought under the Free Speech and Free Exercise Clauses by students wishing to express their faith in various school settings. Another involves student lawsuits brought under the Establishment Clause seeking to prohibit schools from allowing certain religious expression. The RVAA may reduce the number of the first type of lawsuits, but it will likely increase the second type of lawsuits.

This is true in part because the RVAA requires the creation of a limited public forum any time a student speaks publicly and mandates

---

<sup>474</sup> See *supra* notes 24-76.

<sup>475</sup> *Doe v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735, 744 n.4 (W.D. Tex. 2007).

<sup>476</sup> *Id.*

<sup>477</sup> Gary Scharrer, *School Prayer Gets a Boost: House Approves Bill that Would Let Student Express Faith on Campus*, HOUSTON CHRON., May 1, 2007, <http://www.chron.com/dispatch/story.mpl/front/4763323.html>.

nondiscrimination against religious viewpoints in that context.<sup>478</sup> Thus, the RVAA attempts to force public schools to create a multitude of new opportunities where students could pray or proselytize at school events, not only during once-a-year graduation ceremonies and periodic sporting events, but also during daily morning announcements, school assemblies, and pep rallies, for example. Additionally, the fact that the RVAA attempts to protect these kinds of messages at school events where student attendance is not only encouraged, but required, will provide greater incentive for students and their families who care about these issues to sue.

Moreover, the RVAA often will place schools between a rock (the statute) and a hard place (the Establishment Clause). In other words, on the one hand, schools will feel constrained to allow prayers and proselytizing (religious and anti-religious) by students speakers from the state's podium before captive audiences due to the dictates of the statute. On the other hand, for good reasons, they will fear lawsuits and constitutional judgments against them if they do permit such speech in this context. The school board president of the Denton, Texas, school district, Charles Stafford, vividly described the dilemma the Texas legislature has forced on schools. Stafford said, "What I really think is the truth here — the Legislature kind of handed the school districts a hand grenade with the pin pulled," he said. "It doesn't matter which way you throw the thing, someone is going to get hurt."<sup>479</sup>

Further, when considering the cost-benefit analysis of the RVAA generally, it is critical to bear in mind that students have many opportunities to pray and discuss their faith at public schools, quite apart from the ones the RVAA attempts to create. Students are free to pray in school at any time, individually or in groups, so long as they are not disruptive of school activities and the school does not sponsor the prayer or coerce students along religious lines.<sup>480</sup> Thus, students

---

<sup>478</sup> See *supra* notes 38-69.

<sup>479</sup> Sarah Chacko, *School Districts Wary of Law*, DENTON RECORD-CHRON., Sept. 1, 2007, available at [http://www.dentonrc.com/sharedcontent/dws/drc/localnews/stories/DRC\\_new\\_law\\_0902.9273bda0.html](http://www.dentonrc.com/sharedcontent/dws/drc/localnews/stories/DRC_new_law_0902.9273bda0.html).

<sup>480</sup> As the Supreme Court said in the *Santa Fe* case:

The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); *Bd. of Ed. of Westside Community Sch. (Dist. 66) v. Mergens*, 496 U.S. 226 (1990); *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985). Indeed, the common purpose of the Religion Clauses "is to secure religious liberty." *Engel v. Vitale*, 370 U.S.

have the right to pray silently at their desks, audibly over their lunches, in religious clubs that meet during noninstructional time (like other non-curriculum clubs) on the campuses of secondary schools, and at “See You at the Pole” events.<sup>481</sup> Further, students may informally gather for prayer before sporting events, and religious groups may use property that a school has opened up to community groups on an equal-access basis.<sup>482</sup> Students may discuss their faith at school, and schools may teach about religion in an academic sense.<sup>483</sup> The innovation the RVAA seeks to introduce is many opportunities to pray or proselytize from the state’s podium before state-assembled captive audiences of students. Depending on the context, that religious expression may be constitutionally protected or prohibited. Particularly given the many well-established rights students have to express their religion at public schools, subjecting schools to the huge litigation risks the RVAA creates is not merited.

Of course, most statutes run some litigation risk. For example, the EAA effectively invited litigation about whether it was constitutionally required or permissible to force public secondary schools to open their property to student religious clubs when they had already done so for other noncurriculum-related student clubs during noninstructional time.<sup>484</sup> But those risks are small in comparison to the massive litigation risk the RVAA creates.

Litigation is time consuming and stressful, even when a litigant wins a case. But, in certain circumstances, public schools will violate the Establishment Clause precisely because they have followed the dictates of the RVAA. As described above, the application of the RVAA to elementary schools is the most obvious context where this is likely to occur, but it is certainly not the only context.<sup>485</sup> When

---

421, 430 (1962). Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.

*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000).

<sup>481</sup> See, e.g., Dep’t of Educ., *supra* note 88 (laying out examples of guidelines for appropriate religious expression in public schools). “See You at the Pole” is a nationwide event in which students at many different public schools set aside a day in September to gather around the school flagpole before school begins for collective prayer. See *syatp 2008* || connect, <http://www.syatp.com> (last visited Nov. 22, 2008).

<sup>482</sup> See Dep’t of Educ., *supra* note 88.

<sup>483</sup> *Id.*

<sup>484</sup> See *supra* note 35.

<sup>485</sup> See *supra* note 407.

schools are on the losing side of Establishment Clause litigation, they often will be required to pay the attorney's fees of the prevailing parties who have sued to vindicate constitutional principles.<sup>486</sup> In addition to considering the time-consuming and polarizing nature of litigation, legislators and governors need to ask themselves if the risks of large litigation bills and attorney fees that will sometimes fall at the feet of public schools as a result of the RVAA are the best use of state funds. As Texas school trustee Theresa Kosmoski said, "That's money that could be spent educating children."<sup>487</sup>

The RVAA does give schools one way to avoid most of these risks. A school could severely restrict speaking opportunities for students at school events. For example, the superintendent of the Argyle, Texas, school district, Jason Ceyanes, reported that the Argyle school board adopted the RVAA state model policy but revised it so that students would not speak at football games, morning announcements or any other school events.<sup>488</sup> Ceyanes noted, "If no one is speaking, no one is being discriminated against."<sup>489</sup> That is an effective way to avoid many of the risks the RVAA creates, but it comes at a high cost for students and education communities.

Policymakers considering RVAA-type provisions also need to reflect on other ways in which this legislation could distract public schools from their primary education mission. For example, whether it turns out to be a constitutional problem or not, many people deeply resent being made a captive audience for attacks or critiques of their religions or decisions about faith, and this will cause profound difficulties for schools. Texas

---

<sup>486</sup> 42 U.S.C. § 1988 (2006). As Congress recognized in the 1976 Civil Rights Attorney's Fees Award Act, the ability of prevailing parties to receive an award of attorney's fees helps ensure that private attorneys will be willing to take these cases. See, e.g., S. REP. NO. 94-1011, at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910 (commenting on Civil Rights Attorney's Fees Awards Act of 1976). The Senate report includes the following statement:

There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

*Id.* at 6.

<sup>487</sup> Houston Chron. Staff, *A Captive Audience*, HOUSTON CHRON., Aug. 27, 2007, 2007 WLNR 16732357.

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

Representative Scott Hochberg tried to make this point in legislative debate.<sup>490</sup> Under the RVAA, Hochberg said, “a student leader can tell other students that it’s sacrilegious to pray to Jesus for comfort because Jesus was not the son of God, Jesus was not the messiah.”<sup>491</sup> Hochberg “not[ed] some discomfort in the[] facial reactions” of his legislator colleagues when he described this possibility.<sup>492</sup>

In an essay published in August 2007, Kathy Miller, president of the Texas Freedom Network, noted that, during the 2005 Texas legislative session, Senator Dan Patrick of Houston, Texas, “walked off the Senate floor when a Muslim imam opened the day with a prayer.”<sup>493</sup> Mr. Patrick said that his presence during the prayer would have signalled agreement with Muslim beliefs. Like Mr. Patrick, people of a variety of faith traditions believe their faith forbids them from maintaining respectful silence while people of other faith traditions offer prayers. Miller connected the dots to the RVAA appropriately. She noted that students do not have the same freedom to leave a school event. If the situation Senator Patrick experienced created a crisis of conscience for him as an adult, one that required him to walk away, then how much more difficult will it be for children who cannot walk away?

A related difficulty is that the RVAA ignores other ways in which applications of the statute could play out on the ground. For example, Brian Woods, assistant superintendent for secondary administration in the Northside Independent School District of Texas, noted that his school district is diverse, with students speaking more than thirty languages.<sup>494</sup> Accordingly, Woods asked what school officials should do if a student expresses a religious message that is controversial and other students demand to respond right away.<sup>495</sup> Woods said, “If we allowed a Christian to express a religious viewpoint, and then a Wiccan wants equal time, how could we prevent them from doing the same?”<sup>496</sup> These questions are hardly difficult to anticipate, but the

---

<sup>490</sup> Scharrer, *supra* note 477.

<sup>491</sup> *Id.*

<sup>492</sup> *Id.* And, for all of the reasons described above, opt-outs are no real answer to this problem. See *supra* notes 265-67.

<sup>493</sup> Kathy Miller, *Watch the Lawsuits Start Pouring In*, DALLAS MORNING NEWS, Aug. 27, 2007, [http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-miller\\_27edi.ART.State.Edition1.425343c.html](http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-miller_27edi.ART.State.Edition1.425343c.html).

<sup>494</sup> Jenny Lacoste-Caputo, *Law on Religion in School Spurs Fear*, SAN ANTONIO NEWS EXPRESS, July 25, 2007, <http://www.mysanantonio.com/news/metro/stories/MYSA072507.IB.school.religion.387c003.html>.

<sup>495</sup> *Id.*

<sup>496</sup> *Id.*



statute provides no help to the people and communities left to deal with these explosive situations.

An appreciation of these dangers has led some evangelical Christians, among many others, to counsel against school policies like the RVAA. For example, Gary Christenot took this position after serving with the United States military in Hawaii in an area where Christians are a small minority and Buddhists and members of the Shinto faith are the majority.<sup>497</sup> In an essay, Christenot tells about an epiphany he had while attending his first football game at a local public high school.<sup>498</sup> When a voice came over the public address system asking everyone to stand for the invocation, he did so, remembering the Christian prayers he had often heard in this setting growing up. But, in this case, a Buddhist priest offered the prayer. Christenot says this caused a real dilemma for him: by continuing to stand, he felt he would betray his faith, but sitting down in the middle of the prayer would be extremely disrespectful to his Japanese friends.<sup>499</sup>

Christenot then points out that Christians often advocate government-sponsored prayers in public schools “by hiding behind the excuse that they are voluntary and any student who doesn’t wish to participate can simply remain seated and silent.”<sup>500</sup> But he says that if he, as an adult, was made so uncomfortable in this situation, it would be infinitely more difficult for a teenager. As a result of this experience, Christenot is “adamantly opposed to teachers and other [public] school officials leading students in prayer or the conduct of prayer rituals, even by students, at officially sanctioned events.”<sup>501</sup> Christenot concludes by saying to fellow Christians: “[U]nless you’re ready to endure [this kind of] unwilling exposure of yourself and your children to those beliefs and practices that your own faith forswears, you have no right to insist that others sit in silence and complicity while you do the same to them.”<sup>502</sup> Indeed, the golden rule — do unto others as you would have them do unto you — serves as an excellent guide not only for personal ethics but also for policymaking here.<sup>503</sup>

In sum, the RVAA’s limited public forum mandates are dangerous and misguided as drafted. But an even more troubling prospect lurks:

---

<sup>497</sup> Gary Christenot, *Why I’m Against Pre-Game Prayers*, WORLD NET DAILY, Oct. 14, 2005, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=46828](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=46828).

<sup>498</sup> *Id.*

<sup>499</sup> *Id.*

<sup>500</sup> *Id.*

<sup>501</sup> *Id.*

<sup>502</sup> *Id.*

<sup>503</sup> *Luke 6:31; Matthew 7:12.*

once the door is opened for prayers and proselytizing from the school's podium before captive audiences, community pressure will result in favoritism for some messages about religion over others.<sup>504</sup>

Even if legislatures write laws and state officials develop policies in ways that command strict neutrality among faiths and between religious and nonreligious perspectives, the will of the majority has a way of affecting these situations. Some findings of a recent opinion survey done by Auburn University in Alabama help describe this problem with numbers.<sup>505</sup> The survey found that a sixty-five percent majority favored the display of the Ten Commandments in public schools or government buildings, but half of the people surveyed opposed or strongly opposed the public display of a verse from what they called "non-Christian religious texts," such as the Koran or Torah.<sup>506</sup> Indeed, only twenty-eight percent said they would mildly or strongly support the displays of verses from the Koran or the Torah.<sup>507</sup>

Without doubt, some would insist that the government should not only post the sacred teachings of their faith group but of all religious groups. But the fact remains that there is often a vocal part of a community that pressures governmental officials to be selective in these matters. As Rabbi Geoffrey Dennis who lives in Flower Mound, Texas, put it: "There is law and there is what people allow to happen, and it's not the same thing."<sup>508</sup>

These situations often put school officials in the terrible position of keeping their jobs or submitting to the will of the majority on these issues. Of course, majority rule is quite appropriate in many situations, but it is never appropriate to sacrifice precious individual rights, like the right to religious freedom, on the altar of majoritarianism. As Justice Jackson wrote in 1943, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of

---

<sup>504</sup> See *infra* notes 505-08.

<sup>505</sup> *Ask Alabama: Religion and Public Life in Alabama* (Summer 2004), at 1-6 [http://www.auburn.edu/outreach/ask\\_alabama/september2004/september04study.pdf](http://www.auburn.edu/outreach/ask_alabama/september2004/september04study.pdf) [hereinafter *Public Life*].

<sup>506</sup> *Id.* The wording of the question obviously leaves something to be desired. Versions of the Ten Commandments also are found in the sacred texts of Judaism and Islam. See *McCreary County v. ACLU*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting). That does not detract, however, from the point made here — the poll shows a majority was quite comfortable with the government embracing its own faith while it opposed governmental endorsement of other faiths.

<sup>507</sup> See *Public Life*, *supra* note 505, at 3.

<sup>508</sup> Michael A. Smith, *No Right to Hold Others Captive*, THE GALVESTON DAILY NEWS, Sept. 9, 2007, <http://news.galvestondailynews.com/story.lasso?ewcd=bedac88d0e2599c9>.

majorities and officials and to establish them as legal principles to be applied by the courts.”<sup>509</sup> Justice Jackson continued, “One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”<sup>510</sup> Despite the fact that the RVAA does not allow votes on prayer, it will come as no surprise if the application of the RVAA sometimes operates to showcase only the perspectives of majority faiths.

The RVAA’s supporters likely would say that, in these cases, people have a simple way to set things right: they can sue. This fails to recognize that it is often very difficult for students and their families to bring Establishment Clause lawsuits against public schools, even (or perhaps especially) when the activities at issue involve blatant governmental favoritism for the majority faith tradition. It is not an accident that when people bring Establishment Clause lawsuits, they often do so anonymously.<sup>511</sup> Communities often ostracize students and their families who sue to protect their individual liberties from the majoritarian process.<sup>512</sup> Thus, the RVAA could result in substantial unconstitutional favoritism for some faiths over others, yet those wrongs may often go unaddressed.<sup>513</sup> When it comes to religious expression, policymakers are derelict in their constitutional and ethical duties when they ignore these social facts.

Public schools also will suffer under the RVAA because Congress drafted parts of the statute poorly. The most significant problem in

---

<sup>509</sup> *West Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

<sup>510</sup> *Id.*

<sup>511</sup> See, e.g., *Doe v. Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (2000) (upholding anonymous respondents’ assertion that school-sponsored prayers before football games violate Establishment Clause); *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (analyzing anonymous plaintiffs-appellees’ claims that opening school board meetings with prayer violates Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (analyzing claim by anonymous plaintiffs-appellees that coach-led prayer before basketball games violates Establishment Clause); *Doe v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735 (W.D. Tex. 2007) (analyzing anonymous plaintiffs challenge to policy allowing graduating class at school district’s high schools to vote on whether to have prayer at commencement ceremonies violates Establishment Clause).

<sup>512</sup> See *Beyond the Pledge of Allegiance: Hostility to Religion in the Public Square: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 108th Cong. 143-61 (2004) (testimony of Melissa Rogers).

<sup>513</sup> Likewise, it is also important to remember that a child from a minority faith tradition may be quite reluctant to risk the social stigma that could result if he or she was to pray from the state’s podium. Thus, majority faiths may dominate the RVAA system, but that dominance may be brushed off by simply saying that no one from a different religion wanted to take advantage of the opportunity.

this regard is that the RVAA does not define essential statutory terms. What does it mean for a student to speak publicly? Which kinds of school activities are school events? What must a public school do to establish a limited public forum?<sup>514</sup> The RVAA does not say. A good rule of thumb is that if legislators cannot define essential terms in legislation they draft, they ought not to pass such legislation.

Another way in which the RVAA disserves the mission of public schooling is that it imposes an incredibly burdensome process on school administrators and teachers. School officials will have to devote a substantial amount of time to determining when they must establish limited public forums and what is constitutionally required to do so, not to mention actually administering those forums, including setting up student eligibility pools and ensuring that students are prepared to participate.<sup>515</sup> School officials will expend additional time dealing with the inevitable complaints about the process and substance of the delivered speeches and whether officials can restrict controversial speeches. For every lawsuit, there will probably be scores of complaints, coming from all different perspectives.

The RVAA also overreaches in the way in which it dictates to public schools and robs them of discretion. Of course, the EAA also took away some discretion from public schools in this general area, but it used a scalpel compared to the RVAA's sledgehammer.<sup>516</sup> The EAA simply says public secondary schools that have already established a limited open forum by allowing one or more noncurriculum-related student clubs to meet on campus during noninstructional time have to open that forum to student religious clubs too.<sup>517</sup> In contrast, the RVAA attempts to force public schools to establish a limited public forum where none previously existed and to do so during instructional activities. Moreover, it requires the establishment of those forums whenever a student publicly speaks.<sup>518</sup> And while it is at least arguable that the First Amendment requires what the EAA demands, the First Amendment does not require schools to create and administer forums whenever a student publicly speaks — it is a decision Texas policymakers have forced on all of the state's public schools.<sup>519</sup> Further, while the sponsors of the legislation initially indicated that schools would be free to reject the RVAA model policy, they changed their tune somewhat along the

---

<sup>514</sup> See *supra* notes 42-43.

<sup>515</sup> See TEX EDUC. CODE §§ 25.152, 25.156 (Vernon 2008).

<sup>516</sup> See *supra* notes 24-76.

<sup>517</sup> See *supra* note 35.

<sup>518</sup> See *supra* notes 38-69.

<sup>519</sup> See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

way. The sponsors have attempted to coerce public schools to adopt that model policy, which places even more requirements on the schools and takes away more of their discretion.<sup>520</sup>

A final word about the debate over the RVAA. Despite claims to the contrary,<sup>521</sup> the debate over measures like this one does not divide the godless from the God-fearing.<sup>522</sup> There are those who oppose government-sponsored religion precisely because they value faith and freedom so much;<sup>523</sup> some of them resist the RVAA for this reason. This also is not a debate about whether religion has a place in the public schools and in public life; it clearly does.<sup>524</sup> More specifically, this is not a debate between those who support statutes like the EAA and those who do not. I am a longtime and enthusiastic supporter of the EAA, and I support the result the Court reached in the *Good News Club* case.<sup>525</sup> Yet, I believe the limited public forum provisions of the

---

<sup>520</sup> See *supra* notes 49-69.

<sup>521</sup> See, e.g., Executive Director, U.S. Pastors Council, before Senate Committee on Education (2007) (testimony of Dave Welch), <http://www.senate.state.tx.us/75r/senate/commit/c530/handouts07/h051707a.htm> (stating “[w]e wish to make it very clear that we believe there is not defensible reason to oppose this legislation, nor modify it, unless a legislator is hostile to the religious expression that is protected by the courts even in this limited way as compared to historical freedoms”); Coghlan, *supra* note 268 (addressing opponents of RVAA, Coghlan said, “The best kept secret of the anti-God faction is this: The Supreme Court has never held all public prayer over a school microphone is unconstitutional; only government prayer is illegal”).

<sup>522</sup> For example, in his written testimony on the RVAA, Rabbi Charlie Cytron-Walker of Congregation Beth Israel in Colleyville, Texas, said,

Two Jewish teachings are at the heart of my opposition [to the RVAA]. The first is that in the Torah, the first five books of the Bible, we are commanded thirty six times that we should not wrong or oppress the stranger. The second is based on Genesis, chapter one, verse twenty-seven, which teaches that every human being is created in the image of God and therefore every person is infinitely valuable.

Congregation Beth Israel, before Senate Committee on Educa Affairs (2007) (testimony of Rabbi Charlie Cytron-Walker), <http://www.senate.state.tx.us/75r/senate/commit/c530/handouts07/h051707a.htm>.

<sup>523</sup> As Justice Felix Frankfurter wrote in 1952: “My evangelistic brethren confuse an objection to compulsion with an objection to religion. It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar.” *Zorach v. Clauson*, 343 U.S. 306, 324-25 (1952) (Frankfurter, J., dissenting).

<sup>524</sup> See *infra* notes 526-39.

<sup>525</sup> I formerly served at the Baptist Joint Committee on Religious Liberty, one of the institutions that was instrumental in the enactment of the EAA. See ALLEN D. HERTZKE, REPRESENTING GOD IN WASHINGTON: THE ROLE OF RELIGIOUS LOBBIES IN THE AMERICAN POLITY 167-98 (1988). The BJC also filed an amicus brief in the *Good News Club* case

RVAA to be bad public policy. Attempts to suggest that the debate over the RVAA fits any of these false frames are either seriously ill-informed or efforts to distract from serious and fair-minded debate about the merits of this measure.

### B. Policy Alternatives

So, if the RVAA is bad public policy, should state legislators and governors do nothing to safeguard the religious liberties of schoolchildren? No. One thing policymakers should do is mandate and fund training on religion-clause issues for teachers and other officials preparing to serve (or in the midst of serving) in public elementary and secondary schools. Pre-service training is training that aspiring teachers undergo before becoming full-fledged classroom leaders. In-service training is training that teachers undergo while they are serving as teachers. Pre-service training on religious liberties issues would be ideal, but early in-service training would be an acceptable alternative. As noted above, one Texas legislator attempted to introduce this concept into the RVAA, but a majority of his fellow legislators rebuffed his efforts.<sup>526</sup>

Of course, one cannot always articulate the law regarding religious expression and public schools in ways that are accurate as well as clear and concise.<sup>527</sup> This kind of training would not be able to create those kinds of rules where they do not exist. However, other areas of the law are clear.<sup>528</sup> Furthermore, teachers and administrators would be well served by being able to distinguish between areas of the law that are black and white and areas of the law that fall into a gray zone.

It is absolutely critical that any governmental mandate for training in this area include an explicit requirement that the materials that are used are consensus statements and other consensus resources about current law in this area. In other words, training materials and instructions must reflect a common ground understanding of current law, rather than a contested understanding of that law from one or another ideological perspective. While an ideologically diverse group of lawyers and other experts developed some consensus materials and

---

supporting the right of the Good News Club to meet on school property. Brief of the Baptist Joint Committee on Public Affairs *et. al* as Amici Curiae in Support of Petitioners at 1, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (No. 99-2036).

<sup>526</sup> See *supra* notes 92-93.

<sup>527</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, 719-42 (2009).

<sup>528</sup> See, e.g., Dep't of Educ., *supra* note 88.

helped to circulate these materials to schools in the mid-1990s, it appears that the vast majority of teachers still receive no training in this area.<sup>529</sup> It is long past time for government officials to mandate and fund this kind of training for our nation's public school officials.

Competition for space on the pre-service and in-service teacher training agenda can be fierce, and lawmakers may be reluctant to mandate a place on that agenda for training on these issues. There are a number of other reasons why training in this area merits a spot on that agenda. First, Americans place a high value on religious liberty, and public schools are among the most important stewards of that freedom.<sup>530</sup> Teachers deserve to have as much help as possible before schools force them to make spontaneous decisions on a daily basis on these often sensitive and difficult issues. Second, our nation is increasingly pluralistic in terms of religious affiliations.<sup>531</sup> Teachers need to understand a few things about the major religious traditions of the schoolchildren they will teach and how those traditions may shape the students' conduct and beliefs. Further, there are better and worse ways for schools to deal with the fact that their communities are becoming more religiously heterogeneous, and this training would provide an opportunity for teachers and administrators to profit from the lessons other schools have learned in grappling with these issues. Third, teachers, like most Americans, often have scripts in their minds about what the First Amendment says and does not say, and those scripts do not always match the principles that are actually embodied in that constitutional provision. Moreover, tag lines like "separation of church and state" or "a place for religion in public life" do not go very far toward helping teachers to sort through the complex issues they must face. Without training, they may fall back on faulty scripts or wooden recitations of talking points. Especially because current law usually gives teachers a large amount of discretion to judge whether,

---

<sup>529</sup> Teaching About Religion in Public Schools: Where Do We Go from Here?, Conference Sponsored by the Pew Forum on Religion & Pub. Life & the Freedom Forum First Amendment Ctr. (May 20, 2003) (transcript available at <http://pewforum.org/events/?EventID=48>).

<sup>530</sup> For example, the Freedom Forum First Amendment Center's 2007 survey report on the "State of the First Amendment" found that 97% of Americans believe that it is essential or important to be able to practice the religion of one's choosing, and 89% believe that it is essential or important to be able to practice no religion. See First Amendment Ctr., State of the First Amendment Survey 2007: Final Annotated Survey, <http://www.firstamendmentcenter.org/pdf/SOFA2007results.pdf> (last visited Jan. 29, 2009).

<sup>531</sup> See the Pew Forum on Religion & Pub. Life, U.S. Religious Landscape Survey, <http://religions.pewforum.org/affiliations> (last visited Jan. 29, 2009).

how, and when they include discussions of religion in the classroom, teachers need to have time and space away from the firing line to think through these issues and discuss them with experts and their peers.<sup>532</sup>

Another reason teacher training should be a priority is because public schools should do their utmost to welcome students of all faiths and none, from the most theologically orthodox believer to the most avowed atheist. Public schools must never seek to indoctrinate children along religious or anti-religious lines.<sup>533</sup> And they should never avoid important topics or otherwise tailor the curriculum to cater to religious objections.<sup>534</sup> Having said these things, there is room for most schools to improve in terms of making students and families of all faiths and none feel welcome. When teachers have a more cogent understanding of the First Amendment, they will be more skilled at leading in this area.

Some may object to this proposal because it will require the government to spend money. Yet this is exactly the kind of policy that has great potential to save the government money, in terms of time spent on church-state controversies and litigation. Further, while policymakers usually talk a good game on the value they place on these issues, this proposal would provide an opportunity to see who is serious about moving our nation from culture wars to common ground.

Finally, while this is a state and local issue, it certainly would help for the next president of the United States to use the White House's bully pulpit to encourage states to mandate and fund this kind of teacher training. This would be a natural progression in the presidential leadership shown by Presidents Bill Clinton and George W. Bush on these issues.<sup>535</sup> Indeed, the next president might appoint a

---

<sup>532</sup> See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (finding educators do not violate First Amendment by exercising control over content of student speech that is part of school curriculum "so long as their actions are reasonably related to legitimate pedagogical concerns"); *DeNooyer v. Livonia Pub. Sch.*, 799 F. Supp. 744 (E.D. Mich. 1992) (holding public school was not constitutionally required to allow second-grade student to sing religious song as part of classroom show-and-tell program); *Duran v. Nitsche*, 780 F. Supp. 1048 (E.D. Pa. 1991) (finding public school did not violate fifth-grade student's free speech rights when it prohibited her from giving religious oral presentation to class); KENT GREENWALT, *DOES GOD BELONG IN PUBLIC SCHOOLS?* 160-170 (2005) (explaining broad discretion of teachers to choose how students fulfill assignments and related difficulties in ascertaining limits of religious classroom speech).

<sup>533</sup> See, e.g., Dep't of Educ., *supra* note 88 (affirming rights of students to express their faith in school and to be free from state-sponsored religious activity).

<sup>534</sup> *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

<sup>535</sup> See *supra* note 88 and Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 69 Fed. Reg. 42,586 (July 16, 2004), *available at*



commission on religion in public schools comprised of constitutional experts of diverse perspectives to update and revise the materials issued by the Clinton and Bush administrations. This commission could also provide these and other materials to states along with a list of constitutional experts in each state so that states could take advantage of those resources if they wish. Such a commission also might draft an annual report on best practices in the field of teacher training and school policies on these issues. Further, federal, state, and local governmental entities might authorize annual hearings, surveys, and studies to track trainings provided in various areas to ensure that efforts are actually increasing understanding of the law.

Again, it is critical that all of these efforts reflect a consensus approach rather than serving as a tool for one side or another of the culture wars to press its case on these issues. If these efforts reflect a consensus, they will help to build a better civic culture, promote public education, and advance our best traditions of religious freedom.

Beyond governmental mandates for teacher training and presidential commissions, local communities should encourage public schools to teach about religion in an academic way with the benefit of consensus curriculum materials. The Court has long recognized that it is inappropriate for public schools to indoctrinate students on religious matters, but it has also noted that it is appropriate and helpful for schools to instruct students about the ways religion has shaped and continues to shape the ideas and institutions of our national and global society.<sup>536</sup> We simply cannot understand our nation or our world without understanding religion. It is imperative for our schools to improve their efforts to provide sound and responsible academic instruction on these matters. Beyond the undeniable importance of religion's role — for good and for ill — as a shaper of world history, we must acknowledge, as Professor Kent Greenawalt has said, that “[i]f schools say very little about religion, this may incline students to believe that religion, contrary to the convictions of most people, is not

---

<http://www.ed.gov.go.libproxy.wfubmc.edu/policy/gen/guid/religionandschools/prayerguidance.html>.

<sup>536</sup> As the Court said in *Abington Township v. Schempp*:

[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

---

---

of central importance for most domains of life.”<sup>537</sup> Many American schools appear to be sending this message today.<sup>538</sup> Perhaps that is because there are difficult constitutional and pedagogical issues in this area.<sup>539</sup> But students will have a distorted and impoverished education if schools take the easy road and steer clear of instruction and dialogue about religion’s influence on the world around us.

Local communities also should explore the idea of adopting policies that would allow for student debates on some public issues where one’s religious beliefs or lack thereof often play a powerful role in forming one’s views. These debates would create more space in public schools for exchanges over deep differences regarding certain moral issues.

For example, high schools should consider experimenting with these debates on issues such as abortion, the environment, poverty, gay marriage, and torture. The debates should focus on policy issues (e.g., should our government be allowed to torture prisoners of war or enemy combatants in certain circumstances or turn prisoners over to other countries that would do so?), not abstract theological ones (e.g., are Christians the only ones who go to heaven?), in part because secondary schools are usually not the best place for student debate of abstract theological issues. But students could bring their religious or agnostic or atheistic perspectives to bear on these issues, or not, as they choose. Those who chose to bring their personal perspectives to bear on these questions, however, would have to be ready for the ideas they proffer to be subjected to public scrutiny.

These debates should take place only in high schools, where students are mature enough to participate in informed give-and-take and to understand that the school takes no position on the subject being debated. Students should be given ample room to make points from whatever perspective it is that they embrace, while maintaining civility. Because they are debates, students would always hear at least two different perspectives on a topic, which would help to drive home the message that the school takes no sides. Students should not be required or pressured in any way to attend these debates. Policymakers should not require schools to conduct these forums, but they could encourage them, based on the notion that these kinds of exchanges would give students the opportunity to develop their debating skills, and that they would provide those who want to

---

374 U.S. 203, 225 (1963).

<sup>537</sup> KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? 29 (2005).

<sup>538</sup> *Teaching About Religion*, *supra* note 529.

<sup>539</sup> *Id.*

express their perspectives on religion an additional and academically appropriate way to do so at school.

#### CONCLUSION

The fact that schools are public means they have constitutional responsibilities to protect the religious freedom of all Americans. It also means they will always be places of diversity and debate. Religion is, and should be, a part of that mix. Public schools should discuss, not dodge, the topic of religion.

At the same time, the fact that religion-related issues are important and volatile ones requires us to take steps to ensure that public schools do not function as fronts for our culture wars. Because the RVAA aims to protect prayers and proselytizing from the state's podium before captive student audiences at a multitude of school events, it creates great litigation risks and threatens to divide and distract public schools. Thus, state legislators outside of the state of Texas should not adopt the RVAA model. Moreover, Texas legislators should amend the RVAA in their next legislative session to address these concerns.

Instead of embracing policies like the RVAA, legislators should mandate and fund teacher training on religion-clause issues that includes the use of consensus materials. Measures like these will help schools to focus on their primary mission, educating children, while building greater understanding of religious freedom mandates and increased competency to carry out those mandates in the context of public education.