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THE PROPER ROLE OF RELIGION IN THE PUBLIC SCHOOLS: EQUAL ACCESS INSTEAD OF OFFICIAL INDOCTRINATION

JAMES L. UNDERWOOD*

I. INTRODUCTION

THE debate over whether religion has a proper role to play in public schools, and, if so, whether it should be through private, voluntary observances or through officially orchestrated rites, has reached a new level of intensity. For example, in the summer of 2000, the United States Supreme Court in Santa Fe Independent School District v. Doe1 held that a public school system that permitted prayers to be delivered over the loud speaker at high school football games by a student-elected chaplain violated the Establishment Clause of the First Amendment.2 Even before the Supreme Court decided Santa Fe, the push to increase the role of religion in public schools through mass religious exercises at school-sponsored events had spread throughout the country.3 In the summer of 1999, the United States House of Representatives adopted a measure authorizing the posting of the Ten Commandments in schools as a means preferable to gun control for reducing school violence.4 Although the bill lan-

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2. See id. at 2275 (upholding appellate court’s decision). The Establishment Clause of the First Amendment states, “Congress shall make no law respecting the establishment of religion.” U.S. Const. amend. I; see also Wallace v. Jaffree, 472 U.S. 38, 48-49 (1985) (confirming that First Amendment religious clauses are applicable to states).

3. For a discussion of the push to increase the role of religion in public schools, see infra notes 4-23 and accompanying text.

guished in the Senate, it served as a catalyst for an outpouring of local action in support of posting the Ten Commandments in schools and government buildings. 5 Prompted by the House vote, several school districts in Kentucky, California and Illinois began posting the Ten Commandments in schools and courthouses.6 In early 2000, Indiana passed a law permitting the display on state-owned real property of the Ten Commandments, “along with other documents of historical significance that have formed and influenced the United States legal or governmental system.”7 A similar approach was taken by South Dakota, but that state expanded the documents to be posted with the Ten Commandments to include those of “cultural, legal, or historical significance.”8

In the spring of 2000, the Kentucky legislature passed a resolution permitting the posting of the Ten Commandments in public school classrooms and other public property “when incorporated into an historical display,” but specified that the display must serve the “important secular purpose of illustrating how the Bible and the Ten Commandments have influenced the faith, morals, and character of American leaders . . . .”9 Only a few months later, a federal district judge struck down another provision of the same law, which provided for relocation of a Ten Commandments monument to a prominent position on the Kentucky state capitol.


6. See Patrick Crowley, Grant Co. May Display Commandments, Officials Could Be Courting Lawsuit, CIN. ENQUIRER, Sept. 10, 1999, at D01 (noting various Kentucky school districts that are considering posting or have posted Ten Commandments in response to congressional bill that would allow posting in classrooms and government buildings); see also Tom Gorman, School District to Defy Court, Post Ten Commandments, L.A. TIMES, Nov. 14, 1999, at B1 (reporting that Riverside, California school district decided to post Ten Commandments in offices of schools); Rally Backs Posting of Ten Commandments, N.Y. TIMES, Nov. 14, 1999, at A20 (discussing that Harrisburg, Illinois school district decided to post Ten Commandments).

7. IND. CODE § 4-20.5-21-2 (Supp. 2000). Indiana required that:
[s]uch display of an object containing the words of the Ten Commandments shall be in the same manner and appearance generally as other documents and objects displayed, and shall not be presented or displayed in any fashion that results in calling attention to it apart from the other displayed documents and objects.

Id. Passage of the law also may have been influenced by a recent federal district court decision upholding a display of the Ten Commandments on the grounds of the City Hall of Elkhart, Indiana because it was surrounded by other monuments marking historical events—a context that gave the display a broader perspective than that of an exclusively religious message. See Books v. City of Elkhart, 79 F. Supp. 2d 979, 1006 (N.D. Ind. 1999) (concluding that plaintiffs were not entitled to injunctive relief and city would not be forced to tear down monument displaying Ten Commandments), rev’d, 235 F.3d 292, 302-07 (7th Cir. 2000) (holding that display had both purpose and primary effect of advancing religion and violated Establishment Clause).


grounds near an eye-catching floral clock. The judge concluded that, although the legislature purported to authorize an historical display, the purpose and effect of the exhibit was to endorse Christianity by presenting it as the sole source of the state’s legal system. In 2000, Judge Roy Moore rode his fame as an ardent advocate of posting the Ten Commandments in state courtrooms to election as Chief Justice of the Alabama Supreme Court. Across the country, a California school district was sued for refusing to accept an advertisement, consisting largely of the Ten Commandments, for display in a high school ballpark.

A movement involving no official indoctrination and more individual free choice is growing across the country as private groups begin to issue Ten Commandments book covers at off-campus locations to students who want them. In September of 1999, a proposed new school prayer constitutional amendment was introduced to the accompaniment of mass church rallies. The federal appellate courts are wrestling with a renewed surge of official religious observances at public school events, such as


11. See id. ("A reasonable observer to viewing this display would only conclude that the Commonwealth endorsed the Biblical passage quoted on the monument...")


13. See Diloreto v. Bd. of Educ. of Downey Unified Sch. Dist., 87 Cal. Rptr. 2d 791, 799 (Ct. App. 1999) [hereinafter Diloreto I] (holding that school district did not have to accept advertisement because doing so would unconstitutionally show preference for religion); see also Diloreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 968 (9th Cir. 1999) [hereinafter Diloreto II] (holding that exclusion of Ten Commandments advertisement from limited non-public forum (ballpark) did not violate plaintiff’s First Amendment free speech rights and was reasonable in light of controversial nature of advertisement and its potential for disrupting school environment), cert. denied, 120 S. Ct. 1674 (2000).

14. See Linda Gillis, Word on the Street, INDIANAPOLIS NEWS, Aug. 21, 1999, at G01 (reporting that Columbine High School shooting survivor did radio spot in 166 markets for private Christian group, offering free Ten Commandments or “Love Thy Neighbor As Thyself” book covers to any student who called toll free number); see also Michael Ko, Religious Textbook Covers Command Schools’ Attention, CHI. TRIB., Aug. 23, 1999, at 1N (reporting on four Chicago-area churches that distributed 8000 Ten Commandments book covers after Sunday services and noting local civil rights leaders did not oppose program so long as it remained one of individual display of religious beliefs rather than school distribution program); Megan Middleton, Book Covers Feature Ten Commandments; 8000 Wrappers to Be Given Free to Students, DALLAS MORNING NEWS, Aug. 16, 1999 (3d ed.), at 17A (discussing parent who distributed Ten Commandments book covers at church parking lot when school board refused to do so because of contract for other covers).

To secure the people's right to acknowledge God according to the dictates of conscience: ... Neither the United States nor any State shall require any person to join in prayer or other religious activity, prescribe school prayers, discriminate against religion, or deny equal access to a benefit on account of religion. Id.; see also Ron Hutcheson, House GOP Lobbies for School Prayer Amendment, FORT WORTH STAR-TELEGRAM, Sept. 16, 1999, at 5 (describing rallies).

16. For a recent graduation prayer case that ran afoul of the Santa Fe ruling, see Adler v. Duval County School Bd., 206 F.3d 1070, 1071 (11th Cir. 2000), which held that a school board policy permitting a student vote to authorize student-led graduation messages, usually prayers, did not violate the Establishment Clause because there was a "total absence of state involvement in deciding whether there [would] be a graduation message, who will speak, or what the speaker may say combined with the student speaker's complete autonomy over the content of the message." The Supreme Court vacated this ruling and remanded the case for further consideration in light of the Santa Fe decision. See Adler v. Duval County Sch. Bd., 121 S. Ct. 31, 31 (2000) (remanding Eleventh Circuit's decision). The Santa Fe decision also led to the vacating and remanding of Chandler v. James, 180 F.3d 1254, 1263 (11th Cir. 1999) [hereinafter Chandler I], which upheld an Alabama law permitting non-sectarian, non-proselytizing student-initiated voluntary prayer during compulsory or non-compulsory school-related events on the grounds that genuinely student-initiated speech was private speech which did not violate the Establishment Clause. See Chandler v. Siegelman, 120 S. Ct. 2714, 2714 (2000) [hereinafter Chandler II] (vacating and remanding Chandler I in light of Santa Fe, 120 S. Ct. at 2266). The United States Court of Appeals for the Eleventh Circuit reacted to the remand by minimizing the scope of Santa Fe and reinstating its original Chandler I order. See Chandler v. Siegelman, 230 F.3d 1313, 1315 (11th Cir. 2000) [hereinafter Chandler III] ("Santa Fe condemns school sponsorship of student prayer. Chandler condemns school censorship of student prayer. In their view of the proper relationship between school and prayer, the cases are complementary rather than inconsistent."); see also Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 834 (9th Cir. 1998) (approving school board policy by which at least four students, chosen by their academic rank, could deliver graduation "address, poem, reading, song, musical presentation, prayer or any other pronouncement" without official censorship of contents), vacated as moot, 177 F.3d 789 (9th Cir. 1999) (en banc). The program in Madison escaped constitutional condemnation because the school did not control the contents of the ceremony, giving graduates an opportunity to express themselves in public constituted a secular purpose, and the program neither had an effect of advancing religion nor entangled church with state. See Madison Sch. Dist. 147 F.3d at 835-38 (allowing school policy that provides for student graduation pronouncements); see also ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1477, 1480 (3d Cir. 1996) (en banc) (finding student-initiated, student-led graduation prayer pursuant to plurality vote of seniors violates Establishment Clause when school officials still control sequence of graduation events and social pressure coerces seniors to attend, because practice has purpose and effect of advancing religion despite disclaimer of official endorsement of contents of prayers); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 454 (9th Cir. 1994) (holding graduation prayer pursuant to student vote authorized by officials violates Establishment Clause when school controls and pays for ceremony on school property and social pressure renders decision of graduates to participate not entirely voluntary), vacated as moot, 515 U.S. 1154 (1995). In Ingebritsen v. Jackson Public School District, the Fifth Circuit validated student-initiated, student-led graduation prayer. See 88 F.3d 274, 280 (5th Cir. 1996) ("To the extent the School Prayer Statute allows students to choose to pray at high school graduation to solemnize that once-in-a-lifetime event, we find it constitutionally sound ...."). The Fifth Circuit struck down, however, the part of the Jackson program that permitted
tionally, a Texas school district recently conducted a “Clergy in the Schools” program, under which students were taken from regular classes without prior notification to, or consent of, parents and sent to counseling sessions with ministers for instruction in the “civic-virtues.” A California public school adopted books furnished by a private religious group as texts

school officials to lead students in prayer at compulsory and non-compulsory events and to punish students who left the former to avoid the prayers. Prayers at compulsory events such as assemblies forced religion upon a captive audience. See id. at 279-80 (finding part of statute to be “unconstitutional endorsement of religion”). The purpose of the system was to advance religion as a preferred practice and to endorse it to such an extent that it harmed the position of dissidents in the political community. See id. (using endorsement test to find unconstitutional government action when government appears to take position on religious questions or makes adherence to religion relevant to political standing in community). Federal Courts of appeals consideration of the graduation prayer issue is guided by the Supreme Court’s decision in Lee v. Weisman. See 505 U.S. 577, 587-88 (1992) (striking down secondary school graduation prayer ceremony organized and controlled by school authorities).

For a further discussion of prayer at public school athletic events, see Doe v. Duncanville Independent School District, 70 F.3d 402, 406-07 (5th Cir. 1995), which held: (1) prayers initiated by school employees at for-credit athletic events (practices and games) violated the Establishment Clause; (2) practices and games are not public fora at which speech is freely permitted; and (3) the use of Christian music as the theme song of a choral group was justified by secular reasons related to teaching choral music. See also Jager v. Douglas County Sch. Dist, 862 F.2d 824, 831 (11th Cir. 1989), which found that an equal access plan under which the student government randomly selected students, parents or staff members from a group of applicants to deliver a prayer at the start of public school football games violated the Establishment Clause because the practice had a religious purpose and effect and conveyed a message of official endorsement of the contents when prayer occurred at school-sponsored events at a school-owned facility.

For a case involving prayer at a school assembly, see Collins v. Chandler Unified School District, 644 F.2d 759, 761-62 (9th Cir. 1981), which held that a grant by a school principal of a student council’s request to recite a prayer and read Bible verses of the council’s choosing at an assembly violated an Establishment Clause even though attendance was voluntary.

17. See Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274, 279 (5th Cir. 1999) (granting rehearing en banc and discussing facts of case). Although students could leave the meeting, coercion remained because students were confronted with the quandary of staying in a meeting they did not want to attend or leaving and offending school officials who were present. See id. at 290 (noting that these conditions can never lead to “voluntary” participation). The en banc court remanded the case for further development of the record on the issue of whether the clergy program stood alone as a mechanism preferring advice from ministers or was part of a broader plan featuring advice to students from representatives of a variety of professions. See Doe v. Beaumont Indep. Sch. Dist., No. 97-40429, 2001 WL 69499, at *9-10 (5th Cir. Jan. 26, 2001) (noting need to determine whether clergy program was “a single stand-alone program with no relevant kinship to the other programs”).
in basic courses.\textsuperscript{18} The texts advocated specific religious doctrines and criticized non-Christians as not being entitled to a place in heaven.\textsuperscript{19}

State boards of education have also been active. In 1999, the Kansas state board of education voted to delete evolution from the curriculum on the grounds that teaching evolution as fact is bad science, based on theories not observable in the laboratory.\textsuperscript{20} Additionally, a Louisiana school board required that a disclaimer be read immediately before teaching evolution.\textsuperscript{21} In Colorado, after the legislature failed to enact a law requiring public schools to post the Ten Commandments, the state board of education passed a resolution recommending that schools post "In God We Trust" signs on the theory that these words, composing the national motto used on coins, were likely to withstand any challenge that they established religion.\textsuperscript{22} When the South Carolina state board of education

\footnotesize
\textsuperscript{18} See William Booth, ACLU Sues Over Donated Texts with a Christian Bent; Principal Tests Limits of Religion in Schools, WASH. POST, Sept. 7, 1999, at A08 (informing that principal responsible for obtaining books claimed only to want to give students best books possible).

\textsuperscript{19} See id. (noting some religious doctrines expressed in book).

\textsuperscript{20} See George Johnson, It's a Fact: Faith and Theory Collide Over Evolution, N.Y. TIMES, Aug. 12, 1999, at § 4, available at 1999 WL 30476800 (reporting that Kansas board of education dropped evolution from curriculum). Apparently the new policy did not mean that individual teachers could not teach evolution; rather, evolution could not be an official part of the curriculum and students could not be tested on it. See id. (explaining implications of new policy); see also Stephen Jay Gould, Dorothy, It's Really Oz, TIME, Aug. 23, 1999, at 59 (criticizing Kansas decision). The Kansas board's decision proved to be a divisive issue in the August, 2000 Republican primary for state school board, with three candidates who supported the decision being defeated. See Pam Belluck, Evolution Foes Dealt a Defeat in Kansas Vote, N.Y. TIMES, Aug. 3, 2000, at A2 (noting winner of primary opposed board's decision to drop evolution from curriculum). In early 2001, evolution was reinstated as part of the curriculum. See John W. Fountain, Kansas Puts Evolution Back into Public Schools, N.Y. TIMES, Feb. 15, 2001, at A12 (noting that Kansas reinstated evolution in curriculum). For a Supreme Court case dealing with earlier attacks on the teaching of evolution in public schools, see \textit{Epperson v. Arkansas}, 393 U.S. 97, 109 (1968), which struck down a ban on teaching evolution in public schools as having the purpose of advancing religion.

\textsuperscript{21} See Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 346 (5th Cir. 1999) (striking school board requirement that disclaimer be read immediately before teaching evolution and holding disclaimer had primary effect of advancing and endorsing particular religious view of biblical version of creation), cert. denied, 120 S. Ct. 2706 (2000). Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented from the denial of certiorari. See id. (arguing that disclaimer did not establish religion but only encouraged student freedom of thought). The United States Supreme Court also has addressed this issue. See Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (striking down Louisiana law requiring that whenever either evolution or creation science, which theorizes that earth was created by supernatural being, is taught, other must also be taught and concluding that rule pursued purpose of advancing religion).

\textsuperscript{22} See Katherine Vogt, God Motto Urged in Colorado Schools, ASSOC. PRESS, July 6, 2000, available at 2000 WL 23363175 (reporting on state board of education's efforts to bring religion into schools despite legislature's inaction). Lower federal courts have upheld the use of "In God We Trust" as the national motto and on coins. See Gaylor v. United States, 74 F. 3d 214, 216 (10th Cir. 1996) (holding that

failed to pass a proposal for posting the Ten Commandments in public schools because the postings might offend members of minority religions and violate the principle of separation of church and state, the proponent of the measure replied, "Screw the Buddhists and kill the Muslims."23

This Article contends that religion has a valid place in the public schools, but not by government indoctrination through such means as posting the Ten Commandments in public schools used by students under compulsory attendance laws, prayers at official events or efforts to purge the curriculum of religiously obnoxious instruction. Instead, schools should create limited open forums (extracurricular activities periods), during which students would be free to choose to attend religious, secular or even anti-religious clubs.24 Such forums would allow student religious organizations to use school facilities and compete for adherents on par with other student extracurricular clubs.25 Because the current federal statute grants equal access only in secondary schools, it should be amended to provide for equal access in lower grades, with the stipulation that parents exercise the choice of activities for younger children and conduct the programs.26

Obviously, competition in the ideological marketplace of ideas through an equal access program does not, and should not, guarantee

motto merely "symbolizes the historical role of religion in our society"); see also O'Hair v. Murray, 588 F.2d 1144, 1144 (5th Cir. 1979) (upholding constitutionality of federal statutes making "In God We Trust" national motto, printing phrase on coins, and imposing criminal sanctions for removing phrase from coins); Aronow v. United States, 432 F.2d 242, 243-44 (9th Cir. 1970) (same).


24. See Widmar v. Vincent, 454 U.S. 263, 269-70 (1981) (holding that when university created limited public forum permitting wide variety of student organizations to use facilities for meetings, religious clubs cannot be denied such use because content-based discrimination violates their free speech rights under First Amendment); see also Bd. of Educ. v. Mergens, 496 U.S. 226, 253 (1990) (holding equal access to religious groups to limited open forum consisting of high school extracurricular activities period would not violate Establishment Clause); Peck v. Upshur County Bd. of Educ., 155 F.3d 274, 279-81, 288 (4th Cir. 1998) (holding that school policy that permitted private groups to distribute Bible in school hallways one day per year by leaving them at unstaffed tables was permissible when varied secular groups were also permitted to distribute literature). But see Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1171 (7th Cir. 1993) (permitting private group [Gideons] to distribute Bibles to fifth-graders during school hours in classes or mandatory assemblies violated Establishment Clause; there was no public forum because there was captive audience, other groups made school presentations only sporadically and principal used discretion to exclude others).

25. See Mergens, 496 U.S. at 247 (enforcing equal access to school's limited open forum); see also Widmar, 454 U.S. at 267-68 ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.").

26. See 20 U.S.C. § 4071(a) (1995) (providing that public secondary schools that accept federal funds and have created limited open forum must grant equal access to forum without discrimination based on religious, political, philosophical or other content of groups' speech).
II. THE NEW PUSH FOR POSTING THE TEN COMMANDMENTS IN SCHOOLS

On June 16, 1999, a midnight debate in the United States House of Representatives on juvenile justice and gun control was transformed into a struggle over whether the Ten Commandments could be posted in public schools as a talisman to ward off violence. In sponsoring an amendment that would permit posting of the Ten Commandments, Representative Aderholt of Alabama argued:

I realize that many things need to happen to redirect this overwhelming surge toward a violent culture. I also understand that simply posting the Ten Commandments will not change the moral character of our Nation overnight. However, it is one step that States can take to promote morality and work toward an end

27. At the same time, it would avoid both subtle and direct pressure on those who choose to pursue secular interests. See Douglas Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 Nw. U. L. Rev. 1, 3 (1986) (explaining equal access is neutral because it neither encourages nor discourages religion, thus avoiding creation of pressure on students to conform to official school practice).

28. For a further discussion of issues surrounding posting the Ten Commandments, see infra notes 31-103 and accompanying text.

29. For a further discussion of United States Supreme Court cases involving religion in public schools, see infra notes 104-237 and accompanying text.

30. For a further discussion of the Equal Access Act applied to student organizations, see infra notes 238-303 and accompanying text.

of children killing children. The States we represent deserve the opportunity to decide for themselves whether they want to display the Ten Commandments.\textsuperscript{32}

Proponents of the measure contended that posting the Commandments would not force anyone to believe in their contents. Representative Barr of Georgia stated:

This [copy of the Ten Commandments] has been hanging on our wall close to 5 years now, since I was sworn in as a Member of the Chamber.

Not one time have we had somebody that has walked into that office, seen these Commandments, fallen down on their knees and say, I must pay homage to whatever religion the gentleman from Georgia (Mr. Barr) is. There is nothing in these Ten Commandments that reaches out and grabs somebody and forces them to abide by any particular religious belief.\textsuperscript{33}

Opponents of the measure, however, such as Representative Nadler of New York, replied that the Commandments were not the passive consensus moral code that advocates of the amendment pictured; there would be an immediate, highly divisive controversy over which of the several versions of the Ten Commandments found in the Protestant, Catholic and Jewish scriptures would be used.\textsuperscript{34} Representative Nadler argued that the

\textsuperscript{32} Id. at H4458 (statement of Rep. Aderholt on his proposed amendment). Section XX(a) of the Amendment states:

(a) \textbf{Display of Ten Commandments}—The power to display the Ten Commandments on or within property owned or administered by the several States or political subdivisions thereof is hereby declared to be among the powers reserved to the States respectively.

(b) \textbf{Expression of Religious Faith}—The expression of religious faith by individual persons on or within property owned or administered by the several States or political subdivisions thereof is hereby—

(1) declared to be among the rights secured against laws respecting an establishment of religion or prohibiting the free exercise of religion made or enforced by the United States Government or by any department or executive or judicial officer thereof; and

(2) declared to be among the liberties of which no State shall deprive any person without due process of law made in pursuance of power reserved to the States respectively.

(c) \textbf{Exercise of Judicial Power}—The courts constituted, ordained, and established by the Congress shall exercise the judicial power in a manner consistent with the foregoing declarations.

\textsuperscript{33} Id. at H4459 (statement of Rep. Barr in support of Amendment 28 offered by Rep. Aderholt).

\textsuperscript{34} Id. (statement of Rep. Nadler in opposition to Amendment 28); see also Harvey v. Cobb County, 811 F. Supp. 669, 672 (N.D. Ga. 1993) (noting testimony of Rabbi Shalom Lewis comparing different versions of Ten Commandments and ruling that stand-alone display of Ten Commandments violated Establishment Clause of First Amendment), \textit{aff'd}, 15 F.3d 1097 (11th Cir. 1994). A frequently used version of the Ten Commandments is found in the King James translation:
amendments could lead to the tyranny of local majorities on the question of which version to post:

Are our public buildings to be Catholic because the local Catholic majority votes that the Catholic version found in the Douay Bible should be in the public buildings? Or perhaps they should be Protestant because the local majority decides that the Saint James version of the Ten Commandments, which is very different from the Catholic version. Or maybe the Jews have a majority in the local district, and they decide the Messianic version should be in the public buildings.35

And God spake all these words, saying, 2. I am the LORD thy God, which have brought thee out of the land of Egypt, out of the house of bondage. 3. Thou shalt have no other gods before me. 4. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth: 5. Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me; 6. And shewing mercy unto thousands of them that love me, and keep my commandments. 7. Thou shalt not take the name of the LORD thy God in vain; for the LORD will not hold him guiltless that taketh his name in vain. 8. Remember the Sabbath day, to keep it holy. 9. Six days shalt thou labour and do all thy work: 10. But the seventh day is the sabbath of the LORD thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: 11. For in six days the LORD made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the LORD blessed the sabbath day, and hallowed it. 12. Honour thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee. 13. Thou shalt not kill. 14. Thou shalt not commit adultery. 15. Thou shalt not steal. 16. Thou shalt not bear false witness against thy neighbour. 17. Thou shalt not covet thy neighbour’s house, thou shalt not covet thy neighbour’s wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour’s.

Exodus 20:1-17 (King James). Another book of The Bible contains a synopsis of the commandments made by Christ when he was asked by a lawyer to declare which was the great commandment:

37. Jesus said unto him Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. 38. This is the first and great commandment. 39. And the second is like unto it, Thou shalt love thy neighbour as thyself. 40. On these two commandments hang all the law and the prophets.

Matthew 22:37-40 (King James). Another version of the Commandments is found in Deuteronomy 5:2-21. Representative Nadler argued that even Christian groups disagreed over whether the invocation to keep the Sabbath referred to Saturday or Sunday worship. See 145 Cong. Rec. H4458-59 (statement of Rep. Nadler in opposition to Amendment 28) (arguing that no standard rendition of Ten Commandments exists to allow in schools because even religious groups of same faith argue over interpretations).

35. 145 Cong. Rec. H4459. For examples of the differences between the various versions of the Ten Commandments, compare the King James version in Exodus 20, with other translations, such as The Holy Bible (Douay Rheims Version translated from the Latin Vulgate) and The Torah, The Five Books of Moses: A New
Representative Nadler further contended that the amendment sought to replace the Supreme Court's approach to deciding cases involving religious displays in government buildings with a new standard dictated by Congress, and that this approach was an unconstitutional violation of the separation of powers doctrine's allocation of judicial review authority to the courts.  

Representative Scott of Virginia, another opponent of the amendment, argued that it flew in the face of the Supreme Court decision in *Stone v. Graham*, which struck down a law requiring the posting of the Ten Commandments in all public school classrooms in Kentucky, even though the plaques were to be paid for with private funds and were to contain a statement that the purpose of the display was the secular one of teaching children the origins of the law.

Opponents of the amendment alleged that the Ten Commandments were not simply a legal code outlawing the most heinous crimes such as murder, stealing and bearing false witness, but were a religious document defining the relationship of God to humankind, and, as such, they should not be singled out as the one historic source of law in a country dedicated

Translation According to the Masoretic Text, First Section (The Jewish Publication Society of America, 1962). The *Torah* version is similar to the others in substance, but the division into verses is different in the latter parts of the chapter. The Ten Commandments are not a universally agreed upon moral code. For example, *Al-Qur’ n: A Contemporary Translation*, contains a moral code with significant similarities to the Ten Commandments, such as the invocation of honesty, sexual morality and a mandate not to follow other gods. See Ahmed Ali, *Al-Qur’ n: A CONTEMPORARY TRANSLATION* 242-43 (Princeton Univ. Press 1982) (setting forth forbidden immoral acts). Differences abound, however. For example, the injunction against murder, although still strong, is perhaps, less absolute in that it recognizes that taking a life could sometimes be just. See *id.* at 242 (“And do not take a life, which God has forbidden, except in a just cause.”). In addition, it contains advice on the management of personal affairs, such as cautioning against the dissipation of your wealth, not dealt with in the Ten Commandments. See *id.* verse 26, at 242 (“[A]nd do not dissipate (your wealth) extravagantly.”). More importantly, the same chapter containing the moral code also contains a refutation of Christian doctrine. See *id.* verse 111, at 249 (teaching that God has no son). The point is that because not all children are raised within the Judeo-Christian tradition, a consensus statement suitable for posting in the public schools would be difficult to achieve. Rather than a consensus, the outcome would be victory for one group and defeat for another, with the result sometimes varying from district to district. Such fights would prove to be caustic to the atmosphere for learning.

36. See 145 CONG. REC. H4459 (statement of Rep. Nadler) (asserting separation of powers argument against amendment); see also City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (striking down act of Congress that purported to tell courts what level of constitutional scrutiny to apply in reviewing government actions impinging upon religious freedom).


38. See 145 CONG. REC. H4458 (statement of Rep. Scott in opposition to Amendment 28); *Stone*, 449 U.S. at 41-42 (holding that posting Ten Commandments alone as source of law violated Establishment Clause because state’s real purpose was to advance religion even though it claimed secular educational purpose).
to religious freedom.\textsuperscript{39} Several of those who spoke out against the proposal felt it necessary to preface their remarks by claiming that they were Christians, as if they were attempting to ward off accusations that their views branded them as godless advocates of murder, stealing, lying and adultery.\textsuperscript{40} Representative Waters of California, for example, made it clear that she believed in religious education for her children, but that the public school system was the wrong source.\textsuperscript{41}

Far from being an isolated incident, the congressional debate mirrors similar controversies and litigation across the country. Many of the cases dealing with displaying the Ten Commandments concern exhibits in parks and courtrooms, settings that are not completely analogous to public schools, with their audience of children present under compulsory attendance laws. These cases, however, offer examples of when the Ten Commandments can be displayed validly as part of a larger historical or comparative exhibit and when they are inappropriate as isolated endorsements of religious doctrine.\textsuperscript{42} These examples afford a useful framework

\textsuperscript{39} To do so would be for the government "to use its resources to push its religious views on other free citizens of this land." 145 CONG. REC. H4460 (statement of Rep. Edwards of Texas, in opposition to Amendment 28). In his commentaries on the Ten Commandments, J.H. Hertz notes that the religious nature of the Decalogue is seen not only in the "awe-inspiring" manner in which the tablets were presented to Moses, but also in the fact that the first tablet deals with the relationship of humanity to God and the second tablet with the relationship of human beings to each other. See THE PENTATEUCH AND HAFTORAHS 294-95 (J.H. Hertz ed. & trans., 2d ed. Soncino Press 1976) (noting key difference between first and last five Commandments). The author thanks David Popowski of the Charleston, South Carolina Bar for calling this translation to his attention.

\textsuperscript{40} See 145 CONG. REC. H4460 (statement of Rep. Edwards) (stating, "I am a Christian, I would say to my colleague, the gentleman from Georgia (Mr. BARR). I am not going to debate my level of Christianity versus anyone else's. It is not my place in my Christianity to judge anyone else"); see also id. (statement of Rep. Waters) ("Mr. Chairman, I am a protestant, a Baptist in particular. I am not of the Jewish faith, I do not practice Judaism, I do not practice the Muslim faith, I do not know anything about Buddhists. I respect each of those.").

\textsuperscript{41} Such instruction should come from non-official sources such as the parents because "this is a Nation where we are allowed to practice whatever we would like to practice. It is central and basic to our democracy. It is installed in our Constitution. It is sacrosanct. It is the most precious thing that we can have, freedom of religion." 145 CONG. REC. H4460 (statement of Rep. Waters).

\textsuperscript{42} See Stone, 449 U.S. at 41-42 (striking down Kentucky law requiring posting of Ten Commandments in all public school classrooms because posting was designed to serve purpose of advancing religion). Although the state attempted to justify the posting as serving the secular purpose of educating students about the origins of law, the Court did not find this reasoning persuasive. See id. (finding that primary purpose for posting Ten Commandments on schoolroom walls was religious and served no educational function). But the Supreme Court went on to suggest that a Ten Commandments display that was integrated into a larger study of "history, civilization, ethics, comparative religion, or the like" might pass constitutional muster. Id. at 42. This dictum suggesting that the Ten Commandments could be validly posted as part of a larger comparative, historical display, furnishes the analytical framework for the courtroom and park cases, which in turn give examples useful to the school setting. In other words, the two lines of Ten Com-
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for consideration of the school setting. The cases reveal that, although the proponents of religious displays seek moral instruction by exposure of all school children, court and park visitors to a sacred document, what the courts are likely to approve is a bland multicultural display incorporating the Ten Commandments as part of a larger tapestry. Neither approach—indoctrination through religious displays or education through multicultural exhibits, which require official orchestration to achieve the proper balance—leaves much room for individual free expression of students or other citizens. As discussed later in this Article, the equal access option affords more generous room for individual or group expression, spiritual or otherwise.

Several cases illustrate the courts' preference for large comparative displays over those focusing solely on the Ten Commandments. In the 1999 case of Suhr v. Haywood County, a local resident with frequent business in the court challenged a sixty-seven-year-old display of the Ten Commandments in the county courthouse as an endorsement of religion in violation of the Establishment Clause. The federal district court found that the display was valid because: (1) it was installed with the secular purpose of instilling respect for the judicial system; (2) it did not have a primary effect of advancing religion by government endorsement because it was surrounded by secular symbols, such as the sword and scales of justice; (3) it did not entangle church with state because government funds were not used beyond the minute amount necessary for cleaning the display; (4) no religious organization was connected with the display; and (5) the government did not call attention to the display.

A federal district judge in Georgia reached the opposite result. In Harvey v. Cobb County, a lawyer who tried cases in the courthouse where the Ten Commandments were prominently displayed, along with Christ's synopsis of them known as the "Great Commandment," complained that he was forced into contact with the Ten Commandments when he had to conduct business in the courthouse. The district judge ruled that the display violated the Establishment Clause because it had the effect of en-

43. 55 F. Supp. 2d 384 (W.D.N.C. 1999).
44. See id., at 386-87 (describing facts of case).
45. See id. at 393-99; see also Suhr v. Haywood County, 131 F.3d 1083, 1089 (4th Cir. 1997) (holding that plaintiff as citizen of county had standing to challenge display because he was courthouse user who had to confront display as party to civil and criminal proceedings and as participant in political meetings located in courthouse).
47. See id. at 675 (concluding that plaintiff had standing to sue). The Great Commandment is found in Matthew 22: 37-40. Another plaintiff in Harvey was also found to have standing as a municipal taxpayer because county cleaning crews maintained the display. See id. at 675-66 (granting Cunningham standing to sue as taxpayer).
endorsing religion in 'general and Christianity in particular. In accordance with the standard set by the Supreme Court in County of Allegheny v. ACLU Greater Pittsburgh Chapter, the constitutionality of religious displays on government property is determined under the Establishment Clause by deciding whether, in light of the content and context, the display appears to a reasonable observer to endorse religion. The judge in Harvey concluded that the content of the courthouse display was not only religious, but that the addition of Jesus' Great Commandment gave it an undeniably Christian character. The court rejected the county's attempt to portray the exhibit as a secular depiction of sources of law on the basis of the Supreme Court's conclusion in Stone that such avowals of a secular purpose were a mere pretense. The context of the display added to the aura of endorsement of religion. Most telling was the fact that the religious display in Harvey stood alone with "no countervailing secular passages or symbols." The exhibit was placed in a prominent position at "a seat of judicial authority in the county," and thus appeared to unite religious and secular power. The Harvey judge ordered discontinuance of the display in its current form, but stayed the order for four months to give the county

48. See id. at 677 ("The content of the panel, the Ten Commandments and the so-called Great Commandment attributed to Jesus of Nazareth, is undeniably religious.").


50. See Harvey, 811 F. Supp. at 676-77 (citing Allegheny decision in detail). In Allegheny, a sharply divided Court struck down a Christmas-time crèche display, which stood alone in a prominent location in the courthouse, but held constitutional a nearby display in front of the City-County Administration Building, which included a Christmas tree, a menorah and a sign celebrating liberty. See Allegheny, 492 U.S. at 600-19 (holding that crèche display violated Establishment Clause, but other displays nearby did not promote religious beliefs and did not violate Establishment Clause). The isolated nature of the crèche display gave the appearance of government endorsement of its religious content while the latter display diluted any aura of endorsement by its combination of religious and secular symbols. See id. at 617-19 (allowing display that combined ideas of Christianity, Chanukah and freedom in a manner that sent a secular message that holiday season may be celebrated in any number of ways).

51. See Harvey, 811 F. Supp. at 677 (finding display violated Establishment Clause due to its religious nature).

52. See id. at 678 ("The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact" (quoting Stone v. Graham, 449 U.S. 39, 41 (1980))).

53. Id. at 678; see also Separation of Church & State Comm. v. City of Eugene, 93 F.3d 617, 619 (9th Cir. 1996) (noting display of fifty-one foot Latin cross in park owned and maintained by city constituted government endorsement of religion even though cross was erected by private individuals). Belatedly designating the cross as a war memorial did not remove the aura of endorsement of religion. See id. at 619 (stating that purpose of government's act is immaterial, effect on individuals is key consideration); see also Carpenter v. City & County of San Francisco, 95 F.3d 627, 632 (9th Cir. 1996) (holding that display in park of 103-foot Latin cross owned and maintained by San Francisco violated California state constitutional provisions prohibiting religious preferences).

54. Harvey, 811 F. Supp. at 678.
"an opportunity to develop an educational display including the Ten Commandments panel." 55

By contrast, in Colorado v. Freedom From Religion Foundation, Inc., 56 the Colorado Supreme Court refused a request by a non-profit organization dedicated to the separation of church and state that a monument displaying the Ten Commandments be removed from the state capitol grounds, in part, because the setting was distinctly different from the schoolroom in Stone. 57 The court emphasized that visitors to state capitol grounds were there voluntarily, rather than under a mandatory attendance rule as with school children. 58 The display was donated to Colorado by a private fraternal organization, the Eagles, to give the youth of the state a moral code by which to live, and this secular purpose of the donor was imputed to the donee-state. 59

In determining whether there was a primary effect of advancing religion by appearing to a reasonable observer to endorse religious doctrine, the Colorado court, like the federal district judge in Harvey and the Supreme Court in Allegheny, focused on the context and content of the exhibit. 60 Although the Ten Commandments have religious content, they are surrounded by "countervailing secular text," celebrating a variety of civic topics such as liberty and the record of Coloradans in war. 61 Thus, "the content and context of the display do not convey a message that any person is excluded from our political community based on religious beliefs or the lack of such beliefs." 62

55. Id. at 679.
56. 898 P.2d 1013 (Colo. 1995).
58. See id. at 1022, 1025 (noting that where school children are concerned, courts are "less tolerant of the potential to inappropriately persuade or coerce students by religious view").
59. See id. at 1024 (recognizing that Ten Commandments can serve secular purpose of providing background for development of common law and behavioral standards "common to all Western societies").
60. See id. at 1023-26 (discussing composition of exhibit and its effect on advancing particular religions).
61. See id. at 1025 (noting that "the display of monuments in Lincoln Park teaches a history of rich cultural diversity—due to our past it would be inaccurate to ignore a history that includes religion").
62. Id. at 1026; see also Summum v. Callaghan, 130 F.3d 906, 919 (10th Cir. 1997) (holding that permitting Eagle’s display of Ten Commandments on courthouse lawn created limited public forum to which church may be entitled access to erect monument containing its own beliefs); Washegesic v. Bloomingdale Pub. Schs., 33 F.3d 679, 684 (6th Cir. 1994) (ruling that placing portrait of Christ on school walls violated Establishment Clause, but might be valid if it were placed in context of comparative display of world’s religions); Anderson v. Salt Lake City Corp., 475 F.2d 29, 34 (10th Cir. 1973) (upholding display on courthouse grounds of similar monument also donated by Eagles because, although exhibit had both secular and sectarian characteristics, it was primarily historic in nature).

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Although forming part of a larger display may help Ten Commandments postings and monuments escape constitutional censure, the result depends upon the nature of the larger exhibit. In a 2000 case, *Books v. City of Elkhart*, a federal appellate court struck down a display of the Eagle’s Ten Commandments monument on city hall property as having both a purpose and primary effect of advancing religion, because the monument contained both Christian and Jewish religious symbols, was dedicated in a ceremony of largely religious character, and depicted the Ten Commandments as the sole source of principles of justice. By contrast, a Kentucky federal district judge, in two decisions rendered in the spring of 2000, granted preliminary injunctions against Ten Commandments displays in two state courthouses, even though the displays were surrounded by other historical documents, because the other documents were tailored to show the importance of the Ten Commandments and *The Bible* in American history and did not present a variety of views. Because the other documents had been added only after suit was filed and had been edited to include only excerpts with a religious focus, the displays retained a purpose of advancing religion and had the effect of appearing to the reasonable observer to endorse not only religion in general, but Christianity in particular.

Similarly, in the summer of 2000, a federal district judge in Kentucky enjoined the relocation of an Eagle’s Ten Commandments display to a prominent position near a unique floral clock on the Kentucky state capitol grounds. Although the resolution authorizing the pretext that the display was intended to depict the historical origins of law, the real purpose and effect were evident from the contents it prescribed. The court observed that:

This presentation shows Christianity’s influence on the law to the exclusion of all other influences. The display anticipated in the Resolution would not make reference to the influences of Magna

63. 235 F.3d 292 (7th Cir. 2000).
64. Id. at 307 (invalidating city hall Ten Commandments display). The court remarked that religious displays at the seat of government posed special dangers to the separation of church and state. See id. at 302-07 (noting careful scrutiny is due religious displays at seat of government).
65. See id. at 302-04 (discussing evidence of religious purpose); id. at 305 & 305-07 (discussing evidence of primary effect of advancing religion including dual endorsement of Christian and Jewish religions).
67. See Pulaski County, 96 F. Supp. 2d at 698-99 (noting that display originally consisted solely of Ten Commandments); McCreary County, 96 F. Supp. 2d at 686-88 (stating original display weighed heavily against finding secular purpose).
Charta, English common law, or even the ancient Code of Hammurabi. These sources, as well as countless others, have served to mold our system of law. However, the Resolution does not acknowledge any of these sources. Rather, it acknowledges the influence of Christianity to the exclusion of all else. No reasonable person could view this display without being left with the impression that the Commonwealth endorsed the idea that Christianity's influence on the law outranked all other historical influence.69

The exclusively Christian focus of the authorizing resolution, which was to be displayed with the monument, differentiated this new Kentucky version of the Eagle's exhibit from some of those discussed above.70 The monocultural Christian focus was so intense that the nearby secular monuments on the capitol grounds did not dilute the flavor of government endorsement of that religion.71

Despite the occasional victory validating the Ten Commandments displays in the courtroom or park, a tough cordon of law anchored by the Supreme Court's opinion in Stone has blocked entry into the schoolroom.72 In Ring v. Grand Forks Public School District No. 1,73 a federal district court declared an exhibit invalid because the clear purpose was to "display the Ten Commandments of the Christian religion" without "even a pretense of a secular purpose . . . ."74 When the defendants in Ring belatedly argued that the display served the secular purpose of instructing children in moral standards, the court observed that "they are in effect suggesting that the basic mores of civilization are embodied only in the Christian religion. The court does not believe that to be a serious contention."

Additionally, in a 1999 case, Diloreto v. Board of Education of the Downey Unified School District,76 a California appellate court ruled that pub-

69. Id.
70. See Colorado v. Freedom From Religion Found., Inc., 898 P.2d 1013, 1017 (Colo. 1995) (relating how purpose of erecting monument was secular). But see Books, 235 F.3d at 307 (stating that use of both Christian and Jewish symbols may constitute dual endorsement of both religions if such preferences are not diluted by inclusion in large display).
71. See Adland, 107 F. Supp. 2d at 785-86 (arguing that focus was solely Christian). The Adland court also concluded that expenses to be incurred by the state in relocating the monument would create a risk of church and state entanglement. See id. at 785 n.2 (arguing that state funds used to erect religious monuments implicated Establishment Clause).
74. Id. at 274.
75. Id.
76. 87 Cal. Rptr. 2d 791, 799 (Ct. App. 1999). The California Constitution, Article 1, § 4, states, "Free exercise and enjoyment of religion without discrimination or preferences are guaranteed. This liberty of conscience does not excuse
lic school officials did not err in refusing to accept a privately paid advertisement consisting largely of the Ten Commandments for posting at a high school baseball stadium, because accepting the advertisement would have displayed official preference for particular religious views in violation of the state Constitution provision prohibiting establishment of religion.77

In another 1999 decision arising out of the same dispute, a panel of the United States Court of Appeals for the Ninth Circuit held that the school district did not violate the plaintiff's First Amendment free speech rights by refusing the advertisement because the district had not created a public forum open to public issue advertising, but only a limited non-public forum composed of a school facility sometimes used by children who formed a captive audience that should not be subjected to controversial material.78 The Ninth Circuit determined that the school district acted reasonably in excluding the advertisement because its controversial nature might have proved disruptive of the learning environment.79 The school district was not engaging in viewpoint discrimination because it had not opened the forum to other religious or controversial advertisements.80 A similar form of religious display, a portrait of Christ, which was not part of a larger exhibit with secular, historical or comparative material, was judged by a federal appellate court in 1994 to violate the Establishment Clause because its placement outside the principal's office and gymnasium where every pupil had to pass had a proselytizing effect.81

Surrounding the Ten Commandments with other historical documents does not guarantee approval of a schoolroom display. Approval depends on the overall nature of the exhibit. For example, in *Diloreto v. Harlan County School District*,82 a Kentucky federal trial court issued a preliminary injunction against the display of the Ten Commandments in public school classrooms, even though other historical documents were added to the

acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion."

77. *See Diloreto*, 87 Cal. Rptr. 2d at 796-97 (holding that ad violated state constitution). The court held that refusal of the advertisement did not infringe upon the plaintiff's free exercise of religion. *See id.* at 799 (noting plaintiff remained free to publicize his religious views elsewhere). The court also noted that the plaintiff had no right to impose his views on school children. *See id.* at 797 (noting that some events at ballfield were compulsory). In addition, the school had not injured the plaintiff's free speech rights. *See id.* at 800 (noting school had not created public forum at ballfield); *see also id.* at 794 (noting program of seeking financial support for baseball team through advertisements was canceled before such forum was formed).

78. *See Diloreto*, 196 F.3d 958, 964-68 (9th Cir. 1999) (holding that field was non-public forum open for limited purposes).

79. *See id.* at 968-70 (holding school's desire to limit disruption was reasonable and legitimate).

80. *See id.* at 969-70 (arguing denial of ad was not discrimination).


exhibit after litigation had begun, because the other documents were edited to have a religious focus.\textsuperscript{83} The district judge concluded that such was the jaundiced nature of the overall exhibit that "the Ten Commandments displays challenged here are not part of larger artistic renderings or academic displays encompassing a wide range of cultural, religious and legal traditions. Instead, they are narrowly tailored displays, intended to convey and having the effect of conveying a very specific governmental endorsement of religion."\textsuperscript{84}

The privately financed movement to distribute book covers at off-campus locations for students who want them stands in contrast to official posting in classrooms and athletic fields where students are present under compulsory attendance laws.\textsuperscript{85} A student's voluntary decision to accept Ten Commandments book covers and take them to school would be closely analogous to recognized forms of individual free expression that are not disruptive of the educational atmosphere of a school.\textsuperscript{86} Assuming that other varieties of book covers would be permitted, there would be little chance that, by allowing them on the premises, the school would be viewed as endorsing the book covers' contents. Religious groups distributing the book covers would be using willing individuals rather than the machinery of the state to accomplish their goals.\textsuperscript{87} If the school paid for the book covers, however, that could be construed as a direct subsidy of religious expression.\textsuperscript{88} Any school rule requiring students to use Ten Commandments book covers probably would be viewed as unconstitution-

\textsuperscript{83} See id., at 675 (holding that overriding religious purpose is not legitimized by secondary secular purpose).

\textsuperscript{84} Id. at 677.

\textsuperscript{85} See Gillis, supra note 14, at G01 (describing book cover program); see also Ko, supra note 14, at 1N (differentiating between voluntary and compulsory religious education).

\textsuperscript{86} See Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 514 (1969) (school could not exclude students' war-protest armbands). In Tinker, the Court observed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Id. at 506. But see Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (school could discipline student for lewd indecent speech at voluntary assembly).

\textsuperscript{87} The Supreme Court continues to condemn state-sponsored indoctrination of religion, but requires clear evidence that it is taking place. See Agostini v. Felton, 521 U.S. 203, 226 (1997) (rejecting presumption of indoctrination without evidence).

\textsuperscript{88} See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 844 (1995) (expressing concern about direct subsidy of religious expression). It is conceivable under Rosenberger, however, that there could be some scenario under which a school could be construed to have created a fiscal and metaphysical equivalent of a public forum by financing a wide variety of book covers to encourage diverse student expression. In that case, it could be argued that proponents of religious book covers could be entitled to share in the funding. See id. at 830 (finding that university creates metaphysical equivalent of public forum by funding diverse student publications; publications with religious viewpoint are entitled to participate in forum or else state becomes guilty of violating their free speech rights by content-based discrimination).
ally coerced expression. If these pitfalls are avoided, it is possible that private book cover distribution could be a valid, individual free expression alternative to official posting of the Ten Commandments. Religious groups would be doing their own work without relying on the state to do it for them.

Much of the fuel for the current push to post the Ten Commandments in public schools comes from a belief that religion has been banished from the public schools as the result of federal court decisions, that the climate is particularly hostile to Christianity, and that this hostility has produced a youth culture of violence, sex and drugs. In the recent congressional debates, Representative Souder of Indiana argued that, in the effort to create diversity in public schools, ideas such as the Ten Com-


90. In 1652, Roger Williams, the great Baptist leader and advocate of religious freedom, cautioned ministers against depending upon the state to do their job for them. He argued:

The civil sword (therefore) cannot (rightfully) act either in restraining the souls of the people from worship, etc., or constraining them to worship, considering that there is not a title in the New Testament of Christ Jesus that commits the forming or reforming of His spouse and church to the civil and worldly powers . . . .

Roger Williams, The Hirsling Ministry-None of Christ's, in 1 The Annals of America 215 (Mortimer, J. Adler ed., 1976). A similar view was expressed by Benjamin Franklin, a sophisticated votary of the Enlightenment. He observed:

When a religion is good, I conceive that it will support itself; and, when it cannot support itself; and God does not take care to support it, so that its professors are obliged to call for the help of the civil power, it is a sign, I apprehend, of its being a bad one . . . .

Anson Phelps Stokes & Leo Pfeffer, Church and State in the United States 41 (1975). Thomas Paine contended that church dependence on the state would undermine its vitality and purity of doctrine. He said:

By engendering the church with the state, a sort of mule-animal, capable only of destroying, and not breeding up, is produced, called, The Church established by Law. It is a stranger, even from its birth to any parent mother on which it is begotten, and whom in time it kicks out and destroys.


Pope Gelasius I concluded that the two swords of power, the spiritual and the secular, should not be wielded by the same hands because human weakness cautioned against a concentration. See Robert Warrand Carlyle & Alexander James Carlyle, A History of Medieval Political Theory in the West 190 (3d ed. 1903) (describing church/state separation theory). In 1791, American religious freedom advocate and minister, John Leland, contended that "these establishments, metamorphise the church into a creature, and religion into a principle of state; which has a natural tendency to make men conclude that bible religion is nothing but a 'trick of state.'" John Leland, The Rights of Conscience Inalienable, and Therefore Religious Opinions Not Cognizable by Law: Or, The High-Flying Church-Man, Stript of His Legal Robe, Appears a Yaho 5 (1791).
mandments have been eliminated. In addition, Representative Barr of Georgia contended:

Today, we have numerous gun control laws. We also have schools where students are forbidden to pray in class or refer to the Lord, where Bible stories cannot be read, and where teachers cannot discipline students. At the same time, we are forced to fight a rising tide of juvenile violence that would have been unthinkable a few short years ago. Coincidence? Not likely.

One of the most egregious examples of the disconnect between common sense and government is the policy many governments have been forced to adopt, banning public display of the Ten Commandments.

Representative Lindsey Graham said: “I don’t think the courthouse and school house should be religious-free zones . . . . Unfortunately, in many cases, that’s what they are now.” Representative Jim Dement, in offering a related amendment, complained that “our local schools are bullied into restricting student religious expression by high-priced Washington lawyers. The House agreed that our children should not have to leave their faith at the school door.”

This Article contends that Supreme Court decisions have not banished religion from the public schools. The following discussion will illustrate that religion can form a part of the public school scene in several contexts, including: (1) a varied exhibit in which the Ten Commandments or other religious items are part of a neutral display, including non-religious documents, which instructs students on law, history and cultural tradition; and (2) a student extracurricular activities period that amounts to a

91. See 145 Cong. Rec. H4460 (daily ed. June 16, 1999) (statement by Rep. Souder) (“We now have diversity, and in the schools we allow posting of posters from the Hindu background, from the Mexican background, prayers from Indian faiths, but not the Ten Commandments . . . . Anything goes pretty much in the schools as long as it is not the Ten Commandments.”).
92. Id. at H4459.
94. Id.
95. The Supreme Court suggests that displays of the Ten Commandments might be appropriate where they “are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion or the like.” Stone v. Graham, 449 U.S. 39, 42 (1980). In another case, in the course of striking down Louisiana’s creation science law, the Supreme Court remarked by dictum that “[i]n deed, the Court acknowledged in Stone that its decision forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization.” Edwards v. Aguillard, 482 U.S. 578, 593-94 (1987); see also Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963) (observing that “[n]othing 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”).
limited open forum during which students can choose from a variety of secular and religious clubs without school endorsement directing their choice. These options differ significantly from the congressional, state and local proposals described above because they give religious messages a competitive rather than a preeminent position. Indeed, this may give a clue as to the real objections some of the new wave of proponents of religion in the public schools have to the Supreme Court decisions. Acquiescing to the introduction of competing ideas into a forum may be viewed as revealing a lack of faith in one's beliefs and abandonment of what is viewed as the public school's obligation to provide clear moral guidance rather than the confusion created by presenting a variety of views. But in actuality, a willingness to subject one's beliefs to competition may be the ultimate test of faith. In Abrams v. United States, Justice Holmes observed that free expression of competing ideas may strengthen one's beliefs.

The Supreme Court has ruled repeatedly that religious groups, including Christian groups, are entitled to equal access to public forums.

96. See Bd. of Educ. v. Mergens, 496 U.S. 226, 235-38 (1990) (upholding statute preventing schools receiving federal funds from excluding clubs from limited public forum because of their religious or philosophical point of view); Widmar v. Vincent, 454 U.S. 263, 267-77 (1981) (finding public university's policy of denying use of school property to religious student groups unconstitutionally exclusionary); see also Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 837-42 (1995) (holding that publications with religious viewpoint cannot be excluded from fiscal equivalent of limited public forum).

97. See 145 Conc. Rec. H4460 (statement of Rep. Souder) (blaming problems in schools on "diversity" and stating, "I am tired of hearing tonight on the floor about how neutral our Founding Fathers were and this and that"); see also id. at H4459 (statement of Rep. Barr) (noting need for clear moral instruction). Dr. Henry Jordan, a member of the South Carolina State Board of Education, criticized those who are so "tolerant of other religions" that "[t]hey think there are a thousand different ways to God." Askins & Click, supra note 23, at A1. A diverse display might fill some advocates of posting the Ten Commandments in schools with the same kind of disdain that possessed the Apostle Paul when he confronted the variety of idols in Athens, including an altar "[t]o an unknown god." Acts 17:16-29. The battle line in the debate over the Ten Commandments in the schools reflects the larger debate over the role of the public schools: are they to be keepers of the flame of a traditional code of morality or forums for debate of varied ideas. See generally Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (discussing these contrasting views of role of public schools in dispute over authority of board to control library content).

98. 250 U.S. 616 (1919).

99. See id., at 630 (Holmes, J., dissenting). Justice Holmes wrote: ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Id.
including the limited open forums created for students.100 The fact that 
these cases had to be brought by religious groups to obtain admission to 
the forum is indication that their participation has been met by official 
wariness, if not actual hostility. But now that the principle of equal access 
has been established, it would seem that the better course would be for 
schools to create limited open forums and for religious groups to partici-
pate in them, along with a variety of other organizations. This approach is 
preferable to official adoption of one set of doctrines, which could create 
pressure toward conformity.101 

The activities-period option does not force anyone to compromise 
their beliefs or hew to orthodoxy. Because such programs avoid excessive 
entanglement between school officials and religion by limiting teachers to 
the custodial role of maintaining order at activities period meetings, there 
is no mechanism for officials to force student religious or other groups to 
dilute their views, so long as they do not engage in disruptive behavior.102 
A group in one room could pray, sing hymns and study The Bible, includ-
ing the Ten Commandments, while another group in an adjoining room 
could denounced the former group’s beliefs and vice versa, so long as there 
was not disorderly conduct disturbing the others.103 This option is supe-

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100. See Rosenberger, 515 U.S. at 842-46 (holding public school must provide 
equal access to fiscal equivalent of public forum to student publication with religious 
viewpoint); Mergens, 496 U.S. at 235-38 (holding religious student groups 
could not be discriminated against in access to limited open forum); Widmar, 454 
U.S. at 269 (stating that religious-based discrimination is unconstitutional); see also 
(holding religious expression valid unless sponsored by state); Lamb’s Chapel v. 
family values discussion group with religious point of view is entitled to equal 
access to school facilities after class hours). A variety of groups may seek access. See 
Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1550 (11th Cir. 1997) (hold-
ing that state university that had created public forum by providing funding for 
student groups was guilty of viewpoint discrimination when it denied funding to 
gay student group). The Rosenberger principle that a state can create the fiscal 
equivalent of a public forum from which religious groups cannot be excluded be-
cause of their viewpoint was extended beyond the educational setting. See Gentala 
v. City of Tucson, 213 F.3d 1055, 1071-72 (9th Cir. 2000) (holding that organizers 
of National Day of Prayer event held in city park could not be excluded from fiscal 
limited public forum fund created by city to cover cost of city services provided at 
public events, because National Day of Prayer event was kind of historical, cultural, 
social issues function otherwise aided by fund, and only basis for excluding prayer 
day organizers from taking advantage of fund was religious viewpoint expressed by 
their function).

101. See Lee v. Weisman, 505 U.S. 577, 594 (1992) (observing that “the govern-
ment may no more use social pressure to enforce orthodoxy than it may use 
more direct means”).

102. See Mergens, 496 U.S. at 252-53 (arguing that keeping substance of meet-
ings student-run ensures no official school endorsement).

103. See id. (arguing that system would allow diversity). The plurality opinion 
found no problem with official participation to “ensure order and good behavior” 
that does not lead to content control. See id. at 253 (noting custodial oversight of 
student-initiated religious groups does not impermissibly entangle school employ-
ees in administration of religious activities).
rior to the first one: the varied wall display that avoids endorsement of religious doctrine or anti-religious doctrine by putting religious and other material in historical and comparative perspective. Such displays would necessarily have some degree of state orchestration of their contents in order to ensure their historic and comparative nature. In the activities-period forum, the nature of the clubs would be determined by which students voluntarily came forward to form them. This option ensures against watering down individual or group views, which might be the risk of a wall display that must maintain its ecumenical, comparative and historic nature. To be sure, there would be problems in fairly administering an activities period as a limited open forum; problems such as the allocation of scarce space and other resources. Such a program, however, offers a far better chance of vindicating freedom of religious expression while avoiding its establishment. A student who voluntarily attends a religious club when that student could have chosen the drama or chess club is at least as likely to develop genuine moral standards and religious feelings as one undergoing rotExposure to a Ten Commandments hall display or an officially sponsored prayer.

Those who think religion has a place in the public schools basically have a choice between two policies. One policy is the confrontational route that seeks reversal of forty years of Supreme Court cases that restrict official observances of religion in the public schools. The other policy is the route left open by a more recent, but still well-established line of cases that give religion a chance to compete in the public forum of ideas, but does not guarantee it a victory. Why the latter route is preferable will become clearer after the following examination of both lines of cases.

III. CASES CONDEMNING OFFICIAL OBSERVANCE OF RELIGION IN PUBLIC SCHOOLS

The following examination of the Supreme Court's religion in the public schools cases demonstrates that the Court was condemning officially engineered or officially sponsored ceremonies rather than voluntary private observances. Thus, heroic acts of defiance of the Court are unnecessary. Instead, means such as equal access programs that allow meaningful private observance without official pressure or endorsement should be pursued. The Court first began to concern itself with religious instruction and observances in public schools in the 1949 case of Illinois ex rel. McCollum v. Board of Education,104 when it ruled against a program in which privately paid religious instructors were permitted to come on to public school premises—operating under compulsory school attendance laws—

104. 333 U.S. 203 (1948); see id. at 210 (upholding program under which school board reimbursed parents whose children attended public or private schools for transportation expenses as neutral health-safety program available to all students, but announcing that Establishment Clause applied to states through Fourteenth Amendment and that state and federal governments could not “pass laws which aid one religion, aid all religions, or prefer one religion over another”).
to conduct religious instruction in the Protestant, Catholic and Jewish religions to students whose parents gave permission.\textsuperscript{105} The Court concluded that "[t]o hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings."\textsuperscript{106} The Court's chief concerns were that the board aided religion by letting facilities that were built with tax funds be used for religious instruction and that, although only those students whose parents gave permission attended the religious classes, the state used its "compulsory public school machinery" to furnish the pool from which these students came.\textsuperscript{107} Unlike later cases, the schools had not created a limited public forum in which tax-built facilities were open to a variety of purposes so that religious groups were entitled to equal, but not exclusive, access.\textsuperscript{108} That approach lay far in the future.

Three years after \textit{McCollum}, however, in \textit{Zorach} v. \textit{Clausen},\textsuperscript{109} the Court defused the appearance of hostility toward religion by approving a New York program that gave an early release to public school students whose parents requested that they attend religious instruction at a private off-campus center.\textsuperscript{110} The Court reasoned that the program was different from that in \textit{McCollum} because no religious instruction took place in buildings financed by taxes, instructors and materials were paid for by a private group, and the government did not promote the program.\textsuperscript{111} The Court observed that "[g]overnment may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person."\textsuperscript{112} But the government was doing none of those forbidden things. It was

\textsuperscript{105} See id. at 209-12 (holding that use of privately paid religion instructors on public school premises built with tax funds, was invalid).

\textsuperscript{106} Id. at 211.

\textsuperscript{107} Id. at 212; see Gordon Butler, \textit{Cometh the Revolution: The Case for Overruling McCollum} v. Board of Education, 99 Dick. L. Rev. 843, 941 (1995) (arguing that public schools have vital role to play in passing on our religious heritage to children, but Supreme Court decisions such as \textit{McCollum} make this impossible). Gordon Butler contends that parentally controlled religious education classes could be conducted on school premises during regular instructional time without coercing participation or showing lack of respect for dissidents. Students whose parents opt them out of the program could be given interesting alternatives. See id. at 992 (describing program in detail).

\textsuperscript{108} Compare \textit{McCollum}, 333 U.S. at 209-12 (holding that religious instruction in public schools is unconstitutional), with \textit{Widmar} v. Vincent, 454 U.S. 263, 209 (allowing use of public property by diverse groups, including religious groups), and \textit{Mergens}, 496 U.S. at 235-38 (holding use of public property cannot be denied to group based on religious grounds if property used for diverse activities).

\textsuperscript{109} 343 U.S. 306 (1952).

\textsuperscript{110} See id., at 315 (arguing that Bill of Rights does not justify hostility to religion).

\textsuperscript{111} See id. at 308-09, 315 (distinguishing facts from \textit{McCollum}).

\textsuperscript{112} Id. at 314.
merely accommodating its schedule to facilitate the free exercise of religion by those who chose to do so. The concept of separation of church and state did not require the government to act with hostility or "callous indifference to religious groups." But the dissenters pointed out that the case was not as strikingly different from *McCollum* as the majority asserted. The compulsory school machinery was still used in that students were given the stark choice of either staying in school or attending religious instruction.

Because off-campus, released-time programs were cumbersome, efforts continued to have religious observances on public school premises as part of the regular school day. The Supreme Court confronted this issue in the first of the school prayer cases, *Engel v. Vitale*, which punctured the air of benign accommodation that pervaded *Zorach*. *Engel* invalidated a New York program under which the state authorized local school boards to direct the daily recitation of a prayer composed by the State Board of Regents in each classroom in the presence of a teacher. When several parents challenged the program, the Supreme Court struck it down as violating the Establishment Clause even though a child theoretically could choose not to participate by remaining silent or leaving the room, and even though the state claimed that the prayer was "nondenominational." This decision turned on the differences between the religion clauses of the First Amendment, the Establishment Clause and the Free Exercise Clause. Although the Free Exercise Clause requires government coercion for a violation, the Establishment Clause can be violated by subtler means, such as a government pronouncement of religious doctrine.

113. *Id.*

114. *See id.* at 315-16 (Black, J., dissenting) (arguing ownership of building not dispositive in *McCollum*); *id.* at 320-21 (Frankfurter, J., dissenting) (noting that facts are similar to *McCollum*); *id.* at 324 (Jackson, J., dissenting) (observing that public schools served as "temporary jail for a pupil who will not go to church").


116. *See id.*, at 422 (striking down state program as violative of Establishment Clause).

117. *See id.* at 430 (holding that voluntary nature was not redeeming); *see also* Karen B. v. Treen, 653 F.2d 897, 901-02 (5th Cir. 1981) (holding that program under which teachers led prayer in absence of student volunteers violated Establishment Clause even though parental permission was required for students to participate in prayers).

118. *See Engel*, 370 U.S. at 430 (holding that voluntariness may save program from Free Exercise Clause violation, but not Establishment Clause violation). The religious clauses of the First Amendment state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. 1; *see also* Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947) (noting Fourteenth Amendment made provisions of First Amendment applicable to states).

119. *See Engel*, 370 U.S. at 430-31 (citing differences between two clauses of First Amendment).
The Court observed that "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." The implication of the rejection of the argument that the program was valid since the prayer was "nondenominational," was that government endorsement of religion in general was as much a violation as an endorsement of a particular sect. It was this conclusion, together with the Engel Court's decision that the Establishment Clause could be violated even if the government did not use direct coercion, that later became a bitter dividing line between liberals and conservatives on the Court. But the scope of the Engel decision must not be exaggerated. It prohibited official government prayer in schools, not private prayers. The Court did not address

120. Id. at 425. Although the majority opinion emphasized the violation of the Establishment Clause by endorsement of religious doctrine, Justice Douglas's concurring opinion emphasized the use of government funds, no matter how small, in composing the prayer and in the use of a government building as the site of the recitation. See id. at 441, 444 (Douglas, J., concurring) (arguing any public funds used for religion violate First Amendment).

121. See id. at 430-31 (holding that non-denominational nature is not validating); Philip B. Kurland, The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . . ." 1962 Sup. Ct. Rev. 1, 30-31 (1962) (discussing concerns that non-denominational school prayers could lead to establishment of bland, watered-down, civic religion).

122. See Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting) (arguing that Establishment Clause did not forbid government endorsement of religion in general, but only endorsement of particular sects); see also Joseph Story, Commentaries on the Constitution of the United States 701 at § 991 (Carolina Academic Press 1987) (1833) (noting that Establishment Clause was intended to prevent nationally established church and preference among sects and not to prohibit encouragement of Christianity in general). The idea that the Establishment Clause prevents assistance to religions in general, as well as to particular sects, was emphasized in a 1947 Supreme Court case. See Everson, 330 U.S. at 15 ("Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."). The Supreme Court later confirmed this doctrine requiring government neutrality toward religion in general and reaffirmed the distinction made in Engel that, unlike the Free Exercise Clause, the Establishment Clause does not require coercion for a violation. See Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 222-26 (1963) (striking down public school Bible reading and Lord's Prayer ceremonies despite opt-out provision). Justice Souter has used the legislative history of the First Amendment to defend the argument that the Establishment Clause does more than prohibit preferences among sects. See Lee v. Weisman, 505 U.S. 577, 612-19 (1992) (Souter, J., concurring) (noting Framers meant Establishment Clause prohibition to encompass non-preferential aid to religion).

123. See Paul G. Kauper, Separation of Church and State: A Constitutional View, 9 Cath. Law. 32, 40 (1963) (describing Court's disapproval of "officially approved and sanctioned prayer"). The United States Court of Appeals for the Eleventh Circuit interpreted Engel to prohibit only a state command to engage in prayer. See Chandler v. James, 180 F.3d 1254, 1260 (11th Cir. 1999) ("It really did not matter what the prayer said; no prayer commanded by the state can survive scrutiny under the Establishment Clause."). It does not prohibit a school from permitting "genuinely student-initiated religious speech." Id. at 1261. The panel did not adequately deal with the fact that, in a school attended by pupils under compulsory attendance laws, "permitting" one group to speak may be commanding others to listen.
the question of how a right of voluntary private prayer could be exercised during a busy school day, other than between classes. A possible answer began to take shape years later with the passage of the Equal Access Act.\footnote{124}

Officially ordained religious observances in the public schools were again the Court's target in \textit{School District of Abington v. Schempp.}\footnote{125} Pennsylvania and Maryland required the school day to open with the reading of Bible verses and the recitation of the Lord's Prayer by students in unison; but students were permitted to opt-out of the exercise upon parental request.\footnote{126} Although the prayer was not composed by bureaucrats as in \textit{Engel}, the Court found that the ceremony was official in that "[t]he exercises are prescribed as part of the curricular activities of students who

This was a real possibility in the \textit{Chandler I} case because the rule that prompted the suit permitted student religious speech at compulsory, as well as non-compulsory, events. \textit{See id.} at 1256 (describing Alabama statute allowing student-initiated prayer, benedictions and invocations at school events). The panel concluded that the school could not supervise the religious speech it permitted, but that does not clearly preclude one group of students being permitted to give religious speech to which others are commanded to listen. \textit{See id.} at 1264-65 (holding state supervision of student-initiated prayer in school is unconstitutional where it amounts to active endorsement, encouragement or participation). The opinion seriously needed clarification. The Supreme Court vacated and remanded the case for reconsideration in light of the Court's decision in \textit{Santa Fe}, which invalidated a school district's policy of permitting a student-elected chaplain to pray over the loud speaker system at high school football games. \textit{See generally} Chandler v. Siegelman, 120 U.S. 2714 (2000) (vакating and remanding \textit{Chandler I} for further consideration in light of \textit{Santa Fe}).

The opinion issued by the United States Court of Appeals for the Eleventh Circuit panel upon remand did not provide such clarification. The panel reinstated its decision in \textit{Chandler I} after concluding that there was no inconsistency between its decision and \textit{Santa Fe}, because the latter prohibited only school-sponsored student prayer, and the former condemned only official censorship of school prayer. \textit{See Chandler v. Siegelman}, 230 F.3d 1313, 1316 (11th Cir. 2000). This is a remarkable result because the plan approved by the Court of Appeals in \textit{Chandler} is potentially far more coercive than that struck down by the Supreme Court in \textit{Santa Fe}; the prayers are permitted at compulsory events which, presumably, must be attended by all students, but the football games in \textit{Santa Fe} probably would be compulsory only on a small number of students, such as team and band members. \textit{Compare Chandler}, 180 F. 3d at 1256 (addressing statute that permitted prayer at compulsory and non-compulsory events), \textit{with Santa Fe} Indep. Sch. Dist. v. Doe, 530 U.S. 290, 530 120 S. Ct. 2266, 2280 (2000) (addressing situation where attendance at football games was required for band and team members). Moreover, the endorsement of religion is even stronger in the \textit{Chandler} statute than the \textit{Santa Fe} policy because the former mentions only religious speech while the latter policy uses secular and religious terms. \textit{Compare Chandler}, 180 F.3d at 1256 (quoting Ala. Code § 16-1-20.3(b) (1995)) (addressing only "voluntary prayer, invocations and/or benedictions"), \textit{with Santa Fe}, 120 S. Ct. at 2273 (noting policy used secular term "message" as well as term "invocations"). This appellate court reaction to the Supreme Court's remand order is not only inconsistent with \textit{Santa Fe}, it collides frontally with the order after only an imperceptible genuflexion to the Supreme Court's ruling.

\footnote{124}{See 20 U.S.C. § 4071 (1995) (providing for religious clubs to participate in non-curricular activities periods on par with other groups).}
\footnote{125}{374 U.S. 205 (1963).}
\footnote{126}{See id., at 205-08 (describing factual circumstances of case).}
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."\textsuperscript{127} The Court set forth a tough new test: "To withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."\textsuperscript{128} The secular purpose and primary effects elements became the first two prongs of what eventually became a tripartite test when the Court concluded in later cases that the government’s program also must avoid entangling church and state officialdom, such as would occur when state inspectors conduct surveillance of religious school operations to ensure that state financial aid is not being used for religious programs.\textsuperscript{129}

\textsuperscript{127} Id. at 223.  
\textsuperscript{128} Id. at 222.  
\textsuperscript{129} This test was later known as the Lemon test after Lemon v. Kurtzman, which first put all three elements together in the following form: "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 entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612-15 (1971); see also id. at 612-20 (noting that entanglement of church and state occurs when government conducts surveillance of church operations or creates politically divisive programs). The prohibition of excessive entanglement between church and state was developed in Walz v. Tax Commissioner, 397 U.S. 664, 670 (1970), which upheld a New York property tax exemption for church and other charitable property because removal of this traditional exemption would lead to excessive entanglement. Although influential, the Lemon test has not always been followed and has produced much criticism. See Marsh v. Chambers, 463 U.S. 783, 786-95 (1983) (using historical practice instead of Lemon test to uphold Nebraska program of beginning each legislative session with prayers delivered by state-paid chaplain); see also Lynch v. Donnelly, 465 U.S. 668, 686-87 (1984) (applying Lemon test to uphold government Christmas display on private land, but moderating it by looking at traditional acceptance of such displays as secular celebration of winter holiday season). Reformulations of the test have been urged. See id. at 688 (O'Connor, J., concurring) (emphasizing whether government action conveys message of endorsement of religion to objective observer so that it affects standing of those who favor and disfavor message in political community); see also County of Allegheny v. ACLU, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring) (same); Bd. of Educ. of Kiryas Joel Vill. v. Grumet Sch. Dist., 512 U.S. 687, 712-21 (1994) (O'Connor, J., concurring) (same).  

Justice Kennedy prefers an approach emphasizing, for both Establishment and Free Exercise Clause analysis, the question of whether the government action is directly or indirectly coercive. See Allegheny, 492 U.S. at 659-62 (Kennedy, J., concurring in part and dissenting in part) (emphasizing importance of coercion in both Establishment Clause and Free Exercise Clause analysis); see also Lee v. Weisman, 505 U.S. 577, 592-94 (1992) (emphasizing "social pressure" as form of coercion rather than using Lemon test in striking down Providence, Rhode Island’s officially organized graduation prayer program). The Lemon test has been bitterly criticized. See Wallace v. Jaffree 472 U.S. 38, 108-10 (1985) (Rehnquist, J., dissenting) (criticizing purpose prong of test as being too "mercurial" and entanglement prong as creating paradox whereby state surveillance to avoid primary effect of advancing religion violates entanglement doctrine); see also Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 397-400 (Scalia, J., concurring) (criticizing Court’s resort to inconsistent guidance of Lemon test after seeming to abandon it in Lee). The latest incarnation of the Lemon test continues to ask whether
Because the Pennsylvania Bible reading program was an integral part of the curriculum required for students who attended school under compulsory attendance laws, and because it took place on school premises under the supervision of state-paid teachers, it violated the purpose prong of the test. Maryland claimed that its program was adopted for the secular purposes of instilling moral values in students and teaching them about good literature through exposure to The Bible. But the Court ruled that even if this argument was accepted, the program still violated the Establishment Clause by accomplishing those secular goals through religious means, thus having the primary effect of advancing religion. The provision permitting students to be excused from the ceremony upon parental request did not save the law, although it might have reduced its coercive effect because, unlike the Free Exercise Clause, the Establishment Clause did not require coercion for a violation. The Court did not believe it was rendering a decision hostile to religion or tossing it out the schoolhouse door. It observed that "[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," so long as such material was "presented objectively as part of a secular program of education" rather than in a proselytizing manner.

The Ten Commandments case, Stone v. Graham, elaborated upon the Abington analytical system, especially the secular purpose doctrine, by probing the avowed legislative purpose to uncover what it viewed as the government action has the purpose of advancing or inhibiting religion or a primary effect of doing so, but demotes the entanglement doctrine to a subdivision of the effects prong, thus prohibiting only such entanglement between church and state as has the primary effect of advancing or inhibiting religion. See Agostini v. Felton, 521 U.S. 203, 222-23, 232-33 (1997) (discussing changing criteria used to assess effects of aid to religion).

130. See Abington, 374 U.S. at 228 (describing rationale for holding that religious exercises and law requiring them are in violation of Establishment Clause).

131. See id. at 223-24 (discussing secular purpose arguments propounded by defendants).

132. See id. at 224-25 (condemning achievement of secular goals through religious means).

133. See id. (noting coercion is not required for Establishment Clause violation).

134. See id. at 225 (considering impact and rationale of holding).

135. Id. Nevertheless, if the purpose of a curriculum regulation was not objective presentation, but the advancement of particular religious doctrines by banning the teaching of rival theories, the Court would strike it down as a violation of the Establishment Clause. See Epperson v. Ark., 393 U.S. 97, 107-09 (1968) (striking down Arkansas law that forbade teaching of theory of evolution); see also Edwards v. Aguillard, 482 U.S. 578, 596-97 (1987) (invalidating Louisiana law requiring that whenever either creation-science or evolution-science was taught, other also had to be taught and given comparable attention). The Court in Aguillard concluded that the state's real purpose in adopting the law was to promote the view that a "supernatural being created humankind" by ensuring that the theory of evolution was rebutted. Id. at 591.
state's real goal. 136 Kentucky required that the Ten Commandments be posted on the walls of every public school classroom. 137 Each plaque was paid for by private funds contributed to and administered by the state treasury. 138 Each plaque contained a statement that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." 139 The Court concluded that despite this "legislative recitation of a supposed secular purpose," the real purpose was religious because "[t]he Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness." 140 The Ten Commandments also deal with "the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." 141 Perhaps the state's claim of a secular pur-

136. See Stone v. Graham, 449 U.S. 39, 41-43 (1980) (stating that no matter how desirable the private objective to teach students to obey Ten Commandments is, it is not permissible state objective under Establishment Clause).

137. See id. at 39-40 (describing factual circumstances underlying case).

138. See id. at 39 n.1 (explaining that schools used private funds controlled by state treasurer to purchase copies of Ten Commandments).

139. Id. at 40.

140. Id. at 41-42 (citing Exodus 20:12-17 and Deuteronomy 5:16-21). A panel of the United States Court of Appeals for the Sixth Circuit used a similar approach of examining the biblical context of a statement to arrive at its original meaning, rather than being satisfied with the state's attempt to recast it in a secular mode to avoid unconstitutionality. See ACLU v. Capitol Square Rev. & Advisory Bd., 210 F.3d 703, 727 (6th Cir. 2000) (holding state motto to be unconstitutional because it did not meet test of equal liberty of conscience for all), reheard granted, 222 F.3d 268 (6th Cir. July 14, 2000) (en banc), original judgment aff'd, 243 F.3d 289 (6th Cir. Mar. 16, 2001) (en banc). The court found an Establishment Clause violation because Ohio adopted as its state motto the statement from Matthew 19:26, "With God All Things Are Possible." See id. The court determined upon examination of the phrase in its biblical context that it was part of Christ's description of the Christian route toward salvation. See id. at 726 ("[T]he official motto of the State of Ohio repeats . . . Jesus' answer to his disciples' questions about the ability . . . to achieve salvation."). Thus, the state's use of the phrase as its motto would appear to a reasonable observer familiar with its biblical setting to be an endorsement of the Christian religion. See id. at 725, 727. However the panel's decision was overturned by an en banc court that found that the motto did not endorse religion, have a purpose of advancing religion, have an effect of advancing religion or result in an entanglement between church and state. See ACLU v. Capitol Square Rev. & Advisory Bd., 243 F.3d 289 (6th Cir. Mar. 16, 2001) (en banc). The en banc court concluded that a reasonable observer would not think that the state was endorsing Christianity since there was "nothing uniquely Christian" about the thought expressed in the motto. See id. at 303 (noting that the sentiment contained in the motto was also traceable to Greek philosophy). The en banc court further concluded that the purpose of adopting the motto was a secular one. See id. at 307 (deciding that the goal was the secular one of reinforcing the citizens' sense of identity with the state); id. at 306-08.

141. Stone v. Graham, 449 U.S. 39, 42 (1980) (citing Exodus 20:1-11 and Deuteronomy 5:6-15). Even the private financing did not save the program, because the "mere posting" of such a religious document "under the auspices of the legislature" provided official support. See id. Also, the Court noted that some state funds
pose rang hollow to the Court because it seemed odd to teach the origins of law using only one source, The Bible, just as it seemed odd to the Court in Abington for Maryland to use only one source, The Bible, to carry out its claimed secular purpose of teaching good literature.\textsuperscript{142}

But just as in Abington, the Court did not expel religion from the schools.\textsuperscript{143} In fact, the Court hinted broadly as to how the Ten Commandments could find a proper place in the schools by the way in which it rejected the Kentucky program: "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion or the like."\textsuperscript{144} A similar message is found in the holiday display decisions, in which the Court has reasoned that inclusion of religious symbols in a broader holiday display with secular figures removed the aura of sponsorship of religion.\textsuperscript{145}

Despite the benign hints from the Court in Abington and Stone about the manner in which religion could play a role in the public schools when part of a larger objective course of study or display, it may have seemed to the dedicated proponent of religion in the schools that the Court was tracking down all vestiges of religion and tossing them out the schoolhouse door. In Wallace v. Jaffree,\textsuperscript{146} the Court declared unconstitutional an Alabama moment of silence law on the ground that it was enacted with a purpose of advancing religion.\textsuperscript{147} But here again, the Court's opinion was a carefully measured one. Alabama parents brought suit objecting to a state law providing that each school day begin with a moment of silence.

would be expended in administering the program. \textit{See id.} at 43 (noting that while actual copies of Ten Commandments were bought with private contributions, state spent public funds in administering statute).

\textsuperscript{142} \textit{See} Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 224 (1963) (rejecting argument that Bible readings were secular because they instruct on literature); \textit{see also} Edwards v. Aguillard, 482 U.S. 578, 585-94 (1987) (rejecting state's claim that purpose behind rule requiring equal treatment of creation science in school curriculum was academic freedom and concluding that real purpose was to advance religious view of origin of world).

\textsuperscript{143} \textit{See} Abington, 374 U.S. at 225 (noting that religion can be part of objective, comparative or historical study).

\textsuperscript{144} \textit{Stone}, 449 U.S. at 42; \textit{see also} Aguillard, 482 U.S. at 593-94 (reiterating \textit{Stone} conclusion that Ten Commandments could be properly integrated into school curriculums).

\textsuperscript{145} \textit{See} Lynch v. Donnelly, 465 U.S. 668, 684-85 (1984) (approving city holiday display which included not only crèche, but also traditional secular figures such as Santa Claus, reindeer, carolers, clowns and elephants); \textit{see also} County of Allegheny v. ACLU, 492 U.S. 573, 616-22 (1989) (finding that crèche display which stood alone in prominent location in county courthouse violated Establishment Clause by sending message to reasonable observers that government was endorsing religion, but approving city-county office building display that contained mixture of religious and secular symbols).

\textsuperscript{146} 472 U.S. 38 (1985).

\textsuperscript{147} \textit{See id.} at 56-62 (finding law allowing moment of silence was intended to return prayer to public schools).
for meditation or voluntary prayer." The Court concluded that the law was invalid in that it was enacted with a purpose of advancing religion as seen by its legislative history, wording and position midway in a series of laws that progressively became more specific in expressing the goal of returning religion to the public schools. The legislative history of the statute revealed a religious purpose through statements made by the sponsoring senator noting that his intent was to return voluntary prayer to the schools. The text of the law revealed this purpose by the explicit addition of "or voluntary prayer" to an earlier law simply providing for a period of silence for meditation. The Court concluded that the added language indicated "that the State intended to characterize prayer as a favored practice" and that "such an endorsement [was] not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." The Court found further evidence of a religious purpose in the law's place as the middle part of a trilogy of statutes progressing from the first, which provided for a period of silence for "meditation," to the law under litigation providing for a period of silence for meditation or voluntary prayer, to the final law that required teachers to lead willing students in a prescribed prayer. The Court considered all three statutes to be part of the same design to encourage religion in the schools.

Although the Wallace decision might at first appear to be a relentless scourge of all varieties of religion in schools, its real target was official observances or sponsorship of religion, not the private free exercise of religion in the schools. The Wallace Court made this point plain when it said that "the legislative intent to return prayer to public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during

148. Id. at 40.
149. See id. at 55-62 (describing law and lack of secular purpose).
150. See id. at 56-57 (noting that senators' endorsement of law was effort to return voluntary prayer to public schools).
151. Id. at 40 n.1 (quoting first law, Ala. Code § 16-1-20, providing for period of silence for meditation); id. at 40 n.2 (quoting second law, Ala. Code § 16-1-20.1, providing for period of silence for meditation or voluntary prayer). The third law provided for the recitation by "willing students" of a prayer whose wording was provided in the statute. See Ala. Code § 16-1-20.2. This last law was struck down earlier. See Wallace v. Jaffree, 705 F.2d 1526, 1536 (11th Cir. 1983) (holding Alabama prayer law to have primary effect of advancing religion), aff'd, 466 U.S. 924 (1984). The first law was not under attack. Thus, the litigation focused on the second law.
152. Wallace, 472 U.S. at 60.
153. See id. at 58 (analyzing textual differences and progression among statutes); see also Ala. Code § 16-1-20 (allowing period of silence for "meditation"); id. at § 16-1-20.1 (allowing period of silence for "meditation or voluntary prayer"); id. at § 16-1-20.2 (requiring teachers to lead willing children in prescribed prayer).
154. See Wallace, 472 U.S. at 58 (reconciling statutes as promoting religion in schools).
the school day." The Court considered the student’s free exercise rights to be adequately protected by the first law providing for a period of silence to meditate without specific reference to prayer. The student could use this moment in any way he or she chose, including prayer.

This point was made even more forcefully by Justice O’Connor’s concurrence. She concluded that the legislative history and text made clear that an objective observer would view the Alabama law as intended to endorse prayer in public schools. A moment of silence law that was more neutrally worded and did not carry the heavy legislative history baggage of the Alabama statute, however, could be valid. A properly crafted and administered moment of silence law could be significantly different from the governmentally orchestrated ceremonies struck down in Engel and Abington. A neutral moment of silence provision would not determine the content of the student’s use of the moment; he or she could pray or reflect on a variety of secular subjects. No student need compromise personal beliefs by participating, and the state sends no message endorsing a religious or anti-religious theme. An impartially ad-

155. Id. at 59.
156. See id. (O’Connor, J., concurring) (discussing protection of free exercise rights in context of moment of silence law).
157. See id. at 67-84 (O’Connor, J., concurring) (describing students’ free exercise rights as adequately protected in context of moment of silence law).
158. See id. at 77 (considering perceptions of reasonable observer).
159. See id. at 73-74 (suggesting neutrally worded moment of silence law would be upheld as constitutional).
162. See Wallace, 472 U.S. at 72-73 (suggesting neutral moment of silence provision would send impartial message to students). Justice O’Connor cautioned that truly neutral moment of silence provisions must not encourage prayer over other alternatives, either in the statute’s language or mode of administration. See id. at 67-70 (O’Connor, J., concurring) (warning against excessive government entanglement with religion). Justice Powell’s concurring opinion also concluded that it was possible to craft a neutral, constitutionally valid moment of silence provision, but that the Alabama law’s clearly religious objectives breached the Establishment Clause. See id. at 62 (Powell, J., concurring) (discussing religious intentions of moment of silence law). Chief Justice Burger dissented, as did Justice White and Justice Rehnquist. Justice Rehnquist launched a frontal assault on the neutrality doctrine, arguing that the historical meaning of the Establishment
ministered moment of silence, as a mechanism for individual student
determination of content rather than official dictation, is a forerunner of
the equal access approach discussed later, which further reduces the
chances of official orchestration. Thus, the majority and concurring opinions in Wallace, like the Court's decisions in Abington and Stone, struck
down state laws providing for religious observances or displays in public
schools. But the Court, far from banishing religion from the schools, gave
pointed advice as to how religion could play a role in broader, neutral
programs.163

To be constitutional, any role played by religion in the public schools
must avoid the taint of official coercion, direct or indirect. In Lee v. Weis-
man,164 the United States Supreme Court invalidated a public school gradu-
uation prayer even though attendance was technically voluntary for
graduates because, as a practical matter, attendance was obligatory due to
the social importance of the event.165 The principal initiated the cere-
mony, picked the member of the clergy who was to deliver the invocation and benediction, and issued guidelines for the content of the prayers to
ensure their non-denominational nature.166 This close orchestration of
prayers at an important, effectively mandatory event in a public school
setting, was considered analogous to the Engel case, in which officials com-
posed a prayer to be recited in public schools by students present under
compulsory attendance laws.167 The fact that the school officials in Lee

Clause was to forbid a national establishment and governmental preferences
among sects, but not to forbid governmental endorsement of religion in general,
as was found in the Alabama moment of silence provision. See id. at 105-06 (Rehn-
quist, J., dissenting) (describing historical meaning of Establishment Clause).

163. See id. at 59 (implying that there could be valid moment of silence pro-
vision if it did not show legislative favoritism toward prayer); id. at 67-74 (O'Connor,
J., concurring) (describing valid moment of silence provision); see also Stone v.
Graham., 449 U.S. 39, 42 (1980) (stating that study of Ten Commandments properly
integrated into "an appropriate study of history, civilization, ethics, comparative
religion, or the like" would be constitutional); Abington, 374 U.S. at 225 (noting that
religion can be proper part of objective historical and comparative
studies).


165. See id. at 597-99 (holding that school could not provide for "nonsec-
tarian" prayer to be given by clergyman selected by school).

166. See id. at 580-86 (describing factual circumstances of case).

167. See id. at 590 (analogizing to Engel decision regarding compulsory aspects).
The Court in Engel did not base its finding of unconstitutionality on the
nature of official prayer). Emphasis was placed on the government endorsement
of the prayer's contents signaled by its official composition. See id. at 424 (stating
that "by using its public school system to encourage recitation of the Regents' prayer,
the State of New York has adopted a practice wholly inconsistent with the
Establishment Clause"). The Court did observe, however, that "[t]his is not to say,
of course, that laws officially prescribing a particular form of religious worship do
not involve coercion of such individuals." Id. at 430-31. The coercive atmosphere
of Cleveland school board meetings was one reason leading a Sixth Circuit panel
to conclude that the practice of opening the meetings with prayer violated the
Establishment Clause. See Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 377-79
tried to ensure that the graduation prayers were bland, nonsectarian and inoffensive, did not save them any more than similar efforts had in composing the prayer in Engel.\textsuperscript{168} It is as much a violation for the state to endorse a watered-down "civic religion" as it is to sponsor a more specific one.\textsuperscript{169} Pervading the Court’s opinion in Lee is a belief that schools, and important events sponsored by schools, are fertile sites for subtle and direct coercion because of the highly regulated environment they provide for students.\textsuperscript{170}

Ten Commandments displays could be vulnerable under this anti-coercion principle. A display of the Commandments standing alone in public school classrooms occupied by children, who are there under a compulsory attendance law, could be oppressive to children assigned to seats near it day in and day out. True, posting the Ten Commandments does not create social pressure to participate, as the Court thought the

\textsuperscript{168} See Lee, 505 U.S. at 589 (addressing defense that graduation prayers were constitutional because inoffensive); see also Engel, 370 U.S. at 430 ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the . . . Free Exercise Clause . . . ."). \textit{But see} Chaudhuri v. Tennessee, 130 F.3d 232, 237 (6th Cir. 1997) (relying on nonsectarian nature of prayer at university graduation as one basis for concluding that practice was not intended to advance religion, but to "solemnize the events and encourage reflection"). The \textit{Chaudhuri} court distinguished \textit{Lee} by noting that the complainant was not a school child, but an adult tenured faculty member whose attendance at the event was not required. \textit{See id.} at 239 (noting that there was no risk that adult faculty member would be indoctrinated by exposure to prayers).

\textsuperscript{169} See Lee, 505 U.S. at 590 (stating that religion clauses of First Amendment mean "all creeds must be tolerated and none favored").

\textsuperscript{170} \textit{See id.} at 592 ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.").
graduation prayer did in Lee.\textsuperscript{171} Furthermore, it could be less intrusive than a recited prayer. However, its constancy could more than make up for the relative passivity of such a display.

Including the Ten Commandments in a larger display of historical, ethical and cultural material as suggested by Stone might reduce this coercive impact.\textsuperscript{172} If the other historical items in the display are heavily edited to emphasize the religious nature of the Ten Commandments, however, the character of the display as an unconstitutional state endorsement of religion would remain.\textsuperscript{173} Such thinly disguised attempts at religious indoctrination continue to be troubling under recent case law. A 1997 opinion, Agostini v. Felton,\textsuperscript{174} revealed a United States Supreme Court much less eager to strike down government aid to the secular functions of parochial schools when the aid was part of a broader program giving remedial instruction to students, regardless of their religious affiliations.\textsuperscript{175} But the Court still listed “government inculcation of religious beliefs” as a major prohibition of the Establishment Clause.\textsuperscript{176} In Mitchell v. Helms,\textsuperscript{177} a 2000 case dealing with government aid to parochial schools, the Supreme Court continued to use the question of whether the aid results in “governmental indoctrination” of religion as one of its major criteria for evaluating whether a program has the effect of advancing religion.\textsuperscript{178} Given the focus of several Commandments on the relationship of humankind to God, solitary Ten Commandments displays, and those with other items that are historical yet exclusively religious in nature, could continue to be vulnerable as a form of official indoctrination.\textsuperscript{179}

\textsuperscript{171} See id. at 593-94 (discussing social pressures inherent in prayer during graduation ceremonies).


\textsuperscript{174} 521 U.S. 203 (1997).

\textsuperscript{175} See Agostini, 521 U.S. at 237-40 (upholding government remedial instruction program that sent public school teachers to religious school premises to teach secular subjects). In Agostini, the Court overruled Aguilar. See id. The Agostini decision made such programs less vulnerable to invalidation by reducing the doctrine prohibiting “excessive entanglement” between church and state to a mere subdivision of the doctrine prohibiting government programs from having a primary effect of advancing religion. See id. at 232-33 (describing factors used in assessing entanglement as excessive).

\textsuperscript{176} Id. at 229.

\textsuperscript{177} 120 S. Ct. 2530 (2000).

\textsuperscript{178} See id. at 2541 (upholding program under which federal funds are distributed to local governments which lend educational materials and equipment, including computers, to public and private schools, including parochial schools).

\textsuperscript{179} See Exodus 20:1-12 (describing impact of Ten Commandments on relationship between God and humankind); see also Stone v. Graham, 449 U.S. 39, 41-42 (1980) (noting that “the first part of the Commandments concerns the religious duties of believers”).
In its most recent school prayer decision, Santa Fe Independent School District v. Doe, the Supreme Court confirmed that the decision whether to participate in a religious ritual is an individual liberty that cannot be obliterated by a group plebiscite.\textsuperscript{180} Although the case did not deal directly with the equal access doctrine, the Court's emphasis on private choice strengthens the credibility of the equal access approach as one means of vindicating individual choice over group indoctrination. The Court, through Justice Stevens, observed:

One of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control. We explained in Lee that the "preservation and transmission of religious beliefs and worship, is a choice committed to the private sphere." 505 U.S. at 589. The two student elections[, one authorizing student messages or invocations at football games and the other selecting the speaker,] authorized by the [school district's] policy, coupled with the debates that presumably must precede each, impermissibly invade that private sphere.\textsuperscript{181}

The school district policy under adjudication was a permutation of earlier versions that more openly embraced student-led football game prayers.\textsuperscript{182} The final policy, as revised to make it constitutionally more palatable, began with a preamble that sought to cover the exercises with a patina of

\textsuperscript{180} See Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2226, 2279-80, 2283 (2000) (finding policy to allow student-led prayers improper because it established majoritarian election on religion). The Court noted:

Recently, in Board of Regents of Univ. of Wis. System v. Southworth, 120 S. Ct. 1346 (2000), we explained why student elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic:

"To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires." . . .

Like the student referendum for funding in Southworth, this student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority.

Santa Fe, 120 S. Ct. at 2276 (citing Bd. of Regents v. Southworth, 120 S. Ct. 1346, 1357 (2000)).

In 1785, Madison made the same point when he observed that, although elections were the normal means of resolving issues in a democracy, the decision of whether or not to participate in a religious exercise was an individual matter. See James Madison, Memorial and Remonstrance Against Religious Assessments, in 5 The Founders' Constitution 82 (Philip B. Kurland & Ralph Lerner eds., 1987) (discussing religious freedoms in context of democracy). He summarized this principle by noting that the "religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." Id.

\textsuperscript{181} Santa Fe, 120 S. Ct. at 2279-80 (citing Lee v. Weisman, 505 U.S. 577, 589 (1992)).

\textsuperscript{182} See id. at 2272 (describing factual background of case).
secular purposes. The policy stated that the board had chosen to permit students to present "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 competition."\(^{183}\) Later, in court documents, the district claimed the additional secular purpose of fostering "free expression of private persons."\(^{184}\) The policy mandated that the student council, "[u]pon advice and direction of the high school principal," hold an election by "secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation."\(^{185}\)

The policy did not give a detailed prescription of the contents of the student message or invocation, but directed that they be "consistent with the goals and purposes of this policy."\(^{186}\) A clear implication of the policy was that the messages could be sectarian and proselytizing because an alternative policy, requiring that messages or invocations be "nonsectarian and nonproselytizing," would go into effect only if the original policy were struck down.\(^{187}\) The policy was challenged in court by two families, one Mormon and one Catholic, consisting of current or former students and their mothers.\(^{188}\) The Supreme Court sustained the challenge, concluding that "[t]he policy is invalid on its face 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."\(^{189}\)

Along the road toward reaching this conclusion, the Court first rejected the school district's contention that because the prayers were to be delivered by students, they would be private speech protected from government regulation by the free speech provisions of the First Amendment and would not amount to state action subject to that Amendment's prohibition of laws establishing religion.\(^{190}\) The district was too enmeshed in

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183. Id. at 2273 n.6.
184. Id. at 2278.
185. Id. at 2273 n.6.
186. Id.
187. See id. ("Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.").
188. See id. at 2271 (noting religious backgrounds of respondents and their families).
189. Id. at 2283.
190. See id. at 2275-76 (rejecting school district's argument that pre-game prayers should be regarded as private speech). One commentator argues that "[t]he decision halts a movement among Christian legal advocates to recast the school prayer issue as one of free speech for students, rather than an official establishment of religion." David Savage, The Wavering Line, Swing Votes Make the Difference in Two Church-State Cases, 82 A.B.A. J., Aug. 2000, at 36. The lack of state action necessary for an Establishment Clause violation was a major theme of the amicus brief filed by the state of Texas, its attorney general and Governor George W.
the rites to persuade the Court that they were private. The Court observed that “[t]hese invocations are authorized by a government policy and take place on government property at government-sponsored school-related events.”

This was not a case in which the government had created a public forum and was accused of content-discrimination by excluding religious speech. To the contrary, the school had created a highly restricted platform in which religious expression was the governmentally endorsed favorite.

The Court described the restricted nature of the platform by noting that the “school allows only one student, the same student for the entire season, to give the invocation.” Although the district did not dictate the detailed content of the invocations, it did require that they be consistent with its goals of solemnizing the event and promoting student safety and good sportsmanship. The Court noted that the goal of solemnizing the event encouraged the speakers to make a religious presentation because “[a] religious message is the most obvious method of solemnizing an event.”

Encouragement of a religious presentation was fortified by the language of the policy because the “only type of message that [was] expressly endorsed in the text [was] an ‘invocation’—a term that primarily describe[d] an appeal for divine assistance.” The history of the ceremony was such that the students knew that the vote, however it was described, was actually a vote on whether or not to have prayer. The school’s involvement in the procedure was further seen in the requirement that the elections be conducted under the supervision of the high school principal.

The Court summarized the district’s pervasive involvement by noting:

Bush. The document contended that because no school official directed the performance, sanctioned it or coerced participation in it, and because the rites were not a traditional government function, the prayers were private speech rather than state action. See Brief for Amici Curiae State of Texas, Attorney General of Texas John Cronyn, Governor of Texas George W. Bush and Others, available at 1999 WL 1272942.

191. Santa Fe, 120 S.Ct. at 2275.
192. See id. at 2276 (comparing facts of this case with those in Perry Ed. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 47 (1983), in which Court concluded that “selective access does not transform government property into a public forum”).
193. See id. at 2276-77 (noting that only one student gives religious invocation for entire season).
194. Id. at 2276.
195. See id. at 2277 (noting requirements in district policy with respect to message of invocation).
196. Id.
197. Id.
198. See id. at 2278-79 (“The results of the elections . . . make it clear that the students understood that the central question before them was whether prayer should be part of the pregame ceremony.”).
199. See id. at 2277 (noting election procedures as per district’s policy).
The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school’s public address system, which remains subject to the control of the school officials. It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school’s name is likely written in large print across the field and on banners and flags.200

200. Id. at 2278. A few months after the Santa Fe decision, the Ninth Circuit cited the case as the controlling authority when it decided that high school officials were justified in blocking a graduation invocation by a student-elected speaker, who planned to insert a proselytizing message in his presentation. See Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1105 (9th Cir. 2000) (holding that district’s refusal to allow student to deliver religious speech was necessary in order to avoid any violations of Establishment Clause). The court concluded that the school officials were justified in blocking an address by a valedictorian who intended to turn his speech into an opportunity for Christian evangelism. See id. at 1103 (stating that allowing speech to be read would have constituted endorsement of it). The school’s pervasive involvement in sponsoring, funding and planning the graduation and authorizing an invocation and valedictory address to be delivered on school property meant that the messages were not private speech protected by the First Amendment, but were state actions that risked violating the Establishment Clause by official endorsement of religion and creating pressure on those in attendance to participate in the proselytizing. See id. at 1102–04 (noting that valedictorian’s proselytizing speech, if delivered, would have constituted district’s participation in religious practice). The decision demonstrates the court’s willingness to apply the Santa Fe ruling beyond the football game context to other school-sponsored events. The Supreme Court demonstrated a similarly broad application when it vacated a decision of the United States Court of Appeals for the Eleventh Circuit. See Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1077 (11th Cir. 2000) (validating school policy permitting student-led graduation prayer upon authorization by student vote). The Supreme Court directed that the lower courts reconsider the Adler decision under Santa Fe. See The Adler Vacation Order, available at http://www.supremecourts.gov/orders/.

One commentator concluded that Santa Fe “seems broad enough to dispose of elected student prayer leaders at athletic events, graduations, and any other school event,” but that cases involving religious presentations by valedictorians “selected by religiously neutral means” would be the new flashpoint and could turn on whether the composition of a particular district is varied enough so that religious messages would not predominate. Douglas Laycock, The Supreme Court and Religious Liberty, 40 Cath. Law. 25, 56-57 (2000).

A narrower ambit was given to Santa Fe by the United States Court of Appeals for the Eleventh Circuit in Chandler III, when it held that an Alabama law permitting student prayer on public school premises at compulsory and non-compulsory events was private speech protected by the First Amendment. See Chandler v. Siegelman, 220 F.3d 1313, 1317 (11th Cir. 2000) (observing that “[s]o long as the prayer is genuinely student-initiated, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected”).
The school's involvement in the rites was so multifaceted and intense that it violated the Establishment Clause by flunking the Court's endorsement test, which asks "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." The Court concluded that "[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." The message sent by such endorsement to "nonadherents" of the prayers was "that they [were] outsiders, not full members of the political community, and an accompanying message to adherents that they [were] insiders, favored members of the political community."

The Court's proliferation of Establishment Clause tests in recent years led it to evaluate the Santa Fe pre-game ceremonies not only under the endorsement test, but also under the coercion test used by Justice Kennedy in his lead opinion in Lee and the religious purpose prong of the test developed in Lemon v. Kurtzman. The Court rejected the district's argument that the Santa Fe pre-game ceremonies lacked the coercion to participate in religious rites that had been found in Lee. The school district argued that the choice to have pre-game prayers was freely made by the students in an election and that the games were extracurricular activities as to which the students would feel less pressure to attend than a graduation ceremony. But the Court pointed out that the student vote did not result in unanimous agreement to have prayers. Coercive pressure came from the state in that although the choice of speaker was ultimately that of a majority of the students, the decision to have the election

For a further discussion of the inconsistency of Chandler III with Santa Fe, see supra note 123.

201. Santa Fe, 120 S. Ct. at 2278 (quoting Wallace v. Jaffree, 472 U.S. 38, 73, 76 (1985) (O'Connor, J., concurring)).

202. Id.


204. See id. at 2279-81 (discussing coercion test, citing Lee and noting Justice Kennedy emphasized in Lee that coercion could occur through social pressure as well as physical acts); see also County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part) (introducing coercion test).

205. 403 U.S. 602 (1971); see also Santa Fe, 120 S. Ct. at 2282 (citing Lemon and emphasizing that court must invalidate law that has no secular legislative purpose).

206. See Santa Fe, 120 S. Ct. at 2279-81 (rejecting argument set forth by District that its football policy is distinguishable from graduation prayer in Lee).

207. See id. at 2279-80 (setting forth District's argument that distinguishes extracurricular activities from commencement ceremony).

208. See id. (noting that views of students were not unanimous on issue of delivering prayers at varsity football games).
The elections were not a successful "circuit breaker," purging the ceremonies of coercive state action and replacing it with private speech. The Court conceded that "the informal pressure to attend an athletic event [was] not as strong as a senior's desire to attend her own graduation ceremony." The Court noted that "[t]he District's decision to hold the constitutionally problematic election is clearly 'a choice attributable to the State.'" quoting Lee v. Weisman, 505 U.S. 577, 587 (1992).

209. See id. at 2280 ("[T]he District's decision to hold the constitutionally problematic election is clearly 'a choice attributable to the State.'" quoting Lee v. Weisman, 505 U.S. 577, 587 (1992)).

210. See id. at 2279 (explaining that "circuit-breaker mechanism" does not turn public speech private).

211. Id. at 2280.

212. Id. Protection of public school students against being coerced to express a message selected by the state traces back to a 1943 Supreme Court case. See W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (striking down law requiring students to recite Pledge of Allegiance and salute flag). Even the patriotic fervor of World War II did not justify coercing students to express an orthodoxy contrary to their religion. More recently, a week after the Santa Fe opinion, the Court reaffirmed the principle against coerced expression in another setting when it held that the Boy Scouts did not have to retain a gay scout master, even though state law mandated that it do so, because such coerced association impaired the moral message it wished to convey and thus violated the Boy Scout's right of expressive association. See Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2451 (2000) ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association . . . ."); see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 581 (1995) (forcing private group organizing St. Patrick's Day parade to include gay, lesbian and bisexual group in parade violated organizer's right of expressive association). The principle is applied to individual expression outside the school context as well. See Wooley v. Maynard, 430 U.S. 705, 714 (1977) (forcing Jehovah's Witness member to display car license tag containing state slogan that was contrary to his belief's violated his First Amendment rights). The principle is also applied to protect freedom of the press. See Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254 (1974) (holding state law requiring newspapers to publish replies from political candidates who were criticized by newspaper violated freedom of press). The coercion involved in Santa Fe is less intense than the forced affirmative expression in Barnette. Nor does it involve an audience that is forced or socially pressured to be present as in Lee. The coercion comes from having to endure the prayer as the price of participating in the band or team or viewing the game as a spectator.

213. Santa Fe, 120 S. Ct. at 2280.

214. See id. (discussing holding of Lee).

215. Id. (quoting Lee v. Weisman, 505 U.S. 577, 595 (1992)).
comes dangerously coercive because "[t]he constitutional command will not permit the District 'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game."216

Having flunked the Santa Fe pre-game ceremonies under the endorsement and coercion tests for determining Establishment Clause violations, the Court proceeded to drive a third stake into the heart of the football game rituals: the stricture against government action having a purpose of advancing religion.217 The school's pre-game message policy flew flags of secular purpose: to solemnize the event, to promote student safety, to create an atmosphere for sportsmanship and fair competition and to protect student free speech.218 The Court judged these flags to be false colors; the true purpose was to foster pre-game prayer.219 This religious purpose is seen in both the wording and context of the policy.220 The Court observed that "the text of the October policy specifies only one, clearly preferred message—that of Santa Fe's traditional religious 'invocation.'"221 This, together with the "extremely selective access of the policy and other content restrictions confirm that it is not a content-neutral regulation that creates a limited public forum" open to a variety of student speech, but a platform for religious expression.222 The context of the policy is that it was developed to continue, under another name, the "District's long-established tradition of sanctioning student-led prayer at varsity football games."223

The Court concluded that the violation of the endorsement, coercion and religious purpose tests meant that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation."224 The Court anticipated and attempted to refute in advance charges that its opinion was circumscribing student freedom of religion. It emphasized that "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 school day. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."225

216. Santa Fe, 120 S. Ct. at 2280-81 (quoting Lee, 505 U.S. at 595-96).
217. See id. at 2282-83 ("Government efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail.").
218. See id. at 2273 n.6 (setting forth text of district's policy at football games).
219. See id. at 2282 (noting that based on plain language of district's policy, it appears that purpose was unconstitutional).
220. See id. (discussing content of Santa Fe's invocation).
221. Id.
222. Id.
223. Id.
224. Id.
225. Id. at 2281. A statement nearly identical to the first sentence of this quotation was made by Justice O'Connor in her concurrence in Wallace v. Jaffree, 472 U.S. 38, 67 (1985). A grass-roots movement for private citizens to say prayers at
Accusations that the Court’s opinion was hostile to religion were not long in coming. Chief Justice Rehnquist’s dissent accused the Court of giving birth to an opinion that “bristles with hostility to all things religious in public life.” To Rehnquist, the pre-game messages lacked the state action element necessary to trigger Establishment Clause analysis because “any speech that may occur as a result of the election process here would be private, not government, speech.” In his view, the school district’s policy has believable secular purposes in the form of promotion of good sportsmanship, student safety and a positive environment for competition. The Court should defer to the district’s claim that these are its true goals rather than reading sinister meaning into the policy. Use of the word “invocation” in the district’s policy does not mean it is endorsing religion; the district is merely listing this form of speech as one of the options. The district is not orchestrating the details of the speech as was done in the graduation prayer policy struck down in Lee. It is merely facilitating private speech by the students. When the government is merely acting in this role of facilitator of private speech, “our Establishment Clause jurisprudence simply does not mandate ‘content neutrality.’”

The unified observance of student-led, pre-game prayers authorized by majority vote of high school students in Santa Fe left little room for individual choice, especially for those on the losing side of the ballot. When the Court made plain that “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,” it also em}

football games, without the sanction or direction of school officials, and without the use of the district-owned public address system, is growing. See David Firestone, South’s Football Fans Still Stand Up and Pray, N.Y. TIMES, Aug. 27, 2000, at A1 (describing emergence of groups that sponsor organized prayer before high school football games). Duke University School of Law Professor Walter Dellinger observed:

> It strikes me as unfortunate that football games can be used as occasions for prayer, the effect of which is to make some students feel like religious strangers at their own public schools . . . . But as long as it is a product of private decisions by individuals or groups, it doesn’t violate the Constitution.

Id. at A16.

226. Santa Fe, 120 S. Ct. at 2283 (Rehnquist, C.J., dissenting).
227. Id. at 2285.
228. See id. at 2286 (noting that policy had “plausible secular purposes”).
229. See id. (“Where a governmental body ‘expresses a plausible secular purpose’ for an enactment, ‘courts should generally defer to that stated intent.’”).
230. See id. at 2286 n.4 (discussing meaning of word “invocation” as it appears in policy).
231. See id. at 2287 (citing Lee v. Weisman, 505 U.S. 577, 588 (1992)).
232. See id. at 2287 (noting that invocation’s message was to be primarily selected by student).
233. Id.
234. Id. at 2281.
phasized that religion was a matter of private choice. The equal access line of cases discussed in the following section provides a constitutional mechanism for exercising such individual choice.

The equal access approach avoids the taint of indoctrination found in officially arranged religious ceremonies or Ten Commandments displays. By letting students choose among a variety of secular and religious alternatives, it also permits pursuit of the choice in ways meaningful to the students rather than in the one-size-fits-all fashion of official religion. Because the aura of official endorsement of religion is avoided by offering a wide range of choices, once a religious activity is chosen by a student after competition with secular options, it could be pursued to the fullest—whether it involves praying, singing hymns or studying The Bible, including the Ten Commandments—just as those choosing secular options could pursue them to the fullest even if they involved making speeches critical of religion. There would be no official content discrimination, only supervision to maintain order and make reasonable allocation of resources. These points are demonstrated by the following discussion of the limited open forum (activities period) cases.

IV. THE EQUAL ACCESS CASES

In Widmar v. Vincent, an evangelical Christian group of students that had been permitted to hold meetings, which included prayer, hymn singing, Bible study and discussion of religious experiences in classrooms at the University of Missouri at Kansas City, was prohibited from doing so by a new rule of the board. The University permitted a large variety of other organizations to use school facilities for meetings, but the new rule prohibited use "for purposes of religious worship or religious teaching." Upon challenge by the Christian group, the Court declared the rule un-

235. See id. at 2279 ("[T]he preservation and transmission of religious beliefs and worship is . . . committed to the private sphere." (quoting Lee, 505 U.S. at 589)).

236. See Hsu v. Roslyn Union Free Sch. Dist., 85 F.3d 839, 865 (2d Cir. 1996) (holding that Bible club may pray and sing religious music on school premises as part of limited open public forum). One leading congressional proponent of the Equal Access Act, however, argued during debates on the Senate floor that there was a distinction between religious speech, as to which the equal access principle should apply, and religious ceremonies, such as baptisms or masses, which should not be permitted at public schools. See 130 Cong. Rec. 19.233 (1984) (statement of Sen. Hatfield) (noting distinction between religious speech used at non-religious events and that used at religious ceremonies).

237. See Widmar v. Vincent, 454 U.S. 263, 276-77 (1983) (noting that although content regulations of public forum speech usually are not justifiable, neutral time, place, manner regulations can be).


239. See Widmar, 454 U.S. at 265 (describing University regulation that prohibited use of University buildings for religious purposes).

240. Id.
constitutional discrimination against religious speech by excluding it from a public forum open to a great range of other speech.241

Public forums are government property that have been dedicated to free speech through tradition or designation by officials.242 Central to the

241. See id. at 267-68 (noting grounds for reversal of district court's holding); see also Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981) (recognizing right of religious groups to equal access to public forums subject to reasonable time, place, and manner regulations).

242. See Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("Whenever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens."); see also Carey v. Brown, 447 U.S. 455, 460 (1980) (citing Hague, 307 U.S. at 515); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (emphasizing that "[t]he right to use a public place for expressive activity may be restricted only for weighty reasons"); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969) (describing methods of expression protected by First Amendment on municipal property); Kunz v. New York, 340 U.S. 290, 293-94 (1951) (discussing proper regulation of public places and restraint on exercise of First Amendment rights); Schneider v. New Jersey, 308 U.S. 147, 163 (1939) (stating that "streets are natural and proper places for the dissemination of information and opinion"). "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Grayned, 408 U.S. at 116. There are examples of uses that are incompatible with public forum status. See, e.g., Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 685 (1992) (holding that solicitation ban in government-owned air terminal is reasonable); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983) (holding school system's internal mail is not public forum); United States Postal Serv. v. Council of Greensburgh Civic Ass'n, 453 U.S. 114, 135 (1981) (holding personal mailboxes are not public forums); Greer v. Spock, 424 U.S. 828, 838 (1976) (noting military bases' need for security and discipline may be incompatible with public forum status); Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (noting city bus interior is not public forum because of risk of imposing on captive audience); Adderley v. Florida, 385 U.S. 39, 47-48 (1966) (holding area around jails are not public forums because speech at or near jails could be disruptive of security).

Not all government property is a public forum. The Court has recognized three categories of public property: (1) that which becomes a public forum by tradition; (2) that which becomes a public forum by designation of the ruling body; and (3) that which is not a public forum, either by tradition or designation. See Perry, 460 U.S. at 45-46. A content-based restriction of speech in the first two categories must be justified by showing that the restriction is needed to achieve a compelling government interest, and it is narrowly drafted to obtain that goal. See id. at 45. Content-neutral time-place-manner restrictions may be imposed to maintain the peace and prevent various users from interfering with each other, but even these must be narrowly tailored to achieve significant state interests so as to minimize the harm to freedom of expression. See id. (explaining reasons for intermediate level of scrutiny). A public forum may be limited to certain types of speakers or subjects, provided that the limitations do not reflect viewpoint discrimination. See Widmar, 454 U.S. at 267 (describing University's policy to limit forum to students); see also City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167, 175 n.8 (1976) (stating that public bodies can limit forum to certain issues). The public forum doctrine was initially applicable to the government's real property, but recently has been expanded to cover fiscal and metaphysical equivalents of such property as a means of granting religious student publications

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Court's ruling was its conclusion that "religious worship and discussion" are protected forms of speech and association under the First Amendment. As a protected form of expression, religious speech could not be excluded on the basis of its content from the limited public forum created by the University for student activities, unless the exclusion served "a compelling state interest" and was "narrowly drawn to achieve that end" with minimal harm to free expression. The University argued that granting access to the public forum to religious groups would be an establishment of religion and that avoiding such a constitutional violation was a compelling state interest. The Court admitted that complying with constitutional duties could be a compelling interest, but no such duty existed in Widmar because giving religious groups equal access to a public forum would not contravene the Establishment Clause.

In assessing the potential for an Establishment Clause violation, the Court used the three-part Lemon test: "[f]irst, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the [policy] must not foster 'an excessive government entanglement with religion.' Granting equal access to religious groups would violate none of the elements of the Lemon test. Merely treating religious groups on par with others serves a secular goal of fairness. Nor would permitting religious groups to use university facilities on an equal basis with secular clubs have a primary effect of advancing religion. A right to share in university funds along with secular publications. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995) (discussing forum as more metaphysical than spatial, but noting same principles are applicable to both).

243. Widmar, 454 U.S. at 269. The Court decided the case under the speech and association clauses of the First Amendment rather than the religious clauses because the religious speech was in competition with other forms of speech. See Jay Alan Sekulow et al., Religious Freedom and the First Self-Evident Truth: Equality as a Guiding Principle in Interpreting the Religion Clauses, 4 WM. & MARY BILL RTS. J. 351, 395 (1995) (noting that the Court recognized that through the Fourteenth Amendment, the First Amendment requires that states treat religious speech, including religious worship that constitutes speech, as deserving of equal treatment under the Free Speech Clause).

244. Widmar, 454 U.S. at 270.

245. See id. at 270-71 (discussing University's argument that offering facilities to religious groups and speakers violates Establishment Clause of Constitution).

246. See id. at 271 (stating that policy satisfies three-prong Lemon test).

247. Id. (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

248. See id. at 271-73 (giving equal access to religious groups would not violate Establishment Clause); see also James M. Smart, Jr., Widmar v. Vincent and the Purposes of the Establishment Clause, 9 J.C. & U.L. 469, 476 (1983) (contending that three-part test protects not only government neutrality toward religion, but also voluntary religious speech on equal basis with other speech).

249. See Widmar, 454 U.S. at 272-73 (holding that granting equal access to religious groups does not advance religion).

250. See id. at 273-74 (stating that any religious benefits from open forum would be "incidental").
sion to a forum used by a wide spectrum of secular groups "does not confer any imprimatur of state approval on religious sects or practices." The great range of secular groups using the University facilities means that admission of religious clubs to the forum would not alter the primarily secular impact of providing students with a good choice of activities.

The religious clubs would benefit from the use of the facilities, but such benefit would be merely "incidental" to the larger secular benefit.

The Court did hint that if religious groups dominated the forum, that would present a different case. Admission of religious groups to the public forum on an equal basis with others, however, would decrease rather than increase entanglement between church and state. This is because if the rule excluding religious groups were to stand, a university would have to define what kinds of activities were religious and then conduct surveillance of all student organizations to ferret out religious practices. Such monitoring could take on the air of an inquisition hostile to religion.

In determining that giving religious groups equal access to university facilities would not be perceived by the students as school endorsement of religion, the Court relied not only on the fact that a wide spectrum of secular clubs would have access, but also on the age of college students. The Court observed that "[t]hey are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." These remarks could imply that a different case would be presented with high school students, who might perceive granting equal access to religious groups as endorsement of religion. In Board of Education of Westside Community Schools v. Mergens, however, the Court rejected this interpretation.

Mergens dealt with the Equal Access Act. Congress, through the Act, sought to ensure that when a public secondary school receives federal

251. Id. at 274.
252. See id. at 274-75 (noting that advancement of religion would not be forum's "primary effect").
253. See id. at 273 (stating "religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion" (citing Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 771 (1973))).
254. See id. at 275 (noting that forum's "primary effect" would not be advancement of religion without evidence that religious groups would dominate it).
255. See id. at 272 n.11 (agreeing with court of appeals's determination that it would be more difficult for university to enforce exclusion of religious speech or worship).
256. See id. at 274 n.14 (noting that university students should be mature enough to understand university's neutrality policy on religion).
257. Id.
259. See Mergens, 496 U.S. at 250-51 (giving deference to Congress's rejection of "argument that high school students are likely to confuse an equal access policy with state sponsorship of religion").
funds and creates for its students a "limited open forum," in which students are permitted to initiate noncurriculum-related clubs and are able to use school facilities for meetings before or after regular instructional time, the school may not deny equal access to the forum on the basis of the organization's "religious, political, philosophical or other content."\(^{260}\) When Westside High School denied Bridget Mergens's request to allow her Bible club to use school facilities, she brought suit claiming that the school violated the Equal Access Act as well as the First Amendment.\(^{261}\) The Court concluded that the school had created a limited open forum that was used by numerous secular clubs and that it had violated the Equal Access Act by discriminating against the Bible club, which it eventually permitted to meet informally after school hours, although it was not allowed to use the school bulletin boards or newspaper.\(^{262}\) The remaining ques-

\(^{260}\) See id. at 235 (quoting Equal Access Act, 20 U.S.C. §§ 4071 (a) & (b) (1995)); see also Ceniceros v. Bd. of Trustees of the San Diego Unified Sch. Dist., 106 F.3d 878, 881 (9th Cir. 1997) (interpreting Equal Access Act to include lunch time as non-instructional time during which religious club is entitled to meet on par with other groups); Frank R. Jimenez, Note, Beyond Mergens: Ensuring Equality of Student Religious Speech Under the Equal Access Act, 100 YALE L.J. 2149, 2156-62 (1991) (speculating that Act could be evaded if school officials integrate all clubs into curriculum).

\(^{261}\) See Mergens, 496 U.S. at 233 (discussing basis for plaintiff's claims).

\(^{262}\) See id. at 246-47 (holding Westside maintains "limited open forum" under Act). To constitute a limited open forum under the Act, the school did not have to create a constitutional public forum open to advocacy groups, but only one open to clubs not related to the curriculum. See id. at 239-40 (interpreting meaning of "noncurriculum related student group"); see also Pope v. Bd. of Educ., 12 F.3d 1244, 1256 (3d Cir. 1993) (holding that school board violated Equal Access Act when it permitted Bible club to meet on school premises before class, but did not give it access to public address system and bulletin boards afforded to other non-curricular clubs); Laycock, supra note 27, at 36-51 (discussing statutory meaning of "open forum"). In Pope, the school's attempt to close its limited open forum was unsuccessful because at least one non-curricular club was permitted to continue to use school facilities. See Pope, 12 F.3d at 1247, 1251 (listing non-curricular clubs at school, such as Key Club). The court agreed with Mergens, finding that it only takes one non-curricular club to trigger the equal access requirement. See id. at 1251 (agreeing with district court's analysis and conclusion). To determine whether a club was curriculum-related, the court inquired whether: (1) the focus of the club's interest was a subject taught as a regular course; (2) the club concerned the "body of courses as a whole"; (3) membership in the group was required for those taking a particular course; or (4) course credit was given for participation. See id. (citing Mergens, 496 U.S. at 239-40). The court found the Key Club was not curriculum-related. See id. at 1251-52 (finding Key Club's purpose too attenuated from any subjects taught across curriculum). Thus, its use of school facilities triggered the equal access standard and kept the school's limited open forum in existence.

One court held that a student Bible club called "Walking on Water" was denied equal access to the school's after-classes, limited open forum when the school recognized the club, but only on the condition that it delete from its constitution the requirement that officers be Christians. See Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 861 (2d Cir. 1996) (holding "[e]qual treatment should mean that the Walking on Water Club enjoys the same latitude that other clubs may have in determining who is qualified to lead the Club"). The court held that the club
tion was whether the school would violate the Establishment Clause if it complied with the Equal Access Act. In holding that it would not, the Court followed the path cleared in Widmar.263

had a right to insist that key officers, such as President, Vice President and Music Coordinator, be Christians because these officers had the responsibility of leading the group in prayer and Christian music. See id. at 858 (noting group need for Christian officers to ensure message it was disseminating had content it desired). The school’s insistence that the club delete the requirement denied the club equal access because other clubs could ensure that the contents of their messages were what they desired, and the Bible club needed the right to exclude non-Christians from holding key offices in order to guarantee the integrity of its own message. See id. at 848 (concluding club’s Christian officer requirement, in some instances, is protected by Equal Access Act). The club, however, could insist on this requirement only as to officers who led the club’s spiritual activities. See id. at 856-58 (clarifying club’s exclusionary policy to apply only to exclusion of non-Christians from leadership positions).

Allowing the club to require that key officers be Christians would not result in establishment of religion by the school because the purpose and effect of doing so would be the secular one of giving the club equal speech rights. See id. at 862-66. The school’s disclaimer of endorsement of the club helped dissipate any effect of advancing religion. See id. at 864 (quoting disclaimer). Permitting religious exercises on school premises did not have a primary effect of advancing religion because the school was not conducting the exercises, but only allowing students to conduct them as part of an open forum. See id. at 865 (citing Mergens, 496 U.S. at 250-51). The court concluded that it was unlikely that the school would become entangled in decisions concerning who was truly a Christian qualified to hold office, because the club could be expected to resolve these disputes internally. See id. at 867 (noting rare circumstances when school would become involved with internal squabbling of club).

263. See Mergens, 496 U.S. at 247-48 (citing Widmar v. Vincent, 454 U.S. 263, 271-75 (1983), which in turn applied three-part Lemon purpose, effect and entanglement doctrines). In this portion of her opinion, Justice O’Connor spoke only for a plurality. Majority support for the conclusion that the Act does not violate the Establishment Clause, however, is found when concouring opinions are included. See id. at 258 (Kennedy, J., concurring) (joining majority view that Act does not violate Establishment Clause); id. at 262-63 (Marshall, J., concurring) (concluding that proper application of Act would not result in Establishment Clause violation, but cautioning that schools should take clear action to disassociate themselves from religious content of clubs’ meetings).

Although Justice Kennedy agreed that the Equal Access Act did not violate the Establishment Clause, he reached that conclusion through a different route than the plurality. He disavowed reliance on the question of whether the school would endorse religion by granting access to a limited open public forum to religious clubs, and instead relied on his finding that by granting equal access, the schools would not coerce students into attending religious clubs and would not provide a direct benefit to religion. See id. at 260-61 (Kennedy, J., concurring) (emphasizing that Act does not authorize school authorities to require or encourage students to join in religious clubs or their meetings). Justice Stevens dissented, contending that the majority gave such a broad interpretation to the statute that it would interfere with the prerogative of local school districts to exclude unsavory groups. See id. at 270-91 (Stevens, J., dissenting) (noting that “traditional allocation of responsibility” to school districts “makes sense for pedagogical, political, and ethical reasons”).
Failure to grant equal access to religious organizations "would demonstrate not neutrality but hostility toward religion."264 Granting such access in accordance with the will of Congress would not reveal a purpose of advancing religion.265 A plurality led by Justice O'Connor concluded that "Congress' avowed purpose—to prevent discrimination against religious and other types of speech—is undeniably secular."266 Even if some members of Congress had religious motives in supporting the measure, the overall legislative purpose was secular.267

Nor would granting equal access to religious organizations have a primary effect of advancing religion. Equal access would not convey a message that the school was endorsing the religious groups permitted to use the facilities.268 High school students "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."269 Any possible message of endorsement is refuted by the wide array of secular clubs also using

264. Id. at 248. The Ninth Circuit has held that the Equal Access Act preempts state constitutions prohibiting religious groups from school forums. See Ceniceros, 106 F.3d at 883 (noting that Equal Access Act preempts state constitutional provisions); Garnett v. Renton Sch. Dist. No. 403, 987 F.2d 641, 646 (9th Cir. 1993) (noting Equal Access Act preempts state constitutional provisions that would preclude religious groups from school forum).

265. See Mergens, 496 U.S. at 249 (noting Act's purpose was not to endorse or disapprove of religion).

266. Id.

267. See id. (stating that religious motives of legislators are irrelevant). The Court observed that "[t]he Committee Reports indicate that the Act was intended to address perceived widespread discrimination against religious speech in public schools." Id. at 299; see also H.R. Rep. No. 98-710, at 4 (1984) (expressing concern about federal circuit court cases holding that Establishment Clause would be violated if student religious groups were permitted to meet on public school premises during non-instructional time); S. Rep. No. 98-357, at 5-15 (1984) (same). Several circuit courts of appeals did hold that permitting religious groups to meet on school grounds could violate the Establishment Clause. See, e.g., Bender v. Williamsport Area Sch. Dist., 741 F.2d 538, 555 (3d Cir. 1984) ("[T]he Establishment Clause does become implicated when the existence of religion within the school creates the perception among school children that the State has approved a religious activity . . . ."), vacated, 475 U.S. 534 (1986); Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038, 1042-48 (5th Cir. 1982) (discussing possibility that allowing religious activities at school facilities could be unconstitutional); Brandon v. Bd. of Educ., 635 F.2d 971, 980 (2d Cir. 1980) (noting that high school is not "public forum" where religious views should be "freely aired" because Establishment Clause proscription against prayer in public schools would be violated). But see Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 165 n.5 (5th Cir. 1993) (noting that Mergens recognizes statutory revocation of these decisions).

268. See Mergens, 496 U.S. at 251 (holding that "students will reasonably understand . . . neutrality toward, rather than endorsement of, religious speech").

269. Id. at 250; see also Deborah M. Brown, Note, The States, the Schools and the Bible: The Equal Access Act and State Constitutional Law, 43 Case W. Res. L. Rev. 1021, 1054 (1993) (contending that when Congress passed Equal Access Act, it "rejected the notion that students below the college level are unable to distinguish state neutrality from favoritism").
the facilities and by the ability of students to take the initiative in forming others.\textsuperscript{270} The limited role played by school officials and teachers also reduces the appearance of state endorsement of the religious clubs. They do not "promote, lead, or participate in any such meeting," but attend only to maintain order.\textsuperscript{271} The Equal Access Act's stipulation that the clubs meet during "noninstructional time," usually just before or after classes, guards against the perception that the school is teaching religion.\textsuperscript{272}

The plurality opinion found no breach of the doctrine forbidding entanglement between church and state officials.\textsuperscript{273} Teacher presence at club meetings for the custodial purpose of maintaining order would not amount to surveillance of religion by state agents because this would not involve reporting on the ideas expressed in the meetings.\textsuperscript{274} As in \textit{Widmar}, the plurality opinion was concerned that a denial of access to religious clubs would result in more entanglement than granting access. Denial could result in "invasive monitoring" to determine which groups are religious.\textsuperscript{275} If such surveillance revealed religious content and the club was consequently ejected from the forum, the result could lead to a bitter clash between school and religious officials.

The type of use of school facilities by religious groups approved of in \textit{Mergens} may bear a superficial resemblance to the privately conducted religious classes on public school premises that the Court struck down in \textit{McCollum}. Religious activity is taking place on public school premises built with tax funds and students are attending those schools under compulsory attendance laws.\textsuperscript{276} In \textit{McCollum}, the Court clearly was concerned about

\textsuperscript{270} See \textit{Mergens}, 496 U.S. at 251-52 (noting that school has control over impressions it gives and can make clear that recognition of club does not endorses).  
\textsuperscript{271} \textit{Id.} at 253 (citing 20 U.S.C. § 4072(2)). The plurality opinion noted that the Equal Access Act forbids school "sponsorship" of such clubs. \textit{See id.} (citing 20 U.S.C. § 4071(c)(2) (1995)); \textit{see also} 20 U.S.C. § 4072(2) (permitting "assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes").  
\textsuperscript{272} \textit{See Mergens}, 496 U.S. at 251 (noting that Act also avoids problem of mandatory attendance requirements).  
\textsuperscript{273} \textit{See id.} at 253 (noting that, on its face, Equal Access Act does not contravene Establishment Clause).  
\textsuperscript{274} \textit{See id.} (stating presence of teacher is "merely to ensure order and good behavior").  
\textsuperscript{275} \textit{See id.} at 253 (citing \textit{Widmar v. Vincent}, 454 U.S. 263, 272 n.11 (1983)).  
\textsuperscript{276} In \textit{Mergens}, the state argued that "because the student religious meetings are held under school aegis, and because the State's compulsory attendance laws bring the students together (and thereby provide a ready-made audience for student evangelists), an objective observer in the position of a secondary school student will perceive official school support for such religious meetings." \textit{Id.} at 249. But the \textit{Mergens} plurality still found that allowing access to the religious club would not have the primary effect of advancing religion. \textit{See id.} at 250-52 (noting that Act limits official school participation by requiring that meetings be held during "non-instructional time"); \textit{see also} \textit{Hsu v. Roslyn Union Free Sch. Dist. No. 3}, 85 F.3d 839, 865 (2d Cir. 1996) (observing that "as the \textit{Mergens} Court made clear, the conduct of religious exercises in a school, with the school's sanction and under its 'aegis,'
the impact of the compulsory school attendance laws,\textsuperscript{277} even though only those students whose parents signed permission cards attended the religious classes.\textsuperscript{278} Although attendance at the religious classes was technically voluntary, the compulsory attendance laws created the pool of students from which the religious classes were drawn. In the case of the limited open public forums to which the Court approved religious club access in \textit{Mergens}, however, the coercive effect is alleviated by the fact that the clubs are student-initiated, student-led and attended only by those students who choose a religious club from a wide spectrum of other choices.\textsuperscript{279} In \textit{McCollum}, no such array of choices existed; the students either went to the religious instruction or studied.\textsuperscript{280}

V. CONCLUSION: \textbf{EQUAL ACCESS TO STUDENT ACTIVITIES PERIODS INSTEAD OF OFFICIALindoctrination}

The equal access approach to the role of religion in the public schools could create administrative problems, but on balance these difficulties would be more tolerable than the bitterness that is likely to be fomented by the official indoctrination route that seems to be coming into vogue again. Despite its strength in creating a system of options for students that would allow them to explore new interests, including the spiritual, a limited open public forum would not usher in an era of harmony. If such an activities period proves to be popular and numerous student-initiated groups vie for participation in the forum, space allocation could become a problem. The basic principle of \textit{Widmar} was that there could not be discrimination against religious speech on the basis of its content.\textsuperscript{281} Therefore, some other basis of allocation such as first-come, first-serve must be developed. Even assuming a neutral system is fashioned, the school still could be subjected to charges of bias.

In addition, controversial groups may seek to participate. For example, a right-to-life group could find itself meeting next door to advocates of voluntary assisted suicide for the terminally ill.\textsuperscript{282} Under the statute does not have a primary effect of advancing religion\textsuperscript{)}. The limited open forum, utilized by a variety of clubs, dissipated any flavor of endorsement of religion by the school.


\textsuperscript{278} See \textit{id.} at 207.

\textsuperscript{279} See \textit{Mergens}, 496 U.S. at 252 (noting that religious clubs are voluntary).

\textsuperscript{280} See \textit{McCollum}, 333 U.S. at 209 (noting that students who did not choose to take “religious instruction were not released from public school duties”).

\textsuperscript{281} See \textit{Widmar} v. Vincent, 454 U.S. 263, (1983) 269-70 (holding that university cannot discriminate based on religious content of group’s intended speech); \textit{see also Mergens}, 496 U.S. at 253 (holding that there might well be greater entanglement problems when “monitoring to prevent religious speech at meetings”).

\textsuperscript{282} One controversial issue that could confront schools that are considering creating a limited open forum is whether sexual orientation discussion-groups should be given access. \textit{See generally John A. Russ IV, Note, Creating a Safe Space for
approved in *Mergens*, those groups would be entitled to equal access so long as their meetings were orderly.283 The *Mergens* opinion observed that "[u]nder the Act, a school with a limited open forum may not lawfully deny access to a Jewish students' club, a Young Democrats Club, or a philosophy club devoted to the study of Nietzsche."284 Such a genuinely open forum would be constantly under pressure from those who want only their ideas to prevail to reject applications by rivals to participate. Furthermore, the role of teachers could become more complex than the merely custodial role the Court envisioned.285 It may take considerable skill and resolution for a teacher to resist being drawn into a discussion in a way that may be perceived as lending state support to one view or another. Also, teachers' participation should be voluntary rather than forcing them to attend religious meetings some of them may find offensive. Difficulties

283. See *Mergens*, 496 U.S. at 235 (discussing Congress's reasoning behind 20 U.S.C. § 4071(a), which forbids public secondary schools with limited open forums that receive federal funds from excluding groups "on the basis of the religious, political, philosophical, or other content of the speech at such meetings").

284. Id. at 252.

285. See id. at 251, 253 (stating that teachers should be at meetings solely to keep order, rather than to act as role models).
could be encountered in finding enough willing teachers, as well as in determining whether their participation was truly voluntary.

In addition, pressure could grow for school financial support beyond merely providing space and access to bulletin boards. *Rosenberger v. Rector & Visitors of the University of Virginia* held that when a university creates the fiscal equivalent of a public forum by funding a variety of student organizations, publications with a religious viewpoint cannot be discriminated against by denial of a share in such funds. But support of clubs, such as the one in *Mergens*, could involve direct funding of worship activities such as praying, hymn singing and *Bible* study. Such funding could go well beyond the parameters of *Rosenberger*, which dealt with indirect university financial support through payment of printing costs of publications not directly involved in worship, but which had a religious point of view. Direct funding of student organizations engaged in worship activities could involve a school in divisive wrangling over which group gets what share of the fiscal pie. Thus, a school could become enmeshed in the quicksand of making judgments as to which group was the most morally worthy and had the most pristine rites. But such potential difficulties counsel caution in the administration of an equal access program rather than a rejection of a route that is distinctly preferable to the one-size-fits-all official indoctrination path.

For the equal access approach to be a complete alternative to official indoctrination, the current federal statute should be amended to make it applicable in lower grades as well as secondary schools, with the stipulation that the parents, rather than the less mature students found in the lower grades, make the choice of activities and conduct the programs.


287. *See Rosenberger*, 515 U.S. at 837 (holding that denying support to group amounts to denying free speech).

288. *See id.* at 842 (emphasizing that approved equal access to funding did not involve direct payments to organizations or institutions engaged in religious activities).

289. In *Lemon*, the Court warned of the divisiveness of such arguments between religious and other groups over who received what share of the financial pie when annual appropriations were given to religious groups. *See Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971). In *Agostini*, the Court listed such "political divisiveness" as a factor that was no longer enough in itself to invalidate a program, but it did not read it out of the equation entirely. *See Agostini v. Felton*, 521 U.S. 203, 233-34 (1997).

290. *See 20 U.S.C. § 4071(a) (1995)* (stating that equal access requirement is applicable to public secondary schools that accept federal funds and create limited open forum). Although the Equal Access Act does not apply to elementary schools, some federal courts are beginning to wrestle with the problem of whether constitutional free speech standards require equal access for religious clubs to grade school premises. Typically, these cases do not deal with attempts by student-initiated clubs to gain access to elementary school premises during an activity period, but rather with requests by community religious organizations with evangelism efforts directed at school children to meet on school premises. The focus is on whether the school has created a limited public forum under First Amendment standards and, if so, whether exclusion of religious clubs is consistent with the
Such an extension of the doctrine would not violate the Establishment Clause because the variety of secular and religious alternatives would remove any flavor of state endorsement of religion, just as it does in secondary schools when older students are making the choices.\textsuperscript{291} The parents would be even less susceptible to social or official pressure to have their children attend religious clubs than would secondary school students making the choice for themselves under the current system.\textsuperscript{292} Parental pres-

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limitations imposed by the school district on the forum, or whether it is impermissible viewpoint discrimination against religious speech. \textit{See} Good News Club v. Milford Cent. Sch., 202 F.3d 502, 511 (2d Cir. 2000) (holding that even though school had created limited public forum to which it admitted community groups, it was not required to grant access to Good News evangelistic group organized outside school as means of converting children to Christianity), \textit{cert. granted}, 121 S. Ct. 296 (2000). The organizers of the local group were a minister and his wife, who had a child attending the school. \textit{See id.} at 504 n.2 (stating facts of case). The court concluded that although the school was obligated to admit groups that addressed moral issues from a religious perspective to the forum, the Good News Club's worship-style meetings went beyond the scope of the forum. Thus, the school did not have to open its premises to the group. \textit{See id.} at 511 (holding club's activities were not pure "moral and character development"). Implicit in the court's opinion is a concern that use of school premises by an outside evangelistic group that focused on converting children was more of an endorsement of religion than merely permitting moral discussions with a religious perspective along with those of other viewpoints. \textit{But see} Good News/Good Sports Club v. Sch. Dist. of Ladue, 28 F.3d 1501, 1506 (8th Cir. 1994) (holding inclusion of other groups that addressed "moral and character development" required admittance of Good News to limited public forum created by school district); \textit{see also} Culbertson v. Oakridge Sch. Dist., Civil No. 96-6216-TC, (D. Or. Jan. 5, 1999) (unpublished opinion), \textit{aff'd}, 119 F.3d 5 (9th Cir. 1997) (concluding that school district had created limited public forum on elementary school premises after class hours to which non-religious community groups were permitted access, and, therefore, ordering access be granted to Good News on equal basis with other groups). Good News appears to have been an already-existing community group, rather than a student-initiated group. Its focus, though, seems to have been on student participation, including that by elementary school students. The ruling made no mention of the Equal Access Act and appears to have been based solely on First Amendment standards. The school district also was ordered to permit students at the elementary school to distribute Good News brochures and parental permission slips to other students at the school. \textit{See id.} \textit{(discussing "non-school related" literature distribution)}. The author is indebted to C. Todd Hagins for calling his attention to this case.

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\textsuperscript{292} \textit{But see} Scott J. Wilkov, \textit{Note, The Writing Is on the Wall: Equal Access Erodes the Establishment Clause}, 34 \textit{Ariz. L. Rev.} 375, 398 (1992) (arguing against application of equal access approach to lower grades on ground that younger students, because of immaturity, would be more susceptible to peer pressure to participate in religious activities) (citing \textit{Note, The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools}, 92 \textit{Yale L.J.} 499, 507-08 nn.42-43 (1983)); \textit{see also} John C. Coleman, \textit{Friendship and Peer Group in Adolescence}, in \textit{Handbook of Adolescent Psychology} 408, 424-25 (Joseph Adelson ed., 1980) (discussing susceptibility of children to peer group pressure, especially from ages eleven to fifteen). This Article contends that such pressure would be significantly reduced if the parents made the choice of activities for grade school children.
sure on their children to attend or initiate religious clubs would be an exercise of parental rights over the education of their children, rather than state coercion. It is possible that state and parental pressures could combine to coerce a child to attend religious clubs, but if such a problem arises it can be addressed on a case-by-case basis rather than being used as the reason for entirely vetoing the extension of the equal access doctrine to the lower grades.

Involvement in the activities periods in lower grades should be limited to parents, students and teachers acting in a custodial capacity. Participation by churches or other non-school religious organizations would create a far greater risk that the presence of a student religious club on school premises, even as part of a limited open forum with a variety of secular student groups, would be viewed as state endorsement of religion. Such outside participation also would create a greater risk that schools would be turned into ideological battlefields disruptive of the educational environment. Although ideological rancor could emerge from the free marketplace of ideas in a limited open public forum, for the most part, an equal access approach is likely to reduce the bitter contentiousness that would be likely if the official indoctrination approach were used instead. To avoid discrimination against religion, sponsorship of student clubs by non-religious, non-parent outside groups should also be avoided.

Involvement by parents alone is likely to be viewed by the child and the general public as a natural extension of the parental role rather than as an official endorsement of religion.

Despite knotty problems with regard to space allocation, defining the role of teachers, and potentially divisive funding disputes, the limited


294. Church sponsorship of student religious clubs meeting on tax-financed public school premises, used by students who are in the building under compulsory attendance laws, but who are at the club meeting pursuant to parental choice, comes uncomfortably close to the program of religious classes struck down in McCallum. The parents, however, would have a greater choice than the stark study hall or religious class options in McCallum. See McCallum v. Bd. of Educ., 333 U.S. 203, 209 (1948) (describing options). A community religious consortium rather than parents initiated and ran the Illinois program. See id. at 207 (describing facts of case). The church group that the Court said should be permitted to use school premises in a 1993 case did so at a time more clearly divorced from school hours and did not consist of a primarily immature audience in the building under compulsory attendance laws. See generally Lamb's Chapel v. Ctr. Moriches Free Sch. Dist., 508 U.S. 384 (1993) (holding that denial of access was plainly invalid under facts presented). All of these factors would reduce any risk of public perception that school officials were endorsing religion. The risk would be much greater if church groups were permitted to sponsor student religious clubs during, just before or just after the regular school day.

295. See Lamb's Chapel, 508 U.S. at 395 (holding that when variety of community groups, including family-life discussion groups, are permitted to use school facilities at night, church-related family values groups cannot be excluded).
open forum approach affords the best route to allow religion to play a role in public schools in a way that neither establishes nor displays hostility toward religion by its complete exclusion. The equal access option seems to mesh nicely with the Supreme Court's recent confirmation in Santa Fe that "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 school day."296 It provides a meaningful mechanism for effectuating a voluntary choice.

Options such as stand-alone Ten Commandments displays smack of religious indoctrination even when masquerading as legal or ethical instruction because of the significant religious content of the Commandments and similar displays that go well beyond the usual dimensions of a legal code to include religious homilies. The pretense of the secular purpose of teaching the complex sources of legal heritage from a single religious document is not convincing. Multi-faceted displays of an historical and comparative nature that include the Ten Commandments can be structured so as not to endorse religion and thus avoid Establishment Clause violation.297 Such displays, however, by their very nature, require careful calibration of the contents by officials to avoid either endorsement of, or hostility toward, religion. They thus run the risk of becoming either meaningless and bland on the one hand or specific and discriminatory on the other.

A limited open forum in the shape of a student activities period could avoid this official orchestration with its likely descent into bland meaningless or favoritism.298 The clubs would be student-initiated and student-led in secondary schools and parent-initiated and parent-led in the lower grades. A club's continuance would depend on its ability to attract adherents, not official endorsement. Any official attempt to stack the composition of the forum or to encourage or discourage religious organizations would be an improper deviation from neutrality.299 A religious organization participating in such a limited open forum need not craft the contents of its meeting to satisfy official expectations.300 Indeed, the victorious plaintiffs in Mergens included Bible reading and prayer in their meet-

297. See Stone v. Graham, 449 U.S. 39, 42 (1980) (holding that Ten Commandments may be integrated into school curriculum, where Bible may be constitutionally used in “study of history, civilization, ethics, comparative religion, or the like”).
298. See Bd. of Educ. v. Mergens, 496 U.S. 226, 253 (1990) (holding that school personnel could not direct or control contents of club meetings and could only act in custodial capacity to maintain order).
299. The Equal Access Act, approved in Mergens, required that clubs participating in limited open forums not be sponsored either by the schools or outside groups. See id. at 296 (citing Equal Access Act, 20 U.S.C. §§ 4071 (c) (1), (2), (4)-(5)).
ings, as did the Widmar plaintiffs, and the main thrust of both cases is to preclude content-based discrimination against religious organizations when the state has created a limited public or open forum.  

This principle would seem broad enough to prohibit not only content-based discrimination in determining which organizations are admitted to the forum, but also to prohibit censorship of the contents of their meetings after admission. According to the choice of its members, a group could focus on religion, criticism of religion or completely secular subjects. This buffet of options is superior to unified student exercises during which everyone recites an officially approved prayer or listens to officially approved Bible selections. Such exercises not only contravene older decisions such as Engel and Abington, but also violate the principle against state indoctrination of religion that even conservative recent opinions, such as Agostini, continue to recognize.

The risk of official indoctrination remains even when, as in the recent Santa Fe case, the religious exercise is student-led, if the exercise is a unified ceremony at a school-sponsored event on school premises pursued as the result of a collective vote rather than individual choice. A student activities period, with a wide array of choices for students as individuals, would dissipate any risk of indoctrination. If the forum becomes unbalanced as a result of domination by a small array of religious or secular organizations, and this drastically narrows the range of choices, the solution is for those disgruntled by this situation to be more energetic in supporting their own groups rather than to seek a government orchestration of the composition of the forum. Of course, such a system, designed to afford a variety of choices, will never satisfy those who want a guarantee that their views will prevail. But it will help students learn to make decisions for themselves—a valuable lesson for schools to impart.

activity by prohibiting the Federal, State, and local governments from influencing the form or content of any prayer or religious activity*).

301. See Mergens, 496 U.S. at 232 (describing Bible reading, fellowship and prayer at plaintiff's Christian group meetings); id. at 239 (noting that one purpose of statute upheld by decision was to prevent discrimination against religious speech); Widmar v. Vincent, 454 U.S. 263, 265 n2 (1983) ("A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences."); id. at 270 (stating that discrimination against religious speech can be justified only when compelling state interest is achieved through narrowly-tailored means); see also Smart, supra note 248, at 482 (contending that Widmar holds that "atmosphere of worship" does not remove constitutional protection from speech).


303. See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 2283 (2000) (holding that under facts of case, pre-game prayer could be perceived as approved by school and therefore was invalid).