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Recommended Citation

Available at: http://ir.lawnet.fordham.edu/flr/vol70/iss4/3
ARTICLES

THE PUSH TO PRIVATE RELIGIOUS EXPRESSION: ARE WE MISSING SOMETHING?

Kathleen A. Brady*

INTRODUCTION

The last few years have been a busy time for the Supreme Court when it comes to the Establishment Clause of the First Amendment. In 2000, the Supreme Court decided a ground-breaking case relating to government funding of religious institutions,1 and in each of the last two years, the Court has also decided a case relating to religious expression.2 One of the most striking things to note about these cases is how different the trends have been between the Court's jurisprudence regarding religious expression and the Court's funding jurisprudence. When it comes to the funding of religious organizations, the Court's jurisprudence is undergoing profound change. The Court's 2000 decision in Mitchell v. Helms3 extended a trend relaxing the restrictions on government funding of religiously-affiliated primary and secondary schools, but the failure of the Court to produce a majority opinion left the outer bounds of permissible funding far from clear.4 As the Court addresses the constitutionality

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4. Justice Thomas authored the plurality opinion in Mitchell v. Helms, and he was joined by Justices Rehnquist, Scalia and Kennedy. The plurality view articulated new principles for government funding of religious organizations which would significantly broaden the scope of permissible direct aid under the Establishment Clause. Justice O'Connor's concurrence, joined by Justice Breyer, also supported liberalizing the Court's approach to direct funding of religious organizations, but she was unwilling to go as far as the plurality. Justice Souter, joined by Justices Stevens and Ginsburg, favored the Court's traditional restrictive principles.
of school vouchers this term\textsuperscript{5} and questions about funds for faith-based social services programs loom on the horizon, the future of the Court's case law in the funding area promises additional new developments, and the outcomes of unresolved issues are hard to predict. In the funding area, the court is, in short, in the middle of a potentially far-reaching reconstitution of its basic legal principles.

By contrast, when it comes to the Court's decisions regarding religious expression linked to the state, the Court's case law over the past decade has been fairly stable, and the Court's recent decisions have helped to solidify familiar terrain. At the heart of the Court's recent jurisprudence has been a basic dichotomy between religious expression endorsed by the state and private religious expression. In its 2000 decision in \textit{Santa Fe Independent School District v. Doe},\textsuperscript{6} the Court repeated a statement that has become a refrain in recent cases. Quoting from the Court's 1990 decision in \textit{Board of Education v. Mergens},\textsuperscript{7} the Court affirmed that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."\textsuperscript{8} The dissent did not disagree.\textsuperscript{9} Where the majority and dissent differed was over which category the prayers in question belonged to.

This basic dichotomy between religious expression endorsed by the government, which is prohibited, and private religious expression, which is protected, stands in stark contrast to an earlier "accommodationist" approach to religious speech defended by a number of justices in the 1980s and early 1990s. During this period, battles raged over whether the state could permissibly engage in expression endorsing religion. The Court's justices divided into three factions. The separationists viewed religion and government as separate spheres or functions and, hence, they permitted little role for

\textsuperscript{5}In the fall of 2001, the Court granted certiorari in \textit{Simmons-Harris v. Zelman}, 234 F.3d 945 (6th Cir. 2000). The Sixth Circuit in \textit{Simmons-Harris} struck down an Ohio voucher program for troubled school districts subject to state supervision by federal court order. \textit{Id.} at 948. The legislature had adopted the program in response to a court order placing Cleveland's school district under state supervision. \textit{Id.}

\textsuperscript{6}530 U.S. 290 (2000).

\textsuperscript{7}496 U.S. 226 (1990).

\textsuperscript{8}\textit{Santa Fe}, 530 U.S. at 302 (quoting \textit{Mergens}, 496 U.S. at 250 (O'Connor, J., plurality)). This basic dichotomy has appeared in other recent cases as well. \textit{See}, \textit{e.g.}, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995) (recognizing a "distinction between the [government's] own favored message and...private speech"); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 765 (1995) (Scalia, J., plurality) (citing \textit{Mergens} to support the crucial "difference between government speech and private speech").

\textsuperscript{9}\textit{See Santa Fe}, 530 U.S. at 324 (Rehnquist, J., dissenting) (repeating statement in \textit{Mergens} that there is a "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," but arguing that the speech in question should be identified as private, not government, speech).
religious expression by the state. In 1984, in *Lynch v. Donnelly*, Justice O'Connor developed her "endorsement test," which permits religious expression by the state as long as the purpose and effect of the expression are not to endorse religion over nonreligion, nonreligion over religion, or one religious perspective over another. Justice O'Connor's endorsement approach has gained a wide following on the Court, including among the Court's separationists, although the trend has been to interpret the test more strictly than Justice O'Connor initially envisioned. Indeed, in the hands of separationists and others who interpret the test strictly, the endorsement approach has moved very close to separationism. By contrast, the Court's accommodationists envisioned a broader scope for religious expression by the state than either the separationists or supporters of the endorsement test, and accommodationists denied that government expression endorsing religion is always impermissible. According to the accommodationists, the state may engage in expression which "recogniz[es]," "take[s] note" of,

10. For a detailed discussion of the separationist position regarding religious expression by the state, see Kathleen A. Brady, *Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help to Reconcile the Divisions on the Court Regarding Religious Expression by the State*, 75 Notre Dame L. Rev. 433, 509-13 (1999).


12. See Brady, supra note 10, at 515-17. For example, in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), Justice O'Connor disagreed with Justices Blackmun, Brennan, Marshall and Stevens over the proper application of the endorsement test. Justice Blackmun argued that the endorsement approach demands a "secular state" limited to secular speech and symbols. *Id.* at 610-12. Justice Brennan, joined by Justices Marshall and Stevens, argued that any government use of speech or symbols which retain a religious meaning constitutes impermissible endorsement. *Id.* at 637, 643 (Brennan, J., concurring in part and dissenting in part); *see also Lynch*, 465 U.S. at 701, 711, 713 (Brennan, J., dissenting) (stating that the use of symbols which retain religious meaning in holiday displays makes minority groups feel like outsiders). By contrast, Justice O'Connor argued that her endorsement test is consistent with government use of symbols or other forms of expression which retain a religious significance as long as the overall context does not endorse. See *Allegheny*, 492 U.S. at 633-37 (O'Connor, J., concurring in part and concurring in the judgment). Justice Souter has also adopted a strict interpretation of the endorsement test and has disagreed with Justice O'Connor's conclusion that presidential religious proclamations and religious invocations at Thanksgiving can survive the endorsement test. Compare *Lee v. Weisman*, 505 U.S. 577, 630-31 (1992) (Souter, J., concurring), with *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring), and *Allegheny*, 492 U.S. at 630-31 (O'Connor, J., concurring in part and concurring in the judgment).


14. *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part
“accommodat[es],”¹⁶ “acknowledg[es],”¹⁷ and even “support[s]”¹⁸ the central role that religion plays in American society as long as the government does not coerce individuals to participate,¹⁹ engage in proselytizing,²⁰ or give direct aid to religion in such a degree that it in fact “establishes a [state] religion or religious faith, or tends to do so.”²¹

While none of the Court’s accommodationists have repudiated their position, they have not commanded a majority opinion since Lynch v. Donnelly in 1984, and the last major defense of accommodationism was Justice Kennedy’s opinion concurring in the judgment in part and dissenting in part in County of Allegheny v. ACLU²² in 1989. After the Court struck down the practice of using clergy members to deliver graduation prayers in public high schools in its 1992 decision in Lee v. Weisman,²³ accommodationism has appeared to move quietly off the Court’s radar screen as the basic dichotomy reaffirmed in Santa Fe has gained in prominence. In Santa Fe, Justice Kennedy joined with five other justices in agreeing that the relevant distinction is between government expression endorsing religion, which is impermissible, and private speech endorsing religion, which is protected.²⁴ Even Justice Rehnquist and the Court’s two other dissenters agreed with this fundamental distinction.²⁵ The Court’s dichotomy between impermissible government expression and permissible private expression leaves little room for the accommodationist perspective, and at its heart is an affirmation of Justice O’Connor’s endorsement approach. Today, the real battleground within the Court and among the lower courts is over whether the speech at issue is private speech endorsing religion or government speech endorsing religion. If it is the former, it is protected; if it is the latter, it is prohibited.

While this basic distinction between impermissible government speech and protected private speech is now well established, there are some exceptions to this rule. In 1995, in Capitol Square Review and Advisory Board v. Pinette, five justices argued that the Establishment Clause places special limitations on private religious speech when that speech might be confused with government speech endorsing

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¹⁶. Allegheny, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part).
¹⁸. Allegheny, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part).
¹⁹. Id. at 659.
²⁰. See id. at 661.
²¹. Id. at 659 (quoting Lynch, 465 U.S. at 678).
²⁵. See id. at 324 (Rehnquist, C.J., dissenting).
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religion. The Court revisited this issue in 2001 in Good News Club v. Milford Central School, and a number of the justices reaffirmed that the Establishment Clause may justify special restrictions on private religious speech. However, while a majority of justices have favored special restrictions on private religious expression in at least some cases, the Court has never actually applied any special limitations to private religious speech, and the Good News decision makes clear that at least five of the justices would be very hesitant to do so. Thus, in practice, the basic dichotomy between permissible private religious expression and impermissible government religious expression will usually control, and the decisive question will be whether the speech at issue is properly categorized as government speech or private speech. If the speech is categorized as private, it will be protected, but if it is state-sponsored, it will be struck down.

In this article, I will be challenging the appropriateness of using this basic dichotomy between government speech and private speech to evaluate the constitutionality of student religious expression in the public schools. The permissible scope of student religious expression in public schools has been a recurring issue in lower court opinions in recent years, and the expression at issue in the Court’s recent decision in Santa Fe represents just the tip of the iceberg. In Santa Fe, the court struck down a policy authorizing student-initiated, student-led prayers at high school football games on the grounds that the prayers would be school-sponsored religious speech, not private student speech. Both before and after the Santa Fe decision, lower courts have been using the same dichotomy to address the constitutionality of student religious speech at graduations and other school-sponsored assemblies. A similar dichotomy has also been used to evaluate student religious expression in classroom settings. Scholars writing on student religious expression in public schools have generally followed the courts in supporting the basic distinction between private and state speech, and like the courts, they mainly disagree over whether the speech in question is public or private.

I will be arguing that this basic dichotomy is too simplistic for the public school setting. The dichotomy misses the fact that most of the

26. See Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 774-75 (1995) (O'Connor, J., with Souter & Breyer, J.J., concurring in part and concurring in the judgment); Id. at 787-91 (Souter, J., with O'Connor & Breyer, J.J., concurring in part and concurring in the judgment); Id. at 807 (Stevens, J., dissenting); Id. at 817-18 (Ginsburg, J., dissenting).

27. Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093, 2111-12 (2001) (Breyer, J., concurring in part); see id. at 2118 (Souter, J., with Ginsburg, J., dissenting). The majority argued that even if the Establishment Clause can place special limitations on the speech rights of religious speakers, the expression at issue in Good News did not implicate the Establishment Clause because it posed no danger of government endorsement. See id. at 2106.

28. See Santa Fe, 530 U.S. at 301-10.
disputes in the public school context concern speech that is neither purely public nor purely private. When it comes to student religious expression in public schools, there is a significant amount of speech that occupies a "grey area" between private and school speech, and most disputed cases are about such "grey area" speech. While the courts and scholars agree in principle on the basic distinction between private student speech and school speech, they disagree vehemently over whether student speech in captive audience situations is properly categorized as private speech or school speech. Captive audience situations like school-sponsored assemblies, graduations and classroom activities recur as the fault line in court decisions because in these cases both sides are partly right and partly wrong. Grey area speech is both partly private and partly public, and, thus, should be approached as a distinct category of speech requiring unique treatment.

After clarifying the concept of grey area speech, I will propose an approach to address grey area religious speech in the public schools. This approach will seek to balance the critical importance of grey area speech to the educational process in the public schools with the special risks that grey area speech poses to Establishment Clause values. Allowing grey area speech is valuable for mitigating values conflicts in public education, forging common bonds among an increasingly diverse citizenry and strengthening the public schools. However, because grey area speech is partly public, schools should have greater control over grey area religious speech than purely private student speech. Schools have a legitimate interest in protecting the interests of student listeners as well as achieving their own pedagogical goals. Nevertheless, any school supervision over grey area religious speech must also avoid school interference and entanglement in religious matters. The approach that I defend takes into account all of these considerations and strikes a workable balance between Establishment Clause principles, the school’s pedagogical interests, and the great value that grey area religious speech can have for religious and nonreligious students alike.

I. THE PUSH TO PRIVATE RELIGIOUS EXPRESSION

The basic dichotomy that the Supreme Court and the lower federal courts have drawn between government religious speech and private religious speech is not just a judicial phenomenon, but reflects a larger shift in public attitudes about the proper relationship between government and religious expression. Before examining the case law employing this dichotomy in the context of public schools, it is helpful to back up and situate the courts’ decisions against this larger backdrop.

As discussed above, over the last decade the voices of the justices who promoted an accommodationist approach to religious speech in
the 1980s and early 1990s have died down, and a consensus has developed on the Court around the familiar refrain from *Mergens* that private religious expression is protected but government speech endorsing religion is prohibited. This development has not occurred in isolation, and a parallel shift has also occurred among many of the groups in the United States who had supported the accommodationist position in the past. Conservative Christian groups who had battled vigorously in the 1980s and early 1990s to preserve a place for government expression acknowledging America's religious traditions in public institutions like the public schools, town squares and the halls of government have now shifted their agenda. Consistent with the Court's position, many of these groups are now focusing their efforts on protecting private religious expression rather than on preserving government-sponsored religious speech. Indeed, for some of these groups, the effort to retain religious references in government settings has not only taken a back seat to the protection of private religious speech, but has almost disappeared.  

Some scholars have viewed this new push towards protecting private religious expression rather than preserving government religious speech as merely a litigation strategy by conservative religious groups. Because the Court has not been receptive to government-sponsored religious speech, conservative religious groups have shifted their focus away from preserving public religious expression towards protecting private religious speech, and they are repackaging as much religious speech as they can as private expression. However, while all advocacy groups in the church-state

29. For example, as will be discussed further below, in the education context groups like the Christian Legal Society and the National Association of Evangelicals have taken the position that schools must not sponsor religious expression. Religious expression in the public schools is permissible if it is private religious expression, but not if it is government-supported speech. See, e.g., Religion in the Public Schools: A Joint Statement of Current Law (1995) (endorsed by both groups), available at http://ajcongress.org/clsa/clsarips.htm; The Bible and Public Schools: A First Amendment Guide (Bible Literacy Project, Inc. & First Amend. Ctr., eds., 1999) (endorsed by both groups), available at http://www.freedomforum.org. The American Center for Law and Justice has also taken the position that schools must not sponsor religious messages or teach or inculcate religion. See Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 Mercer L. Rev. 1017, 1093-95 (1995).

However, some conservative groups continue to support accommodationism. For example, the National Legal Foundation continues to argue that the government, including the public schools, may sponsor religious expression which acknowledges, accommodates and even encourages religion. See Steven W. Fitschen, *Religion in the Public Schools After Santa Fe Independent School District v. Doe: Time for a New Strategy*, 9 Wm. & Mary Bill of Rts. J. 433, 446-47 (2001). Recently, the National Legal Foundation has criticized other conservative religious groups for adopting the Court's dichotomy between permissible private religious expression and impermissible government expression in the public school context. See id. at 435-41.

30. See, e.g., Steven G. Gey, *When is Religious Speech Not "Free Speech"?*, 2000 U. Ill. L. Rev. 379, 380-81 (citing statement by Jay Sekulow, chief counsel for the
area are certainly interested in developing effective litigation strategies, it would be a mistake to reduce the shift towards protecting private religious expression among conservative groups to mere strategy. The development of a "new consensus" among a wide range of religious organizations and civil liberties groups regarding religious expression issues in the public schools makes this clear. Over the past decade, religious and educational organizations and civil liberties groups from all parts of the spectrum have been working together to develop common ground regarding the place of religion in America's public schools, and these efforts have born much fruit. In 1995, groups as diverse as the American Jewish Congress, the Anti-Defamation League, the Christian Legal Society, the National Association of Evangelicals, the ACLU, and the People for the American Way endorsed a document titled *Religion in the Public Schools: A Joint Statement of Current Law.* That statement then became the basis for a set of guidelines on *Religious Expression in Public Schools* developed by the Clinton administration that same year and sent to all public school districts across the country. At the heart of this new consensus is the same dichotomy that appears in the Court's decision in *Santa Fe.* Private religious expression by students in their personal capacity is to be protected on the same basis as other nonreligious private speech, but school-sponsored expression endorsing religion is prohibited. Conservative, liberal and American Center for Law and Justice, that "the free speech strategy has proven effective with judges across the ideological spectrum against opponents who rely on the First Amendment's clause against the establishment of religion"); see also Fitschen, *supra* note 29, at 435-44 (criticizing other conservative religious groups for adopting a "free-exercise-as-free-speech" strategy which backfired in the Supreme Court's decision in *Santa Fe*).


35. When the Clinton administration reissued its guidelines on religious expression in the public schools in 1998, local school districts received a letter from U.S. Secretary of Education Richard Riley explaining that: These guidelines... reflect two basic and equally important obligations imposed on public school officials by the First Amendment. First, schools...
separationist groups alike have agreed that "[p]ublic schools may not inculcate nor inhibit religion," and the schools do that best when they "protect the religious liberty rights of students of all faiths or none." Neutrality, fairness and respect for religious and nonreligious beliefs alike are the values embraced by participants in the new consensus.

Rosemary Salomone has noted that some conservative groups active in church-state matters have not been regular subscribers to the documents endorsed by the new consensus. The two most prominent of these groups are the American Center for Law and Justice and The Rutherford Institute. In 1995, however, the American Center for Law and Justice issued guidelines regarding religion in the public schools that embrace a similar distinction between private speech and school speech. According to these guidelines, schools must not sponsor religious messages or teach or inculcate religion. They must, however, give private religious expression by students the


Charles C. Haynes, Senior Scholar at the Freedom Forum First Amendment Center, has been instrumental in the process of forging consensus among religious, educational and civil liberties groups, and he has written several pieces that explain the development of the new consensus and the various principles and documents endorsed by this consensus. See, e.g., Haynes, supra note 31; Finding Common Ground, supra note 33.


37. See Haynes, supra note 31, at 102-03. School endorsement of religion is rejected. Id.


39. See Sekulow et al., supra note 29, at 1091-95.

40. See id. at 1018, 1091-95.
same protections as nonreligious student speech. John Whitehead, President of The Rutherford Institute, has also authored several articles embracing the distinction between impermissible government religious speech and protected private student expression.

What accounts for this push to private religious expression among religious groups who only a decade ago were defending public religious expression by the state? There are certainly numerous factors involved, but three factors in particular have played a prominent role in this shift. In the first place, in recent years there has been a growing recognition of the deep diversity of religious and nonreligious perspectives in American society among conservative religious groups, and these groups are increasingly aware that their own views might not prevail over others if the state were permitted to endorse religion. When Paul Weyrich, a leader of the religious right since the 1970s, encouraged fellow Christians to abandon politics in 1999, he expressed this sentiment bluntly: "I no longer believe that there is a moral majority." Second, the process of forging consensus with a wide range of religious and civil liberties groups also certainly helped to bring conservative and liberal participants alike closer to a middle position. Agreement on protecting the free speech and free exercise rights of students was easy to obtain, and conservative groups could agree that robust protections for private religious activity are first priority.

Third, another factor that has contributed to the recent focus on protecting private religious speech rather than preserving state religious expression has been a growing belief among conservative religious groups that religion is best promoted and protected through private expression and activity rather than through state action in the public realm. This is particularly so as the increasing pluralism of American society has fractured a sense of common values. If religious expression is to be deep and meaningful, it will not be the type of ecumenical, watered-down, least-common-denominator religious expression characteristic of state speech, but it will come from religious individuals themselves.

41. See id.
44. See, e.g., Michael W. McConnell, Equal Treatment and Religious Discrimination, in Equal Treatment of Religion in a Pluralistic Society 30, 34-35 (Stephen V. Monsma & J. Christopher Soper eds., 1998). McConnell makes a similar argument in his defense of educational choice, which has replaced public school reform as the priority of many conservative religious individuals and groups. According to McConnell, only private schools can effectively inculcate the public
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All of these factors have contributed to the push to private religious expression among many religious groups in American society, and the result has been that fewer and fewer groups are assigning high priority to state religious speech in contexts like the public schools. Protecting private religious speech is of great importance, but preserving state endorsements of the country's religious heritage is much less so. This shift was illustrated well when representatives from a wide variety of religious groups as well as advocacy groups active in the church-state field were invited by The American Assembly to participate in an Assembly on "Religion in American Public Life" in 2000.\(^5\) When it came to the place of religion in public schools, Assembly participants barely discussed accommodationism, but they quickly agreed upon the importance of protecting the free exercise and free speech rights of students as well as other principles embraced by the new consensus.\(^6\)

The recent push to the private among religious groups in American society has not been limited to religious expression or the context of the public schools. At the same time that conservative groups have been shifting their focus from publicly-sponsored speech to private religious expression, there has been an increasing trend to withdraw generally from politics and other institutions of mainstream American public life. For example, instead of battling for the reform of public education, many conservative Christians are looking towards a solution in private religious schools and home-schooling. In recent years, the numbers of students attending conservative Christian schools has continued to grow,\(^7\) and there has been a steep increase in

\(^{v}\)irtue necessary for sustaining American democracy because when public schools teach virtue in a way that is acceptable to the wide range of different world views in modern American society, "the result is a thin, least-common-denominator version of public virtue too pale to compete effectively with the forces of pop culture and materialism that are all around us." Michael W. McConnell, The New Establishmentarianism, 75 Chi.-Kent L. Rev. 453, 455 (2000) [hereinafter, McConnell, The New Establishmentarianism]. The same would be true if the government tried to engage in religious speech acceptable to all Americans.

45. The American Assembly was established by Dwight D. Eisenhower at Columbia University in 1950. Each year it holds at least two nonpartisan meetings on issues of national importance. In March of 2000, the topic of the Assembly was "Matters of Faith: The Role of Religion in American Public Life." The report of this Assembly is reprinted in al-Hibri et al., supra note 31, at 159.

46. See the section on "Educating for Citizenship in a Religiously Diverse Society" in the Assembly's report. Final Report of the Ninety-Sixth American Assembly (2000), reprinted in id. at 159, 164-66. For other principles embraced by the new consensus, see discussion infra notes 292-301 and accompanying text.

47. The numbers of students in conservative Christian schools rose rapidly from the mid-1970s through the early 1980s. See James C. Carper, The Christian Day School, in Religious Schooling in America 110, 114 (James C. Carper & Thomas C. Hunt eds., 1984); James C. Carper & Jeffrey A. Daignault, Christian Day Schools: Past, Present, and Future, in Religious Schools in the United States K-12, at 315, 318-19 (Thomas C. Hunt & James C. Carper eds., 1993). Although growth rates have slowed, over the past decade the numbers of students in conservative Christian schools have continued to grow steadily as have their percentage of the total private
the numbers of children being home-schooled. In politics as well, conservative Christians have been withdrawing, and once mighty organizations of the Christian right have been floundering. In 1999, two leaders of the Christian right, Paul Weyrich and Cal Thomas, announced the failure of organized political efforts to change American society and culture and urged others to follow them in abandoning political advocacy and separating from mainstream American culture. In Weyrich's words, what is needed is a "strategy of separation," a "sort of quarantine" that will preserve traditional religious communities and their ways of life from being overwhelmed by the larger society. To be sure, George W. Bush's victory in the recent presidential race has meant more political power for conservative religious groups, and they have not rejected the opportunity (including Weyrich himself). However, the shift in their agenda has not changed. Instead of focusing their energy on making public schools more hospitable to religious students and values, the priority for religious conservatives is publicly-funded vouchers for private education. The triumphalist effort of the 1980's to convert school population. See the National Center for Education Statistics's Private School Universe Survey for the years 1989-90, 1991-92, 1993-94, 1995-96, 1997-98, 1999-2000 (students in conservative Christian schools have grown from 10.9% of the total private school population in 1989-90 to 15% in 1999-2000 with an increase of approximately 250,000 students); see also Carper & Daignault, supra, at 319 ("Although their rate of growth in the United States has slowed since the early 1980s, [evangelical and fundamentalist Christian day schools], along with the burgeoning home school movement, still constitute the most dynamic segment of private education.").

48. See Patricia M. Lines, Homeschoolers: Estimating Numbers and Growth (web ed. Spring 1999) (paper available from the National Institute on Student Achievement, Curriculum, and Assessment, in the Office of Educational Research and Improvement, U.S. Department of Education). Patricia Lines writes: "Homeschooling has more than doubled--possibly tripled--in the 5 years between the 1990-91 school year and the 1995-96 school year.... Within the private education world, it has become a major sector, where it represents approximately 10 percent of the privately-schooled population." Id. at 1. For the U.S. Department of Education's most recent estimates of the numbers of children in home-schooling, see National Center for Education Statistics, Homeschooling in the United States: 1999 (2001).

49. See, e.g., Bill Carter, TV Works in Mysterious Ways for Pat Robertson, N.Y. Times, July 30, 2001, at C1 (discussing Christian coalition losing membership and influence); Andrew Sullivan, Pushing the Puritan Over the Clifftop, Sunday Times (London), July 4, 1999, Features (same).


51. Margaret Talbot, A Mighty Fortress, N.Y. Times, Feb. 27, 2000 (Magazine), at 34, 36.


53. In their defense of educational choice, conservative religious groups are now being joined by a host of other groups who are challenging state monopolization of publicly funded education. These groups include inner-city minorities and their clergy, scholars in the liberal tradition and from across disciples, libertarians, and an increasing number of political leaders on the left and right. See Salomone, supra note
and reclaim American culture has ended. The new agenda is protecting private religious activity from the dangers of a hostile public culture.

In 1999, I wrote my own defense of a push to the private in religious expression. I argued that robust private religious expression in the public sphere rather than government expression best protects religion and religious liberty and is also the most promising way to balance and harmonize the concerns of all the factions on the Court, separationist, accommodationist and supporters of the endorsement test alike. I still believe that my thesis is generally correct, and I would certainly reject any renewed efforts by conservative religious groups to commandeer public culture through government-supported religion. However, in this article I will focus on something that my previous article did not address: the existence and value of grey area speech in settings such as the public schools. Those who have joined in the push to private religious expression, whether they are conservative religious groups, other members of the new consensus, or justices and judges of the federal courts, have also been missing the importance of grey area speech. Grey area religious expression and the public schools in which this expression occurs are critical for promoting understanding, respect and engagement among diverse perspectives in an increasingly pluralistic society. In this article, I will propose an approach for addressing religious expression that recognizes and accounts for the existence and value of grey area speech.

II. THE DICHOTOMY BETWEEN GOVERNMENT RELIGIOUS SPEECH AND PRIVATE RELIGIOUS EXPRESSION

Up to this point, I have only written in very general terms about the dichotomy that the Supreme Court and other federal courts have drawn between government speech endorsing religion and private religious speech. This section will examine the case law employing this dichotomy in the public education context. As will become clear, there is actually less consensus among courts and religious and civil liberties groups than at first meets the eye. While the judges and litigants alike embrace the basic distinction between government speech and private speech, there is often vigorous disagreement over whether the speech involved is protected private speech or prohibited government speech. Generally speaking, the disagreements arise in situations involving captive audiences where strong arguments can be made that the speech is both private and public.
A. Student Religious Speech at Graduations, School Assemblies and other School-Sponsored Events

The Supreme Court's recent decision in Santa Fe\textsuperscript{55} was the culmination of a series of lower court cases addressing student religious speech at graduation ceremonies and, to a lesser extent, other school-sponsored events and assemblies. After the Supreme Court's decision in Lee v. Weisman\textsuperscript{56} in 1992, it was clear that clergy-led graduation prayers sponsored and directed by schools were unconstitutional. According to the Court in Weisman, where a school selects the clergy person and directs and controls the content of the prayers, the result of the school's involvement is that the prayers bear the imprint of the state.\textsuperscript{57} The state-sponsored character of the prayers together with the graduation context also results in a coercion problem. Dissenting students who object to the prayers will experience public and peer pressure to stand or at least maintain a respectful silence during the prayers, and high school students may perceive this silence to be the equivalent of state-coerced participation in the prayers.\textsuperscript{58} While dissenting students are, in theory, free not to attend their graduation ceremony, graduation is an event of great importance to high school students and, thus, one that they are, in practical effect, compelled to attend.\textsuperscript{59}

After Weisman, a number of school districts across the country established policies that replaced clergy-led graduation prayer with student-initiated and student-led invocations. These policies usually gave the graduating class the opportunity to vote upon whether to have a prayer or other type of inspirational message at graduation, and if the graduating class elected to have an invocation, the class would elect a student volunteer to deliver the message. Prior to the Supreme Court's decision in Santa Fe, the lower courts decided six cases involving these policies, and the courts divided over their constitutionality. In 1992, in Jones v. Clear Creek Independent School District, the Fifth Circuit upheld a policy permitting seniors to choose student volunteers to deliver "nonsectarian, non-proselytizing invocations" at their graduation ceremonies.\textsuperscript{60} A year later, the

\textsuperscript{55} See supra notes 6-8, 28 and accompanying text.
\textsuperscript{56} 505 U.S. 577 (1992).
\textsuperscript{57} Id. at 587-90.
\textsuperscript{58} Id. at 593, 595-96, 598.
\textsuperscript{59} Id. at 594-98.
\textsuperscript{60} Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 964 (5th Cir. 1992). The Fifth Circuit's 1992 decision was actually the second time that it considered this prayer policy. In 1991, the Fifth Circuit upheld the same policy in Jones v. Clear Creek Independent School District, 930 F.2d 416 (5th Cir. 1991). Then, in 1992, in the same term that it decided Lee v. Weisman, the Supreme Court vacated the 1991 decision and directed the Fifth Circuit to reconsider the case in light of Weisman. See Jones v. Clear Creek Indep. Sch. Dist., 505 U.S. 1215 (1992). The Fifth Circuit did so and reached the same result in its 1992 decision.
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district court in *Gearon v. Loudoun County School Board* struck down a policy allowing the senior class to vote upon whether to have a student-delivered “nonsectarian, nonproselytizing invocation/benediction/prayer or inspirational message” at graduation. In 1994, in *Harris v. Joint School District No. 241*, the Ninth Circuit struck down a policy allowing seniors to determine whether they will have an invocation and benediction at graduation and, if so, who would say it. In 1996, the Third Circuit sitting *en banc* in *ACLU v. Black Horse Pike Regional Board of Education* followed suit and struck down a policy allowing seniors to vote on whether to have “prayer, a moment of reflection, or nothing at all” at their graduation.

In 1999, the Fifth Circuit revisited the issue of student-initiated graduation prayer in *Santa Fe* along with a companion policy permitting student-initiated prayer at high school football games. The Santa Fe School District’s graduation policy permitted the senior class to vote upon whether to have a student-elected volunteer deliver an “invocation and benediction” as part of their graduation exercises. Relying on its decision in *Clear Creek*, the Fifth Circuit held that the school district’s policy would only be constitutional if it required any prayers to be nonsectarian and nonproselytizing. The district’s football game policy provided that students may vote upon whether to have a student deliver a “brief invocation and/or message” at the pre-game ceremonies. Just before the Supreme Court delivered its decision in *Santa Fe* upholding the Fifth Circuit’s judgment regarding the football policy, the Eleventh Circuit sitting *en banc* upheld a graduation prayer policy in *Adler v. Duval County School Board (Duval I)*. The Duval County policy permitted the graduating class to vote on whether to have a student volunteer...
selected by the class deliver "a brief opening and/or closing message, not to exceed two minutes."\(^{70}\)

In each of these lower court cases addressing student-initiated, student-led prayer, the result turned on whether the court viewed the prayers as private student expression or school-sponsored speech endorsing religion. The *Clear Creek* and *Duval I* courts upheld the policies in those cases on the grounds that any religious messages delivered as a result of the policies would be private religious expression.\(^{71}\) By contrast, the courts in *Black Horse*, *Harris* and *Gearon* held that the messages would be public, school-sponsored speech.\(^{72}\) The Fifth Circuit in *Santa Fe* held that restrictions requiring messages to be nonsectarian and nonproselytizing would be necessary to ensure that student prayers at graduation do not carry the imprimatur of the state.\(^{73}\) At football games, by contrast, student prayers would carry the imprimatur of the state regardless of any nonsectarian, nonproselytizing restrictions.\(^{74}\)

The courts which concluded that the prayers would be private student speech focused on a number of factors. For example, the courts argued that where the decision about whether or not to have an invocation is made by the senior class and the speaker is a student volunteer chosen by their peers, school involvement is minimal and any prayers that result do not bear the imprint of the state.\(^{75}\) Judges in several cases also noted that the policy at issue did not permit the school to monitor, supervise or edit the content of any student messages,\(^{76}\) nor did most of the policies require the messages to be religious.\(^{77}\) In several cases, school districts took steps to negate any inference of endorsement by requiring disclaimers to inform those in

\(^{70}\) Id. at 1072.

\(^{71}\) See id. at 1071; Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 968-69 (5th Cir. 1992).


\(^{73}\) See *Santa Fe*, 168 F.3d at 817-18.

\(^{74}\) See id. at 822-23.

\(^{75}\) See *Duval I*, 206 F.3d at 1071; *Clear Creek*, 977 F.2d at 968-69; see also *Adler* v. Duval County Sch. Bd. (Duval II), 250 F.3d 1330, 1342 (11th Cir. 2001) (en banc), reinstating 206 F.3d 1070 (11th Cir. 2000) (en banc), cert. denied, 122 S. Ct. 644 (2001); *Black Horse*, 84 F.3d at 1489-90 (Mansmann, J., with Nygaard, Alito & Roth, J.J., dissenting); *Harris*, 41 F.3d at 460 (Wright, J., concurring in part and dissenting in part).

\(^{76}\) See *Duval II*, 250 F.3d at 1336-37; *Duval I*, 206 F.3d at 1071; see also *Santa Fe*, 168 F.3d at 836 (Jolly, J., dissenting); *Black Horse*, 84 F.3d at 1490 (Mansmann, J., with Nygaard, Alito & Roth, J.J., dissenting). But see *Clear Creek*, 977 F.2d at 967 (stating that the policy permits review of messages to ensure that they are nonsectarian and nonproselytizing); *Gearon*, 844 F. Supp. at 1100 (stating that school reviewed student messages before they were delivered).

\(^{77}\) See *Duval II*, 250 F.3d at 1337-38; *Duval I*, 206 F.3d at 1076; *Clear Creek*, 977 F.2d at 969; see also *Santa Fe*, 168 F.3d at 831 (Jolly, J., dissenting).
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attendance that student-delivered messages are student speech, not messages endorsed by the school.78 According to the court in Duval I, if student-initiated, student-led prayers become public, state-sponsored speech merely by being delivered at a graduation program controlled by the school, all graduation speakers would be turned into state speakers.79 In the Fifth Circuit's decision in Santa Fe, the dissent made the additional argument that the District's graduation and football prayer policies created limited public fora for private student speech.80 The fora were open for the delivery of religious or nonreligious invocations, and any graduating student (or, in the case of the football policy, any student) could qualify as the speaker upon being elected by their classmates.81

The judges who concluded that the prayers would be school-sponsored speech, rather than private student speech, pointed to factors supporting the public nature of the speech. For example, the judges argued that while students make the ultimate decision about whether to have an invocation or other message and they choose the speaker, the graduating class only has this power because the school has given it to them.82 The school also oversees the selection process,83 and when the speech occurs, it is at a regularly scheduled ceremony sponsored and controlled by the school, held on school property at school expense, during a time scheduled by school officials, and before an audience assembled by the school for an official purpose.84 Schools carefully orchestrate and supervise graduation ceremonies, and in these circumstances, delegation of one aspect of the program to students does not divorce the student speech from the school but, rather, turns the student speaker into a state actor.85 Some judges also argued that the school policies explicitly or implicitly encouraged prayer by restricting the duration of the speech or otherwise signaling that prayer is the preferred message.86 In other cases, the court pointed to the history leading up to the policy as evidence that the school district's real purpose was to circumvent

78. See Black Horse, 84 F.3d at 1496 (Mansmann, J., with Nygaard, Alito & Roth, J.J., dissenting); Harris, 41 F.3d at 460 (Wright, J., concurring in part and dissenting in part).
79. See Duval I, 206 F.3d at 1080.
80. See Santa Fe, 168 F.3d at 831-33, 834-35 (Jolly, J., dissenting).
81. See id. at 831, 835 (Jolly, J., dissenting).
82. See Black Horse, 84 F.3d at 1479; Harris, 41 F.3d at 454.
83. See Duval I, 206 F.3d at 1092-93.
84. See Santa Fe, 168 F.3d at 817-18; Black Horse, 84 F.3d at 1479-80; Harris, 41 F.3d at 454.
85. See Duval I, 206 F.3d at 1093-94 (Kravitch, J., with Barkett, J., dissenting); see also Harris, 41 F.3d at 455 ("When the senior class is given plenary power over a state-sponsored, state-controlled event such as high school graduation, it is just as constrained by the Constitution as the state would be."); Black Horse, 84 F.3d at 1483 (citing Harris for the same).
86. See Duval I, 206 F.3d at 1092 (Kravitch, J., with Barkett, J., dissenting).
Weisman and perpetuate a long-standing tradition of prayer at graduation. In addition, judges have also disputed the claim that the policies create a limited public forum for private student speech. Where access is limited to one or two speakers and does not provide an opportunity for the presentation of a wide range of viewpoints, no public forum is created.

When the Supreme Court evaluated Santa Fe's football game prayer policy, the Court invoked nearly all of these arguments made by the courts below. While three justices led by Chief Justice Rehnquist argued that any prayers that may occur as a result of the policy would be private speech, the majority viewed the prayers as school-sponsored speech. Writing for the majority, Justice Stevens began by rejecting the claim that Santa Fe's football policy created a limited public forum. According to the Court, the school did not open the pre-game ceremony to general student participation, and the election system ensured that the students who did have access to the stage would always represent majoritarian views. These facts, the Court argued, are inconsistent with the creation of a limited public forum. The Court then argued that the school district had not succeeded in divorcing itself from the religious content of the messages by delegating the decision about whether to have an invocation to the students. According to the Court, the students only had the opportunity to vote about whether or not to have an invocation because the school district gave them that opportunity, and the school took an active role in overseeing the election. By limiting the messages to solemnizing statements and expressly referring only to invocations in the text of the policy, the school district also circumscribed the purpose of the speech and clearly invited and encouraged prayer over secular speech.

Also contributing to school endorsement of the religious messages was the fact that the invocations would be broadcast to an audience assembled by the school via the school's public address system and as part of a regularly scheduled, school-sponsored function taking place.

87. See Black Horse, 84 F.3d at 1480; see also Adler v. Duval County Sch. Bd. (Duval II), 250 F.3d 1330, 1344-46 (11th Cir. 2001) (Kravitch, J., with Anderson, C.J., & Carnes & Barkett, JJ., dissenting), cert. denied, 122 S. Ct. 664 (2001); Duval I, 206 F.3d at 1097-98 (Kravitch, J., with Barkett, J., dissenting); Santa Fe, 168 F.3d at 816.
88. See Duval I, 206 F.3d at 1103-04 (Kravitch, J., with Barkett, J., dissenting); Santa Fe, 168 F.3d at 819-22; see also Black Horse, 84 F.3d at 1478.
90. See id. at 302-10.
91. See id. at 303-04.
92. See id.
93. See id. at 305-06.
94. See id.
95. See id. at 306-07.
on school property. The Court conjured up the image of a pre-game ceremony "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." In such a context, with the "school's name... likely written in large print across the field and on banners and flags," the audience cannot help but perceive the student's message as one that has been delivered with the approval and endorsement of the school administration. The Court further argued that the history of the policy reinforced the likely perception that the prayers are delivered with school support. According to the Court, the Santa Fe School District had long had a practice of officially-sanctioned prayer at football games and graduations, and its prayer policies were undoubtedly developed to preserve this practice. Because the prayers bear the same imprint of the state that was present in Weisman and attendance at football games is required for some students and strongly desired by others, the Court also found the same coercive pressures in Santa Fe that were present in Weisman. Even if a prayer were never delivered pursuant to the policy, it would still violate the First Amendment because the purpose and perception of the policy are to endorse prayer and because the policy subjects the "inherently nongovernmental subject of religion to a majoritarian vote." By "turn[ing] the school into a forum for religious debate," the policy encourages "divisiveness along religious lines" and "impermissibly invade[s] [the] private sphere" of religious belief and worship.

The Supreme Court's decision in Santa Fe made clear that the lower courts were on the right track when they used the basic dichotomy between school-sponsored speech and private student speech to evaluate the constitutionality of student-initiated prayer at school events. However, Justice Stevens's opinion left many open questions about when student-initiated speech should be characterized as public or private, and after Santa Fe, the judges in the lower courts have continued to disagree vehemently over the proper categorization of student speech at school events.

96. See id. at 307.
97. Id. at 308.
98. Id.
99. See id.
100. See id. at 309.
101. See id. at 310-12.
102. See id. at 313-16.
103. Id. at 317.
104. Id. at 316.
105. Id. at 317; see also id. at 311.
106. Id. at 311.
Two Eleventh Circuit decisions since *Santa Fe* illustrate these divisions. In each of these cases, the Eleventh Circuit had issued opinions prior to the Supreme Court's decision in *Santa Fe*, but following *Santa Fe*, the Court vacated the judgments and remanded the cases to the Eleventh Circuit for consideration in light of *Santa Fe*. In both cases, the Eleventh Circuit reinstated its earlier finding that the speech at issue was private student speech rather than state speech. The decisions rested on a narrow interpretation of the Court's opinion in *Santa Fe*. The dissenters read *Santa Fe* more broadly. All of the judges agreed that after *Santa Fe*, school policies designed to encourage prayer over secular speech or to submit the issue of prayer to a vote are unconstitutional. However, they disagreed about whether any of the other factors cited by the Court in *Santa Fe* are enough by themselves to turn student speech into school-sponsored speech.

In *Adler v. Duval County School Board (Duval II)*107, the Eleventh Circuit reinstated its 2000 decision in *Duval I* upholding Duval County's graduation prayer policy. Reading *Santa Fe* narrowly, the *Duval II* court held that two factors were decisive to the Court's finding of school-sponsored speech. First, the Santa Fe School District policy allowed the school to regulate the content of the student messages, and, second, the policy, by its terms, invited and encouraged prayer.108 According to the court, neither of these factors were present in the Duval policy,109 and the Duval policy also did not involve a vote on prayer per se.110 Students voted on whether to have a student deliver a message wholly of his or her own choosing, which could be religious or not depending upon what the selected student decided to do.111 The court emphasized that "what turns private speech into state speech . . . is, above all, the additional element of state control over the content of the message," and that additional element was absent here.112 The dissenting judges disagreed and read *Santa Fe* more broadly. According to Judge Kravitch, the court in *Santa Fe* also focused on the history of the policy, and like the policy in *Santa Fe*, the purpose of the Duval policy was to encourage prayer.113 Judge Carnes argued that whenever a school board delegates its power to choose a messenger and message for a school-

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108. See id. at 1336-37.
109. See id.
110. See id. at 1338-39.
111. See id.
112. Id. at 1341.
113. See id. at 1345-47 (Kravitch, J., with Anderson, C.J. & Carnes & Barkett, JJ., dissenting).
controlled event to a majority of students, the resulting message is the message of the school.\textsuperscript{114}

The Eleventh Circuit judges also disagreed about how broadly to read \textit{Santa Fe} in \textit{Chandler v. Siegelman (Chandler II)}.\textsuperscript{115} In 1999, the Eleventh Circuit in \textit{Chandler v. James (Chandler I)} held that a U.S. District Court had unconstitutionally enjoined the DeKalb County school system in Alabama from permitting student-initiated prayers or other devotional speech aloud in classrooms, over the public address system, or at school-related assemblies, sporting events or graduations.\textsuperscript{116} According to the court in \textit{Chandler I}, student-initiated speech at school assemblies and other school-related events is only impermissible if the school actively participates in, encourages or supervises the speech.\textsuperscript{117} If the school merely permits a student to speak without requiring the speech, commanding it or suggesting it, the message is protected private speech, not prohibited public speech.\textsuperscript{118} After the Supreme Court's decision in \textit{Santa Fe}, the Eleventh Circuit reconsidered its decision in light of \textit{Santa Fe} and reinstated that opinion in \textit{Chandler II}. According to the court in \textit{Chandler II}, \textit{Santa Fe} prohibits a school from "taking affirmative steps
to create a vehicle for prayer.”¹¹⁹ It did not hold that any student religious expression at school-sponsored events was prohibited if the school did nothing to “actively or surreptitiously encourage[] it.”¹²⁰ Dissenting from the Eleventh Circuit’s denial of an en banc hearing in Chandler II, Judge Barkett read Santa Fe very differently and far more broadly. According to Judge Barkett, the Court in Santa Fe held that when “a religious message [is] broadcast over a public address system controlled by the government and conducted on government property at an official school-related event,” the message becomes school-endorsed speech.¹²¹ School encouragement of prayer or a vote on prayer would also render the prayer school-sponsored expression, but that is not required. The delivery of the message to an audience assembled for an official school-related event controlled and supervised by the school is enough to render the speech school speech endorsing religion.

Thus, it is clear that Santa Fe did not settle the issue of when student-initiated speech at graduations or other school-related events is constitutional. The Court affirmed that the basic dichotomy between government speech and student speech controls the analysis, but beyond situations where schools encourage prayer over secular speech or administer a vote on the issue of prayer itself, whether speech is private or public is largely open for debate. The disagreements on the Eleventh Circuit demonstrate that debate will, indeed, continue for some time to come.

It would, however, be a mistake to blame Justice Stevens’s opinion in Santa Fe for the ongoing disagreements over when student-initiated speech is public or private. The real reason that the issue will not go away is that the speech at issue is often both public and private. In some respects, the Supreme Court’s choice of the prayer policy in Santa Fe as a vehicle for addressing the constitutionality of student-initiated prayer was unfortunate because the Santa Fe case had a number of bad facts that obscured the most difficult issues at stake.

Santa Fe is a small, predominantly Protestant community in south Texas.¹²² There was strong evidence from the history of the policy’s development and other related facts that the school district’s purpose was to encourage student prayer and that the school was not, in fact, neutral between religious and nonreligious speech. For example, at the outset of the litigation in this case, the school district had a policy allowing the student occupying the position of “student council chaplain” to deliver prayers at football games.¹²³ When this policy and

¹¹⁹ Chandler II, 230 F.3d at 1315.
¹²⁰ Id. at 1317.
¹²¹ Chandler v. Siegelman, 248 F.3d 1032, 1033, 1035 (11th Cir. 2001) (Barkett, J., dissenting), denying reh’g en banc 230 F.3d 1313 (11th Cir. 2000).
¹²³ See id.
the school district’s practice of allowing prayer at graduation were challenged, the school district developed several versions of the policies at issue in *Santa Fe*.  

The final version was modeled on the policy upheld by the Fifth Circuit in *Clear Creek* except that sectarian and proselytizing speech was permitted unless the district court held that a nonsectarian, nonproselytizing restriction was required by the First Amendment. The litigation in *Santa Fe* also initially involved several other challenges to school conduct. For example, the plaintiffs alleged that one of the school district’s teachers had announced a Baptist religious revival in class and criticized the Mormon faith, and that other employees had encouraged membership in religious clubs, criticized other minority beliefs, and distributed Bibles on campus. The district court below ordered the school district to establish policies to deal with these and other First Amendment infractions by school employees, and that ruling was not appealed.

With background facts like these, it is easy to see why the audience in *Santa Fe* would perceive student prayers to be the equivalent of state speech. However, consider a policy with better facts. Imagine, for instance, that instead of the small, largely Protestant community in *Santa Fe*, the policy is adopted by a religiously and culturally diverse community in the suburbs of a large metropolitan city. The school district’s policy provides for graduating students to vote upon whether to have “brief inspirational messages” at the beginning or end of the graduation ceremony. Alternatively, the district’s policy provides for the messages without a student vote. Either way, if a decision to have the messages is made, four speakers are then chosen randomly from a list of student volunteers. In most years, the messages are diverse and represent a range of religious and nonreligious perspectives. The school does not review the messages, and the graduation programs include a disclaimer stating that the statements made by the student speakers do not represent the views of the school.

With good facts like these, it is far more difficult than it was in *Santa Fe* to see the student messages as the equivalent of school speech, but it is also too simplistic to see the student messages as purely private speech. A number of factors support the private nature of the speech. The messages that are delivered are chosen or created by the students themselves. The school does not control or define the content of the message except to specify that they be brief and inspirational. Nor does the school review or edit what the student will say. In addition,

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124. See *id.* at 296-98; Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 811-12 (5th Cir. 1999), aff’d, 530 U.S. 290 (2000).
125. See *Santa Fe*, 530 U.S. at 296-98; *Santa Fe*, 168 F.3d at 812.
126. *Santa Fe*, 168 F.3d at 810.
127. See *Santa Fe*, 530 U.S. at 295.
128. See *id.* at 295 n.3.
129. For the procedural history of these claims, see *Santa Fe*, 168 F.3d at 812-14.
the mechanism for choosing volunteers is neutral with respect to the religious or nonreligious beliefs of potential speakers, and as administered, the policy provides for a range of diverse viewpoints to be presented. The disclaimer also makes clear that the statements represent the personal views of the students themselves. In a situation like this, the state has clearly relinquished much of its control over the speech, and any religious messages that result are manifestly not the same thing as state-directed prayer.

On the other hand, there remain public aspects to the speech. The messages occur at a school-sponsored event on school property via the school's public address system, and even more importantly, they are clearly an integral part of that state-sponsored event. The school provides the opportunity for the speech. The students "take the stage" at the graduation and speak from the school's pulpit. They use the "machinery of the State" to express their views. As the students speak with the permission of the school before an audience assembled for official school purposes and on a platform with school officials, listeners will naturally perceive the messages as speech approved by the school. Indeed, there will be "quadruple endorsement" here. All of the views represented will receive a general endorsement by the state.

It is, furthermore, difficult to argue that the policy has created a limited public forum. The state creates a limited public forum when it opens up its property for expressive use by a designated segment of the public or for the discussion of certain subjects. The Supreme Court has held that a limited public forum is not created by inaction on the part of the state, nor by merely permitting limited discourse by select speakers. To create a public forum, the government must intentionally open up its property as a forum for public discourse. To determine whether the government has created a public forum, the Court looks to the "policy and practice" of the government to determine whether it intended to open up a public forum, as well as the nature of the property and its compatibility with expressive activities, and the use of the forum.

In the facts I have described, the school clearly did not intend to open up a forum for general expressive use by the graduating class or for the discussion of certain topics or subjects. The school has limited

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130. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 226 (1963) (indicating that the Free Exercise Clause does not mean that a majority can "use the machinery of the State" to practice its beliefs).
132. See Cornelius, 473 U.S. at 802.
133. See id.
134. See id.; Perry, 460 U.S. at 47.
135. See Cornelius, 473 U.S. at 802.
136. See Perry, 460 U.S. at 47.
the number of speakers to four, and while the selection process is designed to be neutral between religious and nonreligious viewpoints, students cannot take any perspective on their subject matter. To the contrary, all student messages must be inspirational. A message denigrating the event or one's fellow students will not be tolerated, nor would a political diatribe or speech designed to be a practical joke. This is not a soapbox opportunity for speakers to engage in purely private speech. Students cannot speak about whatever they would like. They have essentially been commissioned by the school to play the important role of delivering uplifting messages to the graduating class and their families.

Student speech at school-sponsored events like graduations and assemblies is also unlike the type of expression found to be private in *Mergens*. Recall that Justice O'Connor's plurality opinion in *Mergens* is the source for the Court's recent dichotomy between government speech and private speech. *Mergens* addressed the constitutionality of the Equal Access Act. The Equal Access Act was passed by Congress in 1984, and it guarantees student religious clubs equal access to school facilities when they are made available to other noncurriculum-related student groups for meetings during noninstructional time.  

The school in *Mergens* contested the constitutionality of the Act on the grounds that permitting student religious clubs to meet on campus with other school clubs would send an impermissible message of state endorsement of religion. Justice O'Connor denied that an equal access policy would have that effect. The message will be one of neutrality rather than endorsement of religious speech. The activities of student-led, student-initiated religious clubs meeting after school are private student speech endorsing religion, and "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."  

Student speech before a captive audience at a school-related event is, however, very different than the speech at issue in *Mergens*. Under the Equal Access Act, attendance at the meetings of student religious clubs must be voluntary. By contrast, attendance at school-related events and functions is usually not voluntary. In addition, while the Equal Access Act prohibits school employees from participating in the activities of religious clubs, school officials not only participate in, but they run, school events and assemblies. Furthermore, the

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139. See id. at 251.
140. Id. at 250.
141. § 4071(d)(1), (2), and (4).
142. § 4071(c)(3).
activities of religious clubs take place during noninstructional hours and their activities are noncurricular. School-related events and assemblies, by contrast, are part and parcel of official school activities.

In reality, then, even in situations where a school does not actively try to invite or encourage religious messages over nonreligious ones but, instead, provides a fair opportunity for student speech regardless of its religious or secular viewpoint, student speech before a captive audience is both public and private. Rather than categorizing it as either private speech or school speech, it is more accurate to say that it belongs to both the private and public box. Where student-initiated speech takes place at a school-sponsored event in a captive audience situation, the context changes the purely private character of the speech, but it does not convert the speech into government expression. Unless the school has decided to open up a true public forum for student discourse or debate, when a student steps onto the platform before a captive audience in a school setting, what emerges is grey area speech.

An additional example will make the "grey" character of the student speech in these captive audience situations even more clear. One type of school policy which courts have just begun to consider is a policy that entitles students to deliver messages at graduation based on academic achievement. For example, the school may provide an opportunity for the senior class valedictorian to give a valedictory address. The school might, instead, permit one or more students to deliver briefer remarks or presentations based on class standing. Courts are presently divided over whether religious messages delivered pursuant to such policies would be permissible student speech or impermissible school-sponsored speech, and scholars are divided as well. In his concurrence in Weisman, Justice Souter suggested that religious messages during a valedictory speech would probably not give rise to unconstitutional endorsement by the school. His reason was that valedictorians are chosen by wholly secular criteria. The dissent in Duval I agreed; secular, neutral criteria for choosing a speaker will sever the state association with the speech.

So far only a few courts have directly addressed the constitutionality of religious speech under such policies, and the two

143. § 4071(b).
145. See id. "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State." Id.
146. See Adler v. Duval County Sch. Bd. (Duval I), 206 F.3d 1070, 1095 (11th Cir. 2000) (en banc), cert. granted and judgment vacated, 121 S. Ct. 31 (2000), opinion and judgment reinstated, 250 F.3d 1330 (11th Cir. 2001) (en banc), cert. denied, 122 S. Ct. 664 (2001).
most significant decisions are both recent cases in the Ninth Circuit. In 1998 in *Doe v. Madison School District No. 321*, the court addressed a policy that provided for a minimum of four students to be invited to speak at graduation according to academic class standing. Students could deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement." Speakers were to decide on the content of their messages on their own, and school officials were not permitted to "censor any presentation or require any content."

The plaintiffs in *Doe* challenged the policy on the grounds that allowing students to make religious presentations would violate the Establishment Clause. The court disagreed and held that any religious messages would be private student speech, not school-sponsored speech. The court based this finding on the fact that the policy provided for neutral and secular selection criteria and that student speakers had autonomy over the content of their messages.

In 1999, the Ninth Circuit sitting en banc vacated the judgment in *Doe* on mootness grounds, and a year later in *Cole v. Oroville Union High School District*, the court addressed another policy, this time one inviting senior class valedictorians to deliver valedictory speeches. The most significant difference between the policies in *Doe* and *Cole* was the fact that the *Cole* policy provided for school review of speeches for grammatical errors and appropriateness, and the public school involved in the litigation insisted that speeches be

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147. There have also been two lower court cases addressing religious speech by valedictorians. In October of 2001, a U.S. District Court for the Northern District of California addressed proselytizing speech under a school policy similar to the policy at issue in the Ninth Circuit's most recent decision, but the district court simply followed the reasoning of the Ninth Circuit and did not provide any new analysis of its own. See *Lassonde v. Pleasanton Unified Sch. Dist.*, 167 F. Supp. 2d 1108 (N.D. Cal. 2001). Ten years earlier, a U.S. magistrate judge upheld the decision of school officials to reject a valedictory speech with religious content on the grounds that allowing the speech would violate the Establishment Clause. See *Guidry v. Broussard*, 897 F.2d 181, 181-82 (5th Cir. 1990). The Fifth Circuit upheld the judgment below but did not reach the constitutional issues. See *id.* at 182-83.

148. *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 834 (9th Cir. 1998), withdrawn and complaint dismissed for lack of standing and mootness, 177 F.3d 789 (9th Cir. 1999) (en banc).

149. *Id.*

150. *Id.*

151. See *id.*

152. See *id.* at 836 ("[W]hen a state uses a secular criterion for selecting graduation speakers and then permits the speaker to decide for herself what to say, the speech does not bear the imprimatur of the State.").

153. See *id.* at 835-36. The court also noted that the policy required graduation programs to include a disclaimer to make clear that student messages represent the personal views of the students and are not endorsed by the school. See *id.* at 837-38.

154. See *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789 (9th Cir. 1999) (en banc).

nonsectarian and nonproselytizing.\textsuperscript{156} The \textit{Cole} case arose when the school refused to permit Chris Niemeyer, who was co-valedictorian in 1998, to deliver a speech with sectarian, proselytizing content.\textsuperscript{157} Niemeyer claimed that the school’s refusal to allow him to deliver the speech violated his free speech rights.\textsuperscript{158} The court disagreed on the grounds that allowing Niemeyer to deliver his speech would have violated the Establishment Clause.\textsuperscript{159} According to the court, Niemeyer’s speech was not private speech but was speech bearing the imprint of the state, and, thus, prohibiting the speech was required to avoid religious endorsement by the school.\textsuperscript{160}

Unlike the court in \textit{Doe}, the \textit{Cole} court emphasized the public characteristics of the speech rather than the private aspects. According to the court, like the religious messages in \textit{Santa Fe}, Niemeyer’s speech would have been delivered at a school-controlled event, held on school property, funded by the school, and broadcast over the school’s public address system.\textsuperscript{161} The court also emphasized that the school retained the authority to review the content of student messages.\textsuperscript{162} Whether the court in \textit{Cole} would have found Niemeyer’s speech to be private expression if the school had not retained the power to review it is unclear. Without such a power, the policy in \textit{Cole} would have been essentially indistinguishable from the policy in \textit{Doe}. Certainly the court in \textit{Cole} was far more disposed to see the public nature of the speech than was the court in \textit{Doe}, and, thus, it is possible that the \textit{Cole} court would have found the speech to be impermissible school-sponsored speech even without any school control over the content. Many of the scholars who have addressed this issue side with the position in \textit{Doe}. Even if they view religious speech pursuant to a prayer policy like that in \textit{Santa Fe} to be school-sponsored speech, scholars tend to agree with Justice Souter and the dissent in \textit{Duval I}. Neutral and secular selection criteria, together

\textsuperscript{156} \textit{Id.} at 1096.

\textsuperscript{157} See \textit{id.} at 1095. The litigation in \textit{Cole} also involved another student, Ferrin Cole, who was prohibited from delivering a sectarian invocation at the ceremony. \textit{Id.} In addition to speeches by the valedictorian and salutatorian, the Oroville High School graduation ceremony included an invocation by a student chosen by a vote of the senior class. \textit{Id.} at 1096. Cole was chosen to deliver the invocation for the 1998 graduation, but the school refused to allow him to give the invocation because his proposed message was sectarian and he refused to make it nondenominational. \textit{Id.} The \textit{Cole} court denied Cole’s claim for relief on the grounds that the school’s prayer policy was unconstitutional under \textit{Santa Fe} and that permitting Cole to deliver the invocation, whether sectarian or nondenominational, would have violated the Establishment Clause. \textit{Id.} at 1102-03. According to the court, Cole’s invocation was not protected private speech but unconstitutional religious speech attributable to the school. \textit{Id.}

\textsuperscript{158} \textit{Id.} at 1095, 1101.

\textsuperscript{159} \textit{Id.} at 1103.

\textsuperscript{160} \textit{id.}

\textsuperscript{161} \textit{id.}

\textsuperscript{162} \textit{id.}
with the absence of school supervision over the content of the speech, are sufficient to break the link with the state and preserve the private nature of the speech.\textsuperscript{163}

However, a closer look at the facts in \textit{Cole} will demonstrate that valedictory speeches, like other student messages at graduation, do not, in fact, remain purely private expression. While valedictory speeches are certainly partly private, the unfortunate facts in \textit{Cole} demonstrate that these speeches have an undeniable public aspect as well. The speech that Niemeyer had prepared in \textit{Cole} was essentially a proselytizing sermon.\textsuperscript{164} Niemeyer had included a statement that "he was going to refer to God and Jesus repeatedly, and if anyone was offended, they could leave the graduation."\textsuperscript{165} When the school principal asked him to "tone down" the proselytizing and sectarian religious references, Niemeyer refused.\textsuperscript{166} If Niemeyer's speech were truly private speech, Niemeyer would have been correct. This was his opportunity to say what he wanted, and the school should not be allowed to interfere. However, what is so shocking about Niemeyer's statements is that he took this position at all. Niemeyer's statements demonstrate a fundamental misunderstanding of the nature of the valedictory address and its place within the commencement exercises. Niemeyer viewed his graduation as a soapbox opportunity to deliver his own private message regardless of its effect on his listeners. Niemeyer seemed blind to the fact that the graduation ceremony belonged as much to the other students and their families as to himself. However, aside from the bluntness and callousness of Niemeyer's remarks, Niemeyer's obliviousness is really no different than the obliviousness of those who argue that valedictory speeches are private speech. Valedictory speeches are personal statements, but they are also a part of the school's graduation ceremony. When school officials gave Niemeyer a chance to speak, they did not intend to give him a blank check to say whatever he wanted. They gave him an opportunity to be a part of the exercises and to say something that was appropriate to the circumstances. When the school did so, it retained an interest in ensuring that Niemeyer's speech fit into the general purposes of the graduation and did not significantly diminish the experience for others.

Up to this point, all of the examples I have given of student speech at school-related events have been messages delivered pursuant to a school policy that provides an opportunity for expression. Student religious expression before a captive audience at a school-related event can also occur spontaneously, and where it does, the link between the school and the expression is arguably more tenuous. For

\textsuperscript{163} See sources cited infra note 223.
\textsuperscript{164} See \textit{Cole}, 228 F.3d at 1097
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} Id. at 1096.
example, a student might thank God during a campaign speech for a student government office or invoke God’s blessing at a pep rally. In cases like these, the school does not play any active role in procuring the speech. According to the court in the Chandler cases, where religious references are entirely the result of student choice and the school does not invite, suggest or participate in religious speech, the speech is protected private speech rather than public speech. However, even where student religious speech is entirely a spontaneous choice by the student, there remain public aspects to the speech. A brief reference to God in a campaign speech or pep rally may seem like private speech, but imagine a student who takes the opportunity to deliver a proselytizing sermonette. In such a case, the public nature of the speech comes to the fore, just as it did in Cole. The student is using the school’s platform at a school-related event, and assuming school officials do not intervene to stop the speech, the speech proceeds with the permission of the school. While the student expression does not become the equivalent of school speech just because it is uttered from a school-sponsored pulpit, the circumstances of its utterance do mean that it bears, at least to some extent, the aegis of the school.

B. Religious Expression in the Classroom

Like student-initiated religious speech at graduations, school assemblies or other school-related events, student religious expression in the classroom has been the subject of much litigation in the lower federal courts. Most of this litigation centers around religious messages delivered as part of oral reports or oral presentations. The similarities between this type of classroom speech and religious messages at school-related events are obvious. Both types of speech usually involve a captive audience, and in both situations students deliver their messages from platforms provided by the school. While there are many similarities between student-initiated expression in the classroom and at school-sponsored events, there is surprisingly little overlap in the case law addressing these two types of speech, even though many of the same legal issues arise in both contexts. Federal case law regarding religious expression in the classroom has developed separately from case law regarding religious messages at graduation and other school events, and opinions in the two lines of cases rarely cite each other. However, while federal court case law regarding classroom speech and speech at school events have rarely intersected, parallel concepts appear in both lines of decisions. Most significant for this article is the use of a similar dichotomy between student speech and school-sponsored speech in both contexts.

167. See supra text accompanying notes 117-20.
Unlike the case of graduation prayer or prayers at sporting events, there are no Supreme Court cases directly addressing religious speech in the classroom. While the number of lower court cases is increasing and classroom religious speech promises to be the more significant issue for the future, the lower courts currently base their decisions on Supreme Court precedents which deal generally with student expression in the school setting without specifically addressing any of its religious aspects. The courts have relied on two precedents in particular. These are the Court's 1969 decision in Tinker v. Des Moines Independent Community School District and 1988 decision in Hazelwood School District v. Kuhlmeier.

In Hazelwood, the Court developed a distinction between private student expression or "tolerated speech" and school-sponsored student expression or "promoted speech." Private or "personal" student expression is expression that "happens to occur on the school premises." School-sponsored speech includes "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Activities like these are part of the school curriculum when they are supervised by teachers and designed to serve pedagogical purposes even if they do not occur in a traditional classroom setting. According to the Court, Tinker provides the standard for private student expression. Private student expression is protected speech and can only be censored or restricted by the school if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." Hazelwood controls school-sponsored or "promoted" speech. Where student speech takes place as part of a school-sponsored activity, educators can exercise much greater control over the speech. Editorial control over the style and content of the speech is permissible as long as this control is "reasonably related to legitimate pedagogical concerns." Courts should only intervene where there is "no valid educational purpose" being served by the school's restrictions.

168. See, e.g., Martha McCarthy, Religion and Education: Whither the Establishment Clause?, 75 Ind. L.J. 123, 143 (2000) ("The next wave of Establishment Clause litigation in public schools may involve the instructional program, with plaintiffs expanding on the free expression arguments to justify religious content in student presentations and other assignments.")
171. Id. at 270-71.
172. Id. at 271.
173. Id.
174. See id.
176. See Hazelwood, 484 U.S. at 271-73.
177. Id. at 273.
178. Id.
The Court in *Hazelwood* explained that the *Hazelwood* standard is more deferential than the *Tinker* standard because it addresses situations where the school is "lend[ing] its name and resources to the dissemination of student expression." In situations like these, educators should be able to exercise greater oversight to ensure that students "learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." 

The *Tinker-Hazelwood* dichotomy between personal student expression and school-sponsored speech provides the framework for lower court decisions addressing student religious speech in the classroom. These cases usually come to the courts in a different posture than cases addressing student speech at graduations and other school-related events. In cases involving student-initiated prayer at graduations, it is usually the school that is defending the religious expression against the claim of an Establishment Clause violation. The plaintiffs argue that the speech violates the Establishment Clause because it is school-sponsored speech endorsing religion, and the school defends the speech on the grounds that the messages are private expression, not school-sponsored speech. By contrast, in cases involving classroom speech, it is usually the school that has excluded or otherwise restricted the student religious speech, and the student is challenging the exclusion on free speech grounds. These classroom speech cases usually involve students below high school age, and typically the school will argue that prohibiting the religious speech is necessary to avoid a perception by students that the school endorses the speech. The student, by contrast, argues that the religious speech is private expression and, thus, protected by *Tinker*.

For example, in *Duran v. Nitsche*, the school prohibited a fifth-grader from delivering an oral report with religious content on the grounds that other students might attribute the speech to the school. According to the teacher in that case, "[f]ifth-graders, when you, as a teacher, allow things to occur in your classroom, believe, as a rule, that what is occurring is something that the teacher supports." In *DeNooyer v. Livonia Public Schools*, a second grade student was prohibited from playing a videotape of herself singing a "proselytizing religious song" during the class's show-and-tell period. The teacher refused to allow Kelly DeNooyer to show her tape on the grounds that other students might attribute the speech to the school.

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179. *Id.* at 272-73.
180. *Id.* at 271.
182. *Id.*
that other students might believe that the school endorsed the song’s message and that the song might offend students with different religious faiths. The school also argued that showing a videotape was inconsistent with the purpose of a show-and-tell program. In C.H. v. Oliva, a first grade student was prohibited from reading a story with religious content in front of the class. As a reward for special achievement in reading, students in Zachary Hood’s class were permitted to read one of their favorite stories to the class. Zachary chose a story based on the Bible. His teacher refused to let him read the story to the class but allowed him to read the story to her outside the presence of the class. The school defended this decision on the grounds that young students “cannot be relied upon to distinguish between those things their teacher endorses and those things she merely allows to be expressed in her classroom.” The school also argued that allowing Zachary to read his story might upset students with other faiths. The litigation in C.H. v. Oliva also involved a separate incident that occurred when Zachary was in kindergarten. During the Thanksgiving holiday season, Zachary’s teacher asked the class to make posters depicting what they were thankful for. Zachary’s poster was a poster indicating his thankfulness for Jesus. After the students’ posters were hung on the hallway outside the kindergarten classroom, Zachary’s poster was initially removed because of its religious theme and then returned to a less prominent location.

In each of these cases, the school’s action was upheld by the lower courts. All of the courts to address the issue agreed that Hazelwood provided the standard for addressing classroom speech instead of Tinker. According to the court in Duran, it even “strains language”

184. See id. at 747.
185. Id.
187. See Oliva, 195 F.3d at 169.
188. Id.
189. Id.
190. Id.
191. Id. at 170.
192. Id. at 169, 175.
193. Id. at 168.
194. Id.
195. Id. at 169.
to call the oral report in that case school-sponsored; it was, rather, "school itself."\textsuperscript{197} The district court in \textit{DeNooyer} agreed.\textsuperscript{198} The Third Circuit panel hearing \textit{Oliva} also found the speech to be the equivalent of the "[s]tate's own speech."\textsuperscript{199}

With \textit{Hazelwood} controlling, the schools in these cases were given wide authority to control and restrict the speech, and the courts repeatedly expressed deference to the educational judgment of school teachers and administrators.\textsuperscript{200} In \textit{Duran}, the district court held that the school's concern that the oral report might be attributed to the school was a sufficient pedagogical reason to prohibit the speech.\textsuperscript{201} The district court in \textit{DeNooyer} followed the same reasoning although the Sixth Circuit affirmed the district court's judgment without addressing the religious nature of the speech.\textsuperscript{202} The Third Circuit panel that heard \textit{Oliva} also argued that the risk that Zachary's story would be viewed by other students as school-endorsed speech was a legitimate reason for prohibiting it\textsuperscript{203} and the district court below had reached a similar conclusion.\textsuperscript{204} In addition, the panel in \textit{Oliva} stated that the school had a legitimate interest in avoiding the offense and resentment that exposure to the story might have caused among other students and their families.\textsuperscript{205} With regard to Zachary's poster, both the panel and the district court found that the school's decision to

\textsuperscript{180} Nov. 18, 1993) (unpublished opinion); \textit{Duran} v. Nitsche, 780 F. Supp. 1048, 1054-55 (E.D. Pa. 1991), \textit{vacated and appeal dismissed}, 972 F.2d 1331 (3d Cir. 1992). The Third Circuit sitting \textit{en banc} in \textit{C.H. v. Oliva} did not address this issue. Because the court was equally divided regarding Zachary's story, it upheld the judgment of the district court without further explanation. See \textit{C.H. v. Oliva}, 226 F.3d 198, 200 (3d Cir. 2000) (en banc), \textit{cert. denied}, 121 S. Ct. 2519 (2001). With respect to Zachary's poster, the \textit{en banc} court held that the complaint failed to allege that any of the named defendants played a role in the treatment of the poster, and the court remanded with instructions to allow the plaintiffs to cure the deficiencies in the complaint if possible. \textit{Id.} at 200-03.

\textsuperscript{197} \textit{Duran}, 780 F. Supp. at 1054 n.8.

\textsuperscript{198} \textit{DeNooyer}, 799 F. Supp. at 751 ("As in \textit{Duran}, Kelly's presentation . . . was more than school-sponsored speech, it was 'school itself.'" (quoting \textit{Duran}, 780 F.Supp. at 1054 n.8)).

\textsuperscript{199} \textit{Oliva}, 195 F.3d at 173.

\textsuperscript{200} \textit{Id.} at 171; \textit{DeNooyer}, 799 F. Supp. at 750; \textit{Duran}, 780 F. Supp. at 1056.

\textsuperscript{201} \textit{See Duran}, 780 F. Supp. at 1056.

\textsuperscript{202} In an unpublished disposition, the Sixth Circuit approved of the school's action on the grounds that allowing a student to show a videotape for show-and-tell would undermine the pedagogical goal of enhancing the students' oral communication skills. See \textit{DeNooyer} v. Merinelli, 12 F.3d 211, 1993 WL 477030, at *3 (6th Cir. Nov. 18, 1993) (per curiam) (unpublished opinion). The appellate court found it unnecessary to reach the school's additional claim that prohibiting the videotape was required to avoid state endorsement of religion. \textit{Id.}

\textsuperscript{203} \textit{See Oliva}, 195 F.3d at 174-75.


\textsuperscript{205} \textit{See Oliva}, 195 F.3d at 175.
temporarily remove the poster and place it in a less prominent location was justified by the sensitivity of the issues raised by student religious expression. 206 The panel's decision in Oliva was vacated and the case heard by the full court en banc, but the en banc opinion did not discuss the substantive issues in the case. 207

Judge Alito and Judge Mansmann, dissenting from the Third Circuit's en banc decision, were the lone voices in these cases for viewing the student speech as private expression. 208 According to Judges Alito and Mansmann, Tinker is the appropriate standard for evaluating classroom religious expression rather than Hazelwood because "when a student is called upon to express his or her personal views in class or in an assignment," the resulting speech cannot reasonably be perceived as bearing the imprimatur of the school. 209 In the unlikely event that there is a danger of endorsement, the school can provide a disclaimer. 210 Judge Alito's dissent in Oliva echoes Justice Brennan's dissent in Hazelwood, which went even further. According to Justice Brennan, Tinker should always provide the standard for addressing student speech in a school context. 211 The occurrence of student speech during a school-sponsored activity does not turn private speech into school-sponsored speech. It remains private speech 212 and it can be limited under Tinker if it substantially or materially disrupts the school functions. 213 If there is a danger that the speech will be confused with school speech, the proper remedy is for the school to disassociate itself from the speech with a disclaimer or other less oppressive means short of prohibition. 214 According to Justice Brennan, the Hazelwood standard "license[s] . . . thought control" in the public schools, 215 and threatens to "transform students into 'closed-circuit recipients of only that which the State chooses to communicate.'" 216

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206. Id. at 175-76 & n.3; Oliva, 990 F. Supp at 353.
207. Regarding Zachary's poster, the court held that the complaint failed to allege that any of the named defendants played a role in the removal and relocation of the poster, and the court remanded with instructions to allow the plaintiffs to cure the deficiencies in the complaint if possible. See C.H. v. Oliva, 226 F.3d 198, 200-03 (3d Cir. 2000) (en banc), cert. denied, 121 S. Ct. 2519 (2001). With respect to the treatment of Zachary's story, the court was equally divided, and the court affirmed the judgments below without issuing a new opinion. Id at 200.
208. See id. at 203-14 (Alito, J., dissenting).
209. Id. at 213-14.
210. Id. at 212-13.
212. See id. at 281-82.
213. Id. at 283-84.
214. Id. at 288-89.
215. Id. at 286.
The dichotomy between private student expression and school-sponsored speech in these classroom speech cases closely resembles the dichotomy that federal courts have used to address prayers at graduation and other religious messages at school-related events. In both settings, if student speech is characterized as private expression, it is protected speech. On the other hand, if the speech falls within the category of school-sponsored speech, it is subject to the limitations and powers of the school. The big difference between these two lines of cases is that the classroom speech cases are free speech cases and the graduation prayer cases are Establishment Clause cases. As discussed above, it is objecting students who bring the graduation prayer cases against the school on the grounds that student religious messages at school-related events are school-sponsored speech in violation of the Establishment Clause. By contrast, in the classroom speech cases, it is the school that wants to exclude the student religious speech, and the affected students are arguing that the speech is protected private speech. In the classroom speech cases, the school’s position is that the student speech is school-sponsored speech subject to its pedagogical powers. In the graduation prayer cases, the school’s position is that the student expression is private expression free from its limitations under the Establishment Clause. In theory, student speech with similar characteristics should be treated consistently regardless of whether the speech arises in the classroom or in another captive audience situation like a graduation or school assembly. If the speech has the features of school-sponsored speech and the dichotomies developed by the courts are assumed, the speech should be subject to both the school’s powers and its limitations. By contrast, if the speech is private speech, it should be free from the powers and limitations of the school except to the extent necessary to prevent a material disruption of the educational process.

None of the existing cases addressing classroom speech have decided whether classroom speech which might be confused with school speech is subject to the limitations of the Establishment Clause as well as the powers of the school. The district courts in Duran and DeNooyer expressly declined to address whether allowing the oral presentations in those cases would have involved an Establishment Clause violation by the school.217 Nor did these courts decide whether second and fifth-graders were, in fact, too young to be able to distinguish private speech from speech receiving the endorsement of the school.218 According to these courts, the school’s concern about the possible confusion over the speech was a sufficient reason to

prohibit the speech even if these concerns ultimately prove to be unjustified.\textsuperscript{219} The position of these courts that the schools had legitimately excluded the speech even if their concerns about state endorsement were unjustified is not convincing. If Hazelwood only sanctions restrictions on student speech where there is a legitimate pedagogical interest at stake, then it would seem that there has to be a real, not just imaginary, danger of endorsement before the school can act to censor student speech. On the other hand, if there is, in fact, such a real danger, then it would also seem that the school is not only free to exclude the religious speech from the classroom, but also is obligated to do so.

However, as in the context of student-initiated expression at graduations and other school-related events, the courts are mistaken to label student speech in the classroom setting as either private or school-sponsored. Where a student gives an oral report or presentation, the speech is both public and private. On the one hand, when a student gives an oral report or presentation, the speech is clearly their personal speech, and even a very young child will understand that the speech of their peers is not the same thing as the speech of their teachers. Indeed, classroom speech is more clearly private speech than is a message delivered by a student at graduation. On the other hand, like a graduation speaker, if a student is provided with a special opportunity to address the class by reading a story, presenting show-and-tell material or delivering an oral report, the student has, in effect, been given the school’s stage. As they get up in front of the class, they speak from a platform ordinarily occupied only by their classroom teacher. Particularly where students are young, they may well believe that what a fellow student says from that platform is approved by the school. The teacher’s concern in Duran that young children believe that what their teacher allows to occur in the classroom is something that the teacher supports is not unreasonable when it comes to class presentations. For example, when young children listen to show-and-tell presentations, they certainly realize that it is their peers who are speaking, not the teacher, but they may also assume that the school generally supports what their peers are saying. If the school did not support it, the students would assume that the teacher would not allow it. Young children are very familiar with teachers restricting speech which they do not approve of.

Remarks made in general class discussion or in response to teacher questions are very different. In those cases, no student has sole control over the school platform, and even young students realize that many things that are said during the give and take of classroom discussion are not endorsed or approved of by the school. Likewise, if

\textsuperscript{219} See DeNooyer, 799 F. Supp. at 751; Duran, 780 F. Supp. at 1056.
the school opens up a forum for student debate or discourse, students will also probably realize that the speech that results is private student expression and not school-endorsed messages. However, oral presentations differ in important ways from ordinary classroom discussion or fora for debate, and they are, at least at some level, inescapably public.

Thus, the mistake that courts make in cases addressing classroom speech as well as student speech at graduations and other school events is to see the messages as either private or school-sponsored. To place student speech into a private box frees that speech from school control and makes it unanswerable to Establishment Clause values. On the other hand, to label the speech school-sponsored expression collapses the distinction between student speech and school speech and subjects the speech to all the powers and limitations of the state. If student-initiated speech in classroom settings or at school-sponsored events is truly grey area speech that is both public and private then what is needed is a new model for addressing this speech which takes account of its special features. As I will argue below, one of the special features of grey area speech is its great value for the educational process.

III. THE VALUE OF GREY AREA SPEECH

In the previous section, I argued that the dichotomies that federal courts have used to address student religious speech in classrooms and at school-related events are too simplistic. Student religious speech in captive audience situations like these is both public and private, rather than either public or private. Like the federal courts, most scholars who have addressed student religious expression in the public school setting also adopt the familiar dichotomy between permissible private student expression and impermissible school-sponsored speech.220

Like the courts, these scholars also disagree about whether the speech at issue belongs to the private box or the public box, and they draw the categories of public and private more or less broadly. For example, for some, school-sponsored speech includes all religious speech at school-related events. For others, student religious speech is not school-sponsored unless the government takes an active role in encouraging or supervising the speech or is otherwise the motivational source behind the speech. Still others take a position somewhere in the middle. These scholars will typically include most student religious speech at school-related events in the public box while categorizing valedictory addresses as private speech and perhaps other religious messages delivered by students chosen by neutral, secular criteria as well.


But see Gey, supra note 30, at 432 (rejecting bright line between private and government speech); Stanley Inger, Liberty and Authority: Two Facets of the Inculcation of Virtue, 69 St. John's L. Rev. 421, 452 (1995) (rejecting Tinker-Hazelwood dichotomy); Fitschen, supra note 29, at 440-41, 444 (rejecting litigation strategy based on dichotomy between student speech and school speech). Michael McConnell has also rejected a strict dichotomy between permissible private religious expression and impermissible government religious speech. McConnell has argued that when it comes to public education and other areas where the government exerts significant control over public culture, stripping government speech of all religious content and symbols will have a secularizing influence on the community. See Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L Rev. 115, 189 (1992) [hereinafter McConnell, Religious Freedom at a Crossroads]. McConnell suggests that the best way to ensure that government does not influence or distort the religious choices of the populace is to reduce government pressure in cultural and educational institutions, see id. at 188, and where government still plays a significant role, to have "the aspects of culture controlled by the government (public spaces, public institutions) exactly mirror the culture as a whole." Id. at 193. However, in a recent article, McConnell approves of the dichotomy that the Court has drawn between protected private religious expression and impermissible government speech. See Michael W. McConnell, State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression, 28 Pepp. L Rev. 681, 682, 704, 707, 710 (2001).

221. See, e.g., Jonathan C. Drimmer, Hear No Evil, Speak No Evil: The Duty of Public Schools to Limit Student-Proposed Graduation Prayers, 74 Neb. L Rev. 411, 420 (1995) (stating that "substantive neutrality" in the public schools requires that "religion remain absent from school-sponsored events"); Harlan A. Loeb, Suffering in Silence: Camouflaging the Redefinition of the Establishment Clause, 77 Or. L Rev. 1305, 1332 (1998) (stating that schools have "responsibility of providing a secular graduation ceremony"). The district court in Gearon v. Loundon County School Board took a similar position: "The court is persuaded that the correct view is [that]... a constitutional violation inherently occurs when, in a secondary school graduation setting, a prayer is offered, regardless of who makes the decision that the prayer will be given and who authorizes the actual wording of the remarks." 844 F. Supp. 1097, 1099 (E.D. Va. 1993).

222. See, e.g., Mangrum, supra note 220, at 1049-51; Sekulow et al., supra note 29, at 1093-94; cf. Whitehead & Crow, supra note 42, at 199 (stating that Tinker should apply to all student speech in the public school setting).

223. See, e.g., Peck, supra note 220, at 1147 n.137 (stating that speech by
By contrast, in my view, a better way to approach student religious expression in captive audience situations is to abandon the dichotomy altogether, recognize that the speech is grey area speech, and develop an approach that is appropriate to the special characteristics of this speech. At the end of the previous section, I stated that one of the special characteristics of grey area speech is its great value for the educational process. Before I defend this view and develop my own proposal for addressing grey area speech, it is important to acknowledge that many courts and scholars would disagree that grey area religious speech in the public schools is valuable. They tend to view the presence of religion in the public schools as a dangerous phenomenon which threatens to undermine national unity, spark religious divisiveness, and cause offense to nonbelievers or believers who disagree with the beliefs of the speaker.

For example, in *Santa Fe*, Justice Stevens worries about the divisiveness of religion in a public school setting. According to Justice Stevens, religious beliefs and worship are an "inherently nongovernmental subject" that belongs to the "private sphere." The election mechanism employed by the Santa Fe School District's prayer policy "impermissibly invade[d]" that sphere when it "turn[ed] the school into a forum for religious debate" and, thereby, "encourage[d] divisiveness along religious lines." Stevens's concerns echo those of the Court thirteen years earlier in *Edwards v. Aguillard*. According to *Aguillard*, the Court must be vigilant in monitoring Establishment Clause compliance in the public schools because "the public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools." The belief that the presence of religion in the public schools will undermine national unity and spark religious conflict has also appeared in a number of articles addressing student religious valedictorians chosen according to class standing is private speech which the school may not censor); Pershing, *supra* note 220, at 1115-16 (stating that expression of student speakers selected without regard to his or her religion is private speech if unreviewed in advance); Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 Wm. & Mary Bill Rts. J. 607, 631 (1995) (stating that valedictorians chosen wholly by secular criteria presumptively engage in nonschool-sponsored private speech); *see also* Holmes, *supra* note 220, at 426 ("[A] religious message by a valedictorian who is selected on the basis of merit and whose speech is a personal statement would qualify as private student religious expression, unless the school officials approved the speech.").

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225. *Id.* at 311.
226. *Id.*
227. *Id.* at 316.
228. *Id.* at 311, 317.
230. *Id.* at 583-84 (quoting Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring in the judgment)).
expression in the schools, as well as some of the lower court decisions in the area. Justice Felix Frankfurter elaborated upon the same argument forty-three years ago in his concurrence in *Illinois ex rel. McCollum v. Board of Education.* In *McCollum,* the Court struck down a released time program which provided for religious teachers employed by private religious groups to come on to school premises and deliver religious instruction during regular school hours. In support of this decision, Justice Frankfurter argued for a strict principle of separation in the field of public education. Public schools are "a symbol of our secular unity" and the "most powerful agency for promoting cohesion among a heterogeneous democratic people." Strict confinement of religion to the private sphere of church and home is required to keep schools free from "divisive conflicts" and "entanglement in the strife of sects." Schools should be the "training ground for habits of community," and the Constitution prohibits them from "becoming embroiled in . . . destructive religious conflicts." In Justice Frankfurter's view, separation in the schools is necessary "for assuring unities among our people stronger than our diversities."

Other judges and scholars have been concerned that religious expression in captive audience situations in the schools causes offense to other students with different views. For example, in *Gearon,* one of the reasons that the district court gave for striking down Loudoun County's graduation prayer policy was that "[t]o involuntarily subject a student at such an event to a display of religion that is offensive or not agreeable to his or her own religion or lack of religion is to constructively exclude that student from graduation." Similarly, the Third Circuit panel in *Oliva* agreed with Zachary's school that preventing "resentment" among fellow students and their parents as a result of compelled exposure to Zachary's story was a legitimate

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232. See Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1104 (9th Cir. 2000) ("The requirement that religion be left to the private sphere is the product of a well-documented and turbulent history . . . ."), cert. denied., 121 S. Ct. 1228 (2001).
234. See id. at 207-09.
235. See id. at 215-17 (Frankfurter, J., concurring in the judgment).
236. Id. at 217.
237. Id. at 216.
238. Id. at 217.
239. Id. at 227.
240. Id. at 228.
241. Id. at 231.
pedagogical reason for restricting his speech. The district court in DeNooyer also agreed that the school's desire to avoid offense to other students and parents was a legitimate reason for prohibiting Kelly from showing her videotape.

In addition to judicial concern on this point, a number of scholars have also pointed out that student religious expression in captive audience situations can be offensive to those with different views, and they have defended special restrictions on student religious speech to avoid this offense. For example, Steven Gey, who is one of the few scholars to reject the dichotomy that the courts have drawn between public and private speech, has argued that student religious speech must be prohibited whenever it is "incorporated into the public school atmosphere or curriculum in a manner that gives religious dissenters no way to avoid being proselytized without opting out of some portion of their educational entitlements." This restriction applies to student expression that has been labeled private as well as school-sponsored expression, all student expression is subject to restriction if it subjects others to such unwanted "religious pressure." Jonathan Drimmer has argued that public schools have an affirmative duty to "guarantee that religion remain[s] absent from school-sponsored events," and, thereby, to "protect the nonadherent from unwanted religious influence." According to Harlan Loeb, schools also have a responsibility to ensure "a secular graduation ceremony" so that students are not subjected to religious speech that they find "offensive or alienating."

The judges and scholars who are concerned that the presence of religion in the public schools sparks religious divisiveness and undermines a sense of unity and community among students will almost certainly be just as troubled by grey area religious speech in the schools as with pure school speech. In either case, the religious speech has public features, and religion is brought directly into the educational experience. Those who worry about the offense caused

245. See Gey, supra note 30, at 432.
246. Id. at 441.
247. See id.
248. Id. at 443.
249. Drimmer, supra note 221, at 420.
250. Id. at 426.
251. Loeb, supra note 221, at 1332.
252. Id. at 1331.
by student religious speech to nonbelievers and those of other faiths also find grey area speech problematic. It is the delivery of the religious message in a captive audience situation during regular school functions that is the source of resentment and offense that concerns them.

For other scholars, it is difficult to understand why grey area speech matters so much to believers. Why, asks Frederick Gedicks, do so many people care about prayer at graduation?253 Students have the opportunity to pray privately in schools and the Equal Access Act provides students with the opportunity to meet with fellow believers in after-school clubs.254 With these other avenues available, Gedicks cannot understand why proponents of graduation prayer believe that so much is at stake,255 and he suspects that what proponents really care about is "signal[ling] who is in charge of American politics and culture."256 Likewise, Douglas Laycock has asked, "[w]hy must there be prayer at graduation, with a captive audience of children, instead of at a privately sponsored baccalaureate with an audience of volunteers?"257 Laycock also suspects that it is "precisely because some people want a symbolic affirmation that government approves and endorses their religion, and because many of the people who want this affirmation place little or no value on the costs to religious minorities."258 Justice Souter echoed Laycock's view in his concurrence in Lee v. Weisman.259 According to Justice Souter, students can engage in prayer before or after graduation.260 Prayer during the official graduation ceremony is a "gratuitous largesse,"261 and Justice Souter agrees with Laycock that what proponents probably really care about is having a "symbolic affirmation that government approves and endorses their religion."262

In the remaining portion of this section, I will demonstrate why grey area religious speech in the public schools really does matter, and why there is actually a great deal at stake in preserving a place for grey area speech in the schools. Far from being a source of divisiveness and a threat to national unity, grey area religious speech in the public schools is an important foundation for building lasting common bonds that are forged, not in spite of our religious and nonreligious

254. See id. at 1157, 1166.
255. See id. at 1157.
256. Id. at 1159.
258. Id.
260. See id. at 629. Jessica Smith makes the same point in Smith, supra note 231, at 326.
261. Weisman, 505 U.S. at 629 (Souter, J., concurring).
262. Id. at 630 (quoting Laycock, supra note 257, at 844).
differences, but, rather, in and through them. Grey area religious speech can also serve an important role in mitigating the clash over values in the public schools and can help to make public schools more hospitable to minority religious groups.

There are, however, risks associated with grey area religious speech, and any approach for addressing this speech must be consistent with core Establishment Clause principles, such as neutrality, nonendorsement, noncoercion and noninterference. The proposal that I will develop in Part IV seeks to balance the value and risks associated with grey area speech. A brief outline of this proposal will be helpful at this point as a preview of the approach I will be defending later. The first baseline rule of my proposal is that schools may not discriminate against grey area religious speech where the speech is entirely student-initiated and the school has not taken any action to provide a specific opportunity for religious speech. The second baseline rule is that schools can design and provide an opportunity for student religious expression in classrooms or at school-sponsored events as long as the policy provides for an equal opportunity for nonreligious speech and the policy is scrupulously neutral and fair between different religious perspectives. Such a policy will not violate the Establishment Clause if all of the student perspectives, religious and nonreligious alike, receive equal and general endorsement by the school. If necessary, the school may use a disclaimer to make clear to listeners that the school does not endorse one religion over another or religion over nonreligion.

Whether students engage in religious expression entirely on their own initiative or pursuant to a fair policy developed by the school, the school can exercise a limited amount of control over the style and content of the expression in keeping with its public character. The school can review or otherwise exercise control over the speech to ensure that it is appropriate for the occasion and the school's pedagogical objectives. Such control may not exclude the speech on the grounds of its religious content or restrict this content unless the speech is primarily designed to proselytize a specific student audience and is delivered from a school stage or other type of school platform or pulpit. Such a platform does not include general class discussion or a discussion or debate forum opened up by the school for the interchange of student views. Speech that is primarily designed to proselytize is speech that is primarily designed to convert a specific audience to one's own religious beliefs or worship and involves an insistent call to conversion directed at this audience. Aside from restricting speech that is primarily proselytizing, school officials may not review or interfere with the religious content of student religious speech.
A. Mitigating the Clash of Values in the Public Schools

One of the most challenging issues facing public education in recent years has been the clash among parents, teachers, public school administrators and politicians over what values will be taught in the public schools. As the United States becomes increasingly pluralistic, it becomes more and more difficult to identify a common core of moral and civic values to teach in the schools, and a growing number of scholars in the fields of law, education and political philosophy have begun to doubt that consensus over fundamental values is even possible. At the same time, it is widely recognized that schools cannot help teaching values. Even if a school tries to remove all values education from its curriculum, there remains a "hidden curriculum" that can never be value neutral. By the hidden curriculum, scholars refer to the subtle and indirect ways in which schools inevitably transmit values to students. The hidden curriculum includes the role models that teachers provide, the conduct required of students in and outside of the classroom, the type of achievement that grades and other awards are based on, the governance structure of the school, and even the layout of the classrooms. One of the great advantages of robust grey area speech in the public schools, including religious speech, is that it can help to mitigate this clash over values by permitting students with minority perspectives to voice and affirm alternative views in the classroom and at other school-related functions.

For over a decade, scholars have been returning to the famous Sixth Circuit decision in *Mozert v. Hawkins County Board of Education*.

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264. See Salomone, supra note 38, at 1-2, 241-42, 140.

265. See, e.g., Dent, supra note 263, at 733; Michael W. McConnell, Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?, 1991 U. Chi. Legal F. 123, 133, 151; see also William A. Galston, Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State 241-42 (1991) ("Others doubt that any one specification of civic education can be devised for a liberal polity in which individuals, families, and communities embrace fundamentally differing conceptions of choice-worthy lives."); Salomone, supra note 38, at 238 (stating that in recent litigation between conservative parents and school administrators in Bedford, New York, "worldviews are so far apart that there seems to be no common ground for agreement or compromise"); id. at 188, 196.


268. See Gutmann, supra note 263, at 53; Salomone, supra note 38, at 38.

269. 827 F.2d 1058 (6th Cir. 1987).
to illustrate the problems associated with values education in the public schools.\textsuperscript{270} The litigation in the \textit{Mozert} case arose in Hawkins County, Tennessee in the early 1980s when the local school board adopted a new basic reading series for grades one to eight.\textsuperscript{271} The plaintiffs in that case included the Mozerts and six other families who objected to the new series on the grounds that it exposed their children to material which systematically inculcated values that contradicted their conservative Christian religious beliefs.\textsuperscript{272} The plaintiffs sought an exemption under the Free Exercise Clause which would permit their children to continue attending the public schools without having to read material from the new readers.\textsuperscript{273} In 1987, a panel of Sixth Circuit judges denied the exemption. According to two of the panel members, the plaintiffs failed to demonstrate a cognizable burden under the Free Exercise Clause because the children were merely being exposed to beliefs that contradicted their own. They were not required to affirm any beliefs or engage in any practices prohibited by their religion.\textsuperscript{274} While the panel's third member, Judge Boggs, concurred in the court's result, he disagreed with the majority's understanding of the burden the plaintiffs alleged. According to Judge Boggs, the burden in this case was not mere exposure to contradictory beliefs and values but, rather, the "overall effect" of the new series.\textsuperscript{275} The burden that students were subjected to was "many years of education, being required to study books that, in plaintiffs' view, systematically undervalue, contradict and ignore their religion."\textsuperscript{276} According to Judge Boggs, the burden on the plaintiffs and their children was a cognizable burden under the Free Exercise Clause,\textsuperscript{277} but he concluded that granting the relief requested would


\textsuperscript{271} See \textit{Mozert}, 827 F.2d at 1059-60.

\textsuperscript{272} See \textit{id.} at 1074, 1079 (Boggs, J., concurring); \textit{see also id.} at 1060-61 (Lively, C.J., majority opinion).

\textsuperscript{273} See \textit{id.} at 1060-61.

\textsuperscript{274} See \textit{id.} at 1070.

\textsuperscript{275} \textit{Id.} at 1074 (Boggs, J., concurring).

\textsuperscript{276} \textit{Id.} at 1079.

\textsuperscript{277} See \textit{id.} at 1075-76.
place a substantial imposition on the schools without supporting authority from Supreme Court precedent.\textsuperscript{278}

Judge Boggs's opinion, in particular, demonstrates an appreciation of what was at stake in Mozert. The Mozerts and the other parents involved in the litigation objected to a required curriculum which inculcated values at odds with their own beliefs because they were concerned that education in contrary values would undermine the beliefs they were teaching their children at home and influence their children to adopt contrary views.\textsuperscript{279} These families experienced the school’s efforts to inculcate community norms and values as forced values imposition by the majority. The Mozert case is a concrete example of one of the most difficult challenges for public education today. How can schools teach character and values without imposing hostile norms on the growing number of religious and nonreligious minority groups?

Religious advocacy groups, scholars and public leaders have articulated a number of different approaches for addressing this challenge. One approach was illustrated in the Mozert case. The Mozerts sought an accommodation from the public school in the form of an exemption or "partial opt-out" from the offensive segment of the curriculum. Since Mozert, parents have continued to take this route.\textsuperscript{280} While the Mozerts framed their claim as a free exercise claim, increasingly the organizations representing parents have been asserting a general parental right to direct the education and religious upbringing of their children.\textsuperscript{281} Partial opt-outs have also been defended by some scholars. For example, George Dent has argued that children have a free exercise right to be excused from instruction that offends their religious beliefs.\textsuperscript{282} In a recent article, Philip Kissam

\textsuperscript{278} See id. at 1079-80.

\textsuperscript{279} For similar assessments of what was at stake in Mozert, see Salomone, supra note 38, at 206; George W. Dent, Jr., Religious Children, Secular Schools, 61 S. Cal. L. Rev. 863, 886-92 (1988); cf. Mitchell, supra note 267, at 684-85 (noting that education in values contrary to minority religious beliefs can “devastate the religious liberty of parents and students”). Not all commentators agree with this assessment. Many scholars follow the majority in Mozert in viewing the burden alleged by the Mozerts as mere exposure to beliefs that differed from their own. See Gutmann & Thompson, supra note 270, at 63; Macedo, supra note 270, at 158; Gutmann, supra note 270, at 566. As Judge Boggs observed, the Mozerts’ claim was different. They did not object to mere exposure to contrary beliefs. They objected to a reading series that consistently “denigrate[d] and oppose[d] their religion.” Mozert, 827 F.2d at 1074 (Boggs J., concurring). The cumulative effect of this series substantially impacted the ability of the families to cultivate and preserve their own values and beliefs.

\textsuperscript{280} See Salomone, supra note 38, at 62.

\textsuperscript{281} See id. at 68-70. Litigants have based this right on the Supreme Court’s decision in Wisconsin v. Yoder, 406 U.S. 205 (1972), and on two decisions from the 1920s, Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925).

\textsuperscript{282} See Dent, supra note 279, at 891; see also Dent, supra note 263 (arguing that the Supreme Court's decision in Lee v. Weisman bolsters the free exercise claim).
has also defended exemptions from instruction which burdens religious and other ethical beliefs.  

Other scholars have argued that publicly funded vouchers for private schools are the best approach for resolving values conflicts in education. According to these scholars, values conflicts in the public schools are intractable. In our diverse nation, there is no way to formulate a common set of moral and civic virtues that will be acceptable to all families. If public schools try to inculcate virtue, they will end up either imposing majoritarian norms on dissenting minorities or teaching an anemic, least-common-denominator version of public virtue, which is too thin and watered-down to accomplish any useful purpose.

Michael McConnell and Carl Esbeck are two prominent legal scholars who have made this type of argument in defense of educational choice. According to McConnell and Esbeck, the pluralism of modern American society means that we really only have two options. One option is public schools which teach majoritarian values at the expense of minorities, who must either be indoctrinated in these majority values or forgo their right to publicly-funded education. The other option is a publicly funded voucher system which makes education a matter of family choice. The former "creates a civic orthodoxy," the latter allows families to support a diversity of schools reflecting the full pluralism of modern American society. McConnell and Esbeck are not alone in defending the virtues of educational choice. Educational choice is rapidly attracting proponents from other disciplines and from minority groups, scholars and political leaders on the right and left. One of the great

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Dent argues that "[e]xemption from religiously offensive instruction should be granted unless government has a compelling reason for requiring all children to receive the instruction. Such grounds exist only if the exemption would leave a child without some basic knowledge or skill." Id. at 743. According to Dent, "[b]y this standard, most requests for exemption should be granted." Id.

283. See Philip C. Kissam, Let's Bring Religion into the Public Schools and Respect the Religion Clauses, 49 U. Kan. L. Rev. 593, 600 (2001). Kissam proposes "liberality both in the granting of exemptions and in reviewing school decisions about the nature of alternative study." Id. at 620.

284. See McConnell, supra note 265, at 133, 151; Esbeck, The Establishment Clause as a Structural Restraint, supra note 220, at 94; see also McConnell, The New Establishmentarianism, supra note 44, at 458, 475.


287. See McConnell, supra note 286, at 851; Esbeck, The Establishment Clause as Structural Restraint, supra note 220, at 94-95.

288. McConnell, supra note 286, at 850.

289. See id. at 849; Esbeck, The Establishment Clause as Structural Restraint, supra note 220, at 94-95.

290. See discussion supra note 53.
advantages of educational choice, its proponents argue, is that it avoids clashes over values in education.291 Families with minority beliefs as well as majority beliefs can both choose an education for their children which reflects and inculcates the particular values of their own tradition.

Yet another approach to addressing values conflicts in the public schools has been advocated by the participants in the “new consensus” of religious, educational and civil liberties groups discussed above.292 In addition to embracing the basic dichotomy between protected private religious expression and prohibited school speech, these groups have also embraced the recent “character education” movement.293 “Character education” became an increasingly popular approach to values education in the public schools in the 1990s.294 The goal of character education programs is to bring school officials together with parents and other community members from a wide range of backgrounds in order to identify personal and civic values that are broadly accepted in the community.295 Examples of such values are honesty, caring, fairness, responsibility and respect for others.296 While these norms may not be taught as religious tenets, the mere fact that they coincide with religious beliefs in the community does not make it impermissible to teach them.297

The organizations forming the new consensus have also agreed upon the importance of teaching about religion in the public schools.298 While schools may not teach religion or act in any way which inculcates or inhibits religion, they can, and should, include

291. See Esbeck, The Establishment Clause as Structural Restraint, supra note 220, at 94-95; Macedo, supra note 270, at 229; McConnell, supra note 286, at 849; see also Salomone, supra note 38, at 256.
292. For a discussion of the “new consensus,” see supra text accompanying notes 31-37.
294. See Salomone, supra note 38, at 38.
297. See Religion in the Public Schools: A Joint Statement of the Current Law, supra note 29; Religious Expression in Public Schools, supra note 33, at 13-7; see also Finding Common Ground, supra note 33, at 15-2.
objective and balanced teaching about religion as a critical component of history, literature, social science, and arts classes. Teaching about religion is necessary if students are to learn about the important role that religion has played in history and culture, and it also helps students develop a greater understanding of the religious views of their classmates.

These three basic components of the new consensus are designed to work together to reduce conflicts and tensions over the place of religion and values education in the schools. The vision of the new consensus is a school which inculcates fundamental moral norms agreed upon by the community, provides students with a basic education about the role of religion in history and culture, avoids school speech endorsing religion but protects private religious expression and activities by students.

All of these approaches to dealing with values conflicts in the public schools have drawbacks. Partial opt-outs have been criticized as unworkable and an administrative nightmare. According to opponents, giving families a right to exempt their children from offensive material will tear public education to shreds. All of the judges in Mozert made this argument, as do numerous scholars. They worry that schools will be overwhelmed by numerous claims for accommodation, which will “convert[] the schoolhouse door into a revolving door as different sects participate in the public school curriculum in differing degrees.” Schools will be required to

299. See Finding Common Ground, supra note 33, at 7-1; Religion in the Public School Curriculum: Questions and Answers, supra note 298, at 6-3.

300. See Finding Common Ground, supra note 33, at 7-3; Religion in the Public School Curriculum: Questions and Answers, supra note 298, at 6-2; Religion in the Public Schools: A Joint Statement of the Current Law, supra note 29; The Bible and Public Schools: A First Amendment Guide, supra note 29, at 5.

301. See Finding Common Ground, supra note 33, at 7-3; Religion in the Public School Curriculum: Questions and Answers, supra note 298, at 6-3; A Teacher’s Guide to Religion in the Public Schools, supra note 35, at 2.


303. See, e.g., Salomone, supra note 38, at 240-41; Ingber, supra note 266, at 790-92; Brant, supra note 302, at 759-60. This metaphor is taken from Justice Jackson’s concurring opinion in McCollum. Those who oppose partial opt-outs frequently repeat his words: “If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds.” Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 235 (1948) (Jackson, J., concurring in the judgment), quoted in Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1069 (6th Cir. 1987); Ingber, supra note 266, at 791-92.

304. See Mozert, 827 F.2d at 1069-70 (Lively, C.J., majority opinion); id. at 1072-73 (Kennedy, J., concurring); id. at 1079-80 (Boggs, J., concurring).

305. See Salomone, supra note 38, at 240-41; Ingber, supra note 266, at 790-92; Brant, supra note 302, at 759-60.

306. See Mozert, 827 F.2d at 1072-73 (Kennedy, J., concurring); Salomone, supra note 38, at 240-41; Ingber, supra note 266, at 790-92; Brant, supra note 302, at 759-60.

307. Ingber, supra note 266, at 791.
carefully segregate material from objectionable segments of the curriculum from course work that objecting students are participating in, and as the number of opt-out requests grows, this will become increasingly burdensome and even impossible for schools to achieve.\footnote{308} In Judge Boggs's words, allowing partial opt-outs would be a "challenge" to the very "notion of a politically-controlled school system."\footnote{309}

Proponents of exemptions argue that these critics overstate the dangers associated with allowing exemptions from the curriculum. If families and schools work together in good faith, they will often be able to resolve problems with limited burdens on the schools,\footnote{310} and the existence of an opt-out right is unlikely to spark an avalanche of accommodation requests.\footnote{311} While those who favor partial opt-outs may well be correct that their opponents' fears are overstated, these opponents do have valid concerns. As American society grows increasingly pluralistic, the range of material that might offend minority religious groups and other families with minority views grows as well. Furthermore, given the primary importance of religion to the lives of believers, it is not unreasonable to expect that families with minority views will make use of the opt-out option. Additionally, as a practical matter, most lower courts have followed the judges in \textit{Mozert} and have been reluctant to grant exemptions to the families who seek them.\footnote{312}

The principal disadvantage of educational choice as a way of resolving values conflicts in the schools is that it protects pluralism and diversity at the expense of the unifying functions of the public schools.\footnote{313} Educational choice allows families with minority viewpoints to obtain an education for their children which reflects their own particular values and traditions, but children in private schools do not have the same opportunity to learn about different viewpoints that they have in the public schools. The pluralism fostered by educational choice is essentially a separated pluralism. Students from different religious and cultural backgrounds receive the kind of deep moral education in their own traditions that is impossible in the public schools, but they often have less contact with, and, thus, learn less about traditions different from their own.

Much more will be said below about the benefits of a public school education that would be lost in a system of educational choice. The important point here is that educational choice only solves the

\begin{footnotesize}
\footnote{308} See \textit{id.} at 790-91.
\footnote{309} \textit{Mozert}, 827 F.2d at 1079 (Boggs, J., concurring).
\footnote{310} See Dent, \textit{supra} note 263, at 745.
\footnote{311} See Kissam, \textit{supra} note 283, at 621.
\footnote{312} See Salomone, \textit{supra} note 38, at 128-29, 133-34, 194.
\footnote{313} McConnell recognizes that this is one of the greatest challenges to educational choice. See McConnell, \textit{supra} note 265, at 128.
\end{footnotesize}
problem of values conflicts in the public schools by dismantling the current system of public schooling. The purpose of educational choice proposals is to give families an exit option from the public schools, not to find a resolution to values conflicts within the schools.

There are also disadvantages associated with the proposals offered by the new consensus. Character education programs are subject to many of the same problems that are associated with other efforts to inculcate values in the public schools. Even if school officials work closely with parents and community members from a variety of different perspectives to identify a common core of personal and civic values to teach in the schools, there will be dissenters whose views are not represented. While it may be possible for most members of the community to agree on general principles like honesty, responsibility, caring and respect, as soon as these values are applied to particular situations or given precise content, divisions will inevitably arise.\textsuperscript{314} If, on the other hand, schools try to teach these values at a sufficient level of generality to obtain wide consensus, the principles that are taught will be anemic and watered-down.\textsuperscript{315} In addition, teaching about religion in an objective and balanced manner in the public school system is more difficult than it may appear at first. There will not be sufficient time within the curriculum for all views and traditions to be addressed with the same level of attention and detail, and some minority religious perspectives are bound to be excluded.\textsuperscript{316}

Thus, by trying to teach about religion or inculcate values at all, the public schools will inevitably end up imposing majoritarian preferences upon minority groups. By protecting the rights of dissenting students to engage in private religious expression and

\textsuperscript{314} See, e.g., Salomone, supra note 38, at 37; Dent, supra note 263, at 733.  
\textsuperscript{315} See McConnell, The New Establishmentarianism, supra note 44, at 455, 458.  
\textsuperscript{316} See McConnell, supra note 265, at 143. Proponents of the new consensus recognize the challenge of achieving objectivity and balance when teaching about religion. Because “the school day consists of limited hours, and texts have only so many pages,” Charles Haynes and Warren Nord advocate using the influence of a religion as the primary criterion for determining whether to include the religion in the discussion. Nord & Haynes, supra note 31, at 48; see also Warren A. Nord, Religion and American Education: Rethinking a National Dilemma 254-55 (1995). Because such a criteria will favor the world’s major religions, Haynes and Nord also argue that teachers should include some treatment of minority religions, and the overall curriculum should be balanced and fair among religions. See Nord & Haynes, supra note 31, at 48. While this approach is promising, it does not remove all of the obstacles to achieving an objective and balanced treatment of religion in the curriculum. Questions remain about how much time should be given to minority religions, which minority religions should be included, and when an overall curriculum qualifies as balanced and fair. Moreover, even in spite of the best efforts to be fair, some minority religions will surely receive greater coverage than others, and there will undoubtedly be minority religions that are excluded altogether. As Nord writes, “[o]bviously there are practical limitations on neutrality . . . But this doesn’t mean that we must give up on neutrality completely. We can (and should) be more rather than less neutral.” Nord, supra, at 254.
activities, the new consensus provides these students with an important vehicle for preserving and affirming their values and beliefs among themselves. However, these activities and expressions remain private and, thus, minority views still do not have a place within the school's educational program.

Each of these approaches to resolving the conflicts over values in the public school involves, at least at some level, a push to the private for religion and religious speech. Partial opt-outs from the public school curriculum enable religious minorities whose beliefs conflict with those inculcated by the school to opt out of those portions of the curriculum which they find offensive. If the right to accommodation is based on a general parental right to direct the upbringing of one's children rather than the Free Exercise Clause, parents who have secular objections can also opt out of material that is inconsistent with their values and beliefs. Educational choice is essentially the opportunity for a total opt-out or exit from the public schools altogether. Families who are unhappy with the values taught in the public school can leave the public schools and establish their own schools with public funding. In the approach favored by the new consensus, values are taught in the public schools, but religious dissenters are protected with an opportunity to engage in private religious activity or expression affirming different views.

In contrast to all of these approaches, the most promising approach to resolving conflicts over values in the public schools is not a push to the private for religious expression or activity nor a partial or total opt-out for minority views. Rather, the most promising approach is for students of all perspectives to "opt in" to the educational process by voicing and defending differing views in robust grey area speech. If robust grey area speech in the classroom and other school-sponsored settings is combined with the central features of the new consensus proposal, public schools should be able to engage in values education in a way that is acceptable to religious minorities and majorities alike.

One of the most important features of the new consensus proposal is the involvement of parents and community members from a range of different traditions and backgrounds in the process of identifying the core values that will be taught in the public schools. If dissenting parents like the Mozerts are invited to participate in identifying community norms and they accept this invitation, the resulting values will be more broadly acceptable to the community. This, of course, requires all participants to recognize that none of them will be able to have everything that they want. The school officials in Mozert should have been willing to consider a reading series that was less offensive to conservative Christian parents in the district, but families like the Mozerts must also realize that they cannot expect schools to teach values exactly how they would prefer. In Mozert, two of the plaintiffs indicated that they would object to any reading materials that exposed
their children to religious beliefs or values that contradicted their own without a statement that the other views were incorrect.\textsuperscript{317} That is obviously asking too much. However, the school officials in \textit{Mozert} also demanded too much when they insisted on a reading series that was so objectionable to a significant segment of the school population that dissenting families chose to send their children to private schools rather than allow their children to read the books.\textsuperscript{318}

The new consensus proposal to include teaching about religion in the public schools will also help to relieve tensions in the public schools. Religious believers will feel less excluded from the educational process if the role of religion in history and culture is recognized, and if schools take seriously their responsibility to present the material in an objective and balanced way, families without religious convictions will be less likely to object.

Of course, complete agreement over the values that will be taught in the schools will not be possible, nor will it be possible to teach about religion in a perfectly balanced way. For this reason, it is critical to supplement the proposals of the new consensus with a commitment to robust grey area speech which permits students with differing perspectives to add their own views to the discussion about religion and values. If, for instance, the children in \textit{Mozert} were permitted to bring their perspectives into classroom activities and other instructional settings, they would be able to reaffirm and defend their own values against the imposition of majoritarian norms by the school. Furthermore, by sharing their views with others in school-sponsored settings, minority students like the Mozerts can contribute alternative perspectives to the larger school community. It is even possible that some students with minority views will be prophetic voices that not only deepen the values education process but, perhaps, even change community standards.

The protections for private religious expression and activity advocated by the new consensus allow students with minority views to affirm their views to themselves and with others who are like-minded. For example, students can engage in individual prayer throughout the day when class is not in session, and they can meet with students who share their faith after school in religious clubs under the Equal Access Act. Private religious expression in settings like these can help

\footnotesize{\textsuperscript{317} See \textit{Mozert} v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1062 (6th Cir. 1987). According to Judge Boggs, extreme statements like this were elicited by the defense through skillful cross-examination designed to portray the plaintiffs' claims in the most unfavorable light. \textit{Id.} at 1074-75 (Boggs, J., concurring). In fact, the plaintiffs in the \textit{Mozert} litigation did not object to any incident of exposure to contrary values, and they did not demand that the school affirmatively teach the correctness of their views over others. \textit{Id.} They objected to the new reading series as a whole, and their complaint requested an opt-out from the readers, not an education tailored to their particular religious belief. \textit{Id.} \textsuperscript{318} See \textit{id.} at 1059.}
minority students preserve their alternative values and lifestyles in the face of majoritarian pressure. However, grey area religious speech goes even further. It allows religious minorities and other students to share their views with others so that the entire school community can learn more about what these students believe. By voicing their perspectives in class or other public settings, students bring their views into the educational process rather than opt out, exit or privatize differences. Similarly, when students with religious convictions share their perspectives in curricular settings, they deepen the process of learning about religion. Religious minorities who are left out of textbooks can contribute their perspectives and experiences, and the religious views that do appear in textbooks come alive when young adherents speak directly about their beliefs.

According to this view, values education is best understood as a dialectic. The process of identifying the core values that will be taught in the public schools should be a widely democratic process involving parents and community members of all perspectives. However, because complete agreement will never be possible, there should be many opportunities for students with minority perspectives to present their views in class or other instructional settings. By sharing their views with others, minority students can become a part of the larger conversation about values, and they may well cause the majority to revise or redefine their own views. Envisioning values education in the public schools as a dialectic demonstrates that proponents of publicly funded vouchers present us with a false choice. They argue that we must choose between public school education, which imposes majoritarian values on minority groups, and a publicly funded voucher system, which leaves values inculcation up to family choice. There is, however, a third option. That option is a public school system which inculcates widely held majoritarian beliefs but simultaneously provides students with opportunities to voice and defend alternative views. To be sure, the values taught in public schools which seek wide consensus over community norms will not be as deep and comprehensive as values taught in private schools. However, this is not a weakness. Inculcating values which are somewhat thin gives public school students the opportunity to elaborate upon these values from their varying perspectives and, thereby, deepen values education in a way that respects the diversity in American society.

319. I made this argument when I defended protections for robust private religious expression in the public sphere in Brady, supra note 10, at 557-58; see also Michael W. McConnell, Neutrality Under the Religion Clauses, 81 NW. U. L. Rev. 146, 149-50 (1986) (The Equal Access Act “protects a liberty of incalculable value to the high school students involved, who needed the rights of speech and association to maintain their religious identity.”). McConnell has supported released time programs and moments of silence on similar grounds. See id. at 163-64.
The dialectical vision for values education elaborated above falls mid-way between two common models of public school education. On the one hand, many scholars and courts have envisioned education as primarily a process of inculcation. Schools have an important responsibility to socialize students in community norms and values and to teach students the virtues necessary for democratic citizenship. This was the view of education adopted by the majority in Hazelwood, and it has reappeared in other Supreme Court cases addressing the First Amendment rights of students. For example, the justices have repeatedly affirmed that public schools play a vital role in “prepar[ing] . . . individuals for participation as citizens, and in the preservation of the values on which our society rests.” Schools “[inculcate] fundamental values necessary to the maintenance of a democratic political system.”

In contrast to the model of education as inculcation, another model for education is the marketplace model. Scholars and courts adopting this model emphasize the role of the public school as a marketplace of ideas. Under this view, a robust exchange of ideas among students and with teachers is the primary vehicle for education, not indoctrination. Indeed, under the marketplace model, the

320. See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681, 683 (1986) (holding that one function of a public school system is to inculcate fundamental values necessary for a democratic society); C.H. v. Oliva, 195 F.3d 167, 171 (3d Cir. 1999) (“[P]ublic schools perform a critical role in shaping the nation's youth, and [the] federal courts should be wary of interfering in this process.”), reh’d en banc, 226 F.3d 198 (3d Cir. 2000) (judgment of district court and of appellate panel affirmed in part and case remanded with respect to remaining issues), cert. denied, 121 S. Ct. 2519 (2001); Settle v. Dickson County Sch. Bd., 53 F.3d 152, 156 (6th Cir. 1995) (“Learning is more vital in the classroom than free speech.”); Hafen & Hafen, supra note 220, at 390 (public schools have “broad authority” to teach “values and skills that enable true autonomy”).


323. See cases cited infra notes 324-25.

324. Ambach v. Norwich, 441 U.S. 68, 76 (1979), quoted in Pico, 457 U.S. at 864 (Brennan, J., plurality); id. at 876 (Blackmun, J., concurring in part and concurring in the judgment); id. at 896 (Powell, J., dissenting); id. at 913 (Rehnquist, J., dissenting).

325. Ambach, 441 U.S. at 77, quoted in Fraser, 478 U.S. at 681, and in Pico, 457 U.S. at 864 (Brennan, J., plurality); id. at 876 (Blackmun, J., concurring in part and concurring in the judgment); id. at 889 (Burger, C.J., dissenting); id. at 896 (Powell, J., dissenting); id. at 914 (Rehnquist, J., dissenting).

326. See Mitchell, supra note 267, at 699-706, for a discussion of the differences between the inculcation and marketplace models.


328. See Tinker, 393 U.S. at 512; Whitehead & Crow, supra note 42, at 205-06, 211; see also Sekulow et al., supra note 29, at 1020 (stating that the purpose of education is education, not indoctrination).
danger is that schools will become "indoctrination centers" which impose a state-prescribed orthodoxy on all students. While most Supreme Court decisions addressing student rights in the public schools have embraced the inculcation model of education, in Tinker, which was the Court's first major decision in this area, the Court embraced the marketplace model. According to the Court in Tinker, the classroom is "peculiarly the 'marketplace of ideas,'" and strong protection of student First Amendment rights is necessary to prevent schools from becoming "enclaves of totalitarianism." Justice Brennan's dissent in Hazelwood adopted a similar view. Justice Brennan criticized the decision in Hazelwood for rolling back Tinker's protections for student speech and giving schools wide supervisory and editorial powers that can be used to "strangle the free mind at its source."

When it comes to student expression in the public schools, it is not surprising that the inculcation and marketplace models of education entail very different standards of protection. Those embracing the inculcation model of education tend to view student speech rights quite narrowly. Thus, the Court in Hazelwood gave schools wide latitude to control student expression in school-sponsored settings. Only when student speech is personal speech that merely happens to occur on the school premises do students receive the full protections articulated by the Court in Tinker.

By contrast, those embracing a marketplace model of education advocate strong protections for student expression. For example, in his dissent in Hazelwood, Justice Brennan rejected the Court's distinction between private student speech and school-sponsored speech. According to Justice Brennan, student expression does not lose its private character just because it is uttered in a school-sponsored setting, and all student speech should be evaluated under Tinker. Thus, only when speech materially or substantially interferes with school functions or the rights of other students can it be restricted. Scholars and commentators embracing the

329. Sekulow et al., supra note 29, at 1020.
330. See Pico, 457 U.S. at 876-77 (Blackmun, J., concurring in part and concurring in the judgment).
331. Tinker, 393 U.S. at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).
332. Id. at 511.
334. See id. at 270-71 (majority); see also supra text accompanying notes 171-78. Scholars adopting the inculcation model have also tended to embrace Hazelwood's interpretation of student speech rights. See, e.g., Hafen & Hafen, supra note 220, at 390, 393-96.
335. See Hazelwood, 484 U.S. at 281-84 (Brennan, J., dissenting).
336. See id; see also supra notes 211-13 and accompanying text.
337. See Tinker, 393 U.S. at 513.
marketplace model agree.\textsuperscript{338} Student speech in captive audience situations or other school-sponsored settings remains private expression just like personal expression outside instructional time, and the same standard should apply in both cases.\textsuperscript{339}

The view of public education in this article is a hybrid model which combines the inculcation model with the marketplace model. On the one hand, schools do play an important role in transmitting fundamental values to the nation's youth, and parents and community members should actively participate in the process of defining these fundamental values. The school is not just a platform for debate among students and teachers. The school has an interest in seeing that students learn community norms and traditions, as well as standards of civility, effective communication skills and how to engage one another respectfully. If schools were really only a marketplace of ideas and there were no greater limits on grey area speech than truly personal speech, the educational experience would be little more than a loosely regulated debate in which students stand on soap boxes delivering pronouncements like Niemeyer's sermon in \textit{Cole}.

On the other hand, because complete agreement over fundamental values will never be possible and community standards are always capable of improvement, education should not be viewed solely as inculcation. Students should have opportunities in classrooms and school-sponsored settings to voice alternative perspectives and to challenge and deepen the views presented by the school. The fact that the speech is religious rather than secular should not alter the school's treatment of the speech. Student religious speech can make important contributions to discussions about values just as secular speech can. Thus, it is a mistake to view education as either inculcation or a free market for ideas. Education is ideally both, and viewing education as both inculcation and a marketplace for ideas means that much student expression in school-sponsored settings is unavoidably grey. It has both public and private features, and both of these features must be taken into account and balanced along with the inculcative and marketplace goals of education itself.

Some readers will undoubtedly object to the dialectical vision for values education described above. My discussion has been sympathetic to religious minorities and other groups whose values differ from the majoritarian norms taught in the public schools, and I have sought to both protect dissenting views as well as make a place for them in the values education process. Many scholars are much less

\textsuperscript{338} See, e.g., Sekulow et al., \textit{supra} note 29, at 1073 (stating that \textit{Tinker} should apply to all classroom speech); Whitehead & Crow, \textit{supra} note 42, at 199 (stating that with, perhaps, an exception for lewd or indecent speech, \textit{Tinker} should apply to all student expression in public schools).

\textsuperscript{339} See Sekulow et al., \textit{supra} note 29, at 1071-77, 1093-94, 1095; Whitehead & Crow, \textit{supra} note 42, at 175, 199.
sympathetic to the claims of religious minorities. Indeed, those who are familiar with the literature on the Mozert case will recall that many scholars who have written on Mozert from within the liberal tradition view the minority perspectives held by the Mozerts and other religious fundamentalists as dangerous and destructive forces which threaten to undermine the core values essential for democratic society. For these scholars, Mozert demonstrates the limits of the state's responsibility to protect minority religious perspectives. When parents like the Mozerts object to education in our nation's shared civic values, schools need not and, indeed, should not accommodate their objections unless doing so would serve democratic values by keeping their children in the public schools. Thus, when it comes to the core civic values embraced by these scholars, the proper response to those who object to forced assimilation is nonaccommodationism. When core democratic values are at stake, education is not a dialectic. It is a one-way inculcation process in which minority groups are obliged to submit. Even private schools have an obligation to teach these core values.

The problem with such a view is that it assumes that we have finally identified the core moral and civic virtues that all children should learn. Such a view denies that minority groups may have something to teach us about how our fundamental values might be revised and refined. While some minority perspectives may, in fact, be more destructive than helpful, it is often impossible to identify which minority voices are truly prophetic and which are not until the debate and discussion are well under way. Thus, rather than a non-accommodationist stance, the better path is to embrace a place for the voices of dissenting students in the process of values education. In Douglas Laycock's words, while "[s]ome will view it as a good thing to drag these 'backward' [religious] institutions into the secular virtues of the post-modern age... [that] assumes a totalitarian confidence in contemporary secular values."

B. Promoting Unity in and through Diversity

In addition to mitigating values conflicts in the public schools, grey area religious speech can also help to build a strong and lasting unity among citizens of diverse backgrounds in an increasingly pluralistic nation. The challenge of how to forge and sustain unity amid an increasingly diverse population has been a critical issue in recent years.
scholarship concerning education policy. Political philosophers,345 education theorists346 and others347 have been concerned that the growing diversity in American society may undermine the demands of national unity if the needs for both unity and diversity are not properly balanced.348 How, William Galston writes, can the contemporary liberal state "forge[] and maintain[] needed unity in the face of the centrifugal forces of diversity?"349

One common response is to build unity upon common democratic values that all citizens can share in spite of their differences. Because these values are not natural or innate, civic education is essential, and the project of civic education is a critical, if not the most critical, goal of public school education. If the public schools inculcate common democratic virtues and a shared civic character among students, the increasing diversity and pluralism of American society will not threaten national unity but can coincide with shared purposes and sentiments.

This is the response that has been given by a number of prominent scholars who have embraced what has been called "political liberalism."350 According to political liberals, the powers of the state are limited to matters of civic concern rather than "comprehensive" religious or philosophical ideas about the good life as a whole.351 Disagreement about comprehensive doctrines or ideas about human life as a whole will always exist,352 but agreement can be reached on the political essentials of a liberal democratic regime.353 One of the most important responsibilities of the state is to promote and preserve


347. See, e.g., Salomone, supra note 38.

348. See, e.g., id. at 229; McLaughlin, supra note 346, at 239.


350. The term "political liberalism" coincides with the title of John Rawls's influential book Political Liberalism (1993). In addition to Rawls, other prominent political philosophers who have adopted a similar understanding of liberalism are William Galston, Stephen Macedo, Amy Gutmann and Dennis Thomson. Rosemary Salomone's recent work in Visions of Schooling: Conscience, Community, and Common Education, supra note 38, also fits within this tradition.

351. See Macedo, supra note 270, at 166-68; Rawls, supra note 350, at 38; Gutmann, supra note 270, at 558.

352. See Macedo, supra note 270, at 166-67; Rawls, supra note 350, at 36.

353. See Galston, supra note 265, at 245, 255-56; Macedo, supra note 270, at 168.
the foundations of liberal democracy by inculcating the political principles and values which underlie democratic governance among the nation's youth. It is by teaching shared democratic values and virtues that the unity of American society is forged and sustained.

For some political liberals, the requirements for good citizenship are viewed narrowly, and there is plenty of space for a diversity of views and lifestyles concerning the good life as a whole. For example, William Galston envisions the liberal state as a "Diversity State" which affords maximum feasible space for difference. The state must provide a vigorous system of civic education that teaches core political virtues such as tolerance, respect for the rights of others, law abidingness, and the capacity to evaluate the performance of political leaders, but these requirements for democratic citizenship are viewed minimally. For others, the requirements of democratic virtue are much broader. For example, for Amy Gutmann, Stephen Macedo, John Rawls and Dennis Thompson, civic virtue also includes the capacity and willingness to discuss matters of basic justice in terms accessible to all citizens. Macedo also includes openness to change, openness to social diversity, and self-criticism, as well as many additional values. For Gutmann, a capacity for critical thinking is also necessary as well as the ability to evaluate and make choices among alternative ways of personal and political life. According to Gutmann, children must develop the intellectual skills necessary to evaluate ways of life different from their parents.

However, regardless of whether the requirements for democratic citizenship are understood narrowly or broadly, all of these scholars argue that the demands of civic education outweigh competing claims by families whose beliefs or ways of life conflict with civic values.

354. See Galston, supra note 265, at 245, 255-56; Gutmann, supra note 263, at 39-41, 51-52; Gutmann & Thompson, supra note 270, at 359; Macedo, supra note 270, at 10-11, 13-14, 15-16, 42-43; Galston, supra note 345, at 528.

355. Galston, supra note 345, at 524.

356. See Galston, supra note 265, at 245-46; Galston, supra note 345, at 528.

357. See Galston, supra note 265, at 299.

358. Macedo calls this the virtue of "public reasonableness." Macedo, supra note 270, at 171-73. Rawls refers to it as the duty of "civility." Rawls, supra note 350, at 217, 224. Amy Gutmann and Dennis Thompson call it "reciprocity." Gutmann & Thompson, supra note 270, at 14, 52-53, 55-56.

359. See Macedo, supra note 270, at 25, 125. Macedo's list of democratic virtues includes mutual respect, mutual understanding, tolerance, openness to change, self-criticism, openness to social diversity, public reasonableness, active cooperation with other citizens, a willingness to think critically about public affairs and participate actively in the political process, a sense of ownership of public places, and a willingness to help the weak. See id. at 10-11, 25, 125.

360. See Gutmann, supra note 263, at 51.

361. See id. at 40. In his later writings, Macedo agrees with Gutmann about these virtues. See Macedo, supra note 270, at 238-40.

362. Gutmann, supra note 263, at 30. Gutmann's list of civic virtues also includes toleration and mutual respect. Id. at 118.
Parents have significant freedom to educate their children in their own values and traditions, but where these values or beliefs collide with the requirements of civic education in democratic values, the parents’ values must yield to the demands of the state. 363 Thus, Gutmann, Macedo and Thompson have defended the Sixth Circuit’s decision in Mozert on the grounds that the exposure of children to a diversity of world views and values is essential to fostering the democratic virtues of critical thinking, openness to diversity, mutual respect and tolerance, and the willingness and capacity to make public claims in terms that are accessible to other citizens. 364 Galston disagrees that so much was required for good citizenship, 365 but where his more “parsimonious” 366 core of democratic virtues is at stake, he would also agree that “this civic core takes priority over individual or group commitments . . . .” 367 John Rawls expresses some regret that not all ways of life are compatible with the requirements of democratic education, 368 and he “lament[s] the limited space, as it were, of social worlds . . . .” 369 Macedo expresses no such regret: “[s]o be it,” he says, if “[l]iberal civic education . . . favor[s] some ways of life or religious convictions over others.” 370 We should not “cry crocodile tears” over those who oppose education in shared values essential for liberal society, 371 and, indeed, the state has an important responsibility to transform the diversity of private associations and groups so that they are supportive of civic values. 372

Regardless of whether they understand political liberalism minimally like Galston or broadly like Macedo and Gutmann, the unity that these scholars favor is a unity of sameness and assimilation. What we need, writes Macedo, is “[p]rofound forms of sameness”: “[a] liberal democratic polity does not rest on diversity, but on shared

363. See Galston, supra note 265, at 251-52, 255-56; Gutmann, supra note 263, at 122; Macedo, supra note 270, at 201-02; Rawls, supra note 350, at 156-57, 199-200; Gutmann, supra note 270, at 570-72.
365. See William A. Galston, Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory, 40 Wm. & Mary L. Rev. 869, 904-05 (1999); Gutmann, supra note 263, at 298. Galston discusses the Mozert case at length in Galston, supra, at 896-905.
366. Galston, supra note 265, at 299.
367. Id. at 256. Parental authority is limited by the fact that a “child is at once a future adult and a future citizen.” Id. at 252.
368. See Rawls, supra note 350, at 200.
369. Id. at 197.
371. Id. at 197.
political commitments weighty enough to override competing values.”374 Thus, the bonds of unity are envisioned as common values that stand in contrast to and in tension with the diversity of individuals and associations in American society. Unity and diversity essentially occupy separate spaces, and the bigger the requirements for unity, the smaller the space for diversity.

Judges and legal scholars who worry that the presence of religion in the public schools will cause religious conflict and divisiveness share a similar understanding of the requirements for national unity and the relationship between unity and diversity in American society. When Justice Frankfurter argued that religion should be kept out of the public schools because religious conflicts threaten the role of the schools in promoting a “common destiny”375 and “cohesion among a heterogeneous democratic people,”376 he viewed unity as a matter of sameness and assimilation just as political liberals do today. For Justice Frankfurter, the purpose of the separation of church and state is to ensure that the “unities among our people” will remain “stronger than our diversities.”377 In Santa Fe, Justice Stevens expressed a similar understanding of unity as a matter of commonality. For Justice Stevens, the election mechanism in Santa Fe’s prayer policy violated the Constitution when it “turn[ed] the school into a forum for religious debate” and, thereby sparked divisions along religious lines.378 Schools are not a place for religious debate or divisions over matters of such deep difference. Religious beliefs belong in a “private sphere”379 where they will not divide citizens against each other.

This article proposes a very different understanding of the foundation and requirements for national unity. Seeking to build national unity on sameness and assimilation is fundamentally unsound and misguided. Pushing religion out of the public schools into a private realm in order to avoid divisiveness will neither build unity nor reduce conflict. On the contrary, it will only serve to temporarily suppress differences which ultimately cannot be repressed. Religious convictions are too important a part of the lives of religious believers as well as the nation’s moral traditions for religion to remain separated from public life in a private sphere. Interchanges between believers and nonbelievers and among believers from different traditions will inevitably occur, and the true test of national unity will be whether citizens can listen to one another and converse about their

374. Id. at 134. Similarly, according to Galston, “[l]iberal purposes . . . define what the members of a liberal community must have in common. These purposes are the unity that undergirds liberal diversity.” Galston, supra note 265, at 3.
376. Id. at 216.
377. Id. at 231.
379. Id. at 311.
differences peacefully and respectfully. Pushing religious matters out of the public schools does not serve to foster such understanding or engagement. It leaves in place the misunderstandings and resentments that are the real source of destructive conflict. Isolating religious differences in a private sphere will only cause them to fester; it will do nothing to reduce conflict.

Nor is inculcating a common set of civic values the most promising avenue to lasting unity. There will always be dissenting views, and if the goal is sameness, then unity will come at the expense of diversity. For families like the Mozerts, the inculcation of shared democratic values meant the destruction of their way of life. Furthermore, inculcation in common values in the face of dissent will also likely lead to deeper divisions rather than greater commonality. The Supreme Court made this observation fifty-eight years ago in its famous decision in West Virginia State Board of Education v. Barnette. The Barnette decision addressed the constitutionality of a Board of Education policy requiring a compulsory flag salute to become a regular part of the educational program in the state's public schools. Families adhering to the Jehovah's Witnesses faith objected to the application of the statute to their children on the grounds that the flag salute was prohibited by their religion.

Three years earlier, the Court had denied a similar request for relief in Minersville School District v. Gobitis. Writing for the majority in Gobitis, Justice Frankfurter stated that the flag is “the symbol of our national unity.” By seeking to promote that unity through the flag salute policy, West Virginia was pursuing “an interest inferior to none in the hierarchy of legal values.” Justice Frankfurter's words are echoed by political liberals today, but the Court in Barnette pointed out the flaw in these arguments. According to the Court, “[a]s governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be,” and ultimately “[c]ompulsory unification of opinion achieves only the unanimity of the graveyard.”

A better path to unity is not to seek a unity of sameness but, instead, a unity that is forged in and through diversity rather than at its expense. The goal should not be a common identity, but a common bond based upon a mutual knowledge of our differences and a mutual ability to engage one another in a respectful dialogue about these

381. See id. at 625-26.
382. See id. at 629.
383. 310 U.S. 586 (1940).
384. Id. at 596.
385. Id. at 595.
387. Id. “Those who begin coercive elimination of dissent soon find themselves exterminating dissenters.” Id.
differences. If people from diverse backgrounds can learn to understand, listen and talk to one another about their differences as well as their commonalities, those abilities will be the strongest foundation for national peace. Religious differences do not need to be relegated to "the individual's church and home" to avoid religious strife, nor do we need to neutralize or remove these differences. Quite the opposite. It is a mutual understanding and the ability to discuss differences that promotes lasting harmony, not forced assimilation.

Grey area religious speech in the public schools can play a vital role in building this kind of unity. Public schools are one of the few places where citizens from different backgrounds come together and interact for sustained periods of time in their formative years. Far from being a place where religion should be excluded, the public schools are an ideal place for young people to learn about the religious and nonreligious beliefs of their peers and to develop the ability to understand and engage one another. Grey area speech is critically important for this process. When students express religious and nonreligious beliefs in the classroom or in other captive audience situations, their peers learn about these beliefs. The students who are speaking also learn how to communicate effectively with those who are different. There are risks, to be sure, associated with grey area speech. The public characteristics of this speech mean that schools should have some authority to ensure that the speech is appropriate to the occasion, civil and respectful of the speaker's audience, and consistent with the school's pedagogical objectives. The school also has an interest in protecting Establishment Clause values such as neutrality, nonendorsement and noncoercion. However, within these limits, robust grey area speech, including religious expression, should be encouraged and protected.

Those scholars who object to grey area religious speech on the grounds that it may offend nonbelievers and those with different religious convictions take a very short-sighted position. Democratic governance in a diverse nation will collapse if people with different views are not willing to listen to those who disagree with their position. Student expression in captive audience situations is important primarily because students will be exposed to differing views and, thus, will learn about perspectives different from their own. Religion may be an especially sensitive topic, but students will encounter religious differences eventually, and it is better for students to encounter these differences with some understanding and knowledge rather than repressed mistrust or misunderstanding fostered through lack of communication. Teaching children that they

do not need to listen to those whose ideas offend them is surely a most unpromising preparation for citizenship in a pluralistic democratic regime.

Scholars who embrace political liberalism would agree that schools play an important role in teaching students how to converse with those who are different and reach mutually satisfactory positions. However, the vision of dialogue that political liberals have in mind is very different from the one I describe. For political liberals, the basic political principles governing the use of state power are only legitimate if these principles are based on reasons that all citizens can, in theory, accept.\(^{389}\) This is the ideal of “public reason,” and one of the virtues that civic education must foster is the willingness to engage in public reason when fundamental political principles are at stake.\(^{390}\) Citizens engage in public reason when they offer each other reasons that other citizens can not only understand but can also be reasonably expected to endorse.\(^{391}\) Citizens must offer reasons that are “publicly” or “mutually” accessible or, in other words, reasons that are shared or could become shared by other citizens.\(^{392}\) Reasons that are based on faith or otherwise require citizens to adopt the speaker’s sectarian way of life to be understood do not qualify as public reasons.\(^{393}\) Rawls refers to the willingness to engage in public reason as the “duty of

\(^{389}\) See Gutmann & Thompson, supra note 270, at 25, 52-53; Macedo, supra note 270, at 174; Rawls, supra note 350, at 217.

\(^{390}\) According to Rawls, citizens need only engage in public reason when discussing “constitutional essentials” and questions of basic justice.” Rawls, supra note 350, at 214. For other political liberals, public reason should govern all political discussion. See, e.g., Gutmann & Thompson, supra note 270, at 52 (“Deliberative democracy asks citizens and officials to justify public policy by giving reasons that can be accepted by those who are bound by it.”); Amy Gutmann, Religious Freedom and Civic Responsibility, 56 Wash. & Lee L. Rev. 907, 908 (1999) (“When religious or secular citizens argue in public for a mutually binding law or policy . . . they are morally responsible for making arguments that strive for reciprocity.”).


\(^{392}\) See Gutmann & Thompson, supra note 270, at 14, 55; Macedo, supra note 270, at 172; John Rawls, Justice as Fairness: A Restatement 90-91 (2001).

\(^{393}\) According to Gutmann and Thompson, not all religious arguments are nonpublic. Religious arguments that appeal to principles that can be shared with nonbelievers are consistent with public reason. See Gutmann & Thompson, supra note 270, at 56-57; see also Gutmann, supra note 390, at 909 (stating that citizens can offer religious arguments as long as these arguments “at least can be translated into mutually justifiable reasons for mutually binding policies”). However, for Gutmann and Thompson, it is always illegitimate to appeal to any authority, religious or otherwise, whose conclusions are “impervious” to critical assessment and evaluation based on public reason. See Gutmann & Thompson, supra note 270, at 56. Macedo agrees. See Macedo, supra note 270, at 172. Rawls’s most recent position is slightly different. According to Rawls, citizens may offer religious arguments, whether they are publicly accessible or not, as long as they also offer reasons that are publicly justifiable. See Rawls, supra note 391, at 776, 783-84.
civility.” For Gutmann and Thompson, it is the virtue of “reciprocity.” For Macedo, the virtue is called “public reasonableness.”

Being able to engage in public reason is certainly an important skill, but it should not replace the capacity to understand and engage in dialogue about reasons and premises that are not shared. Political liberals imagine a political world in which citizens speak a kind of “Esperanto” which uses only shared premises and standards of reasoning. In the real world, citizens use all sorts of reasons in public debate, some of which meet the criteria of “publicness” and some of which do not. Dialogue based on “first order” moral languages is not only natural and inevitable, but it is a good thing. When participants use first order moral languages, they can bring new and unfamiliar premises and standards of reasoning to the conversation, and these new perspectives can, in turn, add a prophetic dimension to the dialogue which transforms generally accepted ways of thinking. However, even if the use of first order moral languages in public debate is not desirable, it is certainly unavoidable in any democratic regime that respects basic guarantees of freedom of speech. Building national unity on the widespread use of moral Esperanto is unrealistic. Students need to learn how to engage in discussions that include differences as well as commonalities, and for this type of dialogue, experience in listening to and communicating with those of deeply diverse beliefs is as essential as training in Esperanto.

For some legal scholars, my understanding of unity as something which is achieved in and through diversity rather than through sameness or assimilation is an impossible ideal. These scholars envision religion as inherently exclusionary, dogmatic and nonrational. Religion, they argue, rests upon unquestioning faith in “absolute” standards that resist critique and rational analysis. Whereas secular beliefs depend on matters of human experience and reason that all can understand, religious conviction involves a leap of faith that submits to an “extrahuman” source of authority unaccessible to nonbelievers. Once that leap is taken, faith rejects

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395. Gutmann & Thompson, supra note 270, at 14, 52-53, 55-56.
396. Macedo, supra note 270, at 169.
397. See Gey, supra note 30, at 382, 451-53.
398. See Suzanna Sherry, Enlightening the Religion Clauses, 7 J. Contemp. Legal Issues 473, 478, 480 (1996). Abner Greene has also described religious conviction as involving a leap of faith in an extrahuman source of authority that is not accessible to nonbelievers, but he does not go so far as to suggest that religious conviction is inherently dogmatic or necessarily resists rational critique or analysis. See Abner S. Greene, The Political Balance of the Religion Clauses, 102 Yale L.J. 1611, 1614, 1617, 1619-20 (1993) [hereinafter, Greene, The Political Balance of the Religion Clause]; Abner S. Greene, Is Religion Special? A Rejoinder to Scott Idleman, 1994 U. Ill. L. Rev. 535, 540.
disproof and ignores contrary evidence. The result is that religious convictions are inherently “insular” and exclusivity. These convictions make sense to those who share the faith, but those without faith cannot understand or discuss them. Those who understand religion this way argue that the inaccessibility of religious belief means that there must be limits on the role that religion can play in political discourse and policy-making. The introduction of religious convictions into public discourse effectively excludes nonbelievers from meaningfully participating in that discourse. When religious convictions are at stake, it “is [not] possible for those without faith to enter the discussion.” For these scholars, it seems that there can be no meaningful understanding and engagement among believers and nonbelievers about religious convictions that rest on faith. Conversation and dialogue is only possible if it is based on publicly accessible reasons that all can share.

The problem with this view is that it is based on an overly simplistic understanding of religious faith. Most religious believers do have faith in a deity whose nature and will exceed the capacity of humans to fully understand through unaided reason (and even with the assistance of grace). Believers also generally embrace at least the fundamentals of faith as matters that are “absolute” and unchanging. However, religious faith is not disconnected from human experience or reason and most of the world’s religions do not give a detailed blueprint for all aspects of human life. For most believers, faith is a matter of assent that involves reason and experience as well as the characteristic leap. Believers have faith because their religious convictions make sense of their world and experiences, and these are matters that all humans share. Saint Augustine expressed the nature of faith well when he gave his own reasons for belief: “you have made us for yourself and our heart is restless until it rests in you.” Thus,

399. See Suzanna Sherry, Religion and the Public Square: Making Democracy Safe for Religious Minorities, 47 DePaul L. Rev. 499, 510 (1998); Sherry, supra note 398, at 482.
400. Gey, supra note 30, at 453.
401. See id.; Sherry, supra note 398, at 482.
402. See Gey, supra note 30, at 454-55; Sherry, supra note 399, at 501.
403. See Sherry, supra note 399, at 509 (“Those who do not share a belief in the same God or the same sacred texts have little or nothing to contribute to the discussion.”); cf. Gey, supra note 30, at 417 (“Political disputes over religious absolutes are by nature dangerously exclusionary and divisive.”). Abner Greene has made a similar argument: “[b]asing law expressly on values whose authority cannot be shared by citizens as citizens, but only by those who take a leap of faith, excludes those who do not share the faith from meaningful participation in political discourse . . . .” Greene, The Political Balance of the Religion Clauses, supra note 398, at 1614.
404. Sherry, supra note 398, at 482.
405. For further discussion, see Brady, supra note 10, at 575.
faith is not completely impervious to outside understanding. Nor is the extrahuman source of authority upon which faith rests an entirely supernatural force unrelated to the world of common human experience that believers and nonbelievers alike inhabit. To the contrary, for believers, the universe itself bears the imprint of the creator and faith helps to order and to make sense of experiences that we all share. The statement that faith is so resistant to change that it “ignore[s] contradictions, contrary evidence, and logical implications” and “remain[s] steadfast even in the face of empirical disproof” is also incorrect. Such statements manifest an ignorance about the close relationship between intellect, experience and faith in the lives of believers, and they make a mockery of those who affirm religious convictions.

If religion is a matter of intellect and experience as well as of faith, then fruitful dialogue between believers and nonbelievers and among those of different religious traditions is possible at a number of different levels. In the first place, conversation and dialogue lead to a better understanding of those who are different. Even if none of the participants change their convictions, they can all benefit by knowing more about what others think and believe, and in many cases this will lead to greater mutual respect. Perhaps, for instance, if scholars had closer contact with religious believers, particularly those with conservative beliefs, they would not make statements like “trust in God” is “faith in the face of evidence to the contrary.” That statement and others like it are both demeaning and inaccurate. Douglas Laycock has noted that his respect for religion was the result of “frequent contact with sophisticated believers,” including through his work on behalf of religious liberty. In my own case, respect for secular perspectives began with frequent contact with nonbelievers in the public schools. In either case, it is clear that one of the best foundations for mutual respect is mutual understanding.

In addition to better understanding of each other, dialogue among believers and nonbelievers can also identify areas of mutual agreement. If religion is not disconnected from human experience but, rather, seeks to explain experience just as secular perspectives do, then those with religious and nonreligious understandings of the world

407. According to traditional Christian theology, God is the formal as well as the efficient cause of the world, and this means that the universe reflects and shares in His nature and goodness. In Biblical terms, humans are made in the “image of God,” and, thus, all human beings participate to some degree in His Being. There is, therefore, a natural correspondence between God’s will and commands and the yearnings of the human heart.
408. Sherry, supra note 398, at 482.
409. Gey, supra note 30, at 454.
410. Macedo, supra note 270, at 248.
have much to talk about. Furthermore, dialogue can also lead to mutual growth and development. When believers listen to those from other religious and nonreligious traditions, they can learn information that will help them to understand their own beliefs better, and the same is true of nonbelievers. As noted above, most religious belief systems do not give believers a definitive blueprint for all aspects of life, and listening to others can help believers grow in the understanding of their faith and what this faith requires in particular circumstances. The same will be true for nonbelievers whose own secular perspectives can be deepened through conversations with believers. Dialogue with others may also lead believers to refine, revise or change non-core aspects of their faith, which usually do not have the same absolute and immutable quality as central religious tenants. In some cases, dialogue will lead participants to change their positions in more far-reaching ways. Believers might change their faith or lose faith, and secular participants might convert to religious belief. Whether such changes are good or bad depends upon one’s viewpoint, but the possibility of change means that it is critical for believers and nonbelievers alike to understand one another if they want to be able to influence each other.

There is, in addition, the possibility that the change and development which result from mutual understanding and conversation will lead individuals and even the larger community to a greater understanding of the truth. The idea that there is a truth which underlies the world of human discourse, or that we can know anything about truth even if it exists, has been hotly debated in recent decades. However, most people would agree that some beliefs are better than others. Indeed, the conviction that some beliefs are better than others is so strong among the political liberals that they would be willing to suppress alternative beliefs and lifestyles that collide with democratic values and norms as they understand them. The mistake that the political liberals make is not their belief that some views are better than others or that American political traditions have great value and should be taught in the schools. Education should be, in part, inculcation in community wisdom and traditions. Their mistake, as Laycock states, is to have a “totalitarian confidence” in their understanding of these traditions.

413. Laycock, supra note 257, at 853.
414. Most political liberals do not insist that there is a single correct interpretation of America’s democratic traditions, see Rawls, supra note 391, at 773-75, and they also allow for some revisions to their own understanding of democratic values and norms, see Gutmann & Thompson, supra note 270, at 351-52, 356. However, the range of different views that they are willing to accommodate is limited. For example, Rawls argues that political liberalism is consistent with a family of conceptions of justice, but this family only includes “reasonable” conceptions that satisfy the criteria of
then the most plausible conclusion to draw from continuing disagreement is that we do not yet fully understand it and that interchange among differing perspectives will help us get closer to it. Thus, education should be, in part, also a marketplace of ideas which allows students to deepen and challenge and, perhaps, even to change prevailing norms. It is in this process of learning to engage in conversation and discussion with others over matters where there is deep disagreement that true and lasting unity is forged. A unity of sameness which tries to achieve commonality by forcing all people to accept one set of fundamental principles and norms in politics or any other field is an unstable unity. Such an effort will not only provoke contest and strife; it will also stifle the processes by which these norms can be refined and revised so that they come closer to the truth that all parties seek.

The defense of grey area religious speech in this section is based on the value that this speech has for forging national unity through mutual understanding, dialogue and, ultimately, growth and development. Some legal scholars argue that the purpose of the religion clauses is to ensure as far as practically possible that government has no effect on the religious beliefs and choices of the populace. In Douglas Laycock’s words, the goal is a “substantive neutrality” that “insulates” religious beliefs and practice from government influence or control. According to Michael McConnell, the central value of the religion clauses is “religious liberty, and religious liberty requires that, whenever possible, government action leave untouched the preexisting religious mix in the community.”

Carl Esbeck states that the “aim... is to minimize the effects of governmental action on individual or group choices concerning religious belief and practice.” The assumption behind all of these

reciprocity. See Rawls, supra note 391, at 773-74, 803. Likewise, Gutmann and Thompson envision change and revision to their understanding of reciprocity, but any revisions cannot challenge the foundational principles that they outline for deliberative democracy. See Gutmann & Thompson, supra note 270, at 352. The views of fundamentalist Christians like the Mozerts are inconsistent with these foundational principles. See id. at 65-66, 350.

415. See Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46 Emory L.J. 43, 45 (1997) (stating that the underlying purpose of the religion clauses is “substantive neutrality” which seeks to minimize government influence on religious choice); Douglas Laycock, The Benefits of the Establishment Clause, 42 DePaul L. Rev. 373, 373 (1992) (stating that the “religion clauses are designed to make religious practice and nonpractice, belief and nonbelief, wholly matters of private choice insulated from government influence or control”).


views is that religion should be "let... alone" by government.\textsuperscript{418}

Government's effect on religious choices should be "nil."\textsuperscript{419}

The relationship between religion and government advocated in this article is different. Government should not seek to affect the religious choices of citizens by interfering with religious expression or other religious activities, or engaging in its own religious speech. Neither should government seek to tame the beliefs of religious minorities so that these beliefs fit better with mainstream political values. However, the government may provide a vehicle for the exchange of religious and nonreligious views, and that vehicle can be a platform for speech that has public as well as private features, such as grey area student speech in the public schools. If such a vehicle does lead to communication and exchange, the result will almost certainly be to change the preexisting mix of religious views in the community. Hopefully this change will be mutually beneficial and will promote greater understanding and truth. Certainly it will not leave student beliefs exactly the same. However, as long as all students have an equal opportunity to express their views and the school does not indicate a preference for some beliefs over others, students and their families should have nothing to fear. If one's views are true, they can withstand some scrutiny, and by opting into the conversation, students can learn to explain and share their opinions with others, as well as to voice any disagreement with the values taught by the school. In so doing, they may even change the views of their listeners.

C. Strengthening the Public Schools

The current system of public education in America is under increasing attack.\textsuperscript{420} Scholars who believe that values conflicts in the public schools are intractable are increasingly looking to publicly funded voucher systems as a way to avoid battles over what values are to be taught in the schools.\textsuperscript{421} Scholars are also promoting educational choice as essential for protecting and respecting diversity.\textsuperscript{422} Whereas political liberals such as Gutmann and Macedo have defended public schools as the most promising way to inculcate shared democratic norms among the nation's youth,\textsuperscript{423} opponents of the current system object to the public schools because they do not sufficiently protect diversity.\textsuperscript{424} The project of the public schools is, indeed, to inculcate a

\begin{thebibliography}{9}
\bibitem{420} See Macedo, supra note 270, at 16; Salomone, supra note 38, at 8, 243.
\bibitem{421} See supra notes 284-91 and accompanying text.
\bibitem{422} See supra notes 284-91 and accompanying text; see also Macedo, supra note 270, at 16, 231.
\bibitem{423} See Gutman, supra note 263, at 70; Macedo, supra note 270, at 232.
\bibitem{424} See McConnell, supra note 286, at 849-51.
\end{thebibliography}
shared understanding of democratic citizenship, they argue, but the problem with this project is that we no longer have a single understanding of citizenship or shared fundamental values. The traditional public school system, writes Michael McConnell, "has run its course." It can no longer "establish a coherent position in the face of the conflicting demands of a diverse nation." Its "purpose of providing a unifying moral culture in the face of our many differences" is impossible. The model for the future is a pluralistic system of schools which reflect and inculcate the particular norms and traditions of America's diverse groups and subcultures.

In this article, I have tried to chart a middle course between those who favor public schools as a way to promote sameness and assimilation and those who believe that respecting the diversity and pluralism of American society requires abandoning the public school model. The model of public education that I have offered is a hybrid or dialectical model which affirms the authority of schools to teach broadly inclusive community norms while also providing opportunities for student speech challenging these norms in grey area settings as well as private settings. This dialectical model should make public school education more acceptable to minorities and majorities alike while at the same time fostering a national unity forged in and through diversity rather than at its expense.

It is not the purpose of this article to take a definitive position on the issue of educational choice. Whether a publicly funded voucher system should be adopted by legislatures, and whether such a system, if adopted, would be constitutional, are questions beyond the scope of this discussion. The wisdom of a voucher system, in particular, depends on numerous factors, some of which are not even touched on in this article. For example, educational choice has been defended as a mechanism for addressing the problem of failing public schools in the inner cities, and proponents have also argued that increasing competition among schools will improve educational outcomes. Thus, the merits of educational choice involve issues relating to economic equality and educational outcomes as well as diversity and parental rights. This article does, however, suggest that policy makers and families should be very cautious before abandoning the benefits that public schools can have over a publicly funded system of pluralistic schools.

425. McConnell, supra note 265, at 149.
426. Id.
427. Id. at 150.
428. See id. at 125; Esbeck, The Establishment Clause as a Structural Restraint, supra note 220, at 95.
429. See Salomone, supra note 38, at 243.
430. See Macedo, supra note 270, at 16, 22.
In the first place, public school education benefits the larger society in a number of ways. By bringing students from various backgrounds together for educational purposes, the public schools can help build national unity by fostering mutual understanding and engagement with difference. A system of private schools that cater to different religious and cultural subgroups in American society provides strong protection for diversity, but it is much less effective in fostering unity. While some private schools may have students from a wide variety of backgrounds, many will not, especially those that are established by religious and other cultural minorities. In these schools, students may have very little first-hand experience with students who hold world views very different from their own.

Furthermore, if part of the reason that some parents favor school choice is because their local public schools are not doing enough to teach children values, or are teaching the wrong values, abandoning the public schools will do little to help other children in the community. These concerns have been one of the motivating factors behind the support for educational choice among conservative Christian families in recent years. As the triumphalist efforts of the religious right to convert and reclaim American culture have faded over the last decade and given way to increasing withdrawal from mainstream society, Christians have been abandoning public education in favor of private education or home schooling for their children. Both extremes are unfortunate. Public schools belong to all families, conservative and nonconservative alike, and all have the right and responsibility to help shape the values that are taught there. Conservatives should no more commande public education than political liberals. Nor should they seek official endorsement of their religious views over others. However, withdrawal is also not the appropriate response. As conservative religious groups become more aware of their minority status, they have increasingly adopted a protectionist stance with respect to the state. The state and public institutions like the public schools are seen as part of a hostile public culture, and conservative Christians are increasingly asserting rights to opt out or exit from this culture rather than making efforts to change it. The better response is to opt in, instead of opt out, and participate with other members of the community in defining the norms that will be taught in the schools. This process will involve compromise, to be sure, and no group of parents can be expected to get everything that they want. However, the strength and moral character of our society and the well-being of our children depends in large part on the type of education that the nation's youth receive, and, thus, parents have an important responsibility not to abandon the educational institutions of the larger public culture. If the public schools welcome the participation of all groups in the process of defining community norms and minority voices join with the majority in accepting the invitation,
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the larger community will benefit. If the schools also provide students
from all backgrounds with the opportunity to voice and affirm their
views in grey area settings, parents with minority beliefs do not need
to worry that the well-being of their own children will be endangered
in the process.

Students from minority religious and cultural groups as well as
majority backgrounds can also benefit in important ways from public
school education. As discussed above, interaction and communication
with those who hold different perspectives can help believers and
nonbelievers better understand their own positions, and they can
refine and revise their positions in light of new information. By better
understanding the views of those who hold different positions,
students can also learn how to explain their convictions to others and,
perhaps, encourage others to reconsider their views. 431

Some scholars have argued that children need a culturally coherent
education that supports the values that they are taught at home. 432 If
the messages that children hear at school clash with what they learn at
home, the "cultural dissonance" will cause "psychological and
emotional fragmentation" and stress. 433 This may well be true if
children are from religious or cultural communities who have
separated from mainstream culture and whose lifestyles and traditions
are dramatically different from those around them, such as the Amish
or Hasidic Jewish communities. 434 However, for most children,
learning that their peers have different religious beliefs or values
should not be too surprising or distressing unless the school actively
favors the views of some students over others. To the contrary, it will
make students more comfortable with differences and better able to
relate to people from different backgrounds. If, on the other hand,
children are isolated from cultural dissonance when they are growing
up, they will be less prepared to deal with difference when they
encounter it later life. All adults except those living in separated
communities will inevitably encounter different views, and the
experience of difference will be less jarring and upsetting if individuals

431. As Saint Paul writes: "I have become all things to all men, that I might by all
means save some." 1 Corinthians 9:22. Saint Paul means that knowledge and
understanding of those who are different is critical to reaching them with a new
message.

432. See Salomone, supra note 38, at 99, 193, 202-03, 209.

433. Id. at 265; see also id. at 99, 193, 209, 210.

434. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 210-11 (1972) (stating that the
Amish argue that compulsory education above eighth grade would threaten their way
of life by exposing their children to a "'worldly' influence in conflict with their
beliefs" and teaching values "in marked variance with Amish values and the Amish
way of life"); Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687,
692 (1994) (noting that handicapped children from Satmar Hasidic community
experienced "panic, fear and trauma" upon leaving their community and attending
public schools with children "whose ways were so different") (citing Bd. of Educ. of
have familiarity with it when they are young. Cultural dissonance between the values taught by the school and the values students learn at home will be more stressful than hearing different views from peers. However, if schools invite all parents to participate in formulating the values that will be taught in school and parents with minority views accept the invitation, this dissonance between home values and school values should be lessened. Where dissonance remains, if students receive strong moral training at home and affirm their views during the school day in private and grey area settings, they can preserve their alternative beliefs, and these beliefs may well be strengthened through the process of defending them and sharing them with others.

IV. BALANCING THE VALUE OF GREY AREA RELIGIOUS SPEECH WITH ESTABLISHMENT CLAUSE PRINCIPLES

In the previous section, I have demonstrated the importance of grey area speech for public school students and the larger community. The value of grey area expression extends to religious expression as well as secular speech. If we are to achieve national unity based on mutual understanding and dialogue about our differences, this conversation must include our religious differences as well as other types of diversity. Likewise, grey area religious expression is critical for mitigating the clash over values in public schools. These values conflicts include religious and nonreligious perspectives, and while schools may not teach values as religious tenets, moral perspectives based on America's religious traditions belong in the discussion over values education just as secular perspectives do. While schools should strive to teach broadly inclusive values, there will always be dissenting views. Allowing students with minority views, including religious views, to express their perspectives in class and other public settings is critical for mitigating values disputes and strengthening public education. Indeed, religious traditions are one of the nation's most significant moral resources, and student religious speech can contribute to values education in the public school by adding a deeper and, perhaps, even prophetic dimension to the community norms being taught in the schools. Student religious speech can also challenge classmates and the larger school community to reevaluate and even revise prevailing norms in light of more demanding standards of personal and social responsibility.

There are, perhaps, no better examples of the value that grey area religious speech can have for the school community than some of the inspirational messages delivered by students pursuant to the Loudoun County, Virginia prayer policy before it was struck down in Gearon. The Loudoun County prayer policy was in effect for one year prior to the Gearon decision, and a message was delivered at each of the county's four high schools during graduation. These messages included religious invocations as well as secular messages. At one high school, the student speaker delivered a spiritual, though not explicitly religious, message urging classmates "not to make our lives a quest for money, nor a quest for fame. These things will ultimately pass away and are not permanent solutions to life's problems. Instead I hope that we will make our lives a quest for the truth."436 Another invocation asked God to "[h]elp us to spread your light wherever our paths may lead us and help us to always treat our fellow man with kindness and love."437 A third invocation asked the "Almighty" to give the graduates the "strength to endure hardships, wisdom to make decisions, courage never to give up, love and friendship to guide them and the faith that can accomplish the impossible."438 The message at


The entire message stated:
It has been said, "Re redeem the time, because the days are evil[.]" [W]hen we look at all that is going on around us, it become[s] obvious that the world is spinning wildly out of control. Right now in Bosnia there is a war going on, where thousands of innocent people are being killed. In Central Africa, an entire generation is being killed by AIDS. There are famines in the Third World claiming the lives of the people there. If anyone could come up with answers to all these problems, then they would have. The answer lies on a spiritual level that everyone needs to seek within themselves, to find the truth. This graduation is an ending and a beginning. The end of 13 years of schooling. Also, this is the beginning of a quest, the beginning of our adult lives. I urge each of us, myself included, not to make our lives a quest for money, nor a quest for fame. These things will ultimately pass away and are not permanent solutions to life's problems. Instead I hope that we will all make our lives a quest for the truth.

Id.

437. Id. The entire text of these remarks was:
Dear Heavenly Father, We thank you for the blessings you have bestowed upon us which have brought us together to celebrate this wonderful occasion. We thank you for our families, our teachers, and our friends who have helped us to grow physically, intellectually, and spiritually. As we move on to another phase in our lives, we humbly ask that you grant us the ability to meet each challenge and opportunity we may encounter with strength, courage, and wisdom. Help us to spread your light wherever our paths may lead us and help us to always treat our fellow man with kindness and love. Amen.

Id.

438. Id. The entire message was:
Let us give thanks[.] Almighty, Please watch over the future of these young men and women. Show them that the future for them is bright and although the road may be wearisome and long at times they are never alone. Show them the many open doors offered to them and help them to make the most
the fourth Loudoun County high school was not religious. Each of these spiritual and religious messages expresses valuable ideals for personal and interpersonal excellence that go well beyond what a public school is likely to teach in a broadly inclusive character education program. Not just care for others, but kindness and love, are urged. Not just respect for the law, but a determination to search for the truth instead of material well-being. Not just honesty and respect for others, but wisdom, friendship and unfailing courage and faith. Student expression like this benefits the entire community by encouraging listeners to consider a higher standard of responsibility than they are likely to hear from school officials. The Loudoun County public schools lost something valuable when students could no longer express spiritual and religious ideals like these publicly at graduation.

However, while grey area religious speech is valuable, it should not be completely free from the oversight and control of the school. Grey area speech in captive audience situations like classrooms and school-related events is both public and private, and in view of that, schools have an interest in ensuring that speech is appropriate to the occasion and relevant to the pedagogical objectives that the school is attempting to convey. Thus, where religious speech occurs in the classroom, it must be responsive to the school’s assignment. Zachary Hood, for example, should be able to read his favorite story to the class as part of his reward for special achievements in reading, but not of these opportunities. Guide these young men and women in their future endeavors and give them the talents and the tools necessary to their happiness and success in the future. Give them strength to endure hardships, wisdom to make decisions, courage to never give up, love and friendship to guide them and the faith that they can accomplish the impossible. Amen.

Id. at 1101-02.

The opening remarks at Loudoun Valley High School were as follows:
Welcome honored friends, families, guests and candidates of graduation to the commencement exercises of the Class of 1993. These commencement exercises mark the ending to one chapter of our lives and the preface to another. Let us reflect in our special ways upon the memories that we have compiled throughout our four years in high school—the bonds that we have established and the friendships we have strengthened are just a few remnants that we will cherish. Now let us bow our heads and give thanks to all those who have guided, supported and lead us to the point of which we are today. Best of luck to you, graduates of 1993.

Id. at 1102.

The closing remarks were:
Let our faith guide us through these lessons of life to help us build a brighter future for us and generations to come. May the class of 1993 be blessed with a prosperous and successful future. No [sic] we leave with a sense of dignity and pride. A pride in ourselves and in our accomplishments. We step into a whole new world full of love & hate, triumphs & tragedies, successes, and failures.

Id. at 1102.
in response to a mathematics lesson.\textsuperscript{440} In addition, the Supreme Court has held that schools have an interest in teaching students the "habits and manners of civility."\textsuperscript{441} Consequently, when students engage in religious expression in grey area settings, schools can exercise some control to ensure that the manner of the speech is civil and respectful of other students. In addition, schools need to consider important Establishment Clause principles that may be at risk when a student speaks religiously. These include the school's obligation of neutrality and nonendorsement as well as the school's responsibility to ensure that listeners are not coerced to affirm beliefs that they do not share. At the same time, in striking a balance between the benefits and risks of grey area religious speech, schools must be careful not to interfere or become entangled with religious matters. Thus, any school oversight or control over religious speech must be limited in scope and exercised lightly. Balancing all of these considerations is not an easy task, but the value of grey area religious speech means that it is important to try.

In this section, I will lay out an approach for treating grey area religious speech that takes into account all of these considerations and strikes a workable balance between the benefits of grey area religious expression and the preservation of Establishment Clause values. This proposal has two baseline principles. The first baseline principle is that when student religious expression is entirely student-initiated and the school has not taken any action to provide the opportunity for religious speech, the expression should receive the same protections that secular speech does. The school may not prohibit or restrict the speech because it is religious, nor may it favor the speech because of its religious content. If there is a possibility that other students might perceive the school's attitude to be one of preference for religion over nonreligion rather than neutrality, the school should use a disclaimer to clarify that the school takes a neutral position. However, general endorsement of religious and nonreligious student expression on an equal basis is permissible. The school does not violate the Establishment Clause by, for instance, signaling general approval of all student show-and-tell presentations even if one or more of the presentations has religious content. What the school cannot do is favor the religious presentation over the nonreligious presentations.

This view is consistent with Justice O'Connor's interpretation of the endorsement test. As Michael McConnell has pointed out, there are at least two possible interpretations of the requirements of the endorsement test.\textsuperscript{442} On the one hand, the endorsement test may


\textsuperscript{441} Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (citing C. Beard & M. Beard, New Basic History of the United States 228 (1968)).

\textsuperscript{442} See McConnell, Religious Freedom at a Crossroads, supra note 220, at 156-57.
simply mean that the government may not endorse religion over nonreligion or prefer one religious sect over another. The justices frequently phrase the test this way,\(^{443}\) and this interpretation is consistent with Justice O'Connor's statement that the Establishment Clause permits government to acknowledge the role of religion in American society as long as it does not "convey a message that religion or a particular religious belief is favored or preferred."\(^{444}\) The other interpretation of the endorsement test is that government action which endorses religion is unconstitutional regardless of whether the government also endorses comparable nonreligious perspectives to the same degree. This interpretation is favored by those who argue that the endorsement test demands a "secular state."\(^{445}\) Under this view, the government must not take any action which expresses

\(^{443}\) See, e.g., Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment) (stating that the endorsement test precludes "government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred"); County of Allegheny v. ACLU, 492 U.S. 573, 593 (1989) (same) (quoting Jaffree, 472 U.S. at 70 (O'Connor, J., concurring in the judgment)); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 27 (1989) (Blackmun, J., concurring in the judgment) ("[G]overnment may not favor religious belief over disbelief.").

\(^{444}\) Jaffree, 472 U.S. at 70 (O'Connor, J., concurring in the judgment); see also Allegheny, 492 U.S. at 623 (O'Connor, J., concurring in part and concurring in the judgment) ("The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion.").

For example, in County of Allegheny v. ACLU, Justice O'Connor argued that the government's display of a menorah outside a government building was constitutional because its presence next to a Christmas tree and sign saluting liberty conveyed a message of "pluralism and freedom of belief during the holiday season." Id. at 635 (O'Connor, J., concurring in part and concurring in the judgment). The context of the Menorah in the display did not neutralize its religious meaning, but it was clear that the state was not expressing preference for Judaism. See id. Rather, a "reasonable observer would... appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens." Id. at 635-36.

\(^{445}\) Allegheny, 492 U.S. at 610 (Blackmun, J., majority opinion). Thus, Justice Blackmun argued in Allegheny that government can only celebrate the secular aspects of holidays with religious and secular meanings. Id. at 611-12. According to Blackmun, the menorah in Allegheny was constitutional because its religious meaning was secularized by its placement next to the Christmas tree and the sign saluting liberty. Id. at 617-20.

Justices Marshall and Brennan also followed this interpretation of the endorsement test in Mergens. According to Justice Marshall, if a school operates its club system as a mechanism for promoting fundamental values and citizenship, permitting a religious club will signal school endorsement of religion even if the club system does not prefer religious activities over nonreligious activities. See Bd. of Educ. v. Mergens, 496 U.S. 226, 265, 268 (1990) (Marshall, J., concurring in the judgment). The only way to negate the message of endorsement is for the school to affirmatively dissociate itself from the religious club. See id. at 270. The school can do this by discontinuing its general endorsement of the club system. See id. Alternatively, the school can continue its general endorsement of student clubs and affirmatively disclaim any endorsement of religious clubs. See id.
approval of religion even if the government also expresses approval of similarly situated religious and nonreligious perspectives on an equal basis. While this latter interpretation of the endorsement test appears to be the one favored by the lower courts in the graduation prayer cases, the first reading is more consistent with the fundamental Establishment Clause value of neutrality. If the endorsement test prohibits government from expressing general and equal approval of similarly situated religious and nonreligious perspectives, the Establishment Clause would require the disfavoring of religion. For instance, allowing first graders to read their favorite stories to the class except where the story is a religious story clearly sends a message of disapproval of religion. Permitting Zachary to read his religious story would have signaled general approval of the presentation, but no more so than approval of other student stories, and such a “double endorsement” should be constitutional.

The second baseline rule is that schools can design and provide an opportunity for student religious expression at graduations or other school-related events as long as the school’s policy provides an equal opportunity for nonreligious speech and the school’s policy is scrupulously neutral and fair among different religious perspectives. Such a policy will not violate the Establishment Clause if all the student perspectives, religious and nonreligious alike, receive equal and general endorsement by the school. If necessary, the school should use a disclaimer to make clear to the audience that the school does not endorse religion over nonreligion or favor a particular religious perspective over others. The principle behind the first baseline rule is to allow students to bring their religious perspectives into class discussion or other public school settings on an equal basis with secular perspectives. It protects the right of students to initiate religious speech where nonreligious views are allowed. The principle behind the second baseline rule is to permit the school to initiate an opportunity for students from a variety of backgrounds to engage in

446. Ever since the Court’s landmark decision in Everson v. Board of Education, 330 U.S. 1 (1947), the Court has affirmed neutrality between religion and nonreligion as a fundamental Establishment Clause principle. See id. at 15 (“Neither can [government] pass laws which aid one religion, aid all religions, or prefer one religion over another.”). For other decisions affirming the importance of neutrality, see, for example, Mitchell v. Helms, 530 U.S. 793, 809-10 (2000) (Thomas, J., plurality); id. at 838 (O'Connor, J., concurring in the judgment); id. at 883 (Souter, J., dissenting); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 839 (1995); Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 703-04 (1994); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 215, 222, 225 (1963).

religious and nonreligious expression at school-related events and in other grey area settings. The fact that the school’s motivation is to make a place for specifically religious speech should not matter if the program provides an equal opportunity for religious and nonreligious speech and the school’s policy is fair and neutral among religious and nonreligious perspectives. Indeed, by creating an opportunity for students with different religious and nonreligious perspectives to express these views in grey area settings, the school provides a valuable occasion for students to learn about the different beliefs of their classmates and for speakers to develop the skills necessary to communicate their beliefs effectively and respectfully.

If a school chooses to create an opportunity for religious and nonreligious expression at graduations, sporting events or other school functions, the challenge will be for the school to devise a policy that, in fact, treats religious and nonreligious perspectives fairly and provides a chance for speakers from a range of perspectives to participate. When the school has students from a wide variety of backgrounds, designing such a policy should not be difficult. A policy similar to the hypothetical that I described in Section II would be appropriate for events like graduations. The school can set aside a handful of slots for inspirational messages and randomly select student volunteers to fill these slots. If the composition of the community is diverse, the result will be a range of different religious and nonreligious perspectives reflecting this diversity.

The more problematic situation is where a school district is not diverse, and either one or more religions predominates or secularism predominates. In this situation, a policy of random selection from a list of volunteers will skew the results in favor of the dominant belief system. To address this problem, the school could set aside a handful

448. Similarly, Douglas Laycock has argued that moment of silence laws which are passed in order to accommodate prayer should be constitutional as long as they are neutral between religious and secular thought on their face and in effect. See Laycock, supra note 220, at 62. Michael McConnell has made a similar argument. See McConnell, supra note 319, at 166. According to McConnell, it is not the motivation behind a law that matters, but whether its effects are neutral. See McConnell, supra note 416, at 47-48.


However, as discussed in the text below, a system of random selection will not provide an equal and fair opportunity for minority perspectives in communities where one or more religions predominate. In such communities, a different selection mechanism is required.
of slots and develop a neutral mechanism that would allow for a
greater diversity of perspectives. For example, the school might
provide for a few broad categories like Protestant, Catholic, Jewish,
Muslim, other religion, and nonreligious, and ask student volunteers
to identify themselves with one of these categories. The school could
then randomly select from among these categories to fill the available
slots. Once the denominations are assigned to the available slots, the
school could randomly select one student from among the volunteers
for each selected group. The result will be a diverse selection of
messages representing the religious and nonreligious perspectives in
the community.

To be sure, unless the school has a separate baccalaureate service,
there will not be enough time for all religious denominations to be
represented, nor will there be time for the full range of perspectives
within denominations. Keeping the number of denominations limited
to familiar and broad categories such as Protestant, Catholic, Jewish,
Muslim and other religion[450] will help to avoid disputes over
denominational categories and subcategories,[451] but it will also mean
that in any given year there will be students whose particular beliefs
are not represented. However, if the system ensures a real chance
that any of the religious perspectives in the community could be
selected and the result is a broadly inclusive and diverse group of
voices, the policy will be consistent with the values of fairness and
neutrality as well as the benefits of grey area speech. Students of
minority and majority faiths as well as those of no religion will learn
more about each other and will learn better how to communicate with
each other.

[450] In some communities, an additional category or two might be appropriate
where there are significant numbers of students of other belief systems, such as
Buddhism, Hinduism or Native American religions.

[451] Given the vast number of denominations and subdenominations in the United
States today, it is imperative that schools avoid becoming entangled in questions
about which religious groups should count as separate categories. The difficulty of
identifying appropriate denominational categories is well-recognized. For example, in
Lee v. Weisman, Justice Souter argued that attempts to promote a diversity of
religious views at graduation ceremonies would result in “the government and,
invariably, the courts... mak[ing] wholly inappropriate judgments about the number
of religions the State should sponsor and the relative frequency with which it should
sponsor each.” 505 U.S. 577, 617 (1992) (Souter, J., concurring); see also McAndrew,
supra note 449, at 682 n.121 (stating that a self-conscious effort to provide diversity by
selecting recipients of different religious and nonreligious groups will result in
difficulties associated with “identifying various discrete beliefs and the persons
holding them”). By using a handful of widely recognized and broad categories like
Catholic, Jewish, Muslim and Protestant, my proposal avoids this problem though it
does so at the price of some over-generalization. My proposal also avoids school
entanglement in determinations about which combination of speakers should be
included in the program and how frequently different denominations should be
represented because both of these determinations would be made by a system of
random selection.
Furthermore, as long as a diversity of voices are represented, there will be no danger that students in the audience will experience the type of coercive pressures that were present in *Lee v. Weisman*. In *Weisman*, there was one prayer delivered by a school-selected clergy person, and the Court noted that there was a danger that dissenting students would perceive a respectful silence as participation in the religious observance.\(^4\) In my proposal, students from a range of backgrounds will speak, and student listeners will notice that students from majority faiths are quietly listening to students of minority faiths and vice versa. In a setting like this, no reasonable student will confuse respectful silence with participation or approval.

In addition to these baseline rules, my proposal would allow schools to exercise limited supervision over grey area religious expression in certain specific cases. First, regardless of whether students engage in religious expression entirely on their own or pursuant to a policy developed by the school, the school can review or otherwise control the style or content of the speech to ensure that it is appropriate for the occasion, relevant to the school’s pedagogical objectives, and civil and respectful to other students. For example, if the school has a policy allowing inspirational messages at graduation, the school should be able to review the content of the speeches to ensure that they are, in fact, inspirational messages rather than practical jokes, political diatribes or demeaning assaults on members of the school administration or student body. However, when the school reviews or supervises the style or content of religious expression, it should exercise editorial control only over the secular aspects of the speech and nonreligious stylistic matters like grammar, sentence structure or tone. School officials may not interfere with the religious content of the speech, nor exclude the speech on the grounds of its religious content. Such interference would risk unconstitutional entanglement of the school in religious matters as well as a violation of the constitutional demands of neutrality. For example, if a school required religious references at graduation to be nonsectarian in order to avoid offending listeners, the school would be favoring ecumenical religions over less ecumenical ones and would become quickly entangled in decisions about which types of references meet the nonsectarian standard.\(^5\) If the school sought to otherwise edit or restrict the content of religious expression so that it is palatable and nonoffensive to nonbelievers, the same problem would arise. The school would have to decide when religious expression crosses the line between palatable to offensive, and the likely result would be the

\(^4\) See *Weisman*, 505 U.S. at 593.

\(^5\) See, e.g., id. at 616 (Souter, J., concurring) (stating that the “distinction between ‘sectarian’ religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster . . . invite[s] the courts to engage in comparative theology”).
censorship of minority views in favor of communal standards of religious appropriateness.

Schools should, however, be permitted to restrict certain types of proselytizing speech. Numerous scholars have pointed out the difficulties associated with placing a proselytizing restriction on graduation prayers or other student speech. For instance, much religious speech has proselytizing elements, and if the restrictions apply to all proselytizing speech, it could sweep away a significant amount of student religious speech. Indeed, any time a student defends the value of their religious perspectives to others, there is a proselytizing element to the speech. Second, it will be difficult for the school to determine when student speech crosses the line to proselytizing without the school becoming entangled in reviewing the religious content of the speech. Third, the term "proselytizing" speech is vague: When is speech proselytizing? Should the intent of the speaker be the relevant consideration or its effect or both? Fourth, because the term "proselytizing" is vague and it can apply to so much religious speech, there is a danger that schools would use a proselytizing restriction as a mechanism to keep out most, if not all, student religious expression. Finally, some scholars have argued that there is no authority for drawing a distinction between proselytizing and nonproselytizing speech. The Supreme Court has interpreted the First Amendment to protect speech designed to persuade as much as other types of speech and "[t]he right to proselytize is at the core of the first amendment."

The proselytizing restriction that I suggest below is not inconsistent with these observations. Schools should only be allowed to restrict religious speech where it is primarily designed to proselytize a specific student audience and is delivered from a school stage or other type of school platform or "pulpit." Such a school platform does not include general class discussion or a discussion or debate forum opened up by the school for the interchange of student views. Speech that is


456. See Salomone, supra note 38, at 225.

457. Whitehead, supra note 42, at 245.

458. See Sekulow et al., supra note 29, at 1023 ("Free trade in ideas means free trade and the opportunity to persuade, not merely describe facts.") (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945)); Whitehead, supra note 42, at 245 (also citing Collins).

459. Laycock, supra note 220, at 32; see also McConnell, supra note 319, at 166 ("[T]he right to proselytize, a.k.a freedom of speech, is constitutionally protected.").
primarily designed to proselytize is speech that is primarily designed to convert a specific audience to one's own specific religious beliefs or worship and involves an insistent call to conversion. This restriction on proselytizing speech is intentionally very narrow. The restriction essentially applies to attempts by students like Chris Niemeyer to command the school's platform in a grey area setting and use it as an opportunity to deliver a proselytizing sermon. As noted earlier, the attempt to deliver such a sermon ignores the fact that graduation ceremonies and other school-related events belong to all students and are not just a soapbox opportunity for purely private speech. When students use a captive audience situation to deliver a sermon, they are abusing their position and engaging in speech which is inherently inappropriate and disrespectful of their audience. The audience at a graduation or school assembly has not assembled to hear a sermon but to engage in school-related functions.

However, aside from speech which meets this definition of primarily proselytizing expression, schools should not interfere with student religious expression even if the speech has proselytizing elements. Such interference would, indeed, quickly entangle the school in religious matters and open the door for broad restrictions on religious content. The test that I have suggested for impermissible proselytizing is designed to avoid entanglement and vagueness. Unless the student is using a school stage or other platform and her speech is primarily designed to convert a specific audience and involves an insistent call to conversion directed at that audience, the speech should be permitted. Niemeyer's sermon fits this description, but most speech would not. For example, Kelly DeNoooyer's "proselytizing song" in DeNoooyer would not meet this definition of primarily proselytizing speech. The videotape that Kelly wanted to show to her second-grade class showed her singing a song describing her experience of having accepted Jesus as her Savior at an early age. The song's title was "I Came to Love You Early," and the last verse is representative of the song's content: "I remember how You touched me, but I can't explain at all/ How a choice that's so important could be made by one so small,/ I just put aside my questions; what You said to do, I've done,/ And I thank You for the blessings of coming to You young." While this song certainly

461. See id.
462. Id. at 746 n.1. The other verses were as follows:
Verse 1.
I felt sometimes I didn't have a story I could share.
I wasn't rescued from a past destroyed by dark despair.
O but, Jesus, I have memories of the times that we've been through.
And I wouldn't trade one moment of growing up with You.
describes the advantages of Christian faith and Kelly testified that she hoped the song might save some of her classmates, the song did not contain a proselytizing message directed specifically at her classmates, nor did it involve an insistent call to conversion. It was simply Kelly's account of her own faith experience. As long as students who express religious views do not make their audience the unwilling object of a sermon or sermonette, they should be allowed to share their views like any other students.

Some readers might object that my primarily proselytizing restriction does not provide listeners with sufficient protections against offensive religious speech. For example, some students might be offended by Kelly's song even if it is not primarily proselytizing speech. However, as I have argued above, schools should not suppress student religious speech just because other students might find it offensive or disagreeable. It is important that students learn to listen to and understand views that are different from their own, including religious views. The proselytizing restriction that I propose has a very narrow purpose. It protects students when they are made the unwilling objects of insistent sermonizing directed to them and designed to make them change their views. Such speech exerts a kind of coercive pressure on students in a captive audience situation, and schools have an interest in ensuring that their platforms are not used to exert such pressure. However, schools do not otherwise have a legitimate interest in protecting students from hearing religious views with which they disagree. Quite the opposite. Schools should recognize the valuable opportunity that grey area settings provide for students of different backgrounds to grow in mutual understanding.

Refrain. I came to love You early, came to know You young.
You touched my heart, dear Jesus, when my life had just begun.
I gave You my tomorrows and a childish heart of sin,
And You've saved me from a lifetime of what I might have been.
Verse 2.
You filled some days with laughter;
You held me when I cried.
You said, "Child, you can do anything;" You helped me when I tried.
No [sic] I treasure ev'ry mem'ry, and I'm sure there couldn't be
A child who could have known more love than You have given me.

Id.

463. Unlike sermonizing from a platform usually occupied by school officials, sermonizing in speech fora opened up by the school for student discussion or debate or in general classroom discussion does not involve the same dangers and should not be prohibited. When a school opens up a forum for student exchange, the speech that results is private speech, not grey area speech, and all speakers, religious and nonreligious alike, will be using that forum to persuade their listeners. Likewise, student speech in general classroom discussion is also private speech, and there is no danger that students will feel coercive pressures from passing student comments made as part of a general exchange of numerous student opinions and views. Where a student occupies a stage or platform usually occupied by school officials or teachers and they are given a special opportunity to address their peers, the risk of coercive pressures arises and justifies limited restrictions.
Other readers may object that the primarily proselytizing test I propose would result in the entanglement of schools in religious matters even if the restriction is limited to speech that is primarily proselytizing. To the extent that schools will have some authority to step in and stop or edit student religious speech, there will be risks of unconstitutional interference with religion. It is certainly true that even a narrowly drawn proselytizing restriction will result in some contact between school officials and religious speech. However, unless schools routinely encounter proselytizing sermons, any entanglement will not be excessive.464 Restricting an occasional proselytizing sermon does not involve the school in the type of "comprehensive, discriminating, and continuing state surveillance" that the Court has found to be unconstitutional.465

In its recent Establishment Clause case law in the funding area, the Court no longer assumes that public school employees who provide supplemental educational services on parochial school campuses will be tempted to inculcate religion, and, consequently, it has rejected its prior assumption that pervasive monitoring systems violating the Constitution would be required to prevent this abuse.466 In *Mitchell v. Helms*, Justices O'Connor and Breyer indicated that they would extend a similar assumption to religious school teachers and officials. Justices O'Connor and Breyer now assume that teachers and officials of religious schools will act in good faith in their use of public funds, and, thus, that pervasive monitoring procedures will not be required to prevent the diversion of state funds to religious uses.467 A similar assumption of good faith and attitude of hopefulness should apply to the context of student religious expression. If schools protect all student expression equally and religious speech is treated with the same respect as nonreligious speech, most students will also act respectfully of one another, and proselytizing sermons like the speech in *Cole* will be rare. Furthermore, if schools do not suspect covert sermons in every incidence of religious expression and determine to use their editorial powers over religious expression very lightly, any


465. *Lemon*, 403 U.S. at 619 (striking down private school aid program which required "[a] comprehensive, discriminating, and continuing state surveillance" to ensure that funds were not directed to religious uses); see also *Agostini*, 521 U.S. at 234 (upholding funding program that did not require "pervasive monitoring" of religious institutions); *Walz*, 397 U.S. at 675 ("[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.").


involvement of the school in student religious expression should be minimal. It is possible that there will be more Chris Niemeyers than I predict or that schools will be tempted to engage in heavy-handed control over religious speech. However, until this possibility arises, the assumption should be that the limited review provided for in my proposal will not lead to excessive entanglement in violation of the Establishment Clause.

Moreover, if the school focuses on the manner and purpose of the speech when applying the primarily proselytizing restriction, the school need not become involved in questions of theology or religious belief at all. Unlike a requirement that speech be nonsectarian, which would involve the schools in theological determinations about the ecumenical character of the speech, a primarily proselytizing restriction only requires the school to determine whether the speech is primarily designed to proselytize a specific student audience and involves an insistent call to conversion. A proselytizing sermon will have the same, easily recognizable features regardless of which religion the speaker belongs to, and the proselytizing features are separable from the religious content of the speech. Carl Esbeck has argued that the “Supreme Court’s sensitivity to entanglement is proportional to the examined law’s proximity to subject matters that are inherently religious.” If this is true, a narrowly drawn primarily proselytizing restriction should pass constitutional muster.

Those who would object to any restriction on proselytizing speech on the grounds that there is no authority for drawing a distinction between proselytizing and nonproselytizing speech and that the First Amendment protects both types of speech equally, miss the fact that student religious expression in captive audience situations is not purely private speech. Where speech is purely private, the First Amendment does, indeed, provide equal protections for speech designed to persuade and for nonproselytizing speech. However, when students speak in grey area settings, their speech is partly public, and the school has an interest in and an obligation to ensure that Establishment Clause principles are also preserved. A limited restriction, which applies only to speech that is primarily proselytizing, is consistent with broad First Amendment protections for persuasive speech as well as the value that religious expression has in grey area settings. At the same time, such a restriction balances the school’s interest in ensuring that student speech is appropriate for the occasion, respectful of other students and noncoercive. The argument that there is no authority for a distinction between proselytizing and nonproselytizing speech is, furthermore, inaccurate. At the heart of

468. See, e.g., source cited supra note 453.
the accommodationist position described in the introduction is a
distinction between state religious speech which merely
accommodates or acknowledges religion and speech which is
proselytizing.\textsuperscript{471} According to the accommodationists on the Court,
the former is constitutional, but the latter is not.\textsuperscript{472} When the
accommodationists had enough votes to obtain majorities in the early
1980s, two Court opinions used this distinction between proselytizing
and nonproselytizing speech.\textsuperscript{473} While the distinction I draw is
different because I am addressing grey area speech rather than state
speech and my proposal restricts only speech which is primarily
proselytizing instead of all proselytizing speech, these Supreme Court
cases lend support.

Several additional objections could be made to the proposal for
addressing grey area religious speech that I have laid out. First, it
might be argued that allowing grey area religious expression in school
districts where one or a few religions predominate over others will
have the effect of disfavoring minority perspectives. However, this
objection overlooks the benefits that grey area religious expression
can have for students of minority faiths. In a community where one or
a few religious perspectives predominate, it is especially important for
religious minorities and nonbelievers to have a chance to voice their
own viewpoints in classroom and other grey area settings. Such an
opportunity will give minority students the chance to explain and
affirm their views, and students from the majority faiths have much to
learn from and about students with dissenting views. While students
with minority backgrounds might be hesitant to speak up if most of
their peers hold different views, a school that is committed to
inculcating the virtues of civility and mutual respect can encourage
students to feel more comfortable in expressing different opinions. If,
on the other hand, the school responds by cutting off grey area
religious speech by minorities and majorities alike, neither group will
benefit. Existing misunderstandings and resentments will fester, and
religious and nonreligious dissenters will be the ones to suffer most
from traditional prejudices and animosities. Students from majority
and minority faiths can also learn valuable communications skills from

\textsuperscript{471} For a discussion of the accommodationist position, see \textit{supra} text
accompanying notes 14-21.

\textsuperscript{472} See \textit{County of Allegheny v. ACLU}, 492 U.S. 573, 661 (1989) (Kennedy, J.,
concurring in the judgment in part and dissenting in part).

\textsuperscript{473} See \textit{Marsh v. Chambers}, 463 U.S. 783, 794-95 (1983) ("The content of the
prayer [by Nebraska's legislative chaplain] is not of concern to judges where, as here,
there is no indication that the prayer opportunity has been exploited to proselytize or
advance any one, or to disparage any other, faith or belief."); \textit{Lynch v. Donnelly}, 465
season, it is apparent that, on this record, there is insufficient evidence to establish
that the inclusion of the crèche is a purposeful or surreptitious effort to express some
kind of subtle governmental advocacy of a particular religious message.").
the experience of expressing their views in public. In a school that inculcates civility and mutual respect, students of majority faiths can learn how to communicate respectfully with minorities, and both groups of students can learn to communicate more effectively so that their positions are understood by those who hold different views.

Thus, it is especially in communities where one or a few religious perspectives predominate that grey area religious speech is so important. When schools in such communities go beyond merely protecting student-initiated religious expression on an equal basis with nonreligious speech and take the additional step of providing a platform for religious and nonreligious speech at graduations or other grey area settings, they create further valuable opportunities for mutual learning and exchange. For example, if the Santa Fe School District had developed a graduation prayer policy that provided all religious and nonreligious voices with a fair and equal opportunity to participate in the ceremony, the result would have been a graduation ceremony with messages from students representing the Protestant majority as well as students from minority faiths. The requirement that a school provide an equal and fair opportunity for nonreligious and minority religious speech means that the price to be paid for prayer at graduation will be a chance for religious and nonreligious dissenters to speak as well, and the result would be beneficial to all. Indeed, there would probably be few other occasions when the Baptists in Santa Fe would assemble to hear Mormon or Catholic religious messages as well as their own.

Other readers might object to the proposal outlined above because they fear that it will leave schools few tools to control speech which most Americans, religious and nonreligious alike, would view as harmful and destructive. If, for example, school officials cannot exercise editorial control over the religious content of student speech, will families be forced to listen to student graduation speakers who propose to deliver white supremacist or anti-Semitic messages with religious overtones? While such messages would, indeed, be very harmful to the community, the likelihood that a student would engage in such speech in a grey area setting is very small. Moreover, if a student does attempt to deliver a hate-filled message, the school can disallow messages when they are inappropriate for the occasion or unrelated to the school's pedagogical objectives. Thus, a white supremacist message at graduation can be disallowed on the grounds that it does not qualify as an inspirational message quite apart from any religious content. Restricting opportunities for grey area speech would be unfortunate and unnecessary. If schools proceed on the assumption that students with religious convictions will behave responsibly and respectfully when they address their peers, they will usually find that their hopes are justified.
A final objection to the proposal outlined above is more difficult. Some readers will agree that religious speech in grey area settings is generally a valuable learning experience for speakers and listeners alike, but will disagree when the speech at issue takes the form of prayer. Prayer, writes Frederick Gedicks, is a “form of worship; if it is expression at all, it is a unique kind of expression.”474 The court in Harris v. Joint School District No. 241 called prayer “the quintessential religious practice.”475 According to Justice Brennan, prayer is, for some, a very private experience.476 William Marshall has argued that there are those for whom “being exposed to another tradition’s prayer is a sin.”477 Thus, a captive audience situation involving prayer may present special difficulties. While being required to listen to student expression advocating religious or nonreligious ideas with which one disagrees is generally a beneficial experience for students, being forced to listen to a prayer invoking a “false” God may be especially troubling for some believers. Prayer, unlike other types of student expression, involves communication with the Divine, and required presence at an act of worship with which one disagrees might, for some people, be close to blasphemy. There are, on the other hand, many believers and nonbelievers who have no religious objections to hearing a prayer with which they disagree, and for them, listening to a prayer or inspirational message at graduation could be an uplifting and enlightening experience. Perhaps the best course for schools to take would be to have a separate school-sponsored baccalaureate service prior to, or following, the regular graduation exercises so that attendance is entirely voluntary.478 A separate ceremony like this will also allow time for more messages to be presented than is possible if the invocations are part of the regular exercises. Moreover, the opportunity for additional messages may make it easier to design a policy that provides an equal and fair opportunity for religious minorities and nonbelievers to participate.

Viewing student religious expression in captive audience situations like the classroom, graduations and other school-related events as grey area speech is not only more accurate than viewing it as either private speech or school-sponsored speech, but it also makes possible a better balance between the value of the speech, Establishment Clause principles and the school’s pedagogical interests. If grey area religious expression is viewed as school-sponsored expression and,

474. Gedicks, supra note 253, at 1166.
476. See Marsh, 463 U.S. at 820 & n.47 (Brennan, J., dissenting).
478. Michael McConnell has also suggested such a practice. See McConnell, Religious Freedom at a Crossroads, supra note 220, at 159 n.200.
thus, subject to the full Establishment Clause restrictions that apply to school speech, the result will be to push valuable student speech out of the schools. On the other hand, if grey area religious expression is viewed as private student expression, schools will not have enough control over the speech to ensure that the speech is consistent with the school’s pedagogical objectives and does not exert coercive pressures on students. Section II has already described in detail what would be lost if grey area religious speech is viewed as school-sponsored speech and, thus, excluded from the schools under the Establishment Clause. The lower court decisions in Chandler, Duval and Doe help to illustrate the problem with viewing grey area speech as private speech.

In each of these cases, the courts held that one of the hallmarks of private student expression is the absence of school review and supervision over the content of the expression.\footnote{479} If student religious speech occurs entirely at the student’s initiative or pursuant to a school policy that selects speakers according to neutral, secular criteria, and the speech is not subject to editorial control by the school, the speech is private. On the other hand, if the school exercises control over the speech, there is a risk that it will be labeled school-sponsored religious speech and, thus, will be subject to the same Establishment Clause limitations as school speech.

By drawing the dichotomy this way, these courts were clearly trying to preserve a space for student religious expression at school events or assemblies. However, the consequence will be to encourage schools who want to retain a place for student religious expression at school-related events to remove all supervision over the speech in order to fit it into the private box. This attempt to privatize grey area speech will, in turn, leave schools without the ability to prevent the type of sermon Chris Niemeyer prepared in the Cole case. Schools will also lack the flexibility to exercise editorial control in order to ensure that the messages are appropriate to the occasion and relevant to the school’s pedagogical goals. By affirming that only private religious expression is permissible in captive audience situations and defining private expression as expression free from school control, the decisions in Chandler, Duval and Doe force schools to choose between permitting religious expression and giving up control over the speech or retaining control over the speech and disallowing expression with religious content. Given the value of grey area religious speech and the equal importance of retaining limited control over such speech, this choice is

unfortunate. The most likely result over the long-run will be that schools will choose the retention of control over student speech instead of allowing religious messages. Even if a school begins by relinquishing control over student religious speech, as soon as the school encounters a speaker like Niemeyer, it will undoubtedly choose to retain control in the future at the expense of additional religious speech, and the result will be very little space for religious expression at school-related events.

Another unfortunate result of drawing the dichotomy the way that the courts do in Duval, Chandler and Doe is that it prevents schools from developing prayer policies for graduations and other events that are carefully constructed to provide fair and equal opportunities for religious minorities and nonbelievers to participate. The courts in Duval and Doe suggested that prayers or other religious messages may only be delivered at graduation if speaker selection is by neutral and secular criteria. Such a rule would permit the school to choose graduation speakers randomly from a list of volunteers or select the class's valedictorian as speaker. However, in communities where one or a few religions predominate, either of those mechanisms will skew any religious speech in favor of the majority religion. If the school tries to ensure a broader range of views by developing a policy such as the one I have suggested above, the school will violate the Establishment Clause by making selections based in part on religious criteria. Thus, schools will have to choose between using neutral and secular criteria and having a less diverse set of messages, or abandoning their efforts to make a place for inspirational student messages at graduation.

Scholars have observed that, after Santa Fe, the next round of litigation over student religious speech at school-related events is likely to be about religious messages delivered by valedictorians. There is a strong chance that lower courts will conclude that such messages are constitutional if the speeches are prepared without school supervision or review. However, even if courts allow religious messages by valedictorians, a single message by one student will be an inadequate substitute for a prayer policy that provides for a range of views. Ironically, the privatization of student messages at graduation and other school-related events will come at the price of diversity.

By contrast, viewing student religious expression in captive audience settings as grey area speech and adopting the analysis that I

480. See Adler v. Duval County Sch. Bd. (Duval I), 206 F.3d 1070, 1076-77 (11th Cir. 2000) (en banc), cert. granted and judgment vacated, 121 S. Ct. 31 (2000), opinion and judgment reinstated, 250 F.3d 1330 (11th Cir. 2001) (en banc), cert. denied, 122 S. Ct. 664 (2001); Doe, 147 F.3d at 836.

have proposed will give schools more flexibility to develop opportunities for student speech that will ensure a balance of views and protect minority religious and nonreligious perspectives as well as majority views. This proposal also allows significantly more space for student religious expression regardless of whether the speech is entirely initiated by the student or delivered pursuant to a specific school policy for school-related events. If student speech bears the hallmark of state involvement any time the school exercises supervision or editorial control over the speech, very little speech in captive audience settings will qualify as private. Show-and-tell presentations, oral reports and classroom speech pursuant to a school assignment will all be considered school-sponsored public speech if the teacher retains the power to evaluate the speech as he or she surely will. The only place left for religious messages in captive audience situations will be the rare occasion when the school allows students to speak without school supervision or oversight.

By contrast, recognizing that student speech in captive audience settings is grey and adopting the approach in this article provide more protection for student religious speech. Students will be able to express religious views on an equal basis with nonreligious views, but the school can exercise editorial control over the secular aspects of the religious speech and step in to prevent speech which is primarily proselytizing. This approach balances the value of the speech with the school's pedagogical interests as well as important Establishment Clause principles such as neutrality, nonendorsement, noninterference and noncoercion.

CONCLUSION

The purpose of this article has been multifold. I have demonstrated that using the familiar dichotomy between government speech and private speech to evaluate the constitutionality of student religious expression in the public schools misses the fact that most of the disputes over student religious expression involve speech which occurs in a grey area between private and school speech. I have also developed a proposal for addressing grey area religious speech that balances the value of this speech with the Establishment Clause principles of neutrality, nonendorsement, noninterference and noncoercion. In so doing, I have tried to resist the push to private religious expression and activity that has gathered so many adherents on and off the courts in recent years. Protecting private religious expression is, indeed, important, but there is also an important place in the public schools for student expression that is partly public and

482. See Duval II, 250 F.3d at 1341 ("What turns private speech into state speech in this context is, above all, the additional element of state control over the content of the message.").
partly private. We miss something critical when we fail to recognize and to protect the value of this speech. Religious voices also deprive us of something significant when they opt out of grey area settings in favor of private expression in private settings. Rather than adopting a protectionist stance that seeks to preserve private religious activity and expression from the larger public and cultural institutions of American society, religious adherents should adopt a service-oriented approach that affirms their responsibility to contribute to culture as well as to protect themselves from culture. At the same time, all citizens should recognize that opting into public institutions and culture does not mean controlling public settings but, rather, sharing the space with diverse voices.