University of Miami Law Review

Volume 49 | Number 2 Article 4

12-1-1994

Student Religious Expression in School: Is It Religion or Speech, and Does It Matter

Gilbert A. Holmes

Follow this and additional works at: https://repository.law.miami.edu/umlr

Part of the First Amendment Commons

Recommended Citation

Gilbert A. Holmes, *Student Religious Expression in School: Is It Religion or Speech, and Does It Matter*, 49 U. Miami L. Rev. 377 (1994)
Available at: https://repository.law.miami.edu/umlr/vol49/iss2/4

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Student Religious Expression in School: Is It Religion or Speech, and Does It Matter

GILBERT A. HOLMES*

I. INTRODUCTION 377
II. CONSTITUTIONAL RIGHTS IN THE SCHOOLHOUSE 383
A. *Students' Rights* 383
B. *Religious Rights and Barriers in Public Schools* 386
III. STUDENT RELIGIOUS EXPRESSION 390
A. *Definition of Student Religious Expression* 390
B. *Student Religious Expression as Speech* 391
C. *Student Religious Expression as Free Exercise* 402
IV. CONSTITUTIONALITY OF STUDENT RELIGIOUS EXPRESSION 409
A. *Distinction Between Private and Programmatic Student Religious Expression* 409
B. *Unconstitutionality of Programmatic Student Religious Expression* 411
C. *Constitutionality of Private Student Religious Expression* 412
V. APPLICATION OF THE PRIVATE-PROGRAMMATIC STUDENT RELIGIOUS EXPRESSION ANALYSIS 419
VI. CONCLUSION 428

I. INTRODUCTION

The effort to re-integrate religion into public schools has been infused with new vigor and direction. In the early history of this country, prior to 1948, religion was a regular part of public school education through state-sponsored prayer and regular religious instruction during school hours.[1] During the past forty-seven years, the Supreme Court has systematically supported efforts to eliminate prayer and religious instruction from the public school and has consistently declared that religion is an unconstitutional part of the state's function in educating children.[2] The elimination of school prayer, Bible reading and other

* Associate Professor of Law, Seton Hall University School of Law; B.A. 1969, Bucknell University; J.D. 1972, New York University School of Law. I am grateful to Seton Hall University School of Law for financial assistance and to Southern Methodist University School of Law for technical assistance during the preparation of this article. I am particularly grateful to Angela Carmella, Kathleen Boozang, Illona Sheffey-Rawlings and George Martinez for their valuable insight and support in the preparation of this article. I also wish to thank Tim Ryan, Michelle Wright and Lucinda Andrew for their invaluable research assistance and thought-provoking questions and Carolyn Yates for her tireless secretarial assistance through the many drafts of this article.

1. For a discussion of the history of religion in public schools, see School Dist. v. Schempp, 374 U.S. 203, 266-78 (1963) (Brennan, J., concurring); James E. Wood, Jr., *Religion and the Public Schools*, 1986 B.Y.U. L. REV. 349, 350-53 (1986).

2. *Schempp*, 374 U.S. 203 (reading of Bible verses and reciting the Lord's Prayer in public schools unconstitutional); Engel v. Vitale, 370 U.S. 421 (1962) (required recitation of state

religious expression evoked vociferous objections,[3] defiance,[4] and the constant development of new strategies to ensure the presence of religion and religious beliefs in school.[5] For the most part, these efforts have not revived state-sponsored religious activities in public schools.[6]

---

composed prayer in public schools); McCollum v. Board of Educ., 333 U.S. 203 (1948) (release time for private religious instruction in public school buildings).

3. William Booth, *Longing for Values Drives School Prayer Crusade*, WASH. POST, Apr. 1, 1994, at A1 (noting that school prayer laws are widely supported by big city liberals, as well as by traditional members of the religious right); Larry Witham, *Seeking a Moral Lantern: School Debates Whether Religion Would Help Light Path to Virtue*, WASH. TIMES, June 13, 1993, at A1 (commenting on the removal of religion from schools and the recent drive to bring religion and morality back to the classroom).

4. *Prayer in Schools—Still A Troubling Issue*, U.S. NEWS & WORLD REP., Aug. 18, 1975, at 56 (discussing New Hampshire and Connecticut laws allowing voluntary, nondenominational prayer in public schools and quoting New Hampshire governor as stating that he "couldn't care less if the Supreme Court thinks it unlawful") [hereinafter *Prayer in Schools*]; *Prayer Case is Rebuffed by Justice*, MIAMI HERALD, Mar. 29, 1983, at 12A (Mobile, Alabama school board claimed that it had found a "loophole" in Supreme Court order enjoining state-endorsed prayer by arguing that the order did not ban prayers sponsored by the teachers themselves); *see also* Rosemary C. Salomone, *From* Widmar *to* Mergens*: The Winding Road of First Amendment Analysis*, 18 HASTINGS CONST. L.Q. 295, 298-305 (1991) (discussing the defiant reaction to the *Engel* and *Schempp* decisions).

5. These strategies included establishing a moment of silence, legislating the teaching of creationism as a science, opposing books and curriculum on religious grounds, and promoting student-initiated prayer and religious clubs in school. *See* Mary Ellen Quinn Johnson, *School Prayer and the Constitution: Silence is Golden*, 48 MD. L. REV. 1018, 1019 (1989) (noting that twenty-one states permit or require the observation of a moment of silence in public school classrooms); Nadine Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedoms*, 47 OHIO ST. L.J. 333, 336-55 (1986) (describing the legal challenges to secular humanism, evolutionism, and creativism as forms of religion in school curriculum).

6. The efforts to institute a moment of silence have attained limited success. The Supreme Court and many lower courts have declared moment of silence statutes unconstitutional. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (holding that Alabama statute calling for a moment of silence for "meditation or voluntary prayer" unconstitutional); May v. Cooperman, 780 F.2d 240 (3d Cir. 1985) (declaring New Jersey moment of silence statute unconstitutional because it lacked a secular purpose), *dismissed on other grounds*, 484 U.S. 72 (1987); Walter v. West Va. Bd. of Educ., 610 F. Supp. 1169, 1170 n.1 (D.C. W. Va. 1985) (declaring unconstitutional an amendment to the West Virginia constitution establishing a brief time for "any student desiring to exercise their [sic] right to personal and private contemplation, meditation or prayer"); *see also* David Z. Seide, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. REV. 364, 365-73 (1983) (presenting moment of silence statutes and describing the decisions of lower courts overturning such legislation). Other lower courts, however, have sustained various moment of silence statutes. *See, e.g.*, Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976) (voluntary moment of silence for meditation or prayer does not compel exercise of religion and is not unconstitutional); Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich 1965) (allowing a modified program of voluntary silent prayer at the beginning of the school day and at lunchtime). Other efforts to infuse religion into school have not succeeded. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (declaring unconstitutional a Louisiana statute forbidding the teaching of evolution theory unless accompanied by instruction in the theory of "creation science"), McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982) (declaring unconstitutional a statute requiring balanced treatment of creation science and evolution science where purpose was to introduce biblical version of creation).

They have, however, cultivated a classification of student-initiated religious expression as speech and used this analysis as the new stratagem for returning religion to public school.[7] This approach alters the discourse regarding religion in public school[8] and allows some religious activity to become a constitutionally acceptable part of public school activities.[9]

Student religious expressions pose a significantly different constitutional question than state-sponsored religious programs in public schools. Students express their religious beliefs in school not only through prayer itself, but also in extracurricular activities, class assignments, artistic endeavors, and athletic, musical, or other student per-

---

7. *See* John W. Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools*, 16 PEPP. L. REV. 229 (1989) (arguing that student-initiated religious expression should be protected by both first and fourteenth amendment provisions); *see also Graduation Invocations and Benedictions: Good Faith Interpretations?*, 89 EDUC. L. REP. 1061 (1994) (presenting the argument of some that student-initiated and student-led prayer at graduation is protected free speech). Referring to student religious expression merely as speech denies its importance to students. Their religious expression is the result of sincere efforts by children to manifest their religious faith in school. Adults, however, have used children's efforts to bring their religious faith with them to school as part of the adult strategy for returning religion to school. *See* Wintham, *supra* note 3.

8. The discussion has moved from the prohibitions of the Establishment Clause regarding state-sponsored religious expression in school to the nondiscrimination of student religious expression under a free speech analysis. *See, e.g.*, Frank Calabrese, Mergens v. Board of Education of Westside Community Schools: *Equal Access Upheld as The* Lemon *Test Sours*, 39 DEPAUL L. REV. 1281 (1990) (discussing new equal access policy, designed to allow student religious groups equal access to public school grounds, as involving a balancing of free speech and free exercise rights); Frank R. Jimenez, *Beyond* Mergens: *Ensuring Equality of Student Religious Speech Under the Equal Access Act*, 100 YALE L.J. 2149 (1991) (discussing the requirements to effectively guarantee student religious speech under the free speech analysis); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1 (1986) (discussing the need to treat religious speech the same as secular speech); Salomone, *supra* note 4 (analyzing the relationship between free speech and free exercise jurisprudence); Nadine Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143 (1985) (discussing the application of the free speech/equal access doctrine to student's free exercise of religion in school); Whitehead, *supra* note 7. *See also infra* part III.B. for the discussion of student religious expression as free speech and as free exercise of religion.

9. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226 (1990) (student religious clubs permitted on free speech grounds); Hedges v. Wauconda Community United Sch. Dist., No. 118, 807 F. Supp. 444, 465 (N.D. Ill. 1992) (school officials can neither restrict students' distribution of religious material before and after school nor establish particular locations for such distribution during school hours without violating students' First Amendment rights), *aff'd in part and vacated in part*, 9 F.3d 1295 (7th Cir. 1993) (upholding the prohibition of restrictions on free speech, but permitting certain limitations on the time, place and manner of the student speech); Clark v. Dallas Indep. Sch. Dist., 806 F. Supp. 116 (N.D. Tex. 1992) (permitting high school students to engage in religious discussion and distribute religious literature before and after school); Randall v. Pegan, 765 F. Supp. 793, 795 (W.D.N.Y. 1991) (refusing to issue a preliminary injunction against a student group planning to conduct a religious baccalaureate service in the high school auditorium before the formal graduation exercises).

formances. Distinct from the earlier movement supporting prayer in school, the contemporary campaign via student religious expression employs the Free Speech Clause of the Constitution[10] and avoids the prohibitive dilemma presented by use of the Religion Clauses of the Constitution.[11] This approach has achieved some success in permitting religious expression in public school. The Equal Access Act,[12] which permits student-initiated and led religious activities in high schools on free speech grounds,[13] has withstood constitutional challenge.[14] Additionally, courts have permitted student-initiated invocations at high school graduations on free speech grounds after finding that there was no state sponsorship.[15]

---

10. "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

11. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

The use of the free exercise component of the Religion Clauses to support religious expression in school can create difficulty. While the Free Exercise Clause can create an accommodation of religion in a government setting or within a government regulation, the quest for neutrality may mandate that the Establishment Clause prohibit governmental involvement. The prohibition against the establishment of a religion often trumps the free exercise analysis in cases addressing religion in schools. *See, e.g.*, Board of Educ. v. Grumet, 114 S. Ct. 2481, 2504 (1994) (Kennedy, J. concurring) ("The principle that government may accommodate free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.") (citing Lee v. Weisman, 112 S. Ct. 2469, 2655 (1992)). For further discussion of the interplay between the two clauses, see *infra* parts III.C. and IV.

12. 20 U.S.C. § 4071 (1984).

13. The statute creates a standard for determining when high schools must permit student religious club meetings on school grounds. It uses a similar framework to the one developed by the Supreme Court for determining when the state can censor or prohibit speech. That framework assesses whether the government setting is a nonpublic, public or limited public forum. *See* Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 799-806 (1985) (describing the public forum analysis of government restriction of speech); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-49 (1983) (describing the public forum analysis of government restriction of speech); Widmar v. Vincent, 454 U.S. 263, 267-70 (1981) (applying the public forum analysis to the religious speech of college students). The Equal Access Act refers to limited open fora. 20 U.S.C. § 4071(a), (b) (1984). If the school establishes a limited open forum, by allowing non-curriculum related clubs to meet on school premises, it cannot prohibit the meetings of religious clubs without engaging in content-based discrimination of the students' religious speech. *See* 20 U.S.C. § 4071(a); *see also* Board of Educ. v. Mergens, 496 U.S. 226, 247 (1990) (finding Equal Access Act constitutional under a free speech analysis). In order to avoid an Establishment Clause violation when a school creates a limited open forum, no school employee or official can participate in the club's activities, except to facilitate the opening and closing of classroom space for the group's meetings. *See* 20 U.S.C. § 4071(c)(3). For a further discussion of the public forum doctrine in public schools, see Robert A. Holland, *A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty*, 80 CAL. L. REV. 1595, 1623-24 (1992) (discussing the public forum doctrine and its relationship to Establishment Clause concerns in religious expression cases); James C. Dever, III, Tinker *Revisited:* Fraser v. Bethel School District *and Regulation of Speech in the Public Schools*, 1985 DUKE L.J. 1164, 1173-77.

14. *Mergens*, 496 U.S. at 253.

15. *See, e.g.*, Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992) (student

Relying on free speech principles to protect student religious expression, however, is unsatisfactory and unacceptable. This approach does not accord students proper respect for their personhood under the Constitution,[16] and it improperly blurs the distinction between religion and speech, two separately protected rights under the Constitution.[17] This Article will discuss how student religious expression comports with the jurisprudence regarding children's constitutional rights, religion in public school, and the Religion and Free Speech Clauses of the First Amendment. It will demonstrate why classifying student religious expression, including prayer, as *religion* provides better constitutional protection[18] and a more precise analysis than classifying it as speech.

This Article does not advocate the constitutionality or permissibility of all student religious expression. Instead, this Article suggests that identifying the contexts in which students express their religious beliefs—curricular, ceremonial-functional, and extracurricular[19]—and distinguishing between students' private religious expression[20] and their programmatic religious expression[21] may be a preferable way to determine when student religious expression is constitutionally permissible in

---

initiated and selected invocation at graduation constitutional because there was no state sponsorship). *But see* Gearon v. London County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993) (declaring that prayer at graduation violated the Establishment Clause, regardless of fact that it was student-initiated). For an application of this article's thesis to *Jones*, *see infra* part V.

16. The analysis of student religious expression as speech does recognize that children's voices enjoy protection under the Free Speech Clause. The difficulty, however, is that religious expression is more than just speech. *See infra* part III. The free speech analysis does not acknowledge that children have sincere religious beliefs because it does not protect their religious speech as the free exercise of religion. *See infra* part IV. This failure to accord children constitutional protection of their religious beliefs as religious beliefs mirrors the deficiencies in the analysis of children in the law generally. *See* Wendy Anton Fitzgerald, *Maturity, Difference and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 14-15 (1994) (discussing how constitutional and family law jurisprudence exclude children's personhood); Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals* 53 MD. L. REV. 358, 370-84 (1994) (suggesting that courts should recognize children's constitutional rights in family relationships as they do for adult family constitutional rights).

17. *See infra* part III for a discussion of this distinction.

18. Better protection does not necessarily mean more protection. Rather, it means protection that recognizes the application of the Constitution to children and an analysis that promotes and protects the religious autonomy of children in a manner similar to the protection given the religious autonomy of adults.

19. *See infra* text accompanying notes 113-18 for a definition and discussion of the relevant contexts for student expression.

20. Such expression includes students' individually or collectively communing with a recognized supreme being through prayer or in the students' use of religious beliefs in their school assignments and activities. *See infra* text accompanying notes 208-10 for a further discussion and definition of private student religious expression.

21. Religious expression that is a part of the school program geared towards religious or school-related purposes are examples programmatic expression. *See infra* text accompanying notes 201-07 for further discussion and definition of programmatic religious expression.

public schools. Part II of the Article discusses the development of students' constitutional rights generally and religious rights specifically in the public schools. Part III will define student religious expression and discuss the treatment of it as speech and as religion in the various contexts of public school. Part IV discusses the constitutionality of programmatic and private student religious expression. Part V applies the thesis of the Article to relevant cases.

Religion in school is an issue that will continue to generate public debate and concern.[22] The question of how the government should interact with its religious citizens[23] remains inadequately answered.[24] The perception that children are impressionable,[25] and that religious tutelage is a family function[26] further complicate the question. The dilemma of how much religion to permit in governmental settings in order to accommodate citizen's religious beliefs without violating the Establishment Clause, therefore, becomes more pronounced in public schools than other governmental fora.[27] Striking the proper balance between the requirements of the Religion Clauses in public schools man-

---

22. *ABC World News Tonight: American Agenda—Religion in Schools* (ABC television broadcast, June 21, 1994) (stating that schools are the focal point of a major battle over values and examining children's religious expressions in school) [hereinafter *ABC World News Tonight*].

23. In *Zorach v. Clauson*, the Supreme Court recognized that "[w]e are a religious people whose institutions presuppose a Supreme Being." 343 U.S. 306, 313 (1952) (finding release time from school for religious instruction outside of the school constitutional).

24. The Supreme Court has repeatedly acknowledged that the Religion Clauses of the First Amendment allow accommodation of religious beliefs in government settings and programs without violating the Establishment Clause. The Court, however, has failed to develop a consistent analysis for determining when religious accommodation becomes endorsement of religion. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989) (decision both prohibited a creche in City Hall and permitted a Chanukah menorah outside the City-County Building under the Establishment Clause; five justices wrote opinions explaining the Court's ruling); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (declaring that the Free Exercise Clause does not prevent the government from clearing and constructing a road upon land historically used for Native American religious rituals, arguably destroying Native Americans' ability to practice their religion); Lynch v. Donnelly, 465 U.S. 668 (1984) (permitting a creche displayed by the city in a privately owned park because of its secular purpose); Holland, *supra* note 13 (critically examining the Supreme Court's Establishment Clause jurisprudence); Tanina Rostain, *Permissible Accommodations of Religion: Reconsidering the New York* Get *Statute*, 96 YALE L.J. 1147, 1158-64 (1987) (discussing accommodation of religion under the Establishment Clause); Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987) (criticizing the Establishment Clause doctrine via the emerging "no endorsement" test).

25. Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992); Marsh v. Chambers, 463 U.S. 783, 792 (1983); George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707, 713 (1993).

26. Linda R. Crane, *Family Values and the Supreme Court*, 25 CONN. L. REV. 427, 431 (1993).

27. *See Marsh*, 463 U.S. at 792 (dealing with prayer before legislative sessions); Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35 (1993).

dates balancing issues related to children's development,[28] family autonomy,[29] and government authority. The intersection of these competing "rights" and interests makes the discussion of student religious expression important, delicate, problematic, and polarizing.[30] As such, it is not a discussion we can avoid by quick and simple solutions.[31]

II. Constitutional Rights in the Schoolhouse

A. *Students' Rights*

The Supreme Court has developed an elaborate jurisprudence regarding the constitutional rights of children. The Court began the development by declaring that children were "persons" entitled to protection under the Constitution[32] and applying the Constitution to protect the rights of children in criminal and juvenile proceedings.[33] The Court

28. The reference to children's development includes their emerging autonomy and ability to engage in constitutionally protected conduct. *See generally* David A.J. Richards, *The Individual, The Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. Rev. 1 (1980). However, the application of constitutional principles to children requires "sensitivity and flexibility to the special needs of parents and children." Bellotti v. Baird, 443 U.S. 622, 634 (1979).

29. Family autonomy includes parents' right to determine the religious upbringing and education of children and to raise children as they deem appropriate. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory education law unconstitutional when conflicts with parents' right to raise and religiously train children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (law mandating children's attendance at public school unconstitutional because it violates parents' right to raise and religiously train children); Meyer v. Nebraska, 262 U.S. 390 (1923) (law prohibiting teaching of foreign language before eighth grade unconstitutional violation of parents' right to raise and educate their children in a manner they deem fit); *see also* Crane, *supra* note 26, at 431. Proponents in both the quest for and the objection to religion in school utilize the doctrine of family autonomy in their arsenal of arguments.

30. *See* James E. Ellsworth, *Religion in Secondary Schools: An Apparent Conflict of Rights—Free Exercise, The Establishment Clause and Equal Access*, 26 Gonz. L. Rev. 505 (1990/1991) (proposing that the equal access of religious speech in secondary schools promotes tolerance while limiting the polarizing effect of religion in school); Carl H. Esbeck, *Five Views of Church-State Relations In Contemporary America Thought*, 1986 B.Y.U.L. Rev. 371 (1986) (discussing the need for new language in the discussion of church-state relations because of the polarizing effect of present language); Salomone, *supra* note 4 (presenting the conflicting analysis of school prayer issues at the Supreme Court level).

31. The analysis of religion in school will always generate "gray" areas where the protection afforded by the Free Exercise Clause conflicts with the prohibitions mandated by the Establishment Clause. The analysis proposed in this article seeks a proper location for such gray areas, not the elimination of them.

32. Tinker v. Des Moines Sch. Dist., 395 U.S. 503, 511 (1968); *see also In Re* Gault, 387 U.S. 1 (1967) (holding that children are entitled to constitutional protection).

33. *Gault*, 387 U.S. at 13 (holding children entitled to due process of law in juvenile justice proceedings); New Jersey v. T.L.O., 469 U.S. 325, 333 (1985) (holding that Fourth Amendment prohibitions on unreasonable search and seizure apply to searches conducted by public school officials); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that Eighth and Fourteenth Amendments prohibit execution of fifteen-year-old); Stanford v. Kentucky, 492 U.S. 361, 380

has also protected children's constitutional rights in other contexts.[34] From the beginning, however, the Supreme Court and lower courts made clear that the Constitution provided only limited protection to children.[35] Courts based these limitations on concerns regarding children's maturity, vulnerability,[36] their status as members of a protected, though not suspect class,[37] and the need to preserve the role of parents and other adults in children's lives.[38] Applying these concerns and limitations, courts justified restricting children's rights to obtain an abortion,[39]

(1989) (holding that sixteen- and seventeen-year-old minors may be eligible for the death penalty in light of the crime).

34. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2832 (1992) (children entitled to an abortion under the Constitution); Bellotti v. Baird, 443 U.S. 622, 647 (1979) (every minor must have an opportunity to obtain an abortion without notifying her parents); Carey v. Population Serv. Int'l, 431 U.S. 678, 691-99 (1977) (restrictions on distribution of contraceptives to minors violates children's substantive due process rights); Goss v. Lopez, 419 U.S. 565, 582 (1975) (children entitled to procedural due process when suspended from school); *Tinker*, 393 U.S. at 506 (1969) (children entitled to free speech under the Constitution); *see also* Hedges v. Wauconda Community United Sch. Dist., No. 118, 807 F. Supp. 444, 465 (N.D. Ill. 1992) (school officials can neither restrict students' distribution of religious material before and after school nor establish particular locations for such distribution during school hours without violating students' First Amendment rights), *aff'd in part and vacated in part*, 9 F.3d 1295 (7th Cir. 1993) (upholding the prohibition of restrictions on free speech, but permitting certain limitations on the time, place and manner of the speech).

35. *See Gault*, 387 U.S. at 30 (procedure in juvenile court proceedings need not "conform with all of the requirements of a criminal trial or even of the usual administrative hearing"); *Bellotti*, 443 U.S. at 634 ("the constitutional rights of children cannot be equal with those of adults").

36. *See Bellotti*, 443 U.S. at 634 ("[W]e have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing"); City of Milwaukee v. K.F., 426 N.W.2d 329, 338 (Wis. 1988) (upholding a curfew statute because the vulnerability and immaturity of children justifies restricting their right to travel); Susan M. Horowitz, *A Search for Constitutional Standards: Judicial Review of Juvenile Curfew Ordinances*, 24 COLUM. J. L. & SOC. PROBS. 381, 385 (1991) (discussing courts' use of minors' vulnerability to uphold curfew statutes); *see also Casey*, 112 S. Ct. at 2832 (a court may authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent); Hazelwood Comm. Dist v. Kuhlmeier, 484 U.S. 260, 273 (1988) (noting that educators can exercise control over student expression to ensure that students are not exposed to material inappropriate to their level of maturity); Bethel Comm. Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (noting that First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children).

37. *See* Moe v. Dinkins, 533 F. Supp. 623, 629 (S.D.N.Y. 1981) (state interests advanced by parental consent for marriage statute of "the protection of minors from immature decision-making and preventing unstable marriages" held to be legitimate), *aff'd*, 669 F.2d 67 (2d Cir. 1982).

38. *See Casey*, 112 S. Ct. at 2832; *Hazelwood*, 484 U.S. at 272; *Bethel*, 478 U.S. at 684.

39. The Supreme Court recognized the right to choose an abortion for adults in Roe v. Wade, 410 U.S. 113 (1973), and for children in Planned Parenthood v. Danforth, 428 U.S. 52 (1976). However, the exercise of this constitutional right by minors may require adult approval. Some states require that the approving adult be either the child's parent or a judicial officer. *See Casey*, 112 S. Ct. at 2832; H.L. v. Matheson, 450 U.S. 398, 406 (1981) (permitting requirement of

marry,[40] maintain family relationships,[41] travel at certain times of the day,[42] and freely express their opinions.[43]

Early in the judicial recognition of children's constitutional rights, the Supreme Court proclaimed that children do not abandon their rights at the schoolhouse gate.[44] In the students' rights cases, the Court recognized, among other things, the constitutional protection of students' speech in school.[45] The Court also recognized the need for parameters on student expression in order for schools to be able to fulfill their educational responsibility, and therefore adopted an approach that allowed school officials to control student speech.[46] The Court based its circum-

parental consent provided there is a judicial bypass procedure); *Bellotti*, 443 U.S. at 640 (outlining the requirements of a constitutional notification and judicial bypass system).

40. The Supreme Court recognized a constitutional right to marry. *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967). Courts, however, have not extended that right to children. *See, e.g., Moe*, 553 F. Supp. at 629; Thompson v. Oklahoma, 487 U.S. at 824, 843-45 (listing state requirements for minors to marry).

41. The Court has recognized the constitutional right of adults to maintain family relations. *See* Santosky v. Kramer, 455 U.S. 745, 747-48 (1982) (parents' right to raise their children cannot be severed except on clear and convincing evidence); Stanley v. Illinois, 405 U.S. 645, 650-51 (1972) (unwed father's right to raise children cannot be severed without due process of law). But the Court has not extended this right to children. *See also* Michael H. v. Gerald D., 491 U.S. 110, 130-31 (1989) (Court refused to decide whether a child has a liberty interest, symmetrical with that of a parent, in maintaining her filial relationship, because the state was pursuing the legitimate end of protecting the peaceful union of her mother's marriage).

42. An adult's right to travel is fundamental and states cannot infringe upon it by their rules and regulations. *See* Attorney General of N.Y. v. Soto-Lopez, 476 U.S. 898 (1986) (civil service employment preference for New York residents who were honorably discharged and who resided in New York before entering military service unconstitutionally restricts travel); Shapiro v. Thompson, 394 U.S. 618 (1969) (residency requirement for welfare benefits unconstitutionally restricts travel). States may restrict, however, children's right to travel at night via curfew statutes. *See, e.g.*, Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988). *But see* Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989) (juvenile curfew law unconstitutionally restricts children's constitutional substantive due process right of freedom of movement).

43. Restriction on the sale and distribution of obscene literature for private use violate adults right to Free Speech. *See* Stanley v. Georgia, 394 U.S. 557 (1969). Restrictions on sale or distribution of obscene literature to children for private use, however, do not violate the children's rights to Free Speech. *See* Ginsberg v. New York, 390 U.S. 629, 636-37 (1968).

44. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969); *see also* New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J. and O'Connor, J. concurring); Board of Educ. v. Pico, 457 U.S. 853, 865 (1982); Healy v. James, 408 U.S. 169, 180 (1972).

45. *Tinker*, 393 U.S. at 506.

46. Hazelwood Comm. Sch. Dist v. Kuhlmeier, 484 U.S. 260, 271-273 (1988) (stating that a school, in its capacity as publisher of a school paper or producer of a play, may refuse to allow speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order'. . . ") (citation omitted); Bethel Comm. Sch. Dist No. 43 v. Fraser, 478 U.S. 675, 685 (1986) (holding that the First Amendment does not prohibit school officials from determining that a vulgar and lewd speech would undermine the school's basic educational mission); *see also* Pyle v. South Hadley Sch. Comm., 861 F. Supp. 157, 164, (D. Mass. 1994) (stating that, in *Tinker*, the Supreme Court recognized students' rights to free expression, but that the Court also recognized the need "for affirming the comprehensive authority of the States and of school officials, consistent with

scription of children's speech in school on the students' maturity,[47] the school's obligation to teach moral and social values,[48] the school's need to dissociate from inappropriate student expressions,[49] and the school's pedagogical goals.[50] These cases have had a direct impact on the First Amendment protection of student speech. As one commentator recently noted, the courts gave school administrators more freedom in restricting students' expressive activities and caused students to think twice before speaking because of fear of discipline or censorship by school officials.[51]

B. *Religious Rights and Barriers in Public Schools*

From the initial development of the public school system in this country, schools included religious instruction and observances as a regular part of the education process.[52] This infusion of religion into the public school day epitomized the effort by parents, church leaders, school administrators, teachers, and governmental officials to ensure that children received the appropriate amount of religion. This effort was, in part, a response to the fact that the public school system had possession of children during a significant part of their waking hours.[53] It was also a continuation of the era when education and religious instruction were conducted jointly at home.[54]

Over the past forty-seven years, the Supreme Court has systematically removed the official presence of religion in public schools. In 1948, the Court declared unconstitutional the setting aside of a portion of the school day for religious instruction in school.[55] In 1962, the Supreme Court declared unconstitutional state-composed and mandated school prayer.[56] In 1963, the Court declared unconstitutional the reading of Bible verses and the recitation of the Lord's Prayer in public

---

fundamental constitutional safeguards, to prescribe and control conduct in the schools") (citing *Tinker*, 393 U.S. at 507); Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 288-90 (E.D. Pa. 1991) (discussing regulation of students' speech in school).

47. *Bethel*, 478 U.S. at 683.

48. *Id.*

49. *Id.* at 685.

50. *Hazelwood*, 484 U.S. at 279 (Brennan, J., dissenting).

51. Jeff Horner, *Student Free Speech Rights: "The Closing of the Schoolhouse Gate" and Its Public Policy Implications*, 33 S. TEX L. REV. 601, 613 (1992).

52. *See* Wood, *supra* note 1, at 350-52; John M. Hartenstein, *A Christmas Issue: Christian Holiday Celebration in the Public Elementary Schools Is an Establishment of Religion*, 80 CAL. L. REV. 981, 996 (1992).

53. The typical school day is 7 hours long and constitutes 44-50% of a child's waking hours during the school week.

54. *See* Wood, *supra* note 1, at 350-52.

55. McCollum v. Board of Educ., 333 U.S. 203 (1948).

56. Engel v. Vitale, 370 U.S. 421 (1962)

schools.[57] In subsequent cases, the Court expanded its prohibition against religious activities in schools, by banning the posting of the Ten Commandments in public school classrooms,[58] and prohibiting students from observing a moment of silence for meditation and prayer before school.[59]

The Supreme Court based its initial decision that prayer and religion in school were inappropriate on the Establishment Clause of the First Amendment.[60] The Court supported its determination by joining the Thomas Jefferson metaphor of a wall of separation between church and state[61] with the concern of children as a captive audience as a result of compulsory education.[62] The Court sought to avoid both the endorsement of religion[63] and the coercion of the student participants' religious beliefs[64] in furtherance of the constitutional prohibition against the establishment of religion.[65] In this manner, the Court sought to maintain a barrier between religious observances and public school activities.[66]

While the Supreme Court upheld the barrier against religious observances in public schools, it recognized that government could accommodate individuals' religion-based activities in other state-spon-

---

57. School Dist. v. Schempp, 374 U.S. 203 (1963).

58. Stone v. Graham, 499 U.S. 39 (1980).

59. Wallace v. Jaffree, 472 U.S. 38 (1985).

60. In *Engel*, the Court said: "using [the] public school system to encourage recitation of the Regents' prayer . . . [is] wholly inconsistent with the Establishment Clause." 370 U.S. at 424.

61. The Court used the Jefferson metaphor in Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (declaring constitutional a legislative scheme for reimbursing families for transportation of school children to religious schools). In subsequent decisions, the Court referred to its use of the metaphor in *Everson* without further examination of the accuracy of the metaphor or its use. For a discussion of the questionable use of the "wall of separation" metaphor, see Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 482-90 (1991).

62. *Engel*, 370 U.S. at 430.

63. *Wallace*, 472 U.S. at 61; *Schempp*, 374 U.S. at 251; *Engel*, 370 U.S. at 442 (Douglas, J. concurring);

64. *Engel*, 370 U.S. at 430. The Court also found coercion in the excusing of students' participation in the religious observances. *Schempp*, 374 U.S. at 223-25 (religious exercises as part of the curricular activities of students required to attend school are not mitigated by the fact that individual students may absent themselves).

65. *See supra* note 11.

66. For a discussion of the Supreme Court's goals in its religion in school decisions, see Matthew S. Steffey, *Redefining the Modern Constraints of the Establishment Clause: Separable Principles of Equality, Subsidy, Endorsement and Church Autonomy*, 75 MARQ. L. REV. 903 (1992) (examining how courts have determined that the Establishment Clause does not ban government programs that provided aid to the secular activities of religiously-affiliated organizations); T. Page Johnson, A.M., Zobriest v. Catalina Foothills School District: *Does the Establishment Clause Bar Sending Public School Employees Into Religious Schools?*, 82 ED. LAW REP. 5 (1993) (examining the implication of a Ninth Circuit case holding that the Establishment Clause bars sending a state-sponsored sign language interpreter into a Catholic high school to assist a deaf student); STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZES RELIGIOUS DEVOTION 108-09 (1993).

sored settings and agencies without violating the Establishment Clause.[67] The Court repeatedly acknowledged that American society consisted of a religious people.[68] It therefore mandated that government accommodate individual exercise of religion in the dispensing of government benefits[69] and determined the validity of apparently neutral regulations by balancing the protection provided in the Free Exercise Clause against the prohibitions mandated by the Establishment Clause.[70] As the welfare state, with its regulatory and dispensatory functions, grew and interacted more with religious organizations and individuals, the Court extended the protection of the Free Exercise Clause to other areas of government activities.[71] The Court, however, did not extend its religious accommodations analysis to the public school context.[72] The one exception was the Court's application of the Free Exercise Clause to the unique situation of Amish parents' refusal to send their children to high school.[73]

The Supreme Court has invoked constitutionally-mandated prohibitions and barriers against the presence of religion in public schools. The primary basis for this response was that in all of its decisions regarding

---

67. County of Allegheny v. A.C.L.U., 492 U.S. 573 (1989) (permitting the display of a Chanukah menorah outside the City-County Building as a part of city's "salute to liberty"); Thomas v. Review Bd., 450 U.S. 707 (1981) (holding that a state could not constitutionally deny unemployment compensation benefits to a Jehovah's Witness who was compelled to quit for religious reasons); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that a state could not constitutionally deny unemployment compensation benefits to a member of the Seventh-Day Adventist Church who, for religious observance reasons, could not accept work on Saturdays and thus, prompting the statutory denial of benefits to those who fail, without good cause, to accept available suitable work when offered).

68. Edwards v. Aguillard, 482 U.S. 578, 602 (1987) (Powell J. concurring) (noting that references to our religious heritage are constitutionally acceptable); Lynch v. Donnelly, 465 U.S. 668, 674-75 (referring to the unbroken chain of governmental acknowledgment of the role of religion in people's lives); Zorach v. Clauson, 343 U.S. 306, 313 (1952).

69. *County of Allegheny*, 492 U.S. at 576 (permitting a display of religious holiday scenes together with nonreligious holiday items); Sherbert v. Verner, 374 U.S. at 409 (invalidating denial of unemployment benefits after discharge for refusing to work when work caused violation of religious beliefs); Everson v. Board of Educ., 330 U.S. 1, 7, 9-10 (1947) (permitting government funding of transportation to religious schools when such funding was provided for transportation to nonsecular and public schools).

70. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 113 S. Ct. 2217, 2230 (1993) (invalidating a city ordinance against animal sacrifice because it was not neutral and could not pass a strict scrutiny inquiry); Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 888 (1990) (upholding the denial of unemployment insurance benefits to Native Americans who ingested peyote as part of a religious ritual and were terminated for failing a drug test because the statute was generally applicable and supportable under a rational basis test).

71. For a discussion of the American government as a welfare state, dispensing benefits to its citizens through religious and nonreligious organizations, see CARTER, *supra* note 66, at 137-55.

72. *See* Board of Educ. v. Grumet, 114 S. Ct. 2481, 2491 (1994) (holding that a state may not create a special school district out of a village owned and inhabited by practitioners of strict form of Judaism).

73. Wisconsin v. Yoder, 406 U.S. 205 (1972).

public school religious activities, the Court discussed only the rights of the adults[74] and the obligations of government, but overlooked the rights of the students involved.[75]

Students seeking to engage in religious expression in school, however, present a different claim than religious expression of parents and school officials. Adult- and state-initiated religious expression in schools impose religious activities on the recipient captive audience of students. The Supreme Court and lower courts have easily dismissed claims by school employees or officials that their free exercise rights supported the presence of religious activity in school.[76] Students' religious expression, on the other hand, emanates from the students' commitment to their religious faith.[77] The student claims are more akin to the claims raised in the employment benefits cases[78] and other accommodation cases.[79] By overlooking students as persons wishing to exercise their religious beliefs, courts have ignored the analysis that led to the accommodation of religious beliefs of adults.[80] Student claims to engage in religious expression therefore raise issues that the courts have yet to fully address.

---

74. Those adults included parents, teachers and school administrators.

75. The one exception is *Wisconsin v. Yoder*, in which Justice Douglas referred to the children's right to religious choices in their education decisions. 406 U.S. at 242, (J. Douglas dissenting).

76. The activities of teachers or school administrators carried an imprimatur of state action and the Establishment Clause barred them. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226, 264 (1990) (Marshall, J. concurring).

77. Some student religious expression also imposes on the captive audience of fellow students, e.g., other students might overhear or witness a student praying before class. But, the legal consequences of student-generated imposition may differ significantly depending on the situation or context of the student expression. *See infra* parts IV.B. and IV.C. discussing unconstitutional programmatic and constitutional private student religious expression.

78. *See* Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829 (1989); Thomas v. Review Bd., 450 U.S. 707; Sherbert v. Verner, 374 U.S. 398.

79. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994); Church of the Lukumi Babalu Aye., Inc. v. Hialeah, 113 S. Ct. 2217, 2241 (1993); County of Allegheny v. A.C.L.U., 492 U.S. 573, 613 n.59 (1988); *Yoder*, 406 U.S. at 213-19.

80. *See Thomas*, 450 U.S. at 707; *Sherbert*, 374 U.S. at 409. In these cases, the plaintiffs-claimants alleged a violation of their free exercise rights when they were denied unemployment benefits after they lost their jobs because of the observance of their religious beliefs. They prevailed because the Supreme Court recognized that the government must accommodate the free exercise of religion when it does not constitute a violation of the Establishment Clause. *See Sherbert*, 374 U.S. at 409; *Thomas*, 450 U.S. at 719-20. The Supreme Court and lower courts have not applied this accommodation doctrine to student religious expression. Similarly, they have omitted children from the application of established constitutional doctrine in other contexts. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (refusing to apply the constitutional right to maintain family relationships to children); *In re* Z.J.H., 471 N.W.2d 202 (Wis. 1991) (failing to apply constitutional right to maintain family relationships to a child).

III. Student Religious Expression

A. *Definition of Student Religious Expression*

Student religious expression encompasses students' attempts to imbue their religious beliefs into their school lives. Students participate in school activities in various contexts,[81] including orientation, classroom instruction, plays, concerts and sporting events, after school organizations, and graduation ceremonies. Students may seek to engage in religious expression in these settings and such student religious expressions occur differently in each of these components of public school life. The efforts by students to express religious beliefs in these contexts are similar to the attempts by parents, teachers, school administrators and legislators to have religion remain a part of the students' most significant and time consuming activity.[82]

The clearest examples of student religious expression are their attempts to pray in school. Student religious expression, however, is not limited to prayer. It also includes students' use of religious beliefs in class assignments, artistic endeavors, other student performances, and extracurricular activities in which the students select the topic or display individual styles and talents. Not all school activities, however, permit such student religious expression. The definition purposely limits student religious expression to those activities where the school provides opportunities for students to express their individuality.[83] Under this definition, student religious expression is clearly speech. However, because of its religious component, treating student religious expression as speech, for constitutional analysis, limits the constitutional protection available and ignores the religious autonomy of the students.[84]

Given the legal histories of both children's constitutional rights and religion in school, the issue of student religious expression presents a

81. *See infra* text accompanying notes 113-18 for a discussion of student religious expression in the curricular, ceremonial-functional, and extracurricular contexts of public school.

82. *See supra* text accompanying note 53.

83. In preparing a class assignment or individual performance, where the teacher has provided specific requirements, students have little if any opportunity for religious, political, social or other individual expression. Where, however, the topic for the assignment, performance or other participation is the students' choice in order to permit expression of their individuality, students have the opportunity to engage in religious expression. An example of such an "open" assignment was the independent research project, where the student selected the topic, that was the subject of Duran v. Nitsche, 780 F. Supp. 1048 (E.D. Pa. 1991). For further discussion of *Duran*, see *infra* part V.

84. Acknowledging children's religious autonomy is the first step in recognizing their constitutional right to free exercise of religion in school. Treating student religious expression as speech ignores the religious autonomy of children and obviates full recognition of children as "persons" under the Constitution entitled to protection of their free exercise of religion as well as their free speech rights. *See infra* parts III.B. and III.C.

challenging and important convergence of competing jurisprudence. Creating this crossroad of jurisprudential and constitutional development are children's constitutional rights,[85] the dilemma of religion in government settings,[86] and parents' constitutional and common law rights to raise their children in a manner they deem fit.[87] At the intersection of these constitutional and legal doctrines lie two important questions in the examination of student religious expression in school. The first is whether student religious expression represents speech or religion. The Constitution provides separate and distinctive protection for religious activity and speech. The answer to this question therefore assists in determining the most appropriate analysis of student religious expression claims and regulation. The second question is how the jurisprudence regarding children's constitutional rights affect that analysis. Since the Supreme Court has limited the application of the Constitution to children,[88] are those limitations appropriate for student religious expression and if so, to what extent should they apply?

B. *Student Religious Expression as Speech*

Many proponents of student-initiated prayer and other religious expression rely upon the Free Speech Clause of the Constitution[89] to support their position.[90] Their analysis claims that prohibitions against such speech are content-based discrimination in violation of the Free Speech Clause of the Constitution.[91] This analysis seeks to avoid the

---

85. *See supra* part II.A.

86. *See supra* part II.B.

87. The Supreme Court first announced the constitutional doctrine supporting the right of parents to raise their children as they deem fit in Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925). Both cases involved the exercise of parental control over the education of their children. For a discussion of parents' constitutional and common law right to raise their children, see Katharine Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 297-306 (1988). *See also* Fitzgerald, *supra* note 16, at 35-41 (discussing history of parents' constitutional right to discipline children); Holmes, *supra* note 16, at 363-70 (presenting the jurisprudence regarding the protection of parental constitutional rights); Barbara Bennett Woodhouse, *Hatching the Egg: A Child Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1809-14 (1993) (discussing the harm to children under the current jurisprudence).

88. *See supra* part II.A.

89. *See supra* note 10.

90. *See* Salomone, *supra* note 4, at 299-300 (discussing the focus of proponents of school prayer on a free speech analysis); E. Gregory Wallace, *Beyond Neutrality: Equal Access and the Meaning of Religious Freedom,* 12 U. ARK. LITTLE ROCK L.J. 335. *See generally* John W. Whitehead & Alexis I. Crew, *Beyond Establishment Clause Analysis in Public School Situations: Need to Apply the Public Forum and* Tinker *Doctrines*, 28 TULSA L.J. 149 (1992) (advocating that the public forum analysis is appropriate for outside speakers expressing religious themes in public school buildings and functions and that the free speech doctrine delineated in *Tinker* is appropriate for student speech including religious expression in public school).

91. Courts have adopted this analysis in several circumstances. *See, e.g.*, DeNooyer v. Merinelli, No. 92-2080, 1993 WL 477030 (6th Cir. 1993) (upholding school's refusal to allow a

constitutional dilemma created by the protection of free exercise and the prohibitions against the establishment of religion in the Religion Clauses.[92] This effort to make student religious expression a free speech issue, however, presents several problems. First, it mandates application of the public forum doctrine to the school's treatment of its students and curriculum. Second, it assumes that all student religious expression occurs in student clubs and ignores student religious expression that occurs in other contexts.[93]

Under the public forum doctrine, courts determine the scope of permitted censorship of free speech by assessing whether the forum is of a public, nonpublic, or limited public nature.[94] In a public forum, any member of the public may speak on any issue within the confines of neutral, generally applicable regulations, e.g., time, place and manner restrictions. In a nonpublic forum, the owners or controllers of the forum can determine who can speak and which speech to permit. In a limited public forum, the owners may determine who can speak but cannot engage in content-based discrimination.[95]

In the cases examining the public's permissible use of government facilities, including schools, for religious activities, the use of the public forum doctrine for the analysis of speech regulations or censorship appears appropriate.[96] Public officials can determine if the school facili-

student to show a videotape of her singing a religious song using a speech analysis); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992) (upholding student invocation at graduation under a speech analysis where there was no government sponsorship). For a discussion of *Jones* and *DeNooyer*, under the analysis proposed in this article, see Part V.

92. *See supra* part II.B.

93. One commentator acknowledged that student religious expression can occur outside of the student club arena and treated it as speech under the public forum doctrine. Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499 (1983).

94. Perry Educ. Ass'n v. Perry Local Educ. Ass'n 460 U.S. 37, 44-46 (1983) (defining the components of the public forum doctrine).

95. *See* Board of Educ. v. Mergens, 496 U.S. 266, 233-47 (1990); Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 804-06 (1985). For a discussion of the public forum doctrine, see Leah Gallant Morgenstein, Board of Education of Westside Community Schools v. Mergens: *Three "R's" + Religion* = Mergens, 41 AM. U. L. REV. 221, 229 (1991); Andrew H. Moantroll, *Students' Free Speech Rights in Public Schools: Content-Based Versus Public Forum Restrictions*, 13 VT. L. REV. 493 (1989).

96. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (school district could not exclude religious group from school building because it had created a limited public forum); Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. 941 F.2d 45, 47 (1st Cir. 1991) (declaring that school district created a public forum in the high school cafeteria and could not exclude a religious organization that wanted to hold a Christmas dinner open to the public at which the minister would deliver an evangelical message); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir. 1990) (declaring that the school district created a public forum and therefore could not exclude a religious group from using the high school facility); Fairfax Covenant Church v. Fairfax County Sch. Bd., 811 F. Supp. 1137 (E.D. Va. 1993)

ties are a public, nonpublic, or limited public forum by regulating the extent to which the public may use the facilities. They can choose to maintain the school as a nonpublic forum by excluding all groups from using it after school hours.[97] They can maintain it as a limited public forum by allowing groups to use the school for their own purposes after school hours.[98] Since schools are neither a place where the public can enter at their will, nor a location traditionally "devoted to [public] assembly and debate,"[99] they are not a public forum.[100]

The speech and other expressive activities of students in public school, however, are not the same as members of the general public seeking use of a school building. Thus, the forum analysis does not adequately address the competing rights and interests of students, educators or government.[101] Students' presence in school is mandatory.[102] They do not seek permission to use the school facilities for their education, but rather are entitled[103] as well as required to attend. Furthermore, while the open discussion of ideas is an essential component of quality education,[104] the fact that such discussion occurs does not make the school an open forum.[105] Students do not view, and school officials have never conducted, school as a place "which, by tradition or government fiat ha[s] been devoted to assembly and debate."[106]

Courts have treated public schools as both a limited public forum for student assembly and debate and a nonpublic forum depending on

---

(declaring that school district maintained a public forum and therefore could not charge churches higher rent for use of public school facilities).

97. *Perry*, 460 U.S. at 48.

98. *Mergens*, 496 U.S. at 235.

99. *Perry*, 460 U.S. at 45.

100. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267-68 (1988).

101. *See* William Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505 (1989); Gregory A. Clarick, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 708-13 (1990); Rosemary Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons from* Lamb's Chapel, 24 N.M. L. REV. 1 (1994). *But see* Bruce C. Hafen, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685.

102. *E.g.*, CAL. EDUC. CODE § 48201 (West 1994); FL. STAT. ANN. § 23209 (West 1994); N.Y. EDUC. LAW § 3205 (McKinney 1994); TEX. EDUC. CODE ANN. § 21.032 (West 1994).

103. The Supreme Court has decided that there is not a fundamental right to a public education. *See* San Antonio v. Rodriguez, 411 U.S. 1 (1973). But the Court has also stated that students have a right to participate in the public education system. *See* Goss v. Lopez, 419 U.S. 565 (1975).

104. JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 4-11 (1917).

105. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267-70 (1988).

106. Cornelius v. NAACP Legal Defense and Educ. Fund, 460 U.S. at 788, 801 (1985) (defining an "open" forum); *see also* Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972) ("[N]owhere [have we] suggested that students . . . ha[ve] an absolute constitutional right to all parts of a school building . . . for . . . unlimited expressive purposes.").

the activity involved.[107] In the nonpublic fora of class instruction, students generally are not free to select the topics and nature of their expressions. Courts have supported restrictions of student expression under a rational basis test.[108] In limited public fora such as student clubs, students may select the topic and nature of their expressions within the confines of protected speech and subject to school restrictions supported under the compelling state interest test.[109] The different designations of the forum for student expression occur because the nature of student expression fluctuates within a particular fora, depending on the parameters set by the school or teacher. For example, a history class in which students make an oral presentation can be a nonpublic forum if the assignment's topic is selected by the teacher. The same room would be a limited public forum if the assignment were independent research on a student-selected topic. This fluctuating forum designation does not generally affect student nonreligious expression. Because the Free Speech Clause protects nonreligious student expression and is the only constitutional provision involved, the fluctuating forum designation does not raise constitutional problems. Student religious expression, however, involves the Religion Clauses as well as the Free Speech Clause.[110] The addition of Religion Clause issues therefore creates constitutional difficulties by the use of the fluctuating forum designation.

The fluctuating and sometimes subjective classification of public schools as limited public or nonpublic fora is the primary reason that the public forum doctrine does not facilitate the constitutional analysis of student religious expression. The main deficiency of using the public

---

107. *See* Moantroll, *supra* note 95, at 521-25; Salomone, *supra* note 101, at 5, 17-22.

The fact that, during school hours, schools limit access to its facilities to students, faculty, and staff further supports the conclusion that they are a nonpublic forum. *See Hazelwood*, 484 U.S. at 267 ("school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' " (citing Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 47 (1983)). The only recognized exception is the limited open forum created by Congress for the extracurricular activities of high school students. *See* 20 U.S.C. § 4071(b) (the Equal Access Act permitting the creation of a limited open forum in public high schools by maintaining noncurricular student clubs). Additionally, although the terms are similar, a "limited open forum" is not the same as a "limited public forum". *See* Board of Educ. v. Mergens, 496 U.S. 226 (1990) (discussing the distinction between the limited open forum and the limited public forum). Moreover, the question of whether a school can create a limited open forum or a limited public forum in elementary or junior high schools remains unanswered. *See* Laycock, *supra* note 8, at 51-52 (identifying some of the problems attendant to "equal access" at the junior high and elementary school levels).

108. The Free Speech clause protects certain expressions. Some nonprotected speech includes defamation, obscenity, and child pornography. *See* Dever, *supra* note 13, at 1172 (listing the categories of unprotected student speech).

109. *See Mergens*, 496 U.S. at 235; *Cornelius*, 473 U.S. at 800; Widmar v. Vincent, 454 U.S. 263, 268, 274-76 (1981).

110. *See infra* part III.C. discussing student religious speech as free exercise of religion.

forum doctrine is that it attempts to treat all student religious expression the same, despite the fact that it can differ within the particular fora. As a result, the doctrine is too broad to address the subtle but important differences in student religious expression within the various contexts of public school activities.

Justice O'Connor recently addressed the need to properly identify the distinctions between apparently similar situations requiring constitutional analysis in order to determine and apply the most precise analysis. In *Board of Education of Kiryas Joel Village School District v. Grumet*,[111] she said:

> Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches. Some cases . . . involve government action targeted at particular individuals or groups, imposing special duties or giving special benefits. Cases involving government speech on religious topics . . . seem . . . to fall into a different category . . . . Another category encompasses cases in which the government must make decisions about matters of religious doctrine and religious law.[112]

A more precise analysis of student expression in general, and student religious expression in particular, regardless of the designation of the fora in public schools, similarly requires placing them in three distinct categories.

The first category is the extracurricular setting. Extracurricular activities include student activities that transpire during noninstructional time before, during, or after the school day. Students generally run these activities, although they may have faculty advisors. This category has received significant attention from the courts and legislatures. These activities in public secondary schools are the subject of the Equal Access Act.[113] The Supreme Court addressed such activities at the college level in *Widmar v. Vincent*.[114]

Another category of student expression, religious or otherwise, occurs in school ceremonies and functions. The school establishes, sanctions, and controls ceremonial and functional activities as part of presenting itself to the general public, including the students, as an educational institution. The activities that fall within this ceremonial-func-

111. 114 S. Ct. 2481 (1994).

112. *Id.* at 2499-2500 (O'Connor, J. concurring) (citations omitted).

113. 20 U.S.C. § 4071 (1984).

114. 454 U.S. 263 (1981) (declaring that a college creates a public forum when it allows student groups to use its facilities and thereafter cannot exclude student religious groups from similarly using campus facilities without making an impermissible content-based exclusion).

tional category include graduation, orientation, beginning-of-the-school-day announcements, and other similar routines. Students often participate in these activities as a result of selection by school officials or other students, e.g., student spokesperson at graduation or student-government officer, or as a result of a particular achievement, e.g., class valedictorian or "student of the week." While these ceremonial-functional activities are not curricular, they are distinct from extracurricular or noncurricular activities. The level of administrative control and involvement in ceremonial-functional activities is very high.[115] Over the past five years, courts and elected officials have paid considerable attention to this category.[116]

The final category in which student expression occurs is within the school curriculum. Curricular activities obviously include classroom work and assignments. They also include student activities outside of the classroom[117] that are sufficiently school-related as to be a part of the educational process.[118] Examples of curricular activities outside of the classroom include school-related artistic and athletic endeavors, plays, concerts, talent shows, sports events, dance recitals, art exhibitions, and student newspapers. Courts have focused very little attention on student religious expression in this category, and legislators have totally ignored it.

---

115. School officials plan the ceremonial-functional activities to create cohesion and promote success in the educational process. For example, orientation sets the tone for the school year, daily announcements keep students informed and involved, assembly programs bring the school together as a whole, and graduation concludes the school year by acknowledging those who successfully complete the school.

116. *See, e.g.*, Lee v. Weisman, 112 S. Ct. 2649 (1992) (prayer at graduation by a member of the clergy selected to speak by the school principal violates Establishment Clause); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993) (school district's resolution allowing invocation selected, written and delivered by students does not violate Establishment Clause); Adler v. Duval County Sch. Bd., 851 F. Supp. 446 (M.D. Fla. 1994) (school board policy authorizing graduating seniors to select, author and present a graduation opening and closing message does not violate the Establishment Clause); Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993) (religious remarks at graduation ceremony selected, written and delivered by students violates Establishment Clause); Randall v. Pegan, 765 F. Supp. 793 (W.D.N.Y. 1991) (school permitting private baccalaureate service before graduation does not alone warrant the issuance of a preliminary injunction under the Establishment Clause). *See also* Booth, *supra* note 3 (describing legislative action authorizing daily moments of quiet reflection or student-led prayers at graduation and other school events); *Prayer in Schools*, *supra* note 4 (describing efforts of states to legislate voluntary non-denominational prayer at the beginning of the school day).

117. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) ("These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants or audiences.").

118. A successful education process is an integrated one involving intellectual, artistic and athletic development. *See* DEWEY, *supra* note 104. Professor Dewey's philosophy sees education as a holistic process of the mind, body, and spirit.

Under the public forum analysis, school officials can determine who may speak and what speech is permissible in schools because schools are a nonpublic forum.[119] However, because one of the primary functions of schools is to promote the exchange of ideas, the school setting shares characteristics often attributed to the traditional open forum. This paraxodical characteristic of openness in a nonpublic forum is essential to the pedagogical mission of schools. But, combined with the three distinct categories for student religious expression, this openness creates a nightmare for legal analysis of student religious expression under the public forum doctrine.

The only category of student religious expression that fits neatly into this free speech analysis is the extracurricular student religious expression, e.g., student religious clubs. The public forum analysis appears adequate to address this student religious expression because the student clubs' use of school facilities is analogous to the use of school facilities by outside groups after school hours.[120] Because the school does not "control" the forum, but merely creates the setting for the extracurricular student speech, it cannot exclude student religious speech based on its content.[121] Therefore, student extracurricular activities always exist in a limited public forum, and their presence in the school permits student religious expression via student clubs. The exclusion of these student religious clubs also creates an anti-religious regulation in violation of the Establishment Clause.[122]

Applying the public forum doctrine to the other categories of student religious expression creates problems. Both ceremonial-functional and curricular activities take place under the control and censorship of school officials. This control makes these categories of activities either a nonpublic forum, with the censorship permitted under a rational basis test, or a limited public forum, with the censorship permitted if there is a compelling state interest.[123] Censorship of student speech in both of

119. *See supra* text accompanying notes 90-100.

120. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993).

121. *See* Board of Educ. v. Mergens, 496 U.S. 226, 235-36 (1990) (referring to the fact tht the Equal Access Act permits religious clubs during non-instructional time provided that there is no participation by school officials.

122. The school officials could also claim that student religious clubs are "inappropriate" extracurricular activities given the age and maturity of their students. If the schools permits student clubs in general, however, that claim loses credibility and weight. Students who are mature enough to make extracurricular club choices are mature enough to select a religious club, regardless of their age or grade.

123. The courts have used both the compelling state interest justification and the rational basis test to validate restrictions on student free speech rights. This apparent confusion in identifying the proper forum for student speech is insignificant since both the compelling state interest and the rational basis tests look to the same underlying justification—school officials making "educational" decisions.

these fora emanates from the school's aspirational purpose to teach social and moral values[124] and maintain its pedagogical mission.[125] It also stems from the school's need to properly administer its operations and dissociate itself from inappropriate student speech.[126]

When these objectives confront student religious expression in the ceremonial-functional or curricular contexts, the public forum doctrine fails to provide an adequate framework for evaluating restrictions on student religious expression. Censoring student religious expression because the context is a nonpublic or limited public fora essentially advocates an anti-religious position. Permitting the student religious speech essentially advocates a pro-religious position.[127] Both positions run afoul of the Establishment Clause goal of neutrality towards religion,[128] thereby making the public forum doctrine falter in the attempt to determine when student religious expression is permissible.

Additionally, by placing the emphasis on the openness of the forum, the public forum doctrine misconstrues the importance of the setting for student religious expression. The setting assists in determining whether the student religious expression contravenes the Establishment Clause.[129] It also relates to whether the student religious expression is private, thereby protected by the Free Exercise Clause[130] or program-

124. Schools manifest this purpose by prohibiting speech because of the maturity of the audience or in order to dissociate the school from the displeasing content of the speech. *See* Bethel Sch. Dist. No. 43 v. Fraser, 478 U.S. 675 (1986) (school suspension of student who delivered an inappropriate speech permitted in order for school to teach moral and social values and to dissociate itself from the speech).

125. *See* Hazelwood Comm. Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (censorship of student newspaper to promote educational goals is constitutional).

126. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986) (stating that "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education").

127. Permitting student religious expression can also embroil school officials in the substance of the religious expression when they seek to censor it for inappropriate language. *See infra* text accompanying notes 144-48 discussing the difficulty of school officials' censoring student religious expression.

128. The Establishment Clause, according to some courts and commentators, mandates neutrality towards religion. *See* Lee v. Weisman, 112 S. Ct. 2649, 2676 (1992) (Souter, J. concurring); Wallace v. Jaffree, 472 U.S. 38, 60 n.50 (1985); *see also* R. Collin Mangrum, *Shall We Pray? Graduation Prayers and Establishment Paradigms*, 26 CREIGHTON L. REV. 1027, 1041 (1993); Smith, *supra* note 24, at 313-20. While there is significant debate of the achievability of neutrality, there is little debate that an official position either in favor of religious beliefs or against them violates the Establishment Clause. *See* Lee v. Weisman, 112 S. Ct. 2469, 2676 (1992) (Souter, J. concurring); School Dist. v. Schempp, 374 U.S. 203, 220-23 (1963); *see also* Hall, *supra* note 27, at 38 n.18, 40 n.31; Strossen, *supra* note 5, at 385 nn.258-59.

129. *See infra* text accompanying notes 201-05 discussing student religious expression that violates the Establishment Clause.

130. *See infra* part IV.B. discussing the constitutionality of private student religious expression.

matic,[131] thereby prohibited by the Establishment Clause.[132] Private and programmatic student religious expression occur in both the ceremonial-functional and curricular settings, but, the "openness" of the setting is irrelevant to the determining whether either is permissible under constitutional doctrine.[133] Thus the public forum doctrine does not provide an adequate framework for reviewing student religious expression in either the ceremonial-functional or curricular context regardless of whether the school is a nonpublic or limited public forum.[134] Student religious expression in these contexts requires a more appropriate framework than the public forum doctrine. Treating student religious expression as free exercise of religion provides the proper framework for analysis.[135]

Another difficult aspect of treating student religious expression as speech is the impact on other student speech. Granting that religious expression may be controversial,[136] utilizing the public forum free speech analysis to permit student religious clubs or other student reli-

131. For purposes of this article, programmatic religious expression refers to student religious expression that appears to have state sponsorship.

132. *See infra* part IV.C. discussing the unconstitutionality of programmatic student religious expression.

133. Unconstitutional restriction of student religious expression or endorsement of religious beliefs can occur in the ceremonial-functional or curricular categories, whether the religious expression transpires in a nonpublic or limited public forum. *See infra* parts IV.B. and IV.C.

134. The two other free speech analysis models, "time, place and manner analysis" and "categorical proscription analysis" are equally inapplicable to student religious expression. Courts employ time, place and manner analysis to assess the constitutionality of incidental restrictions on speech. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535-37 (1980) (Public Service Commission's order prohibiting Consolidated Edison from using utility bill inserts to discuss controversial issues of public policy was not a valid time, place and manner restriction because Commission allowed inserts on certain subjects but prohibited inserts on other matters). Time, place and manner restrictions aim at restricting the physical manner, location, or time of the speech, rather than what is being said. Dever, *supra* note 13, at 1172-73; *see also* Hedges v. Wauconda Community Unit Sch. Dist. No. 118, 9 F.3d 1295 (7th Cir. 1993) (invalidating prohibitions of student distribution of religious literature on free speech grounds, but permitting certain content-neutral time, place and manner restrictions on the speech). Since student religious expression occurs in situations where schools permit students to express their individuality i.e., student clubs, ceremonial-functional or curricular activities, the time, place and manner restrictions already exist. *See supra* text accompanying notes 81-87 defining student religious expression and *supra* text accompanying notes 112-118 identifying the categories of student religious expression. Any further restrictions specifically based on the time, place, and manner therefore become redundant. Categorical proscriptions analysis addresses types of speech that do not enjoy protection under the Free Speech Clause, e.g., speech that creates a clear and present danger, defamation, false or misleading commercial speech, child pornography, and obscenity. Dever, *supra* note 13, at 1172 (citations omitted). For an extensive discussion of these models for analyzing speech regulations, see Daniel A. Farber & John F. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1220-39 (1984).

135. Treating student religious expression as the free exercise of religion also provides more appropriate analysis for the constitutionality of student religious clubs.

136. Board of Educ. v. Mergens, 496 U.S. 226, 259 (1990) (Kennedy, J., concurring).

gious expression may open the school to other student groups articulating more objectionable speech.[137] Once schools permit one controversial student club on free speech grounds, they will have difficulty excluding other controversial clubs. Conversely, prohibiting student religious expression in contexts outside of student clubs under a free speech analysis authorizes prohibitions against other student speech.[138] School officials in their zeal to restrict student religious expression may unnecessarily restrict political, racial, moral, or other important discussion in the classroom.[139]

These unintended consequences arise from applying the public forum-free speech analysis to student religious expression in extracurricular as well as ceremonial-functional and curricular activities.[140] Religious expression is speech. But analyzing student religious expression under the free speech doctrine in the special circumstances of public schools creates more problems than it solves. The forum-based free speech analysis, whether the judicially developed public forum doctrine[141] or the Congressionally developed "limited open forum" mandate,[142] looks too narrowly at the opportunity for student expression by ignoring the intricacies of student religious expression outside of extracurricular activities. It also broadens student speech and club activities too much by converting the nonpublic fora of ceremonial-functional and curricular context to a limited public fora and wresting control of student speech from the hands of school administrators. Moreover, regardless of its impact on student speech doctrine, the forum-based free speech analysis does not address whether the Constitution, and more specifically, the Free Exercise Clause protects student religious expression in ceremonial-functional and curricular contexts.[143]

The third difficulty created by treating student religious expression as speech arises when school officials seek to censor or control expres-

---

137. *Cf.* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266-67, 271 (1988) (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

138. *See Mergens*, 496 U.S. at 286-87.

139. This difficulty might not change if the courts treat student religious expression as free exercise rather than as speech. However, with religious expression out of the free speech analysis, an analysis more appropriate to the special circumstances of public school has a greater opportunity to develop.

140. The similarity between student clubs and outside groups seeking to use school facilities permits application of the free speech public forum doctrine to student religious expression in that context. The dissimilarity between student expressions in the classroom and public expressions during their use of school facilities after school hours, makes application of the public forum free speech analysis inappropriate. *See supra* text accompanying notes 96-100.

141. *See* Widmar v. Vincent, 454 U.S. 263 (1981).

142. 20 U.S.C. § 4071 (1984); *see also Mergens*, 496 U.S. 226 (noting that the "limited open forum" is a congressionally created concept).

143. *See infra* part IV.C.

sion. Under current constitutional doctrine, school officials can censor and control the content of student speech in the ceremonial-functional or curricular contexts as part of their responsibilities in educating children.[144] If courts treat student religious expression in these contexts as speech, school officials will undoubtedly review, censor, and control that religious expression in the same manner they can review, censor, and control other student speech.[145] Such censorship and control would involve school officials in evaluating the content of student religious expressions and deciding which student religious expressions are "proper." The Supreme Court has repeatedly declared that state involvement in determining whether a religious expression is proper is unconstitutional under the Establishment Clause.[146] Therefore, when applied to student religious expression, the constitutional monitoring of students' speech entangles school officials in the unconstitutional censorship and control of students' religious beliefs and expressions.[147]

Alternatively, the lack of school censorship of student religious expression and the continued censorship of other student speech creates an equally untenable constitutional quandary. Either school officials permit more student speech than they would otherwise prohibit, in order to avoid Establishment Clause violations for censoring and controlling student religious expressions, or they censor and control student religious expression less than other student speech. In the former case,

144. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). Although the question has not been judicially determined, it is unquestionable that school officials can prohibit expression in student clubs where the expression does not constitute protected speech, e.g., defamation, obscenity, and speech that creates a clear and present danger. Moreover, schools can probably censor student speech in student clubs that does not comport with the educational goals of the school by applying the doctrine created by *Hazelwood* and *Bethel*. However, it is clear that the justification for censorship of otherwise protected speech in student clubs must be more compelling than the justification for censoring it outside of the student club arena. *See Mergens*, 496 U.S. at 236-37. I should point out that I do not necessarily agree with the extent that school officials are permitted to control and censor student speech, but I recognize that the current jurisprudence permits it.

145. One way to avoid this dilemma is to ban outright all student religious expression in ceremonial-functional and curricular contexts. Such a ban, however, raises significant problems because of its anti-religious nature.

146. Even a school's determination of whether a student invocation is nonsectarian or nonproselytizing involves judgments of religiosity. Such judgments raise the specter of endorsement of religion and potentially violate the Establishment Clause.

147. Such censorship or control would clearly violate the polemic *Lemon* test because of the entanglement of the school officials in religious beliefs expressed by students. However, since there is significant debate about the validity of the *Lemon* test, violating it may not create difficulties. *Compare* Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795 (1993) *with* Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865 (1993). But, such censorship or control would undoubtedly violate any test employed to determine the applicability of the Establishment Clause prohibitions, e.g., the nonendorsement test or the coercion test. *See* Conkle, *supra*, for a discussion of alternative tests to *Lemon*.

school officials undermine the current student free speech doctrine; in the latter school officials become engaged in unconstitutional content-based discrimination.[148]

These interwoven difficulties make the treatment of student prayer as speech a Gordian Knot[149] which cannot be undone, but can only be cut. Treating student religious expression as free exercise of religion, not speech, avoids the Gordian Knot and provides a more precise, less problematic analysis.[150]

C. *Student Religious Expression as Free Exercise*

There are several reasons for treating student religious expression as free exercise of religion and not speech. As stated earlier, student religious expression includes student-initiated prayer and students' use of religious beliefs in class assignments, student presentations, artistic endeavors, athletic or other student performances, and extracurricular activities where the students select the topic, or where students display individual styles and talents.[151] Also, student religious expressions take place in the curricular, ceremonial-functional, and extracurricular contexts of public school.[152]

The first reason for treating and protecting student religious expression, particularly in the form of prayer, as free exercise of religion is the distinction between religion and speech. Because of its religious content, student religious expression, while speech, is a *religious* exercise. Student nonreligious expressions are merely speech.

When an individual prays, whether silently, expressively, or ver-

148. This discrimination can violate the Equal Protection Clause by treating student religious expression differently from other student expression. Similarly, discrimination can violate the Religion Clauses by failing to maintain neutrality towards religious expression. Some commentators have advocated using the neutrality aspect of the Religion Clauses to bring an equal protection analysis to the Religion Clauses cases. *See, e.g.*, Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L. J. 89, 90-91 (1990); Jesse Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491, 507-08 (1994); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 987-89 (1989); Al McConnell, *Abolishing "Separate But (Un)Equal" Status For Religious Universities*, 77 VA. L. REV. 1231, 1254-58 (1991); Michael A. Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986). That discussion, however, is beyond the scope of this article, because the analysis proposed here seeks to protect student religious expression under the Free Exercise Clause.

149. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 980 (1986).

150. *See* George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 914-45 (1988) (discussing the Free Exercise Clause as more appropriate for addressing the problem of religious freedom of school children than the Free Speech Clause).

151. *See supra* part II.A.

152. *See supra* text accompanying notes 113-18.

bally, the primary purpose is communing with the Supreme Being he or she recognizes. That individual's community, heritage, tradition, and conscience help to shape his or her belief as to who that Supreme Being is and what comprises the appropriate form, substance, and language of the communication.[153] Prayer may be a solitary or collective event. When others participate, they too engage in a religious communion with an individually or jointly recognized Supreme Being. Therefore, prayer, though often expressive and sometimes collective, is always part of a private and personal communion of conscience between an individual and a Supreme Being. This is the essence of religion,[154] and thus distinguishes prayer from other speech.

Similarly, even though they may not seem as clearly a religious exercise as prayer, other religious expressions by students[155] are the exercise of religion rather than speech. Those religious expression are manifestations of the students' infusion of their religious beliefs into their daily lives. Since this Article limits student religious expression to activities involving presentation of students' individuality,[156] such student expression effuse from the students' opportunity to espouse their personal beliefs. The infusion of religious belief into every aspect of daily life and the professing of religious beliefs at every opportunity are

---

153. *See* WILLIAM GREGORY, FAITH BEFORE FAITHFULNESS: CENTERING THE INCLUSIVE CHURCH 119-23 (1992).

154. The Constitution does not contain a definition of religion. The Supreme Court has announced several different definitions over the past two hundred years that have evolved from a Christian-centered definition to a definition that embraces nearly every belief system. Anand Agneshwar, *Rediscovering God in the Constitution*, 67 N.Y.U. L. REV. 295, 297-98 (1992); *see also* Richard O. Frame, *Belief in Nonmaterial Reality—A Proposed First Amendment Definition of Religion*, 1992 U. ILL. L. REV. 819, 821-31 (1992).

A previous statutory definition described religious training and belief as "an individual's belief in a relation to a supreme being involving duties superior to those arising from any human relation but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." 50 U.S.C. § 456(j) (1966) (a former Selective Service law defining who can qualify as a conscientious objector). As used in this article, religion "is a system of beliefs, based on supernatural assumptions, that posits the existence of apparent evil, suffering or ignorance in the world and announces a means of salvation and redemption from those conditions." Agneshwar, *supra* note 154, at 297.

155. These would include: students' use of religious beliefs in class assignments and artistic endeavors where the students select the topic; athletic and other student performances where students display individual styles and talents; and extracurricular activities.

156. *See supra* text accompanying notes 81-84.

manifestations of religion in action[157] and the goal of religion.[158]

Speech can also involve the expression of opinions and beliefs. Unlike in the exercise of religion, however, the speaker does not necessarily seek to embody those opinions and beliefs in daily life.[159] This simply put, is what distinguishes religion from speech. It also substantiates that student religious expression is an exercise of religion and not merely speech.

The second reason for treating and protecting student religious expression as the free exercise of religion rather than speech is the differentiation between speech and religion in the Constitution. The Constitution specifically and separately protects religion *and* speech. The language of the First Amendment clearly indicates the importance of distinguishing these two protected activities. As Justice White stated in

157. The Supreme Court has often distinguished religious beliefs and conduct. It has protected the former under the Free Exercise Clause, but does not always protect the latter. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961) (Sunday blue laws prohibiting retail sales legal); Prince v. Commonwealth of Mass., 321 U.S. 158 (1944) (permitting the prosecution of a legal guardian for allowing her minor ward to sell newspapers, periodicals, or merchandise in public place even though her faith, Jehovah's Witness, stated it was her religious duty); Reynolds v. United States, 98 U.S. 145 (1878) (polygamy conviction upheld although Mormon religious creed favors polygamy). Other than the holding and professing of beliefs, individuals manifest their religious beliefs in conduct, e.g., going to church, synagogue, mosque, temple or other worship places, or reading from particular religious text. The courts have consistently held that such otherwise acceptable conduct is the exercise of religion and is protected it under the Free Exercise Clause. As used in the article, student religious expression is the espousal of religious beliefs at a time when schools permit, if not encourage, individualized expression. Since this individualized expression is acceptable and student religious expression has a religious base, it is the exercise of religious belief protected under the First Amendment. *See also* THOMAS KELLY, THE ETERNAL PROMISE 44-45 (2nd ed. 1988) (describing religious work as a way of living and not just belief).

158. GREGORY, *supra* note 153, at 147 (describing living life with God as the central reality, the source of one's beginning and the destination of life's journey as a Christian spiritual life).

159. Both lawyers and politicians (many of whom are lawyers) epitomize the distinction between articulating and espousing opinions and beliefs and adopting them as a personal creed. For example, New York Ex-Governor Mario Cuomo personally opposes abortion but advocates a pro-choice position. *See* David Gonzalez, *Searching Its Soul*, N.Y. TIMES, May 31, 1994. President George W. Bush, a lifetime member of the National Rifle Association, suspended importation of "assault" weapons. *See* Sharon La Franiere, *Thornburgh: Deal Possible on Gun Bill*, WASH. POST, April 19, 1991, at A4. Former Arizona Senator Barry Goldwater, a noted conservative heterosexual male, favors allowing homosexuals in the military and advocates to prevent local businesses in Phoenix from discriminating on the basis of sexual orientation. *See* Steve Yozwiak, *Goldwater Foresees Gays in Military*, ARIZONA REPUBLIC, Jan. 29, 1993, at A1. Senator Paul Simon from Illinois, a Caucasian male, favors equal opportunity for minorities and females. *See* Ted Gesti, *Justice Under Reagan*, U.S. NEWS & WORLD RPT., Oct. 14, 1985, at 58.

This divergence between spoken opinion and adopted belief is not only accepted, but expected. This acceptance and expectation of the possible divergence between opinion and lifestyle is a hallmark of speech. In religion, such divergence, while tolerated, is not acceptable. Religious believers understand that they may not always follow or espouse their religious beliefs in their daily lives but they seek to avoid that circumstance through repeated attempts to be more religious in their actions, thoughts, and expressions. For a discussion of relationship belief, action, and redemption, see ROBERT CUMMINGS NEVILLE, A THEOLOGY PRIMER, 51-99 (1991).

his dissent in *Widmar v. Vincent*,[160] "Were [the lack of distinction between worship and speech] right, the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech."[161] The independent meaning of the Religion Clauses, to which Justice White refers, entitles religious expression, which technically is speech, to the dual-edged protection of the Free Exercise and the Establishment Clauses,[162] rather than the single-edged protection of the Free Speech Clause.[163]

Besides specifically enumerating speech and religion as protected activities, the language of the First Amendment distinguishes the protection of religion from the protection of speech. The Constitution protects the freedom to hold opinions and a qualified freedom to speak.[164] It similarly protects the freedom to hold religious beliefs and engage in religious exercises.[165] The Constitutional protection of religion also specifically prohibits State action with respect to an establishment of religion. There is no corollary prohibition in the protection of free speech. Although there is significant debate regarding the Framers' intent in drafting and adopting the Constitution in general, and the First Amendment in particular,[166] there is little debate that one purpose of the First Amendment was to foster a society of diverse views.[167] The distinction

---

160. 454 U.S. 263 (1981).

161. *Id.* at 284 (White, J., dissenting).

162. *See supra* note 11.

163. *See supra* note 10; *see also infra* text accompanying notes 164-86.

164. Some speech does not receive the protection of the Free Speech Clause because of its nature and context. *See* Dever, *supra* note 13, at 1172 (listing the certain types of speech that can be categorically proscribed); Paul G. Stern, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 YALE L.J. 925, 927 (1990) (preeminent is the idea that "we enjoy freedom of speech insofar as it is necessary to carry out the function of self-government").

165. Rebekah J. French, *Free Exercise of Religion on the Public Lands*, 11 PUB. LAND L. REV. 197 (1990); James J. Lawless, Jr., Roy v. Cohen: *Social Security Numbers and the Free Exercise Clause*, 36 AM. U. L. REV. 217 (1986).

166. *See* David A.J. Richards, *A Theory of Free Speech*, 34 UCLA L. REV. 1837 (1987) (discussing the debates among the Founders about the purpose of the Constitution and the debates about the Founders' intent as expressed in the Constitution); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985) (book review) (reporting on the historical and interpretive debate on the intent of the Framers of the First Amendment); William T. Mayton, *Seditious Libel and the Lost Guarantee of Freedom of Expression*, 84 COLUM. L. REV. 91 (1984) (describing the debate regarding the extent and limitations of the First Amendment).

167. The most frequent expressions of the First Amendment values supporting diverse views occur in free speech/free press contexts. As the Supreme Court has often stated: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by Government itself or private licensee." Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 390 (1969) (citing Associated Press v. United States, 326 U.S. 1, 20 (1945); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Commentators have often described this view of the First amendment as the

in the Constitutional protection of religion and speech supports that goal.

The Free Speech Clause guarantees free speech to all citizens and allows the State to participate in the debate and discussion regarding the opinions and positions held by its citizens. The general purpose of the clause is to support and promote a marketplace for the exchange of ideas, including ideas about the government. Government permission and protection of debate among citizens contributes to these aspirations.[168] The Religion Clauses, on the other hand, guarantee the free exercise of religion *and* prohibit the State from becoming part of the debate about religious convictions or the exercise thereof. The respective purposes of the Religion Clauses are to promote and protect religious autonomy.[169] They accomplish this goal by protecting religious freedom from political infringement[170] and prohibiting any official connection between government and religious beliefs.[171] The presence of the government in the debate about religious views does not foster, but

---

"Diversity Principle.". *See, e.g.*, Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. Rev., 1071, 1110 (1992) (identifying *Associated Press v. United States* as the source of the "diversity principle"); Richard Hindman, *The Diversity Principle and the MFG Information Services Restriction: Applying Time-Worn First Amendment Assumptions to New Technologies*, 38 CATH. U. L. REV., 471, 473 (1989); Note, 107 HARV. L. R., 1062, 1074 (1994). Although not as frequent as in the free speech cases, the Court has used the concept of promoting diversity in free exercise cases as well. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 589-90 (1989) ("Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .' "); Frazee v. Illinois Dept. Employment Sec., 489 U.S. 829, 834 (1989) (reversing the denial of unemployment insurance benefits because the Free Exercise Clause protects sincerely-held religious beliefs even if the believer is not a member of a particular religious sect).

168. For examples of state participation in the public debate, *see* Brenda Day, *Simi Proposal to Teach Birth Control Debated*, L.A. TIMES, Feb. 23, 1994, at B4 (public and government debate regarding birth control); Helen Dewar, *Free Speech Free-for-All; Various Hill Reformers Take Aim at Basic Right*, WASH. POST, Oct. 2, 1993, at A1 (public and government debate regarding gay rights); Lynne Duke, *In Arkansas, A Death Row Struggle and Doubt*, WASH. POST, Jan. 9, 1994, at A1 (public and government debate regarding the death penalty); Chuck Philips, *Pop Music: A War That Isn't Over*, L.A. TIMES, Apr. 21, 1991, at 8 (public and government debate regarding music and free speech); *Shouting and Shooting*, WASH. POST, Dec. 31, 1993, at A20 (public and government debate regarding abortion); *Welfare Reform's Other Critics*, WASH. POST, May 24, 1994, at A20 (public and government debate regarding welfare reform). In general, the government regulates speech inasmuch as it enforces free speech by both permitting the expression of ideas, and by participating in the debate through the development and formation of public policy. The debate, therefore, exists in part because the government permits it and in part because the government participates in it through the elective, legislative and judicial process.

169. Religious autonomy includes freedom from attack by both the government and its religion. *See* Ashby D. Boyle II, *Fear and Trembling at the Court: Dimensions of Understanding in the Supreme Court's Religion Jurisprudence*, 3 SETON HALL CONST. L.J. 55, 83 (1993).

170. *See generally* Shelley K. Wessels, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 1201 (1989).

171. *See generally* Boyle, *supra* note 169.

rather stifles and restricts, diverse opinions and beliefs.[172] The presence of government in the marketplace of ideas may arguably create the same result but the Free Speech Clause does not prohibit government speech.[173] The language of the First Amendment and the courts' interpretation of that language, however, recognize that government participation poses a greater danger to religious autonomy than to the exchange of ideas.[174] Thus, they permit the possible negative impact of government participation in civic debates and prohibit government involvement in the discourse regarding religious beliefs.[175]

Furthermore, treating student religious expression as free exercise of religion provides a separate and precise protection, the Free Exercise Clause. The Free Exercise Clause specifically protects the religious autonomy of individuals to choose and avow religious beliefs and prevents the state from infringing on that choice or affirmation.[176] Among the activities identified by the Supreme Court as protected by the Free Exercise Clause, "first and foremost [is] the right to believe and profess whatever religious doctrine one desires."[177] Student religious expression is a professing of religious beliefs in the various public school con-

---

172. Roberto A. Torricella, Jr., Comment, *Babalu Aye Is Not Pleased: Majoritarianism and the Erosion of Free Exercise*, 45 U. MIAMI L. REV. 1061 (1991) (government action motivated by majoritarian beliefs about religion necessarily inhibits the free religious expression guaranteed by the First Amendment); Kenneth W. Brothers, *Church-Affiliated Universities and Labor Board Jurisdiction: An Unholy Union Between Church and State?*, 56 GEO. WASH. L. REV. 558 (1988) (enforcement of federal labor law via the NLRB in disputes between religious institutions and their staff violates the First Amendment).

173. *See* Dorothy E. Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 606 (1993) (identifying the problem created by government participation in the public debate regarding abortion as endangering the First Amendment doctrine of "equality of status in the field of ideas") (citation omitted); Theodore C. Hirt, *Why The Government is Not Required to Subsidize Abortion Counselling and Referral*, 101 HARV. L. REV. 1895, 1906 (1988) (proposing that a prohibition on government is wholly inconsistent with effective government operation and that the concern regarding government dominance of the marketplace for ideas underestimates the ability of citizens to ignore or overcome the government voice); Andrea L. Mc Ardee, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values Into Foreign Policymaking*, 62 TEMP. L. REV. 813, 836-37 (1989) (identifying one danger of government participation in public debate as deterring minority speech but arguing that the danger is minimal as long as deliberative procedures exist for citizens to express competing views); Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2458-59 (1994) (discussing the proper role of government in the public debate as persuasive and not coercive); American Communications Ass'n v. Douds, 339 U.S. 382, 394 (1950) (discussing the appropriate measure of government restrictions of public debate).

174. County of Allegheny v. ACLU, 492 U.S. 573, 590-91 (1989); Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

175. *See* Dent, *supra* note 150, at 914-15.

176. Boyle, *supra* note 169 (analyzing the Supreme Court's Free Exercise Clause jurisprudence).

177. Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 877 (1990).

texts.[178] As conduct falling under the recognized definition of free exercise of religion, student religious expression should enjoy the full protection of the Free Exercise Clause.

Additionally, although Free Exercise jurisprudence has undergone considerable upheaval during the past five years, the changes in the jurisprudence do not affect the analysis proposed in this Article which protects student religious expression under the Free Exercise Clause. *Employment Division, Department of Human Resources of Oregon v. Smith*[179] represented to many a significant change in Free Exercise jurisprudence.[180] Prior to *Smith*, the Supreme Court only sustained regulation infringing on the exercise of religious beliefs upon a showing of a compelling state interest.[181] In *Smith*, the Supreme Court moved away from the compelling state interest test when a generally applicable statute or regulation infringed on the exercise of religion.[182] In response to *Smith*, Congress enacted the Religious Freedom Restoration Act.[183] The Act attempts to statutorily reinstate the Free Exercise jurisprudence that existed before *Smith*.[184] Because public schools have a special status whereby the government can restrict the constitutional rights of children in order to promote generally accepted needs, goals, and values, neither *Smith* nor the Religious Freedom Restoration Act affect the analysis proposed here.[185]

---

178. *See supra* text accompanying notes 115-18 describing the contexts of student religious expression as extracurricular, ceremonial-functional and curricular.

179. 494 U.S. 872 (1990).

180. *See* Robert W. Anderton, *Just Say "No" to Judicial Review: The Impact of* Oregon v. Smith *on the Free Exercise Clause*, 76 IOWA L. REV. 805 (1991); Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO WASH. L. REV. 782 (1992); Jesse Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651 (1991).

181. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, (1981); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

182. "[W]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878-9.

183. 42 U.S.C. § 2000bb to bb-4 (1993).

184. For a discussion of the Religious Freedom Restoration Act and Congress' purpose in enacting it, *see* Leon F. Szetpycki & Jean B. Arnold, *Religious Freedom Restoration Act*, 88 ED. L. REP. 907 (1994); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221 (1993).

185. School officials may regulate student religious expression under generally applicable rules regarding student expression and other student constitutional rights. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (limiting students' Free Speech rights in order to promote the pedagogical goals of the school); Bethel Sch. Dist. No. 403 v. Fraser 478 U.S. 675, 685 (1986) (limiting students' free speech rights in order to dissociate school from student speech); New Jersey v. T.L.O., 469 U.S. 325-343 (1985) (limiting students' Fourth Amendment rights in order to facilitate administrative needs of the school); Goss v. Lopez, 419 U.S. 565, 574 (1975) (limiting students' due process rights because of valid administrative needs); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 513 (1969) (schools may restrict loud and disruptive student

Student religious expression protected under the Free Exercise Clause is part of the religious autonomy of children and deserves the concern and attention of the legal system. The concern for protecting religious autonomy is as important in public schools as in society in general. Courts have demonstrated this concern in the cases barring state-sponsored religious activity in schools.[186] Courts, however, have not demonstrated similar concern for the protection of the religious autonomy of individual students by application of the Free Exercise Clause. Treating student religious expression as speech ignores the need to protect children's *religious* expressions and autonomy. It confines the protection of student religiosity to educationally acceptable speech, and it places inappropriate, if not unconstitutional, power in the hands of school officials. The limited constitutional protection accorded to student speech does not adequately protect student religious expression. Therefore, treating student religious expression as the free exercise of religion—and consequently protected by the Free Exercise Clause, better protects children's religious autonomy.

IV. CONSTITUTIONALITY OF STUDENT RELIGIOUS EXPRESSION

A. *Distinction Between Private and Programmatic Student Religious Expression*

Religious expression in school is a delicate issue.[187] Society's and the courts' dual concerns that public schools do not indoctrinate or alter school children's religious beliefs,[188] and that public schools do not send an anti-religious message,[189] reflect the sensitivity of this subject. When students themselves engage in religious expression, the issue becomes more complex. Student religious expression has all the imbroglio of religious expression in school—permitting it may appear as state sponsorship of religion and prohibiting it may appear as state opposition to

---

expression); *see also supra* text accompanying notes 132-133 discussing limitations on student religious expression that the Free Exercise Clause protects.

186. School Dist. v. Ball, 473 U.S. 373, 385 (1985) (public funding of parochial schools may impermissibly advance religion); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (moment of silence for "meditation or voluntary prayer" impermissible); School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (mandatory Bible reading violates the Establishment Clause); Engel v. Vitale, 370 U.S. 421, 424 (1962) (recitation of official state prayer violates the Establishment Clause); McCollum v. Board of Educ. 333 U.S. 203, 212 (1948) (religious classes may not receive public support).

187. *See generally* Martha M. McCarthy, *Is the Wall of Separation Still Standing?*, 77 ED. LAW REP. 1 (1992).

188. Stanley Ingber, *Religion or Ideology: A Need for Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 234-35 (1989).

189. Eric C. Freed, *Secular Humanism, The Establishment Clause and Public Education*, 61 N.Y.U. L. REV. 1149, 1175-77 (1986); Strossen, *supra* note 5, at 335 (discussing that sometimes alternative instructive methods must be employed to avoid sending an anti-religious message in the name of avoiding religious discourse in schools).

religion.[190] Student religious expression also evokes discussion of the constitutional protection of individual autonomy in the exercise of religious belief.[191]

Student religious expression in school is inevitable. Religious expression through prayer and other means are an essential part of many students' lives.[192] Because such expression is a manifestation of many students' identity, student religious expression will regularly occur in school.[193] The major difficulty presented by student religious expression is its chameleon-like quality. In one circumstance, student religious expression can constitute a state-sponsored religious expression.[194] In another circumstance it can comprise an individual act with no trappings of state sponsorship.[195] For the purpose of this Article, the term "programmatic" defines student religious expression in the former situation;[196] and, the term "private" defines it in the latter.[197]

---

190. *See* Laycock, *supra* note 8.

191. *See* T.R. Reid, *Push—and Pull On School Prayer Comes to Senate*, WASH. POST, Mar. 4, 1984, at A1; Steve Twomey, *It Shouldn't Have a Prayer*, WASH. POST, Apr. 11, 1994, at D1; Patricia White, *The Children Shall Lead Them to Pray*, ST. PETERSBURG TIMES, Nov. 14, 1993 (all referring to the right of students' to pray in school without legislative enactments).

192. Some commentators and critics of student religious expression in school incorrectly view religious students as part of the "radical religious right." *See, e.g.*, Linda Campbell, *Officials Can't Bar Some Groups and Permit Others*, June 5, 1990, at C1 (reporting that one reaction to the Supreme Court decision in *Board of Education v. Mergens* permitting student religious clubs was a concern by some organizations that the decision would open the nation's public schools to proselytizing by student groups); David G. Savage, *High Court Lets Religious Clubs Meet in School*, L.A. TIMES, Jun. 5, 1990, at A1 (quoting Marc Stein, attorney for American Jewish Congress, "Undoubtedly the evangelicals will try to put one of these [religious or bible study] clubs in every school in the country and they have made clear the purpose will be to spread the good news of the Gospel." Mr. Stein also noted that the attorney for Bridget Mergens was Jay Alan Sekulow, general counsel for Christian Advocates Serving Evangelism). This view can be attributed in part to the dominance of the fundamentalist and evangelical voice in the debate over religion in school. *See* Bill Broadway, *Religion—Where Does God Belong?*, WASH. POST, Aug. 20, 1994, at D9 (reporting on coalition of moderate religious leaders' efforts to offset domination of "religious right" in public discourse); *A Shared Vision: Religious Liberty in the 21st Century* (National Council of Churches, ed., 1994) (setting forth the position of "moderate" religious leaders). However, it is a mistake to assume that all students who wish to express their religious beliefs in school are members of the so-called "religious right." Unfortunately, the often negative societal reaction to the fundamentalist voice may silence many other students. These students too deserve an opportunity to appropriately exercise their religious beliefs in public schools.

193. As a popular automobile bumper sticker summed up: "As long as there are exams in school, there will be prayer in school." Although this statement is humorous, it also evidences the fact that students' beliefs in a supreme being do not disappear upon entering the classroom.

194. For example, a student religious expression requesting guidance and wisdom over the public address system at the beginning of the school day has many indications of state sponsorship.

195. The same student religious expression uttered alone prior to entering English class has little if any appearance of state sponsorship.

196. *See infra* part IV.B. for a specific definition of programmatic student religious expression.

197. The term "private" in this context does not mean hidden or secret. *See* CARTER, *supra*, note 66, at 3-17 (discussing and criticizing the culture of keeping religious expressions out of

This distinction between private and programmatic student religious expression is significant. Since both represent students' professing religious beliefs,[198] private and programmatic student religious expressions potentially enjoy protection under the Free Exercise Clause.[199] Each could occur in public school as the free exercise of religion in a government setting. The Supreme Court, however, has determined that some, if not all, religious expression in school violates the Establishment Clause.[200] Distinguishing between private and programmatic student religious expression provides a basis for identifying whether either form of expression also violates the Establishment Clause or eludes it because there is no state sponsorship of religion. Categorizing student religious expression as "programmatic" and "private," therefore, can assist in distinguishing impermissible from permissible student religious expression.

B. *Unconstitutionality of Programmatic Student Religious Expression*

Programmatic student religious expressions occur when they are part of a program specifically geared for religious or school-related expression. Such religious expressions generally take place in the school's ceremonial-functional activities; but they can arise in curricular activities as well.[201] Invocations, benedictions, and other religious expressions that are part of graduation, orientation, assemblies, sporting events, or similar school gatherings are programmatic religious expressions. Similarly, prayerful announcements or moments of silence[202]

---

sight). Rather, it describes religious expressions that are not state-sponsored, regardless of whether they occur in secret or in a public setting. *See infra* part IV.B. for a specific definition of private student religious expression.

198. Although often described in this article as an "individual" expression, student religious expressions are often a group phenomenon. Therefore, references in this article to student religious expression as "individual" include the collective expression of students gathering together for that purpose.

199. *See Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 877 (1990) (protected free exercise of religion includes the right to choose and profess religious beliefs).

200. *See* Lee v. Weisman, 112 S. Ct. 2649, 2662-64 (1992) (Blackmun, J. concurring) (citing to a history of Supreme Court holdings regarding religious expression in school).

201. Because schools can divorce themselves from extra curricular activities by not having school personnel direct or advise them, see, e.g., Board of Educ. v. Mergens, 496 U.S. 226, 247 (1990), student religious expression in these activities is rarely programmatic.

202. Moments of silence appear to endorse religion because, traditionally, the purpose of such moments is prayer. Moments of silence are also invoked to remember the dead or the suffering, e.g., victims of a catastrophe. Moments of silence, despite the claims of advocates, are not for contemplation or relaxation. Both contemplation and relaxation involve more than a moment. Because moments of silence are used for a prayerful purpose, school imposed moments become an endorsement of religion. *See infra* note 203. For the opposite view, see Dent, *supra* note 25, at 746.

during the school day are programmatic religious expressions. The official nature of school activity and the official nature of the student communication provide sufficient state sponsorship to make the inclusion of any religious expressions unconstitutional under the Establishment Clause.[203] Clearly, school officials could not utter religious expression in these situations.[204] The fact that students say them in these contexts does not save the religious expressions from state endorsement or unconstitutionality. Student religious expressions in these contexts have the same problems as adult-uttered religious expressions in school.[205] Therefore, the accommodation of student religious expression in a programmatic setting raises all of the concerns that supported the abolition of state-sponsored religious observances in public school.[206] Thus, programmatic student religious expression violates the Establishment Clause and accommodating it under the Free Exercise Clause infracts the minimal level of church-state separation contemplated by the First Amendment.[207]

C. *Constitutionality of Private Student Religious Expression*

Private student religious expression occurs when students individually or collectively give voice to their religious beliefs in curricular, ceremonial-functional or extracurricular settings that permit them to express their individuality without the schools permission or without disrupting the school program.[208] It also occurs in settings where the

---

203. Under this approach, the claim that the prayer is nonsectarian or nondenominational becomes irrelevant. First, there is no nonsectarian or nondenominational prayer. Every prayer includes some and excludes other religious faiths. Even the methodology of the prayer can serve to exclude some faiths, e.g., Christians pray standing, seated, or kneeling, whereas Muslims often pray in a more prostrate position facing a particular direction. Second, the imposing nature of a *prayer* occurs regardless of its purported neutrality. Since prayer is a communion with the speaker's Supreme Being, a nondenominational-nonsectarian prayer can simultaneously violate the religious freedom of a person who believes in a different Supreme Being and a person who does not believe in any Supreme Being.

204. Lee v. Weisman, 112 S. Ct. at 2665 (invocation by clergy member who was selected by the principal unconstitutional); School Dist. v. Schempp, 374 U.S. 203, 233 (1963) (voluntary student participation in adult-led reading of Bible verses and reciting of Lord's Prayer unconstitutional); Engel v. Vitale, 370 U.S. 421, 424 (1962) (voluntary student participation in adult-led prayer in school unconstitutional).

205. The coercive nature of "voluntary" student participation or "voluntary" student recusal exist regardless of whether the teacher or a fellow student leads the class or school in a religious expression. The imprimatur of state endorsement exists regardless of the age or status of the speaker of a religious expression at an official school function. *But see* Amy Louise Weinhaus, *The Fate of Graduation Prayers in Public Schools after Lee v. Weisman*, 71 WASH. U. L.Q. 957, 979-80 (1993) (arguing that student-initiated prayer unsupervised by school officials may not be barred).

206. *See supra* part II.B.

207. *See supra* note 11.

208. This does not include moments of silence. Moments of silence are neither a curricular nor

school permits students to express their individuality as part of the educational process. Students who pray before, during, or after school or class, provided that such activity does not interfere with the operation of the school or class,[209] engage in private religious expression. Student groups meeting for the purpose of prayer during noncurriculum time also engage in private religious expression. Similarly, individual students who include religious themes or topics in otherwise nonreligious speeches, performances, or class assignments are engaging in private, rather than programmatic, religious expression.[210]

There is no question that the Free Exercise Clause protects prayer and other religious expression in school as well as other places.[211] As stated earlier, there also is no question that students pray and engage in other religious expression in school.[212] The significant remaining questions therefore are when and how school officials may restrict private religious expression.

One major objection to accommodating religious expression in school under the Free Exercise Clause is the perception that such an act amounts to state sponsorship of religion, given the maturity of students and the "captive audience" aspect of compulsory public education.[213] The Supreme Court distinguished permissible accommodation of religious expression in other areas of government from impermissible accommodation of religious expression in school, by focusing on the ability of the audience to distinguish between the ceremonial solemnity function of government-sponsored religious expression and state spon-

---

an extracurricular activity. They are ceremonial religious observances intended to be as inclusive as possible. Some proponents of a moment of silence argue that it is a contemplative or reflective moment. *See* Johnson, *supra* note 5, at 1019. However, moments of silence serve a reverent purpose. Class time devoted to self-reflection in which readings were suggested that would have students contemplate their position in the world would more effectively serve the purpose for which the moment of silence is allegedly intended. Indeed, contemplation and reflection are important and challenging endeavors. The supporters of a moment of silence do a disservice to the value of self-reflection by suggestion that it could occur in a moment.

209. For a discussion of the limitations on private student religious expression, see *infra* text accompanying notes 217-33.

210. The performance of a public school gospel chorus comprised of students engaged in an extracurricular activity could qualify as private religious expression, provided the performance was part of a school program showcasing the extra curricular activities of its students and the group was not led by a school official. *See* Sease v. School Dist., 811 F. Supp. 183, 189-90 (E.D. Pa. 1993) (holding that the direction of a high school choir by a school official violated federal law and, presumably, the Constitution).

211. Wood, *supra* note 1, at 370.

212. *See supra* text accompanying notes 192-93.

213. *See* Wisconsin v. Yoder, 406 U.S. 205, 217-18, 220-29 (1972); School Dist. v. Schempp, 374 U.S. 203, 210 (1963); Engel V. Vitale, 370 U.S. 421, 430-31 (1962); McCollum v. Board of Educ., 333 U.S. at 203, 210-13 (1948).

sorship of religion.[214] The category of programmatic student religious expression, which excludes student religious expression of an official nature in ceremonial-functional activities, addresses this concern for students' ability to distinguish between the solemnity of a religious expression and the state sponsorship of religion in an official religious expression. Prohibiting programmatic student religious expression removes the difficulty that students, particularly young students, will have in understanding that the ceremonial religious expression is not state endorsement.[215] Therefore, the exclusion of programmatic student religious expression avoids the general concerns over and objections to religious expression in school.

Having disposed of the main objection to religious expression in school through the abolition of programmatic student religious expression, the remaining rationale for not accommodating private student religious expression is the limitation of constitutional rights of students in general. Given the inescapable fact that student religious expression is constitutionally protected, what restrictions, if any, should apply to students' efforts to exercise these constitutional rights in school?[216] More-

214. *Compare* Marsh v. Chambers, 463 U.S. 783, 786-92 (1983) (state-sponsored recital of prayer at the beginning of each legislative session served the purpose of acknowledging the solemnity of the proceedings and, since the legislators can attend or not attend that portion of the proceedings, there was no endorsement of religion) *with Schempp*, 374 U.S. at 223-25 (the reading of Bible verses and reciting of the Lord's prayer violate the Establishment Clause, even though students may refrain from participating). For a further discussion of the role and accommodation of religion in civic but not school ceremonies, see generally Hall, *supra* note 27.

215. Students, unlike the legislators in *Marsh*, 463 U.S. at 796 (Brennan, J. dissenting), cannot get up and leave during school-wide or in-class religious expressions without the possibility of suffering stigma or peer pressure.

216. The Supreme Court has consistently limited students' rights—even when they are constitutionally protected in other settings. When students sought constitutional protection of their speech, the Court validated school restrictions geared to students' maturity and the pedagogical needs of the school. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 260 (1988). When students sought constitutional protection of their property from search and seizure by school officials, the Court supported school officials' otherwise unconstitutional conduct as part of the administrative need to maintain discipline in the school. *See* New Jersey v. T.L.O., 469 U.S. 348 (1985). When students sought to enjoin corporal punishment in their schools by seeking protection of the Eight Amendment prohibition against cruel and unusual punishment, the Court found that, because of the history of corporal punishment in public education, the Eighth Amendment did not apply to public schools and the school officials' conduct did not violate the students' constitutional rights. *See* Ingraham v. Wright, 430 U.S. 651 (1977). When students sought Fourth Amendment protection in school suspension hearings, the Court construed their Due Process rights to compel only a "conference" *after* the suspension, rather than before, to facilitate the administrative need for swift action. Goss v. Lopez, 419 U.S. 565 (1975). The Court based those limitations on the purported lack of maturity of the students, and the goals and needs of the schools. *See supra* text accompanying notes 32-50 (discussing the Supreme Court doctrine of limiting students constitutional rights because of the maturity of the students, the need of the school to dissociate itself from student conduct, and the need to further the educational goals of the institution).

over, in reviewing student religious expression, should courts apply the same limitations employed in shaping the other school-based constitutional rights, or are the rationales for those limitations inapplicable to the free exercise of religion in school through private student religious expression?

Applying the developed rationale of student maturity and educational and administrative needs of the school[217] to student private religious expression does not support limiting students' Free Exercise rights more so than other constitutional rights. In *Tinker v. Des Moines Independent Community School District*,[218] the Supreme Court declared that school officials may curtail students' constitutional rights if they cause a disruption in the school.[219] Certainly, school officials have a valid interest in curtailing loud or demonstrative religious expressions that interfere with the operation or administration of the school. But if that religious expression is not disruptive, the *Tinker* rationale does not provide a basis for further limiting students' free exercise rights.[220] The "student maturity" rationale articulated in *Hazelwood*[221] and *Bethel*[222] also does not support limits on students' private religious expression. Neither courts nor school administrators need examine the maturity or ability of the student to privately utter a prayer before an algebra exam in order to determine if it is appropriate.[223] Likewise, neither the maturity nor ability of a student requires examination of her selection of a religious theme or topic for performance or class assignment where the school otherwise permits student selection.[224]

Dissociating the school from student conduct and furthering the school's pedagogical goals and administrative needs are the other rationales for curtailing students' constitutional rights.[225] These rationales

---

217. *See supra* note 216 summarizing the developed rationale.

218. 393 U.S. 503 (1969).

219. *Id.* at 509.

220. *See, e.g.*, Clark v. Dallas Indep. Sch. Dist., 671 F. Supp. 1119, 1122 (N.D. Tex. 1987) (students may pray discreetly with each other but may not use a bull horn to preach and proselytize); *see also Preaching Gets Student Suspended*, CHI. TRIB., May 14, 1988, at C3 (reporting on three elementary school siblings who were suspended for preaching loudly at school).

221. 484 U.S. 260 (1986).

222. 478 U.S. 675 (1988).

223. The Supreme Court authorized examining the maturity of students to exercise constitutional rights in *Bethel*, 478 U.S. 675 (1988) and *Hazelwood*, 484 U.S. 260 (1986).

224. The school may have an interest in ensuring that the theme or topic is sufficiently challenging for the assignment or the level of performance expected of the student; such issues, however, go to the specific theme or topic selected by the student, and not to whether the student may select a religious theme or topic at all. Otherwise, the school official in the name of academic or self-challenge can exclude all religious themes or topics.

225. *Hazelwood*, 484 U.S. 260, 273 (1988) (school officials may censor student speech in order to promote the pedagogical goals of the school); *Bethel*, 478 U.S. 675, 683 (1986) (school

also do not support curtailing students' private religious expression. Schools have an understandable need to dissociate themselves from certain student religious expression to avoid placing the imprimatur of state support on some student religious expression, thereby violating the Establishment Clause. This need to dissociate the school from student religious expression arises either when student religious expression occurs as official school communication in a ceremonial-functional school program or when it occurs in a setting in which the public or other students perceive state sponsorship of religion.[226] As stated above, the definition of programmatic student religious expression includes student religious expression that occurs within official school communications in ceremonial-functional programs.[227] Prohibiting programmatic student religious expression provides the mechanism for schools to dissociate from that student religious expression.

Student religious expression that can reasonably be perceived as state-sponsored religious expression occurring in curricular settings raises different issues.[228] In these situations, schools and courts articulated as their primary concern the maturity and impressionability of the students and their ability to differentiate the presentation or inclusion of the students' religious beliefs and the school's endorsement of religion.[229] This concern, however, may be misdirected because of the fallacy of the underlying assumption.[230]

As an example of the assumption, suppose a second grader heard a

---

may curtail constitutional right to free speech in order to teach moral and social values and to dissociate itself from the student speech). For a summary of the rationale for curtailing students' other constitutional rights, see *supra* note 216.

226. These categories are not totally exclusive. The school may need to dissociate from student religious expression because it is in an official school communication *and* because of the perception that the school endorses the religious expression.

227. *See supra* text accompanying notes 201-05.

228. Examples of these settings are: valedictory speeches; class presentations; school talent shows; extemporaneous or student-selected speeches; or independent school research projects.

229. Cases addressing student religious expression are replete with references to the impressionability of school-aged children. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 584 (1987); Wallace v. Jaffree, 472 U.S. 38, 81 (1985); Lemon v. Kurtzman, 403 U.S. 602, 603 (1971); School Dist. v. Schempp, 374 U.S. 203, 307 (1965) (Goldberg, J. concurring); Berger v. Renaseler Cent. Sch. Corp., 982 F.2d 1160, 1171 (7th Cir. 1993); Bell v. Little Axe Indep. Sch. Dist. No. 70, 766 F.2d 1391, 1404-05 (10th Cir. 1985); Roberts v. Madigan, 921 F.2d 1047, 1057 (10th Cir. 1990); Gregorie v. Cent. Sch. Dist., 907 F.2d 1366, 1380 (3d Cir. 1990); Lubbock & Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038, 1045 (5th Cir. 1982).

230. None of the case listed in note 229 refers to, nor has the research for this article discovered any empirical study to support the assumption that children will view the private religious expression of their fellow students as having the support or endorsement of the school. It would be naive to claim that young children are not impressionable. Studies of the impact of television on young children belie such a claim. But, the assumption that school children cannot distinguish between their peers' religious expression in a nonprogrammatic setting and their teacher's religious expression requires further study or rejection.

fellow student describing her experiences at Science Explorers and Experimenters Day Camp. Would she think that the school "endorses" that specific program over any other program? Similarly, would a second grader hearing a fellow student describing the wonders of a vacation Bible camp at the local Methodist Church think that the school endorses that summer program? Since it is unlikely that the student perceives an endorsement in the first situation, only a view of religion as creating a special level of impressionability supports the notion that the second grader would perceive an endorsement in the second situation. Thus, private student religious expression in the classroom does not present the same difficulties or concerns unless there is an acceptance of the concept that children's impressionability changes when the topic or theme of a student class presentation becomes religious.

The concern about children's impressionability is legitimate. It should, however, stem from the setting of the official nature of the religious expression and not the religious expression itself. Religious expressions by school officials, adults brought in for that purpose, or students in an official or school related capacity, i.e., programmatic religious expression, significantly raise the impressionability issue. Religious expression by students in a theme or topic important to them in a curricular setting which permits and promotes student diversity and individuality does not raise an impressionability issue that would per se bar the religious expression. Furthermore, since religious beliefs are part of a self-defining process,[231] student religious expression is part of the maturing process. By engaging in religious expression when the school permits student individuality, students develop and further their maturity.[232] Additionally, the private religious expression described in this Article occurs when students either select a religious topic or theme, when the schools permit such self-selection, or when students engage in prayer during their free time. Under those circumstances, the decision to engage in religious expression is itself a "mature" one.[233]

231. *See* Brownstein, *supra* note 148, at 95-102 (describing the Religion Clauses as protecting dignity and self-creation).

232. *See ABC World News Tonight, supra* note 22 (describing Sammy Garcia, a five-year-old who drew religious pictures in kindergarten because God was important to him, and Kelly DeNooyer, a second grader who wanted to show a videotape of herself singing a Christian song as part of show-and-tell).

233. Maturity is not a state achieved upon reaching a certain age. Rather, it is a developing process, with fits and starts, that begins at birth and ends upon death. For a discussion of moral reasoning as evidence of nature or adult decisionmaking, see Robert Batey, *The Rights of Adolescents*, 23 WM. & MARY L. REV. 363 (1982) (citing the works of Jean Piaget and Laurence Kohlberg in identifying the development of maturity in children). Allowing private religious expression therefore promotes the process. Courts and school officials should not prohibit student private religious expression, as it enhances the maturing process and personal growth.

Likewise, neither the pedagogical goals nor the administrative needs of the school support elimination of private student religious expression. The purpose of a public education system is to stimulate the minds of students and assist them in the transition from childhood to adulthood.[234] In meeting that purpose, school officials undertake the responsibility to make decisions regarding curriculum and the day-to-day operation of the schools.[235] Certainly the educational mission and administrative functioning of the school can impact private religious expression. But, that impact must stem from a generally applicable concern for the educational process, and not from the desire to keep student religious expression out of the schoolhouse.[236]

Thus, none of the rationale developed to curtail students' constitutional rights support prohibiting private student religious expression. The analysis of student religious expression in its various forms and contexts and the sustaining of private student religious expression, therefore, provides a basis for protecting student religious autonomy. This analysis also addresses the Establishment Clause prohibition against state sponsorship of religion in public school. As a result, this analysis allows the development of a workable student speech doctrine and accords school officials their responsibility for furnishing a quality educational environment and process.

---

234. For a general discussion on the purpose of education, see DEWEY, *supra* note 104, at 1-99.

235. The courts have consistently supported and deferred to school officials execution of their responsibilities. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) ("[school officials] are entitled to exercise greater control over [curriculum-based] student expression to assure that participants learn whatever lessons the activity is designed to teach."); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (["[schools] may determine that the essential lessons of a civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . . ."); Widmar v. Vincent, 454 U.S. 263 (1981); Ingraham v. Wright, 430 U.S. 651, 682 (1977) ("[T]he Court has repeatedly emphasized the comprehensive authority of the states and school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." (citing Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 507 (1969))). Judges have scrupulously avoided substituting their judgment for that of school officials in matters of curriculum and administration where no constitutional or statutory issues were involved. *See, e.g.*, Wilson v. Marana Unified Sch. Dist., 735 F.2d 1178, 1183-84) (9th Cir. 1984) (courts must grant deference to sound judgments of school authorities that do not violate federal law); Keys v. Sawyer, 353 F. Supp. 936, 939 (S.D. Tex. 1973) (law student's petition for readmission to law school denied because federal courts should not substitute their judgment for local school authorities unless warranted to protect rights guaranteed by the Constitution); Union Sch. Dist. v. Smith, 15 F. 3d 1519, 1524 (9th Cir. 1994) (even in a de novo review, courts must give "due weight" to the judgments of school authorities and not substitute their notion of sound educational policy for those of the school officials) (citations omitted).

236. Schools naturally retain the ability to reject a specific topic or theme because it does not sufficiently challenge the student's ability. Such pedagogical decisions are certainly part of the educational process. This pedagogical decision, however, should not serve as a guise for prohibiting all religious topics or themes.

V. Application of the Private-Programmatic Student Religious Expression Analysis

Several recent cases and legislative responses provide opportunities for applying the private-programmatic student religious expression analysis and for examining the educational and administrative limitation of students' free exercise rights. *DeNooyer v. Livonia Public Schools*,[237] and *Duran v. Nitsche*,[238] presented the courts with cases involving the use of religious themes in class presentations and assignments. *Jones v. Clear Creek Independent School District*[239] presented the court with student religious expressions in graduation exercises. Subsequent to these cases, several jurisdictions attempted to legislatively authorize student prayers in school.

In *DeNooyer*,[240] Kelly DeNooyer, a second grade student wanted to show a videotape of her singing a Christian song during a special show-and-tell exercise.[241] When she brought the tape into school, her teacher reviewed it under the applicable school board regulation. After finding the tape inappropriate, the teacher refused to allow Kelly to show it.[242] Both the school principal and the superintendent supported the teacher's decision.[243] The DeNooyer family took the matter to court and the district court found the censorship permissible holding that no constitutional violation occurred.[244] The district court based its reasoning on a free speech-pubic forum doctrine analysis and found that the classroom was a nonpublic forum.[245] On appeal, the Sixth Circuit agreed that Kelly's class was a nonpublic forum and that Ms. Solomon's censorship of the videotape was consistent with the constitutional doctrine limiting

237. 799 F. Supp. 744 (E.D. Mich. 1992), *aff'd sub nom.* De Nooyer v. Merinelli, 12 F. 3d 211 (6th Cir. 1993) (per curiam), *cert. denied*, 114 S. Ct. 1540 (1994).

238. 780 F. Supp. 1048 (E.D. Pa. 1991).

239. 977 F.2d 963 (5th Cir. 1992).

240. De Nooyer v. Merinelli, 12 F.3d 211 (6th Cir. 1993) (per curiam), *aff'g* De Nooyer v. Livonia Pub. Sch., 799 F. Supp. 744 (E.D. Mich. 1992).

241. *Id.* at 211. Kelly brought the videotape to school as part of the V.I.P. program created by her teacher, Sandra Solomon. Ms. Solomon permitted each V.I.P. student to bring something special about themselves to school and explain it to the class. When Kelly had been selected as the V.I.P. student, she brought in her videotape. *Id.*

242. Ms. Solomon claimed that it was not consistent with the purpose of the V.I.P program, which was to enhance student's oral communication skills. Solomon further claimed that the reviewing of videotapes was an improper use of instructional time, and that the subject matter was inappropriate given the age of the students seeing the tape. *Id.* at 212.

243. DeNooyer v. Livonia Pub. Sch., 799 F. Supp. 744, 746 (E.D. Mich. 1992), *aff'd sub nom* De Nooyer v. Merinelli, 12 F.3d 211 (6th Cir. 1993) (per curiam), *cert. denied*, 114 S. Ct. 1540 (1994).

244. *Id.*

245. *Id.* at 748-49. The Sixth Court of Appeals likewise determined that the classroom was a closed forum and that the school could therefore reasonably regulate the style and content of Kelly's presentation. *De Nooyer*, 12 F.3d at 211.

students' free speech reports on pedagogical grounds and the administrative needs of the school.[246]

In *Duran v. Nitsche*,[247] Diane Duran, a student in an accelerated fifth grade class, received an independent research assignment to write an essay on the topic, "The Power of —."[248] Her teacher, Linda Nitsche, permitted each student to fill in the blank and prepare a paper and class presentation on the selected topic. Diane responded to the assignment by proposing to write on "The Power of God." Ms. Nitsche approved the topic.[249] As part of her research and in response to a suggestion made by Ms. Nitsche to the entire class, Diana generated a survey for other students to complete.[250] Although the survey questions were reviewed by Ms. Nitsche, she did not give permission for their distribution. Additionally, Diane did not keep her teacher informed regarding her research, or her proposed oral presentation.[251] On the day the assignment was due, including the oral presentation, the principal refused to allow further distribution of the survey and Ms. Nitsche refused to allow Diane to make an oral presentation to the class.[252] Diane made her presentation to Ms. Nitsche in the library, out of the presence of the other students. Diane sued various school officials and the School Board, alleging that her free speech rights were violated. The court supported the decision of the school officials not to allow a presentation to the class. It reasoned that, despite the fact that the topic was open, the class was still a nonpublic forum.[253] It sustained the school's decision to require Diane to make her presentation to her teacher in the library rather than to her classmates in the classroom—as a legitimate pedagogical determination.[254]

In both of these cases, the courts confronted student religious expression in the completion of class assignments and presentations that were designed in part to permit student diversity and individuality. Each of these cases, therefore, potentially involved private student religious expression in a curriculum setting. Additionally, each of these cases

---

246. *Id.* (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988)).

247. 780 F. Supp. 1048 (E.D. Pa. 1991).

248. *Id.* at 1050.

249. *Id.*

250. The survey started with the students' age, gender, and class and then asked the question, "Do you believe in God, Yes or No? If your answer is no, please hand in your survey now." If the response was yes, the survey asked the students to check any one of 4 boxes regarding their belief in God's power to: control their life, control life and death, forgive sin, or other. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 1053-54.

254. *Id.* at 1055.

involved children in elementary school, thereby necessitating an examination of the religious rights of students below the high school level.

Under the analysis proposed in this Article, Kelly's attempt to have a religious theme in her show-and-tell presentation could qualify as private student religious expression. The class assignment allowed her to personally choose the topic, thus meeting the definition of private student religious expression proposed here.[255] The court's decision supporting the school's refusal to allow the showing of the tape, however, was a proper limitation of Kelly's free exercise rights.

Kelly's attempt to express her religious beliefs through a videotape had both private *and* programmatic religious expression components. As a private religious expression, Kelly's use of a videotape to present the song raised sufficient pedagogical and administrative concerns to justify the school limiting her free exercise rights.[256] Since the educational goal of the V.I.P. program was to enhance student communication skills, the videotape, not the subject matter, did not meet those goals. Similarly, the administrative concern of avoiding spending valuable instructional or preparation time reviewing videotapes children brought to school justified the court's refusal to insist that Kelly be allowed to present her videotape.

Additionally, Kelly's attempt to present her religious beliefs via videotape presentation could qualify as programmatic student religious expression. The setting in which the student presents her religious expression determines whether it is private or programmatic. In order to show her videotape, Kelly needed to borrow her school's video equipment—the same equipment used by her teacher to instruct the class. Thus, Kelly's religious expression could assume the trappings of state sponsorship.[257]

Had Kelly sought to sing her song in person, as part of her V.I.P. presentation, the results in the case might be different.[258] The elimina-

255. *See supra* text accompanying notes 208-10 (defining private student religious expression as occurring when students complete class assignments which promote student individuality and diversity).

256. *See supra* text accompanying notes 217-33 (discussing the limitation of private student religious expression because of the pedagogical goals and administrative needs of the school).

257. The use of school equipment does not per se create school sponsorship. But the use of equipment that requires teacher assistance and is a part of the teacher's educational presentation can add the element of state endorsement necessary to convert otherwise private student religious expression into programmatic religious expression.

258. The circuit court addressed only the pedagogical and administrative justifications acknowledged in prior free speech—public forum cases. DeNooyer v. Merinelli, 12 F.3d 211 (6th Cir. 1993) (per curiam), *aff'g* De Nooyer v. Livonia Pub. Sch., 799 F. Supp. 744 (E.D. Mich. 1992) (discussing the case as analogous to *Hazelwood v. Kuhlmeier* and subject to the doctrine permitting reasonable regulation of student expression in the closed forum of a classroom).

tion of the videotape removes the justifications for preventing Kelly from engaging in this private religious expression. Indeed, there is no administrative need to review the song that Kelly will sing assuming that all students' show-and-tell presentations are not similarly scrutinized. And, upon hearing that the song is religious, there is no pedagogical rationale for refusing Kelly the opportunity to sing it as part of her presentation. The goal of the program was to develop communication skills and self-confidence,[259] and the presentation of a song helps meet those goals.[260] The court, however, could have applied the public forum analysis and still prohibited the song because its content was "inappropriate."[261]

The analysis proposed in this Article would treat Kelly's attempt to sing her song as the free exercise of religious belief. The district court considered Kelly's free exercise claim and rejected it because it could not find a central religious belief or practice burdened by the school's actions.[262] However, the court's analysis ignored the importance of religion to Kelly, her belief that infusion of her religious teaching into her daily life was an essential tenet of her religious faith,[263] and the Supreme Court pronouncements that professing religious beliefs is the free exercise of religion protected by the First Amendment.[264] Recognizing Kelly's religious autonomy and protecting it under the Free Exercise Clause follows from treating her presentation of the song as religious expression. The school and the court may still limit that religious expression when it is inappropriate; but the inappropriateness must then relate to standards of decency and general moral and social values[265] rather than the religiosity of her song. Thus, there is no basis for restricting Kelly's private religious expression in singing her Christian song as part of her show-and-tell presentation.

Similarly, if Kelly sings her song, she removes the programmatic

---

259. *De Nooyer*, 799 F. Supp. at 746.

260. Undoubtedly, had Kelly sought to sing the song without explaining what she was doing and why, she would not meet the goals of the V.I.P. program. But again, the restriction on her singing the song would flow from the format and not the content.

261. Ms. Solomon claimed that the song was inappropriate for second grade students because of the "proselytizing" message. *DeNooyer*, 799 F. Supp. at 746. Ms. Solomon had previously permitted a student to bring in and discuss a Chanukah menorah thereby making the ban on Kelly's song a possible content-based discrimination. The district court however rejected the equal protection claim. *Id.* at 753-54.

262. *Id.* at 752-53.

263. The infusion of ones beliefs into daily life is an essential component of religion. *See* GREGORY, *supra* note 153, at 146-48.

264. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 877 (1990). *See also supra* text accompanying notes 176-85.

265. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (restricting student speech in order to convey social and moral values).

aspect of her religious expression. The teacher need not assist in the singing of the song any more than she would assist another student who wished to sing any popular or folk song. Without teacher assistance or equipment, the setting for the religious expression loses its state sponsorship trappings.[266]

Applying the analysis proposed in this Article to *Duran*[267] creates a different result from the one reached by the court. Diane's selection of the topic, "The Power of God," constitutes student private religious expression. The independent research project permitted all students to express their individuality, diversity, and preference in the selection of their respective topic. Because of this aspect of the assignment, Diane's selection of a religious theme meets the requirements of private student religious expression.[268] Once the teacher approved the topic for Diane's independent research project and approved the use of a survey as a methodology for conducting research, Diane's free exercise rights protected her use of a religious theme.[269] Had Ms. Nitsche disapproved of the topic because it did not meet the pedagogical goals of the assignment, her reasoning must mirror that which was employed in rejecting other topics. In that event, Diane could have chosen another religious theme that would meet the pedagogical goals of the assignment. Similarly, once Ms. Nitsche suggested that students could use a survey as a research tool, she must approve Diane's survey unless the questions did not meet the standards she established for surveys conducted by all students in the class.[270]

As in the analysis of *DeNooyer*, the school must base its justification for prohibiting Diane's use of a religious theme on a rationale applicable to all students and all topics. Otherwise, the restriction is an anti-religious regulation and an unconstitutional restriction on the free exercise of religion. Since Diane's selection of a religious theme constitutes private student religious expression, the requirement that Diane present

---

266. Teachers have the ability to send subtle and overt messages of approval to their students. Allowing children to engage in constitutionally protected religious expression in the classroom, therefore, raises the possibility of state sponsored pro- and anti-religious communication through teacher conduct. The analysis proposed here does not answer this vexing question. It does, however, focus the inquiry on more precise "grey" areas than the analysis currently employed. *See supra* text accompanying note 31.

267. Duran v. Nitsche, 780 F. Supp. 1048 (E.D. Pa. 1991).

268. *See supra* part IV.C. defining private student religious expression.

269. The teacher's approval reflected her opinion that the topic presented a sufficient academic challenge to Diane to warrant her using it. *See supra* text accompanying note 224, discussing school's need to ensure that a student's selection of a topic, religious or otherwise, is academically challenging.

270. The principal or teacher could have required Diane to place a disclaimer on the survey to ensure that students understood that this survey was Diane's research project and not a school survey; that requirement could apply to all of the students' surveys as well as Diane's.

her project to the teacher in private, rather than to the class, violated her free exercise rights. The court's decision supporting the school is therefore incorrect under the analysis proposed here. If her paper was academically unsatisfactory, she should have been treated the same as other students whose work was unsatisfactory.[271] Treating Diane's independent research project as speech and applying the public forum doctrine limitations of student speech, supported the results in that case. Treating Diane's project as private student religious expression, however, permits the presentation of her project under the Religion Clauses. The Free Exercise Clause protects her use of a religious theme as a private religious expression. Since it was not programmatic religious expression, the Establishment Clause does not prohibit Diane's project.

In *Jones v. Clear Creek Independent School District*,[272] the Fifth Circuit Court of Appeals approved a student-initiated invocation at a high school graduation. The Clear Creek Independent School District passed a resolution that allowed the seniors to choose to have a nonsectarian, nonproselytizing invocation or benediction at their graduation ceremony.[273] In determining that the resolution was constitutional, the court used a combination of Establishment Clause and free speech analysis. The court found that the resolution did not violate the Establishment Clause.[274] The court also found that since the decision to have an invocation rested with the students, having the religious exercise at graduation was akin to the free speech choice authorized in *Mergens*.[275] The decision in *Jones* purportedly stands as the model for student-initiated religious expression at school functions. Many proponents of religion in school have seized it as an indication that student expression was the route to returning religion to its proper place in public schools.[276] But

271. The facts of the case are unclear as to whether Diane's final product was unsatisfactory. They indicate that the school officials prohibited the distribution of the survey because of the topic. *Duran*, 780 F. Supp. at 1051. They also indicate that school officials required Diane to present her project to the teacher in private because of the topic of her paper and because Ms. Nitsche's lack of knowledge of the content of the report caused concern that it was inappropriate for the fifth grade class. *Id.* at 1051.

272. 977 F.2d 963, *reh'g denied*, 983 F.2d 234 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

273. *Id.* at 964 n.1.

274. *See id.* at 965-72. The court applied the test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971), as well as the nonendorsement and noncoercion analysis used by the Supreme Court in Lee v. Weisman, 112 S. Ct. 2649 (1991).

275. *Jones*, 977 F.2d at 969 (citing Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990)).

276. *See generally* Michael deCourcy Hinds, *Robertson Trying Again To Put Prayer in School*, N.Y. TIMES, Apr. 16, 1993, at A12; Kim A. Lawton, *Do Students Have a Prayer?*; CHRISTIANITY TODAY, June 21, 1993, at 45; W. John Moore, *The Lord's Litigators*, THE NAT'L J., July 2, 1994, at 1560; Ronald Smothers, *School Prayer Gaining Ground in the South*, N.Y. TIMES, Feb. 22, 1994, at A12. Courts, however, have rejected the analysis. Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994) (invocation and benediction at graduation violates Establishment Clause

the decision distorts both the constitutional rights of students and the role of religion in state-sponsored events such as graduations.

Applying the analysis of student religious expression and the classification of school expressive activities proposed herein, creates a different result than the Fifth Circuit decision in *Jones*. The student religious expression authorized in *Jones* is programmatic and, therefore, unconstitutional for several reasons. First, graduation is a ceremonial-functional activity conducted by the school. Its purpose is to officially acknowledge those students who have successfully completed the course of study offered by the educational institution.[277] Therefore, any communication that is of an official or religious nature bears the imprimatur of state endorsement because of the ceremonial aspect of graduation. A student invocation, like the one in *Jones*, is a religious expression that falls into this category and thereby is programmatic. Student religious expressions that are not an official act or part of the graduation activity may qualify as private; but all other student religious expressions at graduation are programmatic due to the combination of the official nature of the communication and the ceremonial-functional context of the activity. Under the analysis proposed in this Article, it does not matter if the speaker is an adult or student, nor does it matter if the speaker is a member of the clergy. Religious expressions, such as student-selected, written, and delivered invocations or opening or closing messages that are part of the graduation exercises are programmatic and unconstitutional.[278]

Interestingly, in an effort to allow student religious expression at graduation, some school districts have totally abandoned their role in reviewing student remarks at graduation.[279] Other school districts, like Clear Creek County, Texas, authorize student selected religious expressions and review them solely for the purpose of ensuring that they are nonsectarian and nonproselytizing.[280] These school board policies reflect the extent to which adults will go to reintroduce religion in public

---

despite majority vote of students in favor and prohibition of invocation and benediction does not violate Free Exercise or Free Speech Clause because graduation is not an open public forum). *See, e.g.*, Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993) (invocation delivered at graduation held unconstitutional, regardless of whether students choose to deliver it).

277. *See supra* text accompanying notes 115-16 defining ceremonial-functional contexts of public school.

278. *See Gearon*, 844 F. Supp. at 1099 ("[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.").

279. *See* Debbie Wilgoren, *Divining a Way Around the Prayer Ban as Graduation Nears, Activist and Schools Try New Paths in Legal Maze*, WASH. POST, June 14, 1994, at B1 (reporting on school officials' refusal to review student remarks to avoid Establishment Clause law suits).

280. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 964, *reh'g denied*, 983 F.2d 234 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

school. After decades of asserting and litigating the right of school officials to censor and control student speech, these school boards are voluntarily giving students total control over their speech at graduation in order to allow them to convey religious messages.

Abandoning their right to review student messages or limiting that right to ensure that the message is "neutral," however, does not save the religious expression from being programmatic. The placing of the religious message in the graduation exercise provides sufficient state endorsement to make it programmatic. Moreover, the determination that the religious expression is nonsectarian or nonproselytizing is itself censorship and control of the religious message. The limited review suggested by some school officials therefore becomes state endorsement of a particular religious message, albeit an altruistic and inclusive one, and a violation of the Establishment Clause.

A second reason that the student-initiated invocation permitted in *Jones* qualifies as programmatic student religious expression is the government participation in creating the setting for the religious expression. Legislative or regulatory initiatives that would permit these "private" student-initiated religious expressions add a dimension of unconstitutionality. A truly voluntary, nonofficial student message that contained a religious reference would not be a programmatic student religious expression. For example, 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. Paradoxically, once the state authorizes a place in the school activity for such a voluntary religious message, the private student religious expression converts to a programmatic one. Therefore, the student-initiated invocation in *Jones*, which resulted from the resolution enacted by the school board becomes programmatic because of the school board regulation.

The attempt by adults to use students' religiosity as a strategy to reintroduce religion in the public school arena creates the paradox of the school board policy authorizing the student-initiated religious expression yet making such religious expression unconstitutional. The efforts by state legislatures to codify students' "rights" to pray and otherwise engage in religious expression in school are other examples of this strategy.[281] These efforts to legislate student prayer condemn such student

---

281. *See* ALA. CODE § 16-1-20.2 (1994) (authorizing a teacher who recognizes "the Lord God is one" in a public educational institution to pray and lead willing students in a general or statutory prayer); ALA. CODE § 16-1-20.3 (1994) (authorizing nonsectarian nonproselytizing student-initiated prayer at graduation, sporting events, assemblies and other school-related student events); GA. CODE ANN. § 20-2-1050 (1994) (authorizing a brief moment of quiet reflection which shall not be conducted as a religious service, but shall not prevent student-initiated voluntary

religious expression to the realm of state endorsement and violation of the Establishment Clause. The ultimate irony of this stratagem is that *it has never been unlawful for students to pray in school*, except when those prayers or other religious expressions occur in a manner that assumes the mantel of state action.[282] The analysis proposed herein distinguishes between lawful private and unlawful programmatic student religious expression, and circumvents the paradoxical maze that the legislative-regulatory approach creates.

As these cases demonstrate, focusing on the specifics of the expression—whether it is private or programmatic, which in part relates to whether it occurs in a curricular, ceremonial-functional, or extracurricular context—and not on the fact that it is religious—best determines when to permit student religious expression in public schools. Likewise, the private-programmatic analysis places a doctrinally consistent perspective on legislative initiatives seeking to permit student prayers. Applying the Religion Clauses avoids the knee-jerk reaction, both positive and negative, to student religious expression in school. It also

---

nonsectarian and non-proselytizing school prayers at school events); IND. CODE ANN. § 20-10.1-7-11 (West 1995) (authorizing teachers, either voluntarily or pursuant to school board directives to conduct "a brief period of silent prayer or meditation" which is not a religious service and cannot be conducted as one); LA. REV. STAT. ANN. § 17:2115 (West 1995) (directing local school boards to "allow an opportunity . . . for those students and teachers desiring to do so to observe a brief time in silent prayer or meditation" that shall not be conducted as a religious service and the State shall remain neutral in the implementation thereof); MASS. GEN. L. ch. 71, § 1A (1985) (authorizing a moment of silence for personal thoughts at the commencement of the first class of the day); MISS. CODE ANN. § 37-13-4 (1979) (authorizing teachers to permit voluntary participation of students or others in prayer and prohibiting teachers from prescribing the content or form of the prayer); 70 OKL. STAT. ANN. tit. 11, § 101.1 (1993) (directing local school boards to permit students and teachers to participate in voluntary prayer); TENN. CODE ANN. § 49-6-1004 (1993) (directing a moment of silence for which the teacher shall not direct any action to be taken by students, permitting students and teachers to engage in voluntary prayer, and permitting student initiated voluntary nonsectarian and nonproselytizing prayers at noncompulsory student assemblies, sporting events, and commencement ceremonies); VA. CODE ANN. § 22.1-203.1 (Michie 1994) (authorizing students to voluntarily engage in student-initiated prayer); W. VA. CONST. art. 3, § 15a (1984) (directing schools to provide a brief time at the beginning of the day for voluntary student prayer or meditation and prohibiting preventing a student from, or encouraging a student to engage in contemplation, meditation, or prayer).

282. In many ways the analysis proposed here mirrors the state action-private action jurisprudence developed under the Fourteenth Amendment. In Georgia v. McCollum, 112 S. Ct. 2348 (1992), the Supreme Court established that private actors can be described as state actors in certain situations and identified the following principles as useful in making that determination: "1) 'the extent to which the actor relies on government assistance and benefits'; 2) 'whether the actor is performing a traditional government function'; and 3) 'whether the injury caused is aggravated in a unique way by incidents of governmental authority.' " Georgia v. Mc Collum, 112 S. Ct. at 2354 (citing Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 621-22 (1991)). The private-programmatic distinction proposed here similarly attempts to separate permissible and impermissible student religious expression based on whether it can be described as "state action."

avoids the complexities of applying a free speech analysis to the free exercise of religious beliefs.

VI. CONCLUSION

The approach to the constitutional analysis of student religious expression proposed in this Article applies regardless of whether the religious expression is a private prayer occurring: before, during, or after an exam; during a sports event; as part of delivering a student-selected speech; before, during, or after a musical presentation; or in a student meeting. It also applies regardless of whether one or more students engage in the religious expression.[283] Religious expression in these contexts results from the student's religious choice, even when more than one student participates. Thus, they are beyond the schools' need to determine the "maturity" or "ability" of the students to engage in the constitutionally protected conduct. Furthermore, these private student religious expressions are not state-sponsored and do not invoke the Establishment Clause, even though they may be uttered in a public setting. The school does not participate when students individually or jointly pray before class—unless a specific time is set aside for that purpose.[284] Similarly, there is no state sponsorship if a student utters a prayer as the introduction to a valedictorian speech, unless the prayer was "approved" by school officials prior to delivery.[285] Such approval converts private student religious expression into programmatic expression.[286]

Categorizing student religious expression as private or programmatic also respects the maturity and autonomy of students to engage in

283. The rationale for restricting private student religious expression because of potential disruption of the educational process or because of an administrative need may have more substance as more students engage in a collective religious expression. For example, the "See You at the Flagpole" Day, a national prayer vigil conducted at high schools at 7:00 a.m., while a private student religious expression, could not occur during school hours without causing major disruption to the school program. Steven Johnson, *Standoff Over Prayer Session Avoided—Eastside Students Allowed to Hold Vigil*, SEATTLE TIMES, Sept. 19, 1993, at B1. The number of participants alone, however, should not evoke suppression of students' constitutional rights.

284. By setting aside a specific time period, the school endorses the religious conduct of the student, thus making the student religious expression programmatic. *See supra* text accompanying notes 202-05.

285. *See* Wilgoren, *supra* note 279 (reporting on several Virginia school systems' announcement that they will take the unprecedented step of not reviewing students' remarks in advance).

286. I acknowledge the difficulty attendant to viewing a prayer in a valedictory speech as private student religious expression. The valedictorian certainly appears as a representative of the school and therefore bears the mantle of official school spokesperson. But, since that honor generally comes as a result of the individual's academic performance, I view the prayer as a manifestation of the student's religious autonomy and thus as allowable private religious expression. I also acknowledge that this is a borderline call.

private religious activities. It retains the concern for the maturity of students as the speakers and audiences of official religious expression through the category of programmatic religious expression, while permitting students the opportunity to have their religious voices heard.[287] Moreover, as the discussion of the *DeNooyer*[288] and *Duran*[289] cases demonstrates, the classification of student religious expression as private or programmatic and the rationale permitting the former and prohibiting the latter are as applicable for first graders as they are for twelfth graders. This recognizes that children form religious beliefs at every school level[290] and protects the exercise of constitutional rights by students with the appropriate concern for their maturing and developing level of self-awareness.

Finally, treating student religious expression as religion and analyzing it under the Religion Clauses of the Constitution mandates treating students as persons capable of and maturing into adult-like behavior.[291] The distinctions between private and programmatic student religious expression and among the curricular, ceremonial-functional, and extracurricular contexts discussed herein are an attempt to provide greater respect for children's exercise of constitutional rights. This attempt also seeks to avoid abandoning children to raise themselves[292] and permitting adults to use children's legitimate acts of autonomy as a springboard for an adult-generated strategy to bring religion back into the schools.

---

287. Private student religious expressions may be the product of family training or the student's independently developed beliefs. Although the source of the religious expression is irrelevant for the purposes of the analysis proposed herein, permitting private religious expression encourages the role of the family in shaping children's religious beliefs and the opportunity for students' to form their own religious beliefs without concern for official approval or disapproval.

288. De Nooyer v. Merinelli, 12 F.3d 211 (6th Cir. 1993) (per curiam), *aff'g* De Nooyer v. Livonia Pub. Sch., 799 F. Supp. 744 (E.D. Mich. 1992).

289. Duran v. Nitsche, 780 F. Supp. 1048 (E.D. Pa. 1991).

290. *ABC World News Tonight*, *supra* note 22.

291. *See* DEWEY, *supra* note 104, at 7-11 (discussing the education of children as involving their imitating, and then assuming, adult-like characteristics).

292. *See generally* Bruce Hafen, *Children's Liberation on New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605 (1976) (cautioning against according minors constitutional rights in a way that removes the legal protection they receive as minors). I disagree with much of Professor Hafen's thesis. But I do agree that the legal system should not leave children totally to their own devices for development and maturity.