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How Much God In the Schools - A Discussion of Religion's Role in the Classroom

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HOW MUCH GOD IN THE SCHOOLS? A DISCUSSION OF RELIGION'S ROLE IN THE CLASSROOM*

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In this essay Professor Strossen addresses the controversial subject of religion in the public schools. She argues that while there may well be instances of unconstitutional government suppression of religious expression, there are certainly many examples of the opposite--unconstitutional government promotion of religion. Professor Strossen discusses the guiding principles governing the relationship between religion and the public schools, as set out by the Supreme Court. She stresses the First Amendment demand that public schools remain neutral toward religion. While they may and should teach about religion, schools may not promote either religion in general or any particular religion. Professor Strossen also addresses the concept of "student-initiated" graduation prayer, and argues that this is merely an attempt to circumvent the Supreme Court's holding in Lee v. Weisman, *which held that school-sponsored graduation prayer violates the Establishment Clause. She maintains that although the Supreme Court has not directly addressed this issue, when it does, it will hold this form of prayer unconstitutional under the reasoning in* Weisman. *Additionally, Professor Strossen addresses truly student-initiated, non-school-sponsored religious expression, which is protected under the Free Speech Clause. She shows, however, that this type of student expression has been given more protection than other types of student speech, which may raise prob-*

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* This essay is based on the Closing Address that Professor Strossen delivered at the Symposium on "How Much God in the Schools?", sponsored by the Student Division of the Institute of Bill of Rights Law at the Marshall-Wythe School of Law, College of William and Mary, on February 23, 1995. This piece includes some additional examples and authorities supporting the points Professor Strossen made during her oral presentation but that she did not have time to include in that presentation. This piece also refers to some post-Symposium developments, but does not, however, include any arguments or conclusions that Professor Strossen did not present orally.

** Professor of Law, New York Law School; President, American Civil Liberties Union. A.B. 1972, Harvard College; J.D. 1975, Harvard Law School. Professor Strossen gratefully acknowledges the research and administrative assistance of Donna Wasserman and Ralph Toss, and the information and comments provided by Robert Alley, Joann Bell, Robert Boston, Steve Brown, David Ingebretsen, Alex Jeffrey, Courtenay Morris, Steve Pershing, Bill Saks, Micheal Salem, Howard Stambor, Ruti Teitel, Lisa Thurau, Deborah Weisman, Vivian Weisman, and Diane Weiss. The author wants to underscore that she, along with the vast majority of people who carry out the ACLU's work, does so as a volunteer, without any financial payment. *See, e.g.*, *infra* note 11 (describing one lawyer who has handled ACLU religious liberty cases on a pro bono basis). *But see* M.G. "Pat" Robertson, *Religion in the Classroom*, 4 WM. & MARY BILL RTS. J. 595, 596 (1995) (criticizing work done by "paid representatives of . . . the American Civil Liberties Union").

lems under the Free Speech and Establishment Clauses. Finally, Professor Strossen addresses certain misperceptions about the Supreme Court's holdings regarding religion in the public schools.

* * *

Thank you very much. Because the introduction you just heard mentioned my recent book, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*,[1] I want to note that even though Jay Sekulow[2] and I were disagreeing with each other during the panel discussion, I quote him in my book because we have both had to come to the defense of a work that has often been attacked as pornographic—namely, the Bible. As my book explains, Jay recently had to fly out to Minnesota to oppose an effort to remove the Bible from a school district there on the grounds that it was obscene and pornographic.[3]

I am delighted and honored to be addressing this important Symposium, and I want to join Dean Krattenmaker in congratulating and thanking the students who organized it. As someone who is deeply devoted to the rights and empowerment of students and other young people, I have always believed that they will rise to the level of responsibility with which we entrust them. This Symposium shows that such faith is justified.[4]

I.

Of course, students and faith has been the exact substantive focus of these proceedings. How should students' religious faith, or their lack thereof, be handled in the public schools? Of all the contentious issues concerning religious liberty in our society, none is more so than the role of religion in our schools. As the Supreme Court has repeatedly recognized, protecting religious liberty is especially important in public schools. For example, in

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[1] NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995).

[2] Chief Counsel, American Center for Law and Justice, Virginia Beach, Virginia. Panel Discussion at the Institute of Bill of Rights Law Student Symposium at the College of William and Mary (Feb. 23, 1995) (videotape on file in the College of William and Mary Law Library).

[3] STROSSEN, *supra* note 1, at 259.

[4] My sincere praise for the overall caliber of the student organizers' work, however, is tempered by my criticism of some important respects in which the Symposium program deviated from neutrality in framing the issues under discussion. Two instances of what I regard to be an unfair slant, concerning the background materials that the student organizers distributed to Symposium participants, are discussed *infra* text accompanying notes 125-28 and notes 156-63 and accompanying text. My belief that students learn through exercising responsibility is complemented by my belief that they also learn from constructive criticism of how they exercise that responsibility.

1943, in *West Virginia Board of Education v. Barnette*,[5] a case that upheld students' religious and conscientious freedoms, the Court said: "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[6]

One of the recent religious liberty cases brought by the American Civil Liberties Union (ACLU) was brought on behalf of a fourteen-year-old student who recognized precisely the kind of contradiction of which the Court in *Barnette* warned: namely, between the school's teaching about constitutional rights and the school officials' actual practice, which violated those rights.[7] I would like you to listen to the words of that student, Sarah E. Coles. From Pat Robertson,[8] you have heard examples—horror stories—of students whose rights of free expression for religious speech have been violated. I think any such violation is deplorable. But, I want to echo what Elliot Mincberg[9] said during the panel discussion: There are horror stories in the other direction as well, where schools and other governmental bodies are indoctrinating their students and endorsing religion. Sarah Coles, the victim of one such violation, described it this way:

> when I was 14, the school board in Cleveland, Ohio, where I live, invited me to attend a meeting to be recognized for the high scores I had gotten on a standardized test. I felt really proud of myself.
>
> I took a seat at the meeting, expecting that it would begin with something like a welcome. Instead, it began with a prayer.
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> I was shocked. Prayers at a school board meeting? I couldn't believe it. In the middle of the prayer, I found my-

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[5] 319 U.S. 624 (1943).

[6] *Id.* at 637.

[7] *Id.*

[8] Founder and Chairman, Christian Broadcasting Network; Founder and Chancellor, Regent University; Founder and President, American Center for Law and Justice. Address before the Institute of Bill of Rights Law Student Symposium at the College of William and Mary (Feb. 23, 1995) (videotape on file in the College of William and Mary Law Library). Chancellor Robertson delivered the keynote address for the Symposium. *See* M.G. "Pat" Robertson, *Religion in the Classroom*, 4 WM. & MARY BILL RTS. J. 595 (1995).

[9] Elliot Mincberg, then Legal Director, People for the American Way, Washington, D.C. Panel Discussion at the Institute of Bill of Rights Law Student Symposium at the College of William and Mary (Feb. 23, 1995) (videotape on file in the College of William and Mary Law Library).

> self saying out loud, "What's going on here? They aren't supposed to be doing this at a board of education meeting."
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> We learned at school about the separation of church and state. We were taught that all people have the right to believe in their own way, as long as it doesn't harm others. Isn't it important that the school system respect the Constitution that it teaches us to respect?
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> As I sat there at the meeting, I thought: What if I were a Buddhist or a Muslim? How would it feel to be invited to a meeting, only to be offended by your host? The board ought to stop opening its meetings with prayers, I thought, and instead make the meetings free of barriers and open to all.
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> Together with others who felt as I did, I asked the board to drop the prayer from its meetings, but they said they wouldn't. We then consulted with our local ACLU. With the ACLU's help, we filed a lawsuit against the school board, asking for an end to the practice. . . .
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> Our case is still pending, but whatever the outcome I believe the school board ought to live by what it teaches.[10]

As her statement indicates, Sarah had both an awareness of her constitutional rights and the courage to protest the school board's violation of them. Alas, though, many students—and even teachers, parents, and other adults—do not share these qualities. Especially given the political pressures on school boards to bow to majoritarian forces, the religious liberty of individuals and minority groups is always fragile. Often, no one recognizes, or dares to oppose, violations.

And, again, I want to echo something that Elliot Mincberg said. The ACLU often receives complaints from parents, students, and other members of the community about incidents involving government-sponsored indoctrination and inculcations of religion—including those involving public schools—as well as persecutions, attacks, and criticisms because they are members of a minority religion. Often these victims of religious liberty violations do not want even to file a claim in court, even when we assure them they would win, because of the hostility, enmity, persecution, and attacks they would face. I fully sympathize with their reluctance to make themselves into pariahs or even martyrs.

Too many ACLU clients who have asserted their First Amendment right to be free from government-sponsored religion have suffered tangibly, as

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[10] *Meet Some Real Life Sybil Liberties*, ASK SYBIL LIBERTY: YOUR RIGHT TO RELIGIOUS FREEDOM (ACLU/Pub. Educ. Dep't, New York, N.Y.), at 3 [hereinafter *Real Life Sybil Liberties*] (on file with author); *see* Sarah Coles, *Why Student Is Suing Board Over Prayer*, CLEVELAND PLAIN DEALER, Mar. 1, 1993, at 1E.

well as psychologically, for doing so. Many have suffered physical assaults upon themselves and their property. One brave woman, Joann Bell, had her home burned to the ground because she dared to stand up for separation of church and state in a case involving the public elementary and junior high schools that her daughter and two sons attended in Little Axe, Oklahoma.[11] The United States Tenth Circuit Court of Appeals agreed with Joann, her co-plaintiff Lucille McCord (who had two children in the Little Axe schools), and the ACLU that the school violated the Establishment Clause by sponsoring organized student prayer meetings at the beginning of the school day.[12]

Like many of our clients who protest government-endorsed religious exercises, Joann and Lucille are religious people.[13] Precisely for that reason, they do not want the government, in the public schools or anywhere else, promoting any religious exercise, a matter that they believe belongs within the sphere of their own churches or other religious institutions, families, and individual consciences.[14] As Lucille declared: "Leave the religion to me."[15] Joann, Lucille, and their children are Protestants; from the per-

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[11] At the time she approached the ACLU to represent her in challenging the school's violation of her family's religious liberty, Joann Bell had had no previous contact with the ACLU. Indeed, she came from a conservative religious and political background, in which the ACLU was at best unknown and at worst demonized. Since 1990, however, Joann has been the Executive Director of the ACLU's Oklahoma affiliate. The silver lining to the cloud of Joann's heroic but harrowing struggle to defend the religious liberty of herself and her family is not only that she helped to secure religious liberty for everyone within the Tenth Judicial Circuit, but also that it led her to devote her energy and talent to defending the civil liberties of other individuals and families. As one journalist described Joann Bell and Lucille McCord, they are "'ordinary people' in the extraordinary sense of the word." Carter Scott, *Prayer Ruling Unlikely to Resolve Hard Feelings*, UPI, Dec. 11, 1982, *available in* LEXIS, News Library, UPI File. Also greatly deserving of commendation is the lawyer who, on behalf of the ACLU, represented Joann Bell and Lucille McCord on a pro bono basis: Norman, Oklahoma civil rights attorney Micheal Salem.

[12] Bell v. Little Axe Indep. Sch. Dist., 766 F.2d 1391, 1407 (10th Cir. 1985). Teachers often attended, monitored, and participated in these sessions, which were advertised on classroom bulletin boards and devoted to "prayers, songs, and 'testimony' . . . concerning the benefits of knowing Jesus Christ" and Christianity. *Id.* at 1397.

[13] *See* Scott, *supra* note 11:

> Joann Bell was brought up in the Nazarene Church. Prayer sessions, "giving testimony," the practice of . . . speaking of [personal] religious experiences [before church members], and a strict moral code were a way of life. Lucille McCord has been a member of the Church of Christ for more than 40 years. . . . "We try to live the Bible," she said.

Id.

[14] *See id.*

[15] Rob Gloster, *Oklahoma Religion Suits Stir Bitter Feelings*, UPI, Nov. 7, 1981, *available in* LEXIS, News Library, UPI File.

spective of the Little Axe School District, though, they were just not "the right kind of Protestant"—the kind that had supported the school-sponsored religious activities.

Joann, Lucille, and their children were verbally and physically assaulted for successfully championing religious liberty.[16] At trial, Joann and Lucille testified that their children were harassed and insulted by teachers and students for not attending the daily school-organized prayer meetings.[17] After the suit was filed, upside-down crosses were taped to the children's school lockers, other students asked the children why they did not believe in God, and a prize-winning goat that belonged to Lucille's son, who was active in the school's Future Farmers of America chapter, had its throat slit.[18]

At school board meetings, Joann and Lucille were "publicly vilified" for their views on religious liberty.[19] "[F]rom the time the litigation began, they received numerous anonymous threatening telephone calls."[20] They were also "falsely listed on a 'hot' check list at a local grocery store."[21]

When Joann went to the school to check on her children after receiving news of a bomb threat there, she was attacked by a school employee, who repeatedly bashed her head against a car door and threatened to kill her.[22] Joann was hospitalized with a sprained shoulder and cuts; she also lost a lot of hair.[23]

The worst was yet to come, though. Shortly after the lawsuit was filed, Joann's family's home was burned to the ground while she was attending her son's football game.[24] Having received phone calls warning that her house would be torched, Joann is convinced that this was a case of arson.[25] While investigators said that the fire was of a "suspicious nature," they also said they were unable to find evidence as to who might have been responsible.[26] Joann believes the fire was set by someone who took literally a remark made by Little Axe School Board member Elizabeth Butts.[27] Asked

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[16] Rocky Scott, *Settlement Reached in School Prayer Case*, UPI, Oct. 15, 1986, *available in* LEXIS, News Library, UPI File.

[17] *Id.*

[18] *Id.*

[19] Letter from Micheal Salem, attorney representing Bell and McCord, to Nadine Strossen, President, ACLU 2 (Aug. 14, 1995) (on file with author).

[20] *Id.*

[21] *Id.*

[22] Gloster, *supra* note 15.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*; *see also* Scott, *supra* note 16.

[27] UPI, Dec. 8, 1982, *available in* LEXIS, News Library, UPI File (search for records containing "Little Axe" and "Butts").

to comment on the school employee's assault against Joann, Butts had said: "People who play with fire get burned."[28]

Joann's neighbors told her that they had seen a truck leaving the area of her home shortly before the smoke became evident.[29] Joann believed that her neighbors' description of this truck matched that of a truck driven by someone who worked for a school board member.[30] "Although both the Fire Marshall and the FBI told her they thought it was a case of arson, no one was ever prosecuted."[31]

Yes, to its credit, the Little Axe Volunteer Fire Department did show up at the fire.[32] But guess what? There was no water in their truck tanks, so they did not fight the fire.[33] Imagine every single thing you own—every possession, every scrapbook, every piece of clothing, every family photograph and heirloom—that is what burned to the ground along with the Bells' home.[34]

Joann, her husband, and their four children moved from Little Axe at the end of the school year.[35] Joann's trial testimony underscored that, although she played a major role in successfully upholding constitutional guarantees of religious liberty, it was at an enormous personal cost to herself and her family.[36] Fighting back tears, she testified: "I feel like we have been driven from the community. . . . People, I think, were ready to kill me if they could have gotten away with it."[37]

The tragic experiences of the Bell and McCord families constitute an extreme example, but alas only slightly more extreme than what many of our clients face when they dare to balk at government-supported religion in public schools. Let me cite another, current variation on the same theme, also involving a brave woman who dared to stand up for the religious liberty of herself and her children against a public school's attempts to inculcate religion. Like Joann Bell, she is a Christian, whose idea of Christianity is that it is a private matter, and not the business of the government or the government's schools.[38]

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[28] *Id.*

[29] Letter from Micheal Salem to Nadine Strossen, *supra* note 19, at 2.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] UPI, *supra* note 27.

[36] *Id.*

[37] *Id.*

[38] *See* John Burnett, *Mississippi Parent Challenges School Prayer and Wins* (National Public Radio Morning Edition broadcast, Apr. 19, 1995) (transcript *available in* LEXIS, News Library, NPR File) ("The Hurdall's [sic] are practicing Lutherans who believe religion has no place in public schools.").

When Lisa Herdahl moved to Ecru, Mississippi in 1993, with her husband and six children, she was shocked to learn that her children's public school there sponsors regular religious activities, including daily prayers and Bible readings broadcast over the public address system, and a Bible studies class taught from a fundamentalist perspective.[39] When her children refused to participate in these school-organized religious activities, their classmates taunted and harassed them, calling them "atheists" and "devil worshippers."[40] When a teacher put earphones on one of Lisa's sons to drown out the broadcast prayer and Bible readings, other children started mocking him as "football head."[41]

Because school officials repeatedly refused Lisa's requests to respect her children's rights, she turned to the ACLU to challenge the school's practices.[42] In April 1995, working together with People for the American Way, we won a federal court injunction against the morning prayers and Bible readings.[43] The judge ruled that Lisa's children had been stigmatized and had suffered for exercising their First Amendment rights to opt out of the school-sponsored devotional exercises, which he held unconstitutional.[44]

Successful as Lisa Herdahl's defense of religious liberty has been, life for her and her family became even harder after the lawsuit was started. As one press account reported: "The lawsuit mobilized the community against Herdahl."[45] Virtually every house and business posted a sign opposing the Herdahls' fight for religious freedom.[46] Lisa says that "she has . . . been made an outcast in the community, with [people] whispering about her in grocery stores and [threats of organizing] a boycott against the convenience store she manages."[47] She has also received a death threat, while her convenience store has received a bomb threat.[48]

The ostracism and worse reactions that are often faced by those who defend freedom of religion and conscience against governmental inculcation were indicated by an ACLU staff member whom U.S. Supreme Court Jus-

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[39] Stephanie Saul, *A Lonely Battle in the Bible Belt; A Mother Fights to Halt Prayers at Mississippi School*, NEWSDAY, Mar. 13, 1995, at A8.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] Herdahl v. Pontotoc County Sch. Dist., 887 F. Supp. 902, 912 (N.D. Miss. 1995); *see also* Burnett, *supra* note 38; *Mississippi Mom Calls Gingrich Idea "Completely Nuts"*, Reuters, June 18, 1995, *available in* LEXIS, News Library, REUNA File.

[44] *Herdahl*, 887 F. Supp. at 911-12; *see also* Burnett, *supra* note 38.

[45] Saul, *supra* note 39.

[46] *Id.*

[47] *Id.*

[48] Telephone Interview with David Ingebretsen, Executive Director, ACLU of Mississippi (Aug. 23, 1995).

tice Harry Blackmun quoted in a Court opinion.[49] To illustrate the dangerous societal divisiveness that results from government-sanctioned religious exercises, Justice Blackmun quoted Michele Parish, who was then the Executive Director of the ACLU of Utah:

> Of all the issues the ACLU takes on—reproductive rights, discrimination, jail and prison conditions, abuse of kids in the public schools, police brutality, to name a few—by far the most volatile issue is that of school prayer. Aside from our efforts to abolish the death penalty, it is the only issue that elicits death threats.[50]

I know that there are some incidents where school and other government officials are suppressing religious expression that should be protected because it is engaged in by individuals solely as a matter of their own voluntary choice, without government compulsion.[51] In any such case, I and the ACLU would be happy to join with Jay Sekulow and the American Center for Law and Justice (ACLJ) to challenge the resulting violation of religious freedom. One such situation in which we recently did support the ACLJ was a Supreme Court case from my own state of New York, in which we opposed a school district's suppression of truly individual, voluntary, religious expression.[52]

On the other hand, there are many incidents that involve the opposite constitutional violation—not the government's *suppression* of religion, but, to the contrary, the government's *promotion* of religion. In many situations, the government violates its constitutional obligation to maintain neutrality toward religion by unduly favoring religion, not by unduly disfavoring it. For example, more than thirty years after the Supreme Court's historic decisions invalidating school-sponsored classroom prayer and Bible readings,[53] surveys consistently show that many schools throughout the country violate these holdings.[54] And, given that many victims of this kind of religious

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[49] Lee v. Weisman, 505 U.S. 577, 607 n.10 (1992) (Blackmun, J., concurring).

[50] *Id.* (Blackmun, J., concurring) (quoting Michele A. Parish, *Graduation Prayer Violates the Bill of Rights*, UTAH B.J., June-July 1991, at 19, 19).

[51] It should be cautioned, though, that some claims by "Religious Right" organizations about situations allegedly of this sort have either been shown to be false, or have not been corroborated. *See infra* notes 156-63 and accompanying text.

[52] *See* Lamb's Chapel v. Center Moriches Sch. Dist., 113 S. Ct. 2141 (1993).

[53] *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

[54] *See* David E. Rosenbaum, *Prayer in Many Schoolrooms Continues Despite '62 Ruling*, N.Y. TIMES, Mar. 11, 1984, at A1 ("Mrs. Hunter's [second-grade] class is one of many across the nation where, despite the Supreme Court's prohibition of organized prayer in the schools more than 20 years ago, students continue to recite prayers, sing

freedom violation are understandably reluctant to challenge such violations—in light of the harassment and worse they would face—the cases that come to our attention, numerous as they are, still represent only the tip of the iceberg.

Despite the differences among the panelists, I would hope we could all agree that, on the one hand, school officials should not indoctrinate their students in government-sponsored religion and, on the other hand, they should not suppress their students' individual religious expression.[55] Notwithstanding the broad support for these two principles, both on the Supreme Court and in society at large, they are both violated regularly. This is not surprising. There are more than 15,000 public school districts in our country, and each district has numerous administrators and teachers, each with numerous opportunities to unduly favor or disfavor religious expression. Many are no doubt simply ignorant of what the Constitution and the Supreme Court require in this area. Some no doubt are aware of constitutional constraints but seek to defy or evade them.

I urge all of you future lawyers in the audience, who have shown your interest in religious liberty by participating in this Symposium, to put your talents to use in your future careers by standing up for religious freedom in the way that people such as Sarah Coles, Joann Bell, Lucille McCord, and Lisa Herdahl have done. The First Amendment's Religion Clauses, and the Supreme Court decisions that enforce them, are only worth the paper they are written on unless there are actual people who are willing to protest violations, and lawyers who are able and willing to defend them. As stated by Deborah Weisman, an eighth grader who began the challenge to school-sponsored graduation prayer that culminated in the Supreme Court's 1992 decision in *Lee v. Weisman*,[56] in which the ACLU represented the Weismans:

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hymns or read the Bible aloud.").

[55] These broad principles, as well as many others, were endorsed by a wide range of religious and civil liberties organizations in April 1995, in a document entitled *Religion in the Public Schools: A Joint Statement of Current Law* (Apr. 1995) (on file with author). The Drafting Committee was chaired by the American Jewish Congress and also included the following diverse organizations: American Civil Liberties Union, American Jewish Committee, American Muslim Council, Anti-Defamation League, Baptist Joint Committee, Christian Legal Society, General Conference of Seventh-day Adventists, National Association of Evangelicals, National Council of Churches, People for the American Way, and Union of American Hebrew Congregations. The Endorsing Organizations were equally diverse, ranging from separationist organizations, such as Americans United for Separation of Church and State, to religious organizations, such as the Evangelical Lutheran Church in America.

[56] 505 U.S. 577 (1992).

> Throughout the years of waiting for a ruling, we were harassed by hate mail and even death threats, and the media attention often bothered me. But I was encouraged by the support we received from friends, and at no time did I regret having taken our case to court. What amazes me is that it only took me and my family to make a difference.[57]

II.

Now I would like to briefly outline the general principles that govern the relationship between religion and the public schools consistent with the First Amendment Religion Clauses. You will see it is hardly the hostile, antireligious view that Pat Robertson decried, using the term "religious cleansing"[58] to malign what the Supreme Court has purportedly done in enforcing these two guarantees. With all due respect to the powerful preaching we heard in Reverend Robertson's opening presentation tonight, lawyer Robertson[59] would not get a very good grade in my constitutional law class based on his misleading account of the Court's holdings. Conversely, what I am going to say would not earn high grades as a sermon. It is certainly not the kind of arousing[60] rhetoric we heard from Pat Robertson tonight. Instead, I

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[57] *Real Life Sybil Liberties*, *supra* note 10.

[58] Robertson, *supra* note 8, at 604.

[59] Pat Robertson graduated from Yale Law School in 1955.

[60] I use that word deliberately, because of its sexual connotation. Robertson's oratory was not only "stirring" in a general sense, but it also focused on sexual violence both literally and metaphorically. He opened with a graphic description of a gang rape:

> Several years ago, the American people were horrified to learn of the gang rape of a teenage girl by a group of teenage boys that took place in a crowded pool hall in a seaport town in Massachusetts. Imagine the scene. An innocent, young woman was seized by six ruffians. She clawed desperately to free herself from their grasp. Yet, they were too strong. She screamed for help, yet the patrons looked on indifferently. Her clothes were ripped from her body, then she was pinned down on a pool table while one after another of the young men violated her body, her dignity, her very soul.

Robertson, *supra* note 8, at 595-96. Robertson then used the rape metaphor to describe what, in his view, our legal system has done to "our nation's religious heritage":

> Rape is a horrible crime, but my message tonight is not about the brutal rape of a young woman. I want to tell you about a much more insidious rape, a rape that has been repeated over and over, a rape that was not directed against the virtue and self-worth of a few individuals. I am talking about a rape of our entire society. A rape of our nation's religious heritage, a rape of our national morality, a rape of time-honored customs and institutions—yes, and, especially, a rape of our governing document, the United States Constitution.

Id. at 596.

am going to lecture you about what the Constitution actually provides, and how the Supreme Court has in fact interpreted it.

First, I want to outline the governing principles for resolving all religious liberty issues in the public schools. As the Supreme Court has stressed repeatedly, this area requires fact-specific judgments.[61] In any particular case, we must be sensitive to the overall factual context. There aren't too many bright-line rules. Therefore, I thought it would be most useful to outline the general principles that should guide our evaluation of any particular case. After doing that, I will comment on the constitutional status of two matters that are especially embroiled in controversy now: namely, what its proponents label "student-initiated" prayer at graduation and other school functions, and student religious expression.

The ACLU has argued, and the Supreme Court has agreed, that, taken together, the First Amendment religious freedom guarantees require public schools to maintain a neutral posture toward religion.[62] Public schools may neutrally teach about religion, but they may not favor religion by promoting it. And they may not disfavor religion either—for example, by discriminatorily omitting its role in such fields as history, art, or, to cite something very dear to my own heart, civil rights. Religion has played a critical role in historic human rights struggles throughout our history, including the abolition of slavery and racial apartheid. Eliminating discussion of and information about the critically important role of religion in our society is therefore not neutral, and hence violates the Establishment Clause.

In short, where religion is concerned, the public schools may and should *educate*, but they may not *indoctrinate*. Schools should *teach*, not *preach*. In the Supreme Court's felicitous phrase, "religious beliefs and . . . expression are too precious to be either proscribed or prescribed by the State."[63] University of Richmond Professor Robert Alley aptly captured this idea when he wrote that the state should be agnostic toward religion, taking no position on the accuracy of religious claims, and stressing that agnosticism is different from atheism or antagonism toward religion.[64]

A key concept that the Court has stressed in enforcing the government's neutral posture toward religion is the notion of non-endorsement. This non-endorsement test was first formulated in 1984 by Supreme Court Justice

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[61] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 598 (1992) ("Our jurisprudence in this area is of necessity one of line-drawing . . . .").

[62] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

[63] *Weisman*, 505 U.S. at 589.

[64] Robert S. Alley, *Public Education and the Public Good*, 4 WM. & MARY BILL RTS. J. 277, 328 (1995).

Sandra Day O'Connor.[65] It has since been adopted by the Court's majority.[66] The government may not do anything that would lead a reasonable observer to believe that it endorses either religion in general or any particular religion.[67]

During the panel discussion, our moderator, Dean Krattenmaker, asked: "What is the reason for this rule? What harm is caused by actual or apparent government endorsement of religion?"[68] The harm, as Justice O'Connor eloquently explained, is that it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[69] Such governmental preference of some individuals and exclusion of others, along religious lines, is completely at odds with our diverse, pluralistic, tolerant society. Moreover, even adherents of the governmentally-preferred religions may well suffer setbacks to their individual religious liberty as a result of the ostensible government benefit, as I will explain in a moment.

Our constitutional framers wisely recognized that religion is inherently a personal and private matter, which should be preserved for such private institutions as the family and the church, synagogue, temple, mosque, or other religious institutions.[70] In contrast, they recognized the public sphere and government should be neutral toward religion, neither discriminatorily shutting it out, nor preferentially exalting it.[71] As the Supreme Court recognized in *McCollum v. Board of Education*[72] in 1948: "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[73]

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[65] *See* Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

[66] *See* Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 593-94 (1989).

[67] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 605 (Blackmun, J., concurring) (1992); *id.* at 609-10 (Souter, J., concurring); *Allegheny County*, 492 U.S. at 593.

[68] Thomas Krattenmaker, Dean, William and Mary Law School, Williamsburg, Virginia. Panel Discussion at the Institute of Bill of Rights Law Student Symposium at the College of William and Mary (Feb. 23, 1995) (videotape on file in the College of William and Mary Law Library).

[69] *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

[70] *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-7 (1988); *id.* § 14-8, at 1204; Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1 (1986).

[71] *See generally* sources cited at *supra* note 70.

[72] 333 U.S. 203 (1948).

[73] *Id.* at 212; *accord* Lee v. Weisman, 505 U.S. 577, 606 (1992) (Blackmun, J., concurring). Justice Blackmun noted: "'Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate.'" *Weisman*, 505 U.S. at 606 (Blackmun, J., concurring) (quoting JEREMIAH S. BLACK,

Unfortunately, too many people—including our opening speaker tonight, Pat Robertson—wrongly think that such government neutrality is somehow hostile toward religion.[74] But nothing could be further from the truth.[75] This neutrality is at least as important for preserving a sacred, holy concept of religion as it is for preserving a secular state. Therefore, some of the staunchest separationists, from our Founding Fathers on, have been some of our most religious citizens.[76]

Religious Liberty, in ESSAYS AND SPEECHES OF JEREMIAH S. BLACK 53 (Chauncey F. Black ed., 1885)). Black was a former Chief Justice of the Commonwealth of Pennsylvania.

[74] *See generally* Robertson, *supra* note 8.

[75] Justice Blackmun distinguished government neutrality from hostility to religion in his majority opinion in Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 610 (1989) (holding that a government-sponsored religious display violated the Establishment Clause). In response to Justice Kennedy's dissent, Justice Blackmun observed:

> Although Justice Kennedy repeatedly accuses the Court of harboring a "latent hostility" or "callous indifference" toward religion, nothing could be further from the truth, and the accusations [are] as offensive as they are absurd. Justice Kennedy apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause.

Id.

[76] Some of the most religiously devout Supreme Court Justices have been among the Court's staunchest guardians of a strict separation between religion and government. National Public Radio Correspondent Nina Totenberg noted: "Justice Brennan is a religious man, a devout Catholic who attends mass every week. Yet, . . . he is the author of opinions erecting a high wall of separation between church and state, including decisions banning parochial school aid . . . ." Nina Totenberg, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 33, 37 (1990). Justice Blackmun was equally firm in his belief that breaking down the wall between church and state debased religion:

> While certain persons, including the Mayor of Pawtucket, undertook a crusade to "keep 'Christ' in Christmas," the Court today [in rejecting an Establishment Clause challenge to a city-sponsored nativity scene] has declared that presence virtually irrelevant. . . . The crèche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The city has its victory—but it is a Pyrrhic one indeed.
>
> The import of the Court's decision is to encourage use of the crèche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence. Surely, this is a misuse of a sacred symbol. . . . I cannot join the Court in denying either the force of our precedents or the sacred message that is at the core of the crèche . . . .

Lynch v. Donnelly, 465 U.S. 668, 726-27 (1984) (Blackmun, J., dissenting) (citations omitted).

As the Supreme Court has repeatedly stated, "a union of government and religion tends to destroy government and to degrade religion."[77] It destroys government because it leads to division along religious lines—the sort of conflicts that have historically led to brutal wars and are still tearing apart many countries, including the former Balkans.[78] And a union between government and religion degrades religion by watering it down or homogenizing it as a precondition for government approval.[79]

As Professor Teitel[80] reminded us during the panel discussion, we have one of the most religiously vibrant communities in the world. Those who have studied religion in America have consistently concluded that religion is so strong here precisely because of our Establishment Clause. For example, back in the 1830s, Alexis de Tocqueville observed that religion was the strongest of all American institutions, and wrote that "all thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state."[81] To this day, the United States has one of the highest percentages of regular attendance at religious services in the world—even higher than that of countries with official established religions.[82]

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[77] Engel v. Vitale, 370 U.S. 421, 431 (1962); *see also Weisman*, 505 U.S. at 606 n.8 (Blackmun, J., concurring) (quoting *Engel*, 370 U.S. at 431). "Likewise [the court] ha[s] recognized that '[r]eligion flourishes in greater purity, without than with the aid of Gov[ernment].'" *Weisman*, 505 U.S. at 608 (Blackmun, J., concurring) (quoting Letter from James Madison to Edward Livingston (July 10, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 1819-1836, at 98, 103 (Gaillard Hunt ed., 1910)).

[78] *See Engel*, 370 U.S. at 429 ("[The constitutional framers] knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval . . . .").

[79] *See Weisman*, 505 U.S. at 589-90.

> The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.

Id. The Court also stated: "[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." *Id.* at 590 (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 1784-1786, at 295, 301 (Robert A. Rutland et al. eds., 1973)).

[80] Ruti Teitel, Professor of Law, New York Law School. Panel Discussion at the Institute of Bill of Rights Law Student Symposium at the College of William and Mary (Feb. 23, 1995) (videotape on file in the College of William and Mary Law Library).

[81] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 295 (J.P. Mayer ed. & George Lawrence trans., 1969) (quoted in Marsh v. Chambers, 463 U.S. 783, 822 (1983) (Brennan, J., dissenting)).

[82] GEORGE GALLUP, JR. & JIM CASTELLI, THE PEOPLE'S RELIGION: AMERICAN

Just as religion flourishes when it is separate from government, the opposite is also true. Religion is threatened by government involvement, even government involvement that is ostensibly in the form of "support."[83] I can illustrate this through the latest school prayer case that the Supreme Court decided, *Lee v. Weisman*, which involved prayer at public high school graduation ceremonies. The ACLU represented Daniel and Deborah Weisman, a father and daughter, who successfully argued that the First Amendment barred prayers at public school graduation ceremonies.[84] As is typically the case with any organized school prayers, the school in that case had certain guidelines that it issued to the members of the clergy who delivered the prayers, which were designed to make such prayers nonsectarian.[85] But, as the Court noted, this kind of government involvement with religion should be at least as troubling to believers as to nonbelievers.[86]

For devout believers, it is surely abhorrent for a government official to tell them and their religious leader what to include and what not to include in a prayer. A Baptist minister, with whom I have collaborated in defending both the Free Exercise and Non-Establishment Clauses of the First Amendment, has noted that from a religious person's perspective, a so-called "nonsectarian prayer" is an oxymoron.[87] If a statement is nonsectarian, he observes, it cannot be a prayer; but conversely, if it is a genuine prayer, it cannot be nonsectarian.[88] Consider the case of one student in Texas, the son of a Baptist minister, whose school officials recently told him that his "nonsectarian, nonproselytizing" prayer could not include the words "Jesus" or "God."[89] Complaining that he did not know how to pray without saying

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FAITH IN THE 90'S 48 (1989).

[83] *See Weisman*, 505 U.S. at 608-09 (Blackmun, J., concurring). Justice Blackmun noted:

> When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being "taint[ed] . . . with a corrosive secularism." The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation. Keeping religion in the hands of private groups minimizes state intrusion on religious choice and best enables each religion to "flourish according to the zeal of its adherents and the appeal of its dogma."

Id. (Blackmun, J., concurring) (citations omitted).

[84] *Id.* at 599.

[85] *Id.* at 581.

[86] *Id.* at 588-89.

[87] Oliver S. Thomas, Remarks at the Law & Philanthropy Conference, New York University Law School (Oct. 15, 1993).

[88] *Id.*

[89] Pamela Coyle, *The Prayer Pendulum*, A.B.A. J., Jan. 1995, at 62, 65.

"Jesus," he sued the school for mental anguish caused by violating his religious freedom.[90]

So, the price that must be paid to utter a school-sponsored prayer is to strip it of its essential religious character, an affront to many devout people.[91] No wonder, then, that more religious institutions signed *amicus* briefs in support of the ACLU's position in the *Weisman* case—opposing the organized graduation prayer—than on the other side.[92] Indeed, this inevitable problem has led even some members of the so-called "Religious Right" to criticize the ploy that is now being advocated by other members of the Religious Right: student-initiated, nonproselytizing, nonsectarian prayer. For example, Kelly Shackelford, the Southwest Regional Director of The Rutherford Institute, has commented that "[t]he whole point is to keep government hands out of these things."[93]

By the same token, for those who are non-religious, or who follow different religious traditions from those assertedly embraced in school-sponsored prayer, the exercise is equally problematic, because, as Justice O'Connor stated in the passage I quoted previously, it signals to them that

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[90] *Id.*

[91] *See* Lynch v. Donnelly, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting). Justice Blackmun, dissenting from the majority's rejection of an Establishment Clause challenge to a city-sponsored nativity scene, stressed that, under the majority's rationale, "[t]he crèche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning." *Id.* (Blackmun, J., dissenting).

[92] Briefs supporting the ACLU's clients, the Weismans, were filed by the Baptist Joint Committee on Public Affairs, the National Council of Churches of Christ in the U.S.A., the General Conference of Seventh-Day Adventists, and James E. Andrews as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), as well as several Jewish organizations, including the American Jewish Congress, the American Jewish Committee, the Anti-Defamation League of B'nai B'rith, and the National Jewish Community Relations Advisory Council. *See* Brief Amici Curiae of the American Jewish Congress, Baptist Joint Committee on Public Affairs, American Jewish Committee, National Council of Churches of Christ in the U.S.A., Anti-Defamation League of B'nai B'rith, General Conference of Seventh-Day Adventists, People for the American Way, National Jewish Community Relations Advisory Council, New York Committee on Public Education and Religious Liberty, and James E. Andrews as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) in Support of Respondents, Lee v. Weisman, 505 U.S. 577 (1992) (No. 90-1014). The specifically religious institutions that filed in support of the school district were the Southern Baptist Convention and the National Association of Evangelicals. *See* Brief of the Southern Baptist Convention Christian Life Commission as Amicus Curiae Supporting Petitioners, *Weisman* (No. 90-1014); Brief Amicus Curiae of the Christian Legal Society, National Association of Evangelicals, and the Fellowship of Legislative Chaplains, Inc. in Support of Petitioners, *Weisman* (No. 90-1014).

[93] Coyle, *supra* note 89, at 65.

they are only second-class citizens.[94] This doubly adverse impact, upon both those who share the religious faith allegedly supported by government-sponsored exercises and those who do not, was well-stated by Justice Harry Blackmun, who noted:

> The import of the Court's decision [holding that a city-sponsored nativity scene did not violate the Establishment Clause] is to encourage use of the crèche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence. Surely, this is a misuse of a sacred symbol. Because I cannot join the Court in denying either the force of our precedents or the sacred message that is at the core of the crèche, I dissent . . . .[95]

The adverse impact of government-endorsed religious exercises upon those who do not share the beliefs advanced is not just a matter of abstract constitutional theory. Its tangible damage is demonstrated by Deborah Weisman's experience. The most common question she got about her case—and the one that the ACLU most often hears whenever we seek to enforce the Establishment Clause—is: "Why make such a big deal out of a small prayer?" Here is Deborah's answer to that question, speaking from her own experience as a public school student:

> I don't think a little prayer is a small thing. It excludes. They forced me to pray to someone else's God. That is a big deal. . . . When I am forced to participate in a ritual . . . it's an attempt to make me different from what I am—to change my identity, to make me conform.[96]

Those who falsely charge the Supreme Court with hostility toward religion often misstate the Court's holdings. Right-wing religious and political leaders consistently charge that the Court has completely banned prayer from the public schools, or, worse yet, that the Court has removed religion from the schools altogether.[97] Pat Robertson repeated this Big Lie over and over tonight. For example, he decried "the judicial distortions which have forbidden little children to pray or read the Bible in school."[98] He also

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[94] *See supra* text accompanying note 69.

[95] *Lynch*, 465 U.S. at 727 (Blackmun, J., dissenting).

[96] Telephone Interview with Deborah Weisman (Sept. 6, 1995).

[97] *See, e.g.*, Robertson, *supra* note 8, at 598.

[98] *Id.* at 602.

charged that the Court and civil libertarians have "misuse[d] the Constitution to exclude religion from the schools [and] the public square."[99] Correspondingly, he declared that prayer should be "returned" to the public schools.[100]

Ironically, Mr. Robertson gave a list of situations in which students' religious freedom was violated, he said, because of schools' distorted view of the Supreme Court's rulings.[101] He contends that the schools have an exaggerated sense of what the Court has said the Establishment Clause requires, and hence they prohibit the kind of individual, voluntary, non-school-endorsed religious expression that is both protected by the Free Speech Clause and not prohibited by the Establishment Clause.[102] Asserting that "[t]hese examples . . . have become the norm,"[103] he accused the schools of engaging in a "religious cleansing . . . that they believe has been mandated by the courts."[104] But any such distorted view is fueled by the very kind of mischaracterization we heard from Mr. Robertson himself tonight. If schools do in fact believe that the courts have mandated "religious cleansing," this may well be because critics such as Mr. Robertson himself have told them so.

Again, though, nothing could be further from the truth. Consistent with the guiding principle of government neutrality toward religion, the Supreme Court recognizes that individual students, and voluntarily-constituted student groups, are free to pray in school, subject only to the same constraints that apply to all student expression.[105] In short, they must not disrupt the education of other students.[106] For example, students may pray silently in class, but they may not do so out loud.

The only type of prayer that the Court has banned from the public schools is school-*sponsored* prayer.[107] In the graduation context, for exam-

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[99] *Id.* at 598.

[100] *Id.* at 606.

[101] *Id.* at 603.

[102] *Id.* at 603.

[103] *Id.* at 603.

[104] *Id.* at 604.

[105] *See* Board of Educ. v. Mergens, 496 U.S. 226, 247-53 (1990).

[106] *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 507-14 (1969) (holding that students' wearing of armbands in protest of the Vietnam War was not disruptive and was within the protection of the First and Fourteenth Amendments); *see also id.* at 511 ("[T]he prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.").

[107] *See* Lee v. Weisman, 505 U.S. 577 *passim* (1992); Engel v. Vitale, 370 U.S. 421, 429-30 (1962); *accord Mergens*, 496 U.S. at 253 (holding that student prayer that was not school-sponsored did not violate the Establishment Clause).

ple, students, parents, and/or religious leaders remain free to organize their own baccalaureate services, which may include organized group prayers.

III.

On the matter of graduation prayer, there is now a follow-up issue to the one upon which the Court ruled in *Lee v. Weisman*, which is the next subject I want to address. I have already indicated that in order to get around the Supreme Court decision in *Weisman*, a number of organizations, including the ACLJ, have endorsed what I think is only a ruse to circumvent the core of that holding. They advocate what they label, in an effort to camouflage its Establishment Clause defects, "student-initiated" graduation prayer, in which a majority of graduating students vote in favor of prayer and have a student lead the prayer at the ceremony. But this entails the same fundamental problems that, according to the Court's reasoning in *Weisman*, render unconstitutional any organized prayer in an official graduation ceremony.

It is true that *Weisman* happened to involve a prayer that was delivered by a rabbi, who was chosen by the school principal.[108] The rationale for the Court's decision, though, went far beyond these specific facts. The Court in *Weisman* focused on the subtle coercive pressures that accompany any religious exercise that is conducted as part of a school-sponsored event.[109] It stressed that, in a real sense, attendance at high school graduation is required, even if it is not literally mandatory.[110] It also emphasized the unavoidable entanglement between government and religion involved in any graduation prayers, because the school, at a minimum, will have to ensure that the prayers are nondenominational.[111]

The Court's reasoning, therefore, would clearly invalidate any organized prayer that is part of a school-sponsored graduation ceremony. So the device of "student-initiated prayer" is merely a fig leaf to try to cover the same fundamental constitutional flaws that the Court struck down in *Weisman*. Like the rabbi's prayer in the *Weisman* case, "student-initiated" prayer is "to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend."[112]

Weisman held that the Establishment Clause protects students from subtle peer pressure and from the message of exclusion.[113] These harms are hardly avoided through student elections or the leading of the prayer by a fellow student; to the contrary, these steps would probably aggravate the

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[108] *Weisman*, 505 U.S. at 581.
[109] *Id.* at 593.
[110] *Id.* at 595.
[111] *Id.* at 587-89.
[112] *Id.* at 589.
[113] *Id.* at 577.

problem. After all, as the Court has often recognized, teenagers are particularly prone to peer pressure.[114] Therefore, religiously dissenting students would probably feel especially excluded by a student-led prayer approved by a majority of their classmates.

A majority vote can never justify a constitutional violation. After all, constitutional guarantees are designed precisely to protect the rights of individuals or members of minority groups from the tyranny of the majority.[115] But, in the words of Professor Robert Alley, under a system of student-initiated prayer, the school "transfer[s] the responsibility for coercion to [a majority of its] students, [so they can] tyrannize a minority of their fellow students."[116]

Surely we would not let schools violate some students' free speech rights, or privacy rights, or any other rights, just because a majority of their peers voted to do so.[117] The same holds true of their rights under the religion clauses. Indeed, the entire purpose of adding the Bill of Rights—including the First Amendment—to our Constitution was to underscore that no majority, no matter how large, may deny fundamental rights to any minority, no matter how small.[118]

The Supreme Court eloquently set forth this essential idea in its landmark decision in *West Virginia Board of Education v. Barnette*. Significantly, *Barnette* involved the rights of school students who belonged to a small and unpopular religious group, the Jehovah's Witnesses.[119] The Court specifically ruled that Jehovah's Witness school students could not be forced to salute the American flag, even during wartime, because it violated their sincere religious and conscientious beliefs to do so.[120] More generally, the Court powerfully defended all fundamental rights for all dissenting individuals and all unpopular or relatively powerless minority groups,[121] declaring:

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[114] *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 835 (1988).

[115] James Madison observed, in his seminal discussion of majoritarian tyranny, that "[w]hen a majority is included in a faction [that is adverse to the interests of others], the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens." THE FEDERALIST NO. 10, at 60-61 (James Madison) (Jacob E. Cooke ed., 1961); *see also* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). Accordingly, constitutional protections of the minority were necessary.

[116] Alley, *supra* note 64, at 344.

[117] Pat Robertson and Jay Sekulow correctly defend the First Amendment right of individual students to engage in voluntary, non-disruptive prayer. Surely they would not maintain that this right could be suspended by the vote of a majority of students. Likewise, no other First Amendment rights—including those recognized in *Weisman*—can be abrogated in such a fashion.

[118] *See supra* note 115 and accompanying text.

[119] *Barnette*, 319 U.S. at 629.

[120] *Id.* at 641-42.

[121] *Id.* at 637-38.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[122]

That *Weisman*'s invalidation of organized prayer at school-sponsored graduation ceremonies cannot be circumvented through the ruse of a majority vote is clear not only from the inherent nature of the Bill of Rights and landmark precedents such as *Barnette*, but also from the Court's opinion in *Weisman* itself. The majority opinion specifically stressed that an electoral procedure cannot save a government-sanctioned prayer under the Establishment Clause.[123] The Court said: "While in some societies the wishes of the majority might prevail, the Establishment Clause . . . is addressed to this contingency and rejects [it]."[124]

So the ACLU and the ACLJ starkly disagree about the constitutionality of graduation prayers imposed by majority student vote. This disagreement has led to a flurry of lawsuits, with differing rulings, and there will be no conclusive resolution until the Supreme Court itself hears a case involving this factual scenario. The *ACLJ*'s position has been accepted in a Fifth Circuit decision,[125] which was included in the background materials that the organizers of this Symposium distributed to participants. The *ACLU*'s position has been accepted by the Third[126] and Ninth Circuits,[127] as well as some lower federal courts.[128] Curiously, the Symposium organizers did not include any of these important rulings in the background materials they circulated.

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[122] *Id.* at 638.

[123] Lee v. Weisman, 505 U.S. 577, 596 (1992).

[124] *Id.*

[125] Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

[126] ACLU v. Blackhorse Pike Regional Bd. of Educ., No. 93-5368 (3d Cir. June 25, 1993) (order enjoining a proposed student-initiated graduation prayer).

[127] Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), *vacated and remanded with directions to dismiss as moot*, 115 S. Ct. 2604 (1995).

[128] *See* Friedmann v. Sheldon Community Sch. Dist., No. C93-4052 (N.D. Iowa May 28, 1993), *vacated on standing grounds*, 995 F.2d 802 (8th Cir. 1993); Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993).

I believe that when the Supreme Court rules on the issue—which, contrary to some misstatements by some right-wing activists,[129] it has not yet done—the ACLU position will prevail. In 1993, the Supreme Court was asked to review the Fifth Circuit decision, and it declined to do so.[130] In its public statements, the ACLJ has grossly distorted the significance of the Court's denial of certiorari in *Jones*, claiming that this constitutes an affirmance of the Fifth Circuit's decision.[131] That is completely untrue. Precisely because I respect the legal acumen of my co-panelist at this Symposium, Jay Sekulow, I am particularly disappointed that he would so blatantly mischaracterize the law. Any denial of certiorari by the Supreme Court implies no views whatsoever on the merits, and is no forecast as to how the Court might ultimately rule, should it grant certiorari on a similar case in the future. As the Supreme Court declared, in a 1950 opinion by Justice Felix Frankfurter, "[T]his Court has rigorously insisted that such a denial [of certiorari] carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again [it] has to be repeated."[132]

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[129] *See, e.g., infra* note 131.

[130] Jones v. Clear Creek Indep. Sch. Dist., 113 S. Ct. 2950 (1993).

[131] *See* Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons From* Lamb's Chapel, 24 N.M. L. REV. 1, 2 n.4 (1994).

> Appearing on the June 8, 1993 edition of Pat Robertson's "[The] 700 Club" following the Supreme Court's denial of certiorari in the *Jones* case, the American Center for Law and Justice Chief Counsel [Jay Sekulow] inaccurately referred to the Court's action as an "affirmance" and further asserted that the action opened the door to organized school prayer and religious testimonials by students.

Id.

> Religious organizations, including the American Center for Law and Justice in Virginia Beach, Va., however, have seized Jones as ammunition in the battle for public opinion. Its representatives even have suggested that the Supreme Court's denial of certiorari was the same as upholding the appeals court case on its merits.

Coyle, *supra* note 89, at 65.

[132] Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950); *see also* Schiro v. Indiana, 493 U.S. 910, 910 (1989) ("There is a critical difference between a judgment of affirmance and an order denying a petition for a writ of certiorari. The former determines the rights of the parties; the latter expresses no opinion on the merits of the case."); William J. Brennan, Jr., *State Court Decisions and the Supreme Court*, 31 PA. B. ASS'N Q. 393, 402-03 (1960) ("A denial of certiorari is not an affirmance of the [lower] court judgment as some erroneously think. . . . The denial does not mean that the Court agrees with the result reached by the [lower] court . . . . The Court may well take the very next case raising the same question and reach a different result on the merits.").

And I will repeat it yet again! The Supreme Court has not directly[133] addressed the constitutionality of graduation prayer initiated by majority student vote. Most recently, in June 1995, it declined to consider the merits of the Ninth Circuit case in which the ACLU had successfully challenged "student-initiated" graduation prayer on behalf of students, because those students had graduated by the time the Supreme Court granted the school district's petition for a writ of certiorari.[134] For that reason, the Supreme Court vacated the lower court's findings and remanded the case back to the Ninth Circuit with "directions to dismiss as moot."[135] Such a ruling, like a denial of a certiorari petition, is not a ruling on the merits of the case, and therefore has no precedential impact.[136]

I believe that when the Court does consider the constitutional issues presented by "student-initiated" graduation prayers, it will invalidate them for the same compelling reasons that led to its ruling in *Weisman*. As I said, the Third and Ninth Circuits agreed with that conclusion. Here, for example, is the Third Circuit's rationale:

> [T]he graduation ceremony is a school sponsored event; the fact that the school board has chosen to delegate the decision regarding one segment of that ceremony to members of the graduating class does not alter that sponsorship, does not diminish the effect of a prayer on students who do not share the same or any religious perspective, and does not serve to distinguish, in any material way, the facts of this case from the facts of *Lee v. Weisman* . . . .[137]

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[133] I use the qualification "directly" because I believe that the Court's reasoning in *Weisman* implicitly condemns such prayer as unconstitutional, for the reasons explained in the text accompanying *supra* notes 108-24.

[134] Joint Sch. Dist. No. 241 v. Harris, 115 S. Ct. 2604, 2604 (1995), *vacating and remanding*, 41 F.3d 447 (9th Cir. 1994).

[135] *Id.*

[136] *See ACLU Says School Prayer Action Not Precedent-Setting; Remains Confident Court Will Ultimately Reject Student-Initiated Prayer* (ACLU Press Release), June 26, 1995 (on file with author).

> ACLU Legal Director Steven R. Shapiro said that the 9th Circuit decision "remains a persuasive explanation of why student-initiated prayer is a sham and a violation of the basic principles of the Establishment Clause." . . .
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> Shapiro emphasized that the Court's action today was not precedent-setting. "Many commentators," he said, "seem confused about the Court's decision . . . . They assume that in vacating the decision, the Court was expressing a disagreement with the 9th Circuit ruling. That however is not the case; when the Court declares that a case is moot, lower court decisions are automatically vacated."
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> "We may find that some on the far right will once again try to confuse the American public as to the meaning of the Court's action today."

Id.

[137] ACLU v. Blackhorse Pike Regional Bd. of Educ., No. 93-5368 (3d Cir. June 25,

The Court's reasoning in *Weisman* equally mandates the unconstitutionality of organized prayer at athletic events. Here, too, as a practical matter, many students are required to be present. Certainly that is true for team members, band members, and cheerleaders. Beyond that, there is enormous peer pressure on all students to attend. As the Court recognized in *Weisman*, such peer pressure constitutes the kind of practical coercion that requires the organized prayer to be struck down.[138] For these reasons, the Eleventh Circuit Court of Appeals has enjoined organized prayer before high school football games.[139]

IV.

For the reasons explained above, organized prayer at school-sponsored events violates the Establishment Clause. In contrast, truly individual, non-school-sponsored, student-initiated religious expression does not violate the Establishment Clause and is protected under the Free Speech Clause. As Justice O'Connor said in *Board of Education v. Mergens*,[140] "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[141]

Accordingly, the First Amendment would protect the right of a student speaker to voluntarily make religious statements even at a school-sponsored event. To underscore that the views are the student's own, and not the school's, the school should issue a disclaimer. Of course, as always, we would have to ensure that school officials did not manipulate either the selection of the student speaker or the content of the student's remarks. But if the student truly were expressing his or her own views, that should be protected. Justice Souter made precisely this point in his concurring opinion in *Weisman*.[142] Although that opinion espoused a strict separationist view, it recognized that student valedictorians could presumptively engage in their own religious speech: "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State."[143]

Individuals and organizations affiliated with the so-called "Religious Right" often claim that our legal system discriminates against religious

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1993) (order granting preliminary injunction).

[138] *See* Lee v. Weisman, 505 U.S. 577, 593-94 (1992).

[139] Jager v. Douglas County Sch. Dist., 862 F.2d 824, 834-35 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989).

[140] 496 U.S. 226 (1990).

[141] *Id.* at 250 (plurality opinion).

[142] *Weisman*, 505 U.S. at 630 n.8 (Souter, J., concurring).

[143] *Id.* (Souter, J., concurring).

speech. Pat Robertson and others repeated this false charge tonight.[144] To the contrary, though, precisely the opposite is true.[145] Continuing our focus on the schools, for example, the Supreme Court has given more protection to student religious speech than to student speech about other potentially controversial subjects. The Court reaches these disparate results by making inconsistent assumptions about students' impressionability and maturity—in particular, their ability to understand the distinction between the school as a neutral forum for student speech and the school as a partisan sponsor of such speech.[146]

In cases involving both student religious speech and student speech about other sensitive subjects, the Court has ruled that the pivotal constitutional question is the same: Do "reasonable observers" perceive the school as a neutral forum in which individual students are free to express their own views, or do they see the school as endorsing any particular viewpoint that a student expresses in that forum?[147] If the Court concludes that reasonable observers would deem the school to be serving merely as a forum, then it will uphold the free speech rights of student speakers in that forum, including students who engage in religious expression.[148] But if the Court concludes that reasonable observers would view the student speech as bearing the school's imprimatur, then it will hold that the school's restriction of controversial student expression does not violate students' free speech rights.[149] In the latter situation, moreover, the school would have an affirmative obligation to restrict religious expression, in order to comply with the Establishment Clause.

Although the Court's First Amendment analysis therefore centers on the same question in cases concerning both religious speech and non-religious speech, the Court has given diametrically different answers in the two kinds of cases. In *Bethel School District No. 403 v. Fraser*[150] and *Hazelwood*

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[144] Robertson, *supra* note 8.

[145] After the Symposium, on June 29, 1995, the Supreme Court issued two decisions that strongly protected the free expression of religious speech, including speech in public educational institutions. *See* Rosenberger v. Rector of Univ. of Va., 115 S. Ct. 2510 (1995); Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995). The dissenters in both cases argued that in the majority's zeal to protect freedom of religious expression, it had transgressed the Establishment Clause. *See Rosenberger*, 115 S. Ct. at 2533 (Souter, J., dissenting, joined by Stevens, Ginsburg & Breyer, JJ.); *Pinette*, 115 S. Ct. at 2464 (Stevens, J., dissenting); *id.* at 2474 (Ginsburg, J., dissenting).

[146] *See infra* notes 153-54 and accompanying text.

[147] *See Rosenberger*, 115 S. Ct. at 2526 (O'Connor, J., concurring).

[148] *See* Board of Educ. v. Mergens, 496 U.S. 226, 247-53 (1990); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969).

[149] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266-67 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986).

[150] 478 U.S. 675 (1986).

School District v. Kuhlmeier,[151] the Court ruled that schools could suppress student speech about abortion, divorce, and sex for fear that other students would perceive it as being school-sponsored.[152] In stark contrast, however, in *Mergens*, the Court ruled that schools could not suppress student religious speech because, it asserted, other students would *not* perceive that speech as school-sponsored.[153] The very same Justices made the opposite presumption about student impressionability and ability to distinguish neutrality from sponsorship.[154] Thus, far from student religious speech be-

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[151] 484 U.S. 260 (1988).

[152] *Id.* at 270-73. "Educators are entitled to exercise greater control over this . . . form of student expression to assure that . . . the views of the individual speaker are not erroneously attributed to the school." *Id.* at 271. "[I]t 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." *Fraser*, 478 U.S. at 685-86.

[153] *See Mergens*, 496 U.S. at 250 ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."); *see also id.* at 251 ("[S]tudents will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.").

[154] Chief Justices Burger and Rehnquist, and Justices O'Connor, Powell, Scalia, and White voted in support of suppressing students' non-religious speech in *Hazelwood* and/or *Fraser*, and against suppressing students' religious speech in *Mergens* and/or Bender v. Williamsport Area School District, 475 U.S. 534 (1986) (holding that individual school board member did not have standing to appeal district court ruling that a religious student group was allowed to hold meetings on school property during student activity periods). *Compare Hazelwood*, 484 U.S. at 260 (White, J., joined by Rehnquist, C.J., O'Connor & Scalia, JJ.) *and Fraser*, 478 U.S. at 675 (Burger, C.J., joined by White, Powell, Rehnquist & O'Connor, JJ.) *with Mergens*, 496 U.S. at 226 (O'Connor, J., joined by Rehnquist, C.J., White & Scalia, JJ.) *and id.* at 258 (Kennedy, J., joined by Scalia, J.) *and Bender*, 475 U.S. at 534 (majority opinion joined by O'Connor, J.) *and id.* at 551 (Burger, C.J., dissenting, joined by White & Rehnquist, JJ.) (arguing that school board member had standing to appeal, but agreeing with district court decision in favor of student religious group) *and id.* at 555 (Powell, J., dissenting) (same).

For example, see Justice Powell's analysis in *Bender*:

> We did note in *Widmar* that university students are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." Other decisions, however, have recognized that the First Amendment rights of speech and association extend also to high school students. I do not believe—particularly in this age of massive media information—that the few years difference in age between high school and college students justifies departing from *Widmar*.

Bender, 475 U.S. at 556 (Powell, J., dissenting) (citations omitted).

In *Fraser*, however, Justice Powell joined with the majority in denying high school students' First Amendment free expression rights regarding a sexually suggestive student speech at a school assembly, based on a quite different view of the significance of the students' age. *See Fraser*, 478 U.S. at 683 ("The speech could well be . . . dam-

ing *disfavored* by current Supreme Court rulings, it is in fact being *favored* above other student speech. This raises a serious Establishment Clause problem, especially because the Court has rightly held that Establishment Clause values are especially important in the public school setting, in light of our compulsory education laws and the students' relative immaturity.[155]

V.

In the closing portion of my remarks, I would like to comment on an article that the organizers of this Symposium distributed to the panelists among the background materials: *Defenders of the Faith*, written by Mark Curriden, a freelance journalist, and published in the December 1994 *American Bar Association Journal*.[156] The serious misimpressions conveyed by that article mirror those conveyed by Pat Robertson's sermonizing, with which this Symposium opened. Therefore, a consideration of its errors provides an opportunity to summarize my response to Reverend Robertson.

Defenders of the Faith purports to show that religious students' free speech rights are regularly violated in the public schools, with the complicity of the American Civil Liberties Union and other organizations that defend *all* provisions in the First Amendment, including the Non-Establishment Clause.[157] The article's recitation of alleged cases in which students' religious free speech rights were blatantly violated[158] is similar to the "parade of horribles" referred to by both Pat Robertson and Jay Sekulow tonight.[159] Whenever such cases actually occur, I will enthusiastically jump on the bandwagon with Pat and Jay, along with Elliot Mincberg, to defend the students' rights because, as Elliot said, "those would be slam dunk winners."[160] Therefore, a fundamental flaw with the *Defenders of the Faith* article, and my unhappiness at the fact that the Symposium organizers distributed it—without including any other material with a contrasting view-

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aging to its less mature audience . . . ."); *id.* at 685 ("A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.").

[155] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Id.

[156] Mark Curriden, *Defenders of the Faith*, A.B.A. J., Dec. 1994, at 86, 86.

[157] *Id.* at 88.

[158] *Id.*

[159] *See* Robertson, *supra* note 8.

[160] Mincberg, *supra* note 9.

point—was its suggestion that organizations such as the ACLU and People for the American Way oppose *all* religious expression in public schools. This insidious misrepresentation was protested by the ACLU's Legal Director, Steven R. Shapiro, in a letter to the editor that was published in the *ABA Journal*:

> I am concerned that your December feature "Defenders of the Faith" . . . will have left readers with a misimpression of the American Civil Liberties Union's position on religion in public schools.
>
> The ACLU does not oppose students' right to pray quietly in school. We do oppose school-sponsored prayers. We sent a letter to school board members and school administrators last April that states: "Individual students already have a right to pray at any time during the school day so long as they do not disrupt the education process."
>
> Similarly, the ACLU does not take the position that Bibles are off-limits in school. We believe the Constitution protects a student's right to read the Bible quietly in school during free time and the school's right to teach the Bible as a historical text. What the Constitution does not permit is use of the Bible in schools for religious indoctrination.
>
> Finally, the ACLU does not object to "any" discussion of religion in school. It is appropriate to discuss the role religion has played in society. It is inappropriate to teach religious dogma in public schools.[161]

Turning to the cases in which students' religious expression rights were violated, according to the *Defenders of the Faith* article, another letter to the editor of the *ABA Journal* reveals that the "research" underlying that article is highly questionable. Let me share with you relevant portions of this letter, which was written by two partners at the respected Seattle law firm of Davis, Wright & Tremaine:[162]

> Dear Editor:
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> The article "Defenders of the Faith" in your December issue got our attention. We wanted to know more about the "cases" featured in the article that were handled by law firms

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[161] Steven R. Shapiro, *Time Out for Prayer*, A.B.A. J., Mar. 1995, at 8.

[162] The *ABA Journal* did not publish this letter, and its authors did not receive any response to it from the editors of the *Journal*. Telephone Interview between Donna Wasserman, Assistant to Nadine Strossen, and Howard Stambor, Partner at Davis, Wright & Tremaine (Aug. 23, 1995).

associated with the Religious Right and to discover the basis for the complaint that public schools routinely trample on the constitutional rights of religious students.

First we called the author, Mark Curriden. He told us that all his information came from several of the organizations featured in the article. We then called those organizations and, when possible, the school districts. Jay Sekulow's assistants at the largest of these organizations, the ACLJ, could provide no information about any of these "cases." Mr. Sekulow himself declined to return our calls. We had more success with other organizations. This is what we learned about some of the "cases" reported in your article:

[The letter then describes the specific facts that its writers learned about each purported case and shows that the alleged events described in the article either had not in fact occurred or could not be corroborated.]

[In conclusion,] [i]t appears to us that the "outrageous cases" described in "Defenders of the Faith" are not "cases," are not particularly "outrageous," and do not really involve religious freedom. It would have been more accurate to say they are anecdotes which, when repeated, tend to cause people to believe that isolated and inaccurately reported incidents reflect typical school policies, tend to confuse people about the law regarding religion in the schools, and tend to lead people to conclude that the Supreme Court's current interpretation of the First Amendment should therefore be changed.[163]

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[163] Letter from Howard Stambor & Bruce Lamka, Partners at Davis, Wright & Tremaine, to the Editor, *ABA Journal* 1-3 (Dec. 14, 1994) (on file with author). In the letter, the authors explored and clarified several examples of the cases cited in the *Defenders of the Faith* article:

1. "In Arkansas, a fifth grader was ordered by a teacher to turn his T-shirt inside-out to hide the Bible verse on it."

According to Susan Engel of Liberty Counsel, a fifth-grade girl in Arkansas wore a shirt to school with a picture of a garbage can and the words "It's no place for a baby" and "Stop Abortion" on the front. The back said "God made woman with a womb, not a tomb" and "It's a child, not a choice." Her teacher asked her to turn the shirt inside-out. She told her parents and they called Liberty Counsel. Mat Staver told her to wear the shirt again and say that her lawyers said that she had a constitutional right to do so. She did, and that was the end of the matter.

Incidentally, we were also told by the Rutherford Institute that it handled a similar mater (the T-shirt had a drawing of a dismembered fetus and the words "Kind of looks like murder"). Neither of these incidents involves Bible verses and in our view would be more properly described as raising issues of students'

I want to emphasize the reason why I consider it essential to raise this letter and the problems it flags with the *Defenders of the Faith* article that the Symposium organizers circulated. It is not because the purported "outrageous cases" the article describes would not violate students' rights; I will stress yet again that, if the article had accurately described the cases, these would constitute violations of students' rights. But the danger arises from the extent to which alleged cases of this sort are, at best, atypical, and, at worst, apocryphal. At best, unrepresentative cases are being used in an inflammatory way to distort what the Constitution itself commands and what the Supreme Court has held.

And that leads me to my conclusion. During the 1992 Republican Convention, Pat Buchanan said: "There is a religious war going on in our coun-

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freedom of speech rather than freedom of religion.

2. "A boy in Spokane, Wash., was told by his principal that he violated the separation of church and state when he prayed silently before eating in the school lunchroom."

The Western Center for Law and Religious Freedom told us that a father called to complain that the assistant principal at Glover Junior High School in Spokane told his son and daughter not to pray in the school cafeteria at lunch. The Center told the father this was a violation of the students' constitutional rights but did not know the end of the story because the father had not returned the Center's calls.

We called the assistant principal. He told us that the father and the students had met with him and that he had told them he knew nothing about the incident. When the father then asked his children if they were sure it was the assistant principal who told them not to pray, they said "No" because they had not looked up from their prayers. They said they assumed it was the assistant principal because he usually patrols the lunchroom. It turns out the students are often teased by their classmates because they pray conspicuously. The father then apologized.

3. "Another student in Florida had her Bible confiscated by a teacher who saw her reading it during recess."

We cannot find anything to corroborate this story.

4. Bryce Fisher "was told he couldn't read from his Bible in class."

Bryce is a first-grader in South Bend, Indiana. His teacher told her class to bring in and read from a favorite book. Bryce brought a Bible. The teacher stopped him because, as the assistant superintendent of the district explained to us, she was caught off guard and reacted quickly to prevent what she feared would be a complaint-generating event. The district has now adopted a policy that readings of this sort must be from a selected list of books.

Id. at 1-3.

After reviewing these examples, the authors concluded:

While we are troubled generally that debate on these important issues should proceed on the basis of misinformation, we are particularly troubled that a publication such as yours, which reaches a half-million of the most influential people in America, should lend its considerable credibility to this sort of apocrypha and hope you will take this opportunity to correct the record.

Id. at 3.

try for the soul of America."[164] In all wars, children are the innocent victims. This one is no exception. In the relentless battle to reinstate government-sponsored religion into public schools, the inevitable losers are our young people and the nation's future that they represent.

[164] Tom Bethell, *Culture War II*, AM. SPECTATOR, July 1993, at 16, 16.