

**THE RELIGIOUS VIEWPOINT  
ANTIDISCRIMINATION ACT: USING  
STUDENTS AS SURROGATES TO  
SUBJUGATE THE ESTABLISHMENT  
CLAUSE**

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INTRODUCTION.....	127
I. THE EMERGENCE OF ESTABLISHMENT	
CLAUSE JURISPRUDENCE IN PUBLIC SCHOOLS.....	130
II. INCONSISTENCY IN THE COURTS .....	136
<i>A. Establishment Clause Tests</i> .....	138
1. The <i>Lemon</i> Test.....	138
2. The Endorsement Test .....	141
3. The Coercion Test .....	143
III. RELIGIOUS EXERCISES AS AN EXPRESSIVE ACT .....	145
IV. THE RVAA: IS IT CONSTITUTIONAL? .....	149
<i>A. The Lemon Test: Does the RVAA Have         a Secular Purpose?</i> .....	151
1. The Statute on Its Face .....	152
2. The History Behind the RVAA .....	156
<i>B. Does the RVAA Convey a Message         of Endorsement?</i> .....	159
<i>C. Is the RVAA Coercive?</i> .....	160
<i>D. Legal Analysis Through Cherry-Picking</i> .....	162
<i>E. And Now . . . the Rest of the Story</i> .....	166
<i>F. The Mischaracterization of School-Sponsored         Speech</i> .....	173
CONCLUSION.....	179

INTRODUCTION

It is no coincidence that the first line of the First Amendment to the United States Constitution states: “Congress shall make no

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law respecting an establishment of religion . . . .”<sup>1</sup> Many immigrants to the New World in the seventeenth and eighteenth centuries were intimately familiar with the tyranny and oppression created by the marriage of religion and government.<sup>2</sup> This express prohibition, known as the Establishment Clause, “erected a wall between church and state” that was to remain “high and impregnable.”<sup>3</sup> However, many of the Founding Fathers were men of faith, and for them a prohibition against governmental entanglement with religion was not enough.<sup>4</sup> To avoid the establishment of a secular and Godless society, the exercise of religious faith had to be protected, so a second religious clause was attached to the aforementioned Establishment Clause. The attachment, which became known as the Free Exercise Clause, states: “or prohibiting the free exercise thereof.”<sup>5</sup> The by-product is a dichotomous paradox where adhering to one clause can result in a violation of the other, especially when private citizens exercise their religious freedoms in public, governmental venues.<sup>6</sup> Nowhere is this paradox more prominent than in the operation of public schools.

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<sup>1</sup> U.S. CONST. amend I.

<sup>2</sup> See, e.g., *Religion and the Founding of the American Republic*, LIBR. CONGRESS, <http://www.loc.gov/exhibits/religion/religion.html> (last visited Nov. 17, 2012) (providing a detailed description of the influence of religion on the colonization of North America and the development of the founding constitutional principles).

<sup>3</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). There exists considerable debate regarding the intent of the Founding Fathers and the degree of separation.

<sup>4</sup> See, e.g., DAVID BARTON, *SEPARATION OF CHURCH & STATE: WHAT THE FOUNDERS MEANT* (2007); JOHN EIDSMOE, *CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS* (1987) (describing the religious character of our Founding Fathers and asserting that the wall of separation between church and state was never intended to be absolute). *But see* ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (1996) (arguing that many of the Founding Fathers were in fact antireligion and used secular principles of the Enlightenment as the guide for the construction of the government).

<sup>5</sup> U.S. CONST. amend I.

<sup>6</sup> See *Van Orden v. Perry*, 545 U.S. 677, 677 (2005) (“[T]he principle that governmental intervention in religious matters can itself endanger religious freedom requires that the Court neither abdicate its responsibility to maintain a division between church and state nor evince a hostility to religion.”); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001) (“[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.”).

Despite being ratified in 1791, the Establishment Clause would lay dormant as a potential mechanism for ensuring religious neutrality in public schools for almost 160 years.<sup>7</sup> Sadly, it was not due to a lack of enforcement opportunities. The realities of religious practice in America was antithetical to the romanticized views of religious tolerance,<sup>8</sup> and the same bigotry which resulted in waves of mass migrations to the New World was “used to discriminate, suppress and even kill the foreign, the ‘heretic’ and the ‘unbeliever.’”<sup>9</sup> For almost half a century after the Bill of Rights was ratified, the Establishment Clause was viewed as a barricade that prevented any federal involvement with religion, leaving each state to decide which religious exercises were to be practiced in their public schools.<sup>10</sup> Religious neutrality and secular approaches to education did not exist.<sup>11</sup> Most states not only permitted religious exercises in public schools but also mandated that religious exercises be led by teachers and headmasters.<sup>12</sup> Daily devotionals, prayers, and religious exercises were common and reflected the ideology of the religious majority, usually Protestant.<sup>13</sup> Students who did not share the same religious beliefs either acquiesced under substantial pressure,

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<sup>7</sup> The first legitimate application of the Establishment Clause to curtail state-sponsored religious practices in schools was in 1948, 157 years after the First Amendment was ratified.

<sup>8</sup> See Kenneth C. Davis, *America's True History of Religious Tolerance*, SMITHSONIAN MAGAZINE, Oct. 2010, available at <http://www.smithsonianmag.com/history-archaeology/Americas-True-History-of-Religious-Tolerance.html?c=y&page=1>. Evidence of religious intolerance was seen in the “Bible Riots of 1844” when homes were destroyed, Catholic churches were burned, and over twenty people were killed in Philadelphia. *Id.* In 1838, three days after the Governor of Missouri ordered all Mormons to leave the state, seventeen men, women, and children were murdered in the Mormon community of Haun's Mill. *Id.*

<sup>9</sup> Davis, *supra* note 8.

<sup>10</sup> See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in part) (“This textual analysis is consistent with the prevailing view that the Constitution left religion to the States.”); Steven K. Green, *All Things Not Being Equal: Reconciling Student Religious Expression in the Public Schools*, 42 U.C. DAVIS L. REV. 843 (2009).

<sup>11</sup> See Catherine M.A. McCauliff, *Religion and the Secular State*, 58 AM. J. COMP. L. (SUPPLEMENT) 31, 31-32 (2010).

<sup>12</sup> See Green, *supra* note 10, at 851.

<sup>13</sup> See BRUCE J. DIERENFIELD, *THE BATTLE OVER SCHOOL PRAYER: HOW ENGEL V. VITALE CHANGED AMERICA* (2007).

intimidation, and physical violence or they stopped attending school.<sup>14</sup>

These practices went unchallenged, with the exception of a few state cases, from the late nineteenth century, which ruled that the state-mandated religious exercises were a violation of the Establishment Clause.<sup>15</sup> These rulings, however, were ignored, and religious indoctrination continued. Other faiths, specifically Catholics, grew increasingly dissatisfied with Protestant religious indoctrination in the public schools.<sup>16</sup> This dissatisfaction led the Catholic Church to establish a parallel system of schools, an endeavor which was exceptionally expensive but largely successful.<sup>17</sup> It was not until the middle of the twentieth century, more than 150 years after the ratification of the Bill of Rights, that federal courts applied the religion clauses of the First Amendment to address overtly sectarian practices in public schools.<sup>18</sup>

#### I. THE EMERGENCE OF ESTABLISHMENT CLAUSE JURISPRUDENCE IN PUBLIC SCHOOLS

In 1947, the Supreme Court, in *Everson v. Board of Education*, ruled that a state statute that reimbursed parents for costs incurred in transporting children to and from school, both

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<sup>14</sup> See JOAN DELFATTORE, *THE FOURTH R: CONFLICTS OVER RELIGION IN AMERICA'S PUBLIC SCHOOLS* (2004); Vincent P. Lannie, *Alienation in America: The Immigrant Catholic and Public Education in Pre-Civil War America*, 32 REV. POLITICS 503 (1970).

<sup>15</sup> See *People v. Bd. of Educ.*, 92 N.E. 251, 257 (Ill. 1910); *Bd. of Educ. v. Minor*, 23 Ohio St. 211 (Ohio 1872); *State v. Dist. Bd.*, 44 N.W. 967, 976 (Wis. 1890).

<sup>16</sup> See Lenore Hervey, *Religion and Education*, FIRST AMENDMENT CENTER (2008), available at <http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/vol3ch1.pdf> (noting that it was Roman Catholics who were the chief objectors to what they deemed Protestant practices in public schools in the nineteenth century).

<sup>17</sup> See Donald L. Drakeman, *Everson v. Board of Education and the Quest for the Historical Establishment Clause*, 49 AM. J. LEGAL HIST. 119, 124 (2007); *Statistics About Non-Public Education in the United States*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/oi/nonpublic/statistics.html> (last modified Aug. 16, 2011) (42.8% of all children that attended private schools in 2009 went to a Catholic school).

<sup>18</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Ill. ex rel. McCollum v. Bd. of Educ.* 333 U.S. 203, 211-12 (1948).

public and private, did not violate the Establishment Clause.<sup>19</sup> A year later, the Court, in *Illinois ex rel. McCollum v. Board of Education*, ruled that the practice of allowing religious institutions to use public school classrooms to provide religious instruction to students during the school day was a clear violation of the Establishment Clause.<sup>20</sup> These cases not only exposed the discontinuity between the First Amendment's religion clauses and the reality of religious practice in public schools, but also they initiated a divergent course for two educational issues with Establishment Clause implications, one permissive, the other restrictive.

The permissive application, which arose from *Everson*, allowed federal courts to essentially dismantle funding barriers to the degree that today's private, sectarian schools are eligible to receive resources from a multitude of governmental programs.<sup>21</sup>

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<sup>19</sup> *Everson*, 330 U.S. at 18. The Court considered the State's legislative purpose and the primary effect of the statute and noted that the Establishment Clause requires a "state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id.*

<sup>20</sup> *McCollum*, 333 U.S. at 212. The Court noted:

Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.

*Id.* at 209-10.

<sup>21</sup> For example, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court held that a state statute that allowed taxpayers to deduct educational expenses did not violate the Establishment Clause since the "aid to parochial schools is available only as a result of decisions of individual parents" and thus "no 'imprimatur of state approval' can be deemed to have been conferred on . . . religion," *id.* at 399 (citation omitted). Also, in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court found the use of a sign language interpreter to assist deaf students attending religious schools did not violate the Establishment Clause, stating: "[G]overnment programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge," *id.* at 8. Additionally, in *Agostini v. Felton*, 521 U.S. 203 (1997), the Court held that the use of a teacher, funded through public tax dollars, to deliver instruction to disadvantaged youth as a part of general welfare program on the premises of a religious school did not violate the Establishment Clause since the aid is distributed on "secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," *id.* at 231. In *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court held that the distribution of educational materials and equipment to public and private schools based upon enrollment was not a violation of the Establishment Clause and stated: "[I]f numerous private choices, rather than the single choice of a

Generally, if the distribution of aid associated with a general welfare program is available to a broad class of citizens without reference to religion, and the distribution of that aid is determined by the private choices of participants, then any money that goes to a private, religious school does so without any governmental influence.<sup>22</sup> The allocation of public funds to private, sectarian schools is the most consistent and least contentious area of Establishment Clause jurisprudence.

The same cannot be said for the restrictive application—the secularization of the public schools. The *McCullum* decision marked the beginning of a piece-by-piece dismantling that resulted in the removal of state-sponsored or state-endorsed religious practices from the public school environment. Daily prayers recited by teachers or students in public schools were held to be a violation of the Establishment Clause even when students were allowed to leave the room.<sup>23</sup> Similarly, daily devotional readings of Biblical passages by teachers were held to be a violation of the Establishment Clause.<sup>24</sup> Outlawing the teaching of evolution because it contradicted the book of Genesis was held to be a violation of the Establishment Clause.<sup>25</sup> Posting the Ten Commandments in public school classrooms, even when private funds were used to procure the plaques, was held to be a violation of the Establishment Clause.<sup>26</sup> Mandating that teachers provide

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government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment,” *id.* at 810. Finally, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court held that an Ohio voucher program that made money available to children who attended low-performing schools to attend other schools of their choice, some of which were private religious schools, did not violate the Establishment Clause since “the Ohio program [was] neutral in all respects toward religion,” *id.* at 653. *See also Statistics About Non-Public Education*, *supra* note 17 (private schools are eligible to receive Title 1 funding for disadvantaged children, Pell Grants can be used at private religious schools, federal e-rate program provides funds for technology, FEMA funding can be used to rebuild private religious schools, IDEA funds can be used on the grounds of private religious schools state to serve students with learning disabilities); KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* (2d ed. 1985).

<sup>22</sup> *See Mitchell*, 530 U.S. at 816.

<sup>23</sup> *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

<sup>24</sup> *Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963).

<sup>25</sup> *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968).

<sup>26</sup> *Stone v. Graham*, 449 U.S. 39, 42-43 (1980).

equal treatment of, or read a disclaimer promoting, creation science while teaching evolution was held to be a violation of the Establishment Clause.<sup>27</sup> While a moment of silence at school is permissible, suggesting that the moment of silence is for voluntary prayer or indicating that this is the preferred exercise was held to be a violation of the Establishment Clause.<sup>28</sup> Planning for and directing the contents of a prayer to be offered at graduation by a religious leader, such as a rabbi or pastor, was held to be a violation of the Establishment Clause.<sup>29</sup> Allowing the majority of students to elect one student to offer a prayer before school-sponsored events, such as football games, was also ruled to be a violation of the Establishment Clause.<sup>30</sup>

This secularization of the nation's public schools was not well received by the religious establishment.<sup>31</sup> Powerful and influential groups, led and organized by dogmatic religious figures, established foundations and advocacy groups in a determined effort, not only to protect the rights guaranteed under the Free Exercise Clause, but also to return to a time of monotheistic domination.<sup>32</sup> These organizations argued that the federal judiciary was hostile toward religion and that the Christian majority had been and continued to be the victim of horrific forms

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<sup>27</sup> *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 765 (M.D. Pa. 2005). Creation science is still a violation of the Establishment Clause even when referred to as intelligent design. *See id.*

<sup>28</sup> *Wallace v. Jaffree*, 472 U.S. 38, 60-61 (1985).

<sup>29</sup> *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

<sup>30</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000).

<sup>31</sup> *See* Michael D. Waggoner, *When the Court Took on Prayer and the Bible in Public Schools*, RELIGION & POL. (June 25, 2012), available at <http://religionandpolitics.org/2012/06/25/when-the-court-took-on-prayer-the-bible-and-public-schools/> (“[T]he reaction to the cases was immediate and intense.”).

<sup>32</sup> *See* Josie Foehrenbach Brown, *Representative Tension: Student Religious Speech and the Public School's Institutional Mission*, 38 J.L. & EDUC. 1, 74-75 (2009) (“Such controversies are used as rallying points in the campaigns of advocacy groups such as the ADF, ACLJ, the Rutherford Institute, and the Liberty Counsel, cited to validate the largely hyperbolic assertion that Christians have been targeted for attack by the dominant culture and can therefore claim their victimization justifies licensing them to present religious content in public ceremonies and other governmental settings, sometimes over the objections of other citizens, including other Christians, who do not agree that the cause of religious liberty is served by a campaign seeking to reclaim the public square, striving to return Christianity to the central place its historic demographic dominance once ensured.” (citation omitted)).

of discrimination.<sup>33</sup> Many of these claims were highly exaggerated, but not completely without merit. Uninformed teachers and administrators were under the mistaken impression that any mention of religion in the schools constituted a violation of the Establishment Clause, when in fact, such was not the case.<sup>34</sup> The battles over the secularization of the public schools have produced a litany of state statutes and local policies designed to return religious exercises to the public school.<sup>35</sup> Most of these efforts, when challenged, have been found unconstitutional.<sup>36</sup> However, Free Exercise proponents are not easily discouraged from their fundamental beliefs, and their efforts continue.<sup>37</sup>

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<sup>33</sup> See DAVID CANTOR, *THE RELIGIOUS RIGHT: THE ASSAULT ON TOLERANCE & PLURALISM IN AMERICA* 57-65 (1994). Jerry Falwell described the decisions of the Supreme Court as the equivalent of raping the Constitution and the Christian religion. *Id.* at 60 Pat Robertson went even further by claiming that the manner in which Christians were being treated by the Supreme Court was equivalent to the treatment of the Jews during the holocaust. *Id.* at 65.

<sup>34</sup> See *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (“[I]t might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”); McCauliff, *supra* note 11, at 35.

<sup>35</sup> Neil H. Young, *Our Father? The Religious Battle Over School Prayer*, THE HUFFINGTON POST (Nov. 11, 2011), [http://www.huffingtonpost.com/neil-j-young/our-father-the-religious\\_b\\_1076366.html](http://www.huffingtonpost.com/neil-j-young/our-father-the-religious_b_1076366.html) (last visited Jan. 27, 2013) (“Since the U.S. Supreme Court banned prayer and other devotional activities in public schools in the early 1960s, dozens of states have circumvented the law by passing legislation similar to that proposed in Florida this month.”).

<sup>36</sup> See, e.g., *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 317; *Lee*, 505 U.S. at 599; *Wallace v. Jaffree*, 472 U.S. 38, 60-61 (1985). *But see Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 972 (5th Cir. 1992) (holding nonsectarian, nonproselytizing prayer delivered by an elected member of the senior class without school approval, sponsorship, or oversight was not as coercive as a graduation prayer delivered by recruited and supervised member of the clergy); *Oxford v. Beaumont Indep. Sch. Dist.*, 224 F. Supp. 2d 1099, 1114 (E.D. Tex. 2002) (holding that a clergy in the school’s program violated the Establishment Clause); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996) (holding that the School Prayer Statute violated all three prongs of the Establishment Clause).

<sup>37</sup> See *Brown*, *supra* note 32, at 22 (arguing that several attempts at introducing religious expression in public schools under the guise of equal treatment or under the blanket of the Equal Access Act are an attempt “to gradually re-install demographically dominant forms of Christianity as the official religion of the community and school”).



In 2007, the State of Texas, which is no stranger to Establishment Clause litigation, passed the Religious Viewpoint Antidiscrimination Act (RVAA) in an effort to protect voluntary student expression of religious viewpoints in public schools.<sup>38</sup> Clearly, public schools and school personnel must maintain neutrality when it comes to religious matters, but neutrality should not be confused with hostility. When school officials attempt to eliminate all religious symbols and references from public schools, that effort does not represent neutrality. Elimination of all religious references in an effort to promote neutrality “was *not* the view of those who adopted our Constitution, who believed that the public virtues inculcated by religion are a public good.”<sup>39</sup> Further evidence regarding the permissibility of religion in public schools can be found in the Department of Education notice entitled Guidance on Constitutionally Protected Prayer in Public Elementary Schools, which protects the rights of students in public secondary and elementary schools to “among other things . . . read their Bibles or other scriptures, say grace before meals, and pray or study religious materials with fellow students during recess, the lunch hour, or other noninstructional time to the same extent that they may engage in nonreligious activities.”<sup>40</sup>

The operative question is: Do the mandates codified by the State of Texas in the RVAA breach the barrier of neutrality in an attempt to protect religious expression in public schools? Are all the mandates of the statute unconstitutional, or are some portions severable? The purpose of this Article is to assess the constitutionality of the RVAA based on the standards typically applied by federal courts in Establishment Clause cases. These include the *Lemon* Test, the Endorsement Test, the Coercion Test and the First Amendment right of expression. This analysis will reveal that while portions of the RVAA are constitutional and even necessary to protect the Free Exercise rights of students,

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<sup>38</sup> TEX. EDUC. CODE ANN. §§ 25.151-.156 (West Supp. 2011).

<sup>39</sup> *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring).

<sup>40</sup> Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 68 Fed. Reg. 9645-01 (Feb. 28, 2003) (internal quotation marks omitted).

others will likely fail multiple measures of Establishment Clause analysis.<sup>41</sup>

To support this prediction, Part III of this Article will examine the current legal landscape of Establishment Clause jurisprudence and describe the various legal standards used by the courts when evaluating religious exercises in public schools. Part IV will describe a limited but relevant line of cases that analyze religious issues in public education according to First Amendment expression standards. Part V will apply these legal standards to the express language of the RVAA and consider specific Establishment Clause cases in the public school setting to evaluate whether the RVAA represents a constitutional exercise of governmental power. Given the fact that Texas is in the Fifth Circuit, special attention will be given to Fifth Circuit Court holdings. Part VI will briefly examine the passage of similar statutes by other states, and Part VII will offer concluding thoughts and observations.

In ideal conditions, where widely accepted legal standards are applied with some degree of consistency, conclusions regarding the constitutionality of a statute might possess some measure of predictive validity. However, conditions regarding the Establishment Clause and the permissible level of religious activity in public schools are less than consistent. Court decisions have produced an imprecise balance between competing constitutional concerns producing what the Second Circuit describes as the “thorniest of constitutional thickets.”<sup>42</sup>

## II. INCONSISTENCY IN THE COURTS

Currently, Establishment Clause jurisprudence suffers from a lack of uniformity and predictability. Justice Thomas—in a dissenting opinion attached to a denial of certiorari on an appeal of a Tenth Circuit case involving memorial crosses placed along public highways marking the location of patrol officers killed in the line of duty—argued that multiple standards created to provide judicial flexibility have produced inconsistent lower court

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<sup>41</sup> See Melissa Rogers, *The Texas Religious Viewpoints Antidiscrimination Act and the Establishment Clause*, 42 U.C. DAVIS L. REV. 939 (2009).

<sup>42</sup> *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 620 (2d Cir. 2005).

decisions “incapable of coherent explanation.”<sup>43</sup> “Our jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases.”<sup>44</sup> Thomas asserts that, due to a lack of guidance from the Supreme Court, Establishment Clause analyses turn on little more than “judicial predilections.”<sup>45</sup> Indeed, there are several examples where a specific Establishment Clause holding has an exact and opposite holding.<sup>46</sup> This being the case, a meaningful analysis of the RVAA will be challenging, and conclusions or predictions will be reduced to imprecise probabilities. The level of confusion is so tangible that at least one author described case analysis and outcome prediction as an exercise in futility.<sup>47</sup>

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<sup>43</sup> See *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 22 (2011) (Thomas, J., dissenting), *denying cert. to Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010).

<sup>44</sup> *Id.* at 14.

<sup>45</sup> *Id.* at 13 (internal quotation marks omitted).

<sup>46</sup> Compare *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (the display of a crèche satisfied both the modified *Lemon* and Endorsement Tests), *with* *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989) (the display of a crèche failed the *Lemon* and Endorsement Tests). Compare *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (electing not to use the *Lemon* and Endorsement Tests in ruling that a display of Ten Commandments on the grounds of the Texas state capital did not violate the Establishment Clause), *with* *McCreary Cnty. v. ACLU*, 545 U.S. 844, 883-84 (2005) (electing to use the *Lemon* and Endorsement Tests to hold that a display of the Ten Commandments in a courthouse was unconstitutional). Compare *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 972 (1992) (holding nonsectarian, nonproselytizing prayer delivered by an elected member of the senior class without school approval, sponsorship, or oversight was not an Establishment Clause violation), *with* *ACLU v. Black Horse Pike Reg’l Bd. of Educ.*, 84 F.3d 1471, 1482 (3d Cir. 1996), *and* *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 836 (9th Cir. 1998) (both holding that the same approach that was approved by the Fifth Circuit in *Clear Creek* was a violation of the Establishment Clause).

<sup>47</sup> See Mark Strasser, *Religion in the Schools: On Prayer, Neutrality, and Sectarian Perspectives*, 42 AKRON L. REV. 185, 186 (2009) (“[T]he Court has sometimes interpreted the [Establishment] Clause to require strict separation between church and state, at other times interpreted the Clause to accord states great discretion with respect to the kinds of assistance they afford to religious instruction, and at still other times interpreted the Clause to impose an affirmative obligation on states to permit religious views to be expressed within the public schools. In short, the current jurisprudence in this area is simply incoherent, which does not bode well for reasonable and plausible analyses regarding . . . the degree to which religious activities and practices are permissible in public schools . . .”).

*A. Establishment Clause Tests*

Federal Courts have established three tests to determine if a governmental action violates the Establishment Clause: the *Lemon* Test,<sup>48</sup> the Coercion Test,<sup>49</sup> and the Endorsement Test.<sup>50</sup>

1. The *Lemon* Test

The *Lemon* Test, the workhorse of Establishment Clause jurisprudence, is composed of three prongs, each of which must be satisfied if a challenged government action is to survive judicial scrutiny.<sup>51</sup> The first prong requires that the government action has a secular legislative purpose, the second requires that the primary effect can neither advance or inhibit religion, and the third requires that the government action cannot create an excessive entanglement with religion.<sup>52</sup> Almost since its inception, the *Lemon* Test has fallen on disfavor with some members of the judiciary, perhaps as the result of its overuse, or the mechanistic approach mandated in situations that typically require a multi-tiered factual analysis.<sup>53</sup> Despite this disfavor, the *Lemon* Test has endured and still guides Establishment Clause jurisprudence. The secular purpose prong, although not used in the same dispositive manner, remains firmly entrenched as a check against governmental acts motivated by religious objectives. However, state action does not have to be devoid of all sectarian consideration,<sup>54</sup> and courts will be “deferential to a State’s

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<sup>48</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

<sup>49</sup> *See Lee v. Weisman*, 505 U.S. 577, 592 (1992).

<sup>50</sup> *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000).

<sup>51</sup> *See Lemon*, 403 U.S. at 612-13.

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

<sup>53</sup> *See Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . .”).

<sup>54</sup> *See, e.g., Lee*, 505 U.S. at 644 (1992) (Scalia, J., joined by, inter alios, Thomas, J., dissenting); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346-49 (1987) (O’Connor, J., concurring in judgment); *Wallace v. Jaffree*, 472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting); *id.* at 90-91 (White, J., dissenting); *Sch. Dist. v. Ball*, 473 U.S. 373, 431 (1985) (White, J., dissenting); *Widmar v. Vincent*, 454 U.S. 263, 282

articulation of a secular purpose,”<sup>55</sup> but not without examining “the policy’s purpose, history, and the context in which it was adopted to determine whether the policy has a permissible secular purpose or an impermissible religious one.”<sup>56</sup> If the examination reveals the use of language that favors religious practices, a history of non-secular governmental action, or a context that reveals a plainly religious purpose, courts will invalidate state action.<sup>57</sup> An examination of the RVAA’s purpose, history, and the context in which it was adopted will show unequivocal evidence of a non-secular purpose.

Several cases illustrate the definitive nature of the first prong of the *Lemon Test*. In *Edwards v. Aguillard*, the state of Louisiana claimed that a statute forbidding the teaching of evolution, unless accompanied by the teaching of creation science, was designed to increase academic freedom.<sup>58</sup> The Court saw this as a sham.<sup>59</sup> In *Stone v. Graham*, despite posting a small inscription at the bottom of each plaque claiming that the Ten Commandments represented legal codes, the Court observed otherwise and said: “The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature.”<sup>60</sup> In *Wallace v. Jaffree*, the court determined that, based upon the testimony of the bill’s sponsor, “[T]he record . . . makes clear that Alabama’s purpose was solely religious in character.”<sup>61</sup>

The second prong, sometimes referred to as the effect prong, requires the court to assess the primary impact of the

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(1981) (White, J., dissenting); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 813 (1973) (White, J., dissenting).

<sup>55</sup> *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987).

<sup>56</sup> *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1334 (11th Cir. 2001) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). The Court looked beyond the assertions of the district, which claimed the practice was designed to foster free expression and promote good sportsmanship in an environment appropriate for competition, and found a religious purpose.

<sup>57</sup> *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308.

<sup>58</sup> *Edwards*, 482 U.S. at 587 (“[R]equiring schools to teach creation science with evolution does not advance academic freedom.”).

<sup>59</sup> *Id.*

<sup>60</sup> *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (ruling that the posting of the Ten Commandments in public school classrooms in Kentucky was a violation of the Establishment Clause).

<sup>61</sup> *Wallace v. Jaffree*, 472 U.S. 38, 65 (1985) (invalidating a moment of silence for voluntary prayer as a violation of the Establishment Clause).

governmental action independent of the stated purpose.<sup>62</sup> Originally, courts looked at the actual, primary effect and were not concerned with collateral or secondary effects that happened to benefit religion as an indirect consequence.<sup>63</sup> The literal application of the effect prong, however, proved problematic in that following it with fidelity would require courts to enjoin religious exercises that had been a part of governmental practices for centuries.<sup>64</sup> Religious references would need to be removed from our money, the “Star Spangled Banner,” our national motto, and from numerous government buildings, including the Supreme Court. The effect prong is no longer focused only on the actual effect; it asks whether the government’s “practice under review in fact conveys a message of endorsement or disapproval”<sup>65</sup> in the mind of a reasonable observer who “knows all of the pertinent facts and circumstances surrounding the [governmental action].”<sup>66</sup> Therefore, the effect prong has effectively been subsumed into the Endorsement Test.

The third prong of the *Lemon* Test, excessive entanglement, was originally designed as a filter against governmental action that resulted in “intrusive government participation in, supervision of, or inquiry into religious affairs.”<sup>67</sup> The Court in *Lemon* used this excessive entanglement prong to invalidate the Pennsylvania and Rhode Island statues at issue due to the need for “comprehensive, discriminating, and continuous state surveillance.”<sup>68</sup> However, the mere act of cooperation between

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<sup>62</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>63</sup> *See Bd. of Educ. v. Allen*, 392 U.S. 236, 244 (1968) (“Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.”); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973).

<sup>64</sup> *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

<sup>65</sup> *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

<sup>66</sup> *Salazar v. Buono*, 130 S. Ct. 1803, 1819-20 (2010); *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in part and concurring in judgment) (“[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community . . . because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.” (internal quotation marks omitted)).

<sup>67</sup> *Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 733 (7th Cir. 2011).

<sup>68</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

religious and governmental affairs does not automatically constitute excessive entanglement.<sup>69</sup> According to Argyrios Saccopoulos, the excessive entanglement prong is “rarely applied in Supreme Court jurisprudence” since “policies that violate the Establishment Clause are likely to be found unconstitutional under one of the other prongs first, ending the Court’s inquiry.”<sup>70</sup> Amy Alexander argues that the excessive entanglement prong is substantially subjective, often ignored, and suffers from the same inconsistent application as other Establishment Clause standards.<sup>71</sup> Some even argue that it should be replaced with the state action doctrine.<sup>72</sup>

## 2. The Endorsement Test

The Endorsement Test was articulated by Justice O’Connor in her concurring opinion in *Lynch v. Donnelly*, a case where the Supreme Court decided that the display of a crèche in a town square during the Christmas holiday had a secular purpose and the primary effect was not that of advancing any particular religion.<sup>73</sup> Justice O’Connor concurred in the outcome but was uncomfortable with the stretched application of the *Lemon* Test.<sup>74</sup> She stated: “It has never been entirely clear, however, how the three parts of the test relate to the principles enshrined in the Establishment Clause.”<sup>75</sup> Therefore, Justice O’Connor, joined by Justice Stevens, suggested a new measure—the Endorsement Test—that courts can use when determining whether a

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<sup>69</sup> See *Elmbrook Sch. Dist.*, 658 F.3d at 712 (“[T]he District’s use of the rented church space was neither impermissibly coercive nor an endorsement of religion on the part of the District” and so “there was no violation of the Establishment Clause”); *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

<sup>70</sup> Argyrios Saccopoulos, *Analysis: The Religious Viewpoints Antidiscrimination Act*, 14 TEX. J. C.L. & C.R. 127, 130 (2008).

<sup>71</sup> See Amy J. Alexander, *When Life Gives You the Lemon Test: An Overview of the Lemon Test and Its Application*, 3 PHOENIX L. REV. 641 (2010).

<sup>72</sup> See, e.g., *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1279 (2010) (“[T]he state action doctrine furnishes courts with a clearer and more coherent legal framework for evaluating Establishment Clause cases than does automatic application of the *Lemon* test.”).

<sup>73</sup> *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 688-89.

governmental action violates the Establishment Clause.<sup>76</sup> “Endorsement 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.”<sup>77</sup> O’Connor also explained that the Endorsement Test worked within the framework of the *Lemon* Test.

The purpose prong . . . asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice . . . in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.<sup>78</sup>

Justice O’Connor carried the mantra of the Endorsement Test, and it gained support from several members of the court in *County of Allegheny v. ACLU*,<sup>79</sup> a perplexing case where the Court ruled that a crèche displayed in a courthouse constituted an endorsement of religion,<sup>80</sup> but the display of a menorah and Christmas tree in a city park did not.<sup>81</sup> The Court did recognize that the government can violate the Establishment Clause in ways other than just through its own displays or acts.<sup>82</sup> The Endorsement Test “also prohibits the government’s support and promotion of religious communications by religious organizations” through other means of support.<sup>83</sup> When applying the Endorsement Test, two factors must be considered: the government’s action must be viewed from the position of a reasonable observer, and “the test does not evaluate a practice in isolation from its origins and context.”<sup>84</sup> Depending on the

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

<sup>77</sup> *Id.* at 688.

<sup>78</sup> *Id.* at 690.

<sup>79</sup> 492 U.S. 573 (1989) (Blackman, J., joined by Brennan, Marshall, Stevens & O’Connor, JJ.).

<sup>80</sup> *Id.* at 602. The decision of Allegheny County to display a crèche in the middle of the grand staircase represents a patent endorsement of a religious observance.

<sup>81</sup> *Id.* at 617-18 (Blackman, J.).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 600 (Blackman, J., joined by Brennan, Marshall, Stevens & O’Connor, JJ.).

<sup>84</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O’Connor, J., concurring).



circumstances, the context of a case can be used as evidence to either protect governmental action from invalidation<sup>85</sup> or as evidence indicating a non-secular purpose.<sup>86</sup>

The consistent application of the Endorsement Test has proven to be problematic, especially in cases of religious symbols.<sup>87</sup> Justice Kennedy has been critical of its use on more than one occasion.<sup>88</sup> Justice Thomas stated in response to the denial of certiorari in *Utah Highway Patrol Association v. American Atheists* “[t]hat a violation of the Establishment Clause turns on an observer’s potentially mistaken belief that the government has violated the Constitution, rather than on whether the government has *in fact* done so, is perhaps the best evidence that our Establishment Clause jurisprudence has gone hopelessly awry.”<sup>89</sup>

### 3. The Coercion Test

The Coercion Test originated in *Lee v. Weisman*, in which school officials decided to have a prayer at graduation, contacted a local rabbi, and provided instructions regarding the delivery of a nonsectarian, non-proselytizing prayer.<sup>90</sup> Justice Kennedy stated that the “government involvement . . . in this case is pervasive, to

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<sup>85</sup> *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (holding that a nonsectarian prayer to open a state legislative session was not a violation of the Establishment Clause due to its historical context).

<sup>86</sup> *See McCreary Cnty. v. ACLU*, 545 U.S. 844, 883-84 (2005) (holding unconstitutional as a violation of the Establishment Clause the posting of the Ten Commandments due to the context surrounding the posting which was indicative a religious purpose).

<sup>87</sup> *See Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 14 (2011) (holding that twelve-foot crosses on the side of highways in Utah memorializing the death of Highway Patrol officers would be viewed by reasonable observers as an endorsement of religion due to the speed at which their cars goes by); *Salazar v. Buono*, 130 S. Ct. 1803, 1824 (2010); *Van Orden v. Perry*, 545 U.S. 677, 682-83 (2005) (holding the reasonable observer would not view the display of the Ten Commandments on the grounds of the Texas State Capitol as the endorsement of a religious message).

<sup>88</sup> *See Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (“The notion that cases arising under the Establishment Clause should be decided by an inquiry into whether a ‘reasonable observer’ may ‘fairly understand’ government action to ‘sen[d] a message to nonadherents that they are outsiders, not full members of the political community,’ is a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence.”).

<sup>89</sup> *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 19 n.7 (2011).

<sup>90</sup> *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

the point of creating a state-sponsored and state-directed religious exercise in a public school.”<sup>91</sup> “[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise” may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact “establishes a [state] religion or religious faith, or tends to do so.”<sup>92</sup> The application of the Coercion Test to determine whether a governmental action violates the Establishment Clause is not simple. How do we measure coercion? Justices Scalia and Thomas argue that *Lee* was improperly decided and claim that the true measure of coercion as contemplated by the Establishment Clause is “that accomplished ‘by force of law and threat of penalty.’”<sup>93</sup> Other Justices do not share such a narrow interpretation of the Coercion Test; but all agree that mere exposure is not, by itself, coercive. The level of coercion is also a function of context, such as the setting, the age of recipient, and the frequency of exposure.<sup>94</sup> Whatever perspective is used to measure coercion, it provides some of the same problems as the reasonable observer standard under the Endorsement Test.

What seems clear from the inconsistent and unpredictable application of the various Establishment Clause tests is that each case will require the application of legal judgment where general principles of neutrality will drive a case-by-case analysis. Justice Breyer in *Van Orden v. Perry* said, “I see no test-related substitute for the exercise of legal judgment,”<sup>95</sup> based upon the foundation of universally accepted principles. First, “government must neither engage in nor compel religious practices[;] . . . it must effect no

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<sup>91</sup> *Id.* at 587.

<sup>92</sup> *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

<sup>93</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 540 U.S. 1, 49 (2004) (quoting *Lee*, 505 U.S. at 640) (Scalia, J., dissenting)).

<sup>94</sup> Compare *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992) (ruling nonsectarian, nonproselytizing prayer delivered by an elected member of the senior class without school approval, sponsorship, or oversight was not as coercive as a graduation prayer delivered by recruited and supervised member of the clergy), with *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that the district’s policy undermined the protection of students with minority viewpoints and encouraged divisiveness and coercion on students not wanting to participate in the religious exercise).

<sup>95</sup> *Van Orden v. Perry*, 545 U.S. 677, 700 (2005).

favoritism among sects or between religion and nonreligion.”<sup>96</sup> Second, “the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.”<sup>97</sup> When cases are decided through the exercise of legal judgment, where unique factual determinations are applied to multiple imprecise standards, inconsistent outcomes are a virtual certainty. Breyer appears to offer a measure of consistency by stating that the judgment must “remain faithful to the underlying purposes of the Clauses.”<sup>98</sup> Unfortunately, judicial interpretation regarding the underlying purposes of the religion clauses is far from unanimous, which erodes any hope that Breyer’s proposed approach could yield consistent outcomes.

### III. RELIGIOUS EXERCISES AS AN EXPRESSIVE ACT

If the intersection of religion and education was not convoluted enough, courts must also consider religious exercises as expressive acts.<sup>99</sup> In 1981, the Supreme Court ruled, in *Widmar v. Vincent*, that the University of Missouri at Kansas City violated the First Amendment expression rights of a student-led, voluntary religious organization when it refused to allow the group to use university facilities for their meetings.<sup>100</sup> The University justified this decision on a policy predicated on the belief that permitting the use of its facilities by a religious organization would violate the Establishment Clause.<sup>101</sup> Since the University allowed other student organizations to use its facilities, the Court reviewed the case from the perspective of forum analysis and applied the strict scrutiny standard.<sup>102</sup> The strict scrutiny standard requires the government to show that content- or viewpoint-based discrimination is based upon a compelling interest and that the means employed to accomplish that interest are narrowly tailored

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<sup>96</sup> *Id.* at 698 (internal quotation marks omitted).

<sup>97</sup> *Id.* at 699.

<sup>98</sup> *Id.* at 700.

<sup>99</sup> Mark Strasser, *The Coercion Test: On Prayer, Offense and Doctrinal Inculcation*, 53 ST. LOUIS U. L.J. 417 (2009).

<sup>100</sup> *Widmar v. Vincent*, 454 U.S. 263, 277 (1981).

<sup>101</sup> *Id.* at 265.

<sup>102</sup> *Id.* at 268.

and not overly broad.<sup>103</sup> The University was unable to show that this regulation was necessary to meet a compelling state interest.<sup>104</sup>

Despite basing the decision on principles of First Amendment expression rights in public or limited public forums, the Court in *Widmar* still sought the safe haven of traditional Establishment Clause jurisprudence. It applied the *Lemon* Test and ostensibly ruled that the university policy met the secular purpose and excessive entanglement prongs.<sup>105</sup> The majority of the analysis focused on whether allowing the use of university facilities would have the primary effect of advancing religion. The Court ruled that it would not.<sup>106</sup> The Court noted that college students are less impressionable than younger students<sup>107</sup> and should be capable of understanding that the University was not endorsing the message of the group.<sup>108</sup> The holding in *Widmar* opened an alternative avenue for the possible reintroduction of religious exercises into public schools.

In 1984, the federal government passed the Equal Access Act, which made it unlawful for any public secondary school that receives Federal financial assistance and that has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech.<sup>109</sup>

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<sup>103</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 932-41 (3d ed. 2006).

<sup>104</sup> *Widmar*, 454 U.S. at 276.

<sup>105</sup> *Id.* at 271.

<sup>106</sup> *Id.* at 273 (ruling that the benefits received from using the facilities would be incidental and not have the primary effect of advancing religion). If anything, not allowing the group to meet would be hostile, not neutral, toward religion.

<sup>107</sup> *Id.* at 274 n.14. This is significant in that the Court has consistently recognized that younger children are impressionable and must be protected. The recognition of the impressionable nature of younger children, however, did not prevent the holding in *Widmar* from being followed in subsequent cases involving public secondary and elementary schools. See *Bd. Of Educ. v. Mergens*, 496 U.S. 226 (1990); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

<sup>108</sup> *Id.* at 271 n.10. This recognition brings into play the holding in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which provides schools broad control over curriculum or school related matters, *see id.* at 270.

<sup>109</sup> Equal Access Act, Pub. L. No. 98-377, 98 Stat. 1304 (codified at 20 U.S.C. §§ 4071-74 (2006)).

Congress's motive behind passing the Equal Access Act was to remedy perceived religious discrimination as evidenced by two federal cases that denied religious groups equal access in the use of public facilities.<sup>110</sup> It did not force schools to establish limited open forums or mandate that schools allow indiscriminate messages to be delivered at school or school sponsored events.

The application of the Equal Access Act was solidified in *Westside Community Schools v. Mergens* when school officials denied the request of a student-led religious group to meet during non-instructional times out of a fear that allowing a religious group to meet on campus would violate the Establishment Clause.<sup>111</sup> Other non-curricular groups were meeting on campus during non-instructional times, which meant the school had voluntarily created a limited public forum.<sup>112</sup> Since this high school was receiving federal financial assistance, the denial of equal access to the religious group violated the Equal Access Act.<sup>113</sup>

Application of the Equal Access Act requires that the meetings are "voluntary and student-initiated;" are not sponsored "by the school, the government, or its agents or employees;" do not "materially and substantially interfere with the orderly conduct of educational activities within the school;" and are not directed, controlled, conducted, or regularly attended by "nonschool persons."<sup>114</sup> The Court noted that allowing groups to meet under these conditions still allowed the school to "retain a significant measure of authority over the type of officially recognized activities in which their students participate."<sup>115</sup>

In an act of familiarity, the Court applied the *Lemon* Test and reached the same conclusion as *Widmar*.<sup>116</sup> The Equal Access Act was clearly secular as it applied to philosophical, political, and religious speech; its primary effect did not advance religion; and,

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<sup>110</sup> See *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1048 (5th Cir. 1982); *Brandon v. Bd. of Educ.*, 635 F.2d 971, 980 (2d Cir. 1980).

<sup>111</sup> *Mergens*, 496 U.S. at 232-33.

<sup>112</sup> *Id.* at 246.

<sup>113</sup> *Id.* at 253.

<sup>114</sup> § 4071(c)(1)-(2), (4)-(5).

<sup>115</sup> *Mergens*, 496 U.S. at 240 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

<sup>116</sup> See *supra* note 100 and accompanying text.

in regards to what the reasonable observer would conclude, the Court stated:

[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. 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.<sup>117</sup>

Excessive entanglement was not an issue since the Act limits school-official involvement and meetings take place during non-instructional times. The possibility of coercion was not a concern either since the meetings took place during non-instructional times when compulsory attendance did not apply, formal classroom exercises were not involved, and school employees were not involved or in a position where emulation would be possible.<sup>118</sup>

Two additional cases expanded the protection of religious expression from unconstitutional viewpoint discrimination by allowing the use of elementary school facilities by religious organizations after school hours.<sup>119</sup> In each case, the school or district had voluntarily created a limited open forum, the meetings were not connected with any school related event, and the students were not compelled by compulsory attendance statutes to attend these religious meetings, so exposure was completely voluntary.<sup>120</sup> In both cases, school policies and practices that did not permit the use of school facilities by religious organizations on an equal basis with other community groups were ruled to be a violation of the group's First Amendment right of expression.<sup>121</sup> It is significant that the religious organization in *Good News Club* was awarded access to

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<sup>117</sup> *Mergens*, 496 U.S. at 250.

<sup>118</sup> *Id.* at 251.

<sup>119</sup> See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109-10 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-95 (1993).

<sup>120</sup> See, e.g., *Good News Club*, 533 U.S. at 113 (“[T]he Club’s meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members.”)

<sup>121</sup> See, e.g., *Lamb's Chapel*, 508 U.S. at 395 (“The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.”).

an elementary campus when school officials had voluntarily created a limited public forum.<sup>122</sup> However, the club meetings occurred after school during non-instructional times when children were not required to attend, providing a degree of separation between the religious nature of the clubs activities and impressionable young children. The RVAA invades this protective barrier by mandating conditions that assure captive audiences of young impressionable children will be exposed to religious exercises on a regular basis during times when attendance is not an option. This is far different from the religious exercises protected by Equal Access cases.

#### IV. THE RVAA: IS IT CONSTITUTIONAL?

Texas enacted the RVAA five years ago, yet only one superficial constitutional challenge has been adjudicated as of the time of this Article's preparation. In 2011, the Fifth Circuit overturned a preliminary injunction issued to prevent a student from including religious remarks in a graduation speech.<sup>123</sup> When considering a preliminary injunction, courts usually examine four concerns.<sup>124</sup> The operative concern here was the movant's likelihood of success. In answering in the affirmative, the Fifth Circuit analyzed only the portion of the RVAA dealing with student-delivered graduation speeches and ruled it to be constitutional.<sup>125</sup> The parties eventually reached a settlement agreement with no precedential value.<sup>126</sup>

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<sup>122</sup> See *Good News Club*, 533 U.S. at 113.

<sup>123</sup> *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 11-50486, slip op. at 7 (5<sup>th</sup> Cir. June 2, 2011).

<sup>124</sup> CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995 & Supp. 2011); *Schultz*, No. 11-50486, at 6-7 (citing *Canal Auth. V. Callaway*, 489 F.2d 567, 572 (5<sup>th</sup> Cir. 1974)) ("In order to obtain a preliminary injunction, the plaintiff must show: (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable harm if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to the defendant, and (4) that granting the preliminary injunction will not disserve the public interest.").

<sup>125</sup> *Schultz*, No. 11-50486, at 7.

<sup>126</sup> *Schultz v. Medina Valley Indep. Sch. Dist.*, Civil Action No. SA-11-CA-0422-FB, Settlement Agreement and Release Arising During Mediation (W.D. Tex. Feb. 9, 2012); see also *Schultz v. Medina Valley Indep. Sch. Dist.*, Civil Action No. SA-11-CA-0422-FB, Non-Kumbaya Order: The *Homo Sapien* Saga Continues (W.D. Tex. Mar. 19, 2012)

Despite the minute number of law review and journal articles analyzing the RVAA, every author concludes that portions of it are unconstitutional.<sup>127</sup> If this is true, then where are the challenges? Why are the organizations that traditionally fight for religious neutrality in public schools, such as the American Civil Liberties Union and Americans United for the Separation of Church and State, abandoning their propensity to protect and defend the Constitution? If the RVAA is constitutional why have other states not followed suit with similar statutes?<sup>128</sup>

In 2008, the Attorney General of Texas, Greg Abbott, responded to an inquiry from then Education Commissioner, Robert Scott, regarding the impact of the RVAA on the Houston Independent School District. The school district was under a permanent injunction preventing it “[f]rom allowing, permitting, or requiring students of the Houston Independent School District

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available

at

[www.txwd.uscourts.gov/opinions/cases/Schultz/Schultz\\_v\\_MVISD\\_Ord\\_031912.pdf](http://www.txwd.uscourts.gov/opinions/cases/Schultz/Schultz_v_MVISD_Ord_031912.pdf).

<sup>127</sup> Green, *supra* note 10, at 883 (“The Texas statute is a prime example of how the equal treatment theorem has lost its flooring and is being applied in inappropriate contexts.”); Rogers, *supra* note 41, at 1037 (“Because the RVAA aims to protect prayers and proselytizing from the state’s podium before captive student audiences at a multitude of school events, it creates great litigation risks and threatens to divide and distract public schools. Thus, state legislators outside of the state of Texas should not adopt the RVAA model. Moreover, Texas legislators should amend the RVAA . . . .”); Saccopoulos, *supra* note 70, at 141 (“Because a government policy preventing regulation of proselytizing, sectarian prayer at school-sponsored events occurring in objectively nonpublic forums must not be allowed to stand under the Establishment Clause, section 25.152 of the RVAA will likely be held unconstitutional.”); Brown, *supra* note 32, at 77 (“[T]he Texas statute . . . seeks to facilitate the use of opportunities for student expression to preserve an atmosphere in which demographic dominance is enforced in daily official rituals, a result that constitutes a constitutionally unacceptable distortion of the public school’s institutional identity.”).

<sup>128</sup> However, South Carolina and Arizona adopted abbreviated versions of the RVAA excluding the more controversial sections. See S.C. CODE ANN. § 59-1-435 (2011); ARIZ. REV. STAT. § 15-110 (2012). Tennessee, Oklahoma, and Mississippi have tried to pass virtually identical versions, but to date Texas remains the only state to pass the full RVAA. See Amelia Morris Hips, *Tennessee Bills Die by Veto, Summer Study Committee*, THE MURFREESBORO POST (June 3, 2012, 4:31 AM), <http://www.murfreesboropost.com/tennessee-bills-die-by-veto-summer-study-committee-cms-31391>; Dustin Thomas, “*Religious Viewpoints Antidiscrimination Act*” *Oklahoma*, DUSTIN THOMAS LAW (Oct. 15, 2012), <http://www.iwillstandup.com/2012/10/192/>; Dustin Thomas, *Religious Liberties Bill Dies in Senate Education Committee in Mississippi*, DUSTIN THOMAS LAW (Oct. 13, 2012), <http://www.iwillstandup.com/2012/10/religious-liberties-bill-dies-in-senate-education-committee-in-mississippi-we-must-get-this-passed/>.



to participate in the recitation of any prayer in connection with or as part of any school practice, ceremony, observance, exercise or routine.”<sup>129</sup> Attorney General Abbott relied on the continuing jurisdiction of the trial court to avoid issuing any meaningful interpretation, a position that appeared to indicate that he too anticipated legal challenges.<sup>130</sup> Yet, not every section of the RVAA raises constitutional concerns. Some may even address widespread violations of student Free Exercise rights, specifically section 25.153, which prohibits academic penalties for the inclusion of religious references in course assignments.<sup>131</sup> The final version of the RVAA, however, did not include a severability clause;<sup>132</sup> nor is severability applied in most Establishment Clause cases.<sup>133</sup> Therefore, if any part of the RVAA is unconstitutional, it is likely that the entire statute will be invalidated.

*A. The Lemon Test: Does the RVAA Have a Secular Purpose?*

Since the RVAA is a Texas statute, Establishment Clause cases from the Fifth Circuit are of particular importance. In *Doe v. Ouchita Parish*, the Fifth Circuit listed three factors to consider when identifying whether the government has a secular legislative purpose: “[T]he statute on its face, its legislative history, or its interpretation by a responsible administrative agency.”<sup>134</sup> If the court finds that the predominant purpose was religious, the court will invalidate the offending governmental action.<sup>135</sup> Despite difficulties in identifying the actual purpose behind most statutes,<sup>136</sup> an examination of the RVAA, its legislative history, and a substantial quantity of existing evidence

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<sup>129</sup> *Guild v. Houston Independent Sch. Dist.*, Civil Action No. 70-H-1102 (S.D. Tex. Dec. 28, 1970).

<sup>130</sup> See Letter from Greg Abbott, Attorney Gen. of Tex., to Robert Scott, Comm’r of Educ., Tex. Educ. Agency (Mar. 19, 2008), available at <https://www.oag.state.tx.us/opinions/opinions/50abbott/op/2008/pdf/ga0609.pdf>.

<sup>131</sup> TEX. EDUC. CODE ANN. § 25.153 (West Supp. 2011); see also *id.* §§ 25.152, .154.

<sup>132</sup> Rogers, *supra* note 41, at 954.

<sup>133</sup> See C. Vered Jona, Note, *Cleaning Up for Congress: Why Courts Should Reject the Presumption of Severability in the Face of Intentionally Unconstitutional Legislation*, 76 GEO. WASH. L. REV. 698 (2008).

<sup>134</sup> *Doe v. Sch. Bd.*, 274 F.3d 289, 293 (5th Cir. 2001).

<sup>135</sup> *Id.* at 293 (citing *Edwards v. Aguillard*, 482 U.S. 578, 599 (1987)).

<sup>136</sup> See Josh Blackman, *This Lemon Comes as a Lemon: The Lemon Test and the Pursuit of a Statute’s Secular Purpose*, 20 GEO. MASON U. C.R. L.J. 351 (2010).

makes it difficult to conclude that the purpose behind its passage was secular.

### 1. The Statute on Its Face

First, consider the title of the act. If authors of the RVAA, Representatives Chisum and Howard,<sup>137</sup> had a secular purpose, the word “religious” would not be prominently displayed in the title. Instead, the title could be simply: “The Viewpoint Antidiscrimination Act.” Protecting all viewpoints would accomplish the objective of protecting religious viewpoints as well. An inspection of the final version of the bill reveals the use of the word religion or religious no fewer than sixty-four times.<sup>138</sup> These two observations alone call into question the purpose of the RVAA—but there is more.

According to the statement of intent, a document that must accompany all sponsored bills, the purpose of the RVAA is to “clarify the First Amendment rights of students at school by codifying current court decisions regarding religious expression and by authorizing the school district to adopt and implement a policy that establishes a limited public forum, provides certain disclaimers, and sets forth permissible forms of religious expression by students.”<sup>139</sup> This self-serving description is not supported by the express language of the statute. If the only purpose of the RVAA was to clarify, authorize, provide, and set forth, then why does the language mandate specific action both in the statute and in the model policy that all districts are encouraged to follow under the threat of legal action? Second, how is it possible to codify current court decisions when Establishment Clause jurisprudence is “incapable of coherent explanation”?<sup>140</sup> An examination of specific language from the RVAA demonstrates multiple contradictions.

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<sup>137</sup> Charlie Howard and Warren Chisum authored the bill. See H.B. 3678, 80th Leg. Sess. (Tex. 2007), available at <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=80R&Bill=HB3678>.

<sup>138</sup> See *id.*

<sup>139</sup> See Charlie Howard, *Bill Analysis*, available at <http://www.capitol.state.tx.us/tlodocs/80R/analysis/html/HB03678H.htm> (last visited Nov. 27, 2012).

<sup>140</sup> See *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 22 (2011) (Thomas, J., dissenting).

The RVAA is codified in chapter 25 of the Texas Education Code (TEC). Section 25.151 of the TEC mandates that schools treat student religious expression the same as permissible forms of secular expression and states:

A school district shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the district treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.<sup>141</sup>

This language goes well beyond clarification, authorization, or providing and setting forth. It mandates specific action with commands and directives such as "shall" and "may not." Section 25.152 of the TEC mandates that school districts establish limited public forums at any school event where a student is to publically speak and states:

(a) [A] school district shall adopt a policy, which must include the establishment of a limited public forum for student speakers at all school events at which a student is to publicly speak. The policy regarding the limited public forum must also require the school district to:

(1) provide the forum in a manner that does not discriminate against a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject;

(2) provide a method, based on neutral criteria, for the selection of student speakers at school events and graduation ceremonies;

. . . .

(c) Student expression on an otherwise permissible subject may not be excluded from the limited public forum because the subject is expressed from a religious viewpoint.<sup>142</sup>

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<sup>141</sup> TEX. EDUC. CODE ANN. § 25.151 (West Supp. 2011).

<sup>142</sup> *Id.* § 25.152.

Once again, this language mandates specific performance beyond the self-serving purpose articulated by Howard and Chisum.

Section 25.153 of the TEC includes mandates for specific action by directing that “classroom assignments must be judged by ordinary academic standards” and “may not be penalized . . . on account of the religious content of their work.”<sup>143</sup> Once again the wording goes beyond clarifying, authorizing, providing and setting forth. Section 25.154 of the TEC appears to be a restatement of well-established case law involving student religious groups and the Equal Access Act. This section includes directive language such as “must be given the same access to school facilities . . .” and “may not discriminate against groups that meet for prayer.”<sup>144</sup> The troubling aspect of the mandates from this section is the application of the Equal Access Act to elementary children.<sup>145</sup> According to section 25.155 of the TEC, “[a] school district shall adopt and implement a local policy regarding a limited public forum and voluntary student expression of religious viewpoints.”<sup>146</sup>

Section 25.126 of the TEC is the model policy<sup>147</sup> that all school districts are encouraged to follow. And “encouraged” is the wrong word—“threatened” is more accurate. The model policy mandates that school districts “create[] a limited public forum for student speakers at all school events at which a student is to publicly speak.”<sup>148</sup> The model policy also mandates that “[s]tudent speakers shall introduce: (1) football games; (2) any other athletic events designated by the district; (3) opening announcements and greetings for the school day; and (4) any additional events designated by the district, which may include, without limitation, assemblies and pep rallies.”<sup>149</sup> Once again, the language included

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<sup>143</sup> *Id.* § 25.153.

<sup>144</sup> *Id.* § 25.154. *But cf. supra* note 109 and accompanying text.

<sup>145</sup> *See Rogers, supra* note 41, at 945; Saccopoulos, *supra* note 70, at 141. While the RVAA language does not mention elementary schools, it does use the express language of “public schools” and does not denote that the policy only applies to secondary schools. Nowhere in the entire body of the statute does the RVAA denote that any section applies to only secondary schools.

<sup>146</sup> § 25.155.

<sup>147</sup> *Id.* § 25.156.

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

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

in the model policy goes beyond clarification, authorization, or providing and setting forth. What should be clear to any reasonable observer is that the purpose of the RVAA as described in the statement of intent does not match the express language of the statute. The statute mandates that school districts take affirmative steps to not only protect the dissemination of religious viewpoints in class assignment and voluntary student expression but to facilitate the dissemination of religious viewpoints by providing the forum at almost every school event, including over the school's public address system during morning announcements. Protecting religious references by students in class assignments and voluntary, religious student organization is a reflection of equality and neutrality. Forcing schools to allow religious exercises to be disseminated over the public address system during morning announcements to a captive audience is the antithesis of neutrality; it is sponsorship, endorsement, and it is using the state's power to advance religion.

Howard and Chisum's true purpose behind the RVAA was demonstrated when threatening letters were distributed to every school district in Texas in response to an alternate policy published by the Texas School Board Association.<sup>150</sup> Kelly Coghlan, an attorney and primary author of the RVAA, also blanketed the state with threatening letters designed as a scare tactic to force districts to adopt the model policy as written.<sup>151</sup> The letters state that, should any district decide to adopt a similar but not identical policy, they would not receive assistance from the Attorney General if sued and would be "gambling with taxpayer's money."<sup>152</sup> Coghlan's letter stated no fewer than four times that adopting the model policy would be "one less concern and financial risk for the district."<sup>153</sup> The message was clear—follow this policy or else.

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<sup>150</sup> See Letter from Charlie Howard & Warren Chisum, Representatives, Tex. House of Representatives, to Superintendents & School Board Trustees of Texas (Aug. 10, 2007), <http://ritter.tea.state.tx.us/taa/strep081007.html>.

<sup>151</sup> See Letter from Kelly Coghlan, Attorney, The Coghlan Law Firm, to Superintendents & School Board Trustees of Texas, <http://www.christianattorney.com/directive.htm>.

<sup>152</sup> *Id.* ¶ 19.

<sup>153</sup> *Id.* ¶ 6; see also *id.* ¶ 22(2)(a)(i) ("removing the financial and legal risks of adopting a policy that violates any part of the Act."); *id.* ¶ 22(2)(a)(viii) ("District and

## 2. The History Behind the RVAA

The Court in *Santa Fe Independent School District v. Doe* stated:

This history indicates that the District intended to preserve the practice of prayer before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy. Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice."<sup>154</sup>

The history of repeated efforts to subvert the Supreme Court and the Constitution was a clear indication that the policy of the Santa Fe Independent School District (ISD) lacked a secular purpose. An investigation into the history of the RVAA reveals a continuation of the same religious movement by the same religious advocates that tried to protect the prayer policy struck down in *Santa Fe*. The authors of the RVAA, Coghlan and Kelly Shackleford provided legal assistance and representation to the student plaintiffs in *Santa Fe*.<sup>155</sup> Surely Justices Kennedy, Ginsburg, and Breyer, who concurred with the majority opinion in *Santa Fe*, would recognize the RVAA as another attempt by the same parties to return state sponsored religious practices to public schools by force of law?

The brazen contempt for the authority of the Court is further exemplified when we learn that Charlie Howard represents Fort Bend County. The eastern edge of Fort Bend County is approximately twenty-five miles from Galveston County, which is where Santa Fe ISD is located, and Clear Creek ISD, the

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taxpayers will not have to risk tax dollars to defend claims that its policy violates the Act.”).

<sup>154</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000).

<sup>155</sup> See Rogers, *supra* note 41, at 953-54 n.78. Coghlan filed amicus briefs supporting the prayer policy in *Santa Fe*. Kelly Shackleford, who assisted in the drafting of the RVAA, was one of the Santa Fe ISD's lead attorneys.

geographic origin of the student graduation prayer exception, borders Santa Fe ISD to the north.<sup>156</sup> Representing a Texas congressional district located virtually next door to an area with a history of religious activism does not prove a non-secular purpose. However, Howard has a long history of religious leadership and activism in Fort Bend and surrounding communities.<sup>157</sup> In addition, the legislative history of the RVAA shows that Howard worked directly with Coghlan and Shackelford in a concerted effort to introduce and protect a carefully constructed bill that forces school districts in Texas to allow prayers to be delivered to a captive audience of impressionable children at school and at most school-related events. Rogers characterized the legislative history as an orchestrated and deliberate effort to prevent any amendments to the original language of the bill. Amendment after amendment was tabled; those that were approved were subsequently left out of the final version.<sup>158</sup> If the non-secular purpose was not clear enough, in 2011 Howard sponsored House Bill 999, which was designed to strip courts of jurisdiction in cases requiring the interpretation of religious statutes. This appeared to be an attempt to protect the RVAA from judicial scrutiny, but the bill never made it out of committee.<sup>159</sup>

Co-sponsor of the RVAA, Warren Chisum, is also a devoutly religious conservative with a history of activism. He is a member of the Gray County Christian Coalition and of the Board of Trustees of Wayland Baptist University.<sup>160</sup> He has also served on the Board of Directors of the Texas Conservative Coalition, an organization which touts on its website the passage of the RVAA,

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<sup>156</sup> See *Rep. Howard, Charlie, Tex. House Member*, TEX. HOUSE OF REPRESENTATIVES, <http://www.house.state.tx.us/members/member-page/?district=26> (last visited Nov. 27, 2012).

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

<sup>158</sup> See Rogers, *supra* note 41, at 953, 955-58. Numerous amendments were introduced to protect the captive audience from these state sponsored religious exercises, but all were defeated by Howard and the other coauthors and fellow crusaders.

<sup>159</sup> *History for HB 999*, TEXAS LEGISLATURE ONLINE, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB999> (last visited Nov. 27, 2012).

<sup>160</sup> See PROJECT VOTE SMART, <http://www.votesmart.org/candidate/biography/5477/warren-chisum> (last visited Nov. 27, 2012).

the inclusion of a Bible study course, and the inclusion of the words “One State Under God” into the pledge of allegiance to the state flag of Texas.<sup>161</sup> Chisum even led an effort to ban the teaching of evolution in Texas, claiming it was based on a creation scenario of the Pharisee religion and that evidence of the lies of evolution, found on the fixed earth website, proves Copernicus was wrong.<sup>162</sup>

Finally, an examination of the website of the Law Offices of Kelly Coghlan reveals abundant evidence indicative of a non-secular purpose behind the RVAA. The website states, “[o]ur goal is to practice law by The Book” next to a picture of the Bible, and, “Attorney Kelly Coghlan has been internationally recognized for his work defending prayer in public schools.” The web address for Coghlan’s Houston area law firm is: <http://www.christianattorney.com>.<sup>163</sup>

In light of all the evidence pointing to a non-secular purpose behind the passage of the RVAA, any reasonable agency observer or judge can reach but one conclusion: The purpose behind its passage is the antithesis of secular neutrality. The intent was to manufacture, by force of law, a portal for religious indoctrination where a select group of students could be used to accomplish what adults in this small area of Texas have been trying to accomplish for several decades: The restoration of monotheistic religious exercises in public schools. The purpose outlined in the statement of intent is a sham, the legislative history clearly demonstrates a non-secular purpose, and there is no doubt that the RVAA violates the first prong of the *Lemon* Test. As such, the RVAA violates the Establishment Clause, and any further analysis should be unnecessary. However, in light of the disdain for the *Lemon* Test and the inconsistent but widespread use of the Endorsement and Coercion Tests in Establishment Clause jurisprudence, the analysis of the constitutionality of the RVAA is not yet complete.

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<sup>161</sup> TEXAS CONSERVATIVE COALITION, <http://www.txcc.org/traditional-values> (last visited Jan. 2, 2012).

<sup>162</sup> Eric Berger, *Warren Chisum: Science is a Religion, too*, SCIGUY, (Feb. 15, 2007), <http://blog.chron.com/sciguy/2007/02/warren-chisum-science-is-a-religion-too/>.

<sup>163</sup> THE COGHLAN LAW FIRM, <http://www.christianattorney.com/> (last visited Nov. 27, 2012).



*B. Does the RVAA Convey a Message of Endorsement?*

Originally, the *Lemon* Test's second prong asked if the governmental action had the primary effect of advancing or inhibiting religion. Although some student expression made possible by the RVAA may indeed be secular, the primary effect will advance religion. Today, *Lemon*'s effect prong is a part of the Endorsement Test, which asks whether a statute conveys a message of endorsement or disapproval of religion as interpreted by a reasonable observer while considering the origins and context surrounding its passage.<sup>164</sup> The origins and context can be used as evidence demonstrating either a secular purpose<sup>165</sup> or non-secular purpose that effectively endorses religion.<sup>166</sup> Any reasonable observer familiar with the sponsors and authors of the RVAA could not help but conclude that the governmental action "convey[s] a message of endorsement,"<sup>167</sup> especially when exposed to continual and repetitive religious messages during morning announcements, before athletic contests, and during any other school event so designated by the district,

The RVAA attempts to overcome this endorsement hurdle by directing the district and schools to "state, in writing, orally, or both, that the student's speech does not reflect the endorsement, sponsorship, position, or expression of the district,"<sup>168</sup> and "continue to provide the disclaimer at any other event in which a student speaks publicly for as long as a need exists to dispel confusion over the district's non-sponsorship of the student's speech."<sup>169</sup> This continuous surveillance increases entanglement between the government and religion and demonstrates substantial governmental control. Yet, a sympathetic judge could

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<sup>164</sup> See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 34-35 (2004) (O'Connor, J., concurring).

<sup>165</sup> See *Marsh v. Chambers*, 463 U.S. 783, 794 (1983) (holding a nonsectarian prayer to open a state legislative session was not a violation of the Establishment Clause due to its historical context).

<sup>166</sup> See *McCreary Cnty. v. ACLU*, 545 U.S. 844, 881 (2005) (holding unconstitutional, as a violation of the Establishment Clause, the posting of the Ten Commandments due to the context surrounding the posting, which was indicative of a religious purpose).

<sup>167</sup> *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984).

<sup>168</sup> TEX. EDUC. CODE ANN. § 25.152(a)(4) (West Supp. 2011).

<sup>169</sup> *Id.* § 25.152(b).

easily view the disclaimer as removing the imprimatur of state endorsement. Despite its possible effectiveness on the uninformed, proof by assertion is illusory. Many will see that the emperor has no clothes and that, despite the disclaimer, the machinery of the state is being used to advance religious exercises in public schools.

The Endorsement Test not only limits direct governmental action, it also limits the government from using its power to enable others to do what it cannot. The processes mandated by the RVAA use the power of the government to construct an environment where students will do what the government cannot: lead religious exercises in public schools. The RVAA not only sets the table for public demonstrations of religious faith, it forces all children to sit at the same table and observe even when they have contrary religious views.

### *C. Is the RVAA Coercive?*

Application of the Coercion Test raises significant constitutional concerns regarding the RVAA. In *Santa Fe*, the Court recognized that attendance at football games for many students was compulsory, and this compulsory reality contributed to the coercive impact and the level of offense experienced by students with contrary religious views.<sup>170</sup> “To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is ‘formalistic in the extreme.’”<sup>171</sup> Under the RVAA, the coercive pressure is magnified substantially over that recognized in *Santa Fe* and *Lee*, due to the fact that a captive audience of impressionable children will be forced to listen to religious messages ad infinitum. This may not be enough to meet the definition of coercion required by Scalia and Thomas, but it is far greater than the level of coercion required by most other Justices. In *Lee*, the Court stated: “What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a

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<sup>170</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000).

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

religious orthodoxy.”<sup>172</sup> The RVAA employs the machinery of the state to force religious ideology on nonbelievers, and the ludicrous disclaimers could be viewed by many as a transparent and laughable lie.

The context of the religious exercise and the age of those who must listen are factors courts consider when examining the potential coercive impact encountered by non-believers and students of diverse faiths. The RVAA not only applies to secondary schools,<sup>173</sup> it also applies to elementary schools where children are more impressionable and more susceptible to coercion.<sup>174</sup> Plato recognized the impressionable nature of children when he wrote: “[A] young person cannot judge what is allegorical and what is literal; anything that he receives into his mind at that age is likely to become indelible and unalterable; and therefore it is most important that the tales which the young first hear should be models of virtuous thoughts.”<sup>175</sup>

The paradigm supporting the prohibitions of the Establishment Clause lies not as a question of virtue, for most religious teachings are virtuous and many would argue essential for ordered liberty. The paradigm supporting the Establishment Clause seeks to prevent the government from using its power to promote the religious views of the majority in an effort to influence how others should structure the spiritual aspects of their lives. The RVAA mandates that schools use their power and position of trust to force the religious views held by a select group of honor students upon impressionable children. It forces the marriage of government and religion in an attempt to indoctrinate a particularly vulnerable population. This is exactly what the Establishment Clause was designed to prevent. Even the Fifth Circuit’s narrow holding from *Jones v. Clear Creek Independent*

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<sup>172</sup> *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

<sup>173</sup> *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (“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.”).

<sup>174</sup> *See Sch. Dist. v. Schempp*, 374 U.S. 203, 290 n.69 (1963) (“[T]he susceptibility of school children to prestige suggestion and social influence within the school environment varies inversely with the age, grade level, and consequent degree of sophistication of the child.”).

<sup>175</sup> PLATO, *REPUBLIC* 281 (Louise Ropes Loomis ed., B. Jowett trans., 1942).

*School District*<sup>176</sup> and its analysis in *Schultz v. Medina Valley Independent School District*<sup>177</sup> demonstrates that a major factor in permitting student-led graduation prayers is the near-majority age of the graduating seniors.

When the most objectionable parts of the RVAA are challenged, it should not matter whether the court applies the *Lemon*, Endorsement, or Coercion Test. The RVAA fails under all three. Any assertion of a secular purpose is a sham. The primary effect will advance religion, reasonable observers will believe that the government approves the religious messages disseminated through it auspices, and impressionable children compelled to attend will be coerced by the relentless and continual delivery of almost daily religious exercises.

#### *D. Legal Analysis Through Cherry-Picking*

Kelly Coghlan, the self-proclaimed “Christian Attorney,” claims to have drafted “the best piece of legislation for school districts that has been introduced in the past 50 years.”<sup>178</sup> On his website, Coghlan provides a summary of the law in an attempt to defend the RVAA, but his summary is incomplete and misleading.<sup>179</sup> Coghlan obfuscates the legal landscape by cherry-picking portions of a limited number of court decisions while ignoring others. Coghlan combines the public/private speech distinction articulated in *Mergens*, as well as bits and pieces of the language from *Santa Fe*, to argue that “nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday.”<sup>180</sup> While this is an accurate quote, the free exercise of religion is not protected in every circumstance, especially during instructional times. In public schools, prayers that create a substantial disruption of school operation, like other forms of disruptive speech, have not been afforded First Amendment

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<sup>176</sup> 977 F.2d 963, 972 (5th Cir. 1992).

<sup>177</sup> No. 11-50486 (5th Cir. June 2, 2011) available at <http://www2.mysanantonio.com/PDFs/20110602Prayer.pdf> (last visited Nov. 27, 2012).

<sup>178</sup> Letter from Kelly Coghlan, *supra* note 151, ¶ 30.

<sup>179</sup> *Id.* ¶ 24.

<sup>180</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000).

protection.<sup>181</sup> Several federal circuit courts have ruled that schools can exclude religious messages from curricular classroom activities.<sup>182</sup> Furthermore, the Court's opinion in *Santa Fe* included numerous additional passages indicative of constitutional concerns that contradict and nullify the selective passage referenced by Coghlan. For instance, the Court in *Santa Fe* stated:

Regardless of whether the prayers are selected by vote or spontaneously initiated at these frequently recurring, informal, school-sponsored events, school officials are present and have the authority to stop the prayers. Thus, as we indicated in *Duncanville*, our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek Prayer Policy cannot survive.<sup>183</sup>

This language shows that the Court will not support student-initiated prayers as a part of school events, such as football games, which are “far less solemn and extraordinary.”<sup>184</sup> The Court in *Santa Fe* also stated: “The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”<sup>185</sup> This is a clear recognition that the Free Exercise Clause does not stand alone. The freedom to carry out religious practices, or not, is no longer free when the power of the government is used for dissemination, sponsorship, or endorsement of religion. This is especially true when captive audiences of impressionable children are involved.

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<sup>181</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505, 513 (1969); Ralph D. Mawdsley, *Access to Public School Facilities for Religious Expression by Students, Student Groups and Community Organizations: Extending the Reach of the Free Speech Clause*, 2004 BYU EDUC. & L.J. 269, 298 (2004) (“Religious expression, as any other kind of expression, can be restricted and even prohibited if it becomes disruptive to the school environment . . .”).

<sup>182</sup> See *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1217 (11th Cir. 2004); *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 176-77 (3d Cir. 1999); *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 159 (6th Cir. 1995); *DeNooyer ex rel. DeNooyer v. Livonia Pub. Sch.*, 799 F. Supp. 744, 754 (E.D. Mich. 1992).

<sup>183</sup> *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 300.

<sup>184</sup> *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407 (5th Cir. 1995).

<sup>185</sup> *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302.

The Court in *Santa Fe* expressed concern over the location and circumstances surrounding the student prayers. “These invocations . . . take place on government property at government-sponsored school-related events,”<sup>186</sup> and “the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion.”<sup>187</sup> If the reasonable observer would conclude that student-led prayers delivered over the public address system at extracurricular events are an endorsement of religion, the certainty associated with such a reasonable conclusion would surely be higher when prayers are repeatedly delivered over the public address system during morning announcements.

The Court in *Santa Fe* also expressed concerns regarding the closed nature of the limited open forum: “[S]chool officials simply do not ‘evinced either “by policy or by practice,” any intent to open the [pregame ceremony] to “indiscriminate use,” . . . by the student body generally.”<sup>188</sup> Neither does the RVAA, which limits use of the schools public address system to students of honor as determined by school officials, intending to allow indiscriminate use of religious expression. The Court recognized that “the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.”<sup>189</sup> The RVAA, as written, is not as restrictive as the *Santa Fe* policy in that more than one student will have the opportunity to share their viewpoints over the school’s public address systems, but indiscriminate use by the student body will not be practiced. Students with minority viewpoints will still be effectively silenced. “The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views.”<sup>190</sup> “[W]hile *Santa Fe*’s majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.”<sup>191</sup> If prayers over the

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

<sup>187</sup> *Id.* at 305.

<sup>188</sup> *Id.* at 303 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988)).

<sup>189</sup> *Id.* at 304.

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

<sup>191</sup> *Id.* at 305.

public address system at football games would intensify the offense felt by students with minority religious beliefs, the daily religious exercises made possible by the RVAA would magnify this offense exponentially.

Students who meet the district's definition of "honor" may elect to offer non-religious messages, but the language of the model policy indicates that religious exercises are the preferred activity.<sup>192</sup> And the control maintained over the selection process allows school officials to stack the deck. The Model Policy states:

Only those students in the highest two grade levels of the school and who hold one of the following positions of honor based on neutral criteria are eligible to use the limited public forum: student council officers, class officers of the highest grade level in the school, captains of the football team, and other students holding positions of honor as the school district may designate.<sup>193</sup>

The "neutral criteria" for selecting students of "honor" substantially limits the pool to those who model viewpoints held by a majority of the student body or who fit the subjective viewpoint of school officials. It would be the rare case indeed for a student to be selected by the student body as a student council or class officer if he or she exhibited viewpoints and ideologies contrary to those held by the majority, especially since most student council and class officer elections are popularity contests. Furthermore, the authority to define the eligible students "makes it clear that the pregame prayers bear 'the imprint of the State and thus put school-age children . . . in an untenable position.'"<sup>194</sup> The misuse of one quote from *Santa Fe* taken out of context and applied to a factually different circumstance is unconvincing, especially when so many other passages stand in contradiction.

Coghlan's reliance on *Mergens* is also enigmatic. In *Mergens*, the Supreme Court ruled that voluntary student organizations that met after school hours on secondary campuses where school officials had volitionally established a limited public forum did not

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<sup>192</sup> See *supra* note 137.

<sup>193</sup> TEX. EDUC. CODE ANN. § 25.156 (West Supp. 2011).

<sup>194</sup> *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 305 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

violate the Establishment Clause.<sup>195</sup> The RVAA falls outside this protective penumbra on several levels. First, school attendance is not voluntary,<sup>196</sup> it is compulsory, and the mandates of the RVAA intentionally open the door for ongoing, sectarian, proselytizing prayers from which children cannot escape.<sup>197</sup> Second, the RVAA applies to all public schools, even elementary campuses where children are much more impressionable.<sup>198</sup> Third, the RVAA takes discretion away from school officials by mandating that all campuses are automatically considered to be limited public forums.<sup>199</sup> The *Mergens* decision, along with the Court's rulings in *Milford* and *Lamb's Chapel*, is devoid of any precedential value given the substantial factual differences from the RVAA policy. Providing voluntary, student-led religious groups equal access to the use of school facilities during non-instructional times, as that given to non-religious groups, represents neutrality. The RVAA, however, doesn't provide equal access. The forum mandated by the RVAA is strictly controlled by school officials and only available to the preferred few.

### *E. And Now . . . the Rest of the Story*

Not surprisingly, Coghlan, the "Christian Attorney," ignores several cases that, if considered, would call into question the constitutionality of the RVAA. One such oversight is *Hazelwood v. Kuhlmeier*, in which Justice White articulated that school officials are entitled to exercise editorial control over school-sponsored publications and other expressive activities, such as theatrical

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<sup>195</sup> Bd. of Educ. v. Mergens, 496 U.S. 226, 290-91 (1990).

<sup>196</sup> Every state has compulsory education statutes. See Grover J. Whitehurst & Sarah Whitfield, *Compulsory School Attendance: What Research Says and What it Means for State Policy*, BROOKINGS (Aug. 1, 2012), available at <http://www.brookings.edu/research/papers/2012/08/01-education-graduation-age-whitehurst-whitfield> (last visited Jan. 27, 2013).

<sup>197</sup> See TEX. EDUC. CODE ANN. § 25.152 (West Supp. 2011); *id.* § 25.156 ("The school district hereby creates a limited public forum for student speakers at all school events at which a student is to publicly speak. . . . Student speakers shall introduce: (1) football games; (2) any other athletic events designated by the district; (3) opening announcements and greetings for the school day; and (4) any additional events designated by the district, which may include, without limitation, assemblies and pep rallies.").

<sup>198</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); PLATO, *supra* note 175.

<sup>199</sup> § 25.152.



productions, when members of the public could reasonably conclude that the expression appears to “bear the imprimatur of the school.”<sup>200</sup> Justice White arrived at this conclusion because “[a] school must be able to set high standards for the student speech that is disseminated under its auspices” and “take into account the emotional maturity of the . . . audience.”<sup>201</sup> The Court recognized a substantial degree of control by school officials over expressions in school-sponsored publications and school-related events where officials have “legitimate pedagogical concerns.”<sup>202</sup> *Hazelwood* has not been overruled and must be considered when analyzing whether religious exercises delivered during morning announcements, at all athletic contests, or at any other school function where a student is to publically speak represent school speech or private speech. *Hazelwood* is also relevant when considering whether school officials have legitimate, pedagogic concerns that would justify prohibiting in-class assignments with religious references.<sup>203</sup> An occasional religious reference, which is directly related to the curricular purpose, should not be punished based upon the mistaken view that any mention of religion violates the Establishment Clause.<sup>204</sup> However, religious references with no curricular connections can be excluded like any other secular expression that bears no connection to the assignment. Even if section 25.153, standing alone, is constitutional, it stands as a contradiction to cases from other jurisdictions analyzed under *Hazelwood* where school control over classroom exercises was strongly supported, even under

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<sup>200</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

<sup>201</sup> *Id.* at 271-72.

<sup>202</sup> *Id.* at 273.

<sup>203</sup> §§ 25.152-.154.

<sup>204</sup> See, e.g., *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 287 (5th Cir. 1996) (Jones, J., dissenting) (“School officials, averse to the emotional and financial costs of litigation, have systematically excised religious references from school curricula and activities in response to the caselaw. This widespread Establishment Clause misconstruction occurs notwithstanding that Supreme Court justices have repeatedly acknowledged the importance of teaching about religion in public schools and that no Supreme Court authority limits students’ nondisruptive religious self-expression.” (citation omitted)).

circumstances where the activity was only remotely related to a curricular exercise.<sup>205</sup>

However, “[t]he Fifth Circuit has suggested that it favors a narrow approach based on the facts of *Hazelwood*.”<sup>206</sup> In *Morgan v. Swanson*, the Fifth Circuit decided that the application of *Hazelwood* was unnecessary in deciding whether a Christmas party at school where students exchanged small gifts was a curricular event and whether the student’s speech was related to legitimate, pedagogic concerns.<sup>207</sup> *Swanson*, however, only applies to student gifts containing religious messages handed out on an equal basis with other secular gifts at special and limited times of the year. It cannot be read so broadly as to permit the preferential and frequent endorsement of ongoing religious exercises addressed to the entire student body over the school’s public address system.

In *Karen B. v. Treen*, the Fifth Circuit applied the *Lemon* Test to invalidate a Louisiana Statute that allowed school officials to ask teachers to solicit student volunteers to offer daily prayers.<sup>208</sup> If no student volunteered, then the teachers were allowed to provide the prayer.<sup>209</sup> The court noted that simply by looking at the language of the statute, its clear purpose was to conduct religious exercises.<sup>210</sup> While the subject of any particular prayer could be secular, this circumstance could not “alter the inherently religious character of the exercise.”<sup>211</sup> The court reasoned that in light of the statute’s purpose, the primary effect would advance religion.<sup>212</sup> Based on the language of the RVAA, it is also patently clear that the purpose is to conduct religious exercises in schools. These exercises will have the primary effect of advancing religion, leading any reasonable observer to conclude

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<sup>205</sup> See *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1210-11 (11th Cir. 2004); *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 169 (3d Cir. 1999); *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 154 (6th Cir. 1995); *DeNooyer ex rel. DeNooyer v. Livonia Pub. Sch.*, 799 F. Supp. 744, 746 (E.D. Mich. 1992).

<sup>206</sup> *Pounds v. Katy Indep. Sch. Dist.*, 730 F. Supp. 2d 636, 650 (S.D. Tex. 2010).

<sup>207</sup> *Morgan v. Swanson*, 610 F.3d 877, 888-90 (5th Cir. 2010).

<sup>208</sup> *Karen B. v. Treen*, 653 F.2d 897, 899 (5th Cir. Unit A Aug. 5, 1981).

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

<sup>210</sup> *Id.* at 901.

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

<sup>212</sup> *Id.* at 900.

that public schools in Texas are actively sponsoring and endorsing religious practices.

That same year, in *Hall v. Board of School Commissioners*, the Fifth Circuit ruled that a school board policy that allowed students to read morning devotionals over the school's public address system and to teach a Bible course that promoted religion was "clearly a violation of the Establishment Clause."<sup>213</sup> The court applied the *Lemon* Test and ruled the clear purpose and effect of the policy was to advance religion.<sup>214</sup> The RVAA mandates that the resources of the state are to be used to advance religion by hijacking the school's public address system and turning it over to students with the intent that they will deliver religious messages to children who must attend and listen by force of law. The primary effect, from the perspective of the students, will be virtually identical to the morning devotionals invalidated in *Hall*.

The next time the Fifth Circuit applied Establishment Clause jurisprudence to evaluate the merits of a governmental act, the result was an unusual and arguably defiant outcome. In *Jones v. Clear Creek Independent School District*, the School Board established a policy where the senior class could elect to have a student deliver a nonsectarian, non-proselytizing graduation prayer.<sup>215</sup> This policy was challenged as facially unconstitutional.<sup>216</sup> The Court applied the *Lemon* Test and held that the invocation was an act solemnizing the ceremony so that the "attendees may perceive the profound social significance of the occasion."<sup>217</sup> The court acknowledged the religious nature of the prayer but viewed it as minimal and not the preeminent purpose of the policy.<sup>218</sup> The court referenced Justice Burger's opinion in *Lynch*, in which he notes that "an absolutist approach in applying

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<sup>213</sup> *Hall v. Bd. of Sch. Comm'rs*, 656 F.2d 999, 1003 (5th Cir. Unit B Sept. 21, 1981). This case involved residents of Alabama, which was in the Fifth Circuit at the time. The Fifth Circuit was divided on October 1, 1981, when Alabama, Florida, and Georgia became the Eleventh Circuit.

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

<sup>215</sup> *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416, 417 (5th Cir. 1991), *vacated* 505 U.S. 1215 (1992).

<sup>216</sup> *Id.* at 418.

<sup>217</sup> *Clear Creek*, 930 F.2d at 420.

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

the Establishment Clause is simplistic and has been uniformly rejected by the Court,” as support for this limited exception.<sup>219</sup>

In analyzing the primary effect prong, the Fifth Circuit distinguished *Lee*, which had not yet been heard by the Supreme Court, by noting that school officials played a passive role and left any nonsectarian religious reference up to the discretion of the graduating class.<sup>220</sup> In addition, the students were at the threshold of adulthood, not “the impressionable people receiving special protection from religious inferences under the Supreme Court’s school prayer decisions.”<sup>221</sup> Finally, the court noted that a nonsectarian, non-proselytizing invocation witnessed during a once-in-a-lifetime<sup>222</sup> event is not nearly as coercive as when a captive audience is forced to listen to Bible verses or prayers on a daily or weekly basis. Based on all the circumstances, the court felt that the primary effect of the policy did not advance religion.<sup>223</sup>

In regard to the excessive entanglement prong, the court again referenced the passive role played by school officials, thereby distinguishing *Lee*.<sup>224</sup> The court asserted that the type of excessive entanglement which has concerned courts in the past was between the government and a religious institution.<sup>225</sup> The court ruled that the Clear Creek policy met all three of the *Lemon* requirements, and as such, was not a violation of the Establishment Clause.

The following year, the Supreme Court held in *Lee* that a graduation prayer delivered by a member of the clergy violated the Establishment Clause.<sup>226</sup> Hoping for relief, Jones filed an appeal with the Supreme Court to consider *Clear Creek*’s policy in light of *Lee*. The Supreme Court granted certiorari, vacated the holding, and remanded the case back to the Fifth Circuit for

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<sup>219</sup> *Id.* (citing *Lynch v. Donnelly*, 465 U.S. 678 (1984)).

<sup>220</sup> *Clear Creek*, 930 F.2d. at 422.

<sup>221</sup> *Id.* at 421.

<sup>222</sup> *Id.* at 422.

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

<sup>224</sup> *Id.* at 423.

<sup>225</sup> *Id.* (quoting O’Connor, J., from *Lynch v. Donnelly*, 465 U.S. 678, 689 (1984)) (“[T]he entanglement prong of the *Lemon* Test is properly limited to institutional entanglement.”).

<sup>226</sup> *Lee v. Weisman*, 505 U.S. 577, 597 (1992).

further consideration consistent with the holding in *Lee*.<sup>227</sup> On remand, the Fifth Circuit applied all three of the *Lemon* prongs again, as well as the Endorsement and Coercion Tests recently articulated in *Lee*. The court stated: “None of *Lee*’s three elements of coercive effect exist here. Prayers allowed under the Resolution do not unconstitutionally coerce objectors into participation.”<sup>228</sup>

As described, subsequent Fifth Circuit cases have limited the holding of *Clear Creek*. In 2007, before the RVAA was codified, Judge Sparks, a federal judge for the Western District of Texas, called on the Fifth Circuit to overturn *Clear Creek* at the next possible opportunity.<sup>229</sup> But this invitation was ignored when the graduation portion of the RVAA was challenged in *Schultz*.<sup>230</sup> Nevertheless, section 25.152(a)(2), though it specifically mentions graduation, does not advance religion even close to the level made possible by other sections of the RVAA.<sup>231</sup>

In *Herdahl v. Pontotoc County School District*, the Federal Court for the Northern District of Mississippi enjoined a school district from allowing students to broadcast prayers over the school’s intercom system during morning announcements and from allowing organized classroom prayers during instructional time.<sup>232</sup> In *Ingebretsen v. Jackson Public School District*, the Fifth Circuit upheld student-initiated graduation prayers, but ruled that the remainder of Mississippi’s School Prayer Statute violated all three Establishment Clause tests.<sup>233</sup> The statute read: “On public school property, other public property or other property, invocations, benedictions or nonsectarian, non-proselytizing student-initiated voluntary prayer shall be permitted during compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies

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<sup>227</sup> Jones v. Clear Creek Indep. Sch. Dist., 505 U.S. 1215 (1992).

<sup>228</sup> Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 972 (5th Cir. 1992) (Only the Eleventh Circuit has followed the decision in *Clear Creek*.); see also Adler v. Duval Cnty. Sch. Bd., 250 F.3d 1330, 1334 (11th Cir. 2001).

<sup>229</sup> Does 1-7 v. Round Rock Indep. Sch. Dist., 540 F. Supp. 2d 735, 749 (W.D. Tex. 2007) (“Thus, even if this Court is certain the Fifth Circuit will declare *Clear Creek* no longer good law at the first opportunity, this Court cannot put those words in the panel’s mouth.”).

<sup>230</sup> Schultz v. Medina Valley Indep. Sch. Dist., No. 11-50486 (5th Cir. June 2, 2011).

<sup>231</sup> See TEX. EDUC. CODE ANN. §§ 25.156, .152, .159 (West Supp. 2011).

<sup>232</sup> Herdahl v. Pontotoc Cnty. Sch. Dist., 933 F. Supp. 582, 586-87 (N.D. Miss. 1996).

<sup>233</sup> Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 279-80 (5th Cir. 1996).

and other school-related student events.”<sup>234</sup> Despite an assertion of a secular purpose, the Fifth Circuit ruled that the “purpose cannot be characterized as ‘secular’ because its clear intent is to inform students, teachers and school administrators that they can pray at any school event so long as a student ‘initiates’ the prayer.”<sup>235</sup> The holdings in *Herdahl* and *Ingebretsen* raise serious doubt about the constitutionality of the RVAA, especially sections that open the door for religious invocations over the school’s public address system during morning announcements or at school assemblies, sporting events, and any other event where a student speaks publically.

Although the Fifth Circuit has shown tolerance for the occasional religious exercise, these incidents are substantially limited in context and scope as compared to the potential level of religious exercises made possible by the RVAA. Occasional religious exercises do not have the primary effect of advancing religion, leading the reasonable observer to believe the district is endorsing religion, or generating coercive effects even on younger, more impressionable students. Under the RVAA, however, forcing religious exercises in public schools upon captive students with diverse religious beliefs is likely to be much more frequent and repetitive.

It is undeniable that the weight of judicial authority calls into question the legal viability of the RVAA. The students of honor are the recipients of preferential access to the school’s communicative tools and the purpose and intent of the RVAA is to enable students to lead religious exercises in front of a captive and diverse audience. The RVAA, implemented under threat of legal action, forced schools to establish limited public forums so that religious messages can be widely disseminated through the machinery of the state. The careful selection of statements taken out of context, ignoring contradictory federal cases and questionable distinctions, are evidence of a situation where personal bias interfered with the capacity for objective legal analysis. The authors and sponsors of the RVAA were blinded by their unconstitutional zeal to return prayers to public schools in Texas. Despite the inclusion of disingenuous disclaimers and the

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<sup>234</sup> *Id.* at 277.

<sup>235</sup> *Id.* at 279.

use of students as straw men, the result is the same—the use of the power of the state is an unconstitutional attempt to repetitively expose captive impressionable children to the religious views of the majority.

*F. The Mischaracterization of School-Sponsored Speech*

Coghlan argues that unless the government selects the religious message,<sup>236</sup> delivers the religious message,<sup>237</sup> requires a religious message to be given,<sup>238</sup> highlights the religious message as the preferred practice,<sup>239</sup> or gives preferential treatment to a private party with the intent that he or she will deliver a religious message,<sup>240</sup> the religious expression is private and would not violate the Establishment Clause. The assertion that these examples represent the only circumstances that speech can be attributed to the government is fallacious. Establishment Clause cases are regularly decided on a factual, case-by-case basis, which requires the exercise of legal judgment, especially in borderline cases.<sup>241</sup> Any argument that existing exceptions are the only exceptions removes legal judgment from the process and prevents the maturation of the law to meet an ever-changing social context. Coghlan's assertions also ignore the fact that the Court will examine the history and context behind the passage of a statute or policy not only in an attempt to determine if the purpose is secular, but to determine if the speech is private or government-sponsored. This examination necessitates the use of a flexible standard based on legal reasoning as applied to the totality of the circumstances, not a perfunctory, self-serving checklist passed off as exhaustive of all possible scenarios.

Even if Coghlan's list was exhaustive, the messages delivered under the RVAA model policy would still be viewed as school-sponsored speech. The RVAA requires school officials to permit the dissemination of religious messages during compulsory

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<sup>236</sup> See *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

<sup>237</sup> See *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>238</sup> See *Lee v. Weisman*, 505 U.S. 577 (1992); *Karen B. v. Treen*, 653 F.2d 897, 902-03 (5th Cir. Unit A Aug. 5, 1981).

<sup>239</sup> See *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985).

<sup>240</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314-15 (2000).

<sup>241</sup> See *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 16 (2011) (Breyer, J., concurring).

attendance times by delivering the forum, audience, and means of communication to a limited class of students who enjoy preferential treatment under a policy that highlights religious messages as the preferred practice for the purpose of advancing religious ideology. The only factor missing is the actual selection of the message to be delivered. This missing element, however, can be found on the “Christian Attorney’s” website under the link entitled “Message to Student Speakers,”<sup>242</sup> which explains, step-by-step, how students should deliver their sectarian prayers.<sup>243</sup>

Surprisingly, the most controversial sections of the RVAA have not been challenged in either state or federal court. When that day arrives, whether it is analyzed as an Establishment Clause issue or an expression issue depends on how the case comes before the court. If the case is filed by those seeking to enforce its mandates, it is likely to be framed as a First Amendment viewpoint discrimination issue. As previously discussed, the religious exercises permitted by the Court as protected expression in *Mergens*, *Lamb’s Chapel*, and *Milford* were vastly different from those mandated by the RVAA and therefore provide little, if any, precedential value. However, a related line of Supreme Court cases that examined the union of religious messages and the distinction between private and government speech provide some insight that strengthens the case against the RVAA.<sup>244</sup>

*Capital Square Review & Advisory Board v. Pinette* is referenced by Coghlan in his summary of the law to argue that private religious speech is protected under the Free Speech Clause on an equal basis with secular private expression.<sup>245</sup> This assertion is another spurious mischaracterization. First, the venue in *Pinette* was a ten-acre plaza surrounding the Statehouse in Columbus, Ohio, which had been used for over 100 years as an open forum available to all on equal terms where speeches, gatherings, and festivals involved the expression of both secular

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<sup>242</sup> Kelly Coghlan, *Message to Student Speakers*, <http://christianattorney.com/studentspeakers.htm> (last visited Nov. 27, 2012).

<sup>243</sup> Kelly Coghlan, *An American Student’s Prayer*, <http://christianattorney.com/americanstudentprayer.htm> (last visited Nov. 27, 2012).

<sup>244</sup> Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975 (2011).

<sup>245</sup> Kelly Coghlan, *Summary of the Law*, <http://christianattorney.com/expression.htm> (last visited Nov. 27, 2012).



and religious views.<sup>246</sup> This type of venue is markedly different from that of a public school, which has never been an open forum available to all on equal terms. Impressionable children were not forced to view the displays in *Pinette*. Second, Justice Scalia stated, “[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.”<sup>247</sup> The Supreme Court has never ruled that the creation of a public forum provides protection for the government against scrutiny under the Establishment Clause.<sup>248</sup> If it did, the creation of a public forum would bestow upon school officials the authority to advance religion without restraint.

This recognition repudiates the assertion that religious speech is no different from ordinary secular expression. Finally, Justice Scalia foreshadowed the manipulation of state agencies by state officials when he wrote, “[a]nd one can conceive of a case in which a governmental entity manipulates its administration of a public forum . . . in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement *that is in fact accurate*.”<sup>249</sup> The RVAA is the perfect illustration of this type of manipulation.

The government speech doctrine was examined recently in *Pleasant Grove City, Utah v. Summum*, in which the Supreme Court ruled that the City of Pleasant Grove did not violate the expression rights of a religious group when it decided not to display the group’s religious monument in a city park despite other religious monuments so displayed.<sup>250</sup> The Court determined that the City had not opened the park for any and all donations to be displayed.<sup>251</sup> Instead, it “effectively controlled the messages sent by the monuments in the park by exercising final approval authority over their selection.”<sup>252</sup> As a result, the monuments in

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<sup>246</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 757 (1995).

<sup>247</sup> *Id.* at 761-62.

<sup>248</sup> *Id.* at 772.

<sup>249</sup> *Id.* at 766.

<sup>250</sup> *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 489 (2009).

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

<sup>252</sup> *Id.* at 473 (internal quotation marks omitted). In *Summum*, the location was a public park, which is usually considered an open forum, far different from a school,

the park represented government speech, and as such, the city did not violate the First Amendment expression rights of other groups by refusing to display their monuments on an equal basis.

When a school invites a guest speaker to address all or part of the student body, it does not relinquish control; it has not opened the school for any and all messages to be expressed. The school still has legitimate, pedagogic concerns over the content of the message. Likewise, when a student addresses the student body over the public address system during morning announcements, school officials retain complete control over the messages. In most cases, messages must have prior approval, and in all cases, messages that are lewd, vulgar or obscene,<sup>253</sup> create or are likely to create a substantial disruption,<sup>254</sup> advocate drug use,<sup>255</sup> or contradict board-adopted policy,<sup>256</sup> can be prohibited without running afoul of the First Amendment. To assert that schools give up control over the content of the messages delivered at school, or at any and all school related functions, is the equivalent of arguing that a judge gives up control over the content of the testimony delivered by witnesses during a trial. The messages delivered over the public address system during school, or at school-sponsored events, represent the dissemination of government messages, and the government speech doctrine allows schools to control the content of the message.<sup>257</sup>

The RVAA presents the opposite governmental position from that seen in *Sumnum*. Instead of preventing outside groups from using the communicative power of governmental property to disseminate private religious messages, the RVAA forces local school districts to turn over the communicative power of government property for the purpose of the dissemination of religious messages. Despite this difference, the RVAA expressly recognizes the authority of the school to restrict the dissemination

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which must exercise substantial control over the messages it expresses or permits as it attempts to accomplish its unique and compelling mission.

<sup>253</sup> See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986).

<sup>254</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 (1969).

<sup>255</sup> See *Morse v. Frederick*, 551 U.S. 393 (2007).

<sup>256</sup> See *Caudillo ex rel. Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d. 550, 568 (N.D. Tex. 2004).

<sup>257</sup> See Helen Norton, *Imaginary Threats to Government's Expressive Interest*, 61 CASE W. RES. L. REV. 1265 (2011).

of student messages to those considered to be “otherwise permissible subject[s].”<sup>258</sup> This vague language clearly recognizes the authority of school officials to regulate student messages. When the expression is subject to the control of the government, it cannot be characterized as private speech.

Even if one were to concede that religious exercises made possible by the RVAA could be characterized as private speech, to avoid viewpoint discrimination, schools would have to open the forum to all students, not just students of honor. Otherwise, students who do not fit the subjective definition set forth by the policy face continual discrimination. To avoid this discrimination, two approaches could be employed. Either morning announcements would have to be extended to accommodate all students, which would substantially interfere with instructional time and the basic mission of the school, or the standards used in the selection of student speakers would have to be modified so all students enjoy an equal chance of being selected, not just students of subjective honor. Under either alternative, the possibility for the dissemination of highly controversial, divisive, and offensive content would be magnified.

Since the First Amendment protects highly offensive private speech,<sup>259</sup> students would be free to make outrageous comments as long as the comments were “related to the purpose of the event.”<sup>260</sup> For example, student speakers could say, “In honor of the holiday season as marked by the winter choir performance, I feel it is appropriate to let everyone know that God does not exist and neither does Santa Claus.” If the student speaker were introducing a theatrical production that includes a gay character, they could say, “The production we will see tonight includes a gay character. In light of the discrimination faced by homosexuals, I feel compelled to say that there is nothing wrong with homosexuality.” On the contrary, the student may believe homosexuality is wrong and could say, “Homosexuality is against

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<sup>258</sup> See, e.g., TEX. EDUC. CODE ANN. §§ 25.151-.152, .156 (West Supp. 2011).

<sup>259</sup> See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

<sup>260</sup> See § 25.156.

God's law; it is a chromosomal disorder that should be included in the DSM-V as a psychological abnormality." If the student speaker were reading the results of a school-wide mock presidential election during the morning announcements he or she could say, "President Obama is a liar and if you believe his propaganda then you are ignorant." Or the student speaker might say, "The Republican candidate is in favor of entitlement reform which means they want to kill old people and throw poor people out on the street." If a student speaker were announcing the time and date of the next meeting of a support group for student parents, he or she could use the opportunity to express their views on abortion or contraceptives. If the Latino student organization were meeting after school the student speaker could say, "Any Latino student interested in attending this meeting is welcome, even illegal aliens who are criminals."

Each of these statements, despite being highly offensive to one or more members of the school community, is related to the purpose of the hypothetical event. It is not a given that these statements would create a substantial disruption—they are not lewd, vulgar, or obscene, and they do not advocate drug use, nor are they threatening. Therefore, if characterized as private speech, these comments, and others like them, would be protected under the First Amendment. If, on the other hand, school officials can punish student speakers for these types of expressions because they are not "otherwise permissible," then the speech cannot be characterized as private speech. It seems as though the sponsors of the RVAA want to classify student comments broadcast over the school's public address system during school and at most school-sponsored events as private speech when those comments are religious, yet retain the authority to limit speech to "otherwise permissible subject[s]."<sup>261</sup> This invites viewpoint discrimination.

The RVAA, specifically the term "other permissible subject," may be susceptible to a constitutional challenge for vagueness. Vague statutory language raises two concerns by vesting in government authorities the power to define vague terms according

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<sup>261</sup> TEX. EDUC. CODE ANN. §§ 25.151-156 (West Supp. 2011) (The phrase "otherwise permissible subjects" is used twenty times throughout the statute indicating a high degree of governmental control over the message.).

to their subjective interpretation.<sup>262</sup> Furthermore, vague terminology “denies fair notice of the standard of conduct to which a citizen is held accountable.”<sup>263</sup> The RVAA never defines “otherwise permissible subject” so school officials are free to determine what is or is not permissible content based upon their subjective values, and student speakers are forced to proceed without a clear understanding of the standard by which they will be held accountable. This environment opens the door for arbitrary and discriminatory enforcement.

### CONCLUSION

Identifying and maintaining a constitutional balance between the limitations on governmental action mandated by the Establishment Clause, and the religious protections secured by the Free Exercise Clause, is an evasive and imprecise endeavor. Abiding by the limitations of the former can produce infringements of the latter. Yet despite these difficulties, and the litany of inconsistent case outcomes, several unequivocal truths are evident. For those who advocate for religious freedom, the appropriate balance does not require the complete removal of religion from public schools. Students still have the freedom to exercise and demonstrate their religious beliefs. They can pray at almost any time. In most cases, students can form religious clubs and participate in prayer groups during non-instructional times. They can read the Bible or other religious books, as long as they are not doing so in neglect of their secular requirements. They can wear religious symbols and clothing unless banned by a content-neutral school dress code or uniform policy. They can distribute religious literature, as long as they do so according to the appropriate time, place, and manner as set by content-neutral standards. And they can discuss religious issues with others students. Clearly, anyone who asserts that students have no religious freedom in public schools is wrong.

In 1948, when the Supreme Court first applied the Establishment Clause to public schools, government sponsored religious practices were ubiquitous, and anything resembling an

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<sup>262</sup> See *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

<sup>263</sup> *Leonardson v. City of East Lansing*, 896 F.2d 190, 196 (6th Cir. 1990).

appropriate balance did not exist. Since *McCullum*, the fulcrum of balance has migrated to the other end of the religious spectrum; so much so that a surprising number of educators operate under the mistaken paradigm that public schools must be religiously sterile environments. Any educator functioning from this misguided perspective—using their position of authority or color of title to punish a student for the non-disruptive and non-threatening exercise of their religious freedoms—does so in violation of the First Amendment. Their actions have gone beyond the balance of religious neutrality into the arena of religious hostility.

However, the blessings secured under the Free Exercise Clause are individual rights, not express or implied governmental powers. This fundamental, but often overlooked, distinction marks the boundary between religious neutrality and religious advocacy; it is a boundary that portions of the RVAA have ignored. It is undeniable that the government cannot select religious messages, deliver religious messages, require a religious message to be given, highlight that religious messages are the preferred practice, or give preferential treatment to private parties with the intent that they will deliver a religious message. This is where the RVAA breaches the boundary of religious advocacy. The State of Texas is using its authority in a manipulative manner to force all public schools to relinquish control over the avenues of communication in order to facilitate and advance the dissemination of religious messages toward a captive audience. The government cannot abuse its authority to enable others to effectuate a forbidden objective.

When the RVAA is challenged, it should not matter whether the court applies the *Lemon*, Endorsement, or Coercion Test—portions of the statute violate all three. The title of the statute and the use of the words “religion” or “religious viewpoint” more than sixty times clearly demonstrate that its purpose is to advance and promote religious exercises in public schools. An examination of the legislative history reveals an ongoing and coordinated effort by a small group of religious activists who have utilized the power of the state to subjugate the Establishment Clause in order to return prayer to public schools. Any assertion of a secular purpose is a sham, as is the disclaimer. Despite repeated assertions, the habitual dissemination of religious messages during school and at

most school-sponsored events nullifies the spurious denial of endorsement, especially with elementary age children. Lies repeated over and over do not change reality. In light of the probable frequency of religious exercises forced upon a captive student population, more than half of whom are in elementary school, the level of coercion created by the RVAA is far greater than that seen in both *Lee* and *Santa Fe*.

Even if the court decides to analyze the RVAA under the standards set forth by the Equal Access Act, and all related federal cases, it will still fail constitutional scrutiny. Underlying every equal access case is the mandate that student participation and attendance is voluntary. Attending school is compulsory. Providing equal access to a student-initiated religious group represents religious neutrality—an accommodation of religious freedom. Students with different beliefs are not forced to listen to the religious messages of the group. The RVAA removes this freedom from the non-believer, or those of a different faith, by mandating all the conditions needed for involuntary exposure to religious doctrine.

Despite my position on the constitutionality of the RVAA, I am a spiritual person who recognizes the value of religion both on a personal and collective level. On an individual level, recent studies indicate that people who embrace and follow religious tenets are happier, more compassionate, and less stressed,<sup>264</sup> they have a higher self-esteem than the average person,<sup>265</sup> fewer problems with anxiety and alcohol addiction,<sup>266</sup> and commit fewer crimes and deviant acts.<sup>267</sup> On a collective level, most orderly and

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<sup>264</sup> Wai-keung Jerf Yeung & Chan Yuk-chung, *The Positive Effects of Religiousness on Mental Health in Physically Vulnerable Populations: A Review on Recent Empirical Studies and Related Theories*, 11(2) INT'L J. OF PSYCHOSOCIAL REHABILITATION 37-52 (2007), available at [http://www.psychosocial.com/IJPR\\_11/Positive\\_Effects\\_of\\_Religiousness\\_Yeung\\_Jerf.html](http://www.psychosocial.com/IJPR_11/Positive_Effects_of_Religiousness_Yeung_Jerf.html).

<sup>265</sup> Rebecca Searles, *Religious People Have Higher Self-Esteem but Only in Some Countries, Study Shows*, HUFFINGTON POST SCI. (Jan. 20, 2012, 5:31 PM), available at [http://www.huffingtonpost.com/2012/01/20/religion-happiness\\_n\\_1219295.html](http://www.huffingtonpost.com/2012/01/20/religion-happiness_n_1219295.html).

<sup>266</sup> Scott Schieman, *The Education-Contingent Association Between Religiosity and Health: The Differential Effects of Self-Esteem and the Sense of Mastery*, 47(4) J. FOR SCI. STUDY REL. 710-24, Dec. 2008.

<sup>267</sup> R. Mark Kelly, Michael Young, George Denny & Carrie Lewis, *Liars, Cheaters, and Thieves: Correlates of Undesirable Character Behaviors in Adolescents*, 36(4) AM. J. HEALTH EDUC. 194-201 (2005).

safe societies are built upon standards of individual conduct, many of which originated from religious doctrine, and the decline of these societies is usually the consequence of moral decay and an abandonment of religious principles rather than the impact of outside forces.<sup>268</sup> The very survival of our society may depend on religion and spirituality.

Despite these positive aspects of religion, there is a dark side to religion as well. More blood has been spilled over religious differences than almost any other causative factor in human history.<sup>269</sup> Most religions include practitioners who believe that their way is the only way and worse, they treat non-believers or those with different religious viewpoints as second-class citizens. Religious ideology has been used as a tool for oppressions and, in some cases, genocide. In some respects, religion represents both the best and worst of human nature.

Despite my spirituality, I also believe in the Constitution, and I cannot condone picking and choosing which parts of the Constitution to follow and which parts to ignore. The religious clauses of the First Amendment are designed to limit the use of governmental power in matters of religious faith. They do not and cannot exist in isolation, but must work in harmony if true religious freedom is to be protected.

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<sup>268</sup> See JIM NELSON BLACK, *WHEN NATIONS DIE: TEN WARNING SIGNS OF A CULTURE IN CRISIS* (1994).

<sup>269</sup> See MEIC PEARSE, *THE GODS OF WAR: IS RELIGION THE PRIMARY CAUSE OF VIOLENT CONFLICT?* (2007).