The Individualist Court: Naked Public School, Clothed Public Square

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Abstract

The Naked Public Square (Neuhaus 1984) argued that in recent decades the Supreme Court has actively sought to remove religion from American public life. Over twenty-five years after the publication of this book, does Neuhaus’ theory still stand? I examine this question in the context of public schools, because attendance at public schools is mostly compulsory, and thus the way children and their beliefs are treated becomes a matter of serious cultural consequence, not merely academic discussion. The existing research on this topic focuses on two polemic understandings of Supreme Court activity, separationist and accommodationist, neither of which are precise enough to wholly describe the Court’s decisions over the past quarter century. Hence, I instead argue that the Court is best characterized as individualist – that is, Court decisions since the mid-1980s reflect a respect for the ability of the individual to practice religion unhindered in public schools, as well as a respect for the individual to resist coercive religious elements in public schools. Clothed or bare, the individual retains the right to choose or renounce religion in public schools.

I Introduction

I. The Naked Public Square

In 1984 Richard Neuhaus published *The Naked Public Square*, centrally arguing that "in recent decades, separationism has provided the legal rationale for the sanitizing of the public square."[i] In what Mary Ann Glendon called "a rallying cry,"[ii] Neuhaus warned that the United States Supreme Court Justices "venture where politicians fear to tread" in delivering controversial decisions overruling religion in the public square, without subjection to "democratic debate or vote."[iii] This rallying cry is the impetus for this discussion of the central question of this essay: Since the 1984 publication of *The Naked Public Square*, how can we characterize Supreme Court decisions regarding religion in the public square, specifically in public schools? Although there are a couple of competing schools of thought regarding this question – namely, those who view the Court as separationist, or as accommodationist– I will argue that the Supreme Court is best described as what I term *individualist*, insofar as the Court's decisions over the past two decades reveal a respect for an individual's ability to organize around and speak freely about religion in public schools, as well as respect for an individual's ability to reject religion or resist its coercion in public schools. According to this view, the Supreme Court is not concerned with removing or maintaining religion for its own sake; rather, the Court strongly considers the rights of the individual before removing or maintaining religion in public schools.

My exclusive focus on public schools departs from Neuhaus' logic. Unlike the general public square in which participation is voluntary, attendance at public schools is compulsory for students whose families may not have the means to procure an education better suited to their familial values, such as an education offered by parochial schools. As Mary Ann Glendon keenly observes, "when one considers that most children spend more waking hours in school than with their parents… it is obvious why schools have become the chief battlegrounds for the struggle over the role of religion, not only in public life, but in private life as well."[iv] It is precisely because the government maintains a captive audience of students in primary and secondary schools that the way in which the state treats students' religious beliefs has significant Constitutional and cultural implications.

II. The Court: Separationist or Accommodationist?

Before addressing my theory of *individualism* in this essay, due diligence ought to be given to the two prevailing schools of thought regarding the current state of American church-state relations in public schools: *separationism*, which holds that the Supreme Court has sought to remove religion from public education, and *accommodationism*, which holds that the Supreme Court has sought to maintain religion in public education. Scholars in Neuhaus' tradition declare that the Supreme Court has adopted a separationist doctrine in their decisions regarding religion in the public square, adhering strictly to Thomas Jefferson's principle of a "wall of separation between church and state."[v] Glendon describes the chief vice of this doctrine succinctly, since "secularism in the public schools involved the establishment of a new value system through a process of which parents had little notice and in which they had little voice."[vi] Glendon's statement echoes Neuhaus' distaste for the Court's undemocratic process of removing culturally-

significant religious elements from public education. "As late as 1931," Neuhaus observes of America, "the Supreme Court could assert without fear of contradiction, 'We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God.'"[vii]

Within a few decades, Neuhaus' rallying cry was substantiated by several Court decisions which reflected a Court actively removing religious elements from American public schools. Beginning with *McCollum v. Board of Education* (1948), the Supreme Court ruled 6-1 forbidding religious instruction at public schools. This trend continued in the oft-cited case *Engel v. Vitale* (1962), where the Court ruled 6-1 that requiring students to recite prayers in public schools was unconstitutional. The recitation of Bible verses and the Lord's Prayer in public schools was ruled unconstitutional by the Court in *Abbington School District v. Schempp* (1963) by a margin of 8-1, and Arkansas' ban on teaching evolution in public schools was ruled unconstitutional by a unanimous Court in *Epperson v. Arkansas* (1968). Finally, in *Stone v. Graham* (1980) the Court held unconstitutional a Kentucky law requiring that the Ten Commandments be displayed in each public school classroom by a narrow margin of 5-4. While the Court could boldly declare in the 1930s that America was a Christian nation, anything recognizably Christian, or religious for that matter, was arguably eliminated from America's public schools by the 1980s.

Today, over a quarter of a century after the publication of *The Naked Public Square*, separationism still holds notable weight in Supreme Court decisions. Michael McConnell's 1992 work, "Religious Freedom at a Crossroads," noted that "the Court's conception of the First Amendment more closely resembled freedom *from* religion… than freedom *of* religion,"[viii] and expressed hope that the Rehnquist Court would chart a new course. However, Glendon more recently insists that "despite some evidence to the contrary… since 1984, the Court has generally continued a six-decade-long trend toward confining religion to the private sphere."[ix] Glendon cites key cases asserted by separationists as evidence for the propagation of this doctrine, including *Wallace v. Jaffree* (1985); *Lee v. Weisman* (1992); *Santa Fe. V. Doe* (2000), all of which this essay will consider. While the exact issue relating to religion in public education differed in each case, their core contention was similar: impermissible perception of school sponsorship of the portrayal of religion in public education. Michael Davis observes that, true to Neuhaus' assertion, "the [recent] Court has never wavered on issues regarding religious activities in public schools – it has struck down every policy or program it has chosen to review."[x] Indeed, with concern to religious activities, it is true that in every case from *Wallace v. Jaffree* to *Santa Fe v. Doe* a practice has been struck down precisely because of its expression of religion to a captive audience and its association, real or perceived, with the school itself.

But what about religious *speech*? Since the 1980s, groups of religiously-minded public school students have successfully utilized freedom of speech arguments certain to secure equal protection of their religious speech in a school forum otherwise open to other, non-curricular student groups. Broadly speaking, the decisions in these cases effectively ended discrimination against private religious speech in public forums where other types of speech were protected and even endorsed by the school through access to school funds and facilities. These religious free speech cases, ranging from elementary school through University level student groups and outside religious groups seeking equal access to school resources, represent a pattern of religious victories in public institutions largely unseen at the time Neuhaus issued his rallying cry. Gerard Bradley declared of this shift in the Court's thinking, that "the Court is learning to live with God."[xi]

The Supreme Court's "learning to live with God" is exactly what critics of accommodationism fear. Observing the Court's recent trend of accommodating religious elements in public schools, Derek Davis argues that it "raises serious concerns for Americans who view the separation of church and state as the surest guarantor of religious liberty."[xii] In perhaps the most pointed argument repudiating these decisions for purposes of our discussion is Davis' warning that these victories have actually dampened the importance afforded to religious speech and practice, as espoused by the Establishment Clause, by equating it with general freedom of speech.[xiii] Steven Green supports this assertion, describing that "under this framework, a student's assertion that Jesus was the world's greatest revolutionary was no different than a similar claim about Mao Tse-tung."[xiv] Despite their contentions, it is clear that a protection of religion as speech has served to maintain religion in American public schools, seemingly filling the void created by the Court's current view of the Establishment Clause.

III. The Individualist Court

Both the accommodationist and separationist designations fail to acknowledge Supreme Court decisions which reflect obvious victories for the opposing school of thought; conflicting decisions are largely brushed aside as anomalies in the Court's perceived crusade for, or against, religion in public schools. In contrast, I argue that these anomalies instead reflect a nuanced Supreme Court doctrine equally concerned with removing coercive religious elements in public education while simultaneously protecting an individual's free exercise of religion in the same sphere. Instead of separationist or accommodationist, the Court's recent church-state decisions can be better characterized as what I term *individualist*. This doctrine holds that the Court's decisions reveal a respect for an individual's ability to organize around and speak freely about her religion, as well as a respect for an individual's right to reject religion or resist its coercion in public schools. This view of the Court, in my opinion, best reflects the hopes expressed by Michael McConnell in 1992: "It is to preserve what Madison called the 'full and equal rights' of religious believers and communities to define their own way of life, so long as they do not interfere with the rights of others, and to participate fully and equally with their fellow citizens in public life without being forced to shed their religious convictions and character."[xv]

IV. The Roadmap

To illustrate that the Court cannot be holistically characterized as either separationist or accommodationist, this essay will examine pro-religious claims in post Neuhaus cases and discuss why they were or were not successful before the Court. I will argue that those successes and failures characterize a Court more concerned with individual liberty than with removing or maintaining a religious element in public schools for its own sake. Chapter 2 of this essay assesses cases concerning religion in public schools that have resulted in removal of a religious element from schools by the Supreme Court, including *Wallace v. Jaffree* (1985, moment of silence mentioning voluntary prayer ruled unconstitutional); *Edwards v. Aguillard* (1987, teaching the theory of creationism alongside the theory of evolution ruled unconstitutional); *Lee v. Weisman* (1992, rabbi chosen to give a general religious prayer at school graduation ruled unconstitutional).[xvi] While each case addresses a different question of religion in public schools, two common issues antithetical to the individualist court will be discussed in relation to each

case: real or perceived school support for the activity and the involuntary nature of the religious element.

Chapter 3 reviews cases involving religion in public schools that have resulted in a religious element being maintained in the school by Supreme Court decree. Cases to be considered in this chapter include: *Westside Community Schools v. Mergens* (1990, children have the right to establish a Christian group on campus); *Rosenberger v. Rector and Visitors of the University of Virginia* (1995, UVA inappropriately denied funding to student magazine Wide Awake Productions for its Christian ideals).[xvii] These cases will be discussed as having in common religious elements initiated by individuals with no official school position, and an open, voluntary audience of individuals who participate in the religious element. As will be shown, both of these characteristics are necessary conditions for the individualist Court to maintain religion in a public school.

Chapter 4 considers the curious cases of *Santa Fe v. Doe* (2000, student-initiated prayer at a football game ruled unconstitutional) and *Christian Legal Society v. Martinez* (2010, UC Hastings' all-comers group membership policy ruled constitutional). These cases are particularly intriguing because they do not fit the general pattern of freedom of speech victories elaborated in Chapter 3, but they nevertheless reflect a Court centrally committed to protecting the individual. Indeed, while student-initiation and voluntarism are necessary conditions in individualist Court jurisprudence, these cases demonstrate that such characteristics are not sufficient conditions to maintain religion in public schools.

Chapter 5 offers a critique of Neuhaus' characterization of a public school as a public square, and argues that public schools, as a matter of common sense and Court understanding, do not enjoy the same expansive freedoms allotted to proper public squares.

V. Methods of Study

The bulk of the evidence I will use to substantiate my claim is comprised of Supreme Court opinions and oral arguments relating to religion in public schools over the past 25 years.

The criteria that the Court considers in determining whether or not to maintain religion in public schools is firmly grounded in precedent. Under the first set of criteria – official school sponsorship or endorsement of a religious activity and an involuntary audience of students – the courts have historically and consistently removed religion from public classrooms.[xviii] These conditions reflect a Court doctrine dedicated to Establishment Clause concerns and the ability of the individual to resist coercive religious elements in an involuntary environment. With regard to the second set of criteria – non-school/student-initiated speech and open/voluntary group membership – courts have traditionally allowed student groups to remain on public school campuses, so long as the group's speech did not cause substantial harm to the school's educational mission.[xix] Given that recent church-state litigation before the Supreme Court adapted religious speech to free speech, the argument presented in this essay maintains that the criteria of non-school initiation and open, voluntary membership in religious student groups would similarly guide the Court to maintain religion on public school grounds.[xx]

While this essay deals with the current state of church-state relations in public schools, it is by no means a commentary on the historical significance or proper understanding of the Establishment Clause of the First Amendment in the Bill of Rights, the fundamental article which serves as the Constitutional basis in the legal battle between church and state. Much scholarship in this field is devoted to the historical foundation of the separation between church

and state, often concluding how the Court *ought* to act based on competing meanings of the Establishment Clause in historical perspective. Nor does this essay comment on what the current constitutional position of religion in public schools *should* be. Rather, this essay seeks to understand what the current constitutional position of religion in public schools actually *is*, using Supreme Court cases to elucidate that characterization. Finally, this paper does not assess whether or not the Supreme Court correctly applied the Constitution in delivering its ruling. To that end, there are numerous legal notes and articles written by law students, law professors, and legal professionals who argue for or against the Supreme Court's understanding and application of the Constitution in any given case.

2 Religion Removed

This chapter details Supreme Court cases which removed a religious element from public schools. Along with the relevant Establishment Clause concerns, the Court carefully considered the individual when deciding to remove religion from a public school. The Court's respect for the individual is more apparent from the language in some cases than in others, depending on the complexity of the religious element considered. That being said, while a few Court opinions and oral arguments may not elaborate on the individual and her rights in explicit detail, the Court ultimately ruled against the religious element because of two factors critical to safeguarding individual rights: the involuntary nature of the religious element and real or perceived official school support for the element.

The statement of the Court that will be shown to guide these decisions was delivered by Justice Anthony Kennedy writing for the majority in *Lee v. Weisman*:

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause, which guarantees, at a minimum, that a government may not coerce *anyone* to support or participate in religion or its exercise.[xxi]

Not the majority, not the minority, but the government may not coerce any *one* individual. We will consider now how the Supreme Court has removed religion from public schools in the past quarter century in order to safeguard the rights of the individual.

I. Wallace v. Jaffree (1985)[xxii]

On May 28, 1982, Ishmael Jaffree, a resident of Mobile County, Alabama, sought to end practices he found inconsistent with the American value of freedom of religion: "various acts of religious indoctrination" to which his elementary schoolchildren were subjected, including daily prayer led in unison by their elementary school teachers.[xxiii] When Jaffree's complaint reached the Supreme Court in 1985, the court dealt with the narrow issue of whether a 1981 Alabama statute (16-1-20.1), authorizing a one-minute period of silence "for meditation or voluntary prayer," violated the Establishment Clause of the First Amendment. The central defect in this statute, according to the Court, was that it lacked a clear secular purpose, since the addition of "or voluntary prayer" necessarily reflected religious intent on behalf of the Alabama legislature. This intent was confirmed by state senator Donald Holmes, who stated that the legislature had "no other purpose in mind" than "to return voluntary prayer to our public schools."[xxiv] Clearly,

this legislation did not have a secular purpose, the first of three criteria in the Lemon Test[xxv] used by this Court to rule 6-3 that the Alabama statute violated the Establishment Clause. On the other hand the Court would not fault a statute mandating a moment of silence at the beginning of the school day in which schoolchildren silently prayed, so long as the statute did not explicitly promote religious activity, as did this Alabama statute.[xxvi] After all, "it is difficult to discern a serious threat to religious liberty," wrote Justice Sandra Day O'Connor, "from a room of silent, thoughtful schoolchildren."[xxvii]

Beyond constitutional qualms with the Alabama legislation, the Court also emphasized the implications of such legislation for the individual and her right to resist religion in public school. Indeed, the Alabama statute by no means met the requirements of the individualist Court, as it violated both safeguards of the individual prescribed by the Court: the involuntary nature of the religious element instituted by the law and real or perceived school support for the activity. First, state support for religion in this instance was both real and perceived, as the statute itself lent government endorsement to a religious activity and, at least in this instance, the teacher's application of the statute to lead prayer at the beginning of the school day was perceived by the defendant's children as support for religion. Put succinctly, the Court affirmed that "the statute was enacted to convey a message of state endorsement and promotion of prayer."[xxviii] For Justice O'Connor, this prayer "acknowledge[d] the coercion implicit under the statutory schemes…[and] expressly turned only on the fact that the government was sponsoring a manifestly religious exercise."[xxix]

Second, the Alabama statute created an involuntary religious environment by adding morning prayer to the daily activities in public schools. The Court affirmed that, to the extent that the statute was actually implemented in this public school, the moment of silence coupled with prayer created an involuntary religious situation. To be sure, the Alabama statute stated "or voluntary prayer," and such language seems to imply choice and state neutrality. But the mere mention of "prayer" in a school statute, together with state senator Holmes' explicitly religious rationale for the statute, arguably infringed on an individual's ability to truly reject religion, since a choice to abstain from morning prayer would call attention to an individual's nonconformity to the intent of the state. Indeed, during oral arguments, John S. Baker, asserted on the state's behalf that the individual felt no coercion during the moment of silence, but merely stood there, stoically and silently, along with the other school children. But, a justice's inquiry implied, a child would not merely stand, but would kneel or fold her hands in prayer.[xxx] Accordingly, there was a possibility of coercion based on the actions of others.

To conclude, the Alabama statute was in opposition to the individualist Court's understanding of the First Amendment, which essentially protects individuals, not religion. "The First Amendment was adopted," argued the majority, "to curtail the power of Congress to interfere with the *individual's freedom* to believe, to worship, and to express himself in accordance with the dictates of *his own conscience*."[xxxi] As is clear from this statement, the Court determined that the First Amendment centers on the rights of the individual, not the majority, minority, or even religion itself. As far as the individual's rights are concerned with regard to religion, "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."[xxxii] Therefore, the mere mention of "prayer" in the Alabama statute, no less than the daily prayer led by school teachers, violated the Court's understanding of the First Amendment because it both allowed an individual to interpret the statute as a link between church and state,

and created an involuntary religious environment where the consequences of nonconformity were very real for Jaffree's three young children.[xxxiii]

What was at stake in this case was precisely the rights of an individual to reject what for all intents and purposes was state-sponsored religious activity, and the Court responded on the side of the individual. "Such an endorsement infringes the religious liberty of the non-adherent,"[xxxiv] wrote Justice O'Connor in defense of the individual whose rights were compromised by this state-sponsored prayer. The majority of the Court agreed that "the right to speak and the right to refrain from speaking are complementary components of the broader concept of `individual freedom of mind.'"[xxxv] This case was not about removing religion or maintaining religion for its own sake– it was precisely about protecting the individual's rights of free expression (or non-expression) amidst state-sponsored prayer.

II. Edwards v. Aguillard (1987)[xxxvi]

Edwards v. Aguillard revisited the teaching of the theory of evolution in a public classroom, presumably closed in *Epperson v. Arkansas* (1968).[xxxvii] Unlike *Epperson*, which sought to ban teaching evolution in public elementary schools outright, *Edwards* involved a "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act" passed by the Louisiana legislature in 1987 that required the teaching of evolution in the state's public schools alongside the teaching of creation science or "creationism."

Louisiana argued that the act furthered academic freedom by exposing students to different views on the origin of man. The Court, on the other hand, found that the Creationism act violated the Establishment Clause since its primary purpose was to endorse a particular religious doctrine. As in *Wallace v. Jaffree*, the Court held that "a court's finding of improper purpose behind a statute is appropriately determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency."[xxxviii] Based on this assessment, it was clear that the legislative history of this particular Louisiana Act was intended to support a scientific theory based on religious doctrine, so-called "creationism."

The majority opinion only briefly discussed the Establishment Clause issues of the act because, as Justice Byron White of the majority put it, "this is not a difficult case."[xxxix] The rights of the individual were of much greater importance in this decision. In fact, other discussion of whether or not the statute violated the Establishment clause was preceded by discussion of individual rights. According to the majority opinion:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable, and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.[xl]

Here was the individualist rationale for the decision, in which the Court acknowledged the Louisiana statute's subtle coercion of students in Louisiana public schools: because children are susceptible to the opinions of their classmates and may see their teachers as role models, they are likely to be strongly influenced by creationism and its religious undertones. To be sure, the bulk

of the majority opinion detailed the shortcomings of the Louisiana statute with regard to the constitutional separation of church and state. But this statement by the majority offers a critical insight into the concern of the Court for the wellbeing of the individual.

More to our purposes, the statute in question did not meet the requirements of the individualist Court: the statute violated individual rights because there was school support for the religious activity and the activity involved an involuntary captive audience of students. First, the statute enlisted real state support based on the language of the law. By requiring instruction in creationism as a prerequisite to instruction in evolution, the statute was found by the Court to serve the purpose of advancing particular religious beliefs. This being the case, the individual would be able to recognize real state support for a religious creed, since instruction in the secular theory of evolution was conditioned on the instruction of the religious theory of creationism. "The Act violates the Establishment Clause of the First Amendment," wrote Justice William Brennan in the majority opinion, "because it seeks to employ the symbolic and financial support of government to achieve a religious purpose."[xli] This real support, coupled with the perceived support resulting from the teacher's instruction, would hinder an individual's ability to resist religion because such resistance would be interpreted as both unlawful, in reference to the statute, and arguably unpopular, given the importance afforded a teacher in the eyes of their students.

Second, the Louisiana statute created an involuntary religious environment by not allowing the theory of evolution to be taught unaccompanied by instruction in creationism. By nature of this limitation, students would be involuntarily subjected to a religious doctrine in order to be instructed in the secular theory of evolution. Because there was no individual choice to pursue secular scientific instruction instead of religious instruction on the nature of man, the Court ruled in favor of the individual. Indeed, during oral arguments a justice asked Wendell Bird, who argued for the Louisiana statute, whether an individual could leave the public school system if she felt she needed instruction on the origins of man other than solely what was prescribed by the theory of evolution taught in public schools – say, creation science. Bird affirmed that an individual was free to do as she pleased, to which the justice rhetorically interjected "if they could afford to go?"[xlii] Clearly, the Court was very concerned with a situation in which an individual would be involuntarily subjected to a religious viewpoint with limited, if not unavailable, alternative recourse because of lack of funds.

More problematic was the fact that the statute forced a captive audience to consider a singular religious doctrine. There is no question that instruction in every faith's theory on the nature of man would have posed a very different challenge to the Court, a task elusive to even the most advanced University classroom, much less a room full of elementary school students. Yet despite the difficulty of this task, Alabama had no intention to present a cumulative understanding of the origins of man. On the contrary, the Court reasonably echoed the court of appeals' assertion that "the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creationism.'"[xliii] The teaching of the generally accepted, scientific, and secular theory of evolution serves as the most accommodating solution, by sole authority of its religious neutrality and accessibility to individuals of all faiths. Once again the Court ruled to remove religion from public classrooms – not for its own sake, but for that of the individual.

III. Lee v. Weisman (1992)[xliv]

If the mere mention of "prayer" raised the ire of the Court in *Wallace v. Jaffree*, the seemingly voluntary environment and school neutrality posed by *Lee v. Weisman* asked the Court to further consider the meaning of 'voluntary' and school endorsement; an envelope that would be pushed to its extreme in *Santa Fe v. Doe* (2000). In this case the Court considered whether a public school was constitutionally allowed to invite a clergy member to deliver a nonsectarian prayer at a graduation ceremony. In accordance with Rhode Island school policy permitting middle and high school principals to invite a clergy member to deliver a nonsectarian prayer at graduation, Nathan Bishop Middle School principal Robert E. Lee invited Rabbi Leslie Gutterman to deliver the invocation. Gutterman was instructed to give a general, nonsectarian benediction and received guidance from the "Guidelines for Civic Occasions" issued by the National Conference of Christians and Jews.

14-year-old Deborah Weisman, however, was not comfortable with the prayer. Deborah's father sued the middle school in order to avert the prayer, but his objection was overruled and he and his daughter attended the graduation ceremony. Despite this setback Weisman was determined to prevent his daughter from again hearing a prayer at her high school graduation ceremony, nearly four years away. Weisman's complaint reached the halls of the Supreme Court, who ruled by a narrow margin of 5-4 that Deborah would not have to hear a prayer at her graduation ceremony ever again. As the votes show, this decision was not reached lightly. Indeed, the oral arguments focused primarily on whether or not religious coercion existed, since the graduation ceremony was, strictly speaking, a voluntary event. Nevertheless, the Rhode Island school policy allowing prayer at graduations violated the individualist Court doctrine: the policy involved real school support and the Court construed graduation to be an involuntary event.

First, the policy involved real school support because a prayer was invoked at the behest of the principal, a school and government official. For the Court, this was an instance of real school endorsement because the decision was directly "attributable to the State, and, from a constitutional perspective, it is as if a state statute decreed that the prayers must occur."[xlv] It did not matter if the prayer was nonsectarian or if the prayer was in line with the "Guidelines for Civic Occasions" – the prayer was organized by an arm of the state and thus constituted state endorsement of religious activity. "The government involvement with religious activity in this case is pervasive," argued Justice Anthony Kennedy in the majority opinion, "to the point of creating a state-sponsored and state-directed religious exercise in a public school."[xlvi]

Not only was this endorsement important for the constitutional question, but, as we have seen with *Wallace* and *Edwards*, the Court feared the effects of such endorsement of religion on the impressionable minds of young public school students. During oral arguments, Charles Cooper, attorney for the petitioner, had barely spoken a word before Justice Harry Blackmun interjected, asking, "how old were these youngsters, Mr. Cooper?"[xlvii] Justice Blackmun's point, iterated by Justice David Souter, was that "the people who are listening to the prayer are capable of exercising different degrees of judgment,"[xlviii] emphasizing the impressionability of middle school and high school students in contrast to adults. For Justice Kennedy, "subtle coercive pressures exist[ed]" because the graduation prayer created an environment "where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation."[xlix] The office of the principal was of particular significance to the Court when considering the implications of the principal's decision to organize a prayer on the individual

conscience, since the "effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject."[l] As is clear from these statements, this nonsectarian prayer necessarily created a coercive environment for the religious dissenter, since, just as in *Wallace* and *Edwards*, the individual student was subjected to the same subtle coercion posed by the authority of school officials.

Second, the school policy involved a compulsory body of students. To be sure, the graduation ceremony was a voluntary event, as students would receive their diplomas whether or not they attended the convocation. Nevertheless, the Court interpreted the graduation ceremony as holding special significance in a student's educational career, so much so that nonattendance severely diminished that experience. Indeed, Justice Kennedy found "it very difficult to accept the proposition that it is not a substantial imposition on a young graduate to say you have your choice of... hearing this prayer, or absenting yourself from the graduation."[li] It is precisely because of the significance of the graduation ceremony that the Court argued "a student is not free to absent herself from the exercise in any real sense of the term 'voluntary.'"[lii] As a result, although the Court noted the school's effort to seek religious neutrality of the speaker and content of the prayer, the Court found that the actual result was "a prayer to be used in a formal religious exercise which students, for all practical purposes are obliged to attend."[liii] The Court did not hide its individualist leanings in rendering its decision in this case, issuing the following statement as its reasoning regarding why the school policy compromised the rights of the individual to resist religious coercion in public schools:

> The school district's supervision and control of a high school graduation ceremony places subtle and indirect public and peer pressure on attending students to stand as a group or maintain respectful silence during the invocation and benediction. A reasonable dissenter of high school age could believe that standing or remaining silent signified her own participation in, or approval of, the group exercise, rather than her respect for it. And the State may not place the student dissenter in the dilemma of participating or protesting. Since adolescents are often susceptible to peer pressure, especially in matters of social convention, the State may no more use social pressure to enforce orthodoxy than it may use direct means.[liv]

But this rationale was not shared by the entirety of the Court. Justice Antonin Scalia wrote a scathing dissent, criticizing the majority's reasoning. "As its instrument of destruction, the bulldozer of its social engineering," charged Justice Scalia, "the Court invents a boundless, and boundlessly manipulable, test of psychological coercion."[lv] But despite his criticism, the Court's ruling upheld the rights of the individual. *Wallace v. Jaffree*, *Edwards v. Aguillard*, and *Lee v. Weisman* should not be considered primarily as cases of a Court "bulldozing" religion from public schools. Rather, as has been shown, these three cases are symptomatic of the Court's efforts to safeguard individual rights.

In considering these three Supreme Court cases, it has become clear that the Court strikes down a religious element in public schools if there is real or perceived school support for the activity and if the activity involved a captive, involuntary group of students. In regard to the former, the Court had little difficulty in implicating the school, and by extension the state, in supporting a religious element – be it classroom prayer, instruction in creationism, or prayer at a graduation. The Court did recognize that each case had differing levels of school support – for instance, a principal's invitation to a rabbi to offer the benediction at graduation arguably

constituted more real school support than a 'voluntary' prayer during a moment of silence – but in each case the Court erred, if it erred at all, on the side of the individual. Indeed, the relative care the Court took to examine levels of school support in each case illustrates that the justices were heavily concerned with the effect that support would have on the individual student. Whether real or slightly perceived, the Court struck down any religious element with even the slightest inkling of school support.

As for the involuntary question, these cases illustrate that the Court considered varying degrees of voluntarism, but ultimately decided in favor of the individual. Prayer and instruction in creationism involving an involuntary, captive group of students comprised one end of the spectrum, and on the other end was prayer given at a voluntary graduation ceremony. What these cases had in common was the school's exercise of control in these situations – the teacher was in charge of the classroom, and the principal decided the conduct of the graduation ceremony. In that sense it is clear that neither of these situations were voluntary public squares; rather, these situations were in state control and subject to the purposes and direction of the state. As far as the Court is concerned, religion cannot exist in these situations.

But as we will see in the next chapter, the Court ruled to maintain religion on public school grounds, although under the auspices and control of persons other than the state. Indeed, Neuhaus was wrong to characterize the regular dealings of public schools as a public square, because, at the most basic level, not everyone is free to enter or not enter a public school. In the following cases, however, the public school becomes a public square of sorts, insofar as its dealings are without school support and without a forced audience of students. Here, as will be shown, there is a place for the individual and her religion.

3 Religion Maintained

"On issues related to the 'rights' of children and adolescents," wrote Neuhaus, "[the courts] generally come down on the side of an individualistic notion of privacy."[lvi] While Neuhaus asserted that American courts employed individualism to render their separationist decisions, this same idea of individualism allowed for religious accommodation in public schools following the publication of his book in 1984.[lvii] As has already been discussed, even after Neuhaus' time the Court continued to remove religious elements from public schools, seemingly verifying the claim that the Court operates with separationist intentions. But as the assessment in the previous chapter demonstrates, it is a concern for the individual, not the religious element itself, which influences Court decisions regarding religion in public schools.

In sharp contrast to the previous chapter, this chapter will present cases in which the Court allowed elementary school students to use public school facilities and resources for the purposes of a religious group. Despite elements of religion in public schools, the Court found no violation of the Establishment Clause, largely because each of the religious elements in these cases met the criteria of the individualist Court: both of these cases were initiated by non-school entities and all held open and voluntary membership.

Yet a critical question still remains: does the allocation of state property, including classrooms and actual funds, to religiously-minded students and nonstudents necessarily entail school endorsement of the religious activity? In a striking departure from typical church-state litigation, those arguing before the Supreme Court in these instances did not rely on the Establishment Clause to defend the right for free exercise of religious *activity*; rather, the strategy implemented by these religious entrepreneurs was to emphasize these religious elements

as constitutionally protected free *speech*. Marshaling the precedent of religion-as-speech established in *Widmar v. Vincent* (1981) and the passage of the Equal Access Act in 1984, these two cases were successfully argued to maintain religion in public schools. This time around, the cases did not involve a coercive religious element alienating a single individual in a public school setting – rather, the state was found to be unconstitutionally barring the speech of an individual, religious or not.

A critical tenet of this religion as speech doctrine was that free exercise of religion was now afforded free speech immunity from content discrimination; that is, the government may not censor speech on the basis of its content. Most recently the Court made clear its stance against content based speech discrimination in *Police Dep't v. Mosley* (1972), declaring that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[lviii] In the context of this discussion, however, public schools retain the right to decide whether or not to open their facilities for the purposes of a public forum. Moreover, public schools generally, if not in all cases, limit the scope of the public use of their facilities for certain purposes, such as for noncurricular student groups and other community organizations pursuant to specific provisions. However, once a public school erects a limited public forum it is legally barred from discriminating against any viewpoint that otherwise meets the limited purposes of the forum. "Once it has opened a limited [public] forum," the Court emphasized in *Rosenberger*, "the State must respect the lawful boundaries it has itself set."[lix] In the cases that follow, each public school engaged in content discrimination against religious student groups, believing that in doing so their school was protected from Establishment Clause liability in relation to separation of church and state. Nevertheless, allowing religious groups along with other noncurricular groups to participate in a limited forum actually avoids state entanglement with religion, since the school is neutral to all viewpoints, and avoids content- based speech discrimination, which the Court, as shown below, never fails to redress.

Finally, perhaps the most important weapon in the newfound free speech arsenal specifically for public secondary schools was the passage of the Equal Access Act in 1984.[lx] The Act provided that secondary schools which received federal funds and already had a limited public forum open for student clubs were obligated to allow equal access to school resources to all student groups, except those which disrupted school activity. The important implication of this bill was that it opened the school forum and its resources to religious student groups, so long as they were student-initiated and voluntary. With First Amendment guarantees of free speech and free association and this newly-passed congressional Bill, students would have the opportunity to pursue religious ends within public school forums. And the Court would affirm their opportunities.

I. Westside Community Schools v. Mergens (1990)[lxi]

Westside v. Mergens (1990) considered whether a public secondary school could prohibit its students from establishing a voluntary, extracurricular Christian group that would meet afterschool and would be eligible to receive equal access to school funds and facilities that other clubs enjoyed. This was the first case involving a student group considered by the Supreme Court after the passage of the Equal Access Act, and in its deliberation the Court even evaluated the constitutionality of the act itself. This question arose when Bridget Mergens approached the Westside school board, petitioning to establish a Christian student group that would have no

faculty sponsor, presumably to avoid government entanglement with religion. The board denied the request precisely because student groups were required to have a faculty sponsor, and securing such a sponsor would be impermissible, they argued, since doing so would constitute school entanglement with religion. Mergens appealed to the courts. Despite the school's contentions, the Supreme Court ruled 8-1 allowing Mergens to establish her Christian group and upholding the constitutionality of the Equal Access Act.[lxii]

The Equal Access Act was established specifically to defend individual rights of association and free speech in public schools, regardless of the nature or content of that speech. Indeed, even in defending the constitutionality of the Equal Access Act the individualist Court was active, affirming "that Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion."[lxiii] In upholding the constitutionality of the act, the Court agreed with Congress' belief that high school students were mature enough to differentiate between private student speech and state speech. Mergens' Christian club undoubtedly met the requirements of the individualist Court: the club was student-initiated and open to all students on a voluntary basis.

First, Mergens' club was undeniably student-initiated and student-led. The Court rejected the petitioners claim that such a student group entangled the school with the advancement of religion. "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids," wrote Justice O'Connor, "and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[lxiv] This was precisely the latter – a situation of private, student speech endorsing religion. Like Congress, the Court held 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."[lxv] Mergens' proposed Christian club was one of several noncurricular student groups, all of which had equal access to the funds and resources withheld from this religious group. Indeed, according to Justice Scalia "no constitutional violation occurs if the school's action is based upon a recognition of the fact that membership in a religious club is one of many permissible ways for a student to further his or her own personal enrichment."[lxvi]

For the Court, this was not an issue of the state actually supporting the *content* of the students' speech and association. Rather, the Court was more concerned that school should support the *ability* of its students to speak and associate freely, in matters involving a noncurriculum topic (in order to avoid actual school entanglement with a group's activities and purpose). According to the Court, any argument for state endorsement in this instance was void. "Petitioners' fear of a mistaken inference of endorsement is largely self-imposed," wrote Justice O'Connor, "because the school itself has control over any impressions it gives its students."[lxvii] In this case, because the group was student-initiated and would exist among many other student groups, the school had sufficiently little control to give an impression of religious endorsement.

Second, Mergens' Christian club operated during non-instructional time, involved a voluntary body of students, and was open to all students regardless of religious affiliation, thereby avoiding "the problems of the students' emulation of teachers as role models and mandatory attendance requirements that might otherwise indicate official endorsement or coercion."[lxviii] The Court found no issue with the group maintaining a faculty sponsor because the Court held that the sponsor was not a 'sponsor' at all, precisely because "the Act's provisions prohibit faculty monitors from participating in, nonschool persons from directing, controlling, or regularly attending, and school 'sponsorship' of, religious meetings."[lxix] Beyond school sponsorship, the Court considered the possibility of peer pressure involved in the formulation of

the group as a type of subtle coercion, but such pressure was not in any way tied to the state. According to the Court, "there is little if any risk of government endorsement or coercion where no formal classroom activities are involved and no school officials actively participate."[lxx] Accordingly, the requirements of the individualist Court were unequivocally met: Mergens' Christian club was student-initiated and involved a voluntary membership of students, with no realistic possibility of state endorsement or religious coercion. The Court again ruled in favor of the individual and her rights; this time, religion remained.

Although freedom of expression and association was codified by Congress' 1984 Equal Access Act, it was Mergens' legal challenge that made the Act the supreme law of the land. "Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech," wrote Justice O'Connor in the majority opinion, "and that obligation is the price a federally funded school must pay if it opens its facilities to non-curriculum-related student groups."[lxxi] As will become clear in the following cases, these words would echo across two decades, serving to maintain religion in public schools so long as an individual desired it, and so long as no individual was harmed by it.

III. Rosenberger v. Rector and Visitors of the University of Virginia (1995)[*lxxii*]

The Supreme Court in *Mergens* ruled that a public school was obligated to recognize and provide facilities to a non-curriculum Christian student group. But was a school obligated to recognize and pay for a Christian student publication? Wide Awake Productions (WAP), a recognized 'Contracted Independent Organization' (CIO), thought so and sued the University of Virginia for refusing to refund its publication expenses from the Student Activities Fund (SAF) open to recognized student groups. The University argued that refunding the newspaper *Wide Awake: A Christian Perspective at the University of Virginia* violated the Establishment Clause and its SAF guidelines because the publication "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[lxxiii] But for the Court, this case did not endanger the Establishment Clause because it did not involve religious *activity*. Instead, the Court ruled by a narrow margin of 5-4 "that the regulation invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of *free speech* guaranteed by the First Amendment."[lxxiv] Just as in *Mergens,* this was a case of individual speech, and the Court ruled in favor of the individual because WAP met both requirements of the individualist Court: the publication was sponsored and led by students and its operations were open to all students on a voluntary basis.

The issue of sponsorship was addressed sternly by the Court: "First," wrote Justice O'Connor, "the student organizations, at the University's insistence, remain strictly independent of the University."[lxxv] Indeed, in order to secure CIO status and University recognition, a student group had to, among other actions, "include in dealings with third parties and in all written materials a disclaimer, stating that the CIO is *independent of the University* and that the *University is not responsible for the CIO*."[lxxvi] Furthermore, the signed agreement with the University made explicitly clear that any benefits it bestowed on the student group "should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities."[lxxvii] The University's stated policy of independence effectively relieved any burden the University had to regulate the content of any group's speech, such that student groups "are not the University's agents, are not subject

to its control, and are not its responsibility." It therefore followed that "the University may not silence the expression of selected viewpoints,"[lxxviii] including those with religious views, since the University exempted itself from any such authority. In actuality, any attempted regulation over WAP on behalf of the University, the Court warned, "would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires."[lxxix] As a matter of fact, the University was not a sponsor of WAP.

Beyond the issue of official University regulation, the fact that this Christian publication competed with 15 other publications "significantly diminishe[d] the danger that the message… is perceived as endorsed by the University."[lxxx] Coupling this fact with the high level of maturity and discernment the Court attributed to University students, the Court asserted that "any reader of Wide Awake would be on notice of the publication's independence from the University."[lxxxi] There was no danger of excessive entanglement for the state with religion precisely because the state severed itself from the operations of its student groups. Clearly, "the governmental program at issue [was] neutral toward religion."[lxxxii]

Second, WAP's publication was open to the views and membership of all students on campus. A key requirement for a student group's recognition by the University was that a group "must pledge not to discriminate in its membership,"[lxxxiii] a requirement met by WAP given that WAP was in fact a recognized CIO of the University of Virginia. As part of its pledge of official recognition, WAP held an open membership policy for all students on a voluntary basis. Like the student group upheld in *Mergens*, this student publication assembled during non-instructional hours and did not coerce membership. Moreover, the stated purpose of the publication was "[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints," and "[t]o provide a unifying focus for Christians of multicultural backgrounds."[lxxxiv] This emphasis on facilitating discussion and on including the viewpoints of multicultural backgrounds illustrates WAP's openness to a broad range of student opinions on "a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia."[lxxxv] Clearly, WAP's publication involved no state sponsorship and was not a religious exercise forced upon a captive, involuntary audience. Just like *Mergens*, the individualist Court ruled to maintain religion in this instance because this religious publication was student-initiated and involved a voluntary audience of students.

But this case was not about protecting religion. "Religion may be a vast area of inquiry," argued Justice Kennedy, "but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered."[lxxxvi] It was precisely an individual's perspective, her standpoint, that was of considerable consequence for the Court in *Rosenberger*. "Vital First Amendment speech principles are at stake here," asserted the Court, "[and the] danger is to speech from the chilling of *individual thought and expression*."[lxxxvii] The individual was at the core of this decision, as the Court stressed that the government's ability to regulate and deny speech necessarily infringed on the right of the individual to speak freely and equally. It did not matter that the speech was religious – the Court would rule on behalf of the individual regardless of the content of her speech. That being said, the obvious effect of the Court's decision was keeping God in printed speech despite the University's claim of Establishment Clause violation. To that end, the Court argued, "any benefit to religion is incidental"[lxxxviii] – but, as has been shown, any benefit to the individual is deliberate.

4 The Curious Cases

But the final two Court cases to be considered, *Santa Fe v. Doe* (2000) and *Christian Legal Society v. Martinez* (2010), prove that freedom of speech and association are not the panacea for maintaining religion in public schools. As will be shown in this chapter, two cases which seemingly fit the requirements of the individualist Court to maintain religion in public school are nevertheless decided adversely to the religious claim. What is not stricken, however, is the Court's emphasis on safeguarding the rights of the individual.

I. Santa Fe v. Doe (2000)[lxxxix]

Recall that the Court in *Weisman* denied a school principal the ability to invite a clergy member to deliver a prayer during a graduation ceremony. The individualist Court ruled against that policy because it amounted to school sponsorship of religion and involved an involuntary audience of students. But what if the students voted to include a benediction at graduation and also voted to select the clergy member who gave the prayer? That was exactly the situation in this case, where Santa Fe Independent School District adopted a policy allowing student elections to determine if a prayer was acceptable at a high school football game and to decide the student who would conduct the prayer. By all appearances, this policy met the requirements of the individualist Court: the prayer was student-initiated and involved a voluntary audience of students, since attendance at high school football games was not compulsory. Curiously, however, a relatively unified 6-3 Court struck the District's policy as a violation of the Establishment Clause because the policy was a façade for school endorsement of religion, and the football games, for all intents and purposes, were not strictly voluntary. Indeed, by no means did Santa Fe's "election scheme"[xc] meet the requirements of the individualist Court: the policy involved real and perceived school support and it involved an involuntary audience of students.

First, although the school policy placed the prayer in the hands of students, the Court found that "the District has failed to divorce itself from the invocations' religious content."[xci] Here it is useful to note that this school policy of student elections was established during the litigation process. The actual issue that brought about this suit was that prior to 1995 Santa Fe High School's student council chaplain delivered a prayer using the public intercom system at every home varsity football game. Clearly, the District attempted to save its case by adopting a new, student-empowered prayer policy, but this attempt was viewed as a disguise by the majority of the Court and represented a continuation of state sponsorship of a religious activity. For the Court, the "policy's sham secular purposes, and by its history… indicates that the District intended to preserve its long-sanctioned practice of prayer before football games."[xcii] Indeed, the Court found that the District's policy:

> … involves both *perceived and actual endorsement of religion*… declaring that the student elections take place *because* the District "has chosen to permit" student-delivered invocations, that the invocation "shall" be conducted "by the high school student council" "[u]pon advice and direction of the high school principal," and that it must be consistent with the policy's goals, which include "solemniz[ing] the event." A religious message is the most obvious method of solemnizing an event. Indeed, the only type of message expressly endorsed in the policy is an "invocation," a term which primarily describes an

> appeal for divine assistance and, as used in the past at Santa Fe High School, has always entailed a focused religious message.[xciii]

As this statement illustrates, the Court was by no means convinced that the school relinquished its sponsorship of the prayer practices chosen by its students. For one, the policy made clear that it was the District, not the students, which had "chosen to permit" the prayers at the football games. Such a choice necessarily amounted to state endorsement of religion, since the District's decision to enact the policy preceded the students' votes. Moreover, the policy's stipulation that the prayer would be convened with the "advice and direction of the high school principal" mirrored the principal's selection of the clergy member in *Weisman*, where the Court held the principal's action as an endorsement of a religious message. Finally, the policy amounted to state endorsement of religion precisely because its goal was to solemnize the football game. Here, the Court logically construed "solemnizing" to reflect "an appeal for divine assistance" based on the actual history of the prayer at Santa Fe High School's football games, which have "always entailed a focused religious message."

Finally, the forum wherein the student would deliver the prayer was itself controlled by the school, since the prayer would be "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property."[xciv] School endorsement for the prayer would be construed as pervasive, since the football team, cheerleaders, team fans, posters, banners and flags would all display the school's name, insignia and colors. In this environment, argued the Court, "an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[xcv] Despite the policy's appearance of state neutrality and individual prerogative, the Court found clear evidence of real and perceived school support for the football game prayer.

Second, the policy engaged an involuntary audience of students in a religious activity. To be sure, like the graduation ceremony in *Weisman*, Santa Fe's football games were by no means obligatory or compulsory for the vast majority of students. But, as in *Weisman*, the Court found otherwise. "For some students, such as cheerleaders, members of the band, and the team members themselves," wrote Justice Kennedy in the majority opinion, "attendance at football games is mandated, sometimes for class credit."[xcvi] Despite the District's contention that football games were plainly voluntary, some students were in fact obligated to attend. Moreover, the court extended its reasoning, in line with its reasoning regarding the graduation ceremony in *Weisman*, noting the special significance of school football games in a high school student's life. "The District's argument also minimizes the immense social pressure, or truly genuine desire, felt by many students to be involved in the extracurricular event that is American high school football," argued Justice Kennedy, who, along with five colleagues agreed that "the Constitution demands that schools not force on students the difficult choice between attending these games and avoiding personally offensive religious rituals."[xcvii] Just like a graduation ceremony, school football games are, in essence, involuntary for the American high school student.

Furthermore, although the District argued that the football game represented an open public forum, the Court found that "the District's pregame ceremony is not [an open forum because] the District simply does not evince an intent to open its ceremony to indiscriminate use by the student body generally."[xcviii] Had the school allowed multiple speakers on an equal basis to present before the football game, the pregame ceremony may have constituted an open forum. Here, the Court championed the infringed rights of the individual, charging that the danger of the election system was that it "guarantees, by definition, that minority candidates will never prevail

and that their views will be effectively silenced."[xcix] Indeed, despite the fact that the students elected the prayer and the prayer-giver, the mere fact that the policy allowed "only one student, the same student for the entire season, to give the invocation"[c] eliminated any argument that such a prayer amounted to private speech. Quite the contrary, the Court declared:

> The District argues unpersuasively that these principles are inapplicable because the policy's messages are private student speech, not public speech. The delivery of a message such as the invocation here-on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer-is not properly characterized as "private" speech.[ci]

Clearly, Santa Fe's school prayer policy was neither student-initiated nor did it involve a voluntary audience of students. Despite the District's attempts to meet the requirements of the individualist Court, its policy reflected real and perceived school support for religion coupled with an involuntary audience of students. What was curious about this case was the congruency of the District's policy, on its face, with the doctrine of the individualist Court. What was not so curious about this case, however, was the Court's ability to see through the "sham" policy of the District and rule on behalf of the individual and her ability to resist religious coercion in public schools. "This is not a neutral speech policy… it is an act of religious worship," argued Justice Souter during oral arguments, "the question is whether that speech can be… involuntarily inflicted upon those who may not want it by the power of the State."[cii] The Court's answer to that question was no.

II. Christian Legal Society v. Martinez (2010)[ciii]

As has been shown in Chapter 3, the individualist Court has unrelentingly ruled in favor of students' ability to form religious groups despite public school concerns that such groups necessarily violate the Establishment Clause.[civ] But would the individualist Court similarly defend a group's ability to discriminate in its membership for purposes of promoting a unified message? The Christian Legal Society (CLS) chapter at the University of California, Hastings College of Law thought so. It filed suit against the University because it refused to recognize CLS because of its membership criteria. In order to join CLS, students would have to sign a "Statement of Faith." The critical tenet of this statement required members to abide by Christian principles in sexual activity, which meant sexual activity between a man and a woman should not occur outside marriage. CLS interpreted the bylaws to reject those who practiced unrepentant homosexual activities and even those whose faiths diverged from Christianity. CLS' request to register its new bylaws and become a "Registered Student Organization" (RSO) was denied by Hastings precisely because its membership policies violated Hastings' Nondiscrimination Policy, which at the time prohibited groups from discriminating based on religion and sexual orientation. Marshaling the precedent cases previously discussed, CLS appealed to the courts on the basis of a violation of First Amendment rights of free speech, free association and freedom of religion.

But for the first time in a long chain of religious student group victories, a divided 5-4 Court ruled against CLS in *Christian Legal Society v. Martinez*. This loss for a student group, however, is not what marks this case as curious. As will be discussed below, CLS' membership criteria were inconsistent with the prescriptions of the individualist Court, which require that

such groups be open to other students; that is, if the school cannot discriminate against students on the basis of their religious beliefs, neither can its student groups. What is curious about CLS' loss is the fact that the Court did not consider whether CLS's First Amendment rights were infringed by the University's Nondiscrimination Policy – the actual constitutional contention which brought about the suit in the first place. The Nondiscrimination Policy did not specifically mandate that RSOs accept all students, but prohibited Hastings' RSOs from discriminating on several bases, including religion and sexual orientation. Indeed, this policy allowed other groups to discriminate in its membership on bases such as ideology (e.g. a Republican student group could limit its membership only to other Republican students). Given this inconsistency, CLS maintained that the policy "target[ts] solely those groups whose beliefs are based on religion or that disapprove of a particular kind of sexual behavior,"[cv] while other groups were free to limit their membership and leadership based on ideological considerations.

Instead, the Court only considered Hastings' all-comers membership policy, which was introduced by Hastings during the litigation process, claiming that the all-comers policy was actually how the University practically interpreted the Nondiscrimination Policy. The Court only considered this policy because both parties stipulated that such a policy existed prior to litigation. "The Court's treatment of this case is deeply disappointing," wrote a dissenting Justice Samuel Alito, "[because] the Court does not address the constitutionality of the very different policy that Hastings invoked when it denied CLS's application for registration."[cvi] This is a particularly pointed argument, since the Court considered legislative history in cases such as *Edwards*, and the Court characterized the football prayer policy adopted during litigation in *Santa Fe* to be a "sham" for continued school support for religion. True, both CLS and Hastings stipulated that the all-comers policy was in effect prior to the start of litigation, but, given the Court's record of extensive inquiry, one might have expected the Court to consider the case in its entirety. Perhaps the majority's refusal to consider Hastings' initial Nondiscrimination Policy, in contrast to its consideration of history in many previous cases, was a deliberate move to safeguard the rights of the individual by upholding Hastings' all-comers membership policy.

But, based on this limited consideration, it was clear that Hastings' all-comers membership policy met the requirements of the individualist Court: the all-comers policy constituted school neutrality with regard to all its RSOs, including those religious in nature, and the policy involved a voluntary audience open to all members of the law school community.

First, the all-comers policy diminished the possibility that any student group would be perceived to possess unique school support. "The policy draws no distinction between groups based on their message or perspective," argued Justice Ruth Ginsburg of the majority, "its requirement that *all* student groups accept *all* comers is textbook viewpoint neutral."[cvii] The all-comers membership policy ensured that the school would not be perceived to lend real support to any particular group's message precisely because the policy drew no distinction between groups. For Justice Stevens, Hastings' policy did "not reflect a judgment by school officials about the substance of any student group's speech."[cviii] Thus the policy avoided the previously discussed content or viewpoint based regulation of speech, an essential freedom of speech test. Nevertheless, CLS asserted that Hastings' policy "systematically—and impermissibly—burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream"[cix]; in contrast to school support, CLS contended that the policy announced school disfavor of certain groups. The Court rejected this argument, holding that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on

some speakers or messages but not others."[cx] Even if the policy had an adverse effect on CLS, or another group for that matter, the policy was still on its face "textbook neutral."

Moreover, the Court held that this policy prevented the University from delving into possible Establishment Clause violations. "CLS's proposal that Hastings permit exclusion because of *belief* but forbid discrimination due to *status,*" wrote Justice Ginsburg, "would impose on Hastings the daunting task of trying to determine whether a student organization cloaked prohibited status exclusion in belief-based garb."[cxi] Clearly, the neutrality of the all-comers policy relieved the University of any potentially unconstitutional decisions brought about by determining whether a group was discriminating in its member selection based on status or belief. The neutrality of Hastings' membership policy was of considerable importance to Justice Kennedy, who argued that because "the policy applies equally to all groups and views… there is no basis for an allegation that the design or purpose of the rule was, by subterfuge, to discriminate based on viewpoint."[cxii] Indeed, because the University applied a hands-off, equal access membership policy to all of its student groups, the Court found no possibility of real or perceived school support for any specific group. Hastings' RSOs remained entirely student-initiated and enjoyed equal access to RSO resources.

Second, Hastings' all-comers policy, as the name suggests, required that all groups welcome all students on a voluntary basis. An important consequence of this policy was that, because RSOs received school funding, "the policy ensures that no Hastings student is forced to fund a group that would reject her as a member."[cxiii] Such a consequence was of critical importance to the individualist Court, since the ability of an individual to join a student group that her tuition partly funded necessarily safeguarded her free speech rights; CLS' policy, on the other hand, required funds from the individual, but did not reward such funds with access to the group's membership. Furthermore, the Court hailed the all-comers policy as one which "brings together *individuals* with diverse backgrounds and beliefs, encourages tolerance, cooperation, and learning among students."[cxiv] Clearly, a membership policy which encouraged individual rights of association, in contrast to CLS' discriminatory membership policy which barred individuals from membership, met the doctrine of the individualist Court.

Furthermore, Justice Stevens differentiated the limited forum within which CLS operated from a general public forum. Within the latter forum, Justice Stevens argued that a group "must be allowed broad freedom to control its membership and its message, even if its decisions cause offense to outsiders."[cxv] Since CLS operated in a limited forum controlled by the University, however, Justice Stevens asserted that because "CLS… does not want to be just a Christian group [but] aspires to be a recognized student organization,"[cxvi] CLS must abide by Hastings' all-comers membership policy. The Court upheld student associations in *Mergens* and *Rosenberger* precisely because those associations were open to all students on a voluntary basis. Hastings' all-comers policy merely codified the openness in *Mergens* and *Rosenberger* into law.

Although Hastings' all-comers policy clearly met the requirements of the individualist Court, the curiosity in this case is precisely the "*what if?"* question: What if the Court actually considered whether CLS's rights of free association, speech and religion were infringed by Hastings' Nondiscrimination Policy, not its all-comers policy? Even if the Court found that Hastings discriminated against CLS by virtue of its Nondiscrimination Policy, it is very likely that the Court would have ruled against CLS precisely because this Christian student group was different in an important respect from those groups the Court had previously ruled to support. Every student group the individualist Court previously ruled in favor of was open to all students or members of the community: Mergens' Christian club was open to all students and

Rosenberger's Wide Awake Productions Christian magazine invited all student perspectives. CLS, on the other hand, was not so open. As its membership policies demonstrate, CLS discriminated against non-Christians and unrepentant Christians alike.

Nevertheless, Justice Scalia supported CLS' claim that its discrimination was important to its core beliefs and for promoting a unified message, and, as it argued, significantly different than discriminating on the basis of a person's status. CLS contended that it did not discriminate against homosexuals based on their *status* as homosexuals; rather, CLS discriminated against unrepentant, sexually-active homosexuals because their sexual practices did not coincide with CLS' religious *beliefs* renouncing unrepentant homosexuality. Here it is useful to consider whether viewpoint discrimination, which the Court vehemently protests, is akin to discrimination based on belief. To their credit, the justices spent a great deal of time during oral argument hypothesizing on the murkiness between "belief" and "status," and whether discrimination based on the former constituted a discrimination based on the latter. "What if the belief is that African Americans are inferior?"[cxvii] asked Justice Stevens, emphasizing the difficulty Hastings would endure in parsing out what constituted discrimination based on belief, rather than status. This stream of questioning, however prominent in oral argument and the dissenting opinion, was given little force in the majority opinion – put simply, the Court did not have to consider the peculiarities of "belief" and "status" by limiting its decision to the constitutionality of Hastings' all-comers policy. In reality, however, the Court's ruling of the all-comers policy itself as constitutional symbolized a victory for the individual and served as a testament to the individualist Court. It gives priority to the *individual's* freedom to participate in speech over the *group's* interest in effective group solidarity of speech and other activity.

5 Conclusion

"In recent decades," argued Neuhaus, "separationism has provided the legal rationale for the sanitizing of the public square."[cxviii] A quarter century after the publication of this argument, Neuhaus could not be more wrong. Neuhaus could not have been more right, however, than when he asserted that "on issues related to the 'rights' of children and adolescents, [the courts] generally come down on the side of an individualistic notion of privacy."[cxix] A quarter-century after the publication of *The Naked Public Square*, the Court continued to strike religion from public schools, as we have seen with *Wallace*, *Edwards*, *Weisman*, *Santa Fe*, and *CLS*. Recall, however, that the Court was not hostile toward religion in any of those cases; rather, the individualist Court was hostile only to violations of individual rights, and it just so happened that the violation was religious in nature. Put simply, Neuhaus' "rallying cry" against the legal forces of secularization was premature. Contrary to Neuhaus' argument, the same concern for the individual that prompted the Court to remove religion from public schools guided the Court to maintain religion in *Mergens* and *Rosenberger*. Here, too, it is useful to note that the Court maintained religion in public school not for the sake of a given creed, but for the sake of an individual. Neuhaus was right to characterize the American legal system as individualistic, but wrong to characterize it as a force of secularization.

But Neuhaus was wrong on an even more fundamental level – public schools do not properly constitute a public square. Recall Glendon's argument that "despite a few Supreme Court decisions on extracurricular activities, it is hard to think of any public settings from which religion has been more rigorously excluded or where secularism is more dogmatically promulgated."[cxx] While a keen observation, both Glendon and Neuhaus fail to acknowledge that

a public school classroom does not equate with a public setting. For one, unlike an open and voluntary public square, public schools consist of a compulsory and specific audience of students. Indeed, according to Justice Stevens in the recent *CLS* decision: "Although it may be the case that to some 'university students, the campus is their world,' *it does not follow that the campus ought to be equated with the public square*."[cxxi] During curriculum hours school officials exercise specific prerogatives to accomplish the goals of public education. Expressly religious activity, according to the Court's understanding of the Establishment Clause of the Constitution, cannot be part of that education. During noncurriculum hours, however, public school property can be construed as a form of a public square. Even then, though, such facilities are governed by the school itself, which often establishes limited purposes for which its facilities may be used – hence *limited public forum*. So, while schools can broaden the use of their facilities to better incorporate the public and their beliefs during noncurriculum hours, public schools can rarely, if at all, be characterized as general public squares.

To conclude, Glendon, Neuhaus and the Court all share a notable concern, namely that children do spend more waking hours in public schools than they do with their parents, so the way public schools treat children's religious views is a matter of immense cultural consequence. The purpose of this study has been to elucidate the actual position of the Supreme Court with regard to religion in public schools in hopes of quelling that specific concern. Here, at the end of our assessment, it is clear that the Court can offer reassurance to Glendon, Neuhaus, and other religiously-conscious parents of public school children: although their children's religious creed may not be emphasized in public school classrooms during curricular hours, neither will the creeds of other children. Not secularization, but religious neutrality for the sake of the impressionable individual lies at the core of the Court's activity regarding religion in public schools. For now, America can rest assured that in future individualist Court decisions "any benefit to religion is incidental"[cxxii] – but, as has been shown, any benefit to the individual is deliberate.

Works Cited

Wallace v. Jaffree, 472 U.S. 38 (Supreme Court of the United States 1985).

Edwards v. Aguillard, 482 U.S. 578 (Supreme Court of the United States 1987).

Westside School District v. Mergens, 496 U.S. 226 (Supreme Court of the United States 1990).

Lee v. Weisman, 505 U.S. 577 (Supreme Court of the United States 1992).

Rosenberger et al. v. Rector and Visitors of the University of Virginia et al., 515 U.S. 819 (Supreme Court of the United States 1994).

Santa Fe Independent School District v. Doe, 530 U.S. 290 (Supreme Court of the United States 2000).

Christian Legal Society Chapter of University of California, Hastings College of Law v. Martinez, 561 U.S.__ (Supreme Court of the United States 2010).

Bartrum, I. (Fall, 2002). Paradise Lost: Good News Club, Charitable Choice, and the State of Religious Freedom. *Vermont Law Review*.

Bradley, G. V. (2009). The Public Square: Naked No More? In C. Wolfe, *The Naked Public Square Reconsidered* (pp. 1-31). Wilmington: ISI Books.

Davis, D. H. (2004). A Commentary on the Supreme Court's "Equal Treatment" Doctrine as the New Constitutional Paradigm for Protecting Religious Liberty. *Journal of Church and State*, 717-737.

Davis, M. (2009-2010). Religion, Democracy and the Public Schools. *Journal of Law and Religion*, 33-56.

Glendon, M. A. (2009). The Naked Public Square Today: A Secular Public Square? In C. Wolfe, *The Naked Public Square Reconsidered* (pp. 33-43). Wilmington: ISI Books.

Green, S. (2009). All Things Not Being Equal: Reconciling Student Free Expression in the Public Schools. *U.C. Davis Law Review*, 1-34.

Martin, C. E. (1994). Student-Initiated Religious Expression after Mergens and Weisman. *University of Chicago Law Review*, 1565-1594.

McConnell, M. (1992). Religious Freedom at a Crossroads. *University of Chicago Law Review*, 115-194.

Neuhaus, R. J. (1984). *The Naked Public Square.* Grand Rapids: Wm. B. Eerdmans Publishing Company.

Patrick, A. (2004). *Religion in America Since 1945: A History.* Columbia University Press.

Utter, G., & Storey, J. (2001). *The Religious Right: A Reference Handbook.* Santa Barbara: ABC-CLIO.

Wehner, P., & Gerson, M. (2010). *City of Man: Religion and Politics in a New Era.* Chicago: Moody Publishers.

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[i] Richard Neuhaus, *The Naked Public Square* (Grand Rapids: Wm. B. Eerdmans Publishing Company, 1984), 26.
[ii] Mary Ann Glendon, "The Naked Public Square Today: A Secular Public Square?" In *The Naked Public Square Reconsidered*, by Christopher Wolfe, (Wilmington: ISI Books, 2009), 43.
[iii] Neuhaus, 26.
[iv] Glendon, 38.
[v] Letter to the Danbury Baptist Association, 1802.
[vi] Glendon, 39.
[vii] Neuhaus, 80. This statement is of critical value to Neuhaus' argument, but it ought to be augmented with the fact that America was never an entirely Christian people. In fact, the American nation was founded based on the principles of religious liberty, so this statement should to be appreciated solely for its rhetorical effect.
[viii] Michael McConnell, "Religious Freedom at a Crossroads," (1992): 116, emphasis in text.
[ix] Glendon, 35.
[x] Michael Davis, "Religion, Democracy and the Public Schools," *Journal of Law and Religion* (2009-2010): 33.
[xi] Gerard Bradley, "The Public Square: Naked No More?" In *The Naked Public Square Reconsidered*, by Christopher Wolfe, (Wilmington: ISI Books, 2009), 9.
[xii] Derek Davis, "A Commentary on the Supreme Court's "Equal Treatment" Doctrine as the New Constitutional Paradigm for Protecting Religious Liberty," *Journal of Church and State* (2004): 718.
[xiii] Ibid.
[xiv] Steven Green, "All Things Not Being Equal: Reconciling Student Free Expression in the Public Schools," *U.C. Davis Law Review* (2009): 10.
[xv] McConnell, 117.
[xvi] These three cases, along with the two curious cases of *Santa Fe v. Doe* and *CLS v. Martinez*, represent the only Supreme Court decisions removing religion from public schools since the publication of *The Naked Public Square* in 1984.
[xvii] Although *Lamb's Chapel v. Center Moriches School District* (1993) and *Good News Club v. Milford Central School* (2001) both constitute relevant cases for the purposes of our discussion, they are not discussed in this essay in order to highlight cases of student-initiated religious activity. Nonetheless, an analysis of both cases appears in the full and original version of this essay.
[xviii] See for instance: *Engel v. Vitale* (1962), *Abington School District v. Schempp* (1963), and *Epperson v. Arkansas* (1968).
[xix] See for instance: *Tinker v. Des Moines Indep. Community School District* (1969), *Papish v. Bd. of Curators of the Univ. of Missouri* (1973), *Bethel School District No. 403 v. Fraser* (1986).
[xx] Such was the case in *Widmar v. Vincent* (1981), where the Court held the University of Missouri at Kansas City to be unconstitutionally barring the religious content of free student speech. Here, though, it is useful to note that an open and voluntary membership policy, while

discussed at length in several Court opinions, was scrutinized in more depth particularly in the *Rosenberger* case because students at the University of Virginia were funding, through their student dues, speech that they might not have agreed with. In this case, however, Rosenberger's Christian publication was open to the viewpoints of all University students, so the Court did not have to rule on this particular issue. *CLS v. Martinez* presented another opportunity for the Court to clarify its stance on whether student groups can discriminate in their membership, but the Court only ruled Hastings' all-comers membership policy constitutional. That said, by ruling Hastings' all-comers membership policy constitutional, the Court affirmed that a voluntary and open membership policy met the requirements of the Constitution. And while this fact does not necessarily mean that the Court would find a more discriminatory membership policy unconstitutional, the pattern presented in the proceeding case analyses demonstrate that the Court always considers and rules in favor of groups with open membership policies. This suggests that the proceeding cases may have been decided differently were those very same groups to hold more exclusive membership policies – a possibility to be addressed in more detail in the *CLS* case analysis.

[xxi] *Lee v. Weisman,* 505 U.S. 587 (1992, emphasis added), available at: http://supreme.justia.com/us/505/577/case.html.

[xxii] Wallace v. Jaffree , 472 U.S. 38 (1985) available at: (http://supreme.justia.com/us/472/38/case.html).

[xxiii] Ibid, 43.

[xxiv] Ibid, 44. It should be noted, though, that legislative intent or history would lose much of its influence in crafting Court opinions after the introduction of Justice Antonin Scalia to the Court in 1986.

[xxv] The Lemon Test, established in *Lemon v. Kurtzman,* 403.U.S.602 (1971), detailed the legislative criteria the Court would consider in regard to religion: (1) the government's action must have a secular legislative purpose; (2) the government's action must not have the primary effect of ether advancing or inhibiting religion; (3) the government's action must not result in an "excessive government entanglement" with religion.

[xxvi] In fact, a previous Alabama statute (16-1-20) allowed for a moment of silence without a reference to prayer, although it was later replaced by this contentious statute.

[xxvii] *Supra* note 22, 74.

[xxviii] Ibid, 60.

[xxix] Ibid, 73.

[xxx] *Wallace v. Jaffree* Oral Argument, available at: http://www.oyez.org/cases/1980-1989/1984/1984_83_812/argument.

[xxxi] *Supra* note 22, 50, emphasis added.

[xxxii] Ibid, 53.

[xxxiii] Indeed, Jaffree's children were ostracized for not participating in the prayer led daily by teachers in class.

[xxxiv] *Supra* note 22, 71.

[xxxv] Ibid, 53.

[xxxvi] *Edwards v. Aguillard,* 482 U.S. 578 (1987) *available at: http://supreme.justia.com/us/482/578/case.html.*

[xxxvii] 393 U.S. 97; The Court ruled that banning the teaching of evolution in public schools is unconstitutional.

[xxxviii] *Supra* note 36, 596.
[xxxix] Ibid, 609.
[xl] Ibid, 586.
[xli] Ibid, 596.
[xlii] *Edwards v. Aguillard* Oral Argument of Wendell Bird, available at: http://www.oyez.org/cases/1980-1989/1986/1986_85_1513/argument.
[xliii] Ibid, 590.
[xliv] *Lee v. Weisman,* 505 U.S. 577 (1992), available at: http://supreme.justia.com/us/505/577/case.html.
[xlv] Ibid, 588.
[xlvi] Ibid, 587.
[xlvii] *Lee v. Weisman* Oral Argument of Charles Cooper, available at: http://www.oyez.org/cases/1990-1999/1991/1991_90_1014/argument.
[xlviii] Ibid.
[xlix] *Supra* note 44, 588.
[l] Ibid, 590.
[li] *Supra* note 47.
[lii] *Supra* note 44, 595.
[liii] Ibid, 589.
[liv] Ibid, 578.
[lv] Ibid, 632.
[lvi] *Lubbock Independent School District v. Lubbock Civil Liberties Union* (1982).
[lvii] For Neuhaus, this focus on individualism was the basis for the legal reasoning generally applied by federal courts, led by the Supreme Court, in support of their separationist agenda. In this case, the Fifth Circuit Court of Appeals ruled unconstitutional a school policy which allowed afterschool meetings whose focus were religious in nature. As has been discussed, Supreme Court decisions dealing with religion in public schools up to the point of the publication of Neuhaus book could be construed as strictly separationist in character. Nevertheless, the same individualism which separated religion from public schools since the mid-20th century is the same individualism which prompted the Court to maintain religion in public schools beginning at the time Neuhaus issued his rallying cry; that is, the Court also upholds the rights of the individual by keeping religion in public schools. Indeed, where a lower federal court in *Lubbock* (1982) denied afterschool religious meetings, the Supreme Court in *Mergens* (1990) allowed them. Clearly, individualism is not solely the legal rationale for separating church from state schools – it is the doctrine which also maintains religion in America's public institutions.
[lviii] *Police Dep't v. Mosley,* 408 U.S. 92, 95 (1972).
[lix] *Rosenberger v. Rector, et al.* 515 U. S, at 82.
[lx] The exact text of the act can be found here: http://www.law.cornell.edu/uscode/html/uscode20/usc_sec_20_00004071----000-.html.
[lxi] *BoE of the Westside Community Schools v. Mergens*, 496 U.S.226 (1990).
[lxii] Because the Court upheld the Act, it based its ruling on statutory grounds and made no explicit reference to First Amendment protections in rendering its decision.
[lxiii] *Supra* note 61, 250.
[lxiv] Ibid, 228.
[lxv] Ibid.

[lxvi] Ibid, 261.
[lxvii] Ibid, 251.
[lxviii] Ibid, 228; recall that such coercion was of critical importance for the Court in striking down religion in *Wallace v. Jaffree, Edwards v. Aguillard,* and *Lee v. Weisman*.
[lxix] Ibid.
[lxx] Ibid.
[lxxi] Ibid, 240.
[lxxii] Rosenberger et al. v. Rector and Visitors of University of Virginia et al, 515 U.S. 819.
[lxxiii] Ibid.
[lxxiv] Ibid, 837 (emphasis added).
[lxxv] Ibid, 849.
[lxxvi] Ibid, 823 (emphasis added).
[lxxvii] Ibid, 824. Id., at 26.
[lxxviii] Ibid, 835.
[lxxix] Ibid, 846.
[lxxx] Ibid, 850.
[lxxxi] Ibid, Cf. *Widmar* v. *Vincent,* 454 U. S. 274, n. 14.
[lxxxii] Ibid, 820.
[lxxxiii] Ibid, 823.
[lxxxiv] Ibid, 826.
[lxxxv] Ibid.
[lxxxvi] Ibid, 831.
[lxxxvii] Ibid, 835 (emphasis added).
[lxxxviii] Ibid, 843.
[lxxxix] Santa Fe Independent School District v. Doe, et al., 530 U.S. 290. Interestingly, oral arguments revealed that "Jane Doe" was adopted for anonymity purposes because certain individual schoolchildren were pushed and threatened for protesting Santa Fe's prayer practices. Clearly, the individualist's 6-3 decision in favor of Doe served to protect more than the rights of the individual. See the Oral Argument of Anthony P. Griffin http://www.oyez.org/cases/1990-1999/1999/1999_99_62/argument.
[xc] Ibid, 316.
[xci] Ibid, 291.
[xcii] Ibid, 291.
[xciii] Ibid (emphasis added).
[xciv] Ibid, 307.
[xcv] Ibid, 308.
[xcvi] Ibid, 292.
[xcvii] Ibid.
[xcviii] Ibid, 291.
[xcix] Ibid.
[c] Ibid, 303.
[ci] Ibid, 290.
[cii] *Santa Fe v. Doe* Oral Argument of Jay Sekulow, available at: http://www.oyez.org/cases/1990-1999/1999/1999_99_62/argument.

[ciii] Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez, 561 U.S. 1 (2010).
[civ] See, for instance: *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Widmar* v. *Vincent*, 454 U. S. 263 (1981); *Healy* v. *James*, 408 U. S. 169 (1972).
[cv] *Supra* note 103, 8.
[cvi] Dissenting Opinion of Justice Alito, 2.
[cvii] Syllabus, 561 U.S. 5.
[cviii] Concurring Opinion of Justice Stevens, 2.
[cix] *Supra* note 105.
[cx] Ibid, Cf. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791.
[cxi] Ibid, 4.
[cxii] Concurring Opinion of Justice Kennedy, 2.
[cxiii] *Supra* note 103, 2.
[cxiv] Ibid, 23 (emphasis added).
[cxv] *Supra* note 108, 4.
[cxvi] Ibid, 5.
[cxvii] *CLS v. Martinez* Oral Argument of Michael McConnell, available at: http://www.oyez.org/cases/2000-2009/2009/2009_08_1371/argument.
[cxviii] *Supra* note 1.
[cxix] *Supra* note 56.
[cxx] Glendon, 37.
[cxxi] *Supra* note 108, 5 (emphasis added).
[cxxii] *Supra* note 88.