THE RISE AND DECLINE OF CONSTITUTIONALLY PROTECTED RELIGIOUS SPEECH IN THE UNITED STATES

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Religious issues in the US have become integrated into a variety of kinds of law cases and this article is a sequel to earlier ones that have appeared in this journal exploring some of those related areas. Earlier articles have examined religion as it relates to children and parents' rights, religious beliefs and competing values,and religious beliefs and expressive rights. This article updates the judicial interpretation of the Free Speech and Establishment Clauses that was considered two years ago in this journal and analyzes how recent changes may affect religious expressive rights. Just as the sweeping grant of constitutional rights to students in public schools in Tinker v. Des Moines Independent School District (1969) has experienced significant limitations over the past forty years, so also have religious speech cases since Lamb's Chapel v. Center Moriches Union Free School District (1993) demontrated a decline in constitutional protection.

I INTRODUCTION

The United States has a four decade history since *Tinker v Des Moines Independent Community School District*[1] of protecting free speech in schools. In *Tinker*, the Supreme Court created a fairly high disruption standard for restricting or prohibiting expression in schools; however, subsequent decisions have created other standards that have served to broaden the authority of school officials. Because of the U.S. Constitution's Establishment Clause, the most controversial area of free speech protection has involved religious expression in schools. The Supreme Court and lower federal court constitutional interpretations involving religious expression in forty years of post-*Tinker* litigation reveal a shifting balance between the expressive rights of individuals and the authority of school officials to control that expression.

The last two decades of the Twentieth Century saw two important events that affected profoundly the place of religion in U.S. public schools: (1) Congress' bipartisan passage[2] of the Equal Access Act (EAA)[3] in 1984; (2) and the U.S. Supreme Court's 1993 unanimous decision in *Lamb's Chapel v Center Moriches Union Free School District* (*Lamb's Chapel*).[4] Coming as it did on the heels of two federal circuit court decisions upholding public school decisions to not permit student bible clubs to meet on campus,[5] the EAA prohibited secondary schools receiving federal financial assistance from preventing noncurriculum-related student meetings during noninstructional time based on the content of the group's expression. However, while, the EAA afforded some protection to student-initiated meetings and withstood an Establishment Clause challenge in *Board of Education of the Westside Community Schools v Mergens* (*Mergens*),[6] the protection was restricted to the language of the statute,[7] with, however, some later,

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limited expansion of EAA protection under the Free Speech Clause.[8] An even more important development, though, occurred three years after *Mergens* in *Lamb's Chapel* where the Supreme Court declared religious expression to be a fully protected subset of free speech and prohibited public schools from engaging in viewpoint discrimination.[9]

However, in the fifteen years since *Lamb's Chapel*, an initial surge of protection for religious expressive activities has been followed by a more recent decline in such protection.[10] The purpose of this article is to explore the decline of protected religious expression under the Free Speech Clause, using as templates two recent federal court of appeals decisions, *Borden v School District of the Township of East Brunswick* (*Borden*)[11] and *Nuxoll v Indian Prairie School District # 204* **(***Nuxoll***).**[12] In *Borden*, the Third Circuit prohibited the religious expressive rights of a teacher, advancing an expanded interpretation of the Establishment Clause to do so, while the Seventh Circuit in *Nuxoll* constructed an expansive interpretation of school board authority to curb student religious expression in public schools.

Religious issues in the US tend to become integrated into a variety of kinds of law cases and this article is a sequel to earlier ones that have appeared in this journal exploring some of those related areas. Earlier articles have examined religion as it relates to children and parents' rights,[13] religious beliefs and competing values,[14] and religious beliefs and expressive rights.[15] This article updates the judicial interpretation of the Free Speech and Establishment Clauses that was considered two years ago in this journal and analyses how recent changes may affect religious expressive rights.[16]

II An Overview of Religious Expression Litigation

In two important post-*Lamb's Chapel* decisions, *Rosenberger v Rector and Visitors of University of Virginia* (*Rosenberger*)[17] and *Good News Club v Milford Central School* (*Good News*),[18] the Supreme Court addressed the balance between the establishment and free speech clauses, finding in both cases viewpoint discrimination under the Free Speech Clause and suggesting that the denial of religious expression could constitute hostility toward religion under the Establishment clause. *Rosenberger* dealt with a university's refusal to fund a religious student organisation's publication, on the same basis as other non-religious student publications, because the funding guidelines denied funding for 'religious activities'.[19] Relying largely on *Lamb's Chapel*,[20] the *Rosenberger* majority found a free speech violation because the university had engaged in viewpoint discrimination. The Court distinguished between 'on the one hand, content discrimination, which may be permissible if it preserves the purposes of a limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations'.[21] '[E]ven when [a] limited public forum is one of its own creation ... government [cannot] regulat[e] speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction'.[22] In the *Rosenberger* majority opinion, Justice Kennedy rejected the dissent's perspective

> that no viewpoint discrimination occur[red] [where] the [University's] Guidelines discriminate[d] against an entire class of viewpoints ... .[The majority observed that this view] reflected an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech ... [and held] that [t]he dissent's declaration that debate is not skewed so long as multiple voices are silenced ... [was] simply wrong ... . [T]he debate is [simply] skewed in multiple ways.[23]

The university's claim that it could make 'content-based choices ... [in order to] allocate scarce resources to accomplish its educational mission' was restricted to those occasions when 'the University [was] speaking',[24] as opposed 'the viewpoint of private persons whose speech [the university] facilitates'.[25] This notion that government speech is subject to the Establishment Clause but not the Free Speech Clause was reinforced in *Pleasant Grove City v Summum*[26] where the US Supreme Court held that a city's decision not to permit a monument with a religious message in a city park where the monument did not have historical significance did not violate free speech. In addition to finding in *Rosenberger* that the university's refusal to fund a campus organisation publication written from a Christian viewpoint 'was a denial of the right of free speech', the majority also observed that such a denial 'risk[ed] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires'.[27] Thus, in his opinion, Justice Kennedy invoked concepts under the Free Speech Clause (limited public forum, viewpoint discrimination, content-based choices, private vs government speech) and the Establishment Clause (neutrality, hostility) in invalidating the University of Virginia's implementation of its funding Guidelines. In addition, however, the Court indicated that a school's 'educational mission' might have a role to play in enhancing a public school's restriction of free expression, a concept that was to lay dormant, though, for twelve years until awakened by the Supreme Court in *Morse v Frederick*.[28]

Four years after *Rosenberger*, the Court, in *Good News*, held that a public school that provided after-school access to certain youth-oriented groups (for example, Boy Scouts) but denied access to a Christian youth group (Good News Club) violated the free speech clause. Finding 'no logical difference in kind [under the Free Speech Clause] between the invocation of Christianity by the [Good News] Club and the invocation of teamwork, loyalty, or patriotism by other associations [for example, Boy Scouts] to provide a foundation for their lessons', the Supreme Court held that both groups were involved in the 'discuss[ion] [of] morals and character'.[29] In determining that the school district's exclusion of the Good News Club 'constitute[d] impermissible viewpoint discrimination',[30] the Court refused to address whether the school district's 'interest in not violating the Establishment Clause outweigh[ed] the Club's interest in gaining equal access to the school's facilities',[31] concluding only that 'it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination'.[32] However, the *Good News* court added one new concept of Establishment Clause interpretation — endorsement of religion — to the definition of hostility towards religious expression that had been developed in *Rosenberger*, observing that 'even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum'.[33]

The *Good News* decision was rendered in the shadow of *Santa Fe Independent School District v Doe* (*Santa Fe*)[34] decided in the year prior to *Good News* where a different Supreme Court majority than in *Rosenberger* and *Good News*[35] invalidated a school policy permitting student-initiated and student-led messages, statements or invocations prior to home football games. Invoking forum analysis under *Hazelwood School District v Kuhlmeier* (*Hazelwood*),[36] the Court in *Santa Fe* held that the school district allowing students to determine by majority vote whether to have a student deliver a message, statement or invocation had not created a limited public forum where 'school officials simply [had] not evince[d] either "by policy or by practice," any intent to open the [pregame ceremony] to "indiscriminate use," ... by the student body'.[37] The Court in *Santa Fe* declared that 'majority determinations [cannot substitute] for

viewpoint neutrality [under the Establishment Clause]',[38] and went further, observing that 'the student election [did] nothing to protect minority views but rather place[d] the students who [held] such views at the mercy of the majority'.[39] In effect, the *Santa Fe* majority found the proposed school policy to be an Establishment Clause violation for a variety of reasons: (1) the pregame 'messages', 'statements' or 'invocations'[40] would have been government (as opposed to private) speech;[41] (2) 'the [current] policy ... preserve[d] the [past] practice of prayer before football games [and] ... simply [represented] a continuation of the previous policies';[42] (3) the school had never evidenced an intent to create a limited public forum;[43] (4) the school had not succeeded in persuading the Supreme Court majority that 'its policy [was] "one of neutrality rather than endorsement"';[44] and, (5) under an '"objective observer" endorsement test ... an objective Santa Fe High School student ... "acquainted with the text, ... history, and implementation of the [school policy]" ... [would] unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval'.[45] Chief Justice Rehnquist, in a scathing dissent in *Santa Fe* found that 'the tone of the Court's opinion ... bristle[d] with hostility to all things religious in public life'[46] and rebuked the majority for rejecting the school district's private free speech argument and for declaring the policy facially unconstitutional under the establishment clause without a remand to determine whether the policy could be implemented in a constitutional manner.

The meaning of hostility toward religion has been elusive and four years after *Santa Fe*, the Supreme Court, in a majority opinion authored ironically by Chief Justice Rehnquist in *Locke v Davey* (*Locke*),[47] found 'no evidence of hostility toward religion'[48] in the State of Washington's 'denial of funding for vocational religious instruction' where nothing in the State's policy 'suggest[ed] animus toward religion'.[49] Justice Scalia's stinging dissent in *Locke* assailed the State of Washington's 'generally available public benefit [of a scholarship] ... conditioned only on academic performance, income, and attendance at an accredited school ... [except for] a solitary course of study for exclusion: theology'.[50] Rejecting as irrelevant the majority's position 'that the scholarship program was not motivated by animus toward religion', Justice Scalia responded that the Court had held in an earlier decision, *McDaniel v Paty*,[51] that the 'constitutional separation of church and state ... did not justify facial discrimination against religion'.[52] Warning that the Supreme Court majority's upholding the State of Washington's religious statutory exclusion because not doing so would violate 'taxpayers' freedom of conscience ... [would, however, as Justice Scalia opined, lead to a policy that] ha[d] no logical limit and justify the singling out of religion for exclusion from public programs in virtually any context'.[53] To that end, Justice Scalia prophesied in his conclusion that,

> [w]hen the public's freedom of conscience is invoked to justify denial of equal treatment, benevolent motives shade into indifference and ultimately into repression. Having accepted the justification in this case, the Court is less well equipped to fend it off in the future.[54]

While *Locke* involved the free exercise rather than the free speech clause and one can argue that free exercise, following the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v Smith*,[55] had already lost most of its protective punch,[56] Justice Scalia's prophecy in *Locke* casts a long shadow. His observation that 'modern popular culture ... [has] a trendy disdain for deep religious conviction'[57] sounds a tocsin that, if the *Locke* Court is correct that avoidance of an Establishment Clause violation can constitute a compelling interest, then to what extent might religious free speech claims fall under the Establishment Clause hammer?

III The Establishment Clause as a Compelling Interest

The Supreme Court in *Good News* had refused to address whether avoiding an Establishment Clause violation can constitute a compelling interest to justify viewpoint discrimination. Even though the Court had found viewpoint discrimination in *Good News*, it saw no reason to address the issue of the Establishment Clause as a compelling interest because none of the school district's Establishment Clause arguments had been persuasive: (1) since children needed parent consent to participate in the Good News Club 'they [would] not be coerced into engaging in the Good News Club's religious activities';[58] (2) 'the parents of elementary school children would [not] be confused about whether the school was endorsing religion';[59] (3) '[even though] the school facilities [were] being used for a nonschool function ... there [was] no government sponsorship of the Club's activities';[60] and, (4) the 'circumstances [of parent consent forms being required] simply [did] not support the theory that small children would perceive endorsement here';[61]and, (5) 'the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum'.[62]

One can argue from the position taken by the Court in *Good News* that once a court finds no free speech violation, the court should have no reason to address whether an Establishment Clause violation would constitute a compelling interest to override a free speech claim. The troublesome aspect of the Seventh Circuit's decision in *Borden* is that the court of appeals chose to address an Establishment Clause compelling interest claim even though the court had determined that plaintiff had no protectable free speech claim. *Borden* becomes, arguably, an example of the maxim that bad facts make bad law.

Borden involved the free expression claims of a public school employee during a school-sponsored activity and, given the lack of free expression support among federal courts for school employees to engage in religious activities during the school day,[63] the result in *Borden* would seem to be a foregone conclusion. In *Borden*, a high school football coach who, after 23 years of either conducting or permitting other adults to deliver prayers at pregame dinners and in the locker room prior to each game, alleged that his free speech had been infringed by new school guidelines that allowed student-initiated prayers but prohibited him from participating in those prayers by bowing his head and taking the knee.[64] Notwithstanding what should be a predictable decision for the school district, a federal district court in New Jersey, in a decision from the bench, nonetheless granted summary judgment to Coach Borden holding that, while 'an Establishment Clause violation would occur if the coach initiated and led the activity, ... no reasonable observer … [would find] [any]thing wrong with [a coach] remaining silent and bowing one's head and taking a knee as a sign of respect for his players' actions and traditions'.[65] The court also found 'the [school district's] directive regarding the Plaintiff's nonparticipation [to be] over broad and vague, and violat[ive of] the Plaintiff's ... rights to free speech, freedom of association, academic freedom' under both the U.S. and state constitutions.[66]

The Third Circuit unanimously reversed the district court, although doing so in three separate opinions. Regarding Coach Borden's constitutional free speech challenge, Judge Fisher, writing for the court, found plaintiff's claim to have no merit. Under the *Connick v Myers* (*Connick*)[67] public concern test and the *Pickering v Board of Education* (*Pickering*)[68] balancing test, the Seventh Circuit found no need to reach the *Pickering* test since Borden had failed to demonstrate that he had been speaking on a matter of public concern.[69] Circuit Judge Fisher observed that federal courts have held that speech involves a matter of public concern only if it 'addresses a social or political concern of the community, ... implicates the discharge of public responsibilities

by an important government officer, agency or institution, ... [or] relate[s] primarily to the way in which a government office serve[s] the public'.[70] While plaintiff alleged his silent acts were deserving of free speech protection because they 'provid[ed] the team with feelings of unity and increase[ed] team morale, and respect[ed] the players' prayers',[71] the Third Circuit found these interests to be 'personal to Borden and his team and ... not matters of public concern'.[72] In addition, the coach's case did not involve 'any type of public forum ... [since] the bowing of his head and taking of a knee occur[red] in private settings, namely at an invitation-only dinner and in a closed locker room'.[73] Plaintiff Borden '[had] not perform[ed] these acts as part of a broad social or policy statement of being able to take the knee or bow his head in public',nor did his actions 'touch upon the way that government is discharging its responsibilities ... [by] shedding light on any matter with regard to [the school district's] operations that would be important to the public'.[74] Under the Establishment Clause's 'endorsement test',[75] the Third Circuit found that 'Borden's ... twenty-three year history ... involvement in prayer at these two activities-as a participant, an organiser, and a leader-would lead a reasonable observer to conclude that he was endorsing religion'.[76]

At this point, Circuit Judge Fisher, having found no protected free speech and an Establishment Clause violation under the endorsement test, could have simply concluded his analysis. Instead, he chose to go where no Supreme Court decision had gone before, namely, holding that compliance with 'the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech',[77] and, on this basis, concluding that the school could prohibit plaintiff's involvement in prayer with students. In effect, the school district in proposing and enforcing its Guidelines not only had a compelling interest under the Establishment Clause in preventing Borden's alleged free expression, but also 'a legitimate educational interest'[78] in doing so. Just what Judge Fisher meant by this 'legitimate educational interest' is not clear, but arguably it has some kinship to Justice Kennedy's 'educational mission' in *Rosenberger*.

Circuit Judge Fisher's Seventh Circuit opinion in *Borden* presented a dilemma for one of the concurring judges (Judge Barry). While agreeing that Borden's prior history of actively allowing coach-initiated prayer before football games violated the Establishment Clause, Judge Barry was troubled by her colleagues' failure to provide advice for Coach Borden as to 'what response might be permissible [in the future]'[79] regarding his participation in pregame prayers.[80] Judge Barry opined that, since Coach Borden 'under oath [had] represented ... he merely wishe[d] to show respect for his players when they pray, [a] reasonable observer would have no reason to believe that Borden was lying'.[81] A reasonable observer in the future would be aware of the prior 23-year history and seeing a student-initiated prayer, without the coach's

> ask[ing] for the prayer, . . .select[ing] someone to say a prayer, ... monitor[ing] the content of the prayer, ... not join[ing] hands with anyone, [or] ... mouth[ing] the words of the prayer, ... would simply see Borden bow his head or take a knee in a silent, unobtrusive sign of respect for the private choices made by individual players who are constitutionally permitted to choose to engage in religious activities.[82]

Indeed, as suggested by Judge Barry, if the coach were 'required to keep his head erect or turn his back or stand and walk away ... such [a] requirement would evidence a hostility to religion that no one would intend'.[83]

Neither of the other Third Circuit two judges addressed this hostility argument. Judge Fisher acknowledged that he 'would likely reach a different conclusion [were] the same history and context of endorsing religion not ... present',[84] but the third judge (Judge McKee) reasoned from

the Supreme Court's treatment of the graduation prayer in *Lee v Weisman*[85] and was far less sympathetic. He would have found a 'respectful display' to 'violate the Establishment clause even absent [the coach's] 23-year history'[86] because '[p]articipation in high school athletics is no less important than attending one's high school graduation [and], [i]ndeed, the ongoing involvement with high school athletics is undoubtedly far more important to some than a one-time graduation ceremony'.[87] Even if Coach Borden had not 'pressured his players into voting for pregame prayer ceremonies or ... manipulate[d] the outcome',[88]

> Coach Borden as a teacher ... and therefore as a state actor for purposes of the First and Fourteenth Amendments) failed to appreciate that others may not agree with his beliefs or that the religious beliefs that he held dear might be in tension with contrary (but equally valid) beliefs of some of his players. Any player who held opposing beliefs should not have had to 'go along to get along' by silently participating in religious observances he disagreed with.[89]

Thus, at least two of the three judges on the Third Circuit in *Borden* took a step not yet taken by the Supreme Court in deciding that the Establishment Clause can constitute a compelling interest in countering religious free speech claims. Permitting public school districts to rely on a 'legitimate educational interest' in framing and enforcing policies to restrict or prohibit free expression bears some similarity to Justice Kennedy's 'educational mission' in *Rosenberger*, as well as Chief Justice Roberts 'established school policy' from the previous year's Supreme Court decision in *Morse v Frederick* (*Morse*).[90]

IV Broadening the Scope of School Districts to Restrict Religious Expression: Lessons from *Morse* and *Nuxoll*

In *Morse v Frederick* (*Morse*), the Supreme Court upheld a high school's suspension of a student who displayed a message, 'BONG HITS 4 JESUS', on a banner at '[a]t a school-sanctioned and school-supervised event'[91] where an assistant principal reasonably interpreted the message as contrary to a school board policy 'prohibit[ing] any assembly or public expression that ... advocates the use of substances that are illegal to minors ...'.[92] Writing for the majority, Chief Justice Roberts found support for the school's action beyond the traditional tests in *Tinker v Des Moines Independent Community School District* (*Tinker*),[93] *Bethel School District No. 403 v Fraser* (*Bethel*)[94] and *Hazelwood School District v Kuhlmeier* (*Hazelwood*).[95] Because of '[t]he "special characteristics of the school environment"',[96] the assistant principal could 'act … on the spot ... [to punish the student displaying] the banner promot[ing] illegal drug use in violation of established school policy'.[97] While Chief Justice Roberts rejected the school's position that it should be able to punish speech that 'is plainly offensive',[98] he also failed to incorporate Justice Alito's concurring opinion concern that regulation of student speech must rely on 'some special characteristic of the school setting [which] ... in this case is the threat to the physical safety of students'.[99] Although Justice Alito agreed that 'the public schools may ban speech advocating illegal drug use ... [he] regard[ed] such regulation as standing at the far reaches of what the First Amendment permits'.[100] Expressly rejecting the claim of public schools, Justice Alito declared that the Free Speech Clause does not permit 'public school officials to censor any student speech that interferes with a school's "educational mission"'.[101] In effect, the Free Speech Clause 'provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue'.[102]

In its post-*Morse* decision in *Nuxoll*, the Seventh Circuit upheld a federal district court's preliminary injunction allowing a student to wear a t-shirt during a Day of Silence sponsored by the Gay, Lesbian, and Straight Education Network with the words inscribed on it, 'Be Happy, Not Gay'.[103] However, the court of appeals refused to ban the school's policy that prohibited 'derogatory comments ... refer[ring] to race, ethnicity, religion, gender, sexual orientation, or disability'[104] nor would the Seventh Circuit grant an injunction permitting the student to make any 'negative comments' about homosexuality short of 'fighting words'.[105] The Seventh Circuit made much of the fact that, in creating its policy, the high school had not 'forbid[den] all discussion of public issues by [the] students … , only *derogatory* comments on unalterable or otherwise deeply rooted personal characteristics about which most people ... are highly sensitive'.[106] In rejecting the student's claim that he be permitted 'to distribute Bibles to students to provide documentary support for his views about homosexuality', the court of appeals declared that '[m]utual respect and forbearance enforced by the school may well be essential to the maintenance of a minimally decorous atmosphere for learning'.[107] Although the Seventh Circuit stopped short of '[a] judicial policy of hands off (within reason) school regulation of student speech',[108] it nonetheless permitted a broad scope of public school rule-making under *Tinker v Des Moines Independent Community School District*[109] where the speech the school 'wants to suppress will cause "disorder or disturbance", or [would] "materially disrupt class work or involve substantial disorder" or would materially and substantially disrupt the work and discipline of the school"'.[110] The Seventh Circuit painted 'disorder or disturbance' with a broad brush and held that a public school could forbid speech 'if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school... .'[111] The court of appeals pointedly rejected plaintiff's reliance on Justice Alito's concurring opinion in *Morse v Frederick* (*Morse*)[112] where the Justice had 'disparaged invocation of a school's "educational mission" as a ground for upholding restrictions on high-school students' freedom of speech[,] ... warn[ing] that such invocation "strikes at the very heart of the First Amendment"'.[113] The Seventh Circuit reasoned that although Justices Alito and Thomas had each authored concurring opinions in *Morse*, they had both joined in the *Morse* majority opinion and, since the Supreme Court majority opinion in *Morse* focused on the school's drug policy and the *psychological* effects of drugs,[114] so also could the school in *Nuxoll* consider the '*psychological* effects of students messages'.[115] Thus, if 'the plaintiff [in *Nuxoll* were to wear] a T-shirt on which was written "blacks have lower IQs than whites" or "a woman's place is in the home"',[116] the psychological effects on these populations would warrant the school's prohibiting such expression under its policy as 'derogatory comment'. Characterising the plaintiff's 'Be Happy, Not Gay' as 'only tepidly negative',[117] the Seventh Circuit found it 'highly speculative' that plaintiff's t-shirt message would provoke 'incidents of harassment of homosexual students ... or for that matter poison the educational atmosphere'.[118]

Circuit Judge Rovner, in his *Novell* opinion concurring in the judgment,[119] struck hard at the reasoning of the Seventh Circuit decision, declaring that the *Tinker* substantial and material disruption test was the only one applicable to schools in this case and any control by schools of student expression '[would] not [be] constitutionally permissible ... [unless] necessary to avoid material and substantial interference with schoolwork or discipline'.[120] Judge Rovner opined that 'in order for school officials to justify prohibition of a particular expression of opinion, they must be able to show that this "action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"'.[121] Because the test '[u]nder *Tinker* [was that] students [could] express their opinions, even on controversial subjects, so long as they do so 'without "materially and substantially interfer[ing]

with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others',[122] the school district's claim in *Nuxoll* was deficient in that it had 'not demonstrate[d] any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities'.[123] Attacking the majority's 'stealth viewpoint expression',[124] Circuit Judge Rovner rejected the majority's perverse interpretation of 'open debate' whereby 'allowing open debate on any subject would constitute taking the side of the anti-*status quo*'.[125] In other words, '[o]pen debate could never simply be open debate' but instead 'constitute[d] "taking sides", in particular taking the side of the party opposed to the *status quo*'.[126] Now that students in the high school in *Nuxoll* 'have initiated a dialogue [regarding] ... a broad, societal change in attitude towards homosexuals ... in which [the student] Nuxoll wishes to participate', Circuit Judge Rovner lamented that school officials would rather treat high school students who soon will be able to vote and serve in the military as 'children in need of protection from controversy, ... blithely dismiss[ing] their views as less valuable than those of adults'.[127] Rovner found inapposite the majority's effort to 'strike a balance between the interests of free speech and ordered learning ... [similar to the] balancing rule for school-sponsored speech [in] ... *Hazelwood*' because the Supreme Court '[had] already set the applicable standard in *Tinker*'.[128] Contrary to the majority's view that 'free speech and ordered learning' were 'competing interests', Circuit Judge Rovner would find

> these values [to be] compatible ... [and] consistent with the school's mission to teach by encouraging debate on controversial topics while also allowing the school to limit the debate when it became substantially disruptive ... [under] [t]he First Amendment as interpreted by *Tinker*'.[129]

What is surprising is that, despite Circuit Judge Rovner's invective against the majority opinion legal rationale, his opinion contains no references to hostility towards religious expression and the Establishment Clause. In fact, the absence of discussion of these issues in the majority opinion as well causes concern as to what the current relationship is between the Free Speech and Establishment Clauses.

V Hostility Toward Religion and The Diminishing Role of Free Speech

The notion that the establishment clause prohibits government from displaying hostility toward religion has been part of constitutional dogma since the earliest cases decided by the Court under the First Amendment religion clauses.[130] In its early free expression cases, the issue of hostility was sublimated to viewpoint discrimination. In *Lamb's Chapel* the Supreme Court found that a school district had violated the free speech clause by opening its premises to a wide range of community groups but refusing to permit a church to show a religious film series in the evenings. Thus, the Court saw no reason to address 'the church's argument that categorical refusal to permit District property to be used for religious purposes demonstrate[d] hostility to religion',[131] but the refusal of the Court to dismiss the claim out-of-hand was at least tacit recognition that such a claim was possible. Two years later in *Rosenberger*, the Court, in finding that the university's refusal to fund a campus organisation publication written from a Christian viewpoint when other publications from other viewpoints were funded violated the free speech clause, added that, '[the university's] course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires'.[132] Four years after *Rosenberger*, the Court, in *Good News*, held that a public school that provided after-school access to certain youth-oriented

groups (for example, Boy Scouts) but denied access to a Christian youth group (Good News Club) violated the free speech clause. Most telling though was how the Court handled the claim that admitting a religious group immediately after school would violate the establishment clause by creating the appearance of sponsorship of religion; 'even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum'.[133]

However, the Supreme Court has never upheld a hostility claim under the Establishment Clause, leaving lower federal courts to wrestle with that Clause's role in protecting religious expression. Federal courts have not agreed, though, whether refusing to provide the same rights to those expressing their religious views constitutes hostility toward religion.

In *Rusk v Crestview School District*, [134] the Sixth Circuit upheld a school district rule that fliers from community religious groups be distributed to students on the same basis as fliers from other community groups, the court noting that, 'if Crestview were to refuse to distribute flyers advertising religious activities while continuing to distribute flyers advertising other kinds of activities, students might conclude that the school disapproves of religion'.[135] In what may be considered the high point of court of appeals protection against viewpoint discrimination,[136] the Third Circuit in an opinion by (then, Circuit Judge), now, Associate Supreme Court Justice Samuel Alito, in *Child Evangelism Fellowship of New Jersey Inc. v Stafford Township School District* **(***Stafford***),**[137] the court of appeals held that a school district's policy refusal to permit Child Evangelism Fellowship (the parent organisation of Good News Clubs) to send religious flyers home with students, while permitting other community organisations to do so, amounted to viewpoint discrimination and did not constitute endorsement of religion.[138] Circuit Judge Alito quoted with favor the Supreme Court's concern about hostility in *Good News*, observing that 'we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum'.[139] Circuit Judge Alito also observed that '[t]he Supreme Court [had] not settled the question whether a concern about a possible Establishment Clause violation can justify viewpoint discrimination'[140] but found this not a problem in *Stafford* because the Third Circuit held that 'giving Child Evangelism equal access to the fora [in this case] would not violate the Establishment Clause'.[141]

However, in *Bronx Household of Faith v Board of Education of City of New York* **(***Bronx Household***),**[142] a divided Second Circuit[143] vacated a federal district court's permanent injunction against the Board of Education's enforcement of a proposed rule barring any outside organisation from 'holding religious worship services, or otherwise using a school as a house of worship', **a** rule that represented a modification of an earlier rule prohibiting any 'outside organization or group' from conducting 'religious services or religious instruction on school premises after school'.[144] Writing for the Second Circuit, Circuit Judge Calabresi held that 'the barring of worship services from defendants' school facilities [was] a content-based restriction and [did] not constitute viewpoint discrimination [under *Lamb's Chapel*, *Rosenberger*, or *Good News*]'.[145] In observing that '[w]orship services ... [were] not in any sense simply the religious analogue of ceremonies and rituals conducted by other associations [such as the Boy Scouts] that [have been] allowed to use school facilities [under *Good News***]'**,[146] Calabresi declared such a conclusion **'**deeply insulting to persons of faith ... [because] I find the notion that worship is the same as rituals and instruction to be completely at odds with my fundamental beliefs'.[147] Finding the ban on a 'house of worship' to be content neutral discrimination because it '[did] not distinguish

between religious and secular approaches',[148] Calabresi found it 'a proper state function ... to consider the effect upon the minds of middle school children of designating their school as a church'.[149]

Circuit Judge Walker in his dissent in *Bronx Household* saw in the Board of Education's 'exclu[sion] [of a] particular viewpoint from its property ... a long-standing hostility to religious groups'.[150] By assuming that 'judges can define worship[,] ... [151] a task that risks entangling the judiciary in religious controversy in violation of the First Amendment'[152] and by refusing to determine 'the character of the [school district's] forum'[153] by 'inquir[ing] into the forum's current uses',[154] 'Judge Calabresi' as Judge Walker opined, '[had] drawn a circle around our schools to keep worship (whatever that may be) out'.[155]

VI Analysis and Implications

To a large extent, Circuit Judge Alito's query in *Stafford* as to whether avoidance of the Establishment Clause can counter a viewpoint discrimination claim has already been answered in the Third Circuit's post-Alito *Borden* decision where the court of appeals held that avoidance of the Establishment Clause could defeat a free expression claim. The worrisome feature of *Borden* that the Establishment Clause as a compelling interest can trump free speech viewpoint discrimination is compounded by the troublesome aspect of *Nuxoll* that religious expression can be diminished by a school district's manipulation of its educational mission.

Protection of religious expression in public schools has depended on finding constitutional interpretations to counter the efforts of school boards and school officials to restrict or prohibit such expression. Unfortunately, the judicial development of a rationale for protecting religious expression has been a disjointed one. Indeed, as suggested in this article, the outcome will depend on the constitutional rationale that a court chooses to utilise. The halcyon early post-*Lamb's Chapel* years that witnessed widespread protection of religious expression under the Free Speech Clause using viewpoint discrimination, private speech, and limited public forum analyses have given way to Establishment Clause analyses grounded in neutrality and endorsement, as well as reliance on a judicially constructed variety of free speech limitations — *Tinker*'s disruptive speech,[156] *Bethel*'s lewd and vulgar speech,[157] *Hazelwood*'s school sponsored activities,[158] and, most recently, *Morse*'s educational mission. The result is that success in a religious expression claim today demands a walk through a mine field of trip wires, any one of which can defeat that claim.

In the process, the use of the Establishment Clause as a bar to hostility towards religion has an uncertain future. Clearly, in all religious expression cases the Establishment Clause has always had a dominating presence in the room, but the role of that Clause, one can argue, is changing. While, in the earlier religious expression cases, the Establishment Clause's prohibition against hostility served as a non-binding reinforcement of the Free Speech Clause's protection of religious expression,[159] the Establishment Clause prohibition against hostility today, arguably, is at best little more than a shibboleth to be repeated with little judicial efficacy. Indeed, as reflected in Circuit Judge Barry's concurring opinion in *Borden*, the Establishment Clause's endorsement test used to prohibit a history of coach-instigated prayer does not seem to have an effective counterpart preventing what Judge Barry sees as hostility towards the coach's show of respect to his players' prayer before each game. Hostility towards religion, as explicated in Chief Justice Rehnquist's dissent in *Santa Fe*, Justice Scalia's dissent in *Locke*, and Circuit Court Judge Walker's dissent in *Bronx Household*, no longer appears to exert any effective constraints

on school officials. Circuit Judge Rovner's acerbic concurring opinion in *Nuxoll*, despite his vigorous criticism of the majority's reinterpretation of *Tinker* to permit only a tepid religious-based criticism of homosexuality, contains no discussion of hostility towards religion at all. Gone is Justice Kennedy's declaration in *Rosenberger* that the prohibition of all religious perspectives is still viewpoint discrimination and Chief Justice Rehnquist's ringing dissent in *Santa Fe* that refusal to permit implementation of a policy because of the Justices' perception of religious influence was nothing short of hostility toward religion.

How much this change will accelerate following the Supreme Court's decision in *Morse* remains to be seen. In *Morse*, the Supreme Court allowed school officials to define speech according to the school's educational mission, even though in that case the decision was limited to the school's prohibition of drug use. However, in *Nuxoll*, Circuit Judge Rovner was concerned that the Seventh Circuit, by permitting school officials to prohibit 'derogatory' speech, allows those officials to ignore the fact that '[t]here is a significant difference between expressing one's religiously-based disapproval of homosexuality and targeting [gay and lesbian] students for harassment'.[160] In effect, *Nuxoll* suggests that school officials will be allowed to determine which religious-based words can be prohibited as inconsistent with the school's educational policy or mission, even though those words have no disruptive effect on the school. Like Justice Stewart's much-paraphrased observation that he could not define pornography but he knew it when he saw it,[161] schools appear destined to operate in the same manner — they can inform students when non-disruptive speech has an inappropriate effect ('derogatory') without having to define that effect in advance. Whether or not this is an appropriate way to run a school, one can certainly argue that it makes short shrift of both viewpoint discrimination and hostility toward religion.

The lesson from *Borden* and *Nuxoll* for school administrators and school board members is far from clear. In the wake of *Santa Fe* and *Borden*, public schools that have had practices of permitting prayer and other religious activities are suspect and, for purposes of changing their policies and later allowing student or employee religious expression, still bear, as it were, the mark of Cain. Despite Circuit Judge Barry's observation to the contrary in *Borden* that a reasonable person could separate a past history of coach-supported prayer from a coach's current change to only a show of respect for student-initiated and student-led prayer, courts continue to support an interpretation under the Establishment Clause's endorsement theory that is both unrelenting and unforgiving. Circuit Judge McKee's harsh and severe interpretation of endorsement in *Borden* mirrors Justice Souter's majority opinion comments about endorsement in *McCreary County, Kentucky v American Civil Liberties Union of Kentucky* **(***McCreary***)**.[162] In enjoining the display in a public library of the Ten Commandments and other documents of American liberty,[163] Justice Souter opined that 'the reasonable observer in the endorsement inquiry ... [is expected to be] aware of the history and ... and forum in which the religious display appears ... [and thus it is reasonable for] reasonable observers ... to treat differently ... the display ... demonstrating a preference for one group of religious believers as against another'.[164] In other words, once a school has a history of permitting religious activities, 'the reasonable memories ... [of] reasonable observers'[165] make the movement to non-school and non-employee-sponsored religious activities difficult to justify under the Establishment Clause's endorsement test. Even where public schools have no history of supporting religious activities, the Seventh Circuit's decision in *Nuxoll* suggests that *Morse* applies to more than school policies prohibiting drug use. By permitting school officials to enact policies under a psychological impact test, *Nuxoll* has effectively circumvented *Tinker*'s material and substantial likelihood of disruption test. The result is that, with the diminished prominence of the Establishment Clause's prohibition on hostility towards religion, public schools' fulfillment

of their 'educational mission' has become the new mantra justifying the restriction of free speech religious expressive rights in schools.

VII Conclusion

The world has turned since the Supreme Court's landmark *Lamb's Chapel* decision declaring religious expression to be a fully protectable subset of free speech. Early successes in *Rosenberger* and *Good News* explicating the meaning of viewpoint discrimination have been replaced by new judicial reassessments emphasising the rule-making authority of public schools and refining the meaning of an endorsement of religion. While the result in *Borden* is not surprising to the extent that a school employee cannot orchestrate student group prayer, what is disappointing is the Third Circuit's refusal to acknowledge that an employee can still have an expressive free speech right to respect the religious choices of others.[166] Similarly in *Nuxoll*, while students clearly do not have expressive rights under *Tinker* to cause disruption, measuring the derogatoriness of student expression by using a tepidity test leaves school officials extraordinary latitude in framing their educational mission. In the process of reframing the authority of public school officials, what seems to have been lost is the brooding presence of the Establishment Clause's prohibition of hostility toward religion. In its absence, we are left with an endorsement test that shackles those who are unfortunate enough to be in a school district that has allowed prayer in the past and permits the restriction of religious expression that has a negative psychological impact.

Keywords: free speech; religious speech; religious activities; establishment clause; endorsement of religion.

Endnotes

1 393 US 503 (1969).

2 See S Rep 98-357, Feb 22, 1984 **(**Cosponsors and supporters of EAA included Senators Ted Kennedy, Joe Biden, Orin Hatch, and Robert Dole).

3 20 USC § 4071 (The EAA provides that once a secondary school has created a 'limited open forum', the school must permit all 'noncurriculum-related student groups' to meet 'during noninstructional time' regardless of the groups' 'religious, political, philosophical, or other speech content').

4 508 US 384 [83 *Education Law Reporter* 30] (1993).

5 *Lubbock Civil Liberties Union v Lubbock Indep. Sch. Dist*., 669 F 2d 1038 [2 *Education Law Reporter* 961] (5th Cir, 1982), cert. denied, 459 US 1155 (1983) (enjoining school district policy from enforcing school district policy permitting students to gather at school with supervision either before or after regular school hours to voluntarily meet for educational, moral, religious or ethical purposes as violative of establishment clause); (*Brandon v Bd of Educ. of Guilderland Cent. Sch. Dist*., 635 F 2d 971 (2d Cir, 1980), cert. denied, 454 US 1123 (1981) (denying students' request for injunctive relief to order school to permit students to hold religious meetings in the school prior to the school day, reasoning that the school's denial did not violate the students' free exercise rights but would have violated the Establishment Clause's unconstitutional link between church and state).

6 496 US 226 [60 *Education Law Reporter* 320] (1990).

7 See ibid 236 where the Supreme Court provided an expansive interpretation to student groups covered under the EAA ('even if a public secondary school allows only one 'noncurriculum related student group' to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time'). For an application of EAA to expression areas other than religion, see Ralph Mawdsley, 'The Equal Access Act and Public Schools: What are the Legal Rights Related to Recognizing Gay Student

Groups?' (2001) *Brigham Young University Education and Law Journal* 1.

8 See, eg, *Prince v Jacoby*, 303 F 3d 1074 [169 *Education Law Reporter* 85] (9th Cir, 2002) (holding that in addition to equal access of religious club to funding, yearbook, public address system and bulletin boards pursuant to the Equal Access Act, the club was also entitled to student/staff time, school supplies, vehicles and audio/visual equipment under the Free Speech Clause).

9 *Lamb's Chapel*, 508 US 384, 394 ('The principle that has emerged from our cases "is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others"'.) (citations omitted). For a discussion of the intertwining of free speech and the EAA, see Ralph Mawdsley, 'Leveling the Field for Religious Clubs: The Interface of the Equal Access Act, Free Speech, and the Establishment Clause' (2003) 174 *Education Law Reporter* 809.

10 See Ralph Mawdsley and Johan Beckmann, 'The US Supreme Court Continues to Struggle with the Meaning of the Establishment Clause and Its role in Assuring Fair and Balanced Treatment of Religion' (2006) 10 *Australia & New Zealand Journal of Law and Education* 73.

11 523 F 3d 153 [*231 Education Law Reporter* 583] (3d Cir, 2008).

12 523 F 3d 668 [231 *Education Law Reporter* 618] (7th Cir, 2008).

13 J. Joy Cumming, Ralph Mawdsley, and Elda De Waal, 'The "Best Interests of the Child", Parents' Rights and Educational Decision-making for Children: A Comparative Analysis of Interpretation in the United States of America, South Africa and Australia' (2006) 11 *Australia & New Zealand Journal of Law and Education* 43.

14 Ralph Mawdsley and James Mawdsley, 'Balancing a University's Nondiscrimination Policy Regarding Sexual Orientation With the Expressive Rights of Student Religious Organizations: A USA Perspective' (2007) 12 *Australia and New Zealand Journal of Law and Education* 47.

15 Ralph Mawdsley, 'The Uncertain Currents of T Shirt Expression in the US' (2007) 12 *Australia and New Zealand Journal of Law and Education* 69.

16 Mawdsley and Beckmann, above n10.

17 515 US 819 [101 *Education Law Reporter* 552] (1995).

18 533 US 98 [154 *Education Law Reporter* 45] (2001).

19 *Rosenberger v Rector and Visitors of University of Virginia*, 795 F Supp 175 [76 *Education Law Reporter* 997] (W D Va, 1992).

20 *Lamb's Chapel* was not the first lawsuit to present the issue of access to public facilities by religious groups. See *Deeper Life Christian Fellowship v Bd of Educ. of the City of New York*, 852 F 2d 676 [48 *Education Law Reporter*117] (2d Cir, 1988) (in a pre-*Mergens* case, religious groups permitted access to a school facility on the basis of state law); *Gregoire v Centennial Sch. Dist.*, 907 F 2d 1366 [61 *Education Law Reporter* 845] (3d Cir, 1990) (first case to rely on *Mergens* to access to a religious organisation). See also, *Travis v Owego-Applachian Sch. Dist.*, 927 F 2d 688 [66 *Education Law Reporter* 75] (2d Cir, 1991) (denial of pregnancy counseling organisation to use school auditorium for fund-raiser with religious focus not viewpoint-neutral and violative of free speech).

21 *Rosenberger v Rector and Visitors of University of Virginia (Rosenberger)*, 515 US 819, 830.

22 Ibid 829.

23 Ibid 831-32.

24 Ibid 833.

25 Ibid 834.

26 129 S Ct 1125 (2009).

27 Ibid 845-46.

28 127 S Ct 2618, 2629 (2007) (upholding school suspension of student who displayed a banner at school activity interpreted by assistant principal as 'promot[ing] illegal drug use-in violation of established school policy'.)

29 *Good News Club v Milford Central School (Good News)*, 533 US 98, 112.

30 Ibid.

31 Ibid.

32 Ibid 113.

33 Ibid 118.

34 530 US 290 [145 *Education Law Reporter* 21] (2000).
35 The majority in *Rosenberger* was written by Justice Kennedy with Justices Stevens, Ginsburg, Souter and Breyer dissenting. The majority opinion in *Good News* was authored by Justice Thomas with Justices Stevens, Ginsburg, and Souter dissenting. In *Santa Fe*, Justice Stevens wrote the majority opinion with Chief Justice Rehnquist and Justices Scalia and Thomas dissenting.
36 484 US 260 [43 *Education Law Reporter* 515] (1988) (upholding the authority of school officials to control school-sponsored activities, in this case the school newspaper).
37 *Santa Fe Independent School District v. Jane Doe (Santa Fe)*, 530 US 290, 303, quoting, *Hazelwood School District et al v Kuhlmeier et al (Hazelwood)*, 484 US 260, 270, quoting, *Perry Educ. Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 47 [9 *Education Law Reporter* 23] (1983).
38 *Santa Fe*, 530 US 290, 304, quoting, *Board of Regents of Univ. of Wis. Sys. v Southworth*, 529 US 217, 235 [142 *Education Law Reporter* 624] (2000) (invalidating a university student organisation funding system that would have permitted defunding of organisations by student majority vote, finding such an approach to be an infringement of religious expression). See generally, Ralph Mawdsley, 'Funding Student Organizations in Colleges and Universities: An Examination of Constitutional Requirement' (2008) 234 *Education Law Reporter* 1.
39 *Santa Fe*, 530 US 290, 304.
40 Ibid 297.
41 See ibid 302 ('[The] invocations are authorized by a government policy and take place on government property at government-sponsored school-related events'.).
42 Ibid 309.
43 Ibid 303 ('the school allows only one student, the same student for the entire season, to give the invocation … Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum. Here, however, Santa Fe's student election system ensures that only those messages deemed 'appropriate' under the District's policy may be delivered'.).
44 Ibid 305, quoting *Board of Education of Westside Community Schools v Mergens (Mergens),* 496 US 226, 248.
45 Ibid 308, (O'Connor J, concurring in judgment).
46 Ibid 318 (Rehnquist CJ, dissenting).
47 540 US 712 [185 *Education Law Reporter* 30] (2004) (holding that state statute prohibiting state aid to any post-secondary student pursuing degree in theology, and state board of higher education's policy implementing the statute, did not violate Free Exercise Clause.).
48 Ibid 721.
49 Ibid 725.
50 Ibid 727 (Scalia J, dissenting).
51 435 US 618 (1978) (invalidating a state statute prohibiting clergy from serving in the state legislature).
52 *Locke*, 540 US 712, 732, 733 (Scalia J, dissenting).
53 Ibid 730.
54 Ibid 734.
55 494 US 872 (1990) (the Supreme Court, in an opinion ironically authored by Justice Scalia, holding two state employees discharged for use of a prohibited drug could not claim a free exercise defense to justify their conduct where the state's prohibition of certain substances was neutral and generally applicable).
56 See *Church of Lukumi Babalu Aye, Inc. v Hialeah*, 508 US 520 (1993) (finding free exercise clause violation in an area still extant after *Employment Division* where evidence supported hostility toward a particular religion). For a discussion of the immediate and devastating impact of *Employment Division* on free exercise protection, see Ralph Mawdsley, 'Employment Division v Smith Revisited: The Constriction of Free Exercise Rights Under the United States Constitution' (1992) 76 *Education Law Reporter* 1.
57 *Locke v Davey (Locke)*, 540 US 712, 733 (Scalia J, dissenting).

58 *Good News*, 533 US 98, 115. See *Lee v Weisman*, 505 US 577, 592-593 [75 *Education Law Reporter* 43] (1992) (holding graduation invocation and benediction to be Establishment Clause violation based on 'psychological coercion' of those at the graduation to participate).

59 *Good News*, 533 US 98, 115.

60 Ibid 116. Relying on *Santa Fe* where the Court held that 'the school's policy of permitting prayer at football games unconstitutional where the activity took place during a school-sponsored event and not in a public forum': at 115-116).

61 Ibid 118.

62 Ibid.

63 See, eg, *Boring v Buncombe County Bd. of Educ*., 136 F 3d 364 [124 *Education Law Reporter* 56] (4th Cir, 1998) (upholding school board's decision not to permit a play to be entered into state competition without editing where 'the play was curricular . . . [and] was supervised by a faculty member'); *Webster v New Lenox School District No. 122*, 917 F 2d 1004 [63 *Education Law Reporter* 749] (7th Cir, 1990) (upholding denial of injunctive relief to teacher who wanted to add to science course his views of a young earth as an alternative view to evolution because 'the school board [has] the authority and the responsibility to ensure that [the teacher] [does] not stray from the established curriculum by injecting religious advocacy into the classroom').

64 See *Borden v Sch. Dist. of the Township of E. Brunswick (Borden)*, 523 F 3d 153, 160-61; the complete text of the Guidelines read as follows:

1. Students have a constitutional right to engage in prayer on school property, at school events, and even during the course of the school day, provided that:
   A. The activity is truly student initiated; and
   B. The prayer activity does not interfere with the normal operations of the school district.
   This would mean that, for example, if a student or a group of students wish to engage in a prayer before or after their meal in the cafeteria during their lunch period they would have a right to do so, provided that the activity in which they are engaged does not disrupt the normal operation and decorum of the other students eating in the cafeteria. Also, if student athletes on their own decide to hold a prayer huddle before a game, after a game, or during half-time, they have a right to do so.
2. Neither the school district nor any representative of the school district (teacher, coach, administrator, board member, etc.) may constitutionally encourage, lead, initiate, mandate, or otherwise coerce, directly or indirectly, student prayer at any time in any school-sponsored setting, including classes, practices, pep rallies, team meetings, or athletic events.

65 Ibid 164.

66 Ibid. The academic freedom and free association claims are not discussed since neither has the history of constitutional protection that religious expression does. In rejecting the academic freedom claim, the Third Circuit followed earlier precedent that 'the educational institution that has a right to academic freedom, not the individual teacher', 523 F 3d 153, 172, n. 14, citing to, *Brown v Armenti*, 247 F 3d 69, 74 [153 *Education Law Reporter* 48] (3d Cir, 2001). The court of appeals found no association claim violation regarding 'the guidelines prohibiting [the coach] from participating in the players' prayer activities … because he [was] violating the Establishment Clause while doing so' (*Borden*, 523 F 3d 153, 173). The Third Circuit rejected the due process claim as to the Board's Guidelines and statement because 'Borden [had] no interest-privacy, liberty, or otherwise-in behavior that violate[d] the Establishment Clause': at 174.

67 461 US 138 (1983) (holding that an employee's circulating a survey on morale in a district attorney's office did not present an issue of public concern, thus depriving the employee of a free speech claim to an adverse employment decision).

68 391 US 563 (1968) (finding that a school employee's free speech had been violated where the content of his letter to a newspaper regarding financial decisions of the school board referred to a matter of public concern).

69 *Borden*, 523 F 3d 153, 171 ('We find it unnecessary to engage in the *Pickering* balancing test in the present case because Borden does not have a free speech right that would trigger the analysis').

70 Ibid 170. See generally, *Sanguigni v Pittsburgh Bd. of Public Educ*., 968 F 2d 393 [76 *Education Law Reporter* 332] (3d Cir, 1992) (nonrenewal of teacher's coaching position following distribution of union newsletter to faculty referring to 'undue stress' and 'low esteem' did not present free speech since the comments did not concern a matter of public concern under any of the three *Connick* tests).
71 *Borden*, 523 F 3d 153, 169.
72 Ibid.
73 Ibid 171.
74 Ibid 170.
75 Ibid 175. Because the third Circuit found an endorsement test violation, it '[did] not address whether Borden's conduct violate[d] the Establishment Clause under the *Lee v Weisman*, 505 US at 587, coercion and *Lemon v Kurtzman (Lemon),* 403 US 602 (1971) tests. *Lemon* established a three-prong test, holding that conduct violates the Establishment Clause "if (1) it lacks a secular purpose, (2) its primary effect either advances or inhibits religion, or (3) it fosters an excessive entanglement of government with religion"': at 612-13.
76 *Borden*, 523 F 3d 153, 176.
77 Ibid 174.
78 Ibid 174.
79 Ibid 187 (Barry J, concurring).
80 The third member of the Third Circuit, Judge McKee, included in his concurring opinion a photograph of Coach Borden at the front of his football team bending his knee and bowing his head as part of a student-initiated locker room prayer: at 181 (McKee J, concurring).
81 Ibid 186 (Barry J, concurring).
82 Ibid 186-87, citing to, *Zelman v Simmons-Harris,* 536 US 639, 649-55 [166 *Education Law Reporter* 30] (2002) (upholding Ohio's voucher program for Cleveland against Establishment Clause challenge based on parent choice); *Bd of Educ. of Westside Cmty Sch. v Mergens,* 496 US 226, 251-52 [60 *Education Law Reporter* 320] (1990) (upholding Equal Access Act against Establishment Clause challenge based on neutrality and student choice); *Child Evangelism Fellowship of N.J. Inc. v Stafford Twp. Sch. Dist*., 386 F 3d 514, 531 [192 *Education Law Reporter* 670] (3d Cir, 2004) (upholding Good News Club's access to elementary school against Establishment Clause based on private speech).
83 *Borden*, 523 F 3d 153.
84 Ibid 178-79.
85 505 US 577, 592-593 [75 *Education Law Reporter* 43] (1992).
86 *Borden*, 523 F 3d 153, 179.
87 Ibid 183 (McKee J, concurring).
88 Ibid 182
89 Ibid 183.
90 *Morse v Frederick* (*Morse*), 127 S Ct 2618 [220 *Education Law Reporter* 50] (2007).
91 Ibid 2621.
92 Ibid 2623. The assistant principal testified that 'the reference to a "bong hit" would be widely understood by high school students and others as referring to smoking marijuana': at 2625-26.
93 393 US 503 (1969) (finding a free speech violation where students' wearing black arm bands to protest the Vietnam War represented no substantial or material likelihood of disruption).
94 478 US 675 [32 *Education Law Reporter* 1243] (1986) (upholding discipline of student who delivered a lewd and vulgar speech with sexual innuendo).
95 484 US 260 [43 *Education Law Reporter* 515] (1988) (upholding principal's deleting two articles from newspaper on ground of reasonableness where paper was school-sponsored).
96 *Tinker v Des Moines Independent Community School District (No. 21)(Tinker),* 393 US 503, 506.
97 *Morse*, 127 S Ct 2618, 2629.
98 Ibid.
99 Ibid 2638 (Alito J, concurring in the opinion).
100 Ibid.
101 Ibid 2637.

102 Ibid 2636.
103 *Nuxoll v Indian Prairie Sch. Dist. #204 (Nuxoll),* 523 F 3d 668, 670.
104 Ibid.
105 Ibid 675. The plaintiff conceded that 'he could not inscribe "homosexuals go to Hell" on his T-shirt because those are fighting words'" at 671.
106 Ibid 672 (emphasis in original).
107 Ibid.
108 Ibid 671.
109 393 US 503 (1969).
110 *Nuxoll*, 523 F 3d 668, 673, quoting, *Tinker*, 393 US 503, 513.
111 *Nuxoll*, 523 F 3d 668, 674.
112 127 S Ct 2618 (2007) (upholding suspension of high school student displaying a banner at a school activity that the school's assistant principal reasonably interpreted as adopting support for drugs in opposition to the school's written policy).
113 *Nuxoll*, 523 F 3d 668, 673, quoting, *Morse*, 127 S Ct 2618, 2637 (Alito J, concurring).
114 See *Morse*, 127 S Ct 2618, 2628-2629 (emphasis in original).
115 *Nuxoll*, 523 F 3d 668, 674 (emphasis added).
116 Ibid.
117 Ibid 676.
118 Ibid.
119 Circuit Judge Rovner concurs in the judgment because it permits the student, Nuxoll, to wear his t-shirt, but he disputes the majority's misinterpretation and misuse of *Tinker*. See *Nuxoll* at 680, quoting *Tinker,* 393 US 503, 508, 'The First Amendment provides the school with an opportunity for a discussion about the values of free speech and respect for differing points of view but it does not grant a license to shut down dissension because of an 'undifferentiated fear or apprehension of disturbance'.
120 *Nuxoll*, 523 F 3d 668, 677 (Rovner J, concurring).
121 Ibid 676, quoting, *Tinker*, 393 US 503, 509.
122 Ibid 677, quoting, *Tinker*, 393 US 503, 512-13 (quoting, *Burnside v Byars*, 363 F 2d 744, 749 (5th Cir, 1966)).
123 Ibid.
124 Ibid.
125 Ibid. (emphasis in original).
126 Ibid. (emphasis in original).
127 Ibid 678. See *Tinker*, 393 US 503, 512, quoting, *Keyishian v Bd of Regents*, 385 US 589, 603 (1967): 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection'.
128 *Nuxoll*, 523 F 3d 668, 677.
129 Ibid 680.
130 See, eg, *McCollum v Bd. of Educ. of Sch. Dist. No. 71*, 333 US 203, 211-212 (1948) (in invalidating religious classes taught by clerics in school buildings during school time, the Court observed that 'hostility [toward religion] would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion'); *Zorach v Clauson*, 343 US 306, 315 (1952) (in refusing to apply McCollum to an off-campus released time program, the Court observed that 'separation of Church and State [does not] mean that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion'); *Lynch v Donnelly*, 465 US 668, 673 (1984) (in upholding a créche in a town display, the Court observed that 'the constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any'); *Wallace v Jaffrey*, 472 US 38 [25 *Education Law*

*Reporter*39] (1985) (O'Connor J, concurring in judgment) (in invalidating a statute providing for meditation of prayer, Justice O'Connell observed, 'For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion'); *Edwards v Aguillard*, 482 US 578, 616 [39 *Education Law Reporter* 958] (1987) (in striking down a Balanced Treatment statute, the Court observed that 'we have consistently described the Establishment Clause as forbidding not only state action motivated by the desire to advance religion, but also that intended to "disapprove", "inhibit". or evince "hostility" toward religion'); *Board of Educ. of Westside Community Schs v Mergens*, 496 US 226, 248 [60 *Education Law Reporter* 320] (1990) (in upholding constitutionality of Equal Access Act, the Court noted that 'if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion'); *Van Orden v Perry***,** 545 US 677, 683-84 (2005) (upholding display of Ten Commandments on Texas capitol grounds, stating that the role of the Supreme Court in reconciling the 'presuppos[ition] of a Supreme Being [with] . . . not press[ing] religious observances upon [the] citizens . . . requires that [the Court] neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage'.) But see, *McCreary County, Ky v American Civil Liberties Union of Ky***,** 545 US 844, 901 (2005) (in responding to majority's invalidating public library display of religious influence in US history, Justice Scalia in his dissent rejected the majority's analysis under *Lemon v Kurtzman*, 403 US 602 (1971), observing that ' [the *McCreary* majority] modifie[d] *Lemon* to ratchet up the Court's hostility to religion . . . [by] justify[ng] inquiry into legislative purpose, not as an end itself, but as a means to ascertain the appearance of the government action to an "objective observer" [and] replac[ing] *Lemon*' *s* requirement that the government have "a secular ... purpose'" with the heightened requirement that the secular purpose 'predominate' over any purpose to advance religion.)

131 *Lamb's Chapel*, 508 US 384, 390, note 4.

132 *Rosenberger*, 515 US 819, 845-846.

133 *Good News*, 533 US 98, 118,

134 379 F 3d 418 [191 *Education Law Reporter* 84] (6th Cir, 2004).

135 Ibid 423.

136 For prior cases reaching the same result as *CEF of New Jersey, Inc. v. Stafford Township School District (CEF)*, see *Hills v Scottsdale Unified Sch. Dist*., 329 F 3d 1044 [176 *Education Law Reporter* 557] (9th Cir, 2003) (holding that exclusion of religious group's summer camp brochure constituted impermissible viewpoint discrimination and distribution of summer camp brochure would not violate the Establishment Clause); *Child Evangelism Fellowship of Md., Inc. v Montgomery County Pub. Sch*., 373 F 3d 589 [189 *Education Law Reporter* 42] (4th Cir, 2004) (holding that allowing religious organisation access to public school's take-home flyer forum would not likely violate the establishment clause.)

137 386 F 3d 514 [192 *Education Law Reporter* 670] (3d Cir, 2004).

138 Ibid 531-32.

139 Ibid 532, quoting, *Good News*, 533 US 98, 118.

140 See *Good News*, 533 US 98, 112-13 ('[While] [w]e have said that a state interest in avoiding an Establishment Clause violation "may be characterized as compelling", and therefore may justify content-based discrimination ... , it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination') (internal citation omitted), quoting, *Widmar v Vincent*, 454 US 263, 271 [1 *Education Law Reporter* 13] (1981).

141 *CEF of New Jersey, Inc. v. Stafford Township School District (CEF)*, 386 F 3d 514, 530.

142 492 F 3d 89 [222 *Education Law Reporter* 536] (2d Cir, 2007).

143 Circuit Judge Calabresi wrote the court's opinion vacating the federal district court's permanent injunction but Circuit Judge Laval concurred only in the judgment, finding that the case was not ripe for adjudication. Circuit Judge Walker dissented on the merits.

144 Ibid 93, 94 (emphasis in original).

145 Ibid 98.

146 Ibid 103 ('Prayer and worship services are not religious viewpoints on the subjects addressed in Boy Scouts rituals or in Elks Club ceremonies … [T]he Boy Scouts … rituals-flag ceremonies, the Pledge of Allegiance, and the Scout Oath-might be a parallel, but [are] different [from worship which involves] … the teaching and preaching of the word of God[,] administ[ration] [of] the sacraments of baptism and the Lord's supper[,] … sing[ing] hymns[,] sing[ing] Christian songs[,] [and] pray[ing]'.)

147 Ibid.

148 Ibid 104.

149 Ibid 105.

150 Ibid 127 (Walker J, dissenting).

151 Ibid 129.

152 Ibid 131.

153 Ibid 128, 129.

154 Ibid 128.

155 Ibid 132.

156 See, eg, *Harper v Poway Unified School Dist***.,** 445 F 3d 1166 [208 *Education Law Reporter* 164] (9th Cir, 2006) (upholding refusal to permit student to wear t-shirt with religious message against homosexuality because students under *Tinker* have the right to 'be secure and to be let alone'.).

157 See, eg, *Boroff v Van Wert City Bd. of Educ*., 220 F 3d 465, 470 [146 *Education Law Reporter* 629] (6th Cir, 2000) (holding that Bethel could be used to prohibit speech that is 'inconsistent with its basic educational mission'); *Pyle v S. Hadley Sch. Comm*., 861 F Supp 157, 160 [94 *Education Law Reporter* 729] (D Mass, 1994) (upholding school dress code prohibiting students from wearing t-shirts displaying nondisruptive, vulgar messages, even if messages were political and observing that plaintiffs, sons of a constitutional law professor, were highly successful in academic and extracurricular activities).

158 Cf *Bannon v School District of Palm Beach County*, 387 F 3d 1208, 1213 [193 *Education Law Reporter* 8] (11th Cir, 2004) (upholding school officials' eliminating religious comments and symbols on hallway panels where under Hazelwood, Hazelwood that a designated public forum can be created only by a 'policy or practice [in opening] facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations'; *Castorina v Madison County Sch. Bd*, 246 F 3d 536, 543 [152 *Education Law Reporter* 524] (6th Cir, 2001) where the Sixth Circuit reversed summary judgment for a school board that had refused to permit two students to wear a T shirt with a confederate flag where the court concluded that the Hazelwood standard was not apposite; in remanding for trial on the issue of the consistency of the school in enforcing its dress code, the court found that the students' 'actions were not school sponsored, nor did the school supply any of the resources involved in their wearing the T-shirts. Most importantly, no reasonable observer could conclude that the school had somehow endorsed the students' display of the Confederate flag'. See also, *Boring v Buncombe County Bd of Educ***.,** 136 F 3d 364 [124 *Education Law Reporter* 56] (4th Cir, 1998) (upholding school board's decision not to permit a play to be entered into state competition without editing where 'the play was curricular … [and] was supervised by a faculty member').

159 See, eg, *Seidman v Paradise Valley Unified Sch. Dist. No. 69*, 327 F Supp 2d 1098, 1119 [191 *Education Law Reporter*175] (D Ariz, 2004) (upholding school district prohibition of use of 'God' on tile to be displayed in interior of school as being school-sponsored speech and rejecting Establishment Clause hostility claim where prohibition was considered neutral in the absence of 'evidence that the Defendants affirmatively opposed religion, were hostile to religion, or showed preference for those who do not believe in religion'.)

160 *Nuxoll*, 523 F 3d 668, 679 (Rovner J, concurring in the judgment).

161 See *Jacobellis v State of Ohio***,** 378 US 184, 197 (1964) (Stewart , concurring) ('I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that'.)

162 545 US 844 (2005).

163 Ibid 856 (Assembled with the Commandments were framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact,

the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.)

164 Ibid 866, n 14.

165 *Capitol Square Review and Advisory Bd v Pinette*, 515 US 753, 780 (1995) (O'Connor J, concurring in part and concurring in judgment) (upholding display of cross on capitol grounds where other symbols had been permitted).

166 See *Lee v Weisman*, 505 US 577 [75 *Education Law Reporter* 43] (1992). The majority held that prayer at graduation violated the Establishment Clause, but with a powerful dissent by Justice Scalia speaking to the missed opportunity to treat the prayer as religious diversity.

> '[N]othing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration-no, an affection-for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.'. (Ibid 645) (Scalia J, dissenting).