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Options for Local School Districts Reviewing Local Governance and Moral Issues Raised by the Equal Access Act: The Gay-Straight Student Alliance in Utah

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On February 20, 1996, an outspoken student speaker seeking approval of an extracurricular student club for gay, lesbian, bisexual students and their supporting homosexual friends informed school board members of the Salt Lake City School District that the questions involved were neither moral nor religious; they were legal. For other speakers, the legal issues did not focus on another unfunded, federal mandate; rather, reminiscent of the federal protections afforded civil rights in public education in the 1950's and the 1960's, laws like the Equal Access Act were needed to ensure equal treatment of student perspectives regarding private sexual matters. Like in the Lincoln-Douglas Senatorial campaign of 1858 when neither Lincoln nor Douglas could find a common moral, legal or constitutional ground to debate public policies associated with the expansion of slavery in their day, those speaking to the local school board that night were unable to find common ground in law, morality, or political rationale to define or act on the challenging, practical decisions confronting the local school board.

In light of this modern-day confusion, perhaps a return to Abraham Lincoln’s counsel to his fellow citizens seeking to limit the expansion of slavery on moral and legal grounds would be relevant today: “If we could first know where we are, and whither we are tending, we could then better judge what to do, and how to do it.”² Like the irreconcilable differences evident in the debates of Abraham Lincoln and Stephen A. Douglas over the expansion of

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slavery, it seems that the political and legal choices that are made when confronted with a request for student sponsored clubs focusing on sexual matters may well begin and end with one's perception of the nature of man and morality. This article will briefly review the background of the Equal Access Act (EAA), the history of the challenging, unsolicited problems that were presented to an unwilling Salt Lake City School Board, the impact of the Equal Access Act on a state's fundamental definition of its educational mission, and an option under the Equal Access Act that could be chosen by a local school board that would prevent recognition of a student extracurricular club focusing on sexual matters without having to ban all other non-curricular clubs.

I. FACTUAL AND LEGAL BACKGROUND

Seeking understanding of the complex factual and legal background confronting the Salt Lake City school board requires an awareness of the background of the federal EAA legislation that appeared to mandate the decision-making framework of the local board, and the factual background of the controversy confronting the local school board.

A. The Legal Background of EAA

When Congress adopted the EAA by lopsided majorities in both the United States Senate and House, its sponsors were confident that it would override at least two circuit court decisions and practices of many local school districts that seemed to prevent or discourage student-initiated groups of secondary education students from meeting to discuss religious matters outside of classes on school grounds. Six years after the adoption of the EAA, in Board of Education of the Westside Community Schools (Dist. 66) v. Mergens ("Mergens"), the U.S. Supreme Court concluded that the EAA was adopted precisely for that reason.

We think it significant, however, that the Act, which was passed by wide, bipartisan majorities in both the House and the Senate, reflects at least some consensus on a broad legislative purpose. The Committee Reports indicate that the Act was intended to address perceived widespread discrimination against religious speech in public schools, ... and, as the language of the Act

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indicates, its sponsors contemplated that the Act would do more than merely validate the status quo. The Committee Reports also show that the Act was enacted in part in response to two federal appellate court decisions holding that student religious groups could not, consistent with the Establishment Clause, meet on school premises during noninstructional time. . . . A broad reading of the Act would be consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion before and after classes.5

Under the EAA, all secondary schools that receive federal funds, and, which by practice or formal policy, allow student clubs to be organized (that are student-initiated and are not directly related to the curriculum)6 must treat all student clubs the same “regardless of the religious, political, philosophical, or other content of their speech at such meetings.”7

Notwithstanding this significant federal mandate, the majority of the Court in Mergens stated:

[W]e think schools and school districts nevertheless retain a significant measure of authority over the type of officially recognized activities in which their students participate. See, e.g. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). First, schools and school districts maintain their traditional latitude to determine appropriate subjects of instruction. To the extent that a school chooses to structure its offerings and existing student groups to avoid the Act's obligations, that result is not prohibited by the Act. . . . Second, the Act expressly does not limit a school's authority to prohibit meetings that would “materially and substantially interfere with the orderly conduct of educational activities within the school.” § 4071(c)(4); cf. Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 509 (1969). . . . The Act also preserves “the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.” § 4071(f).8

The text and legislative history of the Act is ambiguous on several key points, reflective of the rushed tactics used to adopt legislation in Congress. This ambiguous statutory language and cryptic, conflicting history of the EAA, its apparent tacit adoption of limited open forums through uninformed practices of local school

5. Id.
6. 20 U.S.C. § 4071(c) (1995); Id. at 226, 235-243, 246.
8. 496 U.S., at 240-41.
districts, and the inherent conflicts and tensions raised by overlapping legal pronouncements of the U.S. Supreme Court in Mergens, were all brought into sharp focus in Utah by several East High School students in the Salt Lake City School District who requested recognition of a student-sponsored club called a “Gay-Straight Student Alliance.”

B. The Factual Background of the East High Controversy

In late 1995, several East High School students petitioned their principal for permission to form a “Gay-Straight Student Alliance” (hereinafter “Alliance”). The petition read as follows:

We, the undersigned students of East High School, feel it necessary to form a club for gay, lesbian, and bisexual students, and their supporting heterosexual friends. The purpose of the club would be to increase awareness about homosexuality in high schools, to decrease homophobia, and to help gay, lesbian, and bisexual students feel safe and welcome in their school environment. We request permission to use a classroom for our meetings, and a faculty sponsor to assist during the meetings. We do not request the use of announcement time, nor do we request the use of the hallways for flier announcements. We feel doing so would attract unwanted attention. We are extremely concerned for the safety and well being of our members.

We are supported by many students, faculty, and parents, as well as several Utah organizations. The undersigned as well as many other students have been meeting unofficially off campus for nearly a month. The attendance at these meetings is about twenty people per meeting. We feel that our numbers are not

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9. At the Feb. 20, 1996 hearing of the Salt Lake City School District, it appeared from comments of board members that perhaps basic decisions of educational philosophy regarding student clubs (curricular or non-curricular) had not been previously addressed. Allowing educational philosophy and policy to be set by de facto practice rather than de jure policy may mean many things. For example, maybe local school board counsel had previously failed to bring the existence of the 1984 Equal Access Law or Mergens decision to the attention of the then sitting school board members. Second, perhaps administrators had not brought any matters involving student clubs or organization to the attention of their school board because many were not publicly endorsed by the school. Third, it is possible that a school board could have determined that it was politically easier to let the district’s de facto policies (established by their practices) evolve over time than to comprehensively address the educational, legal and moral ramifications of such decisions. Any of the three could contribute to the determination of issues raised in this article by de facto practices rather than by addressing the same publicly as a matter of law.

10. The inquiry from the State Office of Education to the Utah Attorney General referred to the requested club as the “Gays, Lesbians, Bisexual Club.” Speakers at the Feb. 20, 1996 school board meeting and other newspaper accounts since then have referred to the club as the “Gay-Straight Student Alliance.”
significant enough to form a club.

Our meetings would be a time for discussion of topics deemed appropriate by the faculty advisor, and the students in attendance. We may also invite guest speakers. In addition, we will announce during our meetings the events and activities in which we will be participating.

As an official club, we will plan a community service project. We will be volunteering for the Utah AIDS Foundation and the Utah Stonewall Center. We feel that by doing a monthly community service project, we will help our community, in general, to feel more comfortable with our club.

All students and faculty members are welcome at meetings and are invited to participate in the discussion. There will be no discrimination against anyone for any reason, be it race, age, or sexual orientation. We feel quite confident that our diverse school would readily welcome a club that is against discrimination.  

Salt Lake City School District Superintendent Darlene Robles, in accordance with applicable state law, requested that State Superintendent Scott Bean obtain an opinion from the Utah Attorney General regarding basic questions arising from the student application as well as the parameters of the EAA. After following accepted procedures, and providing relevant background information, on November 3, 1995 Superintendent Bean asked Utah Attorney General Jan Graham to respond to the following questions:

1. If a public school permits its students to form traditional clubs such as the Ski Club, Key Club, and other clubs not directly relating to the curriculum, must it then permit the formation of controversial student clubs such as that which is the subject of the current East High School petition?

If the answer to the proceeding question is "yes," please also

11. The author received a copy of this statement during the Feb. 20, 1996 school board meeting. Thereafter, East High staff in the principal's office confirmed it had been submitted by the students to the school administration.

12. UTAH CODE ANN. §§ 53A-1-303(3) and (4) (1953 as amended).

13. Superintendent Bean noted that "[t]he principal has received a petition from several students for establishment of such a club. The principal has also received a number of individual letters from persons in the community urging authorization of the club. District officials expressed concerns that none of those who have written to date [Nov. 3, 1995] have children in East High School and that there may be an attempt by outside interests to manipulate this issue."
respond to the following:

2. May school officials prohibit discussions or activities in student clubs which, while lawful for adults, are unlawful or otherwise restricted, e.g. restrictions under Sections 53A-13-101, 76-7-322, and 76-7-323?

3. To what extent may schools restrict outside speakers, advocates, and visitors, and may those restrictions, if permissible, be different for controversial clubs than for traditional clubs?

4. To what extent may schools restrict student participation in a club; e.g. if a club is examining controversial issues, may membership or attendance be limited to students whose parents have given prior approval for their children's involvement?

5. May a school treat student clubs differently in matters such as announcements over the public address system, or in the student newspaper, posting club notices, distributing club flyers, references in the school yearbook or other official publications, or membership recruitment?

On December 22, 1995, the Attorney General's Office responded to these questions with effectively one sentence: "We agree with your interpretation of the federal statute and the Mergens decision that high school clubs must be treated equally regardless of their controversial status or lose federal funds." 

Against this backdrop, on February 20, 1996, Salt Lake City School Board members stated that, according to their counsel, there were two options the school board could follow in responding to the student request to form the Alliance. Without abandoning the district's desire "to promote and advance curriculum-related student clubs that enrich the education and lives of students," the board's debate and public hearing was focused on two (and only two) choices. Under "Option 1," the board could "allow students

15. Letter from William T. Evans, Assistant Attorney General, Chief, Education Division, to Scott Bean, State Superintendent of Public Instruction (Dec. 22, 1995). It is not clear on what legal theory the Attorney General's Office based its conclusion that a cut-off of federal funds could be imminent when the EAA specifically provides the following: "Notwithstanding the availability of any other remedy under the Constitution or laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school." 20 U.S.C. § 4071(e) (1995).
opportunities to form and organize student groups that are not related to school curriculum" with certain potential, undefined restrictions. Under "Option 2," the board could choose to "not allow or permit student groups or organizations not directly related to the curriculum to organize or meet on school property."\(^{17}\) The board insisted that the EAA limited their selection to the permissive Option 1 or the restrictive Option 2.\(^{18}\) The board members then voted four to three to ban non-curriculum student groups or organizations after the beginning of the 1996-97 school year.

II. CONTINUING TO ENCOURAGE MORALLY BASED CIVIC VIRTUE IN PUBLIC EDUCATION

Notwithstanding protests by local school board members regarding federal interference with local school district authority, it appears that allowing local school districts to define and emphasize morally based civic virtue in public education could well be unaffected by the EAA. In Utah, state legislation appears to direct that a morally based public education be provided in at least two ways. First, on a public level, various state laws require the teaching of various civic virtues from a morally based perspective. Second, on a private level, parental autonomy and family privacy in religious, sexual and other moral matters are statutorily protected. It appears that the EAA does not interfere with the first objective, but may, depending on which legal authority is used to interpret the EAA, interfere with the second. Understanding the application of these state laws to activities and curricula in public schools in the State of Utah is important for at least two reasons. First, it is important to understand what legal constraints define the role and mission of public education in the state. Second, it is important to understand which, if any, of these state-mandated directives could be understood as conflicting with

17. *Id.* Unless the prohibition was restricted to "meeting on school property" during school hours, it appears that the "restriction to meet on school property" may, if responsible adults or other entities were involved, constitute a violation of the Utah statutory law creating an open public forum on schools after hours. *See Utah Code Ann.* §§ 53A-3-413 and 414 (1953 as amended).

18. The board not only banned the non-curricular clubs in the fall of 1996, but also determined to take action and express their views to federal legislators from Utah and other school districts in the State. At least one board member felt that the fear expressed by Justice Stevens, in his Mergens dissent, was coming to pass: "If a high school administration continues to believe it is sound public policy to exclude controversial groups, such as political clubs, the Ku Klux Klan, and perhaps gay rights advocacy groups, from its facilities, it must now also close its doors to traditional extracurricular activities that are noncontroversial but not directly related to any course being offered at the school." Mergens, 496 U.S. at 290 (Stevens, J., dissenting.)
the language or intent of the EAA, and therefore, be pre-empted or overridden by the same under the Supremacy Clause of the U. S. Constitution. 19

A. Teaching Morally Based Civic Virtues in the Public Schools

Like many states, Utah requires that students be taught certain values and virtues in public school. 20 Utah law requires these virtues to be taught in connection with regular schoolwork and presumes teachers will promote such conduct. Apparently, this requirement to teach and role model a morally based civic virtue is not preempted by any EAA provisions.

1. Basic State Law Requirements

Under Utah state law, "[H]onesty, temperance, morality, courtesy, obedience to law, ... respect for parents and the home, ... and other skills, habits, and qualities of character which will promote an upright and desirable citizenry and better prepare students for a richer, happier life ... [must be] ... taught in connection with regular school work." 21 A 1978 Attorney General Opinion addressing an earlier but similar version of the mandate to teach morality and obedience to law in the school interpreted the legislation broadly.

That same opinion advised former State School Superintendent Walter D. Talbot that the statutory reference to

19. The Supremacy Clause provides the following: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. CONST. art. VI, cl. 2.) "In the absence of explicit statutory language signaling an intent to preempt [state law], we infer such intent where ... the state law at issue conflicts with federal law, either because it is impossible to comply with both ... or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives." Northwest Cent. Pipeline v. Kansas Corp. Co., 489 U.S. 493, 509 (1989).

20. For example, twenty-five states mandate by statute or constitutional provision that their public schools teach or promote morality. See ARK. CONST. art. 14, § 1; ARK. CODE ANN. § 6-18-501; CAL. CONST. art. IX, § 1; CAL. EDUC. CODE § 44806; ILL. ANN. STAT. ch. 122, §§ 27-12, 27-15; IND. CONST. art. 8, § 1; IND. CODE ANN. § 20-10.1-4-4; IOWA CONST. art. 9, 2nd § 3; KY. REV. STAT. ANN. § 158.190; ME. REV. STAT. ANN. tit. 20, § 1221; MASS. CONST. pt. 2, cl. 5, § 2; MASS. GEN. LAWS ANN. ch. 71, § 2; MICH. CONST. art. 8, § 1; MINN. STAT. ANN. § 126.03; NEB. REV. STAT. § 79-214; N.Y. EDUC. LAW § 801; NEV. CONST. art. 11, § 1; N.C. CONST. art. IX, § 1; N.D. CONST. art. VIII, §§ 1, 3; OHIO REV. CODE ANN. § 3313.601; OR. REV. STAT. § 336.067; R.I. CONST. art. XII, § 1; S.C. CODE ANN. § 59-29-10; S.D. CONST. art. VII, § 1; S.D. CODIFIED LAWS ANN. § 13-33-6; VT. CONST. ch. II, § 68; VA. CODE ANN. § 22.1-208; W. VA. CONST. art. 12, § 12; WIS. STAT. ANN. § 118.01.

“morality” could include the teaching of chastity within the context of other civic virtues:

Section 53-14-10 specifically requires the teaching of those qualities which will prepare “our youth for a richer, happier life.” There are manifold problems and difficulties arising from unchastity which would have a negative impact with respect to the promotion of a richer, happier life for our youth. Certainly anyone who has dealt with young people is aware of the problems of guilt, unwanted pregnancies, abortion, adoption, and venereal disease.

Because the law mandates the teaching of morality, which necessarily includes sexual morality, and mandates the obedience to law, including those laws relating to the aforementioned sexual offenses together with the laws prohibiting such things as lewdness, sodomy, obscenity, and contributing to the delinquency of a minor; and mandates teaching which will prepare youth for a richer, happier life, it is my opinion that it is clearly appropriate that the public schools should teach chastity to their students. Certainly nothing should be done or condoned by teachers or administrators which would teach, promote, or condone immorality or unchastity. ... Where Section 53-14-10 [now § 53A-13-101(4)] requires the teaching of honesty, morality, courtesy and obedience to law it is proper and appropriate that the content and applicability of various laws be discussed with the students with the objective of encouraging the students' obedience to these laws. ... This decision and many others indicate that a code of moral conduct is often expressed through elected representatives in the enactment of statutes and ordinances.22

There is a long-recognized relationship between moral judgments and statutory law. Legislatively defined, “criminal punishment usually represents the moral condemnation of the community.”23 Legislatures “are constituted to respond to the will and consequently the moral values of the people.”24 Thus, Utah's requirement to teach morality and obedience to law can be understood to mean, at a minimum, encouraging adherence to the moral judgment expressed by the state's criminal code.

2. Effective Teaching of Morally Based Civic Virtue is Not Undermined by Academic Freedom, Student Speech, or Teacher Private Conduct

Local school districts are charged with implementing the state mandate to teach morally based civic virtue by providing "the setting and opportunities to teach [these values] by example and role modeling." As applied to private sexual matters of students or their teachers, acts of fornication, adultery, and sodomy remain criminal acts in Utah. The power to regulate student and teacher conduct to ensure that the foundation of a school's educational mission to teach morality and obedience to law has long been recognized in state and federal court decisions.

a. Regulating Speech and Conduct in the Classroom

Claims of academic freedom by teachers and freedom of speech rights by students do not require the school to undermine its fundamental mission of teaching morality and obedience to law. In curricula or other classroom matters,

[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.' . . . even though the government could not censor similar speech outside the school. . . . [T]he school is entitled to 'disassociate itself' from the speech in a manner that would demonstrate to others that such vulgarity is wholly inconsistent with the 'fundamental values' of public school education.

Because the Tenth Circuit has found that a teacher's speech rights are similar to those of students, and Utah law allows local school districts and public schools to participate in defining their own educational mission within the framework of state law, a school district could limit teacher and student speech and conduct by choosing not to give its official imprimatur to that which significantly and materially undermines the schools' presentation of civic virtue and morals within the constraints of existing state criminal law and statutory protections of parental autonomy and

28. See footnote 37, infra.
family privacy.

The general principle that teachers do not have academic freedom\(^{30}\) in the traditional sense\(^{31}\) was reaffirmed in two recent Tenth Circuit Court of Appeals cases. In \textit{Roberts v. Madigan},\(^{32}\) a fifth-grade school teacher challenged the school principal’s decision to remove two “Christian” books from his classroom and to prohibit him from reading his personal Bible during class free reading time. The school principal was motivated by a desire to avoid an Establishment Clause violation as well as by the pedagogical concern that the teacher “be actively involved in teaching children.” Ultimately, the federal appellate court upheld the right of the local school to disassociate itself from Establishment clause violations and prevent teacher speech for that reason as well as other motivations “reasonably related to legitimate academic concerns.”\(^{33}\)

Subsequently, in \textit{Miles v. Denver Public Schools},\(^{34}\) a teacher vocalized derogatory, personal feelings about a school tennis team member’s amorous public conduct. The principal disciplined the teacher for making the statement. The appellate court upheld the lower court’s summary judgment in favor of the school district. The Tenth Circuit reaffirmed that a “public forum is not created by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”\(^{35}\) Apparently, the express provisions of state law requiring the teaching of morality and obedience to law in all

\(^{30}\) Other federal court decisions addressing secondary school academic freedom issues include Pelozza v. Capistrano Unified Sch. Dist., 37 F.2d 517 (9th Cir. 1994) \textit{cert. denied} 115 S.Ct. 2460 (1995), Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3rd Cir.1990), Zyan v. Warsaw Community Sch. Corp., 631 F.2d 1300, 1307 (7th Cir.1980), and Mercer v. Michigan State Bd. of Educ., 397 F. Supp. 580, 585 (E.D. Mich. 1974, three judge opinion), \textit{affirmed} 419 U.S. 1081 (1974). In Utah, under the statutory provisions of \textit{UTAH CODE ANN.} § 53A-13-101 (1853 as amended) and implementing administrative rules, it appears teachers or volunteers retain a right to speak of the theistic, agnostic or atheistic assumptions of cultural heritage, societal values, political theory or moral theory that are relevant to the curricula.

\(^{31}\) The U. S. Supreme Court found efforts to impose “academic freedom” by mandating the teaching of scientific evidence favoring a theory of creationism when also teaching about the theory of evolution to be unconstitutional on establishment clause grounds. In that setting since “in the state of Louisiana, courses in public schools are prescribed by the State Board of Education and teachers are not free, absent permission, to teach courses different from what is required ... ‘[a]cademic freedom,’ at least as that phrase is commonly understood, is not a relevant concept in this context.” Edwards v. Aguillard, 482 U.S. 578, 587 n.6 (1987).

\(^{32}\) \textit{Id.} at 1057.

\(^{33}\) \textit{Id.} at 1047 (10th Cir. 1990).

\(^{34}\) 944 F.2d 773 (10th Cir. 1991).

\(^{35}\) \textit{Id.} at 776.
aspects of school class work could prevent a local school from creating an open forum that undermined the values and virtues outlined in the statute. Indeed,

[a] school's interests in regulating classroom speech -- such as "assur[ing] that participants learn whatever lessons the activity is designed to teach" and that students are not "exposed to material that may be inappropriate for their level of maturity" (Hazelwood, 484 U.S. at 271, 108 S.Ct. at 570) -- are implicated regardless of whether that speech comes from a teacher or student.

Furthermore, the Tenth Circuit specifically found that "case law does not support Miles' position that a secondary school teacher has a constitutional right to academic freedom." Prohibiting teacher or employee conduct that endorses or encourages "illegal" or "immoral" conduct is within the prerogative of the legislature, State Office of Education, and local school districts.

On the other hand, student speech is broadly protected under Utah law. A student's expression of personal belief "may not be penalized" when participating in school-directed curricula or activities, unless "the expression unreasonably interferes with order or discipline, threatens the well-being of any person or property, or violates a concept of civility or propriety appropriate to a school setting." Similarly, during non-instructional time, student speech rights cannot be denied unless "the conduct unreasonably interferes with the ability of school officials to maintain order and discipline, unreasonably endangers persons or property, or violates concepts of civility and propriety appropriate to a school setting." Without addressing whether or not the discussion topics sought to be included by the Alliance in their student organization would violate "concepts of civility and propriety appropriate to a school setting," it is clear that the right

37. 944 F.2d at 777 (10th Cir. 1991).
38. Id. at 779 (and cases cited therein).
40. Utah Code Ann. § 53A-13-101.3(2) (1953 as amended). While the state rule addresses the aspects of this statute dealing with the exercise of religious freedoms, and specifically limits involvement of school officials, see UTAH ADMIN. R. 277-104 B, no provision has been made in administrative rule regarding exercise of free speech rights by students. It is assumed that the word "unreasonably" (when modified by the apparent requirements of actual, rather than anticipated, disruption and the use of the least restrictive means to stop the disruption, UTAH CODE ANN. § 53A-13-101.3(3) (1953 as amended), as applied, would conform with the requirements of Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509 (1969).
41. While not addressed in this article, resolution of this issue may well have a direct bearing on fulfilling the implied legislative intent evident when the language
of student speech does not go so far as to require official school recognition and endorsement of that speech. Neither a generalized claim by teachers to academic freedom nor state protected student speech appears to be available when either one undermines the basic educational mission of the public schools to teach morality and obedience to law.

b. Regulating Teacher Conduct Off Campus That Impacts Effective Performance in the Classroom

The U.S. Supreme Court has long recognized a state's interest in inquiring into school employees' private conduct to determine the employees' fitness. In 1960, the Court reaffirmed that "[t]here can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize."42 Indeed, the Court has said:

A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. That school authorities have the right and the duty to screen officials, teachers, and employees as to their fitness to maintain the integrity of the schools as part of ordered society, cannot be doubted.43

There is "no requirement in the federal constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors. . . ."44

While it is understood and recognized that First Amendment protections give teachers the right to speak out publicly on matters that address educational concerns of public import, this right only applies when the statements "are neither shown nor can be presumed in any way to have either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools

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generally."\(^{45}\)

While not specifically addressed in these opinions, more recent cases on both federal and state levels have interpreted requirements to refrain from immoral conduct as not infringing on private First Amendment expressive activity. These prohibitions were upheld as long as there was (1) a nexus between private conduct deemed to be immoral, and (2) either one's teaching performance or the administration of the school.

A leading case in this area is *National Gay Task Force v. Board of Education of City of Oklahoma.*\(^{46}\) The State of Oklahoma forbade "public homosexual conduct," which was defined as "advocating, soliciting, imposing, encouraging or promoting private homosexual activity [public, non-private commission of sodomy] in a manner than creates a substantial risk that such conduct will come to the attention of school children or school employees," and provided for suspension, refusal of employment and other sanctions for public teachers that engaged in such prohibited conduct. When this law was subjected to a facial challenge, homosexuality was not afforded protection as a suspect class\(^{47}\) (whether status-based or conduct-based), but private advocacy by school employees in favor of such conduct "aimed at legal and social change," was found to be protected speech.

The First Amendment does not permit someone to be punished for advocating [in a private capacity] illegal conduct at some indefinite future time.... We recognize that a state has interests in regulating the speech of teachers that differ from its interests in regulating the speech of the general citizenry.... But a state's interests outweigh a teacher's interests only when the expression results in a material or substantial interference or disruption in the normal activities of the school. This Court has held that a teacher's First Amendment rights may be restricted only if "the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee."\(^{48}\)

In its ruling, the Tenth Circuit specifically rejected the earlier


\(^{46}\) 729 F.2d 1270 (10th Cir. 1984), aff'd by an equally divided court 470 U.S. 903 (1985).

\(^{47}\) See also Rich v. Secretary of Army, 735 F.2d 1220, 1229 (10th Cir. 1984), cited in Jantz v. Munci, 976 F.2d 623, 630 n.3 (10th Cir. 1992).

\(^{48}\) Nat'l Gay Task Force, 729 F.2d. at 1274 (citations omitted). For other authority upholding legislative access that had no evidentiary impact on classroom performance, see Barnett v. State of Wisconsin Ethics Bd., 817 F. Supp. 67 (E.D. Wis. 1993).
efforts of the district court to "save" the statute by reading into it an unstated legislative requirement that any challenged, private conduct of a teacher must have a demonstrable nexus to classroom performance.

Efforts to restrict private conduct of teachers—whether considered "immoral" or "illegal" have been challenged in the state and federal courts for some time. However, many courts have found that restrictions may occur when "unfitness to teach" or disruption of the governance of schools by reason of the conduct is shown. An early case articulating this standard is Gaylord v. Tacoma School District. No. 10, 49 which accepted evidence that disclosure of homosexual tendencies and implicit practice could "impair or reasonably be said to impair his ability to perform the duties of an occupation in which the homosexual engages" and also impaired "the effectiveness of the institution which employed him." 50

As to demonstrating "unfitness to teach," several California cases followed precedent which interpreted seven criteria used to determine if "immoral" conduct implicates one's fitness to teach, or impacts on one's teaching performance:

Since the term "immoral conduct" is vague and broad, whether such conduct demonstrates unfitness to teach is measured against seven criteria: (1) the likelihood that the conduct may have adversely affected students or fellow teachers, (2) the degree of such adversity anticipated, (3) the proximity or remoteness of time of such conduct, (4) the type of teaching certificate held by the party involved, (5) the extenuating or aggravating circumstances, if any surrounding the conduct, (6) the likelihood of the recurrence of the questioned conduct, and (7) the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. 51

Under these criteria, while the issue for resolution regarding "immorality" is ultimately one of fact and not law, the complex legal standard that is used encourages either judicial action or local school board inaction in this area.

Other jurisdictions have not imposed such specific guidelines that easily allow a judge in practice to impose his or her

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50. Id. at 134.
personal perspectives regarding the structure, function, and outcome of public education on locally elected school boards. For example, in Pennsylvania, immorality has been interpreted as being "a course of conduct that offends the morals of the community and is a bad example to the youth whose ideals the teacher is supposed to foster and elevate." Elsewhere, an alternate form of analysis was used to determine when conduct is disruptive enough to warrant immediate dismissal without warning. When a teacher wrote overtly sexual letters to two students and was suspended for engaging in immoral conduct, an appellate court followed earlier precedent and held that the teacher's actions were irremediable, and justified disciplinary action without written warning.

A warning, even if effective in stopping the plaintiff's conduct would not be effective in correcting ... damage to the students or the damage to the reputation of the faculty, school district and [teacher] himself. ... The [teacher's] conduct has no legitimate basis in social policy or society. No purpose would be served by giving the [teacher] a written warning. We conclude, therefore, that the [teacher's] conduct is irremediable.

Prohibited "immoral conduct" is not limited to sexual matters. It may include theft of property, possession of marijuana and cocaine, undisclosed sexual activity with a student before hiring in a subsequent school district, and lying or making false statements to the school district regarding absences from work. Thus, state and local school board efforts to ensure that a teacher's private conduct does not prevent effective performance in teaching morally based civic virtue or otherwise interfere with the administration of the public schools, are supported by significant legal precedent upholding such actions.

52. I am indebted to Professor Neil Flinders of the BYU College of Education for promoting in his work an increased awareness of these three concepts as analytical tools to evaluate practical challenges in education that are evident in both jurisprudential theory and educational philosophy.
55. Id. at 906 (citations omitted).
3. Neither the EAA nor Supreme Court Precedent Preempts the Goal of Morally Based Civic Virtue in Public Education

There appears to be no serious risk of federal preemption under the Supremacy Clause on either statutory or judicial grounds when a state or local government determines to teach morally based civic virtue in public education. The text of the EAA demonstrates that the Act is only applicable to non-curricular student organizations. There are no textual requirements that mandate application of any standards to course work or curricular clubs. Indeed, the Mergens opinion specifically recognized that the right to direct curriculum and extracurricular activities still resided with school districts.

Furthermore, the restrictions on the official speech of employees or volunteers do not infringe on the statutory provisions of the EAA. A club afforded “equal access” and a “fair opportunity” is not guaranteed a faculty adviser; in fact, the federal law allows faculty to be present only in a “non-participatory capacity.” Presently, Utah law requires teachers to teach and role model morality and obedience to law. If the activities of a group such as the Alliance were reasonably understood as encouraging criminal conduct, employees or volunteers could be directed to refrain from promoting the same in their official capacities. Allowing faculty to serve only as monitors of student conduct rather than active advisers, does not interfere with the intent or purposes of the EAA.

While expressed in different ways, the U.S. Supreme Court has also repeatedly presumed that American public education’s task is to instill moral and civic values in students. Notwithstanding the Court’s inconsistent use of evidentiary assumptions and legal standards in education-related cases, as shown hereafter, the recognition and acceptance of the role of

61. In light of legislative directives regarding teaching morality and obedience to law and an administrative rule of the State Office of Education to role model the same, such a mandate could be construed as “reasonably related to legitimate academic concerns” under Hazelwood.
62. Alliance’s request presumed that the faculty adviser would be actively involved in setting the agenda for the group’s discussions.
64. See Matthew Hilton, Recognizing Constitutional Freedoms in Public Schools: Reasserting State and Local Educational Policy and Practice through Non-Judicial Law, 1994 B.Y.U. Educ. and L. J. 1, 3-5.
public schools, as an institution designed to promote and build civic virtue, as defined by local school boards has remained constant in significant Court opinions discussing the role of public education.65

For example, early Court opinions assumed that student internalization of morality was a basic objective of public education. Early in U.S. history, the Supreme Court recognized that:

[s]chools and education were regarded by the congress of the Confederation as the most natural and obvious appliances for the promotion of religion and morality. In the ordinance of 1787, passed for the government of the Territory Northwest of the Ohio, it is declared, article 3, 'Religion, morality and knowledge being necessary to good government . . . the means of education shall forever be encouraged.'

In 1898, the Court reaffirmed an 1881 holding that governments could fund education by public taxation because moral training provided by the education contributed to social stability:

Every man in a county, a town, a city or a state is deeply interested in the education of the children of the community,

65. In cases such as Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) where five opinions analyzed on differing grounds the plurality's finding of a "new" liberty of access to certain books in a high school library, eight of the nine justices disclaimed any intent to undermine local control over content of the curriculum. The plurality opinion of Justices Brennan, Marshall, and Stevens stated that "local school boards must be permitted to 'establish and apply their curriculum in such a way as to transmit community values' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral or political.'" Id. at 864. Justice Blackman recognized that "[b]ecause of the essential socializing function of schools, local education officials may attempt 'to promote civic virtue.'" Id. at 876. While Justice White did not address the issue, in dissenting opinions, Justices Burger, Powell, Rehnquist and O'Connor determined that "school authorities must have broad discretion" to fulfill the obligation to promote "respect for authority, and traditional values be they social, moral, or political." Id. at 889. Justice Rehnquist, joined by Justice Burger and Powell, opined that "[w]hen it acts as an educator, at least at the elementary and secondary school level, the government is engaged inculcating social values and knowledge in relatively impressionable young people. Obviously, there are numerous decisions to be made as to what courses should be taught, what books should be purchased, or what teachers should be employed. In every one of these areas the members of a local school board will act on the basis of their own personal or moral values, will attempt to mirror those of the community, or will abdicate the making of such decisions to so-called 'experts.' In this connection, I find myself entirely in agreement with the observation of the Court of Appeals for the Seventh Circuit in Zykan v. Warsaw Community Sch. Corp., 631 F.2d 1230, 1305 (1980), that it is 'permissible and appropriate for local boards to make educational decisions based upon their personal, social, political, or moral views. . . . In short, actions by government as educator do not raise the same First Amendment concerns as actions by government as sovereign." Id. at 909-910.

66. The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 65 (1890).
because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of public schools to supply to the children of his neighbors and associates, if he has none himself.\textsuperscript{67}

Court opinions in the post-World War I private education cases, \textit{Meyer v. Nebraska}\textsuperscript{68} (hereinafter "\textit{Meyer}") and \textit{Pierce v. Society of Sisters}\textsuperscript{69} continued to operate on the assumption that government had an interest in seeing that basic morality and civic virtue was promoted in both public and private schools. Even though the law prohibiting instruction in the living European languages before the eighth grade was enacted as an effort "to promote civic development,"\textsuperscript{70} it was declared unconstitutional because it was an infringement on the natural rights of parents to employ tutors and select subject matter of their own choosing. Nonetheless,

[t]hat the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. . . . [Nonetheless,] [t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools . . . is not questioned.\textsuperscript{71}

Indeed,

[n]o question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.\textsuperscript{72}

Recognition of the importance of morality and education is evidenced in more modern opinions as well.

In 1979, the Supreme Court reviewed a challenge to New York's refusal to allow aliens to teach in the public school system:

\begin{itemize}
  \item \textsuperscript{67} Thomas v. Gay, 169 U.S. 264, 279 (1898), \textit{citing} Kelly v. Pittsburgh, 104 U.S. 78, 82 (1881).
  \item \textsuperscript{68} 262 U.S. 390 (1923).
  \item \textsuperscript{69} 268 U.S. 510 (1925).
  \item \textsuperscript{70} 262 U.S., at 401.
  \item \textsuperscript{71} \textit{Id.} at 401-402.
  \item \textsuperscript{72} 268 U.S., at 534.
\end{itemize}
The curricular requirements of New York's public school system reflect some of the ways a public school system promotes the development of the understanding that is prerequisite to intelligent participation in the democratic process. The schools are required to provide instruction "to promote a spirit of patriotic and civic service and 'obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war . . . '. Flag and other patriotic exercises also are prescribed, as loyalty is a characteristic of citizenship essential to the preservation of a country. In addition, required courses include classes in civics, United States and New York history, and principles of American government.

Although private schools are bound by most of these requirements, the State has a stronger interest in ensuring that the schools it most directly controls, and for which it bears the cost, are as effective as possible in teaching these courses."73

The Court followed earlier precedent indicating that "public school teachers may be regarded as performing a task 'that goes to the heart of representative government.'"74 It stated:

[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, [has been] long recognized by our decisions . . .

Within the public school system, teachers play a critical part in developing students' attitudes toward government and understanding of the role of citizens in our society. . . . In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students towards government, the political process,

74. Id. at 75-76.
and a citizen's social responsibilities. This influence is crucial to the continued health of a democracy. . .

More importantly, a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. Certainly a State also may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects.\(^{75}\)

In 1982, in the case of *Plyler v. Doe*,\(^ {76}\) the Court took occasion to comment on the importance of education in American society. This discussion arose while examining the duty Texas had to provide public education for children of illegal aliens. Nine years earlier, Texas persuaded the Court that education was a right which was not guaranteed by the U.S. Constitution.\(^ {77}\) The issue arose as to whether or not the federal government could impose equal protection standards on Texas’ refusal to educate children of illegal aliens. In determining that the state had to accord certain rights to the children of illegal aliens, the Court addressed significant precedent supporting a state’s right to provide a morally based education:

The “American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance, *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923). We have recognized “the public schools as a most vital civic institution for the preservation of a democratic system of government,” *Abington School District v. Schempp*, 374 U.S. 203, 230, 83 S.Ct. 1560, 1575, 10 L.Ed.2d 884 (1963) (Brennan, J., concurring), and as the primary vehicle for transmitting “the values upon which our society rests.” *Ambach v. Norwich*, 441 U.S. 68, 76, 99 S.Ct. 1589, 1594, 60 L.Ed.2d 49 (1979).\(^ {78}\)

More recent opinions have clarified that public education may be constitutionally permitted.

Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the “work of the schools.” . . . The process of educating our youth for citizenship in public schools is not confined to the books, the

\(^{75}\) *Id.* at 76-80.
\(^{76}\) 457 U.S. 202 (1982).
\(^{78}\) 457 U.S., at 221.
curriculum, and the civics class; school must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers -- and indeed the older students -- demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. . . . The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.\footnote{Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683-685 (1986).}

Following similar reasoning, it stated:

[a] school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order". . . or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." . . . \cite{Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-273 (1988).} We hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.\footnote{Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-273 (1988).}

All of the above suggest that the specific legislative directive to teach morally based civic virtue and obedience to law may continue to be directed under state law and identified as an integral part of the mission of public education, without fear of preemption by the EAA or the Supreme Court precedent outlined above.\footnote{If carefully designed, conscientiously administered, and consistently applied, these decisions need not violate the prohibitions of the Establishment Clause. See Matthew Hilton, \textit{supra}, footnote 64 at 9-11.}

\section*{B. Protecting Parental Autonomy and Family Privacy in Public Education}

Utah adopted specific legislative protections regarding parental autonomy (as to matters of conscience) and family privacy in public education.\footnote{By statute, Utah law prohibits funding of instruction or encouragement of the use of contraceptives. Like the analysis which follows regarding state law upholding parental autonomy and family privacy, depending on the judicial authority relied upon, this law may be preempted when applied to a non-curricular student club under} Protecting choices based on conscience (or
adherence to "a superior duty which is more than personal preference"\textsuperscript{83}) or family privacy regarding sexual matters, religious beliefs, and family relationships, allows parents to ensure that those who "work at creating one type of moral environment at home" are not required to have their children participate in school curricula or activities "that teaches a different set of values."\textsuperscript{84} Nonetheless, depending on which EAA lower court precedent one chooses, applying these protections of conscience and family to non-curricular related student clubs may be preempted by the EAA.

1. Nature of Utah Law

In 1993, the Utah State Legislature unanimously passed legislation giving broad freedom of conscience prerogatives to parents and secondary students. The law provides that when a parent or legal guardian "determines that the student's participation in a portion of the curriculum or in an activity would require the student to affirm or deny a religious belief or right of conscience, or engage or refrain from engaging in a practice forbidden or required in the exercise of a religious right or right of conscience," the parent may request a waiver of the requirement to participate or suggest a reasonable alternative.\textsuperscript{85} State law requires the claimed infringement "must rise to a level of belief that the requested conduct violates a superior duty which is more than personal preference."\textsuperscript{86} These rules state that:

\begin{itemize}
\item the EAA. The Attorney General Opinion of Dec. 22, 1995 failed to address the specific request of State Superintendent Bean as to whether or not recognition of the Alliance under the EAA was forbidden by the statutory prohibitions regarding provision or encouragement of contraceptive services. "Contraceptive services" means "any material, program, plan, or undertaking that is used for instruction on the use of birth control devices and substances, encourages individuals to use birth control methods, or provides birth control devices." \textsc{Utah Code Ann.} § 76-7-321(2) (1953 as amended). The definition of "funds" that are prohibited include "money, supply, material, building, or project provided by this state or its political subdivision." \textsc{Utah Code Ann.} §§ 76-7-322 and 323 (1953 as amended). To the degree that the Alliance activities were to offer instruction regarding, or encouraging the use of birth control devices, such as condoms, it could be argued that such speech was contrary to state law prohibiting access to a "building" for such purposes. It is assumed that in general such provisions would survive a facial challenge under the latitude afforded state and local governments under Supreme Court opinions in Fraser, \textit{supra}, and Hazelwood, \textit{supra}.

\item \textsc{Utah Admin. R.} 277-105-5B (1995).

\item William Kirkpatrick, \textit{Why Johnny Can't Tell Right From Wrong} 252 (Touchstone ed. 1993).

\item \textsc{Utah Code Ann.} § 53A-13-101.2(1) (1953 as amended). The law was written so that either a parent's or student's request would trigger the ability to remove a student on grounds on conscience.

\item \textsc{Utah Admin. R.} 277-105-5 B (1995).
\end{itemize}
permitting the submission of requests for participation waivers, and the provision of reasonable alternatives, is intended to facilitate appropriate protection and accommodation of a requesting party's asserted right of conscience or exercise of religious freedom, and shall not be considered an attempt by a school official to endorse, promote, or disparage a particular religious or non-religious viewpoint. 87

To the degree that "an activity" includes student participation in a curricular or non-curricular club, or the "counseling" that takes place in such a location, 88 under existing state law, parents can request that their child not participate in the club's activities.

In 1994, the Utah State Legislature adopted the Utah Family Educational Rights and Privacy Act. 89 Under this law, unanimously reaffirmed as amended in 1995, districts must have "policies governing the protection of family and student privacy" to "protect the privacy of students, their parents, and their families, and support parental involvement in the education of their children." 90 A two-week, advance written notification is required, (waiveable by the parent) 91 before a student may be involved in any part of the "curriculum" or "other school activities" whose:

- purpose or evident intended effect is to cause the student to reveal information, whether the information is personally identifiable or not, concerning the student's or any family member's . . . sexual behavior, orientation or attitudes; illegal, anti-social, self-incriminating, or demeaning behavior; critical appraisals of individual with whom the student or family member has close family relationships; religious affiliations or beliefs 92

without having written permission from the parent. 93 Assuming that an officially recognized student club (curricular or non-curricular) would be considered "other school activities," it appears from the statute that students need written parental permission, after disclosure, to be involved in school clubs.

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88. Counseling of students is defined by administrative rule as constituting "instructional time." UTAH ADMIN. R. 277-105 G (1995).
89. UTAH CODE ANN. §§ 53A-13-301, 302 (1953 as amended).
90. UTAH CODE ANN. § 53A-13-301 (1953 as amended).
2. Possible Preemption Under EAA

The EAA text and interpretive judicial precedent allow at least two different ways of analyzing a preemption claim involving the application of state laws pertaining to parental autonomy and family privacy to student speech and involvement in non-curricular clubs under the EAA. Possible conflicts could arise under both laws that protect parental autonomy in matters of conscience and those involving family privacy. While some could argue that student speech is protected under the state's creation of a limited public forum regarding student belief,\(^{94}\) protection against inappropriate disclosure of beliefs, attitudes and actions of parents who are either unaware or unable to respond are the very prerogatives of local school districts which were recognized in *Hazelwood*.\(^ {95}\) Nonetheless, such law specifically regulates student speech in non-curricular clubs that parts of the EAA seemed to protect. Under state law allowing parents to remove their children from a school "activity" that is offensive to the conscience of the parent, an argument can be made that were this parental prerogative\(^ {96}\) to be exercised, it could, in fact, restrict the ability of "any student" to create his own non-curriculum club within the limited student forum available to them.

The EAA interprets "fair opportunity criteria" to require that "the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school."\(^ {97}\) Furthermore, nothing in the EAA was intended to "limit the authority of the school . . . to protect the well-being of students and faculty."\(^ {98}\) State laws that seek to comprehensively define public education as a public entity seeking to improve the well being of students within a context of moral standards and parental involvement,\(^ {99}\) could be significantly and materially undermined if

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94. *Utah Code Ann.* § 53A-13-101.3 (1953 as amended). This supposition, however, is undermined by the legislative history of the Act which specifically incorporated reference to the Fraser opinion when defining the nature of "civility and decorum" that should exist in student speech.
95. 484 U.S. 260 (1988). The application of Hazelwood to the EAA is problematic because the facts of Hazelwood dealt with classroom-related activities associated with the school while the EAA presumed that the student-initiated clubs and organizations could be disassociated from the school.
96. Without the exercise of parental prerogative, the school would not be involved; it is presumed that the "voluntary" meeting would ensure no student would attend who would have wanted to assert his or her own, independent right of conscience against participating under the EAA.
99. While not the subject of review here, academic literature has documented how
required to give way on fundamental issues of parental exercise of conscience, privacy and autonomy because a non-curricular student group was allowed on campus.

Equality in application of preexisting laws was determined to be sufficient to justify what, in practice, could result from an intrusion of student governance of a student non-curricular club. In *Hsu v. Roslyn Union Free School District No. 3*, a religious club objected to standardized rules applied to non-student club officer elections because a non-Christian student could seek to become an officer of its Bible club. A federal district court upheld the requirement, stating,

> [a]s there is no basis in the record for plaintiffs' suggestion that the School District will not afford the [B]ible club the same privileges afforded other noncurriculum-related clubs and allow it to meet on the same terms and conditions as those other clubs, the School District appears to have satisfied its obligation under the Act of permitting religious speech and religious activities on a nondiscriminatory basis.

To the degree the one-sentence legal opinion from the Utah Attorney General was seeking to follow this line of reasoning, state laws involving parental autonomy and family privacy that are equally applied to student involvement in all clubs, regardless of the content of the student speech, are valid, and are binding on Utah schools and could, under the theory of the *Hsu* case, be upheld as being in conformance with the statutory requirements of EAA. If so, there would be no preemption concern.

Nevertheless, a contrary result regarding the role of the EAA and preemption of fundamental state law addressing public education could be reached if the thinking of the Ninth Circuit Court of Appeals in *Garnett v. Renton School District No. 403*

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parental involvement in their children’s education is a (if not “the”) dominant factor in the child’s educational achievement. Thus, whether acting on grounds respecting parental authority for moral or political reasons, a school could well conclude that a students’ academic “well being” would be well served by allowing or encouraging such parental involvement.

101. Id. at 456.
102. This is true for two reasons. First, the opinion of the Attorney General is binding on all Utah schools regarding interpretation of law. See Utah Code Ann. §§ 53A-1-303(3) and (4) (1953 as amended). Second, local districts are mandated and empowered to implement the same by local policy. See Utah Code Ann. § 53A-13-101.3 (1953 as amended) and Utah Admin. R. 277-105-9A(1) (1995) for law regarding parental autonomy and conscience; See Utah Code Ann. §§ 53A-13-301, 302 (1953 as amended) regarding privacy laws which are to be implemented on a district level.
103. 987 F.2d 641 (9th Cir. 1993), cert. denied 114 S.Ct. 72-73 (1993).
were applied in Utah. On remand, a lower district court ruled that the EAA need not be applied because allowing student religious meetings violated the Washington State Constitution and the EAA did not force the local district to "sanction meetings that are otherwise unlawful; . . . or to abridge the constitutional rights of any person." The Ninth Circuit reversed, finding that Congress had provided "religious student groups" a federal right and, following the lead in Mergens, "the entire Act must be read to effectuate a broad Congressional purpose." Indeed, the Ninth Circuit found that Congress intended to preempt all state laws which discriminated against clubs authorized by the EAA due to the student groups' speech content:

The Court's finding of a broad legislative purpose suggests that Congress intended to preempt state law: "Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it opens its facilities to noncurriculum related student groups." Mergens, 496 U.S. at 241, 110 S.Ct. at 2367. The Act permits schools to avoid its obligations, but only at a price. They must either reject federal funding or close the school's limited open forum. See id. If the EAA did not preempt state law, then states could freely opt out of its requirements. Congress did not intend to permit the states to thwart its objectives by outlawing speech based on its religious content, and thereby discriminate on that basis.

Protection of the content of student "religious speech" could logically be construed to include all speech because the act protected not only religious speech but also speech of a "political, philosophical, or other content." All "other content" could be understood to include speech that violated a parent's conscience or invaded family privacy. Thus, if the EAA provisions protecting student speech in non-curricular clubs were read broadly, state laws which provide protection for parental autonomy in matters of conscience and family privacy could be preempted by the EAA. This result, however, would depend on which legal doctrines were used to analyze the text and application of the EAA.

104. A previous round of litigation, which was eventually vacated by the U.S. Supreme Court is reported in Garnett v. Renton Sch. Dist., 675 F. Supp. 1268 (W.D. Wash. 1987), aff'd, 865 F.2d 1121, modified, 874 F.2d 608 (9th Cir. 1989), vacated and remanded in light of Mergens, 496 U.S. 914 (1990).
107. Id. at 646.
109. Other federal laws could also be brought into the equation in an effort to
Thus, while it is clear that Utah's legislative mandate to teach morally based civic virtue in the public schools would remain intact under the EAA, other applicable laws dealing with parental autonomy regarding matters of conscience and family privacy may or may not be preempted by the EAA.\footnote{110}

III. CONTINUING TO PROTECT THE WELL-BEING OF STUDENTS UNDER THE EAA

Based on the foregoing legal analysis, it could be presumed that laws governing Utah's public schools presuppose that the teaching of morally based civic virtue and encouraging parental involvement in their children's education will in the short and long-run promote and protect the well-being of students. In Mergens, the Court specifically recognized that the text of the EAA and earlier precedent specifically protects efforts of school districts to protect the well-being of their students.

Nothing in this subchapter shall be construed to limit the authority of the school, its agents, or its employees, to maintain order and discipline on the school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.\footnote{111}

Precedent interpreting Tinker has allowed local school districts to protect high school students from student-to-student emotional and psychological harm that can result from exposure to detailed matters of sexuality.\footnote{112} (If such a prohibition is allowed for high

harmonize federal intent regarding parental participation in their children's education. An example of a federal law adopted after the EAA and Mergens decision that could have a direct impact on a pre-emption analysis would be the Restoration of Religious Freedom Act, 42 U.S.C. § 2000bb (1995), known as "RRFA". Another issue that could be raised and is not addressed in this article is if extracurricular school activities are considered to be "educational activities" under the EAA, would an attempt to have the EAA pre-empt state laws protecting parental conscience, autonomy and family privacy as far as it related to student clubs "materially and substantially interfere with the orderly conduct of educational activities within the school"? See 20 U.S.C. § 4071(c)(4) (1995).

110. It is interesting to note that like the EAA, the Utah law regarding freedom of conscience affords students protection in their own right. Public schools also allow secondary students a right to seek waiver of participation based on grounds of conscience independent of their parents. Utah Code Ann. § 53A-13-101.2(1) (1953 as amended). However, in the event of a conflict between an assertion of conscience by a parent and a minor secondary student who wanted to participate in an activity or part of the curriculum, the parent's assertion and request for waiver (over student desire to participate) would prevail. Utah Admin. R. 277-105-5C (1995).


112. This precedent remains relevant in interpreting Supreme Court analysis for at least three reasons. First, the contemporaneous Supreme Court denied the writ of
school students, *a fortiori*, it should be allowed for seventh and eighth graders, all considered secondary students under Utah law and the EAA.)

In 1977, a federal appellate court was confronted with a challenge to a school district's prohibition on student distribution of an explicit, detailed survey regarding both homosexual and heterosexual matters. 113 The trial judge had approved the district's ban on distribution to ninth and tenth grade students, but had ordered the district to allow it to be distributed to eleventh and twelfth grade students. Overruling the district court's decision the federal appellate court upheld the right of the school district to prohibit distribution of the survey to all students because of the probability that it would result in psychological harm to some students. . . . Although psychological diagnoses of the type involved here are by their nature difficult of precision, . . . we do not think defendants' inability to predict with certainty that a certain number of students in all grades would be harmed should mean that defendants are without power to protect students against a foreseen harm. We believe that the school authorities are sufficiently experienced in these matters, which have been entrusted to them by the community; a federal court ought not impose its own views in such matters where there is a rational basis for the decisions and actions of school authorities. 114

The rationale supporting the prohibition allowed the local school district to determine which testimony among many conflicting "experts" was most applicable for their district and that the anticipated harm need not impact all students or even an "average" student.

While lawyers are generally not well versed in social science literature, 115 even a brief review shows that those who are studying

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113. A copy of the survey is included with the district court opinion reported in Trachtman v. Anker, 426 F. Supp. 198, 205-207 (S.D.N.Y. 1976). Not only was the school district required to allow distribution of the survey, but in the words of the appellate court reviewing the decision, the lower court "ordered [the district] to take steps to oversee the distribution of the questionnaire and provide counseling for those students who were disturbed by it; in effect, defendants were told to expend time and money to provide 'safeguards' for a survey they insisted could not be made safe." Trachtman v. Anker, 563 F.2d 512, 520 n.9 (2nd Cir. 1977).

114. Trachtman v. Anker, 563 F.3d at 519.

115. I am indebted to Dr. A. Dean Byrd and David Robertson for their significant
the nature and origins of homosexuality have not definitively determined whether homosexuality is a natural variation in human behavior or a dysfunction or a combination of both.116 Notwithstanding this lack of consensus (other than apparent agreement that the issue is very complex) other academic studies begin by assuming that homosexuality is either a normal variation or a dysfunction.117

Despite this fundamental difference in foundational assumptions, there is some agreement regarding youth who experience gender confusion. Compared to teenagers with an unquestioned heterosexual orientation, those teenagers who are confronted with challenges feel a greater isolation from peers, parents, and community, and exhibit a much higher incidence of self-defeating behaviors, such as psychological dysfunction, substance abuse, suicide, sexually transmitted diseases and HIV.118 Others have indicated that most school teachers and

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117. For studies assuming homosexuality is a natural variation, see, for example, Virginia Uribe and Karen M. Harbeck, Addressing the Needs of Lesbian, Gay, and Bisexual Youth: The Origins of Project 10 and School-based Intervention, 1991 JOURNAL OF HOMOSEXUALITY 9, 13 (1992); Laura Reiter, Sexual Orientation, Sexual Identity and the Question of Choice, 17 CLINICAL SOCIAL WORK JOURNAL 138 (1989).

118. See, for example, Cleta L. Dempsey, Health and Social Issues of Gay, Lesbian, and Bisexual Adolescents, 75 JOURNAL OF CONTEMPORARY HUMAN SERVICES 160 (1994); Charles R. Pikar, Letter to the Editor, 89 PEDIATRICS 519 (1992); Gary Remafedi, Fundamental Issues in the Care of Homosexual Youth, 74 MEDICAL CLINICS OF NORTH AMERICA 1169 (1990); Report of the Secretary's Task Force on Youth Suicide. Volume 3: Prevention and Interventions in Youth Suicide (Alcohol, Drug Abuse and
counselors are unprepared to deal with these exacerbated needs of such students, that counseling and assistance can only appropriately be done under the direction or control of a licensed psychologist to ensure that the experience will not lead to more conflict, challenge and confusion.119 Furthermore, encouraging premature resolution120 of confused adolescent gender orientation121 toward a self-labeling homosexual status may lead to a greater likelihood of attempted suicide122 and could hinder any later adult effort to return to or develop heterosexuality.123

How a local school board applies this information when confronted with a student application for an extracurricular club like the Alliance will to a large degree turn on whether members view homosexual conduct as a normal variance in human behavior or a dysfunction of biology and socialization. If homosexuality is assumed to be an alternate lifestyle, then contributing to the “well-being” of those students faced with such challenges could include support and assistance in making that transition to such a lifestyle without regard for state laws or parents prohibiting such conduct or the effect a premature decision may have on the adolescent’s short and long-term physical, emotional and psychological health. If homosexuality is assumed to be a dysfunction, then for the sake of the student’s “well-being” it should not be encouraged by allowing open access to unsupervised student promotion of the


same; rather, such promotion should be prohibited. Like the Lincoln-Douglas debates which illustrated how one’s constitutional and public policy positions on the expansion of slavery were driven by underlying assumptions regarding the nature of man and morality, similarly mutually exclusive assumptions regarding the nature of man and morality will likewise direct one’s conclusion on this issue.

Yet, whether Utah’s criminal law is based on the perspective of “millennia of moral teaching,” or simply on the reality that “[f]rom the beginning of civilized societies, legislators and judges have acted on unprovable assumptions,” local school boards are charged with the duty of implementing law that promotes “morality . . . and obedience to law” in all of their school matters. Being charged with this duty, it surely is not unreasonable to follow an alternate view in professional literature explaining homosexuality as the result of biological and/or social dysfunction, whose physical expression and premature labeling should not be encouraged. Assuming this to be so, one cannot logically conclude that allowing student-initiated clubs to promote homosexuality as an alternate lifestyle will contribute to the “well-being” of students. When such a conclusion is based on careful and considerate analysis, the decision to reject an application from a student club like the Alliance is an option under both state law and the EAA regardless of the status of other non-curricular student clubs.

IV. CONCLUSION

Neither the EAA nor the Supreme Court interpretation of the U.S. Constitution undermines the ability or state-mandated duty of local school boards to encourage the teaching by example and precept of a morally based, civic virtue in the public schools.

124. To the degree that other academic literature is correct in identifying peer groups as requiring adherence to a fixed perspective on basic issues, if student clubs such as the Alliance only intended to include heterosexual friends who supported the acceptability of homosexuality as an alternate lifestyle, it is doubtful that a student who was confused regarding his or her own sexual identity would receive anything but the message of the acceptance of an alternate lifestyle in the Gay-Straight Student Alliance. See, for example, W.M. Hall and R.B. Cairns, Aggressive Behavior in Children: An Outcome of Modeling or Reciprocity?, 20 DEVELOPMENTAL PSYCHOLOGY 739-745 (1984); Robert B. Cairns, Holly J. Neckerman, Beverly D. Cairns, Social Networks and the Shadows of Synchrony, eds. Gerald R. Adams, Raymond Montemayor, Thomas P. Gullota, Biology of Adolescent Behavior and Development (1989) at 275.


Neither student speech, academic freedom, nor private conduct of teachers that has a nexus on their ability to teach and role model identified virtues to their students limit a school board's ability to fulfill its legislative mandate to do so. There are different legal perspectives regarding whether or not the effect of the EAA is to prohibit full enforcement of Utah laws protecting freedom of conscience, parental autonomy and family privacy when applied to extra-curricular student clubs.

Nonetheless, a local school board could adopt the position supported by academic literature and long standing experience, that short and long-term adherence to the criminal code of the state will promote the well-being of its students, and that individual students experiencing extraordinary challenges with gender identity should work with qualified professionals (that are generally not within the school system). Then it would be possible to deny recognition under the EAA to a proposed student club that focuses on homosexuality, without having to ban all other non-curricular student clubs presently allowed.