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Beyond Neutrality: Equal Access and the Meaning of Religious Freedom

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BEYOND NEUTRALITY: EQUAL ACCESS AND
THE MEANING OF RELIGIOUS FREEDOM

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I. INTRODUCTION

The controversy at Westside High School began when Bridget Mergens asked her principal for permission to form a student club that would meet after school to discuss religious and moral issues, study the Bible, and pray.¹ Since Westside allowed approximately thirty student groups² to hold meetings after school on school grounds, Bridget and several other interested students wanted the same privilege to organize and meet. They did not ask for money, support, or sponsorship from anyone at the school.³ At that time, no club had ever been refused access to school premises.⁴

School officials denied Bridget's request. They explained that permitting such a club at the high school would violate the establishment clause of the first amendment.⁵ The School Board agreed, claiming that the proposed group would be inconsistent with Board policy which permitted only school-sponsored, curriculum-related activities on school premises.⁶

The students sued the Board and other school officials in United States district court in April 1985. They alleged that the actions of the School Board and its employees violated the Equal Access Act⁷ as

1. Bridget sought permission to form a "Christian Bible Study Club." *Mergens v. Board of Educ. of Westside Community Schools*, 867 F.2d 1076, 1077 (8th Cir.), *cert. granted*, 109 S. Ct. 3420 (1989). Westside High School is located in Omaha, Nebraska.

2. *Id.* at 1077. All of the groups were strictly voluntary and all had faculty sponsors. *Id.* The clubs included the Chess Club, Interact, and Subsurfers. *Id.* at 1078. Interact is a service club related to Rotary International. Subsurfers is a club open to students or members of the community interested in scuba diving. *Id.*

3. The students did not request a faculty sponsor unless one was required by school policy. If so, the students stressed that the faculty sponsor would function only in a custodial role. *Id.* at 1077.

4. *Id.*

5. *Id.* The establishment clause provides that "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I. The establishment clause was extended to the states through the due process clause of the fourteenth amendment in *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

6. 867 F.2d at 1077. School policy recognized student clubs as a "'vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.'" *Id.* (quoting Board Policy 5610). The School Board had no written policy concerning the formation of such clubs. If students wanted to organize a club, they had to present their goals and objectives to school officials who would then evaluate the stated goals and objectives in light of Board Policy 5610. *Id.*

7. *Id.* The Equal Access Act provides in part:

(a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a) (Supp. 1989).

well as the students' constitutional rights to free speech, association, and free exercise of religion.

In February 1988 the district court ruled in favor of the School Board. The court found that all student clubs at Westside High School were curriculum related and therefore the Equal Access Act did not apply.⁸ The court further held that permitting the students to form the religious club would violate the establishment clause.⁹ After the decision, the students issued this statement:

We are deeply disappointed by Judge Beam's decision, but we have learned many difficult and valuable lessons through this experience. We have learned what it means to feel the pain and discouragement of discrimination. We have learned that sometimes the very people who teach us about freedom are guilty themselves of taking it away. We have learned that you must stand up and fight for what you know is right, and we have learned never to take our religious and civil liberties for granted, even in America.¹⁰

These students were perplexed by the refusal of a government supposedly neutral toward religion to treat student religious groups the same as other student groups. At that time, however, three federal courts of appeals had ruled that the establishment clause prevents public high schools from granting student religious groups access to school premises, even when other student groups are allowed to meet.¹¹ One court went so far as to suggest that the mere appearance

8. 867 F.2d at 1078. The Act applies if the school has created a *limited open forum* which occurs "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional law." 20 U.S.C. § 4071(b).

At trial, school officials attempted to show that all student clubs were curriculum-related and thus did not constitute a limited open forum under the Equal Access Act:

Dr. Findley testified that the Chess Club related to the curriculum because it fosters critical thinking and logic. Dr. Findley explained that such skills are extensions of the goals for several different courses even though WHS [Westside High School] does not offer a logic class. Dr. Findley explained that Zonta [the female counterpart to Interact] and Interact are related to the goals of sociology and psychology and that Subsurfers relates to the goals of physical education.

867 F.2d at 1078.

9. *Id.* at 1077.

10. Mawyer, *Court Rules Against Bible Club*, FUND. J., May 1988, at 59, 60 (quoting the students' statement).

11. *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986); *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *see Bell v. Little Axe Indep. School Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985) (equal access policy invalidated in school with grades one through nine); *Nartowicz v. Clayton County School Dist.*, 736 F.2d 646 (11th Cir. 1984) (*per curiam*) (affirming preliminary injunction against student religious

of government involvement with such groups is "too dangerous to permit."¹²

Undaunted by these decisions, Bridget and her friends decided to appeal. In *Mergens v. Board of Education of Westside Community Schools*¹³ the Court of Appeals for the Eighth Circuit reversed the district court's decision. Rejecting the school's attempt to characterize all its student clubs as curriculum related, the court concluded that Westside High School had created a limited open forum for purposes of the Equal Access Act. The court held that neither the Equal Access Act nor a school policy permitting equal access for student religious groups violates the establishment clause.¹⁴ The United States Supreme Court will review the *Mergens* case this Term.¹⁵

Equal access presents the question whether a public high school can permit a student-initiated, student-led religious group to meet during an extracurricular activity period.¹⁶ The Supreme Court has recognized the need for government accommodation of religious interests and expression in the context of public secondary education:

We are a religious people whose institutions presuppose a Supreme

group meeting on junior high school premises, however limited record did not reveal whether school accommodated group as part of equal access policy).

12. *Brandon*, 635 F.2d at 978.

13. 867 F.2d 1076 (8th Cir. 1989). The Eighth Circuit had previously held that the establishment clause does not bar a policy of equal access for student religious groups at a state university where facilities were open to groups and speakers of all kinds. *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom.*, *Widmar v. Vincent*, 454 U.S. 263 (1981). Such a prohibition was a content-based discrimination against religious speech for which the court could find no overriding interest. *Chess*, 635 F.2d at 1315-20.

14. The court construed the Equal Access Act to extend the Supreme Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), to public secondary schools. The court found no justification for distinguishing between *Widmar* and the present case, and stated that "even if Congress had never passed the EAA [Equal Access Act], our decision would be the same under *Widmar* alone." 867 F.2d at 1080.

15. The Court heard oral arguments on January 9, 1990. See *Board of Educ. of Westside Community Schools (Dist. 66) v. Mergens*, 58 U.S.L.W. 3441 (U.S. Jan. 16, 1990) (No. 88-1597).

16. This Comment will focus on the question of "equal access" for student religious groups to public school campuses. However, the equal access issue has arisen in other contexts. See, e.g., *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105 (7th Cir. 1986) (teachers meeting on school premises for prayer); *Thompson v. Waynesboro Area School Dist.*, 673 F. Supp. 1379 (M.D. Pa. 1987) (student distribution of religious newspaper); *Country Hills Christian Church v. Unified School Dist.*, 560 F. Supp. 1207 (D. Kan. 1983) (use of school facilities during nonschool hours by both religious and nonreligious community groups).

Moreover, while this Comment addresses the controversy surrounding student religious clubs, it is important to note that the Equal Access Act does not just protect religious speech. The Act also makes it unlawful to deny students an opportunity to meet on the basis of the political, philosophical, or other content of their speech at such meetings. 20 U.S.C. § 4071(a).

Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.¹⁷

However, school administrators and federal courts have repeatedly denied student religious groups access to school premises. Some fear that this has resulted in "a form of religious apartheid which threatens the rights of an entire class of citizens."¹⁸

The equal access question puts competing first amendment interests on a collision course with one another. In recent years, courts have vigilantly protected the public school setting from any appearance of government support for religion.¹⁹ Courts fear that students

17. *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

18. Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools*, 16 PEPPERDINE L. REV. 229, 230 (1989).

19. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down law requiring teaching of scientific creationism); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (invalidating law authorizing moment of silent for meditation or prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (striking down required posting of the Ten Commandments); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating statute prohibiting teaching of evolution); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (prohibiting state-initiated, state-led classroom Bible readings); *Engel v. Vitale*, 370 U.S. 421 (1962) (prohibiting state-initiated, state-led classroom prayer); *McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (invalidating on-premises program of religious instruction by religious teachers during the school day to students choosing to attend). See also *Jager v. Douglas County School Dist.*, 862 F.2d 824 (11th Cir.), cert. denied, 109 S. Ct. 2431 (1989) (invocations prior to public high school football games unconstitutional); *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987) (Christian benediction at high school graduation unconstitutional); *Parents' Ass'n v. Quinones*, 803 F.2d 1235 (2d Cir. 1986) (city plan to provide separate classrooms for female Hasidic children unconstitutional); *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105 (7th Cir. 1986) (teachers' prayer meetings before school on school premises unconstitutional); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982) (statute authorizing volunteer students or teachers to initiate prayer at beginning of school day unconstitutional); *Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir.), cert. denied, 454 U.S. 863 (1981) (students reciting prayers and Bible verses at school assemblies unconstitutional); *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979) (transcendental meditation course unconstitutional); *Meltzer v. Board of Pub. Instruction*, 548 F.2d 559 (5th Cir. 1977) (distribution of

will infer state endorsement of religion from the mere presence of student religious groups on school campuses. Yet the denial of equal access raises the troubling prospect of both a content-based prior-restraint on religious speech²⁰ and a burden on the free exercise of religion.²¹ In view of these concerns, one court suggested that equal access presents "a constitutional conflict of the highest order."²²

Some commentators argue for equal access in public high schools by appealing to the concept of neutrality and its concomitants—equality and fairness.²³ Neutrality requires that the primary effect of state action neither advance nor inhibit religion.²⁴ Thus, with regard

Gideon Bibles and Bible readings on school premises unconstitutional); *DeSpain v. DeKalb County Community School Dist.*, 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968) (class prayer recited over morning snack unconstitutional); *Roberts v. Madigan*, 702 F. Supp. 1505 (D. Colo. 1989) (upholding both removal of religious books from elementary classroom library and requirement that teacher keep Bible out of sight and refrain from silently reading it during class hours). Professor Tribe observes that

because of their central and delicate role in American life, public schools must be insulated from religious ceremony under the aegis of the establishment clause even where no coercion can be shown, whereas in other public forums, free exercise values permit some accommodation of [religion]

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 14-9, at 841 n.9 (1978).

20. Professor Strossen argues that this results in "a double presumption of unconstitutionality" since

[u]nder the First Amendment, a presumption of unconstitutionality attaches both to prior restraints, *see, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*), and to content-based regulations on speech, *see, e.g.*, *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

Strossen, *A Constitutional Analysis of the Equal Access Act's Standards Governing Public School Student Religious Meetings*, 24 HARV. J. ON LEGIS. 117, 123, 123 n.27 (1987).

21. The free exercise clause of the first amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]" U.S. CONST. amend. I. The free exercise clause was extended to the states through the due process clause of the fourteenth amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

22. *Bender*, 741 F.2d at 557.

23. *See, e.g.*, Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1 (1986) (advocating equal access from a strict neutrality viewpoint); Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986) (proposing an equal protection analysis of equal access cases, while recognizing that both religion clauses ultimately protect religious liberty).

24. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The concept of neutrality is embodied in both the establishment and free exercise clauses.

The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own

to equal access, Professor Laycock asserts that government "may not take a position on questions of religion in its own speech, and it must treat religious speech by private speakers exactly like secular speech by private speakers."²⁵ The neutrality doctrine therefore requires schools to treat student religious groups in essentially the same fashion as other student groups.

I find these arguments on the whole both sensible and persuasive. To the extent that neutrality is understood to require nondiscriminatory treatment of religion, it is pertinent to the equal access question. However, some understand neutrality to mean that the government must remain aloof from religion. This assumes that both religion and government are free to operate within their respective spheres of authority and influence. Yet in the public school setting, the government's presence is pervasive.²⁶ Strict separation between government and religion in this context is tantamount to a complete exclusion of religion.²⁷ While some think this desirable,²⁸ it results in an artificial secularization of public education and distorts the proper role of religion in public life.

For this reason, we must go beyond neutrality²⁹ and consider a

course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap.

Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

25. Laycock, *supra* note 23, at 3.

26. See McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U.L. REV. 146, 161 (1986). See also *infra* notes 255-58 and accompanying text.

27. See *infra* notes 59-74 and accompanying text.

28. For example, Ruti Teitel argues that the state must treat student religious speech and secular speech dissimilarly in public schools "to avoid confusion between religious speech by students and government." Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U.L. REV. 174, 184 (1986). She further explains:

A prophylactic distance inheres in the distinction between government religious and secular speech. A special judicial presumption against government support of private religious speech minimizes confusion between religious speech by government, which is barred, and such speech by a private party, which is permitted. A smaller margin of error will be allowed for government support of private religious views than for similar government support of private political or other secular views.

Id. (footnotes omitted). She concludes that "[r]eligious equality . . . is best preserved not by uniformity in government assistance to private religious speech, but rather by *nonintervention*." *Id.* at 185 (emphasis added). This begs the question because the government's presence in the public school setting is much more pervasive than in society at large. True "nonintervention" is impossible: the state *acts* whether it permits or denies equal access.

29. Professor McConnell argues that while neutrality is a proper starting point for analyzing most cases arising under the religion clauses, it does not exhaust the protections for religious expression provided by the first amendment. McConnell, *supra* note 26, at 147, 149. He succinctly observes: "Protections for religious liberty are no more 'neutral' toward religion than freedom of the press is 'neutral' toward the press." *Id.* at 148.

deeper question: What will best promote *religious freedom*?³⁰ This is the great object of the religion clauses.³¹ To this end, I am convinced that considerations of religious liberty and toleration—rooted in both the free speech and free exercise clauses—call for the government to affirmatively accommodate student religious expression by permitting equal access in the high school setting. Such a policy promotes the highest democratic ideals, is consistent with the purposes of public education, and vigorously preserves our constitutional commitment to religious liberty.

This Comment argues that equal access policies promote religious freedom while at the same time remaining essentially neutral in both purpose and effect. Part II presents an overview of the various constitutional perspectives and statutory provisions regarding equal access. Part III discusses the question of what constitutes an “open forum” for purposes of equal access. Part IV explains how a properly implemented equal access policy is permissible under the establishment clause. Part V demonstrates how equal access advances the values of religious freedom and toleration while avoiding governmental hostility toward religion. Finally, Part VI discusses possible solutions to the equal access dilemma and outlines several options available to the Supreme Court for deciding *Mergens*.

II. THE EQUAL ACCESS CONTROVERSY: AN OVERVIEW

There are four basic positions on the question whether student religious groups should have access to public school facilities. Both courts and commentators are divided over which of these views should prevail:

(1) The free speech or free exercise clauses require schools to treat student religious groups in the same way they treat other student groups. Permitting equal access does not violate the establishment clause.³²

(2) The establishment clause prohibits schools from allowing student religious groups to meet on campus. Denying equal access does not violate the free speech or free exercise clauses.³³

30. Religious freedom includes “the freedom to choose and practice one’s own religion, or none at all.” *Id.* at 147.

31. See *infra* notes 150-56 and accompanying text.

32. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981) (public university); *Mergens v. Board of Educ. of Westside Community Schools*, 867 F.2d 1076 (8th Cir. 1989) (public high school); *Amidei v. Spring Branch Indep. School Dist.*, No. H-84-4673 (S.D. Tex. July 1, 1985) (public high school).

33. See, e.g., *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d

(3) Equal access is protected by the free speech and free exercise clauses, but prohibited by the establishment clause. These conflicting interests must be carefully balanced according to the facts and circumstances of each case.³⁴

(4) None of these clauses controls. The decision whether to allow student religious groups to meet on campus is left to the appropriate legislative or administrative body.³⁵

In 1984 Congress passed the Equal Access Act,³⁶ largely in re-

1038 (5th Cir. 1982) (public high school); *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980) (public high school); see also *Bell v. Little Axe Indep. School Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985) (public school with grades one through nine); *Nartowicz v. Clayton County School Dist.*, 736 F.2d 646 (11th Cir. 1984) (per curiam) (preliminary injunction issued against student religious group meeting on public junior high school premises but unclear whether school had equal access policy).

34. *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984) (establishment clause concerns override free speech and free exercise rights); *Clarke v. Dallas Indep. School Dist.*, 671 F. Supp. 1119 (N.D. Tex. 1987), *modified*, 701 F. Supp. 594, *appeal dismissed*, 880 F.2d 411 (5th Cir. 1989) (establishment clause prevails over free exercise clause). Professor Strossen proposes a framework for a case-by-case resolution of equal access policies that attempts to balance both nonestablishment and free speech concerns. See Strossen, *supra* note 20, at 149-57. Drakeman and Seawright suggest that when the establishment and free exercise clauses are balanced against each other, the scale should tip toward free exercise rights in close cases. Drakeman and Seawright, *God and Kids at School: Voluntary Religious Activities in the Public Schools*, 14 SETON HALL L. REV. 252 (1984).

35. See Stone, *The Equal Access Controversy: The Religion Clauses and the Meaning of "Neutrality,"* 81 NW. U.L. REV. 168 (1986).

36. 20 U.S.C. § 4071-74 (Supp. 1989). The Act provides in part:

Sec. 4071. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

- (1) the meeting is voluntary and student-initiated;
- (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
- (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
- (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
- (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this [subchapter] shall be construed to authorize the United States or any State or political subdivision thereof—

sponse to decisions by both courts and school administrators refusing to allow student religious groups to meet on school property.³⁷ Supporters of the legislation saw these decisions as wrongfully discriminating against religious groups by denying them the same opportunities to organize and meet afforded nonreligious student groups.³⁸ The Act essentially requires public high schools to treat

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- (1) to influence the form or content of any prayer or other religious activity;
 - (2) to require any person to participate in prayer or other religious activity;
 - (3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
 - (4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
 - (5) to sanction meetings that are otherwise unlawful;
 - (6) to limit the rights of groups of students which are not of a specified numerical size; or
 - (7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the 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.

(f) Nothing in this [subchapter] shall be construed to limit 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.

Sec. 4072. As used in this [subchapter]—

- (1) The term "secondary school" means a public school which provides secondary education as determined by State law.
- (2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.
- (3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.
- (4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

For an excellent summary of the procedural history of the Act, see Crewdson, *The Equal Access Act of 1984: Congressional and the Free Speech Limits of the Establishment Clause in Public High Schools*, 16 J. LAW & EDUC. 167, 170-76 (1987).

37. While considering equal access legislation, the Senate Committee on the Judiciary heard testimony that many school administrators were banning extracurricular religious clubs based on the *Brandon* and *Lubbock* decisions. S. REP. NO. 357, 98th Cong., 2d Sess. 11-21, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2348, 2357-67. In recognizing the need for national legislation, the Committee was motivated by the fear that "if schools continue to teach students that religious speech is taboo, our country will reap a harvest of religious intolerance." *Id.* at 12, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 2358.

38. "We cannot," declared Senator Jeremiah Denton of Alabama, "permit the existence of policies or practices which single out religious students for invidious discrimination which makes them second-class citizens." *Equal Access: A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 2 (1983)

student religious groups just like other extracurricular student groups.³⁹ The Eighth Circuit is the only court of appeals to rule on the constitutionality of the Act, upholding it against an establishment clause challenge.⁴⁰

III. EQUAL ACCESS AND FREE SPEECH: THE FORUM QUESTION

The threshold question for analyzing equal access claims is whether the school has created a forum open to student groups.⁴¹ This is part of a larger inquiry that converges on the students' free speech rights as opposed to their associational, free exercise, or equal protection rights. Initially, denials of equal access raised primarily free exercise concerns, but after the Supreme Court's decision in *Widmar v. Vincent*,⁴² the focus shifted to free speech issues.

This does not mean, however, that the forum question has no bearing on whether equal access is permissible under the religion clauses. Without an open forum, schools run less risk of appearing hostile toward religion if they refuse to let student religious groups use school facilities. If they permit *only* religious clubs on campus, the danger of apparent endorsement increases substantially. On the other hand, if an open forum exists, treating student religious groups the same as other student groups avoids religious discrimination and reduces the likelihood of apparent endorsement by equally distributing benefits to religious and nonreligious groups alike.

(statement of Senator Jeremiah Denton, R-Ala.). Senator Mark Hatfield, a co-sponsor of the legislation, remarked: "The bill is a straightforward measure to apply the Supreme Court's decision in *Widmar v. Vincent* . . . to public high schools which receive federal aid." *Id.* at 5. Congressman Barney Frank, speaking in support of the equal access bill, argued:

This is a bill which recognizes the rights of teenagers in the high schools to say that if any group is allowed to meet, then all groups, as long as they do not break either the laws or the furniture, should be allowed to meet in the school buildings. It is an empowerment in my judgment of teenagers so that the school boards and the school authorities can no longer pick and choose for these teenagers. They can no longer say, "If you have a meeting of this club, you can't have a meeting of that one."

130 CONG. REC. H7723-24 (daily ed. July 25, 1984) (statement of Rep. Frank (D-Mass.)); see also *id.* at H7727 (statement of Rep. Lott (R-Miss.)).

39. The Act specifically provides protection for political, philosophical, or other types of speech as well. See *Student Coalition for Peace v. Lower Merion School Dist. Bd.*, 776 F.2d 431 (3d Cir. 1985) (remanding action brought by students seeking to hold antinuclear and peace exposition for determination whether a limited open forum existed at the school after the Act became law).

40. *Mergens*, 867 F.2d at 1079-80. But see *Garnett v. Renton School Dist. No. 403*, 874 F.2d 608 (9th Cir. 1989) (refusal to allow student group to meet on high school campus did not violate Equal Access Act in absence of limited open forum).

41. No one contends that the school must create a forum for the general public. The issue is whether there is a forum open to students and student organizations.

42. 454 U.S. 263 (1981).

The question of what constitutes an open forum for the purposes of equal access must be considered within the framework of previous Supreme Court decisions relating to student expression in public schools.

A. Constitutional Protections for Religious Expression in Public Schools

1. *Student Free Speech Rights*

The leading case defining the free speech rights of students in public schools is *Tinker v. Des Moines Independent Community School District*.⁴³ Two high school students and a junior high student were suspended from school for wearing black armbands during school hours to protest the Vietnam War. The Supreme Court reversed the suspensions, declaring that "[t]he classroom is peculiarly the 'marketplace of ideas'"⁴⁴ and that students do not "shed their constitutional rights to freedom of speech or expression at the school-house gate."⁴⁵

The Court held that students are entitled to express their views, even on controversial issues, unless it would "materially and substantially disrupt the work and discipline of the school" or collide with the rights of others.⁴⁶ School officials could not exercise a prior restraint on student speech merely on the basis of "undifferentiated fear or apprehension of disturbance."⁴⁷ Such a restraint would be justified only where specific facts would reasonably lead school authorities to anticipate substantial disruption of or material interference with school discipline.⁴⁸ Since no such facts existed in *Tinker*, the school violated the students' free speech rights by suspending them.

The Supreme Court reached a different result in *Bethel School District v. Fraser*.⁴⁹ High school authorities suspended a student for delivering a speech containing sexual innuendoes in a student assembly. Applying the standard enunciated in *Tinker*, two lower courts held that the school violated the student's free speech rights.⁵⁰ The Supreme Court reversed, distinguishing the political expression of

43. 393 U.S. 503 (1969).

44. *Id.* at 512 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

45. *Id.* at 506.

46. *Id.* at 513.

47. *Id.* at 508.

48. *Id.* at 514.

49. 478 U.S. 675 (1986).

50. See *Fraser v. Bethel School Dist. No. 403*, 755 F.2d 1356, 1359 (9th Cir. 1985) ("Just as in *Tinker*, the Bethel School District has failed to carry its burden of demonstrating that

Tinker from the sexual content of the student's speech at Bethel High.⁵¹ The Court balanced the rights of students to advocate "unpopular and controversial views" against society's interest in teaching students the limits of "socially appropriate behavior."⁵² Accordingly, the first amendment did not prevent the school from punishing speech that was sexually explicit, indecent, or lewd.

Some commentators read *Fraser* as significantly circumscribing the broad protection given to students' free speech rights in *Tinker*.⁵³ They argue that *Fraser* assumes high school students are too immature to be exposed to speech that is potentially controversial or disruptive. This, of course, would conflict with the rationale supporting equal access, which assumes that high school students are sufficiently mature to handle controversial speech and distinguish between religious speech by the State and religious speech by students.

The immaturity of the teenage students in *Fraser* was undoubtedly a factor in the Court's decision. Yet, in my view, this was because of the unique effect sexually indecent speech may have on children. *Fraser* merely reflects the long-standing concern of the Court for protecting minors from exposure to speech relating to sexual matters.⁵⁴ As such, it does not substantially undercut *Tinker*. *Fraser* merely creates a narrow exception for lewd and indecent speech.

In *Fraser* the school could legitimately disassociate itself from such speech to emphasize to students that "vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."⁵⁵ But the Court stressed that these same fundamental values include "tolerance of divergent political and religious views."⁵⁶ Thus, *Fraser* approves of a policy which teaches future citizens tolerance for the public expression of the religious and political

Fraser's use of sexual innuendo . . . substantially disrupted or materially interfered in any way with the educational process.")

51. In *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988), the Court pointed out the distinction between *Tinker* and *Fraser*: "The decision in *Fraser* rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of a speech delivered at an official school assembly rather than on any propensity of the speech to 'materially disrupt [] classwork or involves [] substantial disorder or invasion of the rights of others.'"

Id. at 570 n.4.

52. 478 U.S. at 681.

53. See, e.g., Strossen, *supra* note 20, at 121, 131-33.

54. See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853 (1982); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Ginsberg v. New York*, 390 U.S. 629 (1968).

55. 478 U.S. at 685-86.

56. *Id.* at 681 (emphasis added).

views of other future citizens—a policy that is entirely consistent with the purposes of equal access.

Neither *Tinker* nor *Fraser* held that the school had created a public forum because neither involved a question of access to school property. In both cases the students were entitled to be on school grounds. The question in *Tinker* and *Fraser* was whether the school could constitutionally suppress their speech; the answer did not depend on whether the school had allowed others to speak. However, as Professor Laycock points out:

Requests to meet in schoolrooms before or after classes do present a question of access to public property. Schools that deny such requests do not suppress speech among students who would have been in the rooms anyway. Rather, they deny the use of rooms to students who have no reason or desire to be there if they cannot hold a meeting.⁵⁷

Because of this difference, neither case is dispositive of the equal access question. However, both cases support the view that high school students are mature enough to be exposed to controversial and unpopular ideas, so long as those ideas are not conveyed in vulgar or indecent terms. When taken together with the Court's decision in *Widmar v. Vincent*,⁵⁸ they present a strong case in favor of equal access.

2. *Widmar: Free Speech Rights of Student Religious Groups on the University Campus*

The Supreme Court set forth a compelling argument for equal access in *Widmar v. Vincent*.⁵⁹ Cornerstone, a group of evangelical Christian students, was one of over one hundred registered student organizations at the University of Missouri at Kansas City. For four years, Cornerstone held its on-campus meetings in vacant classrooms and at the student center just like other student groups. The University then decided that such meetings violated a regulation prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching."⁶⁰ The University informed the group that it could no longer meet on campus. Cornerstone sued, alleging that the University had violated their rights to free speech, free exercise of religion, and equal protection of the laws. The district court

57. Laycock, *supra* note 23, at 48.

58. 454 U.S. 263 (1981).

59. *Id.*

60. *Id.* at 265 (quoting University regulation 4.0314.0107).

upheld the exclusion,⁶¹ the Eighth Circuit reversed,⁶² and the Supreme Court affirmed the court of appeals.⁶³

The Court looked to settled first amendment principles in deciding that the University wrongly excluded Cornerstone from campus facilities. By making its facilities available to student groups, the University had created an open forum.⁶⁴ Absent a compelling interest, the University could not now exclude student groups because of the content of their speech. If groups such as Students for a Democratic Society and the Young Socialist Alliance could meet in University facilities, the school could not deny Cornerstone similar access.⁶⁵

In his concurrence, Justice Stevens stressed the inherent unfairness of a scheme which discriminates against student religious groups:

It seems apparent that the policy under attack would allow groups of young philosophers to meet to discuss their skepticism that a Supreme Being exists, or a group of political scientists to meet to debate the accuracy of the view that religion is the "opium of the people." If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted.⁶⁶

The Court rejected the University's claim that strict separation of church and state compelled the exclusion. In the Court's view, the establishment clause required the government to distinguish between state-sponsored religious speech and state-sponsored nonreligious speech; the latter is permissible, the former is not. In the equal access context, however, the establishment clause does not require the government to suppress voluntary religious speech by private persons.⁶⁷ Thus, neutrality requires the government to both refrain from expressing religious views of its own and interfering with the expression of religious views by others.⁶⁸

This distinction between government speech and voluntary private speech is crucial. Professor Laycock argues that:

[w]ith respect to the government's own speech, taking no position

61. *Chess v. Widmar*, 480 F. Supp. 907 (W.D. Mo. 1979).

62. *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980).

63. 454 U.S. at 277.

64. The Court noted that the Constitution did not require the University to provide an open forum. *Id.* at 268. However, once the University created an open forum, it was not exempt from constitutional scrutiny. *Id.*

65. *Id.* at 274.

66. *Id.* at 281 (Stevens, J., concurring).

67. The Court acknowledged that "the interest of the University in complying with its constitutional obligations may be characterized as compelling." *Id.* at 271.

68. See Laycock, *supra* note 23, at 11.

on religion is the most neutral practice. But with respect to private speech, protecting religious and antireligious speech equally with secular speech is far more neutral than singling out religious and antireligious speech for special treatment.⁶⁹

The Court concluded that any benefits to religion from a policy of equal access would be "incidental."⁷⁰ Two factors contributed to this conclusion. First, the Court thought that no reasonable student would perceive the University to be endorsing the group's religious message.⁷¹ Permitting a student group to use university facilities does not translate into the university's endorsement of the group. Otherwise, the imprimatur of state approval would fall on every group, including those critical of government policies. Second, the provision of benefits to a broad spectrum of both religious and nonreligious groups negated any inference of state approval.⁷²

In sum, the Court determined that the University had created an open forum by making its facilities available to a broad range of student groups. In this setting, the University did not violate the establishment clause by simply allowing religious groups to meet. Free speech and associational rights provided the bases for the Court's decision. The Court declined to inquire into whether the students' free exercise rights were infringed by the University's regulation.⁷³ Neither did the Court "reach the questions that would arise if state accommodation of free exercise and free speech rights should . . . conflict with the prohibitions of the Establishment Clause."⁷⁴

Since *Widmar* involved university students, it left open the question whether student-initiated, student-led religious groups may meet on high school premises. The answer to this question first requires an inquiry into what constitutes an open forum on a high school campus. With regard to equal access, there are two types of open forums: the

69. *Id.* at 13-14.

70. The Court applied the three-part *Lemon* test and concluded that no establishment clause violation would exist if the University permitted the student religious group access to campus facilities. The Court concluded that two prongs of the test were clearly satisfied. The purpose for the forum was to provide for the exchange of student ideas, a clearly secular aim. Furthermore, the Court agreed with the Eighth Circuit that greater entanglement might occur if the University tried to enforce the exclusion of religious worship or speech. This would entail an almost impossible determination of which words and activities constitute such worship or speech, as well as constant monitoring for compliance. 454 U.S. at 271-72 n.10.

71. *Id.* at 274.

72. *Id.* at 274-75.

73. The Court distinguished this case from cases where student religious groups claim that denying them access to facilities *not* available to other groups infringes their free exercise rights. *Id.* at 273 n.13.

74. *Id.*

constitutional "public forum"⁷⁵ and the statutory "limited open forum" as defined by the Equal Access Act.⁷⁶

B. Defining the Constitutional Open Forum in Public Schools

Even if the Equal Access Act does not apply, an equal access policy may still be valid under the first amendment public forum doctrine. The Supreme Court has recognized that "public schools do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"⁷⁷ Thus, "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use' by the general public, or by some segment of the public, such as student organizations."⁷⁸

Such a forum exists only if the government intends to create it, and the designation may be revoked at any time.⁷⁹ Only a compelling state interest can justify the exclusion of speakers in a limited public forum if those speakers fall within the purpose for which the forum was created.⁸⁰

Three circuit courts have addressed the question of what constitutes a constitutional public forum in a public high school for equal access purposes.⁸¹ They arrived at different conclusions. Nevertheless, the equal access policies were struck down in each case.

1. *Brandon and Lubbock: No Public Forum*

In Brandon v. Board of Education of Guilderland Central School

75. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983).

76. See 20 U.S.C. § 4071(a) and (b).

77. *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562, 567-68 (1988) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

78. *Id.* at 568 (citations omitted).

79. *Cornelius*, 473 U.S. at 802.

80. For example, the purpose of the student activity period in *Bender* was to contribute to the students' intellectual and social growth. The court concluded:

It is clear to us that religious discussion, religious study, and even prayer, fall within the articulated qualification that student organizations promote the intellectual and social welfare of students. The Constitution, of course, in no way requires that, because establishment of religion is forbidden, religious activity must be deemed unintellectual or irrelevant to a student's social growth.

Bender v. Williamsport Area School Dist., 741 F.2d 538, 549 (3d Cir. 1984).

81. *Id.* at 547-50; *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038, 1048 (5th Cir. 1982); *Brandon v. Board of Educ.*, 635 F.2d 971, 979-80 (2d Cir. 1980).

*District*⁸² high school students requested permission to meet for prayer in a classroom immediately before the school day began. They did not seek faculty involvement and assured school authorities the meetings would be voluntary and would not conflict with other school activities. Even though the school allowed other groups to meet, the students' request was refused.

The court focused primarily on the students' free exercise claim, rejecting it in the face of overriding establishment clause concerns. The court also dismissed the students' free speech claim, declaring that "a high school is not a 'public forum' where religious views can be freely aired,"⁸³ despite the fact that other student organizations used school facilities.

In support of this assertion, the court distinguished between student *political* speech, protected by *Tinker*, and student *religious* speech, which the court said is limited by the establishment clause. Furthermore, because the students wanted to pray rather than engage in "discussions about religious matters,"⁸⁴ the proscription against prayer in the public schools⁸⁵ negated any claim to the usual protections afforded political and religious speech. In view of these factors, the court concluded that the establishment clause "severely circumscribe[s]" whatever free speech rights the students would enjoy in a public forum.⁸⁶

Any difference between government speech and private speech was apparently lost on the court. *Tinker* involved the right of *individual* students to nondisruptively express their views, even if unpopular or controversial, regardless of whether the school was a public forum.⁸⁷ In contrast, *Brandon* created an exception to *Tinker* for religious speech. Does this mean that the establishment clause would prohibit students from individually expressing their religious views in the hallways and classrooms? Moreover, in an arbitrary mixing of categories, *Brandon* relied on the establishment clause ban on school prayer, which invalidated *state*-sponsored religious exercises, to render irrelevant any first amendment protections for *student*-initiated religious speech.

Nonestablishment considerations restrict religious speech by the

82. 635 F.2d 971 (2d Cir. 1980).

83. *Id.* at 980.

84. *Id.*

85. See *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

86. 635 F.2d at 980.

87. See *supra* notes 43-48 and accompanying text.

state and, in rare circumstances, may provide a compelling interest overriding free speech or free exercise rights of private individuals or groups.⁸⁸ However, this does not mean that the establishment clause may determine whether or not a public forum exists.⁸⁹ In effect, the *Brandon* court used the establishment clause to strip concerted student religious speech of any first amendment protection in the public school setting.⁹⁰ This goes beyond balancing nonestablishment concerns against competing student free speech rights. Under the *Brandon* rationale, the usual first amendment protections afforded other forms of student speech are simply inapplicable when religious speech is involved.

To be sure, the court wished the students well as it turned them away from the schoolhouse door. But the imprecision of the court's reasoning, arising from an exaggerated view of the establishment clause, is neither convincing nor desirable.

The Fifth Circuit faced a somewhat different situation in *Lubbock Civil Liberties Union v. Lubbock Independent School District*.⁹¹ The school district had a policy that permitted student-initiated and directed religious activities on campus. Student religious groups could meet before or after school like other student clubs if the meetings were voluntary. The district court rejected an establishment clause challenge to the school's policy by the LCLU. Relying on *Brandon*, the Fifth Circuit reversed.

The court rejected the school district's public forum argument which was based on *Widmar*. The court stressed that "[t]he District's argument misapprehends the definition of public forum. The holding of student meetings at a *public* school does not turn that school into a public forum."⁹²

Two factors may diminish the substantive contribution of *Lubbock* to the debate over equal access. First, although the factual settings were somewhat different, *Lubbock* essentially adopted the same

88. In *Widmar* the university claimed that its exclusion of religious groups from school facilities was to avoid violating the establishment clause. While the Court held that an equal access policy would not be incompatible with the establishment clause, it did recognize that "the interest of the University in complying with its constitutional obligations may be characterized as compelling." 454 U.S. at 271.

89. Whether a public forum *exists* is a consideration wholly independent of whether the establishment clause *overrides* free speech rights in a public forum.

90. The *Brandon* court further erred in its bizarre distinction between religious discussion and prayer. In *Widmar* the Supreme Court flatly rejected the idea that religious "worship" is not "speech" protected by the first amendment. 454 U.S. at 269-70 n.6.

91. 669 F.2d 1038 (5th Cir. 1982).

92. *Id.*

rationale expressed in *Brandon* to invalidate an equal access policy under the establishment clause. Second, and more importantly, the Lubbock School District had a long history of promoting organized religious activities in its schools. This convinced the court that the district's equal access policy was "clearly designed [in the context of total school policy] to allow the meetings of religious groups,"⁹³ thus failing the secular purpose requirement of *Lemon v. Kurtzman*.⁹⁴

Neither *Brandon* nor *Lubbock* seriously considered competing student free speech or associational rights implicated by a denial of equal access. Despite the fact that in each case a wide variety of non-religious student groups used school facilities, both courts expressed a categorical rule that a high school "is not a 'public forum' where religious views can be freely aired"⁹⁵—a conclusion supposedly mandated by the establishment clause.

2. Bender: *The Undervalued Public Forum*

The Third Circuit performed the first painstaking analysis of competing nonestablishment and free speech interests in *Bender v. Williamsport Area School District*.⁹⁶ Students sought permission to form a religious club and meet during the school's activity period on the same basis as other student organizations. Although the school district had a policy expressly encouraging student-initiated groups at school,⁹⁷ school officials, fearing an establishment clause violation, denied the students' request. The students sued, alleging an infringement of their free exercise and free speech rights.

The district court ruled in favor of the students on their free speech claim.⁹⁸ Since the school had created a "limited public forum" by permitting all kinds of student groups to meet during the activity period, the court found no compelling justification for a content-based exclusion of the religious club from this forum. Allowing the club to

93. *Id.* at 1045. Justice O'Connor recognized in her concurrence in *Wallace v. Jaffree*, 472 U.S. 38 (1985), that even a neutral policy can impermissibly promote religion, depending upon how it is implemented. 472 U.S. at 72 (O'Connor, J., concurring).

94. 403 U.S. 602 (1971). See *infra* notes 160-221 and accompanying text.

95. *Lubbock*, 669 F.2d at 1048 (quoting *Brandon*, 635 F.2d at 980).

96. 741 F.2d 538 (3d Cir. 1984).

97. According to a school yearbook, student clubs active at the high school included the Student Government, Key Club, Class Organizations, Business English Club, Ecology Club, Future Homemakers of America, Vocational Technical Club, Spanish Club, Speech and Drama Club, Band, Choir, and various student publications. The school principal also indicated that other clubs had been approved in the past and might be renewed if the students were interested. These clubs included the Archery, Audubon, Aviation, Bowling, Chess, Future Nurses, Photography, and Ski clubs. *Id.* at 543-44 n.8.

98. 563 F. Supp. 697 (M.D. Pa. 1983).

meet would not violate the establishment clause, since the "spectrum of student groups at the Williamsport Area High School is sufficiently broad to indicate that recognition of Petros [the student religious club] would benefit religion only incidentally."⁹⁹ Finding the case to be "fundamentally different from the traditional school prayer cases,"¹⁰⁰ the court distinguished between student-initiated, student-led religious speech and state-initiated, state-led religious speech. The latter violated the establishment clause; the former did not.

The Third Circuit reversed using a balancing approach that favored nonestablishment concerns. The court first determined that the students' religious speech was protected by the first amendment and fell within the parameters of the limited forum created by the high school. Any content-based restriction on such speech must be narrowly drawn to meet a compelling state interest.¹⁰¹

Since *Widmar* recognized that compliance with the establishment clause may provide the necessary state interest, the next inquiry was whether an equal access policy would run afoul of the traditional *Lemon* test. Unlike *Lubbock*, the court concluded that there was no religious motive behind the establishment of the activity period. However, the court recognized that certain "special circumstances" inherent in the high school setting created "heightened dangers" of an establishment clause violation.¹⁰²

These differences, in the court's view, distinguished the case from the university environment in *Widmar*. The court found these factors significant: high school students are more immature and impressionable; the smaller and more structured high school setting would result in "inevitable" contact between the religious group and nonparticipating students, increasing the likelihood that those with different beliefs would think the school was endorsing the creed of that particular group; high school student meetings require supervision or monitoring by school authorities; attendance of high school students is compulsory under state law.¹⁰³ The court thus concluded that

[a]ctivity which is permitted to exist within the school, therefore, especially when conducted in the constant presence of school-appointed monitors, carries with it the impression of official approval and endorsement, particularly when the state compulsory educa-

99. *Id.* at 712.

100. *Id.* at 713.

101. See *Carey v. Brown*, 447 U.S. 455, 464-65 (1980).

102. 741 F.2d at 552.

103. *Id.* at 552-53.

tional system encourages attendance at meetings of such groups.¹⁰⁴

The court recognized, however, that the establishment clause may bend somewhat to accommodate the exercise of free speech, just as free speech may yield to the purposes of the establishment clause. The outcome of such balancing would depend on the specific circumstances of the case. The court's role was to maximize fundamental rights "by deciding which course of action will lead to the lesser deprivation of those rights."¹⁰⁵

Conceding it was a close question, the court identified three significant factors that tilted the balance in favor of nonestablishment concerns. First, the students' free speech rights only existed in the context of a "limited forum." This gave school officials complete discretion to restrict the activity period to curricular subjects only or to abolish the activity period altogether.¹⁰⁶ Therefore, the students' right to religious expression existed in the first place only because school officials permitted it. If the opportunity was lost, the students could find somewhere to meet off campus before or after school hours. While this might be an "inconvenience," it would not significantly impair their expressive activities.

Second, the court stressed that public schools have never been a forum for religious expression. This altered the nature of the students' right to free speech.

The free speech right enjoyed by the students is therefore of a dramatically different character than the right to communicate in a traditional public forum such as a park or on a sidewalk, or through the press, where the overriding importance of allowing free expression has been deeply and firmly rooted throughout history.¹⁰⁷

Finally, the court concluded that there was simply no way to avoid or remedy the establishment clause problems posed by a policy of equal access. Allowing student religious groups to meet "within the hours of compulsory attendance, on school premises, and under official sanction and supervision, would promote an impermissible atmosphere of religious partisanship in a public secondary school."¹⁰⁸

While I admire the *Bender* court's sensitivity and precision, I cannot agree with its conclusions. For instance, the court suggests

104. *Id.* at 555.

105. *Id.* at 559.

106. *Id.* at 559-60.

107. *Id.* at 560.

108. *Id.*

that the conflict between free speech rights and nonestablishment concerns exists only because school officials have created a limited open forum for student speech. Because this forum exists merely at the discretion of school officials, and they can opt out of it at will, the balance should tip to the nonestablishment side. What the court gives with one hand, it takes away with the other. Such convoluted logic guarantees that students' free speech rights will *never* prevail. This "balancing approach" is a fiction that inevitably leads to only one result.

Moreover, the court's suggestion that the students meet elsewhere fails to fully comprehend their purpose for meeting on campus. Students like Lisa Bender usually do attend off campus religious meetings with other students during the week. However, there is something about meeting together at school which cannot be duplicated in their off campus meetings.¹⁰⁹ Thus, when the government says "no" to their religious discussion and association, while allowing other extracurricular student groups to meet, it creates far more than a mere inconvenience. Instead, such discriminatory treatment sends a message of government hostility toward religion.

The *Bender* court's analysis is also constitutionally suspect. Not only does a content-based restriction on speech require a compelling justification, it must also be narrowly drawn to achieve that end.¹¹⁰ Yet the court fails to consider any less drastic alternatives to outright exclusion. Surely the school could take steps to minimize the possibility that someone might mistake its accommodation of student religious groups as an endorsement of religion. There is no evidence, however, that such measures were attempted or even considered.

Given the three factors the court considers dispositive in its balancing approach, it is difficult to conceive of a set of circumstances involving concerted student religious expression in public schools that would tip the balance in favor of free speech.¹¹¹ Even though the

109. See *infra* notes 263-69 and accompanying text.

110. *Carey v. Brown*, 447 U.S. 455, 461-65 (1980).

111. In response to the dissent's characterization of the court's holding as a bright line *per se* rule, the court stressed:

If the dissent means to say that we have adopted a *per se* rule that *group* prayer activity, held *on school premises*, conducted as part of an *organized high school* activity program, at which a *school monitor* must be present, and which takes place during the hours of *compulsory school attendance*, violates the Establishment Clause, then that characterization is accurate. Without these critical qualifications, however, the dissent mischaracterizes our holding.

741 F.2d at 560 n.30. The court apparently limited its holding to the factors listed above. However, the first three are merely definitional; they will be present anytime a student religious

Bender court pays lip service to such a possibility, it apparently has its thumb firmly planted on the other side of the scale.

3. *Kuhlmeier and the Future of the Public Forum Analysis*

In *Hazelwood School District v. Kuhlmeier*¹¹² the Supreme Court reaffirmed *Tinker*'s protection of student free speech rights while permitting school officials to exercise control over the style and content of student speech that is officially sponsored by the school. The Court held that a high school newspaper published by students in a journalism class was not a public forum and thus school officials could regulate the contents of the newspaper in any reasonable manner.¹¹³

Kuhlmeier drew a sharp distinction between speech that is sponsored by the school and speech that is not:

The question whether the First Amendment requires a school to tolerate particular student speech—the question we addressed in

groups seeks equal access. The final two are apparently the most critical variables. Perhaps the court left the door open for the school to constitutionally accommodate a student religious group which meets on premises before or after school without a monitor present. Nevertheless, one wonders if this would be enough to tip the scales in the other direction given the overall thrust of the opinion.

Bender reflects the problems inherent in a balancing approach. Once an establishment clause violation occurs in the public school setting, courts are extremely reluctant to find any interest so compelling as to override the establishment clause concerns. In practice, this places the establishment clause in a position of permanent supremacy over the free speech and free exercise clauses when it comes to public schools. As a result, courts are far more concerned with keeping religion separate from public education as an end in itself, rather than inquiring whether certain forms of accommodation, as opposed to separation, might better promote the cause of religious liberty.

Professor Strossen proposes an analytic framework for balancing establishment clause and free speech interests that is more precise and, in my view, superior to *Bender*. She attempts to steer a course between an unqualified grant and an outright denial of equal access. However, the fundamental weakness of her approach is that it requires a case-by-case evaluation. See Strossen, *supra* note 20, at 149-57. My own experience has convinced me that, if a school has a choice between implementing complex guidelines or simply refusing to grant access, it will opt for the latter. Many school authorities prefer to err on the side of absolute separation from any religious matters, rather than carefully working to minimize establishment risks in the interest of protecting student religious speech.

112. 108 S. Ct. 562 (1988).

113. *Id.* at 567-69. Hazelwood School Board Policy 348.51 expressly provided that "[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." *Id.* at 568 (quoting from Brief for Appellant at 22). The Hazelwood East Curriculum Guide specified that the Journalism II course would function as a "laboratory situation in which the students publish the school newspaper applying the skills they have learned in Journalism I." *Id.* (quoting Brief for Appellant at 11). A school faculty member taught the Journalism II course during regular class hours, and students received academic credit for the course. *Id.* The Court noted that "[s]chool officials did not deviate in practice from their policy that production of the Spectrum [student newspaper] was to be part of the educational curriculum and a 'regular classroom activit[y]'" *Id.*

Tinker—is different from the question whether the First Amendment requires a school *affirmatively to promote* particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over *school-sponsored* publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as *a part of the school curriculum*, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.¹¹⁴

Although educators may exercise more control over both the content and the style of student speech when it is officially sponsored by the school, their actions must be for legitimate pedagogical purposes or to ensure that the speaker's views are not erroneously attributed to the school.¹¹⁵ Student speech not sponsored by the school is still governed by the *Tinker* standard.¹¹⁶

Kuhlmeier is instructive because the Court's distinction between student speech that is school-sponsored and student speech that is not parallels the difference between curriculum-related and noncurriculum-related student activities as defined by the Equal Access Act.¹¹⁷ The Act does not apply to curricular activities like the school newspaper, but protects student rights of personal expression and association on high school campuses that offer noncurriculum-related activities.

Kuhlmeier, when considered together with *Widmar* and *Bender*, provides a framework for identifying a constitutional open forum in public high schools. Three principles become clear. First, school officials have discretion whether or not to open school premises to student organizations; there is no constitutional requirement to provide facilities to such groups. Second, the existence of *school-sponsored* student groups—groups that are supervised by faculty members, designated as part of the educational curriculum, and function as extensions of regular classroom activities¹¹⁸—do *not* create a public forum for student organizations. Third, once a forum is generally open for

114. *Id.* at 569-70 (emphasis added).

115. *Id.* at 570-71.

116. *Id.* at 569-70.

117. See 20 U.S.C. §§ 4071(b) and 4072(3).

118. See *supra* note 113.

use by extracurricular student groups, school officials cannot then exclude a group because of its subject matter absent a compelling state interest. This applies to both religious and nonreligious groups alike.

Several first amendment scholars have criticized the public forum doctrine.¹¹⁹ Some think the Court's decision in *Cornelius v. NAACP Legal Defense and Education Fund*¹²⁰ effectively emptied the designated public forum category of any significant protections for speech.¹²¹ If this is the case, a public high school could well be deemed a nonpublic forum where "[a]ccess . . . can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'"¹²² The school might then exclude student religious groups from the forum without violating their free speech rights. But banning religious expression in such circumstances may take the form of viewpoint discrimination if the school seeks to protect secular ideology or activities.¹²³

Since *Cornelius* did not purport to overturn *Widmar* or those cases defining the free speech rights of high school students, they still provide the most precise guidelines for evaluating equal access. *Widmar* plainly stands for the proposition that a school cannot make

119. See, e.g., Farber and Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

120. 473 U.S. 788 (1985).

121. "It makes little sense to apply the compelling interest test to a category of cases and then let the government opt out of the category at will." Laycock, *supra* note 23, at 47. See also Strossen, *supra* note 20, at 126-30. The dissenting opinion in *Cornelius* noted:

[t]he Court's analysis empties the limited public forum concept of meaning The Court makes it *virtually* impossible to prove that a forum restricted to a particular class of speakers is a limited public forum The very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis that fact alone would demonstrate that the forum is not a limited public forum.

473 U.S. at 825 (Blackmun, J., dissenting) (emphasis in the original).

122. *Id.* at 800 (quoting *Perry*, 460 U.S. at 46).

123. Professor McConnell observes:

Religion, unlike politics, is commonly understood not merely as a subject but also a point of view. The term "religion" can denote a specific subject matter open to many points of view; this is sometimes called "theology." More often, however, "religion" denotes an outlook toward many different subjects, under which an important element in understanding the phenomena of the world is the presence of a transcendent being. . . . Thus, the opposite of "religion" can be said to be "secularism" or "nonreligion"—or perhaps "irreligion." . . . To favor religion over nonreligion—or nonreligion over religion—is to take sides.

McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 405, 418. See, e.g., *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986) (suggesting in dicta that permitting teachers to use school premises for any meetings except prayer meetings would amount to impermissible viewpoint discrimination).

its facilities available to nonreligious groups while at the same time excluding religious groups.

In the closing words of the *Mergens* opinion, the Eighth Circuit announced that "even if Congress had never passed the EAA, our decision would be the same under *Widmar* alone."¹²⁴ While highly unlikely, if the Supreme Court determines that the Equal Access Act does not apply to Westside High School, the school still remains vulnerable to a constitutional claim.

C. Defining the Statutory Open Forum in Public Schools

The most recent court of appeals decision denying equal access illustrates the difficulty in determining what creates a limited open forum under the Equal Access Act. In *Garnett v. Renton School District No. 403*¹²⁵ high school students sought a court order to permit their student religious club to meet in a classroom before school. The students claimed that both the first amendment and the Equal Access Act required the school to permit their meetings. The school's policy provided that approved "co-curricular" activities must be "an extension of a specific program or course offering," and expressly stated that the school "does not offer a limited open forum."¹²⁶

The district court denied the students' request because it found the student religious group was not curriculum related and the proposed meetings would run afoul of the establishment clause. The Ninth Circuit affirmed. Like *Brandon*, *Lubbock*, and *Bender*, the court rejected *Widmar* as controlling. It reasoned that a student religious group which meets in the highly structured secondary school setting, where students are impressionable and compelled to attend, would more likely appear to be state sponsored than a similar group meeting on a college campus.¹²⁷

The Ninth Circuit did not reach the students' free speech claims because it determined the high school was not a limited public forum. The school had not opened its classrooms for "indiscriminate use"¹²⁸ or "public discourse" by students and student groups. Only clubs which were "an extension of the courses and programs of the district"¹²⁹ were authorized to meet, and religious clubs had nothing to do with the school's educational mission. In fact, the District "must

124. 867 F.2d at 1080.

125. 874 F.2d 608 (9th Cir. 1989).

126. *Id.* at 609 (quoting District Policy 6470).

127. *Id.* at 612.

128. *Id.* (citing *Kuhlmeier*, 484 U.S. 260 (1988)).

129. *Id.* at 613.

exclude organized religious speech because use of public school facilities for religious purposes violates the Establishment Clause."¹³⁰ The Equal Access Act did not apply since the school did not provide a limited open forum as defined in the Act.¹³¹

The School District's broad definition of "co-curricular" activities encompassed any nonacademic activities which might indirectly induce a student's interest in school.¹³² The district court observed that "[t]he key point is that none of the . . . clubs is demonstrated to be student initiated and student directed and without sponsorship and substantial direction by the school through a faculty advisor or a teacher of a related course."¹³³ The Ninth Circuit also concluded that all clubs at the high school were "so closely related to course work or are so integral a part of the traditional and official school programs that they cannot reasonably be termed 'noncurriculum related.'"¹³⁴

The Equal Access Act states that a school has a "limited open forum" when it permits "one or more noncurriculum related student groups to meet on school premises during noninstructional time."¹³⁵ The difficulty is in defining "noncurriculum related."¹³⁶ In *Garnett* the high school permitted fifteen student groups to meet on campus, including the Bowling Club, Dance Squad, Ski Club, International Club, Minority Student Union, SKY Club (Special Kiwanis Youth), Girls Club, Chess Club, and the LIMITS Club (Lindbergh Modern Insight & Technology Society).¹³⁷ School officials characterized all of these clubs as curriculum related to avoid triggering the Equal Access Act.

School administrators should be permitted much discretion in determining what is and is not part of the curriculum. However, this ambiguity in the Equal Access Act creates an obvious potential for rhetorical sleight-of-hand. Schools could circumvent the Act's requirements simply by designating all nonreligious student groups as curriculum related. One is reminded of Juliet's plight:

'Tis but thy name that is my enemy;—

130. *Id.*

131. *See* 20 U.S.C. § 4071(b).

132. *Garnett v. Renton School Dist. No. 403*, 675 F. Supp. 1268, 1271 (W.D. Wash. 1987) (testimony of the Assistant Superintendent for Curricular Instruction for the Renton School District).

133. *Id.* at 1272.

134. 874 F.2d at 614.

135. 20 U.S.C. § 4071(b).

136. Section 4072(3) defines the type of "meeting" protected by the Act as encompassing the activities of student groups "not directly related to the school curriculum."

137. *Garnett*, 675 F. Supp. at 1271.

Thou art thyself though, not a Montague.
 What's Montague? It is not hand, nor foot,
 Nor arm, nor face, nor any other part
 Belonging to a man. O, be some other name!
 What's in a name? that which we call a rose,
 By any other name would smell as sweet¹³⁸

Sponsors of the Act emphasized that "a limited open forum should be triggered by what a school does, not by what it says."¹³⁹ In *Mergens* the Eighth Circuit, responding to an argument similar to that made in *Garnett*, observed:

Allowing such a broad interpretation of "curriculum-related" would make the EAA meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the EAA. A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.¹⁴⁰

While a detailed analysis of precisely what makes a student club curriculum or noncurriculum related is beyond the scope of this Comment, some commentators have proposed guidelines that may help to clear away some of the confusion. After a thorough examination of the legislative history of the Act, Professor Laycock concludes that the best definition of "curriculum related" is any group that is an extension of the classroom:¹⁴¹ "[i]f a group is sponsored by a teacher

138. W. SHAKESPEARE, *Romeo and Juliet*, in *THE COMPLETE WORKS OF WILLIAM SHAKESPEARE* 1020 (Avenel ed. 1975).

139. 130 CONG. REC. S8341 (daily ed. June 27, 1984) (statement of Sen. Leahy).

140. 867 F.2d at 1078. For a discussion of how several school districts have tried to avoid the provisions of the Act, see Crewdson, *supra* note 36, at 183.

Faced with a similar situation where the school permitted only those clubs which contributed to the intellectual, physical, or social development of the students, the *Bender* court concluded that several clubs were only tangentially related to the school's course of study. The court also pointed out that

[w]hile it might be said that each of these activities enhances the curricular goals of the school by promoting civic awareness (the Key Club), logical thought (the Chess Club), practical applications of scientific principles (Aviation Club), or a general sense of responsibility (Office Aides), the same extended chain of reasoning could be used to justify religion as a promoter of civic, social, and intellectual values.

741 F.2d at 549 n.18.

141. Laycock, *supra* note 23, at 36-41.

who teaches a closely related course, and if nearly all the members of the group take that course, then the group is curriculum related, and its existence does not trigger any obligation to recognize other groups."¹⁴² Relying on other comments made in congressional debates on the Act¹⁴³ and the word "directly" in section 4072(3),¹⁴⁴ the Center for Law and Religious Freedom suggests two inquiries to determine whether an activity is noncurriculum related:

- 1) Does a public school usually sponsor an activity with this subject matter?
 - 2) Does the school require or directly encourage student participation in such a group in connection with curricular course work?
- If the answer to *either* question is no, then an activity is noncurriculum-related, and the Act applies.¹⁴⁵

Arguably, a broad construction of "noncurriculum related" would best effect the intent of Congress to eliminate religious discrimination, while at the same time leaving a fair measure of discretion in the hands of school officials. Considering both the legislative history of the Equal Access Act¹⁴⁶ and the Supreme Court's decision in *Kuhlmeier*,¹⁴⁷ courts should apply a three-part test to identify those groups which are curriculum related. Student groups falling into this category must (1) be supervised by faculty members,¹⁴⁸ (2) be specifically designated as part of the educational curriculum,¹⁴⁹ and (3) function as extensions of regular classroom activities.¹⁵⁰ Any group that fails to meet one or more the above criteria would be deemed "noncurriculum related."

Despite the difficulty in arriving at a precise definition of key

142. *Id.* at 41.

143. See 130 CONG. REC. H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling).

144. 20 U.S.C. § 4072(3) provides: "The term 'meeting' includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum."

145. Center for Law and Religious Freedom, A GUIDE TO THE EQUAL ACCESS ACT 30 (1988).

146. See *supra* notes 36-39, 139-143 and accompanying text.

147. See *supra* notes 112-18 and accompanying text.

148. This requires substantial faculty supervision that exceeds mere custodial oversight. Whether faculty or other school officials *initiated* such groups would not necessarily be dispositive. In certain circumstances, students may initiate groups or activities as extensions of regular classroom activities that are subsequently deemed curriculum-related and require faculty supervision. Of course, faculty members may *not* organize or sponsor student religious clubs under the establishment clause.

149. Express designation of each curriculum-related student group would prevent school boards from circumventing the Act's requirements by adopting a singularly broad definition of "curriculum related" that would include all but student religious groups.

150. There must be a direct and substantial relationship between the student group and regular classroom activities to qualify the group as curriculum related.

terms in the Act, the committee reports and debates do reflect agreement on its overall purpose. As Professor Laycock observes:

The committees believed that there was widespread discrimination against student religious speech. The lopsided majorities that voted for the Act plainly wanted to end that discrimination. Such discrimination can be ended by either admitting religious speech to the schools or by excluding much of the speech now allowed in the schools. But any interpretation that largely validates the status quo is not faithful to the legislative purpose.¹⁵¹

The Act embodies two important values: liberty and equality. It ensures that the state may not create disadvantages intentionally based on the religious character of student affiliations or practices. Thus, the primary thrust of the Act is to end one form of religious discrimination. Yet the most significant challenge to equal access comes from those who advocate a broad separation of religion and government. It is to these issues we now turn.

IV. EQUAL ACCESS AND THE ESTABLISHMENT CLAUSE: THE ENDORSEMENT QUESTION

A. The Theoretical Underpinnings of the Establishment Clause Analysis

Much of the confusion in recent years over the religion clauses is a consequence of the view that they must somehow be "balanced," one against the other.¹⁵² This assumes that the establishment and free exercise clauses pull in different directions, toward conflicting ends, rather than being "essentially one provision for preserving religious liberty."¹⁵³ As a result, the establishment clause has been given a separate and controlling status all its own. Instead of serving the cause of religious freedom, it has often been perceived as an end in itself, demanding that "wherever government reaches religion must retreat."¹⁵⁴ This is especially true in the public school setting.

151. Laycock, *supra* note 23, at 41.

152. See Neuhaus, *Genuine Pluralism and the Pfefferian Inversion*, *THIS WORLD: A JOURNAL OF RELIGION AND PUBLIC LIFE* 71, 73 (No. 24, Winter 1989); McConnell, *Making Peace Between the Religion Clauses*, 33 U. CHI. L. SCH. REC. 6 (Fall 1987).

153. *The Williamsburg Charter: A National Celebration and Reaffirmation of the First Amendment Religious Liberty Clauses*, *THIS WORLD: A JOURNAL OF RELIGION AND PUBLIC LIFE* 40, 48 (No. 24, Winter 1989). See also *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring) ("Although a distinct jurisprudence has enveloped each of these clauses, their common purpose is to secure religious liberty.")

154. Neuhaus, *supra* note 152, at 78.

This strange inversion¹⁵⁵ obscures the underlying goal of nonestablishment. The threat perceived by the framers was that the federal government would force people to support a religion to which they did not freely adhere.¹⁵⁶ They feared that the establishment of a religion would infringe upon the "liberty of conscience" of those who dissented from the established belief. As Neuhaus observes:

The two-part religion clause of the First Amendment stipulates that there must be no law respecting an establishment of religion. The reason for this is to avoid any infringement of the free exercise of religion. Nonestablishment is not a good in itself, it does not stand on its own feet. The positive good is free exercise, to which nonestablishment is instrumental. . . . Both historically and logically, there is no reason for nonestablishment other than to protect religious freedom.¹⁵⁷

Some claim that permitting equal access puts the government in the position of endorsing religion; others think that equal access endorses only the idea that public schools should accommodate concerted student religious expression in the interests of liberty and equality. We will move closer to resolving this dilemma by asking the kind of questions in our analysis which are faithful to the larger purpose of the religion clauses. To put it bluntly: Which view of equal access best promotes religious choice?

It is hard to be neutral about religion.¹⁵⁸ Some are sympathetic,

155. Neuhaus' thesis is that nonestablishment has been given practical priority over free exercise in most cases, with the result that the end (free exercise of religion) has been subordinated to the means (nonestablishment of religion). *Id.* at 74. He attributes this "inversion" to the influence of Leo Pfeffer. *Id.* at 75-77.

156. The original committee draft of the religion clauses specified that "no religion shall be established by law, nor shall the equal rights of conscience be infringed." Madison understood these words to mean "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 ANNALS OF CONG. 730 (J. Gales ed. 1834) (Aug. 15, 1789). He believed the people "feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 730. For a discussion of the historical background of the religion clauses, see R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); D. DREIBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT (1987); M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); McConnell, *Coercion: The Lost Element of Establishment* 27 WM. & MARY L. REV. 933 (1986); Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569 (1984); Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645.

157. Neuhaus, *supra* note 152, at 73-74.

158. Because of the nature of religious truth, it may be logically impossible to be truly

others are hostile, but almost no one is indifferent. As Professor Esbeck observes, at the root, one's view of church-state relations depends on one's theological or philosophical worldview.¹⁵⁹ This makes it all the more difficult to dispassionately balance competing interests when one of those interests involves religion. This does not mean courts should not try. But we must understand that judicial decision-making might never be more at risk of being improperly influenced by personal beliefs than in matters touching religion.

B. The *Lemon* Test and Equal Access

Any form of concerted or organized religious expression in public high schools raises establishment clause concerns.¹⁶⁰ Opponents of equal access argue that student religious groups may be excluded from campus since compliance with the establishment clause provides the "compelling state interest" needed to override the students' free speech interests.¹⁶¹ Thus, a policy permitting equal access is usually evaluated by the tripartite test formulated in *Lemon v. Kurtzman*:¹⁶² first, the policy must have a secular purpose; second, the policy's primary effect must neither advance nor inhibit religion; third, the policy must not result in excessive government entanglement with

"neutral" about religion. Religious claims involving ultimate truths usually do not presume a middle ground between belief and unbelief. For example, in most religions, the nonbeliever is really no better off than the unbeliever; the ultimate destination is the same for both.

Drawing an analogy to theological categories, neutrality most approximates the position of the agnostic. The theist affirms God's existence, the atheist denies it, while the agnostic claims ignorance about it. Yet the term *agnosticism* can be used in a variety of ways:

- (1) as the suspension of judgment on all ultimate issues, including God, free will, immortality; (2) to describe a secular attitude toward life, such as the belief that God is irrelevant to the life of modern man; (3) to express an emotionally charged anti-Christian and anticlerical attitude; (4) as a term roughly synonymous with atheism.

Feinberg, *Agnosticism*, in *EVANGELICAL DICTIONARY OF THEOLOGY* 24 (W. Elwell ed. 1984). Under the neutrality principle, the government must take the position of "suspending judgment" on ultimate questions. When the state, however, directly or indirectly fosters the notion that God does not exist or is irrelevant to modern life, or sides with the antireligious against the religious, it is no longer neutral, but hostile to religion.

159. Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371, 375.

160. Religious worship and discussion are forms of speech and association protected by the first amendment. See, e.g., *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Neimotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948). The establishment clause does not prohibit purely private, individual religious expression in hallways, classrooms, etc.

161. Content-based exclusions of speech from a public forum are justified by a compelling state interest that is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 464-65. The Supreme Court has recognized that compliance with the establishment clause "may be characterized as compelling." *Widmar*, 454 U.S. at 271.

162. 403 U.S. 602 (1971).

religion.¹⁶³

The Supreme Court has declared that seven specific practices are unconstitutional establishments of religion in public schools.¹⁶⁴ Before applying this precedent to equal access, a crucial distinction must be noted. In each of the cases above, the state both initiated and was directly involved in the particular religious activity held unconstitutional. For example, in *Engle v. Vitale*¹⁶⁵ a state law required teachers to lead their classes in vocal prayer. In *Abington School District v. Schempp*¹⁶⁶ state statutes authorized daily Bible readings in public schools. In both cases, teachers and students led classes in devotional exercises that were required by state law and part of an official school program.

These factors are generally absent, however, when a school permits a *student*-initiated, *student*-sponsored religious group to meet along with other groups during an extracurricular activity period on a high school campus. It is the students, not the state, who are engaging in religious speech. This is why *Engle* and *Abington* are not dispositive on the constitutionality of equal access.

1. *Secular Purpose*

With a single exception, every court of appeals which has faced the issue has concluded that a policy of equal access for high school students has a secular purpose.¹⁶⁷ The *Brandon* court articulated one such purpose: "[a] neutral policy granting all student groups, including religious organizations, access to school facilities reflects a secular, and clearly permissible purpose—the encouragement of extracurricular activities."¹⁶⁸

In *Widmar* the Supreme Court acknowledged that equal access provides a forum for the exchange of ideas between students.¹⁶⁹ Permitting religious speech in the forum does not undermine the secular aim of the policy by aiding religion, since "by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there."¹⁷⁰

163. *Id.* at 612-13. This test has been questioned in some recent cases. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983).

164. See the cases listed *supra* note 19.

165. 370 U.S. 421 (1962).

166. 374 U.S. 203 (1963).

167. See *Garnett*, 874 F.2d at 610; *Bender*, 741 F.2d at 551; *Brandon*, 635 F.2d at 978.

168. 635 F.2d at 978.

169. 454 U.S. at 271 n.10.

170. *Id.*

Critics of the Equal Access Act charge that its overall aim is "to bring organized religious activities into the public schools,"¹⁷¹ thereby manifesting an unconstitutional religious purpose. This mischaracterizes the primary thrust of the Act, which is to eliminate discrimination against religion. Moreover, the Act does not deal exclusively with religion. It also protects political, philosophical, and other forms of speech.

2. Primary Effect

The second part of the Supreme Court's establishment clause test is that the challenged policy have a "principal or primary effect . . . that neither advances nor inhibits religion."¹⁷² This is essentially a statement of the neutrality principle. The neutrality analysis, however, can be misleading.¹⁷³ For instance, if religion is being unfairly treated, then government action to insure fair and impartial treatment can be said to "advance" religion. While government action to advance religion from neutral to preferred status may violate the Constitution, government action that advances religion from discriminatory treatment to neutral treatment may actually be required by the Constitution. It all depends on the starting point: *protecting* religion is not the same as *promoting* religion.¹⁷⁴

The ambiguity inherent in the concept of neutrality has necessitated further refinement of what unconstitutionally advances religion. In recent years, the Court has looked to whether the challenged policy or practice has had the purpose or effect of "endorsing" religion.¹⁷⁵ Thus, the government may not favor, prefer, or promote a

171. Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis*, 12 HASTINGS CONST. L.Q. 529, 558-59 (1985).

172. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

173. It may be illogical to attempt to place the government in a neutral position between religion and nonreligion. One commentator has observed that "[t]he appropriate dichotomy is between religion and irreligion, not between religion and nonreligion: government must remain neutral, not between those who believe and those who hold no religious viewpoint, but between those who favor and those who oppose some or all religious views." Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 813 (1978). In other words, how can government be truly neutral between religion and nonreligion if government itself is supposed to be nonreligious?

174. Professor McConnell argues that "it is not meaningful to ask whether a government accommodation to religion has a 'secular' purpose or whether it 'encourages' or 'advances' religion; all protections of religious liberty, including the Free Exercise Clause itself, 'advance' religion in a sense and are intended to do so." McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 6.

175. See *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086,

particular religious belief or practice, or it will likely fail the endorsement test.¹⁷⁶

Equal access raises the question of whether accommodating student religious groups on campus will lead to the perception that the school is promoting religion. A school can make private speech its own by promoting or sponsoring it. In one case, the court found actual endorsement in the school's implementation of facially neutral equal access policies.¹⁷⁷ The remaining cases focus on whether there will be an improper *appearance* of endorsement if concerted student religious speech is allowed in public high schools.¹⁷⁸

In *Widmar* the Court rejected the argument that the primary effect of the University's public forum would be to advance religion.¹⁷⁹ The Court thought that college-age students would understand that a university does not endorse or support every group that uses its facilities. An open forum " 'would no more commit the University . . . to religious goals' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities."¹⁸⁰ The Court further noted that, in view of the over one hundred recognized groups at the University, "[t]he provision of benefits to so broad a spectrum of groups is an

3100-01 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 687-91 (1984) (O'Connor, J., concurring).

176. *Allegheny*, 109 S. Ct. at 3101. In *Allegheny* the Court held that a creche displayed on public property violates the establishment clause while a nearby menorah did not have the prohibited effect of endorsing religion. The menorah was displayed together with a Christmas tree and a sign saluting liberty. As such, the display conveyed the message of pluralism and freedom of belief rather than government endorsement of religion.

One could draw an analogy between equal access and the creche and menorah displays. In neither instance is there direct government sponsorship. The student religious groups are initiated and led by the students themselves. They seek only permission from the school to meet on school premises. Both the creche and menorah are owned by private groups. Standing alone, the creche conveys the idea that the government favors or endorses Christianity. In contrast, the menorah, by being a part of a larger display that also contains secular symbols, conveys a message of pluralism and freedom. Similarly, when a school uniquely or exclusively favors a student religious club, it violates the establishment clause. However, when that club is part of a larger program that includes other nonreligious extracurricular student clubs, and all clubs are treated equally, the arrangement merely reflects the diverse interests of the students and does not suggest that religion is being preferred or endorsed.

177. See *Lubbock*, 669 F.2d at 1045-47.

178. See *Garnett*, 874 F.2d at 610-12; *Bender*, 741 F.2d at 551-55; *Brandon*, 635 F.2d at 978-79.

179. 454 U.S. at 272.

180. *Id.* at 274 (quoting *Chess v. Widmar*, 635 F.2d 1310, 1317 (8th Cir. 1980) (citations omitted)).

important index of secular effect.”¹⁸¹

In contrast, the Second Circuit in *Brandon* held that an equal access policy in a public high school would violate the establishment clause. The court reasoned that “[t]o an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.”¹⁸² The court was concerned that a student might see the captain of the football team, the student council president, or the leading actress in the school play attend the religious club’s meeting and be unduly influenced.¹⁸³

The endorsement issue turns on a fundamental question: Does a school endorse whatever it permits?¹⁸⁴ The answer, of course, is no. A school no more endorses a student religious group by allowing it to meet on campus than it does when it permits the Young Democrats or Young Republicans to do the same. Just because a school permits a variety of student groups to meet, it does not follow that it endorses or approves of their views. *Widmar* clearly stands for the proposition that toleration does not equal endorsement.

Does it matter then that some students might *think* a school endorses what it permits? Opponents of equal access argue that impressionable students might believe the school endorses religion because it

181. *Id.*

182. 635 F.2d at 978. Judge Kaufman’s pronouncements in *Brandon* about the impressionability of high school students are inconsistent with his earlier opinions in that regard. In *Russo v. Central School Dist. No. 1*, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973), the court held that a teacher’s refusal to lead a flag salute would not harm or unduly influence students. Judge Kaufman, writing for the court, observed that

[w]e do well to note that her pupils were not fresh out of their cradles: she had charge of a tenth grade homeroom class consisting of students ranging in ages between fourteen and sixteen years. Young men and women at this stage of development are approaching an age when they form their own judgments. They readily perceive the existence of conflicts in the world around them; indeed, unless we are to screen them from all newspapers and television, it will be only a rather isolated teenager who does not have some understanding of the political divisions that exist and have existed in this country. Nor is this knowledge something to be dreaded. As we said in *James*: “schools must play a central role in preparing their students to think and analyze and to recognize the demagogue.”

Id. at 633 (citations omitted). As Drakeman and Seawright succinctly point out: “Apparently, Judge Kaufman believes that high school students are only immature and dangerously impressionable when it comes to matters of religion.” Drakeman and Seawright, *supra* note 34, at 256 n.25. See *infra* notes 197-202 and accompanying text.

183. Professor Laycock observes that “[t]he right to proselytize is at the core of the first amendment; the right to attend religious services openly rather than in secret was heretofore unchallenged.” Laycock, *supra* note 23, at 32.

184. See Laycock, *supra* note 23, at 15-19.

allows student religious groups access to campus.¹⁸⁵ While university students can understand state neutrality in an open public forum, high school students supposedly cannot.

Courts invalidating equal access policies have refused to apply *Widmar* based on certain distinctions between colleges and high schools. They conclude that, unlike universities, high schools serve a more inculcative function, have a more restricted and structured environment, compel students to attend by law, and generally require teacher supervision over student activities. High school students are generally less intellectually and emotionally mature than college students. Thus they are considered more impressionable as well as more susceptible to peer influence.

While the above distinctions warrant greater scrutiny of student speech in high schools, they do not justify the absolute exclusion of student religious groups simply for fear of apparent endorsement.¹⁸⁶ Constitutional free speech protections should not be easily crippled by fears that some in the audience might misunderstand.¹⁸⁷ Nor does the concern that some might object to student religious groups meeting on campus condone a content-based restriction.¹⁸⁸

None of the opinions rejecting equal access policies rely on any evidence concerning the impressionability of high school students. This is inconsistent with the *Tinker* standard which prevents school officials from exercising a prior restraint on student speech merely on

185. See, e.g., Teitel, *supra* note 171, at 566-74.

186. Other commentators have analyzed these distinctions more fully. See Laycock, *supra* note 23, at 15-19; Strossen, *supra* note 20, at 143-49.

187. See *Bigelow v. Virginia*, 421 U.S. 809, 827-28 (1975) (state interest in "shielding its citizens from information" is entitled to little weight); *Roth v. United States*, 354 U.S. 476, 489 (1957) (test judging obscenity by effects "upon the most susceptible persons" unconstitutionally restricts freedoms of speech and press); *Citizens Concerned for Separation of Church and State v. City & County of Denver*, 526 F. Supp. 1310, 1315 (D. Colo. 1981) (court permits nativity scene despite evidence that "most sensitive or fastidious citizens" perceive it as a state endorsement of religion). See also *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring) (proposing that where establishment clause challenges are made to policies that lift state-imposed burdens on free exercise, courts should consider whether the policy "conveys the message of endorsement of religion" to an objective observer "acquainted with the Free Exercise clause and the values it promotes").

188. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. See also *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (school must admit homosexual to dance despite demonstrated potential for violence); *Gebert v. Hoffman*, 336 F. Supp. 694 (E.D. Pa. 1972) (court may consider conduct of speakers, not conduct of audience, in determining school disruption).

the basis of "undifferentiated fear or apprehension."¹⁸⁹ Three Supreme Court Justices who dissented in *Bender v. Williamsport Areas School District*¹⁹⁰ observed that students' free speech and free exercise rights should not be undercut by "utterly unproven, subjective impressions of some hypothetical students."¹⁹¹

Research in adolescent psychology suggests that by the age of fifteen most adolescents are capable of independent thinking and critical inquiry on a fairly sophisticated level.¹⁹² High school students are more likely to question or resist authority rather than to be unwittingly swayed by it.

The Senate Judiciary Committee squarely faced the establishment clause problem when considering the Equal Access Act and concluded that permitting student religious groups to meet on high school campuses under the same restrictions as other student groups would not put schools in the position of impermissibly advancing religion.¹⁹³ The committee specifically found that "students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other."¹⁹⁴

The assumption that high school students are too immature to understand the difference between neutral accommodation and partisan endorsement is also at odds with other federal decisions suggesting a great degree of adolescent maturity about nonreligious issues. For instance, the Supreme Court has upheld the rights of minors to receive contraceptives¹⁹⁵ and to seek abortions without parental consent or notification.¹⁹⁶

The Second Circuit provides a particularly striking example of this contradiction. In *Russo v. Central School District No. 1*¹⁹⁷ the Second Circuit ordered reinstatement of a high school teacher who was dismissed for refusing to lead a flag salute because her students

189. 393 U.S. at 508.

190. 106 S. Ct. 1326 (1986). The Supreme Court dismissed the *Bender* appeal for lack of jurisdiction, effectively reinstating the district court ruling. See *infra* notes 275-84 and accompanying text.

191. *Id.* at 1337 (Burger, C.J., dissenting).

192. For a fuller discussion, see Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499 (1983).

193. S. REP. NO. 357, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2348, 2379-82. The Eighth Circuit relied on this fact-finding in *Mergens*.

194. *Id.* at 2381.

195. *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977).

196. *Bellotti v. Baird*, 443 U.S. 622 (1979).

197. 469 F.2d 623 (2d Cir. 1972).

were mature enough to distinguish between the teacher's views and school policy. In another Second Circuit opinion, *James v. Board of Education*,¹⁹⁸ the court held that a teacher could not be dismissed for wearing a black armband protesting the Vietnam War because "[i]t does not appear . . . that any student believed the armband to be anything more than a benign symbolic expression of the teacher's personal views."¹⁹⁹ The teacher was a Quaker and wore the armband as a form of religious expression.²⁰⁰ Again, the opinion relied on the students' ability to understand the difference between the personal and official views.

These two decisions are irreconcilable with the Second Circuit's decision in *Brandon*.²⁰¹ If students are mature enough to differentiate between a teacher's personal religious views and those of the state, why are they unable to distinguish the state's accommodation of student-initiated religious expression from the state's endorsement of religion? Oddly, the same judge wrote the *Russo*, *James*, and *Brandon* opinions. He stressed in *James* that "a teacher may have a far more pervasive influence over a student than would one student over another."²⁰²

Finally, if students might think a school *endorses* religion by equal treatment of student religious groups, then it would logically follow that students might also think a school *disapproves* of religion by its unequal treatment of student religious groups.²⁰³ The establishment clause prohibits communicating a message of either disapproval or endorsement of religion.²⁰⁴ Unfortunately, courts have not been as sensitive to the former as to the latter. Additionally, students are already expected to understand that forbidding state-mandated, state-led Bible reading and prayer in public schools does not manifest gov-

198. 461 F.2d 566 (2d Cir. 1972).

199. *Id.* at 574.

200. *Id.* at 568.

201. 635 F.2d at 971.

202. 461 F.2d at 573.

203. See Strossen, *supra* note 20, at 146; see also *Bender*, 741 F.2d at 565 (Adams, J., dissenting). Actually, when the school permits other extracurricular student groups to meet, there is a greater risk that a student might perceive state hostility toward religion from the *exclusion* of a student religious group than the student might think the state endorses religion by the *inclusion* of the group. In the first instance, the state is treating the religious groups differently from all others; in the last instance, the state is treating all groups the same.

204. See *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) ("a government practice [must] not have the effect of communicating a message of government endorsement or disapproval of religion").

ernment hostility toward religion.²⁰⁵ Why then can they not be expected to understand that permitting equal access does not amount to promotion of religion?

Any risk that students might misperceive a school's equal access policy as an endorsement of religion can be countered through explanations or disclaimers.²⁰⁶ As Professor Laycock explains:

The proposition that government cannot censor speech, and therefore that it does not endorse everything it fails to censor, is not complicated. High school students can understand the proposition if it is explained to them. That is all they need to understand to avoid a mistaken inference of endorsement.²⁰⁷

Courts should recognize that high school students can understand when an activity is state sponsored and when it is not. Reasonable students are not likely to mistake toleration for endorsement, especially when it is clearly explained to them.

Widmar determined that an equal access policy at the university level did not confer any imprimatur of state approval on religion because young adults could understand that the policy was neutral toward religion. The Eighth Circuit in *Mergens* upheld the Equal Access Act's extension of the *Widmar* principle to public secondary schools. The court accepted the congressional finding that high school students, like college students, could recognize the difference between accommodation and endorsement.²⁰⁸

Decisions to the contrary rejecting equal access in public high schools rest primarily on an unsupported assumption about adolescent immaturity. Once this assumption falls, all that remains is the *Widmar* rule that, in the context of a limited open forum, whatever benefits student religious groups receive from access to school facilities are merely "incidental" and do not have the primary effect of impermissibly advancing religion.²⁰⁹

205. See *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engle v. Vitale*, 370 U.S. 421 (1962).

206. See Strossen, *supra* note 20, at 144-45 n.121.

207. Laycock, *supra* note 23, at 15.

208. 867 F.2d 1076, 1080 (8th Cir. 1989).

209. Justice O'Connor, concurring in *Lynch*, suggested that the establishment clause is infringed when the government "mak[es] adherence to a religion relevant in any way to a person's standing in the political community." 465 U.S. at 687 (O'Connor, J., concurring). "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688. See also *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3118 (1989) (O'Connor, J., concurring);

3. *Excessive Entanglement*

The final part of the *Lemon* test forbids excessive entanglement between government and religion.²¹⁰ Generally, excessive entanglement occurs when a "comprehensive, discriminating, and continuing state surveillance"²¹¹ of a nonsecular activity is required to ensure protection of first amendment freedoms. Additionally, the entanglement inquiry presents "essentially a procedural problem"²¹² in determining to what degree the policy fosters an ongoing relationship between church and state.

The courts in *Brandon*, *Lubbock*, *Bender*, and *Garnett* held that impermissible entanglement results from faculty supervision and monitoring of student religious groups on campus.²¹³ Such oversight would apparently be necessary to maintain discipline as well as to guarantee that participation in such meetings remains voluntary. However, official supervision by a school monitor would put "the school in a position of governance over religious activity."²¹⁴

The Supreme Court reached exactly the opposite conclusion in *Widmar*. Greater entanglement would result from the exclusion of student religious groups since the school would have to determine what words and activities constitute religious speech and then continually monitor group meetings to ensure such speech did not occur.²¹⁵ However, officials at universities and high schools begin with different assumptions about monitoring student meetings. At the university, it is generally presumed that no monitors are needed. On the other hand, at the high school, monitors are usually necessary to oversee student gatherings because of a greater need to maintain discipline and order. Yet monitors present for this purpose would only "govern" student behavior in a minimal sense, wholly unrelated to the religious character of the group.

Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring). Justice Blackmun, writing for the Court in *Allegheny*, also adopted this view. 109 S. Ct. at 3102.

If equal access is denied, who then is the outsider and who is the insider? The obvious answer is that nonreligious student clubs will enjoy government benefits while student religious groups will be excluded. If equal access is allowed, who will be the outsider and who will be the insider? The answer is nobody. A properly implemented equal access policy benefits *all* groups, religious and nonreligious alike. If all are treated equally, there will be no outsiders or insiders.

210. *Lemon*, 403 U.S. at 612-13.

211. *Id.* at 619.

212. *Roemer v. Board of Public Works*, 426 U.S. 736, 755 (1976) (plurality opinion).

213. See *Garnett*, 874 F.2d at 612; *Bender*, 741 F.2d at 555-57; *Lubbock*, 669 F.2d at 1047; *Brandon*, 635 F.2d at 979.

214. *Bender*, 741 F.2d at 556.

215. 454 U.S. at 272 n.11.

The presence of a monitor at student religious meetings raises both endorsement and entanglement concerns. Some fear that students might infer from the monitor's presence that the school supports religion.²¹⁶ Professor Laycock points out the fallacy in this fear:

When the police are sent to preserve order at a demonstration, no one infers that the city endorses the goals of the demonstrators. It is no more reasonable to infer that a monitor sent to protect furnishings and to suppress spitballs endorses the goals of the groups he supervises.²¹⁷

Again, any risk of misunderstanding could be countered by explanations or disclaimers that the monitor is present in a nonparticipatory capacity and not as a "faculty sponsor."²¹⁸

Religious meetings under the Equal Access Act must be voluntary and student-initiated; neither the school nor its employees may sponsor the meetings.²¹⁹ The Act permits employees or agents of the school to be present at such meetings only as nonparticipants.²²⁰ These provisions should be sufficient to avoid any endorsement or entanglement problems.

If the school has created a forum for student groups, permitting all forms of speech avoids the potential entanglement problems created by content-based interference with religious speech. The procedural machinery required to enforce such subject-matter discrimination would be complex and "strikes more at the heart of entanglement concerns than the mere physical contacts produced by passive monitoring."²²¹

V. POLICIES FAVORING EQUAL ACCESS IN PUBLIC HIGH SCHOOLS

Justice Brennan, dissenting from the Court's rejection of the free exercise claim in *Braunfeld v. Brown*,²²² recognized the importance of

216. See, e.g., *Bender*, 741 F.2d at 552.

217. Laycock, *supra* note 23, at 29.

218. Professor Laycock observes that

[i]t is not difficult for the monitor to explain that religion is committed to private choice in our society, that the school cannot take a position on religious questions or participate in the students' religious activities, and that consequently the monitor is not a sponsor and is present only to keep order.

Id. at 30. Not having a faculty sponsor is not exactly neutral, but this singling out of religious groups is not particularly troubling.

219. 20 U.S.C. § 4071(c)(1) and (2).

220. 20 U.S.C. § 4071(c)(3).

221. Crewdson, *supra* note 36, at 180.

222. 366 U.S. 599 (1961).

putting the first amendment in its proper perspective:

I would approach this case differently, from the point of view of the individuals whose liberty is—concededly—curtailed by these enactments. For the values of the First Amendment, as embodied in the Fourteenth, look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals.²²³

Equal access promotes liberty and equality for those individuals who feel the discriminatory hand of the state. Permitting religious students to voluntarily assemble on school premises removes an unfair burden on those students in the practice of their religion. Equal access also promotes collective values essential to a liberal democracy. It reflects a commitment to pluralism, tolerance, and religious diversity.

A properly drafted and implemented equal access policy²²⁴ is not only neutral in purpose and effect, but embodies a profound allegiance to religious freedom—a freedom that should be no less evident in our nation's public schools than anywhere else.

That they [school boards] are educating the young for citizenship is reason for scrupulous protection of Constitutional Freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.²²⁵

A. Pluralism and Tolerance

We live in a society that is religiously, politically, and socially diverse. The Supreme Court has been reluctant to strike down government policies that recognize and foster this pluralism, even when the effects of those policies benefit religion. For example, in *Walz v. Tax Commission*²²⁶ the challenged tax statute exempted a broad spectrum of social, political, and religious organizations that fostered the "moral or mental improvement" of the community.²²⁷ Besides religious institutions, the exemption applied to hospitals, libraries, playgrounds, and scientific, professional, historical, and patriotic groups.

223. *Id.* at 610 (Brennan, J., concurring and dissenting).

224. Such a policy is acceptable only if it does not put pressure on unwilling students to participate and if it is genuinely neutral toward all student beliefs, including atheism and agnosticism.

225. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

226. 397 U.S. 664 (1970).

227. *Id.* at 672.

The Court stressed that the exemption did not single out a particular church or religion in general, but merely reflected a state policy that considered these groups to be "beneficial and stabilizing" influences in the life of the community.²²⁸ Justice Brennan, in his concurrence, acknowledged the contribution that religion makes to our society:

[G]overnment grants [tax] exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.²²⁹

In *Mueller v. Allen*²³⁰ the Court upheld a Minnesota law permitting parents to deduct educational expenses incurred in sending their children to elementary or secondary schools. Although the statute applied to all parents, those with children in private, mostly religious schools took the largest deductions. The Court concluded that the statute treated religion and nonreligion equally: "[a]s *Widmar* and our other decisions indicate, a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."²³¹ Even Justice Marshall, in his dissent, conceded that the tax deduction "promot[ed] pluralism and diversity among the State's public and nonpublic schools."²³²

The Court in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*²³³ held that a creche displayed on public property had the prohibited effect of endorsing religion while a nearby menorah did not. What saved the menorah was its being part of a display that included a Christmas tree and a sign saluting liberty. As such, "the display of the menorah [was] not an endorsement of religious faith but simply a recognition of cultural diversity."²³⁴

Walz, *Mueller*, and *Allegheny*, along with *Widmar*, all support

228. *Id.* at 673. Justice Harlan, in a separate concurrence, concluded that because "the breadth of exemption includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including . . . groups whose avowed tenets may be antitheological, atheistic, or agnostic, [there is] no lack of neutrality in extending the benefit of the exemption to organized religious groups." *Id.* at 697 (Harlan, J., concurring) (footnote omitted).

229. *Id.* at 689 (Brennan, J., concurring).

230. 463 U.S. 388 (1983).

231. *Id.* at 398-99.

232. *Id.* at 405.

233. 109 S. Ct. 3086 (1989).

234. *Id.* at 3115.

the idea that the state may provide certain benefits to religion without the danger of endorsement if those benefits are part of a larger strategy to assist a broad spectrum of diverse groups. An equal access policy does just that. It recognizes the diversity of student interests, both religious and nonreligious, without placing an official imprimatur on any of those interests.

Moreover, there is a deeper level at which pluralism must function. Diverse *interests* often reflect diverse *ideologies*. If the American democratic experiment is to endure, we must embrace a *principled* pluralism in which everyone's truth claims are brought into the arena of public discourse.²³⁵ This includes both religious and nonreligious convictions.²³⁶

Religion should be a welcome ingredient in public life. It is a primary source of public morality and justice outside of government. Religious values reinforce civic virtue.²³⁷ It is in the state's interest to

235. By principled pluralism I do not mean *indifference* to the normative claims brought into the public square by those with conscientious convictions, be they religious or not. Professor Bloom describes this thoughtless indifference:

[Openness] is the virtue, the only virtue, which all primary education for more than fifty years has dedicated itself to inculcating. Openness—and the relativism that makes it the only plausible stance in the face of various claims to truth and various ways of life and kinds of human beings—is the great insight of our times. The true believer is the real danger. The study of history and of culture teaches that all the world was made in the past; men always thought they were right, and that led to wars, persecutions, slavery, xenophobia, racism, and chauvinism. The point is not to correct the mistakes and really be right; rather it is not to think you are right at all.

A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 26 (1987).

236. John Courtney Murray points out that the ancient tensions between religious traditions competing for the loyalties of the American public have been compounded by the emergence of the *secularist*

[who] has always fought his battles under a banner on which is emblazoned his special device, "The Integrity of the Political Order." In the name of this thundering principle he would banish from the political order (and from education as an affair of the City) all the "divisive forces" of religion. At least in America he has traditionally had no quarrel with religion as a "purely private matter," as a sort of essence or idea or ambient aura that may help to warm the hidden heart of solitary man. He may even concede a place to religion-in-general, whatever that is. What alarms him is religion as a thing, visible, corporate, organized, a community of thought that presumes to sit superior to, and in judgement on, "the community of democratic thought," and that is furnished somehow with the armature of power to make its thought and judgment publicly prevail. Under this threat he marshalls his military vocabulary and speaks in terms of aggression, encroachment, maneuvers, strategy, tactics. He rallies to defense of the City; he sets about the strengthening of the wall of the City from its Enemy.

J.C. MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 32* (1964).

237. In President George Washington's Farewell Address on September 17, 1796, he warned:

permit diverse religious beliefs and associations to flourish in the "marketplace of ideas." The question arises, however, as to what extent the state should permit religious beliefs and associations to flourish in public schools.

The Supreme Court has described the role and purpose of public education in America as "'prepar[ing] pupils for citizenship in the Republic It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and in the nation.'" ²³⁸ While the Court has repeatedly acknowledged this inculcative function, ²³⁹ public schools also serve to facilitate students' independent thinking, inquiry, and discussion. ²⁴⁰ Both the Supreme Court ²⁴¹ and lower federal courts ²⁴² have expressly recognized the role of the public high school as a "marketplace of ideas."

However, due in part to the ambiguity of the Supreme Court's position on religion and public education and in part to popular misconceptions about the establishment clause, schools have systemati-

Of all dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens. . . . And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on the minds of peculiar structure, *reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.*

A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 212 (J. Richardson ed. 1897) (emphasis added), *quoted in* D. DRIESBACH, *REAL THREAT AND MERE SHADOW* 255-56 n.11 (1987). For a discussion of how religion benefits the liberal state, see McConnell, *supra* note 170, at 14-24.

238. *Bethel School Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

239. *See, e.g., Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979) (goal of public education is "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system"); *see also Board of Educ. v. Pico*, 457 U.S. 853, 909 (1982) (Rehnquist, J., dissenting) ("When . . . [government] acts as an educator, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge . . .").

240. *See, e.g., Board of Educ. v. Pico*, 457 U.S. 853, 868-69 (1982) (plurality opinion).

241. *See, e.g., Tinker*, 393 U.S. at 512 ("[t]he classroom is peculiarly the 'marketplace of ideas'") (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

242. *See, e.g., Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 807 (2d Cir. 1971) ("A public school is undoubtedly a 'marketplace of ideas.' Early involvement in social comment and debate is a good method for future generations of adults to learn intelligent involvement."). *Accord Russo v. Central School Dist. No. 1*, 469 F.2d 623 (2d Cir. 1972); *James v. Board of Educ.*, 461 F.2d 566 (2d Cir. 1972); *Cary v. Board of Educ. of Adams-Arapahoe School Dist.*, 427 F. Supp. 945 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979).

cally avoided references to religious matters.²⁴³ Neuhaus observes:

The frequent proposal that our society should find its "shared values" or public philosophy in the government school room is, I believe, illusory. This is not because, as often claimed, that the classroom is so pluralistic. That classroom, regardless of the cultural and religious diversity of the students in it, is more often not pluralistic but monistic. It is marked by the monism of indifference to the differences that make the most difference in people's lives. Genuine pluralism is the sustained and disciplined engagement of the differences that make the most difference. For structural reasons, some so mundane as the marketing interests of textbook publishers, such differences, especially religious differences, are denied or suppressed in the government classroom. They are all too often excluded altogether because of the inversion of the religion clause that invokes "no establishment" to assure that wherever government reaches religion must retreat.²⁴⁴

When religion is excluded from the public school setting, schools often become the "marketplace" for one predominant ideology: secularism. Let us be very clear about this—secularism and pluralism are not the same. Pluralism is a *sociological* phenomena in which both religious and nonreligious viewpoints coexist; secularism is a *ideological* system that is often at odds with religion.²⁴⁵

To promote pluralism rather than secularism, public schools should strive to accommodate the diversity of views among students, including those with sincerely held religious beliefs. I do not mean that the government should sponsor religious exercises in public schools. However, there are at least two ways schools could respect the religious diversity of their students. First, schools can teach *about*

243. Charles E. Klein, who spent sixteen years working with young people, testified before a senate subcommittee about what pressures cause school authorities to overreact to religion:

Here is what I see happening in several situations I have recently been exposed to. A small but powerful interest group . . . puts pressure on a local school board or district school office, threatening a lawsuit if that school district does not eliminate all religious expression among the students. The pressure group often provides its own attorneys as the interpreters of religious freedoms of the students. School boards, being on tight budgets and wanting to avoid controversy and costly legal battles, most often do what is expedient and draft policies that deny freedom of speech and association on the basis of religion.

S. REP. NO. 357, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2348, 2360-61 (quoting *Equal Access: A First Amendment Question: Hearing Before the Senate Committee on the Judiciary*, 98th Cong., 2d Sess., at 146).

244. Neuhaus, *supra* note 152, at 85.

245. For a discussion of secularism and religion, see R. SPROUL, J. GERSTNER, & A. LINDSLEY, *CLASSICAL APOLOGETICS* 3-12 (1984).

religion.²⁴⁶ This will require rewriting many textbooks which have ignored religion and its impact on American society.²⁴⁷ Second, when a school permits extracurricular student groups to meet on school premises before or after school, it can provide equal access to student religious groups. Such voluntary, student-led meetings would provide a measured presence of concerted religious discussion in the public school "marketplace" without overt government sponsorship of religious practices and without imposing religion on anyone.

Apart from the "marketplace" function, public high schools should permit equal access in their "inculcative" role as well. In a pluralistic society, part of preparing students to be good citizens involves teaching them the value of *tolerance*. The Court has recognized in the context of public secondary education that the "fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include *tolerance of divergent political and religious views*, even when the views expressed may be unpopular."²⁴⁸

When a school permits equal access for student religious groups, it sets a powerful example of tolerance and respect for the freedom of others to choose and practice their own religion without governmental interference. Students will learn that the state respects equally those who choose a religion and those who do not. However, when schools permit other types of student groups to meet and yet banish student religious groups simply because they are *religious*, students may perceive such action as hostility toward religion. If students see the state singling out religion for such discriminatory treatment, the state may be sowing seeds of religious intolerance in future generations.²⁴⁹

246. *Abington School Dist. v. Schempp*, 374 U.S. at 225.

247. Professor Paul Vitz of New York University, in a study done for the Department of Education, has shown how textbooks distort American history by omitting several important facts relating to religion, particularly the Christian religion, in American culture. He studied 60 representative social study textbooks and found that books for grades 1 through 4 which introduced children to American history did not contain a single word about the Christian religion. Fifth-grade history texts made it appear that religious life ceased to exist in America about a hundred years ago. The books depicted fundamentalists as people who followed an ancient agrarian way of life and described the Pilgrims as people who took long trips. See P. VITZ, *RELIGION AND TRADITIONAL VALUES IN PUBLIC SCHOOL TEXTBOOKS: AN EMPIRICAL STUDY* (1985).

248. *Bethel School Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (emphasis added).

249. In its report on equal access, the Senate Committee on the Judiciary found that: The priceless rights of freedom of speech and free exercise of religion are being denied by our Nation's schools, the very institutions that ought to teach their importance to the American way of life. The Committee fears not only that school

Opponents of equal access argue that it will expose students to religious views contrary to their own, thus aggravating the potential for conflict between students of different religions.²⁵⁰ However, as Professor Laycock stresses:

The school must address such frictions by teaching tolerance, not by stamping out religious expression. Unless schools are training students to live in a system of religious apartheid, contact between students of different faiths is a good thing. Students in a pluralistic society must learn to deal constructively with religious differences. To the extent they do, both dominant and minority religions will benefit.²⁵¹

Public education will contribute to the development of good citizens only when it is structured to facilitate, rather than suppress, the pluralistic nature of our society. While the state itself cannot endorse religion, it can create an environment where religious choice, and the religious expression necessary to assist that choice, can flourish. As Professor Baer points out, "[a] genuine pluralism is not a matter of autonomous, isolated selves . . . making "free" choices. It has to do rather with maintaining conditions that permit the long-term survival and flourishing of diverse religious, ethnic, and ideological *traditions* and *communities* of people."²⁵² To this end, equal access policies help preserve religious pluralism in our society.

B. Religious Liberty

Religious liberty declares that within every person there is an inviolable sanctuary of conscience where the coercive power of the state may not tread. This is why free and unfettered religion is a dangerous threat to tyrants. Freedom of religion is indispensable because it posits an ultimate limit on the power of the state.²⁵³ The eminent

authorities will continue to suppress speech within schools, but that, if schools continue to teach students that religious speech is taboo, our country will reap a harvest of religious intolerance. Individuals raised on the notion that public religious speech is forbidden in schools will learn to apply that teaching and prohibit it in other areas. S. REP. NO. 357, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2348, 2358.

250. See, e.g., Teitel, *supra* note 171, at 577-78.

251. Laycock, *supra* note 23, at 32-33.

252. Baer, *Public Education as "Brutal Censorship"*, THIS WORLD: A JOURNAL OF RELIGION AND PUBLIC LIFE, 110, 112 (No. 22, Summer 1988).

253. In his *Memorial and Remonstrance Against Religious Assessments*, James Madison argued:

It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be consid-

American jurist James Kent warned that "[c]ivil and religious liberty go hand in hand, and the suppression of either one of them, for any length of time, will terminate the existence of the other."²⁵⁴

While almost everyone agrees that religious liberty must be preserved, there is a variety of opinion on how to go about it. This is especially true when it comes to the relationship between religion and public schools. Because of the direct and extensive state involvement in public education and the impressionability of children, courts have been particularly wary of any appearance of state support for religion in schools. Yet this pervasive governmental presence is precisely what has caused some to question whether it is possible for the state to remain truly neutral toward religion in the public school setting. For example, Professor McConnell argues that

when the government so dominates and controls a particular area that private activity and initiative are crowded out, a course of true neutrality is not available. If there are to be religious elements, they must deliberately be introduced by the government; if the government does not take affirmative steps to make room for religious elements, the environment will be wholly secular. Secularism is not neutrality.²⁵⁵

A pervasive government presence exists in other settings such as prisons and the military.²⁵⁶ In these situations, because of the absence of alternatives, if the government does not make room for certain religious practices, it might seriously interfere with religious freedom.

Public schools are not exactly like prisons or the military.²⁵⁷ However, compulsory attendance laws combined with a six to eight hour school day make the public school a dominant force in the lives of its students. The state exercises a significant and sustained influence over students through both curricular and extracurricular endeavors. Moreover, during the time students are at school, the state

ered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

Madison, *Memorial and Remonstrance Against Religious Assessments*, in *THE SUPREME COURT ON CHURCH AND STATE* 18-19 (R. Alley ed. 1988).

254. J. KENT, *COMMENTARIES ON AMERICAN LAW*, I, 633.

255. McConnell, *supra* note 26, at 161.

256. In prisons and the military the government may provide, for example, chaplains, Bibles or other religious literature, and facilities for worship.

257. See *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (Brennan, J., concurring) ("The situation of the school child is therefore plainly unlike that of the isolated soldier or prisoner.").

effectively forecloses access to the regular religious facilities of the community.²⁵⁸

These factors give the state far greater influence in the public school setting than in society at large. For example, in society at large, one does not have to seek permission from the state to organize a religious group. The state properly declines to intervene in such decisions. However, in the public school, the state does not have the option of nonintervention. It must *act* by either granting or refusing permission to students to organize and meet for religious purposes. In this context, religious elements will exist only if the state deliberately makes room for them.

Perhaps there would be less need for policies such as equal access were it not for the fact that "public schools in recent years have chosen to pretend that religion does not exist, at least in any serious or relevant way."²⁵⁹ While most public schools do not expressly repudiate belief in God, they often act in a way just as destructive to religious faith: they ignore Him. It is wrong to think you teach nothing about a subject when you omit it: on the contrary, you teach that it is irrelevant or insignificant.

Systematic avoidance of reference to religion in public schools may have a serious negative impact on children, especially religious children. The school environment, instead of being pluralistic, becomes wholly secular. This secularization by omission affects students in at least two ways. First, they may perceive that the government is hostile toward religion. Second, in this pervasively secular environment, they will feel a much greater need to maintain their religious identity.

Both the establishment and free exercise clauses forbid the state from displaying hostility toward religion.²⁶⁰ Whether intentional or not, this is often the perception that follows state efforts to avoid or remove references to religious matters in public schools. The perception is heightened when the state takes the additional step of restricting individual rights of expression and association in the school setting. The Senate Committee on the Judiciary concluded that "stu-

258. The exception to this would be released time programs for religious instruction. See *Zorach v. Clauson*, 343 U.S. 306 (1952). Such programs, however, are rare.

259. *McConnell*, *supra* note 26, at 162.

260. See *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) ("The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life."); *McCollum v. Board of Educ.*, 333 U.S. 203, 211-12 (1948) ("A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.").

dents reasonably perceive the denial of access for religious speech as State hostility toward religion.”²⁶¹ The Committee based its finding largely upon testimony from students such as Bonnie Bailey who described the general perception at her high school in Lubbock, Texas when students were told they could not meet for religious discussions:

It seems to us that the government is not neutral but that it is against religion. Many students look up to and respect the school board members, teachers, principals, and judges. But on this important issue, the students feel that they have let us down. We look up to these leaders, and we see in them an antagonism toward religious speech.²⁶²

Schools devoid of religious elements create a secular environment that can threaten the religious identity of students who take their religion seriously. As Professor McConnell points out:

The religious sensibility of these students easily could [be] overwhelmed by the secular environment of the [high school]. The ideals of popularity, worldly success, and materialism—not to mention the realities of sex, drugs, and violence—are surely more prominent features of modern high school life than faith and good works.²⁶³

He further argues that “[i]f the students are able to bring their religion with them into the schools, the schools’ pervasive secularism can be tempered without government initiative or involvement.”²⁶⁴ This is precisely why equal access is of immense value to students who feel the need to maintain their religious identity by associating with other like-minded students for mutual discussion and encouragement.

Opponents of equal access maintain that prohibiting student religious meetings on school premises does not interfere with the students’ religious freedom because alternative facilities are available at other times for religious discussion and worship.²⁶⁵ Courts have taken this approach as well. For example, in *Brandon* the court decided that the school’s refusal of equal access did not interfere with

261. S. REP. NO. 357, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2348, 2382. See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1175 (1988) (“A message of exclusion . . . is conveyed where the state refuses to let religious groups use facilities that are open to other groups.”).

262. S. REP. NO. 357, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2366 (quoting *Equal Access: A First Amendment Question: Hearing Before the Senate Committee on the Judiciary*, 98th Cong., 2d Sess., at 41-42).

263. McConnell, *supra* note 26, at 150.

264. *Id.* at 163.

265. See, e.g., Teitel, *supra* note 171, at 590-94 (“[t]he presence of alternative facilities to the schools for religious activities is dispositive”).

the students' fundamental religious beliefs since they could hold prayer meetings off campus.²⁶⁶ In *Lubbock* the school district argued that its equal access policy was necessary to avoid violating the free exercise clause. The court rejected this claim, noting that "[a] school is obligated to provide religious facilities only if its failure to do so would effectively foreclose a person's practice of religion."²⁶⁷ The court in *Bender* concluded that forcing the students to meet off campus might be an "inconvenience," but it would not significantly impair their expressive activities.²⁶⁸

My own experience for over ten years in working with student religious groups persuades me that there is a significant difference between meeting on and off school premises. Students who are serious about religion usually do attend religious meetings away from school with other students during the week. Why then do they want to meet in a more restrictive, less comfortable school environment if their aims can be essentially satisfied off campus? Lisa Bender summed it up this way:

During the third week of the fall semester of my senior year, it became apparent to several of my friends and me that a general good morale and spiritual uplift was definitely lacking in our school day. As Christians we recognize the need to fellowship with other Christians in the school on a regular basis. It was important that this fellowship occurred during the week while we were in school that we might be better able to encourage one another and also make our Christianity more a part of our everyday lives.²⁶⁹

For these students and others, the high school plays a comprehensive role in their lives. Beyond the usual six to eight hours of classes, students participate in a wide variety of extracurricular clubs and activities before and after school. High schools sponsor social events, offer counseling on career, family, and sexual matters, and even provide health services. Classes are no longer limited to the "three Rs," but address the Big Questions—who we are and how we

266. 635 F.2d at 977-78. The court pointed out that "students . . . are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place." *Id.* at 977.

267. 669 F.2d at 1048.

268. 741 F.2d at 560 ("[a]lthough it cannot be said that the loss of the high school as a meeting place would not impose an inconvenience upon the students . . . we are not persuaded that it would impair the practical ability of such a group to conduct its activities in a meaningful way").

269. *Religious Speech Protection Act: Hearings Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, 98th Cong., 2d Sess. 46 (1984)* (statement of Lisa Bender).

ought to live. School is where the students' friends are; it is the focal point for much of their "culture"; it is their community. The effect of this is not just education but socialization.

Many diverse ethnic, ideological, and religious affinities often exist in this setting. For these groups to maintain their identity, association around shared values and interests is a necessity. Denying equal access thus imposes far more than a mere inconvenience. It works a hardship on those students who, through coming together for mutual encouragement, want to maintain their religious identity in a secular environment that is becoming increasingly more indifferent, and at times even hostile, to their religious beliefs. They should be afforded the same opportunity to organize and meet as those who wish to associate for ethnic, ideological, or other commonly accepted reasons.

Perhaps courts should be more cognizant of the students' free exercise claims.²⁷⁰ The existence of alternative meeting places should not be dispositive in equal access cases.²⁷¹ There are troubling implications for religious liberty in requiring that government action effectively foreclose the practice of one's religion in every context before a free exercise claim may succeed. Such a standard "would allow rampant government hostility to religion so long as it fell short of a ban on religious practice."²⁷²

The proper inquiry should be to what degree government action burdens a religious practice in the particular sphere of contact. Denial of equal access absolutely forecloses any students meeting together on school premises for religious purposes. By rejecting the communal relevance of their religious beliefs,²⁷³ such action essen-

270. Modern free exercise analysis applies a two-part balancing test. First, the government regulation must substantially burden a religious practice. Second, the burden of the regulation will be balanced against the importance of the state interest in the regulation. *Jimmy Swaggart Ministries v. Board of Equalization*, 58 U.S.L.W. 4135, 4136 (U.S. Jan. 17, 1990); *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2148 (1989). See also *Thomas v. Review Bd.*, 459 U.S. 707, 717-19 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972). For a criticism of the Court's concept of "burden," see Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

Courts which have addressed the question have generally found that the hardship experienced by the students does not rise to a free exercise violation. See, e.g., *Brandon*, 635 F.2d at 977 ("the school's rule does not place an absolute ban on communal prayer, nor are sanctions faced or benefits forfeited").

271. Denying equal access obviously does not foreclose student religious meetings in an *absolute* sense because the students can meet together at other times and in other places. But it does foreclose such meetings during the substantial time each day the students are at school. Furthermore, it is incorrect to assume that alternative meetings will provide the same benefits to the students as meeting on school premises. See *supra* text accompanying note 269.

272. Laycock, *supra* note 23, at 11 n.56.

273. Teitel asserts that "[o]rdinarily, communal prayer is not central to a student's reli-

tially reduces their religion to a purely private concern whenever it touches public education. In view of the comprehensive role the high school plays in the lives of these students, and the seriousness of their reasons for wanting to meet together, this prohibition imposes a significant burden on the practice of their religion.

Religious liberty is best served in this context by accommodating the religious needs of these students without compelling indifferent or unwilling students to participate. Equal access need not be coercive. Attendance at such meetings will require an affirmative choice by the student. If the meetings are conducted before or after school, nonparticipants might not even be on school premises. If meetings are held during an activity period as part of a larger forum for student groups, the presence of alternative choices will minimize possible coercive effects, especially since the state has not encouraged the religious meeting over the other alternatives. In either instance, nonparticipants will not have to withdraw, thereby calling attention to their nonconformity. While there is the potential for some students to encourage other students in the halls and on school grounds to attend such meetings, this form of speech is protected under *Tinker*.²⁷⁴ This could occur—and would be permissible—even if the meetings were held off campus.

VI. RESOLVING THE EQUAL ACCESS DILEMMA

The Supreme Court has never addressed the merits of the equal access controversy in public high schools. However, in *Bender v. Williamsport Area School District*,²⁷⁵ the Court vacated the Third Circuit's ruling, effectively reinstating the district court's decision that permitted students to meet on school premises for prayer, Bible study,

gious beliefs, a requirement necessary to achieve free exercise right status." Teitel, *supra* note 171, at 590. Does this mean that the state could also forbid group prayer *off campus* without violating the free exercise clause, since communal prayer is supposedly not central to the student's beliefs? For a criticism of the "centrality" test, see Lupu, *supra* note 270, at 958-60.

We should not be so quick to dismiss these religious practices as insignificant. For example, group prayer was a common practice among early Christians. See *Acts* 1:13-14; 4:23-31; 12:5, 12; 13:3; 16:25; 20:36; 21:5. See also *Brandon*, 635 F.2d at 977 ("We do not challenge the students' claim that group prayer is essential to their religious beliefs."). The Bible also commands meeting together for mutual encouragement. See *Hebrews* 10:24-25 ("[l]et us not give up meeting together, as some are in the habit of doing, but let us encourage one another") and 3:13 ("encourage one another daily . . . so that none of you may be hardened by sin's deceitfulness").

274. See *supra* notes 43-48 and accompanying text.

275. 106 S. Ct. 1326 (1986). For a discussion of the Third Circuit's ruling, see *supra* notes 96-111 and accompanying text.

and religious discussion during an activity period. The majority²⁷⁶ dismissed the appeal for lack of jurisdiction.²⁷⁷ Four dissenting justices²⁷⁸ discussed the merits of the case in two opinions. They concluded that the Third Circuit's decision should be overturned on substantive grounds.

Both dissenting opinions agreed that *Widmar* clearly controlled the outcome in *Bender*. Justice Powell, the author of the *Widmar* opinion, concluded that the only "arguable distinction" between *Widmar* and *Bender* was the age difference between high school and college students. However, "in this age of massive media information," he did not think this "justifi[ed] departing from *Widmar*."²⁷⁹

Chief Justice Burger, joined by Justices White and Rehnquist, rejected the Third Circuit's conclusion that "because an individual's discussion of religious beliefs may be confused by others as being that of the State, both must be viewed as the same."²⁸⁰ He stressed the crucial distinction between *state* establishment of religion and *individual* discussion of religious belief; the former is prohibited, while the latter is protected under the free speech and free exercise clauses. He reasoned that "utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform *individual* expression of religious belief into *state* advancement of religion."²⁸¹

Consistent with *Tinker*, Chief Justice Burger would have required some objective evidence that students think the school was endorsing religion by permitting equal access. This would effectively "replace the current presumption—that any concerted student religious expression in public schools causes Establishment Clause problems—with the presumption that any such expression is protected by the Free Speech Clause."²⁸²

This analysis did not require a careful balancing of competing first amendment interests. Three dissenters reaffirmed that the establishment clause mandates government neutrality—not hostility nor even callous indifference—toward religion. Permitting equal access

276. Justices Stevens, Marshall, Brennan, Blackmun, and O'Connor voted with the majority.

277. The Third Circuit's ruling was set aside on the grounds that the lone school board member who appealed did not have standing. *Id.* at 1330.

278. The four dissenters were Chief Justice Burger, and Justices White, Powell, and Rehnquist.

279. 106 S. Ct. at 1339 (Powell, J., dissenting).

280. *Id.* at 1337 (Burger, C.J., dissenting).

281. *Id.*

282. Strossen, *supra* note 20, at 141.

"follows the best of our traditions"²⁸³ by accommodating the religious needs of certain students. Thus, these dissenters concluded, even without the affirmative protection of the free speech and free exercise clauses, presumptive rights of access for concerted student religious speech would not be inconsistent with the establishment clause.²⁸⁴

Will the Court take a similar approach in *Mergens*? Several possibilities exist. The Court could construe the Equal Access Act so that it does not apply to Westside High School in order to avoid the constitutional issue. However, in view of the configuration of student clubs at the school, this would render the Act essentially meaningless. Moreover, the Eighth Circuit expressly indicated that it would have reached the same decision even if the Equal Access Act did not exist.²⁸⁵

The Court could choose to leave the definition of curriculum and noncurriculum related clubs for purposes of the Act to the sole discretion of school officials. The *Garnett* court pointed out the problem with this approach: "Complete deference would render the Act meaningless because school boards could circumvent the Act's requirements simply by asserting that all student groups are curriculum related."²⁸⁶ This would give an opportunity to discriminate to school officials who were of the mind to do so, or it would provide school officials with a convenient way to avoid dealing with religious matters in the public schools.

If the Court construes the Act to apply in this instance,²⁸⁷ it must address the question of whether the Act violates the establishment clause. Obviously, the establishment clause would not permit public schools to officially organize and sponsor religious clubs for students, even if they did the same for nonreligious clubs. Nor would it allow schools to grant religious clubs exclusive access to school premises or to prefer some religious clubs over other religious clubs.

However, an equal access policy presents an appealing alternative that respects the constitutional rights of all students involved. Equal access, so long as it imposes no pressure on unwilling students, "enable[s] the government to accommodate serious and substantial religious needs without departing significantly from the ideal of neu-

283. 106 S. Ct. at 1338 (Burger, C.J., dissenting) (quoting *Zorach*, 343 U.S. at 313-14).

284. For a contrary view, see Strossen, *supra* note 20, at 141-49.

285. 867 F.2d at 1080 ("[E]ven if Congress had never passed the EAA, our decision would be the same under *Widmar* alone.") (footnote omitted).

286. 874 F.2d at 614.

287. For a discussion of what constitutes whether student clubs are "noncurriculum related," thereby triggering the Act, see *supra* notes 135-51 and accompanying text.

trality and without invading the religious liberty of nonbelievers and other believers.”²⁸⁸ The Equal Access Act, properly implemented, reflects these concerns.

In resolving the constitutional question in favor of equal access, the Court could simply adopt the Eighth Circuit’s approach and hold that *Widmar* controls because there are no significant differences, for the purposes of equal access, between university and high school students. The Court could balance the competing first amendment interests and affirm *Mergens* by adopting a less restrictive means approach, by concluding there is an insufficient nexus between private speech and state action to constitute an endorsement of religion, or by holding that the religious liberty of the students is infringed by denying equal access.

Our historic commitment to religious freedom and tolerance, the democratic values of equality and a free exchange of ideas, Supreme Court precedent, and common sense all counsel affirming *Mergens*. To refuse equal access is to foster a tragic perception among students and citizens alike that the power and prestige of the government in this instance is set against religion.

E. Gregory Wallace

288. McConnell, *supra* note 26, at 167.