THE MISNOMER OF EQUALITY UNDER THE EQUAL ACCESS ACT*

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INTRODUCTION

The United States Supreme Court has recently heard arguments in a challenge to the Equal Access Act (the Act).[1] The case,

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1. 20 U.S.C. §§ 4071-4074 (1988). The Act reads as follows:

§ 4071. Denial of equal access prohibited

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

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) "Limited open forum" defined

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) Fair opportunity criteria

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) Construction of subchapter with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof—

(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

Board of Education of Westside Community Schools v. Mergens,[2] challenges the constitutionality of the 1984 federal law requiring public secondary schools to provide access to student-initiated religious clubs if the schools permit other extra-curricular clubs to meet on school campuses. Under the Act's provisions, once a public school has opened its doors to non-curricular related student groups—such as chess clubs or pep squads—the school cannot

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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) Federal financial assistance to schools unaffected

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) Authority of schools with respect to order, discipline, well-being, and attendance concerns

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.

§ 4072. Definitions

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.

§ 4073. Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

§ 4074. Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

2. 867 F.2d 1076 (8th Cir. 1989), *cert. granted*, 57 U.S.L.W. 3852 (U.S. June 27, 1989) (No. 88-1597). (Editor's note: the case was heard on January 9, 1990. 58 U.S.L.W. 3405 (U.S. Jan. 2, 1990)).

then discriminate against other student groups because of the speech content of those clubs.

This is the first time the Court will consider the constitutionality of the Equal Access Act. In 1986, the Court resolved an earlier challenge on procedural grounds without reaching the merits of the Act.[3] Thus, this will be the Court's first opportunity to address the constitutionality of a program specifically designed to facilitate religious expression in public schools. The Court will also be faced with determining the extent of the students' free speech and free exercise rights to express their religious beliefs while at school. Because the Act, in essence, sanctions organized religious exercises on public school property during the school day, the importance of this case cannot be overstated.

Stated briefly, the Equal Access Act raises grave constitutional concerns. The Act violates the first amendment's establishment clause by providing both symbolic and direct assistance to religion while entangling the government in religious matters. By falsely equating disparate forms of organized expression, the Act furthers religious expression within the confines of the public schools. Thus, the term "equality" serves as a misnomer for the advancement of religious expression.

Moreover, the rationale behind the Act is invalid. Despite its stated purpose,[4] the legislative history of the Act reveals an improper motive underlying its creation: the return of organized religious expression to the public schools. Therefore, the Act suffers

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3. Bender v. Williamsport Area Schools, 475 U.S. 534 (1986). Four Justices (Chief Justice Burger and Justices White, Powell, and Rehnquist) would have upheld the constitutionality of the Act.

At least one federal district court has implied the Act is unconstitutional. Clark v. Dallas Indep. School Dist., 671 F. Supp. 1119, 1124-25 (N.D. Tex. 1987) ("Because the application of the Equal Access Act would command an unconstitutional result under the facts of this case, it cannot override the establishment clause interests of the [school] district."). The same court later modified its holding, stating that because it found the Act inapplicable it did not express any view as to the constitutionality of the Act. Clark v. Dallas Indep. School Dist., 701 F. Supp. 594 (N.D. Tex. 1988).

4. S. REP. No. 357, 98th Cong., 2d Sess. 3, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2348, 2349.

> The purpose of this legislation is to clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and the free exercise of religion which accrue to public school students who desire voluntarily to exercise those rights during extracurricular periods of the school day when the school permits extracurricular activities.

Id.

from multiple constitutional infirmities.

Beyond the above constitutional concerns, the Act is also unnecessary because it fails to protect a recognized first amendment right. Students may exercise their religious rights individually at school regardless of the Act's application.[5] Even though an arguable free exercise *interest* in group meetings may exist, school districts do not impinge on students' free exercise *rights* by refusing to allow organized religious meetings on public school property. Thus, absent a showing of discrimination, there is no constitutional requirement that the students' religious needs be accommodated by the public schools.[6]

Finally, the Act infringes upon the schools' authority to direct and control their curriculum by incorrectly equating religious speech with other forms of speech. Religious speech cannot be accommodated within public schools to the same extent as other speech without raising establishment clause concerns.[7] Consequently, the Act not only violates the establishment clause, it also fails as a permissible accommodation of religion.

This article will examine the constitutionality of the Equal Access Act, as well as the countervailing free speech and free exercise arguments, in light of the pending Court review. In addition to maintaining that the Act is unconstitutional, this article also proposes that arguments in support of the Act rest on invalid assumptions as to the equality of different forms of speech within the public school context. Because of the special nature of public schools within our heterogeneous democratic society, organized religious expression deserves less constitutional protection than other forms of organized expression, or individual expression, within that special context.

I. Underlying Premises

No area of constitutional litigation has been thornier, nor more contentious, than that area concerning issues of the proper role of religion in public education. Clearly, religion has a place in the education of children. Public school students should be taught

5. *See* Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring); Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

6. Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890, 901 (1989) (plurality opinion).

7. *See infra* text accompanying notes 146-56.

about our nation's religious heritage and the important role religion plays in our culture. As Justice Clark stated in *Abington Township School District v. Schempp*,[8] the "study of the Bible or of religion, when presented objectively as part of a secular program of education," is entirely consistent with the first amendment.[9]

Moreover, students possess an arguable free exercise right to pray individually and read the Bible, or to engage in other private, nondisruptive religious practices during free time while at school. Nothing in either the first amendment or the decisions of the Supreme Court "prohibits public school students from voluntarily praying at any time before, during, or after the schoolday."[10] Thus, because students maintain their constitutionally protected rights to free exercise, in those rare situations where the coercive power of the state educational system forces a child to compromise his or her sincerely-held religious beliefs, the state may be required to provide an exemption and accommodate those religious practices.[11]

Nevertheless, while religion and religious expression may have a place in public education, that place is a limited one. In no area has the Court been more vigilant of separation of church and state than in the case of religion in America's public schools.[12] The Court has consistently invalidated even the slightest appearance of state sponsorship of or involvement with religious exercises in the schools.[13] As Justice Frankfurter noted:

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny.

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8. 374 U.S. 203 (1963).

9. *Id.* at 225.

10. *Wallace*, 472 U.S. at 67 (O'Connor, J., concurring).

11. *See* Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (the state's compulsory attendance requirement found to be "at odds with fundamental tenets of [the Amish children's] religious beliefs."). However, not all burdens upon religious practice are unconstitutional. *See* Bowen v. Roy, 476 U.S. 693, 706 (1986); Mozert v. Hawkings County Bd. of Educ., 827 F.2d 1058, 1065 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (public school students had no protected free exercise right to refrain from reading certain objectionable school texts even though the contents of the texts conflicted with their religious beliefs).

12. *See* Edwards v. Aguillard, 482 U.S. 578 (1987); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968); Abington School Dist. v. Schempp, 374 U.S. 203 (1968); Engel v. Vitale, 370 U.S. 421 (1962); McCollum v. Board of Educ., 333 U.S. 203 (1948).

13. As the Court recently stated, "[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student or his or her family." *Edwards*, 482 U.S. at 584.

> In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.[14]

Because of this special nature of our public schools, any organized religious exercise[15] on public school campuses, even when voluntarily attended, creates the appearance of government endorsement and support of religion.[16] Thus, organized religious meetings on public school property at times associated with the school day, whether the meetings are initiated or directed by school officials,[17] outside personnel,[18] or the students themselves, are inconsistent with the principles of the establishment clause. Public schools, more than any other type of government institution, must be kept free from the infusion of religious influences.[19] As Professor Tribe has remarked, "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]."[20]

Hence, only through the exclusion of all organized religious exercises can public schools be truly neutral toward religion.[21] Some advocates of equal access maintain that neutrality can only be achieved where public schools make no distinctions based upon the nature of student speech, so that religious and nonreligious speech are both equally allowed.[22] However, as Dean Stone has observed,

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14. *McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring).

15. By "religious exercise," I intend to include religious instruction, religious ceremonies, devotional meetings, and worship services. Secular instruction of religious traditions and belief systems, on the other hand, is both acceptable and desirable.

16. "[T]he mere appearance of a joint exercise of [governmental] authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." Larkin v. Grendel's Den, 459 U.S. 116, 125-26 (1982).

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

18. McCollum v. Board of Educ., 333 U.S. 203 (1948).

19. "Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects." *McCollum*, 333 U.S. at 216-17 (Frankfurter, J., concurring); *accord* Amback v. Norwick, 441 U.S. 68, 76-77 (1979) (public schools "inculcat[e] fundamental values necessary to the maintenance of a democratic political system.").

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

21. Wallace v. Jaffree, 472 U.S. 38, 60 (1985); Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion.").

22. Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious*

neutrality "is not a self-defining concept. Its meaning may vary depending on the context and nature of the issue."[23] The context here is the special nature of the public schools within our democratic system. Because of the role of schools in the inculcation of values within our heterogeneous society, as well as the great authority they exert over school children, the most neutral position schools can take toward religion is to exclude all organized religious expression within the confines of the school day. Consequently, true "neutrality" within the public schools requires that administrators take an active role to ensure that potentially divisive religious influences remain absent from their schools.

II. The Equal Access Act

The Equal Access Act came about as a result of several factors. Ever since the Supreme Court's decisions outlawing school prayer and Bible reading,[24] certain religious groups have sought government sanction for alternative methods of religious instruction in the public schools.[25] President Reagan became a champion of these groups during the 1980 election by calling for a constitutional amendment which would permit religious exercises in public schools. Following up on his campaign promise, on May 17, 1982, President Reagan proposed a constitutional amendment to "remove the bar to school prayer established by the Supreme Court and allow prayer back in our schools."[26] During the early 1980's, several amendments and bills were introduced in Congress that would have both guaranteed the existence of religious exercises in public schools and stripped the federal judiciary of its jurisdiction to rule on such matters.[27]

Speech by Private Speakers, 81 Nw. U.L. Rev. 1, 3 (1986).

23. Stone, *The Equal Access Controversy: The Religion Clauses and the Meaning of Neutrality*, 81 Nw. U.L. Rev. 168, 168 (1986).

24. Engel v. Vitale, 370 U.S. 421 (1962); Abington School Dist. v. Schempp, 374 U.S. 203 (1968).

25. *See generally* Cong. Q. Weekly Rep. 881, 881-85 (May 1, 1964).

26. President's Message to the Congress Transmitting Proposed Legislation, 18 Weekly Comp. Pres. Doc. 664, 665 (May 17, 1982). The proposed amendment provided that "[n]othing in [the] Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer." *Id.* at 666.

27. The Hatch Amendment provided for voluntary silent prayer and meditation in public schools. S.J. Res. 212, 98th Cong., 1st Sess., 130 Cong. Rec. S93 (daily ed. Jan. 24, 1984). The Dixon Amendment provided for silent prayer and equal access in public schools. S. 2782, 98th Cong., 1st Sess., 130 Cong. Rec. S2678 (daily ed. Mar. 14, 1984). The Helms

In 1981, in the case of *Widmar v. Vincent*,[28] the Supreme Court held that public colleges and universities could not exclude student religious groups from campus facilities if the colleges had created open forums by permitting other student organizations to use those facilities.[29] The Court held that colleges do not violate the establishment clause by granting religious clubs "equal access" to campus facilities so long as the colleges do not "confer any imprimatur of state approval"[30] and "the forum is available to a broad class of nonreligious as well as religious speakers."[31] However, *Widmar* was both preceded and followed by several United States Court of Appeals decisions holding that similar "equal access" could be prohibited at the secondary school level, thereby creating an apparent conflict.[32]

By 1983, many members of Congress had seized upon the idea of equal access as an alternative to imposing constitutionally mandated religious exercises on public schools.[33] After more than a year of hearings and debate, Congress passed the Equal Access Act in 1984. The Act provides that those public secondary schools which create "limited open forum[s]" by allowing noncurriculum related student groups access to school premises may not discriminate against other student groups on the basis of the "religious, political, philosophical, or other content of the[ir] speech."[34] The Act requires that the religious groups be both voluntary and initiated by students.[35] It also prohibits the schools from sponsoring the clubs or allowing their agents to involve themselves in the clubs' operation except in a nonparticipatory capacity.[36]

A public secondary school must have created a limited open forum for the Act to apply. The Act defines a limited open forum

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Amendment would have stripped the federal judiciary of jurisdiction to hear matters involving religion and public education. S. 1742, 97th Cong., 1st Sess. (1981).

28. 454 U.S. 263 (1981).

29. *Id.* at 277. The right of access was based on a free *speech* interest. *Id.* at 270 n.13. This author believes *Widmar* was decided correctly under the facts of the case.

30. *Id.* at 274.

31. *Id.*

32. *See* Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982).

33. Senator Mark Hatfield introduced the first equal access proposal in September, 1982. S. 2928, 97th Cong., 2d Sess., 128 CONG. REC. 24,070 (1982). The proposal was limited to religious speech.

34. 20 U.S.C. §§ 4071(a), (b) (1988).

35. *Id.* § 4071(c)(1).

36. *Id.* §§ 4071(c)(2), (3).

as existing whenever a school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[37] "Noninstructional time" is defined as that time set aside by the school before the actual classroom instruction begins or after such instruction has ended.[38] Interestingly, the Act fails to define the most crucial terms "curriculum" or "noncurriculum." According to the Act's sponsors, determinations of curriculum are left to the discretion of school officials.[39]

In summary, the Act forbids school officials from discriminating against a student-initiated club on the basis of the content of the club's "speech" if the school allows other noncurriculum related clubs to meet on school property during noninstructional time.[40] Once a school has opened the door to noncurriculum related student speech by creating a "limited open forum," it cannot then restrict such speech solely on the basis of its content.

III. *Board of Education of Westside Community Schools v. Mergens*

Prior to the passage of the Act, the Board of Education of Westside Community Schools in Omaha, Nebraska adopted a policy to govern student clubs at Westside High School. Board Policy 5610 states that student clubs are considered "a vital part of the total education program [and regarded] as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills."[41] The policy requires that all clubs be school sponsored

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37. *Id.* § 4071(b).

38. *Id.* § 4074(4).

39. As contained in the Congressional Record:

> (Senator) Gorton. Would the school district have the full authority to determine where the line is to be drawn between curriculum-related activities and noncurriculum-related?
>
> (Senator) Hatfield. We in no way seek to limit that discretion.

130 CONG. REC. S8342 (daily ed. June 27, 1984) (statements of Sens. Gorton and Hatfield).

40. 20 U.S.C. § 4071(a) (1988).

41. Record at 10, *Mergens*. Board Policy 5610 reads as follows:

> The Board of Education regards student clubs and organizations as a vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.
>
> School-sponsored clubs, and organizations are those directly under the control of the school administration, and shall have faculty sponsorship. The Superintendent shall establish operational guidelines for clubs and organizations which shall function for the welfare and the best interest of the

and under the control of the school administration. All clubs must have a faculty sponsor. Finally, the policy forbids clubs from being under the control or sponsorship of any political or religious organization.[42]

In the autumn of 1984, Westside school administrators met to discuss the impact of the recently passed Equal Access Act on the school's activities program. They concluded that the provisions of the Act, particularly its definition of a limited open forum, did not apply to Westside because Policy 5610 required all student clubs to be school sponsored and curriculum related, and the school administration considered all existing clubs to meet the policy. Consequently, the school left Policy 5610 intact.[43]

In 1985, a group of students at Westside High School petitioned the school principal for permission to form a Christian Bible Club. For some time prior to the request several of the students had been meeting informally and discussing the Bible, apparently with the administration's knowledge and acquiesence.[44] The students, however, now requested formal recognition of their group as a campus club and permission to meet before or after school like other student clubs.[45] The principal, and subsequently the superintendent and School Board, denied the students' request. The school based its denials on the belief that approval of the club would violate the establishment clause as well as contravene the educational goals stated in the Board Policy.[46]

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students and the school.

Such clubs and organizations shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race, color, creed, sex or political belief.

Id.

42. *Id.*

43. Interview with Allen Daubman, attorney for Petitioner (Oct. 25, 1989).

44. Brief of Petitioners at 7, Board of Educ. of Westside Community Schools v. Mergens, 867 F.2d 1076 (8th Cir. 1989), *cert. granted*, 57 U.S.L.W. (U.S. June 27, 1989) (No. 88-1597) [hereinafter Petitioners' Brief].

45. The students stated that they wished to form a "nondenominational Christian Bible Club" for students with "similar beliefs in God." Petitioners' Brief at 7-9. The club would be "identical in its formation, rights, privileges, terms, and conditions as other Westside High School affiliated students' clubs," except that the students did not request a faculty sponsor. Mergens v. Board of Educ. of Westside Community Schools, No. 85-0-426, slip op. at 2 (D. Neb. Feb. 2, 1988). The School Board has asserted that approval of this request means the Christian Bible Club would be entitled to participate in the school's annual club fair and would have access to the school's bulletin boards, the public address system, the school's newspaper, and the yearbook. Petitioners' Brief at 9.

46. Petitioners' Brief at 9-12.

The students then brought suit in federal district court claiming their rights of freedom of speech, assembly, and free exercise of religion were being violated by the School Board's decision.[47] The students also claimed that the board's action contravened the provisions of the Equal Access Act.[48] However, the district court found that the Act did not apply to Westside High School because the school had not created a limited open forum for student expression. Consequently, the court held that the Board's denial did not violate the students' expressive rights.[49]

On appeal, the United States Court of Appeals for the Eighth Circuit reversed the district court's decision.[50] The appellate court held that the Act did apply to Westside High School, finding that the school had created a limited open forum by allowing other noncurriculum related student groups to meet on school premises. Thus, the court held the school is required to permit the Christian Bible Club to meet during the extracurricular periods.[51] The court also upheld the constitutionality of the Act, finding that its provisions satisfy all three parts of the *Lemon* test.[52] Because the court upheld the application of the Act to the instant situation, it did not address the question of whether the students have a specific free exercise right to meet on school property.[53]

The School Board filed a petition for a writ of certiorari with the Supreme Court. The Court granted the writ in June, 1989 as to two questions: (1) whether the Act violates the establishment

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47. Mergens v. Board of Educ. of Westside Community Schools, No. 85-0-426, slip op. at 2 (D. Neb. Feb. 2, 1988).

48. *Id.*

49. *Id.* at 15. Because the district court found that the Act did not apply to the situation at Westside, it did not rule on the constitutionality of the Act.

50. Board of Educ. of Westside Community Schools v. Mergens, 867 F.2d 1076 (8th Cir. 1989).

51. *Id.* at 1079.

52. *Id.* at 1079-80. Lemon v. Kurtzman, 403 U.S. 602 (1971). In *Lemon*, the Court set out the standard of review for establishment clause challenges, stating that a law or policy is constitutional if: (1) it has a secular purpose; (2) its primary effect neither inhibits or advances religion; and (3) it does not foster an excessive governmental entanglement with religion. *Id.* at 612-13. The *Lemon* test has been criticized recently by several members of the Court. *See* County of Allegheny v. ACLU, 109 S. Ct. 3086, 3134 (1989) (Kennedy, J., dissenting); Edwards v. Aguillard, 482 U.S. 578, 636-40 (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 108-13 (1985) (Rehnquist, J., dissenting). However, the Court continues to adhere to the *Lemon* standards. *See* County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989); Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989) (plurality opinion); Bowen v. Kendrick, 487 U.S. 589 (1988).

53. *Mergens*, 867 F.2d at 1080.

clause, and (2) to what extent schools can control certain types of student speech.[54]

IV. The Equal Access Act Violates the Establishment Clause

The Equal Access Act violates the establishment clause because it fails to satisfy all three parts of the *Lemon* test.[55] The Act lacks a valid secular purpose, it has the primary effect of advancing religion by sponsoring and endorsing the religion of the student groups involved, and it leads to excessive entanglement between government and religion as well as to political divisiveness in the community.

A. The Equal Access Act Lacks a Valid Secular Purpose

First, the legislative history of the Act reveals an invalid sectarian purpose.[56] The Act was designed to return religious exercises to public schools after other legislative attempts had failed.[57] The Act followed the failure of President Reagan's prayer amendment[58] and several circuit courts of appeals' decisions disallowing student religious meetings.[59] Sponsors introduced the Act following the *Widmar* case with the specific intent of applying the decision's holding to secondary schools,[60] despite the Court's own statement

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54. Board of Educ. of Westside Community Schools v. Mergens, 867 F.2d 1076 (8th Cir. 1989), *cert. granted*, 57 U.S.L.W. 3852 (U.S. June 27, 1989) (No. 88-1597).

55. *See supra* note 52.

56. A finding of an invalid secular purpose is appropriately determined by examining the face of the statute and its legislative history, including the historical context of the statute and the sequence of events leading to its passage. Edwards v. Aguillard, 482 U.S. 578, 594-95 (1987).

Professor Laycock argues that the Court generally upholds facially neutral statutes with neutral effects without inquiring into the statutes' purposes. Laycock, *supra* note 22, at 23-24. However, such analysis overlooks improperly motivated legislation by focusing on a presumed effect. It also ignores the special nature of public education issues. *See supra* text accompanying notes 12-23. Moreover, the Court has clearly stated that it will not be constrained by a statute's stated purpose or the fact that it appears neutral on its face when there is evidence of improper motivation. *Edwards*, 482 U.S. 578 (1987); Stone v. Graham, 449 U.S. 39 (1980).

57. *See supra* notes 25-27 and accompanying text.

58. On March 20, 1984, the proposed amendment permitting voluntary prayer in public schools was defeated after it failed to receive the necessary two-thirds vote in the Senate. The vote was 56 to 44 in favor of the amendment. 130 Cong. Rec. S2901 (daily ed. Mar. 20, 1984).

59. *See* cases cited *supra* note 32.

60. *See Equal Access: A First Amendment Question: Hearings on S. 815 and S. 1059*

questioning the efficacy of a similar policy at the high school level.[61]

The sponsors therefore envisioned the Act as a mechanism for returning religious exercises to the public schools. Original versions of the Act contained both silent prayer and equal access provisions limited solely to religious speech.[62] Senator Denton, one of the sponsors of the Act, stated during floor debate that his primary motive in supporting equal access was to ensure greater forms of religious expression in schools than previously allowed by the Court.[63] He acknowledged that the Act "applies only to religious activities."[64] Denton even expressed his preference that the final versions of the Act not include protection for other forms of speech, but acknowledged that the added protections were necessary to ensure passage of the measure.[65] The other sponsor of the

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Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 5, 25 (1983), *reprinted in* 130 CONG. REC. S8348 (daily ed. June 27, 1984) [hereinafter *Senate Hearings*] (statements of Secretary of Education Terrell Bell and Senator Mark Hatfield). Senator Hatfield and 23 other senators filed an amicus brief in the *Lubbock* case asking the Court to grant certiorari and reverse the court of appeals decision denying a student religious group access to a public high school.

61. "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981).

62. *See supra* notes 27 & 33. Both S. 815 and S. 1059, the proposed amendments considered during the 1983 Senate Hearings, were limited solely to religious speech. *Senate Hearings*, *supra* note 60, at 289-94.

63. 130 CONG. REC. S8348 (daily ed. June 27, 1984) (statement of Sen. Denton).

> The question before us is whether or not we are going to continue to exist in the condition which began in 1962-63 and which prohibits the mention of the word "God" in the Jewish, Moslem, Christian, or whatever context, in a reverent, orderly sense, in a sense of assembly, if you will, voluntary on the part of the students.

Id.

64. *Id.* at S8336.

65. Senator Denton stated:

> The perfecting amendment contains language that would extend the cause of action in the Denton-Hatfield amendment to political, philosophical and other speech. I must say that I share some of the doubts expressed by the Senator from Washington [Senator Gorton] regarding the advisability of that extension, but on the other hand, I share with Senator Hatfield the need to craft a bill which will pass and still be substantially an improvement.
>
> . . . .
>
> There are two principle reasons why I believe we would be better off not tampering with the equal access amendment by including those other forms of speech, philosophical, political, and others. First, we have not really identified that a problem exists with respect to political, philosophical, or other speech. Second, it may confuse the issue, as was mentioned.

Id. at S8348-49.

Act, Senator Hatfield, whose original amendment was also limited to protection of religious expression, acknowledged that extending the coverage of the Act to "political, philosophical, and other" forms of speech was to appease critics and garner support.[66]

Several nonsponsoring senators substantiated the sponsors' view that the primary goal of the Act, as well as its understood purpose, was to protect the right to religious speech in the schools. Senator Dixon, who had introduced his own prayer amendment, stated that his "position on this issue is the same today as it was back in March 1984 when the Dixon amendment included a similar position in the silent school prayer and silent reflection amendment."[67] Senator Dixon, like several other senators, saw the measure as geared primarily toward facilitating religious speech.[68] Dixon's remarks, like the remarks of the Act's sponsors, indicate that the protection of other forms of speech was of secondary importance.

The text of the Act also indicates an improper sectarian purpose.[69] Whereas the Act also protects student speech related to "political, philosophical, or other" matters, religion is repeatedly singled out for special consideration throughout the text.[70] Religious speech is the focus of the Act, and its language even recognizes the problems inherent in schools accommodating religious meetings. Schools are barred from influencing the form or content of any religious activity, and teachers are barred from participation only in religious clubs.[71] As the Court emphasized in *Edwards v. Aguillard*,[72] the creation-science case, if a legislature truly intends

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66. *Id.* at S8344-45.

67. *Id.* at S8338. The Dixon Amendment, which contained silent prayer provisions, was considered in conjunction with the vocal prayer amendment proposed by the Reagan Administration. S.J. Res. 73, 98th Cong., 1st Sess., 129 CONG. REC. 3973 (daily ed. Mar. 24, 1983).

68. 130 CONG. REC. S8338 (statement of Sen. Dixon).

> Mr. President, this is a good amendment. Its time has come. I sincerely believe that we should have an equal access provision that permits high school students who want to discuss religious matters to come together on a voluntary basis in the public schools to follow the dictates of their own conscience and their own religious desires. This amendment does just that.

Id.

69. *Cf.* Edwards v. Aguillard, 482 U.S. 578, 586-89 (1987), where the Court perceived a similar disparity in the treatment of religion and nonreligion in a statute as evidence of the lack of a secular purpose.

70. *See* 20 U.S.C. §§ 4071(c), (d) (1988).

71. *Id.*

72. 428 U.S. 578 (1987).

to further multiple forms of expression, instead of merely promoting religious expression, then that purpose should at least be borne out in the text of the statute.[73] Here, the textual emphasis on religious speech reveals the true purpose of the Act: to facilitate student religious expression.

Advocates of equal access maintain that Congress passed the Act in order to counter religious discrimination.[74] They claim that schools have excluded student initiated religious groups from activity periods solely because of the clubs' religious content. During the floor debates the sponsors of the Act repeatedly referred to incidents where students had been prohibited from praying, reading the Bible, or discussing religious subjects with fellow classmates.[75] Thus, advocates maintain that the secular purpose of the Act is found through its attempt to end religious discrimination.[76]

Arguably, the prevention of religious discrimination can be a valid government concern and serve as the basis for appropriate remedial legislation.[77] Governmental efforts to alleviate discrimination or to lift state-imposed burdens on religious practice are consistent with concepts of neutrality.[78] However, the determination of neutrality must be objective—there should be empirical proof of an actual burden on religion. As Justice O'Connor stated, governmental attempts to accommodate religion are permissible only

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73. *Id.* at 586-89.

74. *See* CENTER FOR LAW & RELIGIOUS FREEDOM, A GUIDE TO THE EQUAL ACCESS ACT 18-20 (1988); *Amicus Curiae* Brief of Baptist Joint Committee on Public Affairs, et al., in support of Respondents at 6, Board of Educ. of Westside Community Schools v. Mergens, 867 F.2d 1076 (8th Cir. 1989), *cert. granted*, 57 U.S.L.W. 3852 (U.S. June 27, 1989) (No. 88-1597) [hereinafter BJC Brief].

75. 130 CONG. REC. S8331-8336 (daily ed. June 27, 1984); *See also Senate Hearings*, *supra* note 60, at 37-179.

76. BJC Brief, *supra* note 74, at 21. As stated in the Senate Judiciary Committee report:

> Despite *Widmar*, many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity. Like the judges of the district court in *Widmar*, they erroneously believed that the Establishment Clause prohibits students from engaging in such speech at all, even when other types of extracurricular student speech are permitted. Generally, those administrators act not from malevolence toward religion but from ignorance of the law and erroneous legal advice. A primary source of their confusion has been the lower Federal courts.

S. REP. No. 357, 98th Cong., 2d Sess. 6, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2348, 2352.

77. In fact, governmental practices suggesting religious discrimination are subject to strict scrutiny. Larson v. Valente, 456 U.S. 228, 246 (1982).

78. Laycock, *supra* note 22, at 21.

when they lift "an identifiable burden *on the free exercise of religion.*"[79] Otherwise, government attempts at alleviating only perceived discrimination will contravene the establishment clause by improperly advancing religion.

The examples of school restrictions alluded to in the committee debates do not evince the existence of rampant religious discrimination. In fact, most examples were no more than exceptions that proved the rule that schools should resist situations that create the appearance of endorsement of religion. In most instances cited, school officials were following the constitutional mandate to maintain separation of church and state, and as such, the restrictions were permissible.[80] Consequently, because of the absence of constitutionally prohibited discrimination,[81] the avowed secular purpose of the Act fails.

Even if one assumes that "pervasive" religious discrimination exists[82] (the existence of which, when it occurs, this author does not intend to belittle), the Act provides an inappropriate response. Instead of mandating that the proper remedy for religious discrimination is the education and enlightenment of teachers and school administrators as to the value of religious liberty and diversity, the Act requires schools to recognize and provide facilities for *organized* student religious meetings. If student rights to religious expression have been infringed—*e.g.*, if students have been told they cannot pray in home-room or read the Bible in school parking

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79. Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment) (emphasis in original); *accord* County of Allegheny v. ACLU, 109 S. Ct. 3086, 3111, n.59 (1989).

80. For example, Bonnie Baily of Lubbock, Texas testified that she felt discriminated against because her religious group, Morning Watch, was no longer permitted to hold religious meetings at the public high school. *Senate Hearings*, *supra* note 60, at 37-38. However, the Fifth Circuit found that the access program at Bonnie's high school had been an artifice for the perpetuation of unconstitutional practices that included Bible reading over the school public address system, classroom prayers, school assemblies with religious speakers, and the distribution of Bibles to students. Lubbock Civil Liberties Union v. Lubbock, 669 F.2d 1038, 1039-40 (5th Cir. 1982). Other testimony in support of equal access indicated that several of the prohibited religious clubs had been associated or encouraged by outside evangelical organizations, such as Youth for Christ and Young Life. 130 CONG. REC. S8332 (daily ed. June 27, 1984). *See* testimony of Chuck Klein of Campus Crusade for Christ, evincing a desire for continued access to public high school campuses. *Senate Hearings*, *supra* note 60, at 141-44. Such activities are not even protected by the Act. 20 U.S.C. § 4071(c)(5) (1988).

81. *See infra* notes 119-29 and accompanying text on the absence of a constitutionally protected right to group religious meetings.

82. BJC Brief, *supra* note 74, at 6.

lots[83]—then the answer is not *organized*, religious meetings on public school property. Thus, because the avowed problem does not justify the mandated response, the Act lacks a valid secular purpose.

B. The Equal Access Act Has the Primary Effect of Advancing Religion

Even if the Act was motivated primarily by a legitimate secular purpose,[84] it fails the second prong of the *Lemon* test. The Act has the primary effect of advancing religion by providing both direct assistance to and symbolic endorsement of religion. The Act directly benefits religion by requiring schools to provide religious groups with the free use of classrooms, heat and light, free monitoring by teachers, organizational support by school personnel, and a "captive audience" through the states' compulsory attendance laws.

Advocates of equal access have deprecated these factors as merely incidental benefits to religion.[85] However, similar benefits were found unconstitutional in *McCollum v. Board of Education*,[86] the on-campus release time case. In *McCollum*, the Court held that a school's facilitation of religious instruction in public school classrooms, even though voluntarily attended by students, impermissibly advanced religion by "aid[ing] religious groups to spread their faith."[87] Significantly, four years later in *Zorach v. Clauson*,[88] the absence of such factors was critical to the Court's decision upholding a similar *off-campus* release time program.[89] Thus, a public

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83. These examples were provided by Senators Hatch and Denton during the Senate floor debates on the Act. 130 CONG. REC. S8331-8336 (daily ed. June 27, 1984).

84. "Illicit legislative intent is not the sine qua non of a violation of the First Amendment. [The Court has] long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983) (citations omitted).

85. "[N]ot every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973).

86. 333 U.S. 203 (1948).

87. *Id.* at 210.

88. 343 U.S. 306 (1952).

89. "In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction." *Id.* at 315.

school directly advances religion when it provides both classroom space and organizational structure and support for religious meetings.

Government need not withhold generally available benefits from a religious organization simply because it is religious.[90] Qualified religious institutions may be entitled to public benefits that are neutrally available to all.[91] Such benefits may, however, be restricted if used in a manner that is pervasively sectarian.[92] Thus, "even insignificant amounts of direct aid to religious groups violate the Establishment Clause."[93]

Of even greater significance is the symbolic benefit that accrues to religion through the schools' endorsement and sponsorship of the student religious groups.[94] Under equal access programs schools recognize or approve the religious clubs. Once approved, the schools then provide time and class space during the school day, access to school media to announce or promote their meetings, and teacher supervision for the religious meetings. As the Court noted in *Widmar*, high school students are more impressionable than college students and less able to appreciate a school's attempt at neutrality.[95] As a result, students will be more likely than adults

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I would argue that the program in *Zorach* was also suspect because both programs utilized the coercive force of compulsory attendance laws; students either attended the religious classes or remained in study-hall. However, the Court found the locus of the activity compelling. *Compare McCollum*, 333 U.S. at 209, 212 *with Zorach*, 343 U.S. at 315. The holdings of *McCollum* and *Zorach* have never been overruled. *See* Lanner v. Wimmer, 662 F.2d 1349, 1353-54 (10th Cir. 1981).

90. Roemer v. Board of Public Works, 426 U.S. 736, 746-47 (1976).

91. *Id.*

92. Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385 (1985).

93. Garnett v. Renton School Dist., 874 F.2d 608, 610 (9th Cir. 1989). As Justice O'Connor stated recently, "*any* use of public funds to promote religious doctrines violates the Establishment Clause." Bowen v. Kendrick, 108 S. Ct. 2562, 2581 (1988) (O'Connor, J., concurring) (emphasis in original).

94. "[I]t has been noted that the prohibition against government endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.' " County of Allegheny v. ACLU, 109 S. Ct. 3086, 3101 (1989) (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).

95. Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981). As the Court noted recently, "[t]he potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses [than with regard to high school students]. *This distinction warrants a difference in constitutional results.*" Edwards v. Aguillard, 482 U.S. 578, 584 n.5 (1987) (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 253 (1963) (Brennan, J., concurring)) (emphasis added). *Accord* Tilton v. Richardson, 403 U.S. 672 (1971), where the Court upheld grants to church-related colleges and universities for building con-

to perceive such school conduct as manifestations of school endorsement of religion.[96] As the Fifth Circuit stated in *Lubbock*, a "policy of allowing religious meetings at a time closely associated with the beginning or end of the school day implies recognition of religious activities and meetings as an integral part of the [school's] extracurricular program and carries with it an implicit approval by school officials of those programs."[97] Such programs also create the appearance of prohibited joint enterprises between religion and government, which are also prohibited.[98]

Teacher supervision of religious meetings, as permitted by the Act, raises special endorsement concerns. The presence of a monitor, like formal recognition of the clubs, creates the appearance of school endorsement. Students look to teachers as role models and tend to emulate their behavior.[99] Students, both club members and nonmembers alike, will perceive the presence of a teacher, who may instruct them in other classes, as an indication of school approval of the religious club. The teacher will not become any less a figure of authority simply because he or she is prohibited from participating in the religious meetings. When the impressionability

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struction on the ground that:

> [t]here is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations.

Id. at 686.

96. The Court has consistently adhered to its position that the problems with perceived endorsement of religion are greater within the public schools. As the Court stated in *Grand Rapids*,

> an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.

Grand Rapids, 473 U.S. at 390 (citations omitted).

97. Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1045 (5th Cir. 1982).

98. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125-26 (1982).

99. "The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the childrens susceptibility to peer pressure." *Edwards*, 482 U.S. at 584.

factor[100] is seen in conjunction with all of the factors that make secondary schools different from colleges—compulsory attendance, structured instruction, controlled environments, the relationship between students and teachers—the appearance of government endorsement of the religious groups becomes overwhelming.

The voluntariness of the student associations or the fact that they are student initiated does not dispel the appearance of government endorsement. On several occasions the Court has rejected arguments that the voluntariness of school religious exercises renders them constitutional.[101] A presumption of state sponsorship arises whenever religious activities are conducted on school premises at times associated with the school day.[102] In *McCollum*, which involved outside religious figures leading the meetings, the Court held that the origin of the particular religious activity was immaterial to the question of government sponsorship of religion. The appearance remained the same. As the Court stated recently in *County of Allegheny v. ACLU*,[103] government endorses religion just as readily when it "conveys the sense of promoting someone else's message."[104]

C. *The Equal Access Act Leads to Excessive Entanglement*

Third, the application of the Act results in excessive entanglement between government and religion.[105] As mentioned above, the

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100. *Accord* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) (where the Court stated that school administrators could take into account the limited emotional maturity of high school students when the speech in question concerned "sensitive topics.").

101. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); McCollum v. Board of Educ., 333 U.S. 203 (1948). Justice Frankfurter stressed in *McCollum* that despite the voluntary nature of such meetings, there "is an obvious pressure upon children to attend. . . . The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when school should be a training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents." *McCollum*, 333 U.S. at 227-28.

102. *See supra* text accompanying notes 12-23.

103. 109 S. Ct. 3086 (1989).

104. *Id.* at 3105. *See also* Stone v. Graham, 449 U.S. 39 (1980), where the Court held that the posting of the Ten Commandments in public school classrooms was unconstitutional even though the plaques were paid for and provided by an outside group and had visible disclaimer signs.

105. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). "Excessive entanglement is undesirable because it involves state scrutiny of religious activities, a task necessarily requiring oversight of 'core matters of belief and ritual.' This involvement threatens the voluntarism of religious observance and violates the principle of separation." Brandon v. Board of Educ., 635 F.2d 971, 979 (2d Cir. 1980) (citation omitted).

Act provides for religious meetings during school hours, on school property, and with faculty supervision. School officials may be required to determine whether a particular student club is a legitimate "religious" group and to resolve conflicts between competing groups and students. Because the Act mandates equal status for religious clubs, these groups will have access to bulletin boards, public address systems, and club fairs.[106] Administrators will be called on to review and preapprove the clubs' advertisements to ensure the messages are nonoffensive and do not create the impression of school endorsement. Such oversight of potentially religious messages is clearly within the scope of entanglement prohibitions.[107]

Moreover, even though the Act requires that all faculty monitors serve in "nonparticipatory" capacities, they may be asked to advise, to decide competing doctrinal claims, or to maintain order within the clubs. The Act specifies that school officials retain the authority to maintain order and discipline.[108] As a result, the Act encourages and even requires the type of "comprehensive, discriminating, and continuing state surveillance" of religion prohibited under the establishment clause.[109]

The Act also provides that teachers cannot be compelled to monitor the religious clubs if the clubs' speech is contrary to the teachers' beliefs.[110] Thus, it is likely that those teachers who volunteer as monitors will themselves be religious or at least sympathetic to the students' beliefs. Principals and other officials will then be required to monitor the monitors to ensure that their role remains nonparticipatory.[111] This is precisely the type of "comprehensive, discriminating, and continuing" entanglement that the

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106. *See* 20 U.S.C. § 4071(a) (1988).

107. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980).

108. 20 U.S.C. § 4071(f) (1988).

109. *Lemon*, 403 U.S. at 619.

110. 20 U.S.C. § 4071(d)(4) (1988).

111. *See* Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391, 1405 (10th Cir. 1985) (several teachers actively participated in the student religious meetings). According to the trial transcript, a poster announcing a meeting of the religious club once contained a statement from a teacher that she had seen a vision of Jesus Christ and had been anointed to lead the students to Him. *Id.* at 1397 n.3. *See* Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 Nw. U.L. REV. 174, 174-75 (1986), for additional instances of teacher participation in student religious clubs.

Court has struck down as unconstitutional.[112]

Finally, the process of implementing equal access programs and approving student religious clubs may lead to political divisiveness in the community.[113] In many communities, one religious denomination or faith predominates. As discussed below, in most instances only one type of religious club will be formed in the schools. Minority faiths will perceive student clubs associated with the majority denomination as receiving special consideration. Schools, boards of education, and communities as a whole will divide along religious lines, which will result in the type of sectarian strife that is the antithesis of the establishment clause.[114]

Thus, for all of the reasons stated above, the Equal Access Act violates the establishment clause. The Act does not have a valid secular purpose, it has the effect of directly benefitting and endorsing religion, and it causes excessive government entanglement with religion.

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112. *See* Lemon v. Kurtzman, 403 U.S. 602, 619 (1971): "[T]he very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state." *Id.* at 620-21. *See also* Aguilar v. Felton, 473 U.S. 402, 410, 413-14 (1985).

113. "Ordinary political debate and division, however vigorous or even partisan, are normal and healthy mainfestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Lemon*, 403 U.S. at 622.

114. *See Bell*, 766 F.2d at 1397, for examples of strife created by the controversy over student religious clubs. The court specifically found that divisiveness resulted from the equal access meetings. *Id.* at 1407. *See also* County of Allegheny v. ACLU, 109 S. Ct. 3086, 3132 n.10 (1989) (Stevens, J., concurring). Justice Stevens argued that the public display of religious symbols may lead to political divisiveness in the community.

Several members of the Court have attempted to limit the political divisiveness test to situations where direct financial subsidies are paid to parochial schools or situations involving teachers in parochial schools. *See* Bowen v. Kendrick, 108 S. Ct. 2562, 2578 n.14 (1988) (Rehnquist, C.J.); Lynch v. Donnelly, 465 U.S. 668, 683-85 (Burger, C.J.); Mueller v. Allen, 463 U.S. 388, 403 n.11 (Rehnquist, J.). However, Justice Brennan maintains that this view comes from a "distorted reading of [the Court's] prior cases." *Lynch*, 465 U.S. at 703 n.9. The Court has not been consistent with its application of the doctrine. *See* Aguilar v. Felton, 473 U.S. 402, 414 (1985) (implying that political divisiveness may also result from administrative entanglement where the entanglement includes governmental determinations on matters of religious significance); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982) (referring to the political divisiveness resulting from a statute that lent state power to religious bodies). The political divisiveness test has yet to be applied to an equal access situation. Because of the controversial nature of religion in the public schools and the likelihood that an equal access program would send "a message to nonadherents that they are outsiders, not full members of the political community," *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring), the political divisiveness test is appropriate for equal access programs. *See Bell*, 766 F.2d at 1406.

V. The Free Exercise and Free Speech Issues

Proponents of equal access argue that the Act is necessary to preserve both free speech and free exercise rights.[115] This argument implies, however, that student expressive rights are somehow being infringed by prohibitions against organized religious meetings on school property during the school day. Granted, student expressive rights do not end at the "schoolhouse gate."[116] In fact, the Court has at least implied that students have the right to pray and read the Bible on their own or informally in groups.[117] I would argue that such activity *is* constitutionally protected, thereby rendering the Act superfluous.[118] However, there is no corresponding *right* to *organized* religious meetings during the school day.[119] Even advocates of equal access concede that schools may deny access to all student groups without violating the free speech and free exercise rights of a religious group.[120]

Every discussion of "equal access" for expressive rights must begin with a consideration of the forum within which the expression is to be made—the extent of any free speech right always depends on the particular context.[121] There is a vast difference between traditional public forums and secondary schools. Parks, sidewalks, streets, and even universities are designed for free expression and the exchange of ideas.[122] Public schools, by contrast,

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115. Laycock, *supra* note 22, at 57.

116. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).

117. Wallace v. Jaffree, 472 U.S. 38, 67 (1985); Abington School Dist. v. Schempp, 374 U.S. 203, 222-26 (1963). *See supra* text accompanying notes 10-11.

118. However, one district court has held that the Act affords students certain access rights to use of school property beyond those guaranteed by the Constitution. Student Coalition for Peace v. Lower Merion School Dist. Bd., 633 F. Supp. 1040, 1043 (E.D. Pa. 1986).

119. Every federal court that has considered this free exercise argument has rejected it. *See* Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980); Clark v. Dallas Indep. School Dist., 671 F. Supp. 1119 (N.D. Tex. 1987).

120. Center for Law and Religious Freedom, *supra* note 74, at 29.

121. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 797 (1985).

122. "Traditional public fora are those places which 'by long tradition or by government fiat have been devoted to assembly and debate.' Public streets and parks fall into this category." *Cornelius*, 473 U.S. at 802 (quoting Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983)). *See* Hague v. CIO, 307 U.S. 496, 515 (1939); Widmar v. Vincent, 454 U.S. 263, 276-68 (1981). *See also* Niemotko v. Maryland, 340 U.S. 268 (1951) (where the Court found that the defendants, Jehovah's Witnesses, had a free exercise and free speech right to conduct Bible talks in a public park).

have a different mission and purpose: they are primarily concerned with education.[123] This educative purpose necessitates extensive government involvement and control. Such control includes curriculum related content restrictions, constant teacher instruction and monitoring of students, compulsory attendance laws, and prioritization of school facilities. As one commentator has noted, these factors "negate the possibility of characterizing public high schools as public forums and undermine the premises—indispensible in an open forum—that attendance and association in the forum are voluntary."[124]

Consequently, student "rights" to expansive forms of expression are necessarily curtailed within public schools.[125] Public school officials are given more discretion to determine what forms of speech are conducive to their educational mission.[126] A prohibition against *organized religious meetings* does not infringe upon free speech or free exercise rights, especially when there are alternative forums for that expression.[127] Furthermore, as the Court has long held, the absence of religious instruction in public schools indicates neutrality, rather than hostility, toward religion.[128] A school policy

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123. "The 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.'" Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (quoting *Hague*, 307 U.S. at 515).

124. 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. 587 (1985).

125. Clark v. Dallas Indep. School Dist., 671 F. Supp. 1119, 1122 (N.D. Tex. 1987).

> The first amendment rights of high school students, however, are not coextensive with the rights of adults in other settings. Although 'divergent political and religious views' must be tolerated, the students' right of expression must be balanced against the school's countervailing interest in protecting the privacy of unwilling student listeners and avoiding disruption in school activities.

Id. at 1122 (quoting Bethel School Dist. v. Fraser, 478 U.S. 675, 681 (1986)); *cf.* New Jersey v. T.L.O., 469 U.S. 325 (1985).

126. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel School Dist. v. Fraser, 478 U.S. 675 (1986).

127. "The student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others." Abington School Dist. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring). *Accord* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 809 (1985) ("Rarely will a nonpublic forum provide the only means of contact with a particular audience.").

128. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1968); Engel v. Vitale, 370 U.S. 421 (1962). "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not . . . manifest a governmental hostility to

of nonreligion does not inhibit religious practice, nor should it be equated with "antireligion." Thus, on its own, a prohibition against organized religious groups in a public school does not restrict student rights of free expression.[129]

As a result, the student interest in an organized religious club is qualitatively different from the rights asserted in *Tinker v. Des Moines Independent School District*[130] and *West Virginia State Board of Education v. Barnette*.[131] Both cases involved rights to individual student expression rather than claims for organized group speech on public school campuses. Whereas schools are limited in their ability to restrict individual student expression, they are afforded greater latitude to restrict group speech, especially where that speech would be inconsistent with the "special interests of [the school in] overseeing use of the property."[132] This is consistent with a long line of Court cases that have upheld distinctions between individual and group use of public forums by approving permit requirements for group meetings.[133] As one court recently stated, "a 'meeting' is an intelligible concept, a criterion of legal regulation, and a thing distinct from a private conversation."[134]

While some advocates of equal access acknowledge that schools are not traditionally considered public forums, they maintain that the closed forum analysis is inapposite to equal access issues. Professor Laycock argues that distinctions between *Tinker* and *Hazelwood* overlook the fact that *Tinker* was not a public fo-

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religion or religious teachings." McCollum v. Board of Educ., 333 U.S. 203, 211 (1948).

129. "[A] school may permissibly prevent organized religious meetings without violating Plaintiff's free exercise rights." Clark v. Dallas Indep. School Dist., 671 F. Supp. 1119, 1122 (N.D. Tex. 1987). If, for some reason, a prohibition did restrict protected expression, it could still be constitutional because of the compelling governmental interest in maintaining separation of church and state. Widmar v. Vincent, 454 U.S. 263, 271 (1961).

130. 393 U.S. 503 (1968) (high school students wearing black armbands to protest the Vietnam War).

131. 319 U.S. 624 (1943) (mandatory salutes to the United States flag).

132. Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 540 (1980).

133. *See* cases cited in Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 n.2 (1969).

134. May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105, 1110-11 (7th Cir. 1986).

> [A] private conversation has a different significance from a regularly scheduled group meeting devoted to a particular subject. Not only is it more difficult for a school administration to monitor private conversations, but they do not create the same danger of injecting the school into undesired controversy on matters remote from its educational mission.

Id. at 1110.

rum case—the students were already entitled to be on the school grounds and presumptively entitled to speak.[135] Thus, since students and teachers already have access to school facilities, Laycock argues that it is inappropriate to focus on the location of the speech.[136]

This analysis conflicts with the clear holdings of *Cornelius v. NAACP Legal Defense & Education Fund*[137] and *Perry Education Association v. Perry Local Educators' Association*[138] In *Cornelius*, the Court reemphasized that the extent of expressive rights is dependent on the nature of the forum, and that the applicable forum is defined in terms of access sought by the particular speaker.[139] In *Perry*, the Court held that "when government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum's business."[140] The Court has never held that persons have unlimited rights to use government property simply because they have a preexisting right of access to that property.[141] Thus, even though students are already entitled to access to public school grounds, they have no entitlement to meet during a school activity period unless the school has created that particular forum for expression.[142] The public forum analysis applies.

Student rights to hold on-campus religious meetings are necessarily curtailed for an additional reason: the curriculum restrictions and administrative controls inherent in public schools make it all but impossible to separate organized student speech from government speech.[143] Because of the presence of state action—the compulsory attendance requirement, the recognition of religious groups, the involvement of teachers, and the use of government

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135. Laycock, *supra* note 22, at 48.

136. "[A]ttacks on equal access mistakenly have focused on the location of the speech. That religious speech occurs on public property is incidental and almost entirely irrelevant. . . . What matters is not the location of the speech, but the identity of the speaker." *Id.* at 9.

137. 473 U.S. 788 (1985).

138. 460 U.S. 37 (1983).

139. *Cornelius*, 473 U.S. at 797, 801.

140. *Perry*, 460 U.S. at 53.

141. *See* United States v. Albertini, 472 U.S. 675, 684-90 (1985); Greer v. Spock, 424 U.S. 828, 836 (1976).

142. *See* May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105, 1114 (7th Cir. 1986) (entitlement to access to school property does not include a right to use the school in any manner desired).

143. *See* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1988).

property—the students' religious speech becomes the government's speech. Government should not be allowed to accomplish through a private speaker what it is forbidden to do on its own.[144] Because government is prohibited from making religious speech, it should also disassociate itself from the private religious speaker, especially when that speech occurs in an organized, structured manner.[145] Only in this way can government remain truly neutral toward religion.

Finally, the Equal Access Act incorrectly equates student religious speech with other forms of speech. Religious speech is different from political, philosophical, or artistic speech.[146] The first amendment separates out religious expression for specific protection.[147] But with the special benefits afforded religion come certain restrictions and detriments. The establishment clause institutionalizes certain forms of content discrimination against religion.[148] While government may sponsor or encourage political or artistic speech[149]—after all, it is government's business to speak politically—it may not do the same with religious speech. While courts usually do not distinguish between religious and political speech

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144. *See* County of Allegheny v. ACLU, 109 S. Ct. 3086, 3105 (1989).

145. As the Court stated in *Hazelwood*,

> [t]he question of whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.
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> . . . .
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> Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.

484 U.S. at 270-73.

146. While Justice White correctly recognized this difference in his *Widmar* dissent, he went on to argue incorrectly that worship is protected only under the free exercise clause. Widmar v. Vincent, 454 U.S. 263, 284-85 (1961) (White, J., dissenting). Rights to protected worship are also protected under the free speech, assembly, and establishment clauses. As mentioned above, this author believes that *Widmar* was decided correctly under the facts of that case.

147. *See* Sherbert v. Verner, 374 U.S. 398, 402 (1963); Largent v. Texas, 318 U.S. 418, 422 (1943).

148. *See* Epperson v. Arkansas, 393 U.S. 97, 106 (1968); McCollum v. Board of Educ., 333 U.S. 203, 210-11 (1948); YUDOF, WHEN GOVERNMENT SPEAKS 214-15 (1983). Yudof states that the establishment clause is "the only substantive constitutional restraint on what governments may say." *Id.* at 214. As Justice Jackson stated, this disabling quality "is a difference which the Constitution sets up between religion and almost every other subject matter of legislation." Everson v. Board of Educ., 330 U.S. 1, 26 (1946) (Jackson, J., dissenting).

149. YUDOF, *supra* note 148, at 42-50.

when government involvement or sponsorship is minimal—such as in a park[150]—they hesitate to equate the two when government involvement is greater.[151] As Judge Kaufman stated in an early equal access case, "[w]hen the explicit Establishment Clause proscription against prayer in the public schools is considered, the protections of political and religious speech are inapposite."[152]

In fact, the holding in *Widmar* recognized the inherent difference between religious speech and other forms of protected speech. In reaching the conclusion that, under the facts of the case, an equal access program would not violate the establishment clause,[153] the Court recognized that the university's interest in complying with the establishment clause "may be characterized as compelling."[154] In *Widmar*, the university was unable to exclude student religious meetings under the "applicable constitutional standards" of the establishment clause.[155] However, the Court implied that the constitutional standards for religious and nonreligious speech may be different, especially where the "equal" treatment of religious speech in a public forum would endanger the constitutionally mandated separation of church and state.[156] Thus, depending on the particular set of circumstances, the establishment clause might require disparate treatment for different forms of private speech.

Even the Act, in spite of its attempt to equate religious speech with political and philosophical speech, recognizes that religious

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150. *See* Niemotko v. Maryland, 340 U.S. 268 (1951).

151. County of Allegheny v. ACLU, 109 S. Ct. 3086, 3104-05 n.50 (1989). The Court noted that the use of the Grand Staircase of the Pittsburgh City Hall to display flags commemorating the aniversary of Israel's independence was permissible, while the display of a creche was not. *See also* Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989); Jager v. Douglas County School Dist., 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 109 S. Ct. 2431 (1989) (forbade invocations at public high school football games by local clergy); Deeper Life Christian Fellowship v. Board of Educ., 852 F.2d 676 (2d Cir. 1988) (approved distinctions in use of school buildings that might exclude religious groups); Salinas v. School Dist. of Kansas City, 751 F.2d 288 (8th Cir. 1984) (upheld closer administrative review of religious use of public school auditorium).

152. Brandon v. Board of Educ., 635 F.2d 971, 980 (2d Cir. 1980) (citations omitted). Similarly, the Court has also recognized that government may grant access to particular forms of nonpolitical speech without extending similar access to political speech. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding the city's policy of permitting the display of commercial advertising in transit vehicles while excluding political ads).

153. Widmar v. Vincent, 454 U.S. 263, 277 (1961).

154. *Id.* at 271.

155. *Id.* at 277.

156. *Id.* at 271.

and nonreligious speech are not equal.[157] The Act imposes greater restrictions on school involvement with religious meetings.[158] Through these restrictions the Act proves too much: it acknowledges the inappropriateness of equating religious and nonreligious speech in situations where government involvement is anything more than minimal.

Even if religious and nonreligious speech are entitled to equal access within the public school context, the Act lacks a true element of "equality." As mentioned above, the primary purpose behind the Act was the promotion of religious expression, not of political or philosophical speech.[159] Student religious groups are the true beneficiaries of the Act. In fact, under the Act a "limited open forum" may be created by the application of one noncurriculum student group, which may be the religious group.[160] In essence, a student religious club may gain access to the school based on a nonexistent lack of equality.

Practically speaking, the Act benefits only religious students or groups concerned with organized Bible study or with proselytizing to other students,[161] a primary purpose behind many such groups.[162] In essence, the Act is directed toward a particular form of religious expression: evangelical Protestantism. The argument that other religious groups are able to take advantage of the access is disingenuous. Students with Jewish, Moslem, and liberal Protestant backgrounds, for example, will not be inclined to form similar clubs. And, as has happened in several early cases, student religious groups sometimes serve as "fronts" for local churches or religious groups.[163] It does not take a leap of faith to imagine a local

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157. *See supra* text accompanying notes 69-73.

158. 20 U.S.C. §§ 4071(c)(1)-(3), (d)(1)-(4) (1988).

159. *See supra* text accompanying notes 62-68.

160. 20 U.S.C. § 4071(b) (1988). Even though a school that maintains a closed forum may deny access to noncurricular groups, such as student religious clubs, the Act makes it difficult for school boards to adopt such policies.

161. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 2; *see generally* MARTY, A NATION OF BEHAVERS (1976), on the myriad forms of religious expression.

162. A purpose behind Mergens' group was to be "a vehicle for proselytizing those who had not yet 'accepted' Christ." Petitioners' Brief, *supra* note 44, Joint Appendix at 252. *See also* Clark v. Dallas Indep. School Dist., 671 F. Supp. 1119 (N.D. Tex. 1987), where the student members distributed pamphlets at school, preached loudly in public areas, and even used bullhorns to attract prospective converts.

163. *See Clark*, 671 F. Supp. 1119 (N.D. Tex. 1987); Somer v. Hicksville, No. 85-3168 (S.D.N.Y. filed Dec. 26, 1985) (settled). *See also* testimony of representatives of Campus Crusade for Christ and Fellowship of Christian Athletes expressing desire for continued ac-

minister encouraging or directing devout students to organize campus groups and engage in proselytizing. Consequently, the government is attempting to circumvent the requirement of neutrality by facilitating a particular form of religious expression on public school property.

Thus, the Equal Access Act does not protect a student's free exercise or free speech rights; neither does it further true "equality" between types of student speech. When these factors are considered in conjunction with its establishment clause problems, the Act becomes troubling indeed.

VI. The Constitutionality of the Equal Access Act

This article argues that the Equal Access Act is unconstitutional. Most, if not all, of the problems addressed above are present in *Mergens*. If the Court upholds the Act and finds it applicable to the facts of the case, the Christian Bible Club would then be officially recognized by Westside High School. As a result, the Christian Bible Club would gain access to school facilities during the school day, and it would have the benefit of a faculty sponsor. The problems of a nonsecular purpose,[164] direct assistance, endorsement, sponsorship,[165] and entanglement[166] issue.

The first place to look for direction is *Bender v. Williamsport Area School District*.[167] As mentioned above, the Court declined to address the equal access claim presented in *Bender*, focusing instead on the lack of standing of one of the parties. However, four Justices dissented, urging the majority to find jurisdiction and reach the issues in the case. In two separate opinions,[168] the dissenters argued that *Widmar* controlled at the high school level and that student access claims should be protected by the free speech and free exercise clauses.[169] Chief Justice Burger even suggested that because of the voluntary nature of the student religious club, he doubted whether sufficient state action existed to implicate the

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cess to public schools. *Senate Hearings*, *supra* note 60, at 143-44, 168-71.

164. *See supra* text accompanying notes 56-83.

165. *See supra* text accompanying notes 84-104.

166. *See supra* text accompanying notes 105-114.

167. 475 U.S. 534 (1986).

168. Chief Justice Burger was joined by Justices White and Rehnquist. *Id.* at 551. Justice Powell wrote a separate opinion. *Id.* at 555.

169. *Id.* at 553, 555.

establishment clause.[170]

Two of the *Bender* dissenters are now retired from the Court. However, their replacements, Justices Scalia and Kennedy, have indicated a willingness to uphold legislative attempts at accommodating religious practice. Justices Scalia and Kennedy's dissents in *Texas Monthly, Inc. v. Bullock*[171] and *County of Allegheny v. ACLU*,[172] respectively, suggest that they would look favorably on the stated purpose of the Act and would restrictively view claims of religious entanglement and endorsement.[173]

Justice O'Connor, increasingly the wild-card in establishment clause matters, has been less deferential to governmental attempts at accommodating religious expression and practice.[174] Like her more moderate brethren, she has argued for limiting permissible accommodation of religion to situations where a legislature is attempting to lift government-imposed burdens on religion.[175] Thus, her determination of the constitutionality of the Act may rest on her reading of the congressional findings in the legislative record.

The four moderate-to-liberal Justices (Brennan, Marshall, Blackmun and Stevens) all voted to reverse *Bender* on the basis of standing.[176] Thus there is no clear indication as to how they would rule on the issue of equal access in public schools.[177] All four voted with the majority in *Widmar*, which found a free speech right to equal access at the college level. In a separate concurrence, how-

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170. *Id.* at 553.

171. 109 S. Ct. 890 (1989).

172. 109 S. Ct. 3086 (1989).

173. *Texas Monthly*, 109 S. Ct. at 912-13 (1989) (Scalia, J., dissenting); *Allegheny*, 109 S. Ct. at 3135-37 (1989) (Kennedy, J., dissenting). Justice Kennedy has urged that the Court limit findings of endorsement of religion to situations where there has been a showing of governmental coercion or governmental support for actions amounting to proselytizing. *Id.* at 3136.

174. *See Allegheny*, 109 S. Ct. at 3121-22; *Texas Monthly*, 109 S. Ct. at 907 (Blackmun, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 83-84 (1985).

175. *Allegheny*, 109 S. Ct. at 3121. *Accord Allegheny*, 109 S. Ct. at 3105 n.51 (Blackmun, J.); *Texas Monthly*, 109 S. Ct. at 901 n.8 (Brennan, J.).

176. Bender v. Williamsport Area School Dist., 475 U.S. 534, 541-49 (1986).

177. Justices Brennan, Marshall, and Blackmun dissented in *Hazelwood* urging greater protection for the expressive rights of public school students. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 277 (1988). However, Justices Marshall, Blackmun, and Stevens joined in Justice Brennan's opinion in *Edwards* which relied in part on the greater impressionability of elementary and secondary school students to religious influences in the public schools. Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987). This latter factor suggests that the Justices would be concerned with the appearance of endorsement of religion created by the application of the Act.

ever, Justice Stevens questioned whether public universities, because of their educative purpose, could ever be considered true public forums.[178] Stevens also argued that because of this educative purpose, universities should not be required to establish a compelling state interest to defend their decisions to limit access to particular student groups.[179] Because Stevens voted with the majority in *Hazelwood*, which upheld greater latitude to public school administrators, his reasoning in *Widmar* would likely apply to the public school setting.

Consequently, while it is all but impossible to predict how the Court will ultimately rule on the constitutionality of the Equal Access Act, it appears likely that several of the Justices will support its constitutionality. It remains to be seen whether that number will be sufficient to uphold the Act.

Conclusion

This article has argued that the Equal Access Act violates the establishment clause by providing direct assistance to student religious groups, by sponsoring and endorsing student religious groups, and by fostering impermissible government entanglement with religion. This article has also argued that the Act lacks a valid secular purpose due to the clear congressional intent to return organized religious exercises to the public schools.

More significantly, this article maintains that the Act creates a false conception of equality between variant types of student speech because religious and nonreligious speech are not equal within the public school context. Finally, the Act does not further any recognized free exercise right, especially because schools continue to exercise the authority to restrict extracurricular student expression. Consequently, the Supreme Court should take the opportunity to make a clear statement on the impropriety of organized religious exercises in public schools and reverse the decision of the Court of Appeals in *Mergens* upholding the constitutionality of the Equal Access Act.

178. Widmar v. Vincent, 454 U.S. 263, 278 (1981).
179. *Id.* at 278-79.