REPELLING A CONSTITUTIONAL BATTERING-RAM: THE FIGHT TO KEEP NONSTUDENT RELIGIOUS WORSHIP SERVICES OUT OF PUBLIC SCHOOLS

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INTRODUCTION

In recent years, religious groups have stepped up their fight to attain equal access to public school facilities for all purposes, including nonstudent religious worship. Legal battles over equal access are taking place all over the United States,[1] even in places traditionally considered bastions of liberal politics.[2]

Beyond merely providing a roof under which teachers attempt to educate children, public schools generally assume several important roles within most communities. For example, they often serve as convenient and functional venues for local meetings and assemblages. In recognition of this fact, public school districts generally adopt policies that set forth the parameters of permissible use of school facilities during noninstructional hours. These policies normally permit members of the community to utilize school facilities for group meetings, evening classes, community theater, and other similar activities, but usually prohibit use for religious purposes, including worship services.[3]

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1. Such an incident recently took place in Sutton, Massachusetts. Robert Keough, *God On Their Side: A Holy Alliance Takes Arms Against the Sutton Schools*, WORCESTER PHOENIX, May 6, 1994, at 8.

2. Interestingly, while "separation of church and state" is a mantra associated with followers of traditional liberal ideology, because the *Sutton* case involves competing constitutional rights, the Massachusetts chapter of the ACLU was divided over which side to support in the controversy. Jennifer Greaney, *ACLU Reviews Sutton Case*, WORCESTER TELEGRAM AND GAZETTE, Apr. 13, 1994, at 1.

3. For example, a New York public school's use policy must comply with state law, which dictates that public school districts may allow school facilities to be used for the following purposes (among others): (1) instruction in any branch of education, learning, or the arts; (2) public library purposes; (3) holding social, civic and recreational meetings and entertainments, provided they are open to the public; and (4) meetings for an educational or charitable purpose. Deeper Life Christian Fellowship v. Board of Educ. of the City of New York, 852 F.2d 676, 678 (2d Cir. 1988) [hereinafter *Deeper Life I*] (citing New York Education Law § 414). But "such use shall not be permitted if such meetings, entertainments[,] and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination. . . ." *Id.*

In theory, such policies are designed to insulate school districts from unwanted controversy and divisiveness. In practice, however, they have proved capable of stirring up more controversy than they avoid, as their very existence inspires calls for equal access.

The issue of equal access to public school facilities is being litigated throughout the federal court system. This is not, in itself, particularly surprising, for American courtrooms have often served as an arena for those seeking to advance social or moral positions. However, that the religious challengers have consistently been winning these suits is raising eyebrows and causing concern within many communities.

Although the notion of permitting a religious group—regardless of the sect or denomination—to conduct a worship service inside a public school triggers the Establishment Clause alarm in every lawyer's mind, such action actually implicates principally the First Amendment right of free speech.[4] Accordingly, to reach a well-reasoned decision in this type of case, a court generally must engage in First Amendment public forum analysis.

This article introduces readers to public forum analysis in the context of a nonstudent religious group's attempt to gain equal access to public school facilities for the purpose of engaging in worship services. While small portions of the article specifically target Massachusetts practitioners, it is intended to be a resource for attorneys facing similar issues in any state or municipality. In fact, the analysis and commentary contained herein rely almost exclusively on federal case law for authority.

The article identifies three defenses that a school can raise if confronted with an equal access challenge, examining the strengths and weaknesses of each. It places special emphasis on the concept of the "limited public forum," focusing on noteworthy cases which support and oppose its application, and examining the chaotic state of the law surrounding this forum classification. The article also attempts to provide the reader with insight into how the First Circuit Court of Appeals approaches equal access challenges by critically analyzing its recent decisions. Finally, the article explores the most recent U.S. Supreme Court decision on

4. "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I. The First Amendment applies to the States through the Fourteenth Amendment. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

a nonstudent equal access challenge, and attempts to gauge its importance.

I. FORUM ANALYSIS GENERALLY

Forum analysis in an equal access case begins with a determination of whether the religious group's desired use of public school facilities constitutes speech protected by the First Amendment.[5] Though an essential element of the analysis, this issue is almost always disposed of with little discussion, as the Supreme Court has repeatedly extended full First Amendment protection to religious speech, including religious worship.[6]

The second step of the process calls for an examination of the relevant forum in which the group seeks to engage in the protected speech. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[7] the Supreme Court announced that analysis of the constitutionality of speech restrictions differs "depending on the character of the property at issue."[8] In *Perry*, the Court enunciated a system of nomenclature for purposes of speech restriction analysis, and defined three distinct categories of fora: the traditional public forum, the public forum created by designation, and the nonpublic forum.[9] Each category corresponds to an evidentiary standard against which any content-based speech restrictions must be measured.

A "traditional public forum" is a place "which by long tradition or by government fiat [has] been devoted to assembly and debate. . . ."[10] The paradigmatic examples of traditional public fora are public streets and parks.[11] In traditional public fora, the government's right to implement a content-based exclusion is quite limited: to be upheld, such a restriction must

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5. Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1370 (3d Cir. 1990).

6. Widmar v. Vincent, 454 U.S. 263, 269 (1981). Although religious speech is unquestionably entitled to First Amendment protection, an argument can be made that religious worship is not similarly privileged. *See id.* at 282-89 (White, J., dissenting).

7. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

8. *Id.* at 44.

9. *Id.* at 45-46. Prior to *Perry*, the Supreme Court formally recognized only two distinct forum categories: public and nonpublic. Greer v. Spock, 424 U.S. 828 (1976).

10. *Perry*, 460 U.S. at 45.

11. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 802 (1985). Courts have held that public schools are not traditional public fora. *Deeper Life I*, 852 F.2d at 679. Thus, extensive analysis of the traditional public forum generally is absent from court opinions involving public schools and will not specifically be addressed in this article.

satisfy strict scrutiny, that is, it must be shown to be narrowly tailored and necessary to serve a compelling state interest.[12]

A "designated public forum" is a state-owned facility that the state chooses indiscriminately to open to the general public for the purpose of expressive activity.[13] Speech restrictions in a designated public forum, like those in a traditional public forum, are generally reviewed under strict scrutiny.[14] However, a designated public forum differs from a traditional public forum in three significant respects. First, whereas public streets and parks are, by definition, places open to public speech, it must be established that the government intended to create a designated public forum.[15] Second, a state need not "indefinitely retain the open character" of a designated public forum.[16] Finally, a designated public forum "may be so designated for restricted or limited uses or for a limited class of speakers."[17] This third distinction carries particular importance, as it is responsible for what some courts view as the creation of a subset of the designated public forum category known as the "limited public forum."[18]

A "limited public forum" is one created "when government opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects."[19] Because in a limited public forum the government may restrict access to the forum based upon subject matter, this subcategory represents an appealing argument for a school district attempting to resist a challenge to its policy restricting religious speech.

The final category, the "nonpublic forum," encompasses publicly-owned fora that have not been dedicated to indiscriminate use by the general public for the purpose of

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12. *Cornelius*, 473 U.S. at 800.

13. *Id.* at 802.

14. *Id.* at 800.

15. *Id.* at 802.

16. *Perry*, 460 U.S. at 46.

17. *Id.* at 46 n.7. Footnote seven, written by Justice White, states: "A public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects." (citations omitted).

18. *See, e.g.*, Brody *ex rel.* Sugzdinis v. Spang, 957 F.2d 1108, 1118 (3d Cir. 1992); Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991); Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 292 (E.D. Pa. 1991).

19. *Travis*, 927 F.2d at 692 (citation omitted).

expressive activity.[20] In a nonpublic forum, the State "may reserve the forum for its intended purposes . . . as long as [a] regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[21] Accordingly, to be upheld, speech restrictions in a nonpublic forum must meet a two-part test: they must be reasonable and viewpoint neutral.[22]

To determine a forum's appropriate classification, courts will look to a variety of factors including: the state's intent, the extent of the use granted, and the state's consistency in granting or denying permission to use the facilities.[23] In deciding the category in which a public school falls, a court should look to the policy promulgated by the school and to its actual practice, as well as to the nature of the property and the extent to which that nature is inherently compatible with expressive activity.[24] To assess the extent of use granted by the school district, a court should consider whether, through policy or practice, the facilities are open to the general public, or whether their use has been limited by well-defined standards.[25] In evaluating the State's consistency in granting or denying permission to use the facilities, a court should examine the procedures in place and how those procedures historically have been applied to similarly-situated speakers.[26]

Before a court endeavors to determine in which category a particular forum falls, it must first precisely define the nature of the forum itself. This is not often an issue of great contention. In public school cases, courts generally find that the entire school constitutes the forum, despite the fact that a group may actually have requested use of only one particular room or facility within the school.[27]

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20. *Perry*, 460 U.S. at 46.

21. *Id.*

22. *Cornelius*, 473 U.S. at 806.

23. *Id.* at 802; *Gregoire*, 907 F.2d at 1371.

24. *Cornelius*, 473 U.S. at 802-03; *Gregoire*, 907 F.2d at 1374 ("forum classification 'should be triggered by what a school does, not what it says'") (citation omitted).

25. *Perry*, 460 U.S. at 46-47.

26. *Cornelius*, 473 U.S. at 804-05.

27. In defining what constitutes the actual forum in a given case, a court must consider the access sought and the particular activity the group sponsors. *Id.* at 801. Thus, while a religious group may specifically apply to use a high school cafeteria for conducting a worship service, absent evidence of contrary intent, a court will likely presume that the

II. APPLICATION OF PUBLIC FORUM ANALYSIS TO CASES INVOLVING RELIGIOUS WORSHIP RESTRICTIONS

A school district hailed into court to defend its policy restricting religious speech has a limited repertoire of potentially effective responses, as most courts characterize public schools as designated public fora.[28] As a consequence, a school can successfully defend a religious speech restriction only if it persuades a court either that, regardless of forum status, the restriction satisfies strict scrutiny, or, in the alternative, that the school represents something other than a public forum and that the restriction satisfies lesser scrutiny.

A. First Defense: Regardless of Forum Status, Strict Scrutiny is Satisfied

A school district able to justify its restrictive policy as satisfying strict scrutiny will render forum status irrelevant. Consequently, as if relying on instinct, most school districts answer the call for a compelling state interest by invoking the Establishment Clause as a defense, insisting that allowing nonstudent worship on public school grounds would violate the First Amendment's prohibition against state endorsement of religion.[29] Despite the frequency with which this tack is taken, it seldom succeeds.

While the Supreme Court has stated that a public school has a compelling state interest in avoiding an Establishment Clause violation, the school must first demonstrate that allowing the

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group has no particular preference for the cafeteria over a comparable school facility. *Gregoire*, 907 F.2d at 1372 n.2 (despite group's specific request for use of the auditorium, the court classified the entire high school as the relevant forum); *see also Slotterback*, 761 F. Supp. at 292 n.11 (finding forum incorporates entire school). It should be noted, however, that there exists some authority for the proposition that one school may be composed of many separate fora, including but not limited to daytime classrooms and adult evening school. *Gregoire*, 907 F.2d at 1384 (Stapleton, J., dissenting).

28. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (characterizing the University as generally open for use by students); *Gregoire*, 907 F.2d at 1378 (characterizing the school as a designated open forum).

29. In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Supreme Court enunciated a three-part test for assessing potential Establishment Clause violations. To be upheld as constitutional, State action that somehow affects religion (1) must be secular in purpose; (2) must be neutral in its primary effect on religion; and (3) must not excessively entangle the State in religious affairs. *Id.* at 612-13.

worship to take place would, in fact, offend the Constitution.[30] The vast majority of courts presented with the opportunity have refused to allow the Establishment Clause defense to justify a religious speech restriction, and suggest that a district which permits religious expression in its facilities does not thereby impermissibly endorse a particular religious point of view or excessively entangle the State in religious affairs.[31] The Supreme Court has held that a school does not violate the Establishment Clause merely by tolerating religious speech.[32] Thus, a school relying solely on the Establishment Clause to shield its religious speech restriction should take little comfort in the strength of its position. Given an appropriate set of facts and a sympathetic court, however, the onerous strict scrutiny standard can be overcome.

In *Wallace v. Washoe County School District*,[33] a public school district had in place a policy that afforded general community access to school facilities during nonschool hours but specifically excluded use for religious purposes, including worship services.[34] The school district, relying on its stated policy, denied a religious group's request to use school facilities to conduct Sunday worship services; in response, the group sued for an injunction in federal court.[35]

Concluding that the breadth of the school's access policy had created a public forum, the court applied strict scrutiny to the worship exclusion.[36] The school invoked the Establishment Clause defense, contending that to allow worship in the school would constitute improper state advancement of religion.[37] The court found this argument persuasive, particularly in view of the

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30. *Widmar*, 454 U.S. at 271.

31. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 770 F. Supp. 91 (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 (2d Cir. 1992), *rev'd on other grounds*, 113 S.Ct. 2141, 2148 (1993) (posited fears of Establishment Clause violation are unfounded); *Widmar*, 454 U.S. at 271 (equal access policy not necessarily violative of Establishment Clause); Fairfax Covenant Church v. Fairfax City Sch., 17 F.3d 703, 707-09 (4th Cir. 1994) (school board's concern about establishment of religion is unfounded).

32. *Widmar*, 454 U.S. at 274; Board of Educ. v. Mergens, 496 U.S. 226, 249-50 (1990).

33. Wallace v. Washoe County Sch. Dist., 701 F. Supp. 187 (D. Nev. 1988).

34. *Id.* at 189.

35. *Id.*

36. *Id.* at 189-90.

37. *Id.* at 190.

religious group's stated intention to conduct its worship services in the school on a weekly basis.[38] The court wrote:

> A formal application . . . would include a request to permanently conduct church services and Sunday school at the . . . High School. In other words, [the group] wants to convert a portion of the high school into a permanent site for its church services and activities. . . . [The group] plans to establish the high school as its permanent place of worship [and] will have no other facility in which to meet, worship[,] or conduct any of its services. [The] High School will become the physical embodiment of the church.[39]

Accordingly, the court upheld the school's worship ban.[40]

The *Wallace* court recognized that housing a church within a public high school would have the primary effect of advancing religion, thereby offending the First Amendment.[41] Thus, *Wallace* demonstrates that under appropriate circumstances a school can wield the Establishment Clause as an effective weapon to combat an equal access challenge. While the decision is significant insofar as it represents one of few reported decisions in which a court embraces the Establishment Clause defense,[42]

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38. *Id.* at 191.

39. *Id.* at 190.

40. It bears noting that three years hence, the same parties engaged in similar litigation in the same court. At issue in the second suit was the school's denial of a one-time request to use school facilities for conducting an Easter service. Concluding that this request did not imply an intent to convert the school into a house of worship, the Court ruled in favor of the religious group. Wallace v. Washoe County Sch. Dist., 818 F. Supp. 1346 (D. Nev. 1991).

41. *Wallace*, 701 F. Supp. at 190.

42. Other decisions in which courts have demonstrated sympathy for the Establishment Clause defense include Resnick v. E. Brunswick Township Bd. of Educ., 389 A.2d 944 (N.J. 1978); *Gregoire*, 907 F.2d at 1366; and Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703 (4th Cir. 1994). In *Resnick*, despite disclaiming that the facts of the case were insufficient for proper invocation, the Court suggested that, theoretically, a school could appropriately invoke the Establishment Clause defense to prevent "continuous use" of school facilities for the promotion of religion. *Resnick*, 389 A.2d at 958-59. The *Gregoire* Court, in its evaluation of the Establishment Clause defense asserted by the school district, considered relevant the fact that the religious group's "proposed use of the auditorium is occasional only." *Gregoire*, 907 F.2d at 1381. In *Fairfax*, the Court hinted that appropriate facts could support a valid Establishment Clause defense, writing, "[m]ere speculation that a nonexclusive access to a public forum might ripen into a violation of the Establishment Clause, *absent any facts suggesting that probability*, is not

the decision is quite fact-specific, likely hindering its broad application.

B. Second Defense: The School Represents a Nonpublic Forum

Because of the infrequency with which courts find strict scrutiny satisfied in equal access cases, a school district confronted with such a challenge should explore alternative defenses. A district should contemplate arguing that the school at issue is a nonpublic forum, and, therefore, that the district is able to exercise greater discretion over forum access. Although a school need not be completely closed to public expression to qualify as a nonpublic forum, a school is well advised to invoke this defense with circumspection, advancing it only if it can do so without appearing disingenuous. Otherwise stated, if the school's policy and practice afford a variety of groups virtually unlimited and unfettered access to school facilities, then the school should probably avoid making a nonpublic forum argument. Even under more appropriate circumstances, persuading a court that a public school deserves nonpublic forum status will prove no easy task.[43]

In *Student Coalition for Peace v. Lower Merion School District Board of School Directors*,[44] a student organization dedicated to the cause of world peace[45] requested permission to use the public high school athletic field[46] to hold a fair. Notwithstanding that the field had regularly been used by certain nonschool groups for community events,[47] the school denied the group's request, citing as its rationale the fact that the field had traditionally been used

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a justification sufficiently compelling to burden free access to the forum." *Fairfax*, 17 F.3d at 708 (emphasis added).

43. In these cases most courts characterize public schools as designated public fora. *See supra* note 28 and accompanying text for cases identifying public schools as designated public fora.

44. Student Coalition for Peace v. Lower Merion Sch. Dist. Bd. of Sch. Directors, 776 F.2d 431 (3d Cir. 1985).

45. While *Student Coalition* did not involve religious expression, the forum analysis applied by the Court of Appeals is equally applicable to religious equal access cases. *See Gregoire*, 907 F.2d at 1377-78.

46. Although it focused on the athletic field as the relevant forum, the Court suggested that its reasoning "applies to all" school facilities. *Student Coalition*, 776 F.2d at 435 n.4.

47. Veterans' groups, the Special Olympics, and at least one other charitable organization had been permitted to use the field in the past. *Id.* at 434.

only for athletic or governmental purposes.[48] Observing both that the district had not granted permission to use the field as a matter of course and that the primary purpose of the property was something other than to provide a location for expressive activity, the court categorized the field as a nonpublic forum.[49] It found the speech restriction to be reasonable[50] and viewpoint neutral, thereby satisfying the two-part standard. Accordingly, the court upheld the restriction.[51]

A school district can use the *Student Coalition* holding to support an attempt to qualify a school as a nonpublic forum, although it must be noted that the breadth of the decision's application was subsequently limited by the Third Circuit's opinion in *Gregoire v. Centennial School District*.[52] In *Gregoire*, the court stated that the facts addressed by the court in *Student Coalition* were somewhat unique, and that the situation present in *Student Coalition* involved limited access to the relevant forum.[53] Thus, *Gregoire* reinforces the notion that only a school district faced with facts analogous to *Student Coalition* will be entitled to have a content-based speech restriction reviewed under the lesser scrutiny of a nonpublic forum.

A school district can look to *Perry* for additional authority for characterizing a school as a nonpublic forum.[54] At issue in *Perry* was a public school's internal mail system, which the district had made available to one union but not to that union's rival.[55] The excluded union sued in federal court for equal access.[56]

Notwithstanding that the school had historically afforded access to its mail system to nonstudent groups like the Cub Scouts, the YMCA and other civic and church organizations, the Court found that opening the school to certain groups did not, ipso facto, create a public forum.[57] Writing for the majority, Justice White trumpeted that merely affording certain nonstudent

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48. *Id.* at 436-37.

49. *Id.*

50. Specifically, the Court found that the desire to avoid political controversy within the local community was a reasonable basis for the restriction. *Id.* at 437.

51. *Id.*

52. Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir. 1990).

53. *Id.* at 1377.

54. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

55. *Id.* at 39-40.

56. *Id.* at 41.

57. *Id.* at 47.

organizations "selective access [to a public school's mail facilities] does not transform government property into a public forum."[58] The Court stated that to constitute a public forum, a school must be deemed to have opened its forum for "indiscriminate use by the general public."[59] Accordingly, a school district that selectively allows only certain groups to use school facilities for purposes of free expression may be able to cite *Perry* in support of a nonpublic forum argument.[60]

While the prospect of having a speech restriction judged under lesser scrutiny makes the nonpublic forum defense particularly attractive to school districts, *Student Coalition* and *Perry* establish that eligibility for this forum status cannot be manufactured or contrived. Rather, nonpublic forum status is determined by a district's policy and practice.

C. Third Defense: The School is a Limited Public Forum

A more novel approach, and one based principally in law rather than fact, would be for a district to argue that the school at issue fits within the meaning of a limited public forum. While the term is often peppered throughout forum analysis opinions, it has no single universally accepted definition, much to the chagrin of the attorneys who rely on such opinions. Some courts appear to equate limited public forum with nonpublic forum.[61] Other courts use the term as a synonym for "designated public forum."[62] Still others endow limited public forum with independent meaning, characterizing it as a subcategory of the

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58. *Id.*

59. *Id.*

60. Further authority for characterizing a school as a nonpublic forum can be found in *Gregoire*, 907 F.2d at 1383-94 (Stapleton, J., dissenting) ("this court should conclude that [the district] has established a 'nonpublic forum' rather than a 'designated public forum'"); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (holding that a public high school's student newspaper is a nonpublic forum).

61. Grace Bible Fellowship v. Maine Sch. Admin. Dist. # 5, 941 F.2d 45, 47 (1st Cir. 1991); *Gregoire*, 907 F.2d at 1370-71.

62. Chabad-Lubavitch of Georgia v. Miller, 5 F.3d 1383, 1391 n.13 (11th Cir. 1993); Calash v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986); Kurtz v. Baker, 630 F. Supp. 850, 858 (D.D.C. 1986); *see also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1751-52 (1987) (describing how the *Perry* court created a third type of government property, called the limited public forum); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 46 (1986) (distinction unclear between limited public forum and nonpublic forum).

designated public forum.[63] Congress compounded the confusion by passing the Equal Access Act,[64] which compels public schools that are "limited open" fora to afford equal access to *students* desiring to engage in religious speech on school property.[65] Remarkably, few courts have made mention of the apparent widespread confusion that surrounds the limited public forum.[66] This uncertainty notwithstanding, the limited public forum argument still merits serious attention, particularly for school districts in those judicial districts or circuits that have expressly or impliedly embraced the concept.

In effect, courts that subscribe to the limited public forum subcategory theory view the designation as creating a nonpublic forum as to expression excluded from the forum and a designated public forum as to included expression.[67] So interpreted, this category uniquely implicates both evidentiary standards: restrictions on speech of the type permitted in a limited public

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63. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 770 F. Supp. 91 (E.D.N.Y. 1991), *aff'd*, 959 F.2d. 381, 386 (2d Cir. 1992), *rev'd on other grounds*, 113 S.Ct. 2141 (1993); Brody *ex rel.* Sugzdinis v. Spang, 957 F.2d 1108, 1118 (3d Cir. 1992); Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991); Deeper Life Christian Fellowship v. Board of Educ. of New York, 852 F.2d 676, 679 (2d Cir. 1988); Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 292 (E.D. Pa. 1991); *see also* John W. Whitehead and Alexis I. Crow, *Beyond Establishment Clause Analysis In Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L.J. 150, 179 (1992) (designated public forum contains subcategory called limited public forum).

64. 20 U.S.C. § 4071 (1984).

65. The Equal Access Act provides that a school becomes a "limited open forum" when it allows "one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). While the Supreme Court upheld the constitutionality of the Equal Access Act in *Mergens*, it should be noted that in the majority opinion, Justice O'Connor stated that Congress, by deliberately dubbing its creation a "limited open" forum, "intended to establish a standard different from the one established by our free speech cases." *Board of Educ. v. Mergens*, 496 U.S. 226, 242 (1989) (citing Laycock, *supra* note 62, at 36). Interestingly, Justice Stevens commented, "[b]ut our own efforts to articulate 'public forum' analysis have not, in my opinion, been altogether satisfactory." *Mergens*, 496 U.S. at 283 (Stevens, J., dissenting).

66. In *Chabad-Lubavitch*, the Fourth Circuit Court of Appeals acknowledged the lack of clarity surrounding the term, stating that "'[l]imited' public forum terminology is misleading because . . . when [the government] turns property from a nonpublic forum into a public one," it may open it only for a "limited purpose" or it may "open the forum to the same extent as a traditional forum." *Chabad-Lubavitch*, 5 F.3d at 1391 n.13 (quoting Searcey v. Crim, 815 F.2d 1389, 1391 n.4 (11th Cir. 1987) (citation omitted)). Similarly, in *Slotterback*, the District Court detailed some of the different interpretations of limited public forum that various courts have adopted. *Slotterback*, 766 F. Supp. at 292-93. The Supreme Court has not yet addressed this confusion.

67. *Lamb's Chapel*, 959 F.2d at 386, *rev'd on other grounds*, 113 S.Ct. at 2144 (citing *Deeper Life I*, 852 F.2d at 679).

forum should be strictly scrutinized, whereas restrictions on speech of the type excluded from the same forum receive lesser scrutiny.[68] Accordingly, a school district will markedly improve a religious speech restriction's chances of being upheld if it can persuade the reviewing court to follow those jurisdictions that have endorsed a party's ability to limit access to a forum based on the identity of the speaker or the type of speech involved.

1. Opinions Supporting an Expanded View of the Limited Public Forum

In *Travis v. Owego-Apalachin School District*, a nonprofit Christian organization requested permission to use public school facilities to hold a fund-raiser.[69] Fearing an Establishment Clause violation, the school district denied the group's request.[70] The group sued in federal court for equal access.[71]

Although the court ultimately ruled in favor of granting the group equal access, in performing its analysis the court stated that a limited public forum is a "sub-category of the designated public forum" and, as such, "constitutional protection is afforded only to expressive activity of a genre similar to those that government has admitted to the limited forum."[72] The court explained that in a limited public forum the government can indeed "impose a blanket exclusion on certain types of speech," although once the government permits a certain genre of expression, it thereby relinquishes the ability selectively to deny access to other expression within that genre.[73] Thus, the *Travis* court generally sanctioned the creation and application of a limited public forum, so long as such a forum would not invite viewpoint-based discrimination.

The *Travis* court concluded that in light of the specific facts of the case *sub judice*, whether the school qualified as a limited public forum had become an irrelevant inquiry because the school had in the past sanctioned fund-raisers similar to the one at

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68. *Deeper Life I*, 852 F.2d at 679-80.
69. Travis v. Owego-Appalachin Sch. Dist., 927 F.2d 688 (2d Cir. 1991).
70. *Id.* at 691.
71. *Id.*
72. *Id.* at 692.
73. *Id.*

issue.[74] The school, therefore, could not now deny the religious group's request absent a compelling state interest.[75] By virtue of having traditionally permitted charitable fund-raisers, the school had become a public forum as to that genre.[76]

In dictum, the *Travis* court made a comment destined to spawn great controversy in future religious equal access cases. The court stated that a school that allows religious speech into its facilities does not, ipso facto, open the door to religious worship.[77] It wrote that a school which historically has permitted religious groups to hold fund-raisers on its property would not necessarily be deemed open to "the actual practice of a religion, including formal religious services."[78] Thus, *Travis* suggests that in restricting the forms of expression permitted to take place in its schools, a district may indeed be able to distinguish between religious speech and religious worship. Accordingly, *Travis* should serve to hearten public school districts desiring to keep school facilities open to most forms of expression but closed to religious worship services.

Another decision in which a district court entertained the limited public forum concept is *Slotterback v. Interboro School District*.[79] The controversy in *Slotterback* centered around a student who had begun distributing religious literature at the public high school he attended.[80] The school, concerned about the disruptive effect this distribution was having on the school, issued a formal written policy that restricted the time, place, and manner for permissible distribution of nonschool literature.[81] In response to the school's restrictions, the student sued the school district in federal court.[82]

In performing its public forum analysis, the court focused its attention on whether the school at issue was a designated public forum or a nonpublic forum.[83] Looking to the Third Circuit's

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74. *Id.* at 693.

75. *Id.* The school asserted the Establishment Clause defense, which the Court rejected. *Id.* at 694.

76. *Id.* at 693-94.

77. *Id.* at 694.

78. *Id.* at 693 n.3.

79. Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280 (E.D. Pa. 1991).

80. *Id.* at 284.

81. *Id.* at 285.

82. *Id.*

83. *Id.*

decision in *Gregoire* for guidance, the *Slotterback* court stated that while "some commentators have recognized, that in the wake of *Cornelius* the concept of a 'limited public forum' does not exist as an analytically 'separate' forum category[,]"[84] the limited public forum "has retained vitality *within* the designated public category."[85] Thus, the *Slotterback* court endorsed the subcategory theory and noted that "commentary to the contrary is unpersuasive."[86]

The *Slotterback* court stated that since the limited public forum is a subset of the designated public forum, it "will not be found to exist at a public high school absent: (1) government intent to create such a forum; or (2) where outsiders seek access to the high school, evidence that wide access to the high school is granted to outsiders."[87] Hinting that it felt some solidarity with Judge Stapleton, the lone dissenter from the *Gregoire* majority opinion, the *Slotterback* court indicated that intent to limit a forum, as noted in footnote seven of *Perry*, should be judged by the property's "dedication."[88] The court expressed harmony with Judge Stapleton's view that "'speakers or topics within the ambit of the dedication cannot be excluded without showing a compelling state interest . . . until the forum is redefined or terminated.'"[89]

A school district within the jurisdiction of a court holding views akin to those of the *Travis* and *Slotterback* courts will likely be able to avail itself of the limited public forum subcategory theory in defending against an equal access challenge.[90] Of

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84. *Id.* at 292.

85. *Id.* (emphasis in original).

86. *Id.*

87. *Id.* (footnote omitted).

88. *Id.* at 293 (emphasis omitted). *See supra* note 17 for text of *Perry*, 460 U.S. at 46 n.7.

89. *Id.* at 293 (quoting Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1387 n.3 (Stapleton, J., dissenting)) (emphasis omitted).

90. Of course, persuading a court that the limited public forum is a legitimate argument and a valid defense represents only the school's first step toward having its speech restriction upheld. For a religious speech restriction in a limited public forum to satisfy constitutional scrutiny, a school district must also convince the court that the speech being restricted is not within the genre of speech permitted in the limited forum and, further, that the restriction is reasonable and viewpoint-neutral. Deeper Life Christian Fellowship v. Board of Educ. of New York, 852 F.2d 676, 679-80 (2d Cir. 1988).

Because of the resistance a school district will likely encounter in attempting to persuade a court to lend its imprimatur to a school district's blanket ban on all religious speech, attempting to create a limited public forum that distinguishes between religious

course, because numerous courts do not share such views, many school districts will find that such an argument receives a more tepid reception.

2. Opinions Supporting a Restrictive View of the Limited Public Forum

As indicated, many courts are not particularly enamored with the concept of the limited public forum, fearing that allowing parties arbitrarily to open and close fora would invite abuse and impermissible state-sponsored censorship.[91] However, even these courts do not deny that, at least theoretically, a school can exercise some measure of control over the groups permitted to access the forum and the types of expression in which those groups may engage.[92] Certain courts, most notably the First Circuit Court of Appeals, have transformed the acquisition of limited forum status into a Sisyphean task: irrespective of a school's efforts to qualify as a limited public forum, these courts invariably will deem it to have fallen short.

a. The First Circuit

That the First Circuit evinces little sympathy for the concept of the limited public forum is perhaps best evidenced by its decision in *Grace Bible Fellowship v. Maine School Administrative District #5*.[93] In *Grace*, a case on appeal from the District of Maine, a religious group requested permission from a public school district to lease school facilities for the purpose of giving a Christmas dinner, which would be free and open to the entire community.[94] Because the dinner was to be accompanied by an

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speech and religious worship (permitting the former and proscribing the latter) would seem a sounder strategy. *See* Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 693 n.3 (2d Cir. 1991). School districts should take notice, however, that drawing such a distinction will by no means ensure success, for this tactic may also run into judicial resistance. *See Gregoire*, 907 F.2d at 1382 ("Attempting to draw a line between religious discussion and worship would only exacerbate establishment clause concerns, requiring [the school] to entangle itself in what would almost certainly be complex content determinations").

91. *See, e.g.*, Grace Bible Fellowship v. Maine Sch. Admin. Dist. #5, 941 F.2d 45, 48 (1st Cir. 1991) (school volunteered forum not only for educationally-related purposes but for service to community).

92. *See, e.g., Gregoire*, 907 F.2d at 1379.

93. Grace Bible Fellowship v. Maine Sch. Admin. Dist. #5, 941 F.2d 45 (1st Cir. 1991).

94. *Id.* at 46.

evangelical message, however, the school district, fearful of advancing religion or engendering divisiveness within the local community, denied the group's request.[95] The district court ruled in favor of the religious group, concluding that the school was a designated public forum and that the district had offered no compelling state interest to justify the exclusion.[96] The First Circuit, Judge Aldrich writing for the Court, affirmed.[97]

Focusing on the school district's policy and practice, the First Circuit observed that the district had in the past allowed other groups to use school facilities for purposes similar to that proposed by the religious group.[98] In addition, the court found that the school district had exercised its discretion to deny access requests in a curious fashion, noting that the district was unable to "cite an example within recent memory of a refusal to any group other than to religious organizations."[99] Consequently, the court concluded that the school was a designated public forum, open to indiscriminate use by the community at large.[100]

In dismissing the possibility that the school qualified as something other than a public forum, the court explained that the exclusion of an entire class of speech, namely religious speech, did not result in the creation of a limited forum.[101] On the contrary, the First Circuit concluded that the district's exclusion of all forms of religious expression from school facilities "did not mean that a broad access forum was legally limited."[102]

Distancing the case *sub judice* from a nonpublic forum situation, the court distinguished the school district's policy in *Grace* from that examined by the Supreme Court in *Perry*.[103] It emphasized that the forum in *Perry* had been limited to expression germane to the discrete "'mission and function of the

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95. *Id.*

96. *Id.*

97. *Id.* at 48.

98. The American Association of Retired People, Up With People, and the United Parcel Service all used school facilities to solicit new members or employees; to benefit a local community kitchen, Kitchen and Meeting Room People sponsored suppers in the schools; Pen Bay Hospital and Hospitality House held charitable fund-raisers in the schools. *Id.* at 47.

99. *Id.*

100. *Id.* at 48.

101. *Id.*

102. *Id.* at 47.

103. *Id.* at 48.

schools,'" whereas in *Grace* the district had opened the schools to a substantially broader range of expression, inviting use for "'community'" purposes.[104] Accordingly, the First Circuit determined that because the Christmas dinner at issue in *Grace* was open to the general community, and because "community" issues were to be discussed at the dinner, the school was compelled to approve the group's request.[105]

While clearly there is much merit in Judge Aldrich's analysis and the concern he expresses over state-sanctioned censorship of free speech and religious expression, two issues bring into question the tenability of his position. First, Judge Aldrich hinges his interpretation of the limited public forum concept on two nonpublic forum cases, thereby suggesting that the two concepts are synonymous. Citing *Perry* and *Greer v. Spock*[106] as authority, Judge Aldrich opined that a forum may be limited only to advance a state interest. He wrote, "'a public forum may be created for a limited purpose, such as use by certain groups' . . . but this means for an affirmative state interest."[107] His reliance on these cases would seem at odds with *Perry*, the decision that gave rise to the limited public forum debate.

In *Perry*, Justice White logically segmented the majority opinion's forum analysis introductory passage into three distinct sections: first, he discussed the traditional public forum; second, he discussed the designated public forum; and third, he introduced the nonpublic forum.[108] Footnote seven, which established a party's ability to limit a forum, resides squarely within the designated public forum section.[109] Had Justice White intended for the footnote to modify the nonpublic forum section, he certainly could have deposited it in a location more likely to reflect such an intent. By deliberately placing it where he did, one can reasonably infer that Justice White intended the footnote to refer to the designated public forum. Accordingly, Judge Aldrich's reliance on nonpublic forum cases to explicate his understanding of the limited public forum seems misplaced.

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104. *Id.* (citation omitted).

105. *Id.*

106. Greer v. Spock, 424 U.S. 828 (1976).

107. *Grace*, 945 F.2d at 47 (citation omitted).

108. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

109. *Id.* at 46 n.7. *See supra* note 17 for text of *Perry*, 460 U.S. at 46 n.7.

The second shortcoming of Judge Aldrich's interpretation of the limited public forum is that he seems to glean more from *Perry* than appears on the pages of the opinion. Footnote seven does not speak of restricting the state's capacity to limit forum access by requiring that it advance an affirmative state interest.[110] It is true that the *Perry* majority stated that allowing expression by certain groups whose activities would be "of interest and educational relevance to students . . . would not as a consequence" convert the school into an open public forum.[111] But this language does not, on its face, seem to circumscribe a party's ability to limit access to a forum by requiring that a state interest be demonstrated. While footnote seven empowers a party to limit a forum based on category of speech or speaker, Judge Aldrich's construction, which prohibits a school generally open to "community" purposes from closing itself to religious expression,[112] substantially hinders a party's ability to restrict access to its forum. Judge Aldrich concluded that because the school district had "volunteered expressive opportunity to the community at large," it could not exclude some groups "because of the content of their speech."[113] In so holding, the First Circuit seemed to distort, even contravene, the Supreme Court's vision of the limited public forum. As a consequence, Judge Aldrich may have impliedly deprived footnote seven of all vitality within the First Circuit.[114]

Reduced to its essence, *Grace* seems to stand for the following proposition: a school district which, through policy or practice, permits a broad range of expression to take place within the facilities under its control, will be bound by that breadth.[115] In

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110. *Id.*

111. *Id.* at 48.

112. *Grace*, 941 F.2d at 48.

113. *Id.*

114. *See supra* note 17 for text of *Perry*, 460 U.S. at 46 n.7.

115. If one squeezes hard enough, a few drops can be extracted from the *Grace* opinion that might ultimately benefit schools desiring to remain open to the general community but closed to religious worship. In *Grace*, the First Circuit refused to consider use of the school facilities "by political parties, organizations, or individuals," because this was a use "imposed on [the district] by [Maine] statute." *Grace*, 941 F.2d at 47 n.4 (citing ME. REV. STAT. ANN. tit. 20-A § 1001(4) (West 1990)). The Court added "[b]y placing this special obligation on [the district,] the [Maine] legislature did not create a public forum. . . . [I]t would be unfair to penalize, or charge [the district] with this use if it were otherwise conducting a limited forum." *Id.* at 47 n.4.

the First Circuit, therefore, a school district should think twice before proclaiming itself open for "community-related" purposes, for, once so opened, forum access will become difficult to regulate.[116] And therein lies the rub.

While *Grace* does not expressly foreclose a public school's ability to impose and enforce a flat ban on all nonstudent religious worship, if the proposed worship bears some connection to permissible purposes of expression then the school will be compelled to allow the worship to take place. The school district in *Grace*, which was generally open to "community-related" expression, denied the religious group's request to hold a Christmas dinner because it feared that the accompanying evangelical sermon might engender controversy within the local community.[117] Although the school's policy and practice did not specifically permit worship services in the school, the First Circuit found that the school was compelled to allow the sermon because it was linked to a request to provide a free Christmas dinner to the local community.[118] Accordingly, by annexing religious worship to a community dinner, thereby cloaking it in secular garb, the group was able to gain access to the school for both forms of expression.

Massachusetts has an even more comprehensive statute on public school access. MASS. GEN. L. ch. 71, § 71 (1993) requires that public schools allow the use of school facilities "by individuals and associations for such educational, recreational, social, civil, philanthropic and like purposes as it deems for the interest of the community." Moreover, no group may be disqualified from using public school facilities on the basis of that group's affiliation with a religious organization, provided the group seeks to use the facilities for one of the enumerated permissible purposes. *Id.*

Thus, while perhaps an unintended consequence of the opinion, a reasonable reading of *Grace*, in conjunction with ch. 71, § 71, suggests that a court should not consider the various purposes enumerated in ch. 71, § 71 when assigning a forum status to a public school. In light of *Grace*, then, it seems that a public school in Massachusetts might be afforded a fair amount of "free" openness before being deemed ineligible for nonpublic or limited public forum status, for taking the statutorily required uses into account would, as the *Grace* Court suggested, be "unfair" and would "penalize" the school district and effectively render unattainable limited public forum status.

116. *See Grace*, 941 F.2d at 48 (access to whatever is good for the community, unless injurious to the school, is not legally or practically limited but is selection, and if based on word content, is censorship).

117. *Id.* at 46.

118. *Compare* Deeper Life Christian Fellowship, Inc. v. Sobol, 948 F.2d 79, 83 (2d. Cir. 1991) [hereinafter *Deeper Life II*] (interpreting New York law as proscribing sectarian group's access to public school property because the "church's activities are primarily for its own benefit" rather than for the general benefit of the community) (quoting Deeper Life Christian Fellowship v. Board of Educ. of New York, 852 F.2d 676, 680 (2d Cir. 1988)).

Savvy counsel can extract much from the *Grace* opinion. Indeed, query what type of speech a public school with a liberal access policy would be permitted to exclude under the approach espoused in that opinion? Surely, even a public school district generally open to the community could deny the CIA permission to use the high school gymnasium for the purpose of training Nicaraguan Contras, for such expression has no apparent "community" purpose. But what if the CIA invited the local community to the high school gym for a free hearty brunch, coupled with a thoughtful discussion on Central American politics, to be followed by a lecture on military tactics and a rigorous aerobic workout? Under *Grace*, this tenuous, arguably ridiculous, nexus to a "community" purpose would seem sufficient to preclude the school from denying the CIA's request.[119]

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119. While *Grace* reflects the First Circuit's reluctance to permit a party to exercise control over which speakers may utilize a given forum and in which types of expression those speakers may engage, the court does not advocate a more expansive view of the protection afforded by the public forum doctrine, as evidenced by its decision in Fund for Community Progress, Inc. v. Kane, 943 F.2d 137 (1st Cir. 1991). At issue in *Kane* was a committee, created by the State of Rhode Island, designed to oversee a program that enabled willing State employees to designate a fixed portion of their salaries to one or more charitable causes. Fund for Community Progress, Inc. v. Kane, No. 90-0343T, slip op. at 3 (D.R.I. Nov. 1, 1990) [hereinafter *Kane, slip op.*]. In 1990, the State excluded all charitable groups except the United Way from serving on the committee. *Kane, slip op.* at 9. In response, the Fund for Community Progress, one of the groups excluded by the State's restriction, sued the State in federal court for equal access to the committee.

The U.S. District Court for the District of Rhode Island found that while certain groups had, in fact, been denied the right to serve on the committee, all groups received equal access to the forum of real significance, the fund-raising forum. *Id.* at 6. The District Court determined that the State had transformed the committee into a nonpublic forum. *Id.* at 14-15. Concluding that the restriction was reasonable and viewpoint neutral, the court sanctioned it. *Id.* at 16-17.

In a brief and unequivocal opinion, the First Circuit, Judge Aldrich again writing for the court, affirmed the District Court's decision. *Kane*, 943 F.2d at 139. However, the First Circuit determined that the issue of forum status need not have been reached by the District Court. *Id.* at 138. The court held that "[t]he Committee is not a forum at all, public or nonpublic, and there is no First Amendment question." *Id.* Judge Aldrich resolutely stated that it was "novel, indeed extraordinary" for those excluded from an administrative committee to allege a First Amendment freedom of speech abridgment. *Id.* Plainly evincing some displeasure with the request to characterize an administrative committee as a forum for purposes of free speech analysis, Judge Aldrich inquired, "where would be an end to this?" *Id.* Thus, while in *Grace* the First Circuit appeared to favor broad application of public forum analysis, it is clear that the court also believes the protection offered by the public forum doctrine is not boundless.

b. Outside the First Circuit

While the First Circuit's interpretation of the limited public forum is susceptible to criticism, *Gregoire v. Centennial School District*[120] demonstrates that the *Grace* opinion by no means stands alone. In *Gregoire*, an evangelical Christian youth group requested permission to use the public high school auditorium to present the performance of an illusionist, who was considered a traveling representative for Campus Crusade for Christ, Inc.[121] Traditionally, after performing his act, the illusionist would deliver to the audience "an account of his investigation of the miracles of Christ" and of his own discovery of Christ.[122] The school district, fearing it would violate the establishment clause if it permitted the performance to take place, denied the group's request to use the auditorium.[123] The group sued in federal court.[124]

The district court found in favor of the group and issued a permanent injunction mandating that the school open itself to certain forms of religious speech, including the disputed magic show.[125] Both parties appealed the decision.[126] The Third Circuit affirmed and remanded the case to the district court with instructions to broaden the injunction to include additional categories of religious speech.[127]

In assigning the school a forum status, the court looked principally to three factors: (1) governmental intent; (2) extent of use granted and; (3) consistency of decisions.[128] Despite the school's contention that it was open only to expression consistent with the school's educational mission,[129] the court concluded that, in fact, the school had opened itself to indiscriminate

120. Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3rd Cir. 1990).

121. *Id.* at 1369.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Although it prevailed in the lawsuit, the religious group appealed because it sought a broader injunction, which would compel the school to permit worship and the distribution of religious literature to take place on school property. *Id.* at 1369-70.

127. *Id.* at 1383. It should be noted that the *Gregoire* Court confessed that the basis of its holding was "narrow." *Id.* at 1379.

128. *Id.* at 1371.

129. *Id.* at 1373-74.

expressive activity by allowing other forms of religious speech on school property.[130] Consequently, the school was labeled a designated public forum.[131]

Like the *Grace* court, the *Gregoire* majority resisted the notion of affording a school district the ability to limit fora based on speaker or content of speech, insisting that granting schools such discretion would derogate the spirit of Supreme Court precedent.[132] The court wrote:

> We cannot conclude that, because there is . . . exclusionary language in the wording of the . . . policy, we are precluded from finding that the school district has created a designated open forum. If this is, indeed, what *Cornelius* requires, there is no longer a place in the law for the concept of the designated open forum; the government may, upon the most tenuous and internally inconsistent grounds, pick and choose those to whom it grants access for purposes of expressive activity simply by framing its access policy to carve out even minute slices of speech which, for one reason or another, it finds objectionable. We do not read either *Perry* or *Cornelius* as sounding the death knell for the designated open forum.[133]

Thus, like the First Circuit, the Third Circuit hinged its decision on the belief that the school district, by denying the group's request, was engaging in viewpoint-based discrimination. Accordingly, because the *Gregoire* court shares the *Grace* court's concern over granting school districts the power to engage in censorship, and because the courts also hold similar views on a party's ability to limit a forum,[134] the *Gregoire* opinion would appear to suffer from the same infirmities as *Grace*.

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130. *Id.* at 1374-75. The Third Circuit took into consideration the fact that the school district had amended its policy in response to the litigation, but it concluded that the new policy opened the school to the same extent (if not greater) than did the original policy. *Id.* at 1375, 1377.

131. *Id.* at 1378.

132. *Id.*

133. *Id.*

134. Interestingly, the Court also stated that a school district cannot attempt to limit a forum by "draw[ing] a line between religious discussion and worship," as this would "exacerbate [E]stablishment [C]lause concerns." *Id.* at 1382.

As noted, Judge Stapleton dissented from the *Gregoire* majority.[135] Although he opined that the school at issue should have been characterized as a nonpublic forum, Judge Stapleton addressed the limited public forum concept during the course of his analysis, writing that he was "unsure of the continuing vitality of the 'limited public forum' concept after *Cornelius*. . . ."[136] He added, however, that

> where, as here, there is an express definition of the forum at the time of its creation and the definition has been consistently applied, speakers or speech that does [sic] not come within the definition can be excluded so long as there is a rational basis for the exclusion in light of the purpose of [the] forum and no viewpoint discrimination.[137]

He wrote further, "a public entity can expressly limit the terms of the dedication without showing a compelling state interest for all excluded speakers and topics."[138] Judge Stapleton, it seems, would permit a party to limit a forum, provided that limitation is clearly set forth and evenly enforced. Indeed, applying his reading of Supreme Court precedent to the context of a party's ability to enforce a religious speech restriction, Judge Stapleton wrote, "if a school district's policy is clear and consistent it may prohibit religious speakers from a forum and welcome all other types of speakers without creating a public forum."[139] Consequently, his interpretation appears more consistent with the view expressed in footnote seven of the majority opinion in *Perry*.[140]

In light of opinions like *Travis*, *Slotterback*, *Grace*, and *Gregoire*, it seems clear that until the Supreme Court speaks directly to the issue of whether the limited public forum is, in fact, a viable concept, the various jurisdictions that espouse

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135. *See supra* note 60 and accompanying text.

136. *Id.* at 1387-88 n.3 (Stapleton, J., dissenting) (citing Post, *supra* note 62, at 1745-58).

137. *Id.* at 1388 n.3 (citing Deeper Life Christian Fellowship v. Board of Educ. of New York, 852 F.2d 676, 679-80 (2d Cir. 1988)).

138. *Id.* at 1388 n.3.

139. *Id.* at 1388.

140. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7. *See supra* note 17 for text of *Perry*, 460 U.S. at 46 n.7.

differing views on the issue simply will have to agree to disagree. Equally clear is that in the absence of a well-lit path by which one can negotiate the limited public forum labyrinth, practitioners are well advised to proceed with caution.

III. THE SUPREME COURT'S MOST RECENT VISIT TO THE ISSUE

In its most recent visit to the question of equal access, the Supreme Court avoided becoming entangled in forum status determination by sidestepping the issue altogether. In *Lamb's Chapel v. Center Moriches Union Free School District*,[141] a religious group requested permission to use a public school auditorium for the purpose of showing a film that addressed, from a Christian perspective, broad principles of family values.[142] Adhering to the district's policy, which prohibited use of school facilities for religious purposes, the school denied the group's request.[143] The group challenged the denial in federal court.[144]

Because neither the school's policy nor its practice had previously opened the forum to religious groups, the district court concluded that the school was a limited public forum, open to a broad array of expression but closed to religious speech.[145] Finding the exclusion reasonable and viewpoint-neutral, the district court granted summary judgment for the school district.[146] The Second Circuit affirmed, although it labeled the question of whether the school had actually opened its facilities to religious uses a "close question."[147] In an opinion by Justice White, the Supreme Court reversed.[148]

The Supreme Court reviewed the restriction against the two-part nonpublic forum standard, recognizing that if the religious speech restriction failed to withstand lesser scrutiny,

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141. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 770 F. Supp. 91 (E.D. N.Y. 1991), 959 F.2d 381 (2d Cir. 1992), *rev'd on other grounds*, 113 S.Ct. 2141 (1993).

142. *Lamb's Chapel*, 113 S. Ct. at 2144-45.

143. *Id.*

144. *Id.* at 2145.

145. *Lamb's Chapel*, 770 F. Supp. at 98. The District Court interpreted limited public forum consistently with *Travis*. *See id.* at 99.

146. *Lamb's Chapel*, 770 F. Supp. at 99.

147. *Lamb's Chapel*, 959 F.2d at 387.

148. *Lamb's Chapel*, 113 S. Ct. at 2142.

forum status determination would be rendered unnecessary.[149] In performing this analysis, the Court found particularly significant the fact that the school district had not prohibited other groups from using school facilities for the purpose of discussing topics pertaining to family values.[150] The Court held that a school cannot allow one group to use school property for a given purpose and deny a religious group the right to use the property in the same manner.[151] Justice White wrote:

> That all religions and all uses for religious purposes are treated alike under [the policy], however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint.[152]

Accordingly, after employing a methodology that circumvented the need for determining forum status, the Court concluded that the school district's restriction was not viewpoint neutral and, therefore, did not pass constitutional muster.[153]

Although the *Lamb's Chapel* methodology is sound, the case underscores the flaw inherent in the manner in which equal access cases are reviewed: the outcome is completely dependent upon the court's characterization of the topic of the expression at issue; this characterization may be susceptible to subjective judgments. In *Lamb's Chapel*, for example, the Supreme Court found that the expression at the heart of the controversy pertained to the topic of family values, and concluded that a religious group may not be denied permission to address a topic deemed permissible for a secular group. This result, however, leaves unanswered whether the outcome of *Lamb's Chapel* would have been the same had the Court defined differently the topic of expression in which the religious group desired to engage. Because the district court defined the expression at issue as religious speech, it reached an outcome markedly different than

149. *Id.* at 2147.
150. *Id.*
151. *Id.* at 2147-48.
152. *Id.* at 2147.
153. *Id.* at 2147-48.

the Supreme Court.[154] Accordingly, a court's characterization of the type of speech at issue in an equal access controversy can have a profound impact on the outcome of the analysis.

It is important not to overstate the import of *Lamb's Chapel*; the decision should not be interpreted as further evidence of the Court's desire to implant nonstudent religious worship into public schools. Although Justice White suggested that the church's public forum argument had considerable force,[155] the Court did not reach the question of whether the school was a public forum, nor did it determine that the school's restriction was unreasonable. The Court held only that, as applied to the facts of *Lamb's Chapel*, the school's policy was not viewpoint neutral and was not otherwise justified.[156] The opinion did not examine whether a school generally open to the community, but which has never before permitted nonstudent worship to take place in its facilities, may properly deny a religious group's request to engage in worship on school property. In fact, the Court remained tight-lipped on the issue of worship, noting that the right to use the school for worship services was not at issue in this case.[157] Accordingly, because the Court did not address a school's ability to impose a total worship ban, *Lamb's Chapel* should not be construed as commanding public schools to welcome into their facilities would-be worshippers.

Those given to conjecture may view *Lamb's Chapel* as a harbinger of a shift in the Court's attitude toward public forum analysis in equal access cases. *Lamb's Chapel* may, in fact, represent the Court's belated acknowledgment of the merit of the dissenting opinion in *Perry*, written by Justice Brennan and joined by Justices Marshall, Powell, and Stevens.[158] The *Perry* dissent berated the majority for harping on what it believed to be the wrong issue, namely, forum status determination.[159] Justice

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154. *See supra* note 145 and accompanying text (district court concluded school was a limited forum, open to broad array of expression but closed to religious speech).

155. *Lamb's Chapel*, 113 S. Ct. at 2146.

156. *Id.* at 2147.

157. *Id.* at 2144 n.2. Although at one point the Church requested to use the school facilities for the purpose of conducting worship services, which request was denied, the Church did not challenge this denial and thus the Court properly determined that "the validity of this denial is not before [the Court]." *Id.*

158. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55-72 (1983) (Brennan, J., dissenting).

159. *Perry*, 460 U.S. at 57.

Brennan opined that the real issue in equal access cases is not whether the speech restriction is permissible in light of the situs in which it is enforced, but rather whether the restriction represents viewpoint censorship.[160] The *Lamb's Chapel* majority, choosing altogether to avoid forum status determination, focused on this precise consideration. Perhaps recognizing that traditional public forum analysis has failed to provide courts with a reasonably clear understanding of what constitutes a constitutional restriction on speech in a public school setting, the Court now seems poised to modify its approach. Further indications from the Court will be necessary before such a shift truly becomes evident.

CONCLUSION

In recent years, religious groups launching equal access challenges have skillfully wielded the First Amendment, dominating their public school adversaries in federal courtrooms throughout the nation. These courtroom victories have allowed the groups to make continual gains toward their shared goal of winning complete, unfettered access to public schools for all forms of expression, including worship services.

While proponents of enhanced interaction between religion and public schools will likely delight in learning of the apparent trend toward equal access, Madisonian separationists should not yet abandon hope, for the wall separating church and state, though perhaps corroding in places, is still intact and free-standing. In fact, separationists should take heart in knowing that, as detailed in this article, there are methods available by which a school can defend itself against an equal access challenge.

Perhaps the most poignant lesson to be learned from a review of the case law in this area is that a school district should choose its battles with care and circumspection. A religious group, like any group attempting to use the courtroom as a vehicle for social reform, will generally not be pacified by a monetary settlement

160. *Id.* (Justice Brennan wrote, "[t]he Court fundamentally misperceives the essence of the respondents' claims. . . . This case does not . . . turn on whether the internal school mail system is a 'public forum' . . . [but rather on] the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic.").

from a school district hoping to avoid protracted litigation and potentially unflattering media coverage. These cases are not about money; they represent attempts to effect change, to shatter the status quo. Consequently, groups championing equal access challenges often make tenacious adversaries. Absent either a white knight willing to take up the school district's cause on a pro bono basis, or a broad insurance policy accompanied by understanding adjusters, the cost of mounting a skillful defense to an equal access challenge will likely prove staggering to any school district.

As a consequence, the spate of recent court decisions extending equal access to nonstudent religious groups has left an increasing number of public schools with only two options: (1) lower their drawbridges completely and welcome those who would worship in their facilities; or (2) raise and barricade their drawbridges, denying permission to all who would use the school facilities for noncurricular purposes. A school district unable to defend itself against an equal access challenge must ultimately determine which option represents the lesser evil.