Religious Civil Rights In Public High Schools: The Supreme Court Speaks on Equal Access

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In 1984, the same year the Equal Access Act[1] was signed into law by President Reagan, Richard John Neuhaus wrote his seminal book, *The Naked Public Square*.[2] According to Neuhaus, the "naked public square is the result of political doctrine and practice that would exclude religion and religiously grounded values from the conduct of public business. The doctrine is that America is a secular society."[3]

In other words, the naked public square is a form of religious apartheid,[4] a systematic exclusion of religious ideas, expression, and symbols from public life. The result is a pervasively hostile and chilling environment for religious persons who venture onto this intellectually and spiritually sterile landscape.

At the center of the attempt to strictly secularize public life in America is the public school system. Whether caused by what Professor McConnell calls "the elite culture's suspicion toward religion"[5] or by an overzealous and erroneous notion of the extra-constitutional principle of separation between church and state,[6] many public school officials have attempted to suppress religious expression on campus.

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1. 20 U.S.C. § 4071-4074 (1988).

2. R. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984).

3. *Id.* at vii. "The case can be made that the great social and political devastations of our century have been perpetrated by regimes of militant secularism, notably those of Hitler, Stalin, and Mao. That is true, and it suggests that the naked public square is a dangerous place." *Id.* at 8.

4. *See* Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech By Private Speakers*, 81 NW. U.L. REV. 1, 32 (1986); Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools*, 16 PEPPERDINE L. REV. 229 (1989).

5. McConnell, *Religious Freedom: A Surprising Pattern*, 11 CHRISTIAN LEGAL SOC'Y Q. 5 (1990).

6. *See* Laycock, *supra* note 4, at 27 (recognizing that the free speech rights of religious citizens are often "denied in the name of separation of church and state"). The

Evidence of official bias against religious expression in public schools is abundant. Paul C. Vitz, a professor of psychology at New York University, conducted an extensive study of ninety widely used elementary and secondary textbooks and concluded that public school textbooks are both biased and censored.[7] "And the nature of the bias is clear: Religion, traditional family values, and conservative political and economic positions have been reliably excluded from children's textbooks."[8] For example, one social studies book contained thirty pages on the Pilgrims, including the first Thanksgiving; however, the book did not contain even one word or image that referred to religion as a part of Pilgrim life.[9] Another text discussed the life of Joan of Arc without a single reference to any religious aspect of her life.[10] Not only are these examples clear evidence of bias against religious references in school texts, but they

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phrase "separation between church and state" is not part of the written Constitution. Its source is a letter, written more than 10 years *after* the Bill of Rights was ratified, from Thomas Jefferson to the Danbury Baptist Association. 8 WRITINGS OF THOMAS JEFFERSON 113-14 (H. Washington ed. 1854). Jefferson's literary metaphor was canonized as part of the Supreme Court's establishment clause doctrine over a century later in Everson v. Board of Educ., 330 U.S. 1, 16 (1947). As Chief Justice Rehnquist has observed, it is "impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history." Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

7. P. VITZ, CENSORSHIP: EVIDENCE OF BIAS IN OUR CHILDREN'S TEXTBOOKS 1 (1986).

8. *Id.* Professor Vitz made clear that he found no evidence of a conscious conspiracy to censor textbooks. "Instead, a very widespread secular and liberal mindset appears to be responsible. This mindset pervades the leadership in the world of education (and textbook publishing) and a secular and liberal bias is its inevitable consequence." *Id.*

9. *Id.* at 3. Professor Vitz also recounts an interesting anecdote concerning this book: "One mother whose son is in a class using this book wrote me to say that he came home and told her that 'Thanksgiving was when the Pilgrims gave thanks to the Indians.' The mother called the principal of this suburban New York City school to point out that Thanksgiving was when the Pilgrims thanked God. The principal responded by saying 'that was her opinion' — the schools could only teach what was in the books!" *Id.*

10. *Id.* Still another example concerns textbook censorship of a story written by the Nobel laureate Isaac Bashevis Singer:

> In his original story the main character, a boy, prayed "to God" and later remarked "Thank God." In the story as presented in the sixth grade reader the words "to God" were taken out and the expression "Thank God" was changed to "Thank goodness." These changes not only represent a clear case of removing God from our textbooks, but they also transform the story. That is, by removing God, the spiritual dimension is taken out, and the story's clear answer to the boy's prayer is blunted or negated; and, of course, the historical accuracy of the author's portrayal of small town Jewish life in Eastern Europe is also falsified.

Id. at 3-4.

also clearly demonstrate that children assigned these books are being taught a grossly distorted version of history.

Discrimination against religious expression is not limited to bias in textbooks. The Rutherford Institute, a legal defense organization created to protect religious civil rights, has defended numerous religious students against censorship in the public schools. For example, one recent case involved a third-grade girl in a Wisconsin public school who was told by her teacher that her valentine art project could not be displayed with the other children's because she had written "I love Jesus" and "Jesus is what love is all about" on her valentines.[11] In another case, a ten-year-old girl was banned from reading her Bible on the school bus by the principal of her Virginia public school.[12] In a third case, a nineteen-year-old public high school senior in New York was told by school officials that he could not perform a rap song in the school's variety show unless he agreed to censor all references in the song to Jesus Christ and Christianity.[13] Legal action in all three of these cases vindicated the free speech rights of the student victims; however, the fact that legal recourse was necessary to establish so basic a right illustrates the chilling environment that religious children often encounter in strictly secularized public schools.

Religious students also have encountered widespread discrimination in public school extracurricular programs.[14] During congressional hearings on the Equal Access Act, witness after witness testified about discrimination against "student-initiated, extracurricular, religious speech."[15] This testimony led the Senate Judiciary Committee to conclude that the record established "a reasonable perception of state hostility toward religious speech."[16] The result was enactment of legislation designed, in

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11. ACTION: A MONTHLY PUBLICATION OF THE RUTHERFORD INSTITUTE 4 (May, 1990).

12. ACTION: A MONTHLY PUBLICATION OF THE RUTHERFORD INSTITUTE 5 (October, 1989).

13. ACTION: A MONTHLY PUBLICATION OF THE RUTHERFORD INSTITUTE 2 (April, 1990). The censored lyrics included the following: "My name is Kenny Green, and I'm a Jesus machine. I love Jesus Christ for he is not mean. I became born again at the age of 14. Now I live for Jesus Christ. Now I am his machine." *Id.*

14. *See* Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990). "The committee reports indicate that the [Equal Access] Act was intended to address perceived widespread discrimination against religious speech in public schools." *Id.* at 2366.

15. S. REP. No. 357, 98th Cong., 2d Sess. 10 (1984). The nature of religious discrimination in the public schools was described by Bonnie Bailey, a witness before a House subcommittee, as follows: "We need legislation to protect our students' rights, to protect our freedom of speech because it's wrong that we can use the name of God profanely at school but we can't use it reverently." H.R. REP. No. 710, 98th Cong., 2d Sess. 6 (1984).

16. S. REP. No. 357, 98th Cong., 2d Sess. 10 (1984).

the words of Senator Levin, "to protect students who are being discriminated against in secondary schools today based on the religious content of their speech."[17]

The Supreme Court's recent decision in *Board of Education v. Mergens*,[18] which upheld the constitutionality of the Equal Access Act and decided that the Act was violated on the facts before the Court, must be viewed against this background of governmental discrimination and the struggle for religious civil rights. *Mergens* is truly a civil rights case, and we must heed its lessons if we are serious about our claim to be a fair, open, and pluralistic society.

I. Equal Access Act

After the landmark decision in *Widmar v. Vincent*,[19] the Equal Access Act should have been unnecessary. In *Widmar*, a public university denied a student religious group access to university meeting facilities that were otherwise generally available for use by student organizations.[20] Finding that the university had created "a forum generally open for use by student groups,"[21] the Supreme Court held that the school's exclusion of religious speech from that forum violated the free speech clause of the first amendment.[22] Significantly, the Court reaffirmed the principle that "religious worship and discussion" are forms of speech and association entitled to all the protections of the first amendment,[23] and also recognized that the free exercise clause[24] is offended by "content-based discrimination against . . . religious speech."[25] As Professor Laycock has put it so well: "Whether one starts with the principle that the free speech clause requires content-neutral regulation of speech, or with the principle that the religion clauses require strict neutrality toward religion, one arrives immediately at the result in *Widmar*."[26]

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17. 130 Cong. Rec. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin). *See also* H.R. Rep. No. 710, 98th Cong., 2d Sess. 1 (1984) (the purposes of the Equal Access Act "are to eliminate discrimination against student religious groups that occurs when such groups are denied access to school facilities and to establish a policy of fair, even-handed treatment").

18. 110 S. Ct. 2356 (1990).

19. 454 U.S. 263 (1981).

20. *Id.* at 264-65.

21. *Id.* at 267.

22. *Id.* at 270-77. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble." U.S. Const. amend. I.

23. *Widmar*, 454 U.S. at 269.

24. U.S. Const. amend. I provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

25. *Widmar*, 454 U.S. at 276.

26. Laycock, *supra* note 4, at 11.

Despite the apparent applicability of *Widmar* to public school extracurricular programs, many public school systems continued to exclude religious student groups from extracurricular facilities.[27] In one case, school officials went so far as to prohibit students from praying together in a car in a school parking lot.[28] Congress enacted the Equal Access Act to eliminate these discriminatory policies and "to clarify and confirm the First Amendment rights . . . [of] public school students who desire voluntarily to exercise those rights during extracurricular periods of the school day."[29]

The Equal Access Act applies to any public secondary school[30] that receives financial assistance from the federal government.[31] It provides that, if a public school subject to the Act maintains "a limited open forum," the school may not deny equal access to student meetings "on the basis of the religious, political, philosophical, or other content of the speech at such meetings."[32]

The key term, "limited open forum," is defined in section 4071(b).[33] Under this provision, a public secondary school maintains a limited open forum (and is thereby subject to the equal access obligation) whenever it "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[34] In other words, if a public high school recognizes even one noncurriculum-related student group, the equal access requirement is triggered and the school must allow other student groups to meet on a non-discriminatory basis.

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27. "Despite *Widmar*, many school administrators across the country are prohibiting voluntary, student-initiated religious speech at the secondary school level. Generally, those administrators act not from hostility toward religion but from ignorance of the law and erroneous legal advice." H.R. REP. No. 710, 98th Cong., 2d Sess. 3 (1984). *See also* S. REP. No. 357, 98th Cong., 2d Sess. 11-12 (1984).

28. S. REP. No. 357, 98th Cong., 2d Sess. 11-12 (1984).

29. *Id.* at 3. During Senate debate, Senator Levin explained the connection between *Widmar* and the Equal Access Act as follows:

> I am persuaded that the pending amendment is constitutional in light of the Supreme Court's decision in Widmar against Vincent. This amendment merely extends a similar constitutional rule as enunciated by the Court in Widmar to secondary schools.

130 CONG. REC. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin).

30. The term "secondary school" is defined as "a public school which provides secondary education as determined by State law." 20 U.S.C. § 4072(1) (1988).

31. *Id.* § 4071(a). Obviously, in the modern welfare state, the Act's coverage of public high schools is essentially universal.

32. *Id.*

33. *Id.* § 4071(b).

34. *Id.* "Noninstructional time" is defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." *Id.* § 4072(4).

Although the term "limited open forum" resembles the constitutional concept of "limited public forum," the two phrases should not be confused. The Equal Access Act creates a legislatively defined, artificial construct, "and comparisons with the constitutional cases can be misleading."[35]

II. The *Mergens* Litigation

A. Background, Facts, and Lower Court Decisions

Discrimination against student-initiated, religious speech in public schools did not stop following passage of the Equal Access Act. When confronted with claims under the Act by religious students excluded from extracurricular facilities, public school officials usually claimed either that the Act was inapplicable or that it was constitutionally void under the establishment clause.[36] The story of Bridget Mergens (now Bridget Mergens Mayhew) and her attempt to organize a Bible study club at Westside High School in Omaha, Nebraska is typical.

In January 1985, Mergens, then a student at Westside, requested permission to form a Bible study club at the school.[37] Although the school allowed approximately thirty other student groups to meet on campus after school hours and had never before denied any student group access to the school,[38] Westside officials decided to exclude the Bible study club based upon their belief that "a religious club at the school would violate the Establishment Clause."[39]

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35. Laycock, *supra* note 4, at 36. The statutory definition goes far beyond the Supreme Court's cases. "Most notably, government speech does not create a constitutional public forum, but a school-sponsored student group that is not curriculum related . . . creates a statutory open forum." *Id.*

36. *See, e.g.*, Board of Educ. v. Mergens, 110 S. Ct. 2356, 2363 (1990); Garnett v. Renton School Dist., 865 F.2d 1121, 1123 (9th Cir. 1989).

37. *Mergens*, 110 S. Ct. at 2362. The purpose of the proposed club was "to permit the students to read and discuss the Bible, to have fellowship, and to pray together." *Id.* Membership in the club was voluntary and open to all students without regard to religious affiliation. *Id.*

38. Mergens v. Board of Educ., 867 F.2d 1076, 1077 (8th Cir. 1989), *aff'd*, 110 S. Ct. 2356 (1990).

39. *Mergens*, 110 S. Ct. at 2363. Westside officials took a very hard line in opposing the proposed Bible study club. In fact, the school's principal, Dr. Findley, stated that he would consider "doing away with all clubs at WHS, if necessary" to prevent the Bible study club from meeting on campus. Mergens v. Board of Educ., No. 85-0-426, slip op. at 13 (D. Neb. Feb. 2, 1988). Of course, as previously discussed, this is exactly the attitude that led Congress to enact the Equal Access Act. *See supra* notes 27-29 and accompanying text.

The students sued the Board of Education claiming the decision to exclude the Bible study club violated their rights under the Equal Access Act and their constitutional rights to freedom of speech, association, and religion under the first and fourteenth amendments.[40] The district court ruled in favor of the defendants. The court held that the Act was inapplicable because Westside did not maintain a limited open forum,[41] and rejected the students' constitutional claims "reasoning that Westside did not have a limited public forum as set forth in *Widmar* . . . and that Westside's denial of [the Bible study club] was reasonably related to legitimate pedagogical concerns."[42]

On appeal, the Eighth Circuit reversed and held that "[m]any of the student clubs at WHS . . . are noncurriculum-related."[43] Therefore, the court concluded school authorities had violated the Equal Access Act by excluding the Bible study club from the school's limited open forum.[44] The court also rejected the school's establishment clause attack on the Act and further concluded that, under the logic of *Widmar*, equal access was constitutionally required "even if Congress had never passed the [Equal Access Act]."[45]

B. The Supreme Court's Decision

The Supreme Court granted certiorari and prepared to settle the split in the circuits over the equal access issue.[46] The case presented the following three major issues: First, whether the Equal Access Act required Westside to allow the Bible study club to meet on school premises; second, whether the Act, if so construed, is void under the establishment clause; and third, whether Westside's exclusion of the Bible study club violated the students' constitutional rights under the free speech and free exercise clauses.

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40. *Mergens*, 110 S. Ct. at 2363.

41. *Id.* District Judge Beam concluded that all of the clubs allowed to meet at Westside, including a chess club, a scuba diving club, and two service clubs related to Rotary International, "are curriculum related and tied to the educational function of the institution." Mergens v. Board of Educ., No. 85-0-426, slip op. at 14 (D. Neb. Feb. 2, 1988).

42. *Mergens*, 110 S. Ct. at 2363.

43. *Mergens*, 867 F.2d at 1079.

44. *Id.*

45. *Id.* at 1080.

46. Less than a month before the Eighth Circuit handed down its decision in *Mergens*, the Ninth Circuit, on nearly identical facts, had upheld a school district's exclusion of a student religious group in Garnett v. Renton School Dist., 865 F.2d 1121 (9th Cir. 1989). For a discussion of other federal cases holding erroneously that the establishment clause forbids public high schools from granting equal access to student religious groups, see Laycock, *supra* note 4, at 5.

1. Applicability of Equal Access Act.—As previously discussed, the key issue concerning the triggering of the Equal Access Act is whether a public secondary school maintains a "limited open forum." This, in turn, depends upon whether the school recognizes any one or more noncurriculum-related student groups. If at least one of the approximately thirty recognized clubs at Westside were found to be noncurriculum-related, the school was required to allow the Bible study club equal access.

Unfortunately, the Act fails to define the key term "noncurriculum-related student group." Therefore, the Court was required to fill this statutory gap.

The school argued for a narrow construction of the phrase in order to maximize "local control" over public education.[47] Essentially, this approach would have allowed public schools to maintain a closed forum so long as each recognized student group had at least some tangential relationship to the curriculum. Thus, Westside officials claimed that all of the recognized student clubs at the school were curriculum-related. For example, they argued the chess club "supplement[s] math and science courses because it enhances students' ability to engage in critical thought processes."[48] Subsurfers, a scuba diving club, was said to be curriculum related because it furthers "one of the essential goals of the Physical Education Department — enabling students to develop life-long recreational interests."[49] Similarly, the school argued that participation in Interact and Zonta, clubs in which student members engage in community service such as collecting food for the poor, "promotes effective citizenship, a critical goal of the WHS curriculum, specifically the Social Studies Department."[50]

The student-respondents in *Mergens* argued for a broad interpretation of the phrase "noncurriculum-related." Taking the position that a club was noncurriculum-related unless it "directly related to curriculum course work,"[51] they claimed that "many noncurriculum-related clubs meet at WHS."[52]

As the Eighth Circuit had noted, the school's narrow interpretation would render the Equal Access Act "meaningless."[53] "A school's ad-

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47. *Mergens*, 110 S. Ct. at 2367.

48. Brief for Petitioners at 18-19, Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990).

49. *Id.* at 18.

50. *Id.* at 19.

51. Brief for Respondents at 36, Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990).

52. *Id.* at 35.

53. *Mergens*, 867 F.2d at 1078.

ministration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal."[54] On the other hand, under the broad interpretation suggested by the students, the Equal Access Act, like other civil rights legislation before it, would restrict the power of local authorities to control public school activities. Such was the tradeoff facing Justice O'Connor and her colleagues as they prepared to decide the issue.

Justice O'Connor, writing for a majority of six,[55] chose to interpret the Act broadly to carry out the intent of Congress to eliminate "widespread discrimination against religious speech in public schools,"[56] and "to provide a low threshold for triggering the Act's requirements."[57] Therefore, she interpreted the term "noncurriculum-related student group" to mean "any student group that does not *directly* relate to the body of courses offered by the school."[58]

The Court provided a four-part test to determine whether any particular student group has a direct relationship with the curriculum. A student group is considered directly related to a school's curriculum if:

1) the subject matter of the group is actually taught, or soon will be taught, in a regularly offered course;[59]
2) the subject matter of the group concerns the body of courses as a whole;[60]
3) participation in the group is required for a particular course;[61] or
4) participation in the group results in academic credit.[62]

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54. *Id.*

55. Justice O'Connor's majority opinion was joined by Chief Justice Rehnquist and Justices White, Blackmun, Scalia, and Kennedy. In addition, two other Justices (Marshall and Brennan) concurred and agreed with the majority's broad interpretation of the Equal Access Act. *See Mergens*, 110 S. Ct. at 2378 (Marshall and Brennan, JJ., concurring).

56. *Mergens*, 110 S. Ct. at 2366.

57. *Id.*

58. *Id.* (emphasis in original). This interpretation is also consistent with the Act's definition of the sort of student "meeting" that must be accommodated under the statute. *See* 20 U.S.C. § 4072(3) (1988) ("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.") (emphasis added).

59. *Mergens*, 110 S. Ct. at 2366.

60. *Id.* The court explained that student government generally would qualify as curriculum-related under this provision "to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school." *Id.*

61. *Id.*

62. *Id.*

If even one student group fails to qualify as curriculum-related under this test, the school maintains a limited open forum and must allow equal access.[63]

It is difficult to imagine how the Court could have construed the Act more broadly in favor of student speech. Under Justice O'Connor's four-part test, most public secondary schools recognize many noncurriculum-related student organizations. As a result, the cost of avoiding maintenance of a limited open forum are high. To close its forum, a typical public secondary school probably must exclude chess and other hobby clubs, service clubs, vocation clubs (such as future farmers, doctors, or lawyers clubs), pep clubs, cheerleaders, and perhaps even athletics.

Whether a student club is curriculum-related or noncurriculum-related depends upon the actual curriculum of the particular school. A French club would directly relate to the curriculum if the school offered (or planned to offer in the near future) a French language course.[64] Similarly, a school band or orchestra would be curriculum-related if, but only if, participation "were required for the band or orchestra classes, or resulted in academic credit."[65]

However, cheerleaders or a pep club would be considered noncurriculum-related unless the school offered a cheerleading or pep class, required participation in cheerleading or the pep club for a particular course, or granted academic credit for participation in the groups.[66] For example, if a school grants academic credit in physical education for students who participate in cheerleading or the pep club, the groups are curriculum-related and do not create a limited open forum. But if not, the groups are noncurriculum-related, create a limited open forum, and trigger the school's equal access obligation.[67]

The same analysis applies to every student group allowed to meet on campus. The presence or absence of school sponsorship is irrelevant for purposes of the Equal Access Act. It is the subject matter of the group and its relationship to courses actually and regularly offered as part of the school's curriculum that determine whether the group is curriculum related.[68]

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63. *See supra* notes 30-34 and accompanying text.

64. *Mergens*, 110 S. Ct. at 2366.

65. *Id.*

66. *See id.* at 2366-69.

67. *See id.* at 2366-67.

68. *See* Laycock, *supra* note 4, at 36 ("a school-sponsored student group that is not curriculum related . . . creates a statutory open forum"). *See also Mergens*, 110 S. Ct. at 2369 ("our definition of 'noncurriculum related student activities' looks to a school's actual practice rather than its stated policy").

Athletic teams are likely to be marginal cases under the Court's analysis. Is a high school football team curriculum-related? If a school grants academic credit in physical education for participation in football, there should be no problem — the football team is curriculum-related.[69] However, if students do not earn academic credit for football, and if football is not taught as part of the curriculum, the football team is not curriculum-related and its existence results in a limited open forum.[70]

Suppose the school teaches touch or flag football in physical education classes. Would this make the football team curriculum-related? Probably not. Justice O'Connor's majority opinion made clear that the scuba diving club at Westside was noncurriculum-related even though Westside's physical education classes teach swimming.[71] The reasoning appears to be that scuba diving involves much more than swimming. It appears to follow, as Justice Stevens noted in his dissent, that tackle football is noncurriculum-related because it "involves more equipment and greater risk, and so arguably stands in the same relation to touch football as scuba diving does to swimming."[72]

Clearly, it will not be easy for most public high schools to close down their limited open forums merely by eliminating one or two extracurricular activities. Instead, schools bent on avoiding equal access will need to make deep cuts in student clubs and activities. They may even need to eliminate pep clubs, cheerleaders, and varsity athletics.

If schools are unwilling to make cuts in popular student activities, they have only two other choices — grant equal access, or forgo federal funding. As Justice O'Connor made clear, equal access is "the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups."[73] Just as other civil rights laws limit the options

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69. *Mergens*, 110 S. Ct. at 2366.

70. *Id.* at 2366-69.

71. *Id.* at 2369.

72. *Id.* at 2388 (Stevens, J., dissenting).

73. *Id.* at 2367. One possible strategy to avoid triggering the Equal Access Act is to schedule all noncurriculum-related student meetings for an activities period during the regular school day. Because a limited open forum is only created when the school allows one or more noncurriculum-related clubs to meet before actual classroom instruction begins or after actual classroom instruction ends, setting aside part of the regular school day for student clubs to meet arguably would not trigger an equal access obligation under the Act. *See* 20 U.S.C. § 4071(a)-(b), 4072(4) (1988); Strossen, *A Constitutional Analysis of the Equal Access Act's Standards Governing Public School Student Religious Meetings*, 24 HARV. J. ON LEGIS. 117, 188 (1987). Notice, however, that this strategy fails if even one noncurriculum-related group, including cheerleaders, pep clubs, and perhaps athletic teams, is allowed to meet before or after school. Of course, even if this interpretation of the Act is adopted and the school limits all noncurriculum-related student clubs to the activities period, student clubs excluded from the activities period will argue that they

of public school officials, the Equal Access Act allows few choices to those who wish to avoid its nondiscriminatory goals.

2. Equal Access Act and the Establishment Clause.—Westside's next line of defense against its equal access obligation was to claim the Equal Access Act was unconstitutional under the establishment clause. The school claimed that recognition of a student Bible study club constitutes official endorsement of religion and provides the club "with an official platform to proselytize other students."[74] In effect, the argument equates tolerance with apparent endorsement and appears to be based on the assumption that the school endorses everything it does not censor.[75]

In *Lemon v. Kurtzman*,[76] the Court formulated a three-part test to determine whether a statute or practice that touches upon religion is valid under the establishment clause. First, the statute or practice must have a secular purpose; second, its primary or principal effect must neither advance nor inhibit religion; and third, it must not foster an excessive government entanglement with religion.[77]

After *Widmar*, the constitutionality of an equal access policy seemed reasonably free from doubt. Realistically, school policies that discriminate against student religious groups pose greater risks under the establishment clause than do those that treat all groups equally, because these discriminatory policies arguably have the primary or principal effect of inhibiting religion.[78] An equal access policy, however, is neutral con-

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have a constitutional right to equal access under *Widmar*. This is the issue the Supreme Court avoided in Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986). The four Justices who reached the merits in *Bender* concluded that *Widmar* is controlling and mandates equal access to the forum created during the activities period. 475 U.S. at 551-55 (Burger, C.J., White, and Rehnquist, JJ., dissenting); 475 U.S. at 555-56 (Powell, J., dissenting).

74. *Mergens*, 110 S. Ct. at 2370.

75. *See* Laycock, *supra* note 4, at 14. "The claim of actual endorsement is absurd. Perhaps in a totalitarian state the government implicitly endorses all that it does not censor. But no such inference can be drawn in a nation with a constitutional guarantee of free speech." *Id.*

76. 403 U.S. 602 (1971).

77. *Id.* at 612-13.

78. The second-prong of the tripart *Lemon* test states that the establishment clause is violated by a statute or governmental practice if its primary or principal effect either advances or inhibits religion. 403 U.S. at 612. *See also* County of Allegheny v. A.C.L.U., 109 S. Ct. 3086, 3102-03 (1989). A school policy that discriminates against religious student groups sends a message of governmental disapproval of religion, and thus its primary effect is arguably to inhibit religion. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1175 (2d ed. 1988) ("A message of exclusion . . . is conveyed where the state refuses to let religious groups use facilities that are open to other groups."). Professor Laycock has argued that the establishment clause is concerned only with government support for religion. Thus, he believes that the "suggestion that any inhibition of religion raises establishment

cerning religious content and serves the secular purpose of ensuring that extracurricular programs in public schools are truly open and free of discrimination.[79] Unless equal access in public secondary schools is different in a constitutionally material way from equal access in public universities, *Widmar* was powerful authority for upholding the Equal Access Act.

In *Mergens*, eight Justices agreed with the Eighth Circuit's conclusion that the Equal Access Act is constitutional. However, Justice O'Connor's plurality opinion on this issue fell one vote short of a majority, and two separate concurring opinions were filed.[80] The resulting 4-2-2 split is typical of the Supreme Court's confusing establishment clause jurisprudence. Regardless, one important point emerged from this judicial cacophony — for one reason or another, the Equal Access Act is constitutional.

At least six Justices concluded in *Mergens* that the Equal Access Act does not violate the establishment clause.[81] Moreover, two additional Justices agreed "that the Act as applied to Westside *could* withstand Establishment Clause scrutiny" so long as the school took certain steps "to avoid appearing to endorse the Christian Club's goals."[82] The ninth Justice, John Paul Stevens, did not reach the establishment clause issue.[83] Although he noted that the issue was a difficult one, Justice Stevens observed that he "tends to agree" with the Court "that the Constitution does not forbid a local school district, or Congress, from bringing organized religion into the schools so long as all groups, religious or not, are welcomed equally."[84]

a. The Equal Access Act has a secular purpose

Justice O'Connor's plurality opinion applied the logic of *Widmar* to the Equal Access Act's waltz through the three-part harmony of the

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questions should be disregarded." Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1385 (1981).

79. *See* Widmar v. Vincent, 454 U.S 263, 271 (1981).

80. Justice O'Connor's plurality opinion on the establishment clause issue was joined by Chief Justice Rehnquist and Justices White and Blackmun. Justices Kennedy and Scalia and Justices Marshall and Brennan filed concurring opinions on the establishment clause issue.

81. Although Justices Kennedy and Scalia concurred with the judgment of Justice O'Connor and the plurality, their reasons for upholding the Equal Access Act under the establishment clause differed significantly. *Mergens*, 110 S. Ct. at 2376-78 (Kennedy, J., concurring). *See infra* notes 118-21 and accompanying text.

82. *Mergens*, 110 S. Ct. at 2378 (Marshall, J., concurring).

83. *Id.* at 2390 (Stevens, J., dissenting).

84. *Id.* at 2392 (Stevens, J., dissenting).

Lemon test.[85] As in *Widmar*, the Court concluded that an equal access policy has a secular purpose — prevention of discrimination against religious and other types of speech.[86] "Because the Act on its face grants equal access to both secular and religious speech," O'Connor concluded that its purpose was not to "endorse or disapprove of religion."[87]

An amicus brief, filed on behalf of the school, argued that the Equal Access Act was the result of a two-year effort to circumvent the Court's school prayer decisions "and to promote religious activities in the public schools."[88] This assertion was supported, for the most part, by quoting individual legislators who appeared to be acting on religious motivation.[89] Justice O'Connor gave short shrift to this argument and concluded that "what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law."[90]

b. The Equal Access Act neither advances nor inhibits religion

Westside next argued that the Equal Access Act has the primary effect of advancing religion, and therefore fails the second prong of the

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85. *Id.* at 2371.

86. *Id.* Laws prohibiting discrimination against religious speech are similar to statutes banning employment discrimination on the basis of religion. Both serve basic civil rights goals which are "equally consistent with the establishment clause." Laycock, *supra* note 4, at 22.

87. *Mergens*, 110 S. Ct. at 2371.

88. Brief of the Anti-Defamation League of B'nai B'rith et. al., amici curiae, at 5, *Mergens*, 110 S. Ct. 2356 (1990). One commentator even went so far as to suggest that the Equal Access Act is tainted because evangelicals "have been preeminent advocates of equal access both in the courts and in Congress." Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis*, 12 HASTINGS CONST. L. Q. 529, 557 n.130 (1985). Apparently, Professor Teitel believes evangelical Christians should remain silent in the sanctuary and not get involved in the struggle for civil rights and civil liberties. The Eighth Circuit recently rejected an argument similar to Professor Teitel's in a case involving a school district's policy prohibiting dances in the public schools, and stated that "this approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular decisions." Clayton v. Place, 884 F.2d 376, 380 (8th Cir. 1989). *Cf.* McDaniel v. Paty, 435 U.S. 618 (1978) (striking down a provision of the Tennessee constitution that disqualified clergy from serving in the legislature).

89. Brief of the Anti-Defamation League of B'nai B'rith et. al., amici curiae, at 6, *Mergens*, 110 S. Ct. 2356 (1990). For example, the brief quotes Senator Denton's statement that the equal access policy was designed "to restore the constitutional right to pray in public schools and buildings." *Id.* Of course, the goal of protecting constitutional rights of religious expression can be viewed as a secular purpose. It is certainly not an inherently religious purpose.

90. *Mergens*, 110 S. Ct. at 2371 (emphasis in original).

Lemon establishment clause test.[91] Specifically, the school argued that "because the student religious meetings are held under school aegis, and because the state's compulsory attendance laws bring the students together (and thereby provide a ready-made audience for student evangelists), an objective observer in the position of a secondary school student will perceive official school support for such religious meetings."[92]

In *Widmar*, the Court considered a similar argument and concluded, "[w]e are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion."[93] The benefit to religious clubs of access to university facilities on the same basis as other groups was deemed merely "incidental" and therefore not a violation of the establishment clause.[94]

However, in *Garnett v. Renton School District*, the Ninth Circuit attempted to distinguish *Widmar* from equal access in public secondary schools and concluded that "[t]he religious activity proposed in this case, which would take place at a time closely associated with a highly structured school day, would be far more likely to appear to enjoy school sponsorship than a group on a college campus."[95] In reaching this conclusion, the *Garnett* court placed great weight on the "impressionability" of high school students, compulsory attendance laws "that make students a captive audience," and "the role of public schools in inculcating democratic ideals."[96]

Reduced to its essence, the Ninth Circuit's analysis amounts to an unsubstantiated fear that students will mistakenly conclude that the government endorses everything it does not censor.[97] The basic flaw in this view is its failure to recognize the difference between voluntary, student-initiated speech and governmental speech. As Justice O'Connor observed in *Mergens*, "there is a crucial difference between *government* speech endorsing religion, which the establishment clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[98] The establishment clause does not mandate governmental censorship of private religious speech. It merely requires that government neither advance nor inhibit religion.

The *Mergens* plurality followed this logic and concluded that public secondary school students are sufficiently mature to understand that

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91. *Id.*
92. *Id.*
93. 454 U.S. at 273.
94. *Id.* at 273-74.
95. 865 F.2d 1121, 1125 (9th Cir. 1989).
96. *Id.*
97. *See* Brief of the Rutherford Institute et. al., amici curiae, at 8, *Mergens*, 110 S. Ct. 2356 (1990); Laycock, *supra* note 4, at 18.
98. *Mergens*, 110 S. Ct. at 2372 (emphasis in original).

equal access for religious groups "evinces neutrality toward, rather than endorsement of, religious speech."[99] This conclusion is supported by social science research[100] as well as congressional fact-finding.[101] For example, in his recent book on children and education, Professor David Moshman, an educational psychologist and an expert in adolescent reasoning and intellectual development, specifically considered the issue of apparent endorsement under the Equal Access Act and reached the following conclusion:

> It appears, then, that the Equal Access Act, which is limited to secondary students, is constitutionally acceptable in that secondary students, like the college students in *Widmar*, are capable of understanding a school's nonendorsement of religion. . . . Concerns about a perceived establishment of religion can be handled through announcements, notices on bulletin boards, etc., rather than through the more restrictive alternative of abridging freedom of speech, freedom of association, and the free exercise of religion.[102]

Moreover, today's youth are confronted with a myriad of difficult choices not faced by past generations. These choices range from whether to have an abortion to whether one should file a lawsuit against his or her parents, teachers, or school. These experiences have caused one commentator to conclude that the "dividing line between childhood and

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99. *Id.* at 2373.

100. *See* D. MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT: A PSYCHOLEGAL ANALYSIS 114-19 (1989); Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499, 507-09 (1983) (collecting research in the field of adolescent psychology suggesting "that high school students are generally independent and capable of critical inquiry"). Dr. Moshman was called as an expert witness for the students at trial in the *Mergens* case.

101. In connection with its consideration of the Equal Access Act, the Senate Judiciary Committee examined the evidence and specifically concluded "that students below the college age can understand that an equal access policy is one of State neutrality toward religion, not one of State favoritism." S. REP. No. 357, 98th Cong., 2d Sess. 8 (1984). The *Mergens* plurality cited this report and noted that deference was due to this congressional finding of fact. 110 S. Ct. at 2372.

102. D. MOSHMAN, *supra* note 100, at 118. At trial in *Mergens*, Dr. Moshman testified that beyond the age of twelve, children "all seem to be capable of formal reasoning." Joint Appendix at 390, *Mergens*, 110 S. Ct. 2356 (1990). He further testified that the "typical high school student is capable of a wide variety of abstract abilities, being able to look logically at arguments, being able to formulate hypotheses, [and] being able to test hypotheses." *Id.* at 391-92. Dr. Moshman's conclusion at trial was the same he reached in his book — the average high school student is able to understand that toleration of religious student groups as part of an equal access policy does not constitute official endorsement or sponsorship. *Id.* at 397.

adulthood is being unmistakably eroded."[103] If teenagers are competent to make decisions as important as whether to have an abortion or to bring a lawsuit, they should be able to understand that equal treatment of religious clubs does not amount to sponsorship or endorsement of religion.

In fact, Dr. Moshman's expert testimony at trial supported the conclusion that Westside's *exclusion* of student religious groups from the extracurricular program risks violating the establishment clause proscription against official hostility toward religion.[104] A potentially unconstitutional "inhibition" of religion exists when a school denies equal access, because students who are aware of the school's decision to exclude religious clubs "may then perceive the absence of religious clubs and the presence of others" and conclude that the official attitude of the school indicates "some degree of hostility toward religious [clubs]."[105]

Compulsory attendance laws were not seen by the plurality as affecting the validity of the Equal Access Act. The Act contains specific safeguards designed to ensure that student religious meetings are "voluntary and student-initiated,"[106] and that the equal access obligation occurs only when the school allows "noncurriculum related student groups to meet on school premises during *noninstructional time*."[107] Thus, there

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103. *See* Brief of the Rutherford Institute et. al., amici curiae, at 7, *Mergens*, 110 S. Ct. 2356 (1990) (quoting N. POSTMAN, THE DISAPPEARANCE OF CHILDHOOD 75 (1982)).

104. *See supra* note 78 and accompanying text.

105. Joint Appendix at 398-99, *Mergens*, 110 S. Ct. 2356 (1990).

106. 20 U.S.C. § 4071(c) (1988) provides:

> 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.

Admittedly, this language is not a model of the drafting art. It should not be interpreted to mean that public secondary schools may not sponsor any student groups. Rather, it should be interpreted as a non-exclusive "safe harbor" by which schools that maintain a limited open forum can meet their equal access obligations to non-sponsored, noncurriculum-related student organizations. *See Mergens*, 110 S. Ct. at 2377 (Kennedy, J., concurring).

107. 20 U.S.C. § 4071(b) (1988) (emphasis added). Section 4072(4) defines the term "noninstructional time" as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." *Id.* § 4072(4).

is no possibility of a "captive audience" for student religious meetings held outside regular school hours.

To the contrary, state education laws which require students to attend school and which create a public school monopoly for state-financed elementary and secondary education, give rise to a special need to protect religious students from being treated like outsiders whose religious beliefs must be checked at the public schoolhouse door.[108] As the Court observed in *Tinker v. Des Moines Independent Community School District*,[109] "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."[110]

Finally, the Equal Access Act is perfectly consistent with the role of the public schools in inculcating democratic ideals. Our society's commitment to freedom of religion, freedom of speech, and pluralism is demonstrated by public schools when they comply with the Equal Access Act. In fact, the schools serve as poor role models when they discriminate against and deny equal access to religious student groups. "Whatever the risk that some students will perceive an open forum as an endorsement of all groups that participate, that risk is far outweighed by the actual and apparent hostility in a rule that allows students to talk about anything except religion."[111]

c. The Equal Access Act does not result in excessive entanglement between government and religion

Justice O'Connor and the plurality quickly dismissed Westside's final establishment clause argument — that compliance with the Act "risks excessive entanglement between government and religion."[112] The Equal Access Act provides safeguards to ensure that faculty and employees of the school may be present at religious meetings "only in a nonparticipatory capacity."[113] In other words, although the Act allows custodial

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108. Professor Dent made the same point in his important article about religious objections to public school curriculum. He argued that in "our era of high taxes and extensive social welfare benefits," a failure to accommodate religious beliefs "discriminates against the religious by forcing them either to forego a free education or to compromise their religion." Dent, *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 939-40 (1988).

109. 393 U.S. 503 (1969).

110. *Id.* at 511.

111. Laycock, *supra* note 4, at 20.

112. *Mergens*, 110 S. Ct. at 2373.

113. 20 U.S.C. § 4071(c)(3) (1988). This provision may be attacked under the free speech and free exercise clauses by teachers who claim a right to sponsor or participate in student religious meetings. For a thoughtful discussion of this issue, see Laycock, *supra* note 4, at 30-31.

oversight of student religious meetings to maintain order and discipline, it prohibits active participation by agents of the school in religious activities. Thus, there is no impermissible entanglement.[114]

Justice O'Connor further recognized that an equal access policy is less likely to entangle the school with religion than is a policy of religious censorship.[115] Although an equal access policy is satisfied when the school adopts a strictly neutral, nondiscriminatory posture as to all points of view, a censorship policy requires the school to determine which groups, which words, and which activities are "religious" and therefore forbidden.[116] The policy of religious censorship also results in "a continuing need to monitor group meetings to ensure compliance with the rule."[117] Clearly, as between equal access and censorship, the safer policy under the establishment clause is equal access.

d. The views of Justices Kennedy and Scalia

As previously discussed,[118] although only four Justices joined in Justice O'Connor's plurality opinion, two additional Justices are even more permissive of governmental accommodation of religion. Justice Kennedy, in a concurring opinion joined by Justice Scalia, voted to uphold the Equal Access Act because it satisfies two establishment clause principles. First, the Act does not give direct benefits to religion "in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"[119] Second, the Act does not "coerce any student to participate in a religious activity."[120] Therefore, Justices Kennedy and Scalia concurred in the judgment upholding the constitutionality of the Equal Access Act.[121]

3. Hate Groups, Satanic Clubs, and Other Fringe Organizations.— Critics of the Equal Access Act argue that it will open public high schools to student clubs promoting hate, satanism, and other sorts of extremism.[122] It is true that once a public secondary school creates a

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114. *Mergens*, 110 S. Ct. at 2373.

115. *Id.*

116. *See* Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981).

117. *Id. See Mergens*, 110 S. Ct. at 2373.

118. *See supra* notes 80-81 and accompanying text.

119. *Mergens*, 110 S. Ct. at 2377 (Kennedy, J., concurring) (quoting County of Allegheny v. A.C.L.U., 109 S. Ct. 3086, 3136 (1989) (Kennedy, J., concurring in part and dissenting in part)).

120. *Mergens*, 110 S. Ct. at 2377 (Kennedy, J., concurring).

121. *Id.* at 2376.

122. *See, e.g.*, Note, *The Equal Access Act: A Haven For High School 'Hate Groups,'* 13 HOFSTRA L. REV. 589 (1985).

limited open forum, the Act prohibits discrimination against student meetings "on the basis of the religious, political, philosophical, or other content of the speech at such meetings."[123] Thus, if a school allows even one noncurriculum-related club to meet on campus, it must allow equal access to all student clubs and may not censor the message of any such club.[124] However, this theoretical possibility of extremist clubs being allowed equal access to public school facilities does not justify the exclusion of religious clubs from campus. The proper response to clubs spewing hate is not the suppression of clubs expressing love, worship, redemption, and forgiveness.

Neither the Equal Access Act nor student religious clubs are the cause of hate groups or satanic activity on campus. An hysterical overreaction to the Court's decision in *Mergens* is not part of the solution. A more rational approach to the issue should take into account a number of considerations. First, the likelihood of extremist groups seeking equal access to public school facilities is, at best, remote. Equal access has been the law for years at public universities, and there is no evidence of a problem concerning satanic cults or hate groups seeking formal access to campus. These kinds of groups dwell in the dark, not in the light.

Moreover, if bigots or satanists are active in the public schools, and if they decide to apply for equal access, what have we lost? Equal access does not create these groups; it only allows them to surface and meet openly. This, in turn, gives public school officials an opportunity to respond to their ideas of hate and evil. As always, the cure for evil speech is good speech.[125]

Finally, the Court made clear in *Mergens* that the Equal Access Act does not limit a school's authority to prohibit student meetings that "interfere with the orderly conduct of educational activities within the school."[126] Clearly, there is no need for panic in the wake of *Mergens*. We should embrace the free speech and civil rights benefits of equal access and prepare to deal calmly and rationally with the remote possibility of student extremists surfacing to demand the right to meet.

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123. 20 U.S.C. § 4071(a) (1988).

124. *See supra* notes 30-34 and accompanying text.

125. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). For example, upon learning of hate group activity on campus, school officials may respond by calling a school assembly to discuss our society's commitment to equality and civil rights. School officials also may decide to offer counseling to the emotionally disturbed children who participate in these hate groups.

126. *Mergens*, 110 S. Ct. at 2367; 20 U.S.C. § 4071(c)(4). *See also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969).

4. Free Speech and Free Exercise Rights of Religious Students.— Because the Court concluded that Westside's exclusion of the Bible study club was unlawful under the Equal Access Act, it did not decide the students' claims under the free speech and free exercise clauses.[127] As a result, a number of interesting questions remain unanswered.

Does *Widmar* apply to public high schools (and junior high schools), or is it limited to public universities? If *Widmar* applies to public high schools, are high schools like Westside "limited public forums" for student organizations? A closely related question is: At what point does a school activity program become a "limited public forum" in a constitutional sense?[128]

Although the *Mergens* plurality clearly indicated that private student speech endorsing religion is protected by the free speech and free exercise clauses,[129] the exact contours of that protection will need to be defined in a future case, should one arise. Whether such a case arises will be determined by how well public schools and lower federal courts understand the lessons of *Mergens*.

III. The Lessons of *Mergens*: The Place of Religion in Public Schools

As Eugene Rostow, former dean of Yale Law School, observed, "The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar."[130] If Rostow is correct, and I believe he is, the opinions in *Mergens* have much to teach us about the proper role of religion in public schools.

Mergens is a landmark decision which, like *Brown* v. *Board of Education*,[131] carries the struggle for civil rights around a sharp corner. *Mergens* makes clear that religion has a legitimate place in the public schools, and it also makes clear that schools run significant legal risks when they censor or exclude private religious expression by students.

The Court's school prayer cases did not remove voluntary prayer from the public schools. At most, the prayer cases preclude state sponsored, required, or endorsed prayer or religious worship in public schools.[132]

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127. *Mergens*, 110 S. Ct. at 2373.

128. For a discussion of the constitutional meaning of limited public forum, see Laycock, *supra* note 4, at 45-51.

129. *Mergens*, 110 S. Ct. at 2372.

130. Rostow, *The Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193, 208 (1952).

131. 347 U.S. 483 (1954).

132. *See, e.g.* Edwards v. Aguillard, 482 U.S. 578 (1987) (requirement of equal treatment for creation science and evolution science constituted impermissible state en-

As the *Mergens* plurality observed, private student prayer and religious expression are outside the establishment clause ban and are protected by the free speech and free exercise clauses.[133] In other words, the crucial distinction is not the location of the speech, but rather the identity of the speaker. Government speech endorsing religion is prohibited even if it occurs on private property. Private speech endorsing religion is protected even if it takes place on public property.[134]

Although the precise holding of *Mergens* involves only the Equal Access Act, the signals it sends to the public schools and the lower federal courts are far-reaching. The Court's broad interpretation of the Equal Access Act determines, almost as a matter of certainty, that Bible study and other religious clubs will be allowed to meet in most public high schools throughout the country.[135] The clear line drawn by Justice O'Connor and the plurality between government speech endorsing religion and private speech endorsing religion removes the mask of legitimacy from public school officials who censor religious expression by students in the name of separation of church and state. Students who wish to write "I love Jesus" on valentines or sing Christian rap songs in school talent shows will be welcomed, not excluded, by school officials who listen to the message of *Mergens*. School board attorneys who understand *Mergens* will advise their clients that it is riskier to censor private religious speech than it is to tolerate it.

Thomas Jefferson, the author of the phrase "wall of separation between church and state,"[136] is a hero to those who wish strictly to exclude religion from public schools and other public places. However, I believe Jefferson would agree with the decision in *Mergens*. My support for this assertion is Jefferson's personal experience as a public educator. Jefferson was the first school board president for the public schools in the District of Columbia.[137] In fact, an historian of the District of

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dorsement of religion); Wallace v. Jaffree, 472 U.S. 38 (1985) ("moment of silence" law; state legislature acted with the intent to endorse and promote prayer); Stone v. Graham, 449 U.S. 39 (1980) (required posting of the Ten Commandments in each public school classroom); School District v. Schempp, 374 U.S. 203 (1963) (required reading of passages from the Bible and recitation of the Lord's Prayer); Engel v. Vitale, 370 U.S. 421 (1962) (required recitation of state-written "nondenominational prayer"); McCollum v. Board of Educ., 333 U.S. 203 (1948) (state-sponsored religious instruction in public school classrooms during regular school hours).

133. *Mergens*, 110 S. Ct. at 2372.

134. *See* Laycock, *supra* note 4, at 9.

135. *See supra* notes 46-73 and accompanying text.

136. *See supra* note 6.

137. *See* Wilson, *Eighty Years of the Public Schools of Washington-1805 to 1885*, 1 RECORDS OF THE COLUMBIA HISTORICAL SOCIETY 122 (1897); Whitehead, *supra* note 4, at 236.

Columbia public schools credits Jefferson as "the chief author of the first plan of public education adopted for the city of Washington."[138] Interestingly (perhaps devastatingly for those who revere Jefferson as a strict separationist), the first official report on file indicates that the principal books then in use in the District of Columbia public schools were the Bible and Watts Hymnal.[139] Jefferson apparently did not believe that use of these religious texts breached the wall of separation.

It is in the spirit of Thomas Jefferson, public educator, that the Supreme Court acted in *Mergens*. The establishment clause does not require religious apartheid in the public schools. Nor does it require religious students to pretend that their God does not exist when they walk through the public schoolhouse door. They are free to speak to Him, to praise Him, and yes, even to share Him with others "in the cafeteria, or on the playing field, or on the campus during the authorized hours."[140]

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138. Wilson, *supra* note 137, at 123. *See* Whitehead, *supra* note 4, at 236.

139. *See* Wilson, *supra* note 137, at 127; Whitehead, *supra* note 4, at 236.

140. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 512-13 (1969).