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Constitutional Analysis of the Equal Access Act's Standards Governing Public School Student Religious Meetings, A

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ARTICLE

A CONSTITUTIONAL ANALYSIS OF THE EQUAL ACCESS ACT'S STANDARDS GOVERNING PUBLIC SCHOOL STUDENT RELIGIOUS MEETINGS

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Numerous disputes have arisen over the use of public secondary schools for meetings by student religious groups. In every analysis of whether schools should grant such access there are competing Free Speech Clause and Establishment Clause concerns. Students could perceive a school's granting access as state endorsement of religion. Conversely, prohibition could result in the violation of students' free speech rights.

Congress attempted to deal with these concerns in 1984 by enacting the Equal Access Act. Professor Strossen shows that the Act favors access in situations where the Supreme Court has indicated that access is not required by the Free Speech Clause and circuit courts have found that such access would violate the Establishment Clause. In the absence of any directly controlling Supreme Court precedent, Professor Strossen attempts to reconcile the competing constitutional concerns involved in equal access controversies. In doing so she offers guidance as to whether and how schools should comply with the Act, given the inconsistencies between the constitutional and statutory standards for resolving equal access claims.

In the Equal Access Act (the Act),[1] Congress addressed a controversial issue that has led to numerous disputes before school boards and courts around the country: when a public high school[2] allows voluntary, student-initiated, nonreligious student groups to meet on school premises, should it grant equal

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[1] Pub. L. No. 98-377, 98 Stat. 1302 (1984) (codified at 20 U.S.C. § 4071 (1984)). The Equal Access Act became effective in August 1984. For the text of the Act, *see infra* note 164.

[2] This Article's analysis applies to schools containing lower grade levels, as well as high schools (grades nine through twelve). The Article refers to high schools, however, because they will probably receive the most access requests from voluntary, student-initiated, religious groups.

access to voluntary, student-initiated, religious student groups?[3] Two federal judges have maintained that denying equal access violates the Free Speech Clause.[4] However, all four courts of appeals which have ruled on the issue have held that granting equal access violates the Establishment Clause.[5]

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[3] The equal access controversy concerns the free speech rights of organized student groups rather than individual students or informal student groups. Religious expression in public schools by individual students or informal student groups raises fewer Establishment Clause concerns. *Cf.* Wallace v. Jaffree, 105 S. Ct. 2479, 2496 (1985) (O'Connor, J., concurring) ("Nothing in the United States Constitution as interpreted by this Court . . . prohibits students in public schools from voluntarily praying at any time before, during or after the school day."); Mueller v. Allen, 463 U.S. 388, 399 (1983) (government aid received by parochial schools, under a statute allowing tax deductions for tuition and related expenses, was "available only as a result of decisions of individual parents;" therefore, no "'imprimatur of state approval' . . . can be deemed to have been conferred" on religion).

[4] Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983) (Nealon, C.J.), *rev'd*, 741 F.2d 538, 561 (3d Cir. 1984) (Adams, J., dissenting), *vacated and remanded on other grounds*, 106 S. Ct. 1326 (1986) (school district's refusal to permit wholly student-initiated nondenominational prayer club to meet during activity period violated club members' free speech rights). The Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. It is binding on the states, Near v. Minnesota, 283 U.S. 697, 707 (1931), and protects the rights of individual students not only to engage in religious expression, but also to associate for such purposes. NAACP v. Alabama, 357 U.S. 449, 460–61 (1958).

[5] Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985); *Bender*, 741 F.2d 538 (3d Cir. 1984); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982); Brandon v. Bd. of Educ., 635 F.2d 971 (2d Cir. 1980). The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. It is binding on the states. Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

Although the Establishment Clause is usually invoked to challenge governmental favoritism toward religion, it also prohibits governmental hostility toward religion. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984). Most equal access opinions have not discussed the Establishment Clause problems resulting from the denial, as opposed to the grant, of access. However, in Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub. nom.* Widmar v. Vincent, 454 U.S. 263 (1981), the Eighth Circuit held that the Establishment Clause required a public university to grant equal access to a student religious group. *See id.* at 1317–18 (denial of equal access has the primary effect of inhibiting religion, and "hopelessly entangles" a university in defining religion, determining whether proposed events involve religious worship, and monitoring events to ensure no prohibited activity occurs).

Student religious groups seeking access to school premises have also based their claims on the Free Exercise Clause, which provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. I. The Free Exercise Clause is binding on the states. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211–12 (1948). However, the courts have consistently rejected the asserted free exercise rationale for equal access. *See Bell*, 766 F.2d at 1400 n.6; *Lubbock*, 669 F.2d at 1048; *Brandon*, 635 F.2d at 976–78; *Bender*, 563 F. Supp. at 703. As one court of appeals has explained,

> [w]e do not challenge the students' claim that group prayer is essential to their religious beliefs . . . . [However,] the school's rule [prohibiting group prayer on school property] does not place an absolute ban on communal prayer . . . . While school attendance is compelled for several hours per day, five days per

Reflecting asserted congressional concern for the high school students' free speech rights,[6] the Act requires secondary schools to grant equal access to any "noncurriculum related" student groups, including religious, political, or philosophical groups, in circumstances where such access would probably not be required under current Free Speech Clause doctrine.[7] In several recent decisions, the Supreme Court has curtailed Free Speech Clause protection of both access claims to government property[8] and public school students' speech.[9]

Conversely, reflecting what some critics have described as Congress's relative lack of concern for Establishment Clause values,[10] the Equal Access Act purports to require schools to grant equal access to student religious groups in certain circumstances under which circuit court rulings have held that such access would violate the Establishment Clause,[11] and Supreme

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> week, the students . . . are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place . . . .

Brandon, 635 F.2d at 977.

Although the majority in Widmar v. Vincent, 454 U.S. 263 (1981), did not reach the college student religious group's free exercise rationale for its equal access claim, the sole Justice who did analyze that claim rejected it. *Id.* at 284 (White, J. dissenting).

[6] *See, e.g.*, 130 CONG. REC. H7723–24, H7727 (daily ed. July 25, 1984) (statement of Rep. Roukema (R-N.J.)); *id.* at H7724 (statement of Rep. Frank (D-Mass.)); *id.* at H7732 (statement of Rep. Goodling (R-Pa.)); *id.* at H7734–35 (statement of Rep. McEwen (R-Ohio)); *id.* at H7735 (statement of Rep. Eckart (D-Ohio)); *id.* at H7738 (statement of Rep. Slattery (D-Kan.)); 130 CONG. REC. at S8337 (daily ed. June 27, 1984) (statement of Sen. Hatfield (R-Or.), the Act's Senate sponsor); *id.* at S8361 (statement of Sen. Jepsen (R-Iowa)). *See also* President's Statement Upon Signing H.R. 1310 (Education for Economic Security Act), 20 WEEKLY COMP. PRES. DOC. 1120, 1121 (Aug. 11, 1984): "These provisions honor, in a public school setting, this country's heritage of freedom of thought and speech, and I am delighted that they now become the law of the land." *Id.*

[7] *See infra* text accompanying notes 258–65.

[8] *See infra* text accompanying notes 37–44.

[9] *See infra* text accompanying notes 49–62.

[10] *See, e.g.*, Boisvert, *Of Equal Access and Trojan Horses*, 3 LAW & INEQUALITY 373, 406 (1985) (The Equal Access Act's legislative history indicates that it is a "blatant push to get religion into the public schools in violation of the Establishment Clause"); Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High School: A Proposal for a Unitary First Amendment Forum Analysis*, 12 HASTINGS CONST. L.Q. 529, 556–59 (1985).

Some members of Congress viewed the Act as a backdoor attempt to inject organized prayer into the public schools. 130 CONG. REC. S8352 (daily ed. June 27, 1984) (statement of Sen. Metzenbaum (D-Ohio)); *see also id.* at H7725 (statement of Rep. Schumer (D-N.Y.) quoting the Reverend Jerry Falwell's comment that "[w]e knew we couldn't win on school prayer, but equal access gets us what we wanted all along"); *id.* at H7733 (statement of Rep. Ackerman (D-N.Y.) referring to equal access bill as "the son of school prayer").

[11] *See infra* text accompanying notes 69–87.

Court rulings have indicated that access would at least raise Establishment Clause problems.[12]

In light of the inconsistency between the Act's standards for resolving equal access claims and judicial decisions enunciating constitutional standards for resolving such claims, it is not surprising that decisions under the Act reflect differing views of its constitutionality.[13] Faced with the competing constitutional considerations implicated in every equal access dispute, as well as with conflicting directives from the courts and the Congress, school officials, students, parents, and other concerned parties had hoped that the Supreme Court would provide some guidance for resolving these conflicts during its 1985 Term. The Court had granted certiorari to review *Bender v. Williamsport Area School District*, in which the Third Circuit had rejected an equal access claim on Establishment Clause grounds, notwithstanding its holding that the denial of access violated the students' free speech rights.[14] Although the events at issue in *Bender* occurred before the Act's effective date, some parties concerned with the equal access issue had hoped that the Court's ruling would provide at least some indirect guidance concerning the Act.[15] However, in March 1986, a narrow majority of the Court de-

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[12] *See infra* text accompanying notes 28–33 & 68.

[13] *See infra* text accompanying notes 193–232.

[14] 741 F.2d 535, 559 (3d. Cir. 1984), *cert. granted*, 106 S. Ct. 56 (1986). Having concluded that denying equal access to the students seeking to hold religious meetings would violate their free speech rights, but that granting them equal access would violate the Establishment Clause, the Third Circuit was faced with the issue of how to reconcile these competing constitutional claims. It did so pursuant to a novel, open-ended balancing test:

> [T]he appropriate analysis requires weighing the competing interests protected by each constitutional provision, *given the specific facts of the case*, in order to determine under what circumstances the net benefit which accrues to one of these interests outweighs the net harm done to the other. Recognizing that, under these circumstances, some constitutional protections must unavoidably be abridged, we believe that our role is to maximize, as best as possible, the overall measure of the fundamental rights created by the Framers, by deciding which course of action will lead to the lesser deprivation of those rights.

Id. (emphasis in original).

Although the Third Circuit observed that the facts of the *Bender* case presented a close question under its balancing analysis, it concluded that Establishment Clause concerns outweighed free speech concerns. *Id.* at 559–60. However, the court emphasized that "[u]nder other circumstances, of course, this same analysis could work to override the Establishment Clause, if a sufficiently compelling interest were shown." *Id.* at 560. For the facts of *Bender*, *see* text accompanying note 78.

[15] *See, e.g.*, Brief for the United States as Amicus Curiae, Supporting Petition for a Writ of Certiorari, at 2–9, Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986) (No. 84-773)(contending that, if allowed to stand, Third Circuit decision would cast doubt on Act's constitutionality, and would frustrate congressional objective of resolving constitutional issues involved with minimal additional litigation).

clined even to comment, let alone to rule, upon the merits of the *Bender* case.[16]

Far from resolving the equal access controversy during its 1985–1986 Term, the Supreme Court increased the confusion surrounding this controversy by issuing another decision, *Bethel School District v. Fraser*,[17] which significantly circumscribed students' free speech rights. The rationale underlying *Bethel* was that, due to their presumed immaturity, high school students are likely to be emotionally harmed by, and therefore should be insulated from, certain controversial speech.[18] This is directly contrary to the rationale underlying the Equal Access Act, which presumes that high school students are sufficiently mature to be exposed to controversial speech.[19]

Because of the Supreme Court's failure to provide specific guidance concerning high school equal access disputes, the numerous parties and courts that face such disputes have been relegated to the various commentators upon the subject. A school's ultimate concern in facing equal access issues must be to comply with the general dictates of the Free Speech Clause and the Establishment Clause, as interpreted by the Supreme Court.[20] The facts and circumstances that may be relevant to these ultimate constitutional requirements cannot be codified for all cases. Consequently, the Act's specification of criteria for evaluating all equal access claims necessarily departs from

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[16] Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986). The majority and dissenting opinions are discussed *infra* at text accompanying notes 85–103.

[17] 106 S. Ct. 3159 (1986).

[18] *See infra* text accompanying notes 56–62. *But see infra* note 60 (*Bethel* may reflect the Court's special concern with shielding minors from sexually explicit speech).

[19] The Equal Access Act's legislative history is replete with statements by members of Congress repudiating the view that high school students are too immature or impressionable to be exposed to controversial speech. *See, e g.*, H.R. REP. No. 710, 98th Cong., 2d Sess. 4 (1984); 130 CONG. REC. S8359 (daily ed. June 27, 1984) (statement of Sen. Hatfield); *id.* at S8363 (statement of Sen. Mitchell (D-Me.)); *id.* at S8366 (statement of Sen. Grassley (R-Iowa)); *id.* at H7723 (statement of Rep. Frank); *id.* at H7727 (statement of Rep. Roukema).

[20] Any denial of equal access could be challenged under the Supreme Court precedents limiting governmental discretion to impose content-based restrictions upon speech in limited public forums, even absent any statute purporting to grant equal access rights. *See infra* text accompanying notes 34–48. Under the Supreme Court decisions consistently invalidating state-sanctioned religious expression in public schools on Establishment Clause grounds, *see infra* text accompanying notes 28–33, no such expression could escape judicial scrutiny merely by virtue of general legislative authorization. *See* Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391, 1407 (10th Cir. 1985) (although state statute purportedly authorized religious expression by voluntary student groups in public schools, equal access issue was reviewed solely on constitutional grounds, with no discussion of statute).

constitutional standards.[21] A school should comply with the Act's specific standards only insofar as they are not inconsistent with general constitutional principles.

This Article[22] is intended, first, to fill the gap left by the Supreme Court's failure to address the merits of *Bender*, by articulating principles for reconciling the competing constitutional concerns implicated in equal access controversies. The Article's second purpose is to compare the proposed constitutionally-derived standards with those specified in the Act in order to offer guidance about the respects in which schools should or should not comply with the Act.[23]

After sketching the constitutional underpinnings of the equal access controversy, Part I briefly summarizes the specific constitutionally-based equal access case law. Part II shows why constitutional principles require the resolution of any equal access case to be based upon the particular facts involved, rather than according to categorical rules. Part III specifies evidentiary standards for evaluating the facts surrounding any equal access controversy consistently with constitutional precepts, and explains why the dispositive facts cannot be exhaustively catalogued.

After analyzing the Act's provisions, as illuminated by its legislative history[24] and the judicial decisions that have inter-

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[21] *See infra* text accompanying notes 233–35.

[22] Some of the ideas discussed in this Article have developed out of issues previously explored in Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143 (1985).

[23] Few works which analyze the Equal Access Act have been published, and none compare the Act's standards for reviewing equal access claims with constitutionally-based standards. Nonetheless, several works have examined the Act from other perspectives. *See* Boisvert, *supra* note 10 at 375–79 (analysis of Act's legislative history concluding that Act had pro-religious purpose, thus rendering it unconstitutional in its entirety); Teitel, *supra* note 10 at 556–59; Note, *The Equal Access Act: Is It A Solution or Part of the Problem?*, 8 GEORGE MASON U.L. REV. 353 (1986) (concludes that Act is unconstitutional in its entirety, because it is inconsistent with current equal access case law and fosters excessive entanglement between government and religion); Note, *The Equal Access Act: A Haven for High School "Hate Groups"?*, 13 HOFSTRA L. REV. 589 (1985) [hereinafter HOFSTRA Note] (focuses on Act's legislative history, and concludes that "hate groups" cannot be excluded from student forum under Act); Note, *Using Federal Funds to Dictate Local Policies: Student Religious Meetings Under the Equal Access Act*, 3 YALE L. & POL'Y REV. 187 (1984) [hereinafter YALE Note] (examines federalism and enforcement problems associated with Act, and concludes that Act is potentially unenforceable).

[24] A detailed analysis of the Equal Access Act's lengthy legislative history is beyond the scope of this Article. At least two assessments of that history conclude that the Act's purpose was to advance religion, and therefore any grants of access under it to student religious groups would violate the Establishment Clause. *See* Boisvert, *supra* note 10; Teitel, *supra* note 10.

preted it, Part IV contrasts the Act's framework for evaluating equal access questions with the constitutionally-based framework proposed in Part III. Because the Act is more protective of free speech values than of nonestablishment values, some grants of equal access to student religious groups may comply with the Act but violate the Establishment Clause; conversely, some denials of equal access to student religious, political, philosophical, or other groups may comply with the Free Speech Clause but violate the Act. Finally, taking into account both the constitutionally-based standards and those aspects of the Act that are consistent with these standards, Part V outlines the options available to a public high school in determining its equal access policies.

I. Constitutionally-Based Cases Pertinent to Equal Access

A. *Underlying Constitutional Precedents*

As the Third Circuit stated in *Bender*, the equal access issue implicates "a constitutional conflict of the highest order."[25] Both the nonestablishment and free speech concerns, which weigh in favor of differing results, seem compelling. While the courts have vigilantly protected Establishment Clause values in the public school setting,[26] the denial of equal access suffers under a double presumption of unconstitutionality as a content-based prior restraint on free speech.[27]

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[25] Bender v. Williamsport Area School Dist., 741 F.2d 538, 557 (3d Cir. 1984), *vacated and remanded on other grounds*, 106 S. Ct. 1326 (1986).

[26] *See infra* text accompanying notes 28–33. For a statement of the concerns underlying the strict judicial enforcement of the Establishment Clause in public schools, *see* L. Tribe, American Constitutional Law § 14-9, at 841 n.9 (1978):

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

Id.

[27] *See* Widmar v. Vincent, 454 U.S. 263, 267 n.5 (university's refusal to permit religious student group to meet on campus constitutes prior restraint upon students' expressive rights); *accord* Healy v. James, 408 U.S. 169, 184 (1972). Under the First Amendment, a presumption of unconstitutionality attaches both to prior restraints, *see, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam), and to content-based regulations on speech, *see, e.g.*, Police Department of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972).

1. Establishment Clause Cases Concerning Religious Expression in Public Schools

The Supreme Court has found an Establishment Clause violation[28] in nearly every case in which it has ruled upon state-sanctioned religious expression on public school premises, even where individual student participation was at least arguably voluntary.[29] Even though the Court has recently sanctioned chinks in the metaphorical wall separating church and state in other

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[28] From at least 1971 until 1984, the Supreme Court consistently evaluated Establishment Clause issues under the tripartite test first specifically enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971). The *Lemon* test provides that a government policy or practice can pass muster under the Establishment Clause only if: (1) it has a secular purpose; (2) its primary effect neither advances nor inhibits religion; and (3) it does not foster excessive entanglement between government and religion. *Id.* at 612–13.

In Lynch v. Donnelly, 465 U.S. 668 (1984), the Court stated that it would no longer be confined to the *Lemon* test in all Establishment Clause cases, *id.* at 679, although it did not propose an alternative test and has subsequently continued to rely on *Lemon*. *See, e.g.*, Witters v. Washington Dep't of Services for the Blind, 106 S. Ct. 748, 751 (1986); Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3222 (1985); Wallace v. Jaffree, 105 S. Ct. 2479, 2489–90 (1985).

Indeed, in one post-*Lynch* decision, the Court appeared to strengthen *Lemon*'s purpose test, by emphasizing that any challenged policy or practice must have a "clearly secular purpose." *Wallace*, 105 S. Ct. at 2490. Although the Court had employed the "clear secular purpose" test in previous cases, *see, e.g.*, Stone v. Graham, 449 U.S. 39, 40–41 (1980) (per curiam) (invalidating statute mandating the posting of Ten Commandments in public school classrooms), *Lynch* had reverted to the weaker "secular purpose" formulation. *See Lynch* 465 U.S. at 679 & n.6 (indicating that even a single secular purpose, among many religious purposes, would suffice under this standard). Perhaps the explanation for these shifting standards lies in the special strictness with which the Court enforces the Establishment Clause in the public school context. In another post-*Lynch* decision, the Court stressed that it has "particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children." *Grand Rapids*, 105 S. Ct. at 3222.

Justice O'Connor's concurring opinion in *Lynch* formulated a "clarified version" of the *Lemon* test, 465 U.S. 688 n.*, under which the central issue is whether the challenged governmental action is either intended to convey a message that the government endorses (or disapproves) religion, or is likely to be perceived as conveying such a message. *Id.* at 691. The Court has regularly invoked this "clarified" *Lemon* test in several post-*Lynch* Establishment Clause cases. *See, e.g.*, *Grand Rapids*, 105 S. Ct. at 3223; *Wallace*, 105 S. Ct. at 2492–93.

[29] *See, e.g.*, *Wallace*, 105 S. Ct. 2479 (1985) (striking down statute mandating moment of silence for meditation or prayer); *Stone*, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating statute that prohibited teaching Darwinian evolution theory); School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (prohibiting organized, teacher-led classroom Bible readings); Engel v. Vitale, 370 U.S. 421 (1962) (prohibiting organized, teacher-led classroom prayer); McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (striking down "released time" program under which religious teachers provided religious instruction in public school classrooms during the school day to students electing to attend). *But see* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding program under which public school students, upon written request by their parents, may leave school during school day and go to religious centers for religious instruction).

contexts,[30] its most recent pronouncements concerning public school religious expression continue to reinforce that wall.[31] The Court's chief concern in these cases is the risk that reasonable students could perceive the school as endorsing or supporting religion.[32] The Court has repeatedly expressed the fear that, because of young people's particular impressionability, they might be more likely than adults to perceive any religious expression on school premises as manifesting the school's approval of religion.[33]

2. Free Speech Clause Cases Concerning Speakers' Access to Public Property

The second significant body of Supreme Court precedent underlying the equal access issue is that concerning free speech guarantees on government property. Although individuals have

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[30] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (rejecting Establishment Clause challenge to city-sponsored nativity scene); Marsh v. Chambers, 463 U.S. 783 (1983) (rejecting Establishment Clause challenge to state-paid legislative chaplain); Mueller v. Allen, 463 U.S. 388 (1983) (rejecting Establishment Clause challenge to statute granting tax deductions to parents for tuition and other expenses incurred in sending children to parochial schools). *See generally* Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094 (1985); Teitel, *The Supreme Court's 1984–1985 Church-State Decisions: Judicial Paths of Least Resistance*, 21 HARV. C.R.-C.L. L. REV. 651 (1986).

[31] *See Wallace*, 105 S. Ct. 2479 (1985) (finding Establishment Clause violated by statutorily mandated daily moment of silence in public schools, for meditation or prayer, where legislative history indicated statutory purpose of promoting prayer). *See also* Grand Rapids, 105 S. Ct. at 3222 (1985) (holding Establishment Clause violated by school district's adoption of two programs under which public school employees taught secular subjects to nonpublic school students in classrooms leased from nonpublic schools at public expense, stressing "sensitive relationship between government and religion in the education of our children"); Aguilar v. Felton, 105 S. Ct. 3232 (1985).

[32] For a discussion of this policy concern, *see, e.g.*, L. TRIBE, *supra* note 26, § 14-5 at 825 n.15.

[33] *See, e.g.*, *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring): "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school . . . . The law of imitation operates and nonconformity is not an outstanding characteristic of children." *Id.*

The Court has also expressed the fear that, as a result of such perceived approval, students adhering to a minority religion or students not adhering to any religion at all might feel more alienated, or be more susceptible to indoctrination, than adults would be. In *McCollum*, the Court asserted that:

> [there] is an obvious pressure upon children to attend . . . . The children belonging to these nonparticipating sects will thus have inculcated in them a feeling of separatism when the school should be a training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents.

Id. at 227–28. *See also* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (distinguishing between adults "not readily susceptible to religious indoctrination" and children subject to "peer pressure").

no general right of access to public property for purposes of exercising their free speech rights, they do have such a right with respect to some government property, under the "public forum" doctrine.[34] Certain types of public property, such as sidewalks, streets, and parks, have been deemed quintessential public forums because they have traditionally been open for free speech purposes.[35] In addition, any other property that the government actually makes available for free speech purposes, even without a history or tradition of openness, is also regarded as a public forum. The government may not exclude or restrict speech on the basis of its content in any public forum, unless such action is necessary to promote a compelling state interest.[36]

Until recently, the Supreme Court also recognized, as a subcategory of public forums, a "limited public forum": public property where access could be limited to certain categories of speakers or subjects if "need[ed] to confine expressive activity on the property to that which is compatible with the intended uses of the property. . . ."[37] Public schools which made their facilities available to student groups were considered to have created limited public forums, in that nonstudent speakers could be excluded, and such exclusion was viewed as necessary to preserve the school's educational function. However, a public

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[34] *See generally*, Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

[35] This notion is eloquently expressed in Justice Roberts's oft-quoted dictum in Hague v. CIO, 307 U.S. 496 (1939):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515.

[36] For a discussion of the public forum doctrine, *see* Widmar v. Vincent, 454 U.S. 263, 267–68 (1981). *But see* Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1220 (1984) (although Supreme Court decisions in early 1970s began to espouse view that First Amendment almost completely prohibited content-based speech regulation, this approach never determined outcome of any cases, and has in any event become riddled with exceptions); Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 727–31; Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 205–06, 236 (1982).

[37] Cornelius v. NAACP Legal Defense & Educ. Fund, 105 S. Ct. 3439, 3458 (1985) (Blackmun, J., dissenting). For examples of limited public forums involving speaker and subject matter limitations, see, e.g., Widmar v. Vincent, 454 U.S. 263 (1983) (forum limited to speech by university students); City of Madison Joint School Dist. No. 8 v. Wisconsin Pub. Employment Relations Comm'n, 429 U.S. 167 (1976) (forum limited to speech about school board business).

school could not have limited the permissible subject matters for such a forum unless it could have shown that any such limitations were also necessary to preserve the school's educational function. Based upon this understanding of the limited public forum doctrine, both the district[38] and circuit[39] courts in *Bender* ruled that the exclusion of a student religious group from a public school forum violated the students' free speech rights.

The Supreme Court's most recent decision concerning the public forum doctrine, *Cornelius v. NAACP Legal Defense & Educ. Fund*,[40] was decided after the Third Circuit's ruling in *Bender* and effectively eliminated the limited public forum as an analytically separate category.[41] The Court indicated that so long as property is not held open to the public at large, it would be treated as a "nonpublic forum," and any access restrictions to it would be subjected only to minimal scrutiny.[42] In *Cornelius*,

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[38] 563 F. Supp. at 705–06.

[39] 741 F.2d at 546–50.

[40] 105 S.Ct. 3439 (1985).

[41] *See id.* at 3450 -51. As the dissenting opinion noted,

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

Cornelius, 105 S. Ct. at 3461 (Blackmun, J., dissenting) (emphasis in original).

[42] *Id.* at 3450–51. The effective elimination of the limited public forum concept had been foreshadowed in Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). *Perry* held that the government's "selective" granting of access to certain mailboxes did not "transform" this property into any type of public forum. *Id.* at 47. Yet the whole point of the limited public forum doctrine had been precisely to prevent the government from granting free speech access on any "selective" or restrictive basis, unless the government could prove that the access restrictions were necessary to preserve the government property for its intended purposes. *See supra text* accompanying note 37.

The *Perry* Court also observed that even in a limited public forum, "the constitutional right of access would . . . extend only to entities of similar character," *id.* at 48, and that the government maintained substantial discretion to classify which entities should be deemed "of similar character." *Id.* at 48. Applying these principles to the facts in *Perry*, the Court approved a school's determination that a rival teachers' union was not "of similar character" to the union which had been designated the teachers' collective bargaining representative. *Id.* at 55. Thus, *Perry* substantially constricted both the range of property which would be classified as a limited public forum and the protection against speech access restrictions on any such property. For examples of cases which, under *Perry*'s criteria, classify government property which has traditionally been accessible to speakers as nonpublic forums, see Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767, 773 (2d Cir. 1984) (public areas of subway stations); ACORN v. City of Phoenix, 603 F. Supp. 869, 871 (D. Ariz. 1985) (intersection of two public streets). For a decision illustrating the difficulty of showing an access restriction to be unreasonable as required by *Perry*, see Low Income People Together, Inc. v. Manning, 615 F. Supp. 501, 518 (N.D. Ohio 1985) (requiring

the Court stated that "[a]ccess to a nonpublic forum . . . can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'"[43] *Cornelius* was the latest in a series of recent Supreme Court decisions vesting the government with substantial discretion to define the speakers and subjects that will be granted or denied access to government property which is not open to the general public for speech purposes.[44]

Under the relatively constricted public forum doctrine reflected in these recent cases, a public school might well exclude religion from a student forum without being held to violate students' free speech rights. Consistent with the relatively expansive view of the government's discretion to restrict access to its property which these cases espouse, a school could apparently manipulate its definition of appropriate subjects for a

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"convincing evidence" of unreasonableness). *See also* Note, *Public Forum Analysis After Perry Education Association v. Perry Local Educators' Association—A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property*, 54 FORDHAM L. REV. 545, 550 (1986) [hereinafter FORDHAM Note]. ("[S]ince *Perry*, no restriction of access to a nonpublic forum has ever been held unreasonable.").

[43] 105 S. Ct. at 3448 (quoting *Perry*, 460 U.S. at 46). The *Cornelius* decision was issued by a 4–3 vote, with Justices Marshall and Powell not participating. Accordingly, the participation of these two Justices in future public forum cases could conceivably restore some limitations upon governmental discretion to restrict speakers' access to government property. Both Justices dissented from the Court's decision in *Perry*, 460 U.S. 37 (1983), which had also sanctioned broad governmental discretion to restrict access to government property. *See supra* note 42.

[44] In *Cornelius*, the Court held that an annual charitable fundraising drive conducted in the federal workplace during working hours was not a limited public forum, although for almost twenty years it had been open to any tax-exempt, nonprofit charitable organization that was supported by public contributions and provided direct health and welfare services to individuals. The Court therefore applied only minimal scrutiny to a 1982 Executive Order, No. 12,353, 3 C.F.R. 139 (1983), which for the first time excluded from the fundraising drive "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves." 105 S. Ct. at 3446. The Court held that the exclusion of advocacy groups survived the low-level scrutiny it deemed applicable, reasoning that the avoidance of controversy is a valid ground for restricting speech in a nonpublic forum. *Id.* at 3453. Acknowledging that the purported concern to avoid controversy may conceal a bias against particular viewpoints, the Court said that on remand the excluded groups could attempt to show that their exclusion "was impermissibly motivated by a desire to suppress a particular point of view." *Id.* at 3455.

See also Perry, 460 U.S. 37 (although school mail facilities were open to union which had been certified as teachers' exclusive bargaining representative, had previously been open to rival union, and had periodically been open to civic and church organizations, *id.* at 47–48, the Court held that these facilities did not constitute limited public forum, and that school could bar rival union from them). According to the four *Perry* dissenters, the selective exclusion sustained there constituted viewpoint discrimination which should be prohibited even in a nonpublic forum. *See id.* at 65 (Brennan, J., dissenting). *See also* Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

student forum to exclude, for example, all subjects deemed "controversial," including religious, political, or philosophical subjects. The school's assertion that such a subject matter definition was designed to avoid divisiveness and to provide a harmonious atmosphere conducive to education would probably be viewed as "reasonable" and not intended "merely" to suppress particular viewpoints.[45]

The Justices who have dissented from recent Supreme Court decisions eroding the public forum concept,[46] as well as First Amendment scholars,[47] have decried these decisions as undermining fundamental free speech values. To the extent that these criticisms are justified, the Equal Access Act could be viewed as restoring the constitutionally correct understanding of the limited public forum concept in the public school context. The Act prohibits the government from fine-tuning its definition of appropriate subjects for any public secondary school forum to

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[45] *See Cornelius*, 105 S. Ct. at 3454.

> Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.

Id. See also infra text accompanying notes 179–81 (under recent public forum decisions, school might permissibly include political clubs in student forum, but exclude philosophical or religious clubs).

[46] *See, e.g.*, *Perry*, 460 U.S. at 57 (Brennan, J., dissenting) ("[T]he Court disregards the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic."). *See also Cornelius*, 105 S. Ct. at 3455 (Blackmun, J., dissenting); *id.* at 3466 (Stevens, J., dissenting); *Knight*, 465 U.S. at 300 (Stevens, J., dissenting) (restriction of speech on policy matters is inconsistent with First Amendment values which "guarantee an open marketplace for ideas—where divergent points of view can freely compete for the attention of those in power").

[47] *See, e.g.*, Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1301 (1979) (reasoning in Lehman v. City of Shaker Heights "stands the mandatory access notice on its head. Instead of providing an additional brake on governmental restriction of speech, [*Lehman*'s] approach makes mandatory access a threshold test for protection."); Farber & Nowak, *supra* note 36, at 1259, 1264 (public forum doctrine "endangers judicial protection of first amendment values"; *Perry* was wrongly decided because "Court failed to demand a noncensorial justification"); Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 336, 342, 422–23 (1986) (under Court's recent public forum cases, "First Amendment interests are lost in the formalistic maze of an outcome-determinative tiered analysis that focuses primarily on the law of property"; under this analysis, Court has "allow[ed] plainly viewpoint-based restrictions to stand"; this approach "appears calculated to enshrine streets, parks, and sidewalks . . . as the only public fora"); FORDHAM Note, *supra* note 42, at 546–52 (1986) (*Perry* revives previously repudiated treatment of speakers' access to public property more as matter of property law than of free speech rights); Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 131, 133 (1982) (First Amendment values are undermined by Court's recent public forum analyses, because of unsatisfactory criteria used to determine whether place is public forum, and because of the low level of scrutiny applied to restrictions on speech in nontraditional forums).

at least the same degree as the pre-*Cornelius* case law, and invalidates subject matter restrictions which would probably be acceptable under *Cornelius*.[48]

3. Free Speech Clause Cases Concerning Public School Students' Speech Rights

The Equal Access Act can fairly be viewed as counteracting the Supreme Court's recent reductions in the protection accorded not only speech on public property generally, but also in-school speech by public school students specifically. The level of protection which the Act accords to student speech is more consistent with the standard enunciated in the Supreme Court's seminal student speech case, *Tinker v. Des Moines Indep. Community School Dist.*,[49] than is the Court's latest ruling on the issue, *Bethel School Dist. v. Fraser*.[50]

Declaring that "[i]t can hardly be argued that students shed their constitutional rights of freedom of speech or expression at the schoolhouse gate,"[51] the Court in *Tinker* ruled that schools could not restrict students' expressive conduct merely on the basis of general apprehensions. Instead, the Court repeatedly emphasized that such restrictions would be permitted only if based upon specific evidence demonstrating that the expressive conduct would "materially and substantially interfere" with the work of the school or impinge upon the rights of other students.[52] Applying this standard to the facts in *Tinker*, the Court held that the school had violated students' freedom of expression in suspending them for wearing armbands protesting the Vietnam War, where the armbands had caused no actual disturbances. In addition, there was no specific evidence which might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities.[53]

In subsequent cases, the federal courts have consistently enforced *Tinker*'s mandate that high school students' speech may be restricted only on the basis of specific evidence establishing that a particular harm necessitates such limitation. Accordingly,

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[48] *See infra* text accompanying notes 179–81, 258–66.
[49] 393 U.S. 503 (1969).
[50] 106 S. Ct. 3159 (1986).
[51] *Tinker*, 393 U.S. at 505–06.
[52] *Id.* at 509.
[53] *Id.* at 514.

these cases have consistently rejected the presumption that high school students are inherently too immature to be entitled to full free speech rights.[54]

Indeed, applying the principles enunciated in *Tinker* and its progeny, the Ninth Circuit Court of Appeals affirmed the lower court's ruling in *Bethel* that a high school had violated a student's speech rights by suspending him for delivering a speech containing sexual innuendoes at a student government assembly.[55] In reversing *Bethel*, the Supreme Court paid lip service to the standard it had articulated in *Tinker*.[56] However, as noted by the Ninth Circuit[57] and the dissenters from the Supreme Court's majority opinion,[58] the evidence in *Bethel* did not satisfy the *Tinker* standard: the record contained no evidence that any particular student was offended or otherwise harmed by the speech, let alone that the speech had caused or would be likely to cause a substantial disruption of the school's educational functions. Instead, the Supreme Court majority authorized the school to curb student speech rights on the basis of mere speculation that the sexual innuendo might be offensive or insulting to certain students in the audience, including younger students and female students.[59]

In effect, the Supreme Court in *Bethel* presumed that high school students are too immature to be exposed to potentially controversial, offensive or disruptive speech, and shifted the burden of proof to the student speaker to establish that the

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[54] *See, e.g.*, Russo v. Central School Dist. No. 1, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); Garvin v. Roseneau, 455 F.2d 233 (6th Cir. 1972); Riseman v. School Comm., 439 F.2d 148 (1st Cir. 1971); Scoville v. Bd. of Educ., 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970); Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980); Wilson v. Chancellor, 418 F. Supp. 1358 (D. Or. 1976); Dixon v. Beresh, 361 F. Supp. 253 (E.D. Mich. 1973).

[55] *See* Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356, 1359 (9th Cir. 1985) ("Just as in *Tinker*, the Bethel School District has failed to carry its burden of demonstrating that Fraser's use of sexual innuendo . . . substantially disrupted or materially interfered in any way with the educational process.").

[56] *Bethel*, 106 S. Ct. at 3163 (Court intimated that *Tinker* may be narrowly construed to apply only to political speech, or at least that it may be viewed as not protecting speech with sexual content).

[57] *Fraser*, 755 F.2d at 1359–61.

[58] *Fraser*, 106 S. Ct. at 3168–69 (Marshall, J., dissenting); *id.* at 3169 n.2 (Stevens, J., dissenting).

[59] The majority opinion simply asserted, as if it were taking judicial notice of incontrovertible facts, that "[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive to . . . any mature person. By glorifying male sexuality . . . the speech was acutely insulting to teenage girl students." 106 S. Ct. at 3165. The majority opinion further surmised that the speech "could well be seriously damaging" to the youngest students in the audience, noting that they were "on the threshold of awareness of human sexuality." *Id.*

challenged speech would not meet the substantial disruption or material interference standard. It also deferred extensively to the discretion of school authorities to curb students' speech for purposes of avoiding its speculative or presumed adverse effects.

Bethel's weakened standards for judicial review of public school limitations upon student speech could be invoked to uphold denials of equal access for groups seeking to discuss religion or other potentially controversial, and hence potentially disruptive, subjects.[60] The Supreme Court's Establishment Clause decisions concerning interrelationships between government and religion in the educational context have consistently presumed that such interrelationships would lead to disruptive effects such as divisiveness and alienation, without any specific evidence that these effects were likely to occur.[61] Indeed, much like the dissenters in *Bethel*, Justices dissenting from these Establishment Clause decisions have charged the majority with engaging in mere speculation about the adverse effects of the challenged interrelationships.[62] In the context of the equal access controversy, the combined effect of *Bethel* and the educational Establishment Clause cases may well be to authorize denials of access to student religious groups based upon little more than the conjecture that some students might view an equal access grant as the school's endorsement of religion.

The Supreme Court's recent decisions limiting free speech rights in the context of both public forums in general and public schools in particular have somewhat lessened the conflict between nonestablishment and free speech precedents posed by pre-*Cornelius* and pre-*Bethel* equal access cases. Because these recent free speech rulings increase school officials' discretion to impose content-based restrictions on speech, the officials may exercise such discretion to avoid the Establishment Clause problems that could result from in-school meetings of student religious groups. Nevertheless, if the Free Speech Clause were

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[60] Because *Fraser* involved sexually explicit speech, it may well reflect the Court's particular interest in sheltering minors from words or images relating to sexuality. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968). If so, *Fraser* may represent more of an exception to the *Tinker* standard than a general erosion of it.

[61] *See* cases cited *supra* at note 29. *See also infra* note 102 and accompanying text.

[62] *See, e g.*, Aguilar v. Felton, 105 S. Ct. 3232, 3244 (1985) (O'Connor, J., dissenting) ("The abstract theories explaining why on-premises instruction might possibly advance religion dissolve in the face of experience in New York."). *See also infra* note 102.

construed to grant student speech in public schools the full measure of protection to which many judges and scholars contend it is entitled, and which it received under Supreme Court rulings until recently, then equal access issues would still entail a sharp collision between nonestablishment and free speech precedents. Putting aside the specific tenets of current constitutional doctrine, the equal access issue continues to reflect a sharp collision between general values of nonestablishment and free speech.[63] The following section discusses the cases which have attempted to resolve this conflict.

B. *Current Constitutional Case Law Concerning Equal Access*

1. The Supreme Court's Decision Concerning Equal Access in the University Context

The Supreme Court's decision in *Widmar v. Vincent*[64] involved a public university which made its facilities generally accessible to voluntary, student-initiated, nonreligious student groups. The Court ruled that the university violated the Free Speech Clause by not making these facilities equally accessible to a voluntary, student-initiated, religious student group, which sought to engage in prayer and worship.

Stressing the number and diversity of the student groups which met at the university,[65] *Widmar* held that the university had designated its campus as a limited public forum for students. Based upon this finding, the Court concluded both that the Free Speech Clause barred a content-based exclusion of the student religious group,[66] and that the Establishment Clause permitted granting equal access to this group, because no reasonable stu-

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[63] As the district court observed in *Bender*:

> On the one hand, but for the fact that the present dispute involved a high school . . . *Widmar* clearly would have controlled. On the other hand, but for the fact that the instant situation involved a purely student-initiated request to use a forum created by the school, the "school prayer" cases may very well have been dispositive.

563 F. Supp. at 699.

[64] 454 U.S. 263 (1981).

[65] *Id.* at 265, 274.

[66] *Id.* at 277.

dent should perceive the university as endorsing the group's religious message.[67]

The Court suggested, however, that the Establishment Clause analysis might be different in the context of a public high school student forum, asserting that "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University policy is one of neutrality toward religion."[68] Although this statement implies that high schools might justifiably exclude student religious groups, the Court did not make a definitive holding to this effect. The Court did not state that all "younger students" are so "impressionable" that they would be inherently incapable of appreciating a school's neutral role under an equal access policy. Therefore, the Supreme Court in *Widmar* did not resolve under what circumstances, if any, high school student religious groups should be granted equal access.

2. Courts of Appeals Decisions Concerning Equal Access in the Secondary School Context

The four courts of appeals which have directly faced the issue[69] have unanimously held that Establishment Clause values

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[67] The *Widmar* opinion reasoned that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices" because an equal access policy "'would no more commit the University . . . to religious goals' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities." *Id.* at 274 (quoting Chess v. Widmar, 635 F.2d 1310, 1317 (8th Cir. 1980)).

[68] *Id.* at 274 n.14.

[69] Another court of appeals decision, Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984), also involved the propriety of a student religious group's meeting on school premises, but the limited record in that case does not reveal whether the school had an equal access policy. Because of the case's procedural posture, its holding was quite narrow.

The Eleventh Circuit affirmed a district court order which preliminarily enjoined a school district from permitting a junior high school student group called "Youth For Christ" to meet on school premises, after school hours, under faculty supervision. The Eleventh Circuit held that the district court had not abused its discretion in concluding that the school's practice of permitting these meetings was likely to be found, after a trial on the merits, to violate the Establishment Clause. *Id.* at 649. In particular, the court concluded that the religious meetings were likely to be found to have the impermissible effect of promoting religion, in light of the school district's history of announcing church-sponsored activities at school assemblies, on school bulletin boards, and over school public address systems, and of allowing religious signs to be posted on school property. *Id.* at 648–49. However, given the sparse record, the Eleventh Circuit expressly noted that it could not make several factual determinations which would be necessary to evaluate the propriety of permanent relief, including whether the school permitted other student groups to meet on school premises. *Id.* at 649.

See also May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105, 1118 (7th Cir.

require denial of equal access to high school student religious groups.[70] However, these rulings were premised on differing analyses.

The rationale of two decisions, the Second Circuit's holding in *Brandon v. Board of Education of Guilderland Central School District*[71] and the Fifth Circuit's ruling in *Lubbock Civil Liberties Union v. Lubbock Independent School District*,[72] are fully consistent with a categorical rule precluding concerted student religious expression in public schools. Although neither expressly espoused such an absolute prohibition, both declared that "a high school is not a 'public forum' where religious views can be freely aired."[73] Thus, both courts apparently concluded that a high school cannot create a forum for concerted student religious expression without engendering reasonable student perceptions that the school supports religion. These conclusions followed from the courts' unsupported generalizations or presumptions that high school students are innately immature and impressionable.[74] This reasoning seems inconsistent with protecting students' free speech rights concerning certain potentially controversial nonreligious subjects, exposure to which could also adversely affect immature or impressionable students.[75]

In contrast with *Brandon* and *Lubbock*, the other two equal access decisions by courts of appeals, the Third Circuit's ruling

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1986) (rejecting claim by teachers and other public elementary school employees that the Free Speech Clause gave them the right to hold prayer meetings on school property before the school day, because there was no evidence that school had created any free speech forum). In dicta, the Seventh Circuit panel which issued the *May* opinion indicated that it might have fewer Establishment Clause concerns regarding religious meetings on school premises than did the other courts of appeals which have directly ruled upon such issues. The court noted that

> [t]he strongest support for [the plaintiff teachers'] position is the fact that the [school authorities] were fearful of violating the Establishment Clause. Their concern, which may well have rested on an exaggerated view of the scope of the Establishment Clause, led them to deny the use of school premises to two religious groups, one of which, at least, was school-related. This refusal might create interesting questions in a suit by such a group, modeled on the suit in *Widmar*, but that is not this suit . . . .

Id. at 1117.

[70] *See supra* note 5. *But see May*, 787 F.2d at 1117 (dicta), discussed *supra* at note 69.

[71] 635 F.2d 971 (2d Cir. 1980), *cert denied*, 454 U.S. 1123 (1981).

[72] 669 F.2d 1038 (5th Cir.), *reh'g denied*, 680 F.2d 424 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

[73] *Lubbock*, 669 F.2d at 1048; *accord Brandon*, 635 F.2d at 980.

[74] *Lubbock*, 669 F.2d at 1046–47; *Brandon*, 635 F.2d at 978.

[75] *See infra* text accompanying notes 131–37.

in *Bender*[76] and the Tenth Circuit's holding in *Bell v. Little Axe Independent School Dist. No. 70*,[77] employed ad hoc analyses. Focusing upon the particular facts presented, both decisions held that the equal access policies under review violated the Establishment Clause. In *Bender*, the Third Circuit concluded that the religious speech of a student Christian fellowship violated the Establishment Clause because it occurred during the official school day, was part of a school-organized activity program, and took place in the presence of a school-approved monitor.[78] In invalidating the student religious group meetings in *Bell*, the Tenth Circuit stressed the following specific facts presented by that case: the school was composed of students in kindergarten through grade nine, so most students were in elementary grades;[79] the religious group had been initiated by a faculty member along with several students;[80] teachers had participated in the meetings and arranged for outside speakers, including a minister, to attend;[81] the meetings occurred after school buses arrived at school, which was after teachers were required to be on duty, and after students were legally subject to the school's supervision and control;[82] students in the religious group were the only ones allowed inside the school building before the first class;[83] and the student religious group's meetings were announced through school publications and posters on school walls.[84]

In addition to stressing the specific facts involved in the cases at bar, both the *Bender* and *Bell* opinions further indicated that, because of certain inherent distinctions between universities and schools, there was a greater risk that an equal access grant in a secondary or elementary school would violate the Establishment Clause. The courts asserted that, because of these differences, high school students would more likely perceive such a grant as governmental endorsement of religion. For example, the Third Circuit in *Bender* emphasized the following distinctions: high school students' relative immaturity; the more obvious presence

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[76] 741 F.2d 538 (3d Cir. 1984).
[77] 766 F.2d 1391 (10th Cir. 1985).
[78] 741 F.2d at 560.
[79] 766 F.2d at 1396 n.1, 1401 n.7.
[80] *Id.* at 1397.
[81] *Id.*
[82] *Id.* at n.4.
[83] *Id.* at 1405.
[84] *Id.* at 1397.

that a religious group would "unavoidably" have owing to a high school's more structured and controlled environment; the fact that attendance for most high school students is compulsory under state law; and the fact that high school students are subject to constant supervision by, and follow the example of, adult school authorities.[85]

Nonetheless, unlike the Second and Fifth Circuits in *Brandon* and *Lubbock*, both the Third and Tenth Circuits in *Bender* and *Bell* stressed the important free speech rights of students in a school forum, noting that while the particular facts in the respective cases tilted the constitutional balance of interests in favor of Establishment Clause concerns, the outcome of such balancing might differ in other situations.[86] Therefore, the balancing approach followed by the Third and Tenth Circuits appears better calculated to promote both free speech and nonestablishment concerns than does the more nonestablishment oriented, categorical approach of the Second and Fifth Circuits. The anticipation that the Supreme Court would endorse one or the other of these two basic approaches, which resulted from its decision to review the *Bender* case, was frustrated by the Court's ultimate disposition of *Bender* on procedural grounds.[87]

3. The Supreme Court's Consideration of Equal Access in the Secondary School Context

In an opinion joined by five Justices,[88] the Supreme Court in *Bender* vacated the Third Circuit's judgment and remanded the case with instructions to dismiss the appeal for want of jurisdiction.[89] Neither the majority opinion nor Justice Marshall's separate concurrence expressed or intimated any views on the merits of the controversy. The merits were discussed, however, by the two dissenting opinions, one authored by Chief Justice

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[85] 741 F.2d at 552.

[86] *Bender*, 741 F.2d at 561; *Bell*, 766 F.2d at 1407.

[87] *Bender* was not the first case presenting the high school equal access controversy which the Court declined to review on the merits. It had previously denied certiorari in both *Brandon*, 454 U.S. 1123 (1981), and *Lubbock*, 459 U.S. 1155 (1983).

[88] Justice Stevens delivered the opinion of the Court, *Bender*, 106 S. Ct. 1326 (1986), in which Justices Brennan, Marshall, Blackmun, and O'Connor joined. Justice Marshall also filed a concurring opinion. 106 S. Ct. at 1335.

[89] This ruling was premised on the Court's conclusion that the sole party who had appealed from the district court decision, an individual school board member and parent of a student attending the school, did not have standing to appeal. *Id.* at 1333, 1335.

Burger and joined by Justices White and Rehnquist,[90] and the other written by Justice Powell.[91] The four dissenters agreed with the majority that the Third Circuit's judgment should be vacated, but they based their conclusion on substantive grounds.

Both dissenting opinions agreed that *Bender* was controlled by *Widmar*.[92] Justice Powell, who had authored the *Widmar* majority opinion, premised his *Bender* dissent entirely on the *Widmar* precedent. He said that the only "arguable distinction" between *Widmar* and *Bender* was the ages of the students involved, but he concluded that this "arguable distinction" did not warrant different legal rulings in the two cases.[93] Although Justice Powell quoted *Widmar*'s observation that university students are "less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion," he nevertheless opined that, "particularly in this age of massive media information . . . the few years difference in age between high school and college students" does not "justif[y] departing from *Widmar*" in the high school setting.[94] In support of this conclusion, Justice Powell cited Supreme Court decisions recognizing that First Amendment rights of free speech and association extend to high school students.[95]

Chief Justice Burger's dissent appears to rest upon broader grounds than the analogy between the *Widmar* and *Bender* cases employed by Justice Powell. He characterized the Third Circuit's decision as holding that, "because an individual's discussion of religious beliefs may be confused by others as being that of the state, both must be viewed as the same."[96] But, the opinion reasoned, if individual discussion of religious belief is to retain the protection it is intended to receive under the Free Speech and Free Exercise Clauses, "utterly unproven, subjec-

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[90] *Id.* at 1336.

[91] *Id.* at 1338.

[92] *Id.* at 1337 (Burger, C.J., dissenting); *id.* at 1338 (Powell, J., dissenting).

[93] *Id.* at 1339 (Powell, J., dissenting).

[94] *Id.*

[95] *Id.* (citing Bd. of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 864 (1982); and Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506–07 (1969)). Of course, just a few months after its *Bender* decision, the Supreme Court issued its ruling in the *Bethel* case, which appeared to cut back the free speech rights accorded to high school students in the earlier cases cited by Justice Powell. *See supra* text accompanying notes 55–62. Regarding the inconsistencies between the positions espoused by the *Bender* dissenters in the *Bender* and *Bethel* cases, *see infra* note 101.

[96] *Bender*, 106 S. Ct. at 1337 (Burger, C.J., dissenting).

tive impressions of some hypothetical students should not be allowed to transform *individual* expression of religious belief into *state* advancement of religion."[97]

Chief Justice Burger and the two other Justices who joined his opinion would apparently not subject a school's grant of equal access to any scrutiny under the Establishment Clause, on the theory that granting access does not entail sufficient state action to invoke constitutional limitations.[98] At the very least, these Justices would impose as a threshold requirement, necessary to trigger Establishment Clause scrutiny, the submission of some objective evidence justifying students' perception that an equal access grant manifested the school's endorsement of religion.[99] Absent this type of evidence, they would apparently deem irrelevant any indications that the equal access grant's primary effect was to advance religion.[100]

Chief Justice Burger's stringent evidentiary standard for challenging an equal access grant to a student religious group is inconsistent not only with the Court's most recent pronouncements concerning student speech in *Bethel*,[101] but also with the

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[97] *Id.* (emphasis in original).

[98] *See id.* at 1337–38. It is difficult to understand how the Williamsport school's voluntary creation of a student forum, in which groups met during the school day with teacher monitors present, can fairly be characterized as "state inaction." *See id.* at 1338.

In any event, even assuming *arguendo* that the Williamsport school had taken no action to initiate a student forum but had just passively permitted the student religious group to meet, Establishment Clause scrutiny still should not be foreclosed. As recognized in Justice O'Connor's widely cited reformulation of the *Lemon* test in *Lynch*, *see supra* note 28, the Establishment Clause may be violated when the government *appears* to approve or disapprove religion, even if it has not actually done so. Under this standard, a negative answer to Chief Justice Burger's "threshold question of whether the challenged activity is conducted by the State or by individuals," *Bender*, 106 S. Ct. at 1338, should not insulate such activity from judicial review. A school's passive acquiescence in a student religious group's meeting could reasonably be perceived as constituting endorsement, and would therefore violate the Establishment Clause even though the school did not actually conduct the meeting.

[99] *See Bender*, 106 S. Ct. at 1337–38 (Burger, C.J., dissenting). Even assuming *arguendo* the propriety of this threshold evidentiary requirement, Chief Justice Burger does not explain why it could not be satisfied by evidence concerning those characteristics of public schools and their students which create risks that any group religious expression on school property would be perceived as school endorsed. *See infra* text accompanying notes 111–14.

[100] *See id.* at 1338 ("That the 'primary effect' of state inaction might turn out to advance the cause of organized religion has no bearing upon the threshold question of whether the challenged activity is conducted by the State or by individuals.").

[101] The four dissenters in *Bender*, who joined the majority in *Bethel*, expressed substantially different attitudes concerning high school students' maturity and imposed significantly different evidentiary standards, depending on whether or not the speech at issue was religious. In *Bethel*, which did not involve religious speech, these Justices referred to the high school student speaker as a "boy" and to the other students as

Court's previous rulings concerning Establishment Clause problems caused by public school religious expression. The central question involved in any Establishment Clause challenge to public school religious expression, whether reasonable students would perceive it as conveying the school's approval or disapproval of religion, is not readily susceptible to "objective" proof. Therefore, the reassignment of evidentiary burdens could have a significant impact on the outcomes of actual controversies.

The Supreme Court's opinions concerning public school religious expression have not required specific objective evidence that the challenged expressions would actually cause reasonable student perceptions that the school endorses religion. Instead, the Court has assumed or presumed that such perceptions would arise from certain inherent characteristics of public schools and their students: that students are required to be on school premises as a result of state compulsory education laws and that, while on school premises, students are subject to at least a modicum of school supervision, as a matter of state or local law.[102]

The effect of adopting the evidentiary burdens endorsed by Chief Justice Burger and Justices White and Rehnquist in

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"girls" or "children." 106 S. Ct. at 3165–66. In *Bender*, which did involve religious speech, they argued that high school students should be accorded the same free speech rights as college students, brushing aside arguments about different maturity levels. 106 S. Ct. at 1338 (Burger, C.J., dissenting); *id.* at 1339 (Powell, J., dissenting).

Moreover, the *Bender* dissenters castigated the Third Circuit's conclusion that granting equal access to a student religious group would cause reasonable student perceptions that the school endorsed religion, charging that this finding rested on "utterly unproven, subjective impressions of some hypothetical students." 106 S. Ct. at 1338 (Burger, C.J., dissenting). Yet in *Bethel*, these same Justices relied upon the same type of "evidence" in concluding that the sexual innuendo contained in the student assembly speech would offend other students. 106 S. Ct. at 3165. *See supra* text accompanying notes 57–59.

[102] *See* cases cited *supra* at note 29. Two recent Supreme Court decisions illustrate the Court's relatively lenient evidentiary standards governing the finding of an Establishment Clause violation in cases "involving the sensitive relationship between government and religion in the education of our children." Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3222 (1985); *see also* Aguilar v. Felton, 105 S. Ct. 3232 (1985). The Supreme Court in both cases invalidated certain governmental assistance programs, under which public school employees taught secular subjects in parochial schools. The Court in *Grand Rapids* feared that these teachers "knowingly or unwittingly tailor the content of the course to fit the school's announced goals," causing a prohibited "indoctrinating effect." 105 S. Ct. at 3225–26. This potential Establishment Clause violation persuaded the Court to strike down the programs, even though they had existed for almost twenty years, and even though there was no evidence of even one incident of the feared indoctrination throughout the entire period. *Id.* Expressly acknowledging this lack of evidence, the Court dismissed it as "of little significance," and concluded that "[t]he symbolic union of church and state inherent in [the challenged programs] *threatens* to convey a message of state support for religion . . . ." *Id.* at 3230 (emphasis added). *See also supra* note 62.

Bender would apparently be to replace the current presumption—that any concerted student religious expression in public schools causes Establishment Clause problems—with the presumption that any such expression is protected by the Free Speech Clause. The effect of the position articulated in Burger's *Bender* dissent is thus similar to that of the Equal Access Act, which also confers presumptive access rights upon concerted student religious expression.[103] In light of the compelling free speech interests implicated in any public forum, including a high school student forum, it is appropriate to grant more protection to concerted student religious speech in such a context than would be available under the traditional Establishment Clause analysis, which would presume such speech to breach the required separation between government and religion. To go to the other extreme, however, by presuming that free speech concerns should prevail, would attribute insufficient weight to the substantial countervailing Establishment Clause concerns implicated by any concerted religious expression in the especially sensitive public school environment.

For the reasons explained in the following two Parts, either absolute or presumptive rights of access for concerted student religious speech would be inconsistent with Establishment Clause principles. Instead, those principles, as well as Free Speech Clause principles, require that any equal access dispute be resolved on the basis of its particular facts and circumstances, with no absolute or presumptive rules in favor of either countervailing set of constitutional concerns.

II. The Constitutional Requirement of a Case-by-Case Resolution of Equal Access Issues

Three basic approaches are available for resolving any student religious group's claim for equal access to a high school student forum. The first is a general rule requiring schools to grant equal access to any voluntary, student-initiated, student religious group on free speech grounds.[104] The Equal Access Act essen-

[103] *See infra* text accompanying notes 164–90; *see also infra* text following note 233.

[104] Any student religious group meeting that occurs on school property must be voluntary and student-initiated. If any meeting, or any student's participation in a meeting, were instigated by school officials or other adults, then the free speech rationale for such a meeting would dissipate, because it would not reflect the students' expressive and associational choices. The Establishment Clause dangers entailed in such a meeting would concomitantly increase, because the adult role could create perceptions of government endorsement. *See infra* text accompanying note 184; *see also infra* text accompanying note 190.

tially extends such per se permission,[105] and the four Supreme Court Justices who dissented in *Bender* would apparently do the same.[106] The second possible approach is a general rule prohibiting schools from granting equal access to any student religious group on Establishment Clause grounds. In *Brandon* and *Lubbock*, the Second and Fifth Circuits each essentially imposed such a per se prohibition.[107]

A third possible approach is an individualized determination, based upon the facts and circumstances involved in any particular case, of whether a student religious group should be granted equal access. Such an individualized analysis was employed by the Third and Tenth Circuits in *Bender* and *Bell*, respectively.[108] This Part of the Article concludes that the case-by-case approach is the only one consistent with the applicable constitutional principles.

A. *A Categorical Rule Requiring Schools to Grant Equal Access Would Violate the Establishment Clause*

No court which has considered the equal access issue has advocated a per se rule authorizing concerted student religious expression under an equal access policy.[109] These cases all recognize the special establishment dangers posed by any religious expression in high schools. Due to certain inherent characteristics of high schools, as contrasted with colleges, there is a significant risk that any such expression, even in the context of a student forum, could be perceived as conveying the school's endorsement of religion. Judicial opinions have cited the follow-

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[105] *See infra* text accompanying notes 164–90; text following note 233.

[106] *See supra* text accompanying notes 92–100.

[107] *See supra* text accompanying notes 71–74.

[108] *See supra* text accompanying notes 76–86. The Supreme Court had also applied an individual analysis to the university equal access issue in *Widmar*. *See supra* text accompanying notes 64–68.

[109] Even the two judges who have approved particular equal access grants to public school student religious groups have stressed that their rulings were based upon the particular facts and circumstances involved. *See, Bender*, 563 F. Supp. at 698 (Nealon, C.J.); 741 F.2d at 569–70 (Adams, J., dissenting). Similarly, even with respect to the public university equal access policy in *Widmar*, the Supreme Court emphasized that its rulings were based upon the particular factual record, and should not be read as a per se authorization of all student religious expression under every equal access policy. 454 U.S. at 274–75. *But see supra* text accompanying notes 92–103 (four dissenters from Supreme Court's *Bender* decision would apparently endorse rule which at least presumptively authorized concerted student religious expression under equal access policy).

ing distinctions between colleges and high schools as particularly relevant: a high school serves more of an inculcative function than a college, which more closely resemble a marketplace of ideas;[110] most high school students are present in school by virtue of state compulsory education laws;[111] state laws generally require schools to exercise some supervision over students while on school property;[112] and high school students are generally less intellectually or emotionally mature, and more impressionable, than college students.[113] Accordingly, only a close examination of the facts in any particular case can illuminate whether, as actually implemented, even a facially neutral equal access policy has the nonneutral effect of implying that a school supports religion.[114]

B. *A Categorical Rule Prohibiting Schools from Granting Equal Access Would Violate the Free Speech Clause*

The foregoing differences between high schools and colleges warrant a stricter scrutiny of student religious speech in the former than in the latter. However, these distinctions do not absolutely preclude the creation of open student forums in high schools, nor do they inevitably cause high school students to perceive concerted religious expression in the school as endorsed by the school. Therefore, the above distinctions may not afford even a rational justification for the per se exclusion of concerted religious speech from a high school student forum. In any event, these distictions do not afford the compelling justification traditionally required for content-based exclusions of speech from a public forum or limited public forum.[115]

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[110] *E.g.*, *Bender*, 741 F.2d at 552. "[H]igh school instruction is given in a structured and controlled environment . . . [unlike] the open, free, and more fluid environment of a college campus." *Id.*

[111] *E.g.*, *id.*; *Lubbock*, 669 F.2d at 1046; *Brandon*, 635 F.2d at 978.

[112] *E.g.*, *Bender*, 741 F.2d at 552–53; *Brandon*, 635 F.2d at 979.

[113] *E.g.*, *Bender*, 741 F.2d at 552; *Brandon*, 635 F.2d at 978.

[114] *Cf.* Wallace v. Jaffree, 105 S.Ct. 2479 (1979):

> By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period . . . . Nonetheless, it is also possible that a moment of silence statute . . . as actually implemented could effectively favor the child who prays over the child who does not. For example, the message of endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray.

Id. at 2499 (O'Connor, J., concurring).

[115] *See supra* text accompanying notes 36–37.

The inculcative function of public high schools does not justify an absolute prohibition of equal access. A public high school is intended to serve dual, somewhat inconsistent roles: not only as the transmitter of majoritarian views and values, but also as the facilitator of students' independent thought, inquiry, and discussion.[116] Both the Supreme Court[117] and lower courts[118] have expressly recognized the importance of the public high school's role as a marketplace of ideas.[119]

If a school were, or were perceived to be, serving as an inculcator of student religious speech, it would transgress the Establishment Clause. However, a school's designation of an open student forum under an equal access policy epitomizes its noninculcative or intellectual marketplace role. Reasonable students should appreciate that when a school functions as a marketplace of ideas, it does not necessarily endorse any ideas that students might exchange in such a marketplace.[120] Any risk that students would misperceive the school's neutral, noninculcative, nonsponsoring role under an equal access policy should be countered through such measures as explanatory statements or

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[116] *See, e g.*, Bd. of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 868–69 (1982).

[117] *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 512 (1969) ("[P]ersonal intercommunication among the students . . . is an important part of the educational process."). *See also* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues [rather] than through any kind of authoritative selection.'") (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). *Accord* Wiemann v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

Some Supreme Court decisions have referred to high schools and colleges interchangeably in discussing this essential intellectual marketplace function common to all public educational institutions. *See, e.g., Pico*, 457 U.S. at 877; *Tinker*, 393 U.S. at 512–14 & n. 6; Shelton v. Tucker, 364 U.S. 479, 487 (1960).

[118] *See, e.g.*, Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 807 (2d Cir. 1971) ("A public school is undoubtedly a 'marketplace of ideas.' Early involvement in social comment and debate is a good method for future generations of adults to learn intelligent involvement."). *Accord* James v. Bd. of Educ., 461 F.2d 566, 573 (2d Cir. 1972); Cary v. Bd. of Educ. of Adams-Arapahoe School Dist., 427 F. Supp. 945, 952–53 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979) (while many Supreme Court statements concerning importance of opportunity for independent inquiry in academic setting were made in higher education context, "that does not destroy their importance in providing a philosophical guidance" in secondary education context).

[119] Indeed, the plurality opinion in *Pico* suggested that public school students have a constitutional right of access to a diversity of ideas. 457 U.S. at 866–68.

[120] *See Cary*, 427 F. Supp. at 953, *aff'd*, 598 F.2d 535 (10th Cir. 1979) (in assessing academic freedom issue, court should consider whether it arises in context where school acts in inculcative role, or in context where student is part of "open, participatory community").

disclaimers.[121] The wholesale exclusion of student religious speech is not necessary to avert such risk.

Compulsory education and school supervision requirements also do not warrant a per se prohibition of equal access. Even assuming that the majority of high school students actually attend school because of legal compulsion,[122] and even assuming that all schools have some legal responsibility for students whenever they are on school premises,[123] it still does not follow that students would inevitably regard their school as endorsing the religious content of any concerted religious speech which occurs on the school premises. The risk that these aspects of public high schools could lead reasonable students to infer school support for religion could and should be readily countered through

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[121] Various courts that have considered the tensions between free speech and nonestablishment values implicated by religious symbols on public property have relied upon disclaimers to minimize Establishment Clause problems. *See, e.g.*, McCreary v. Stone, 739 F.2d 716, 728 (2d Cir. 1984), *aff'd by an equally divided Court sub nom.* Bd. of Trustees v. McCreary, 105 S. Ct. 1859 (1985) (per curiam) (Establishment Clause does not bar temporary location of privately owned nativity scene in public park: "[w]e believe that a proper disclaimer message [together with other factors] will ensure that no reasonable person will draw an inference that the Village [of Scarsdale, New York] supports any church, faith, or religion associated with the display of a creche during the Christmas season").

In Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973) (per curiam), the court determined that the temporary display of a creche in a public park would not violate the Establishment Clause if appropriate plaques indicated that the government did not sponsor the creche. *Id.* at 67. The court emphasized that the plaques "should be designed for maximum exposure and readability." *Id.* at 90 (Leventhal, J., concurring). *See also Widmar*, 454 U.S. at 274 n.14 (university handbook contained disclaimer concerning student organizations).

Of course, disclaimers will not always eliminate Establishment Clause violations. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 40–41 (1980) (per curiam) (Establishment Clause violated when copy of the Ten Commandments was required to be posted in every public school classroom with disclaimer stating that the Ten Commandments constituted the basis of secular legal system).

[122] In most states, school attendance ceases to be compulsory once a student has attained the age of sixteen, which generally occurs in the tenth or eleventh grade. Therefore, in a high school with grade levels nine or ten through twelve, most of the students are no longer subject to compulsory education requirements. *See* Guggenheim & Sussman, *Age Under Which School is Compulsory*, in THE RIGHTS OF YOUNG PEOPLE, app. I, 306–07 (1985). Moreover, even students below the cut-off age level for compulsory attendance probably attend school for reasons other than their legal obligation to do so. *Cf.* Note, *Students' Constitutional Rights on Public Campuses*, 58 VA. L. REV. 552, 554 (1972) (even university-level education has come to be widely viewed as practical necessity).

[123] A random survey of the education statutes of several states indicates that many impose on schools a duty to supervise students' conduct on school property only during the school day. *See, e.g.*, Lauricella v. Bd. of Educ., 52 A.D.2d 710, 381 N.Y.S.2d 566 (N.Y. App. Div. 1976). Schools generally have no duty to supervise students who participate in voluntary extracurricular activities on school grounds after regular school hours, unless the activity is inherently dangerous. *See, e.g.*, Bush v. Smith, 154 Ind. App. 382, 289 N.E.2d 800 (1972). *See* Strossen, *supra* note 22, at nn.137–38.

reasonable, specific precautionary measures. Total exclusion of student religious speech is not necessary for this purpose.

The distinguishing feature between high schools and colleges that is most stressed by equal access decisions is high school students' relative immaturity and impressionability.[124] This distinction also fails to warrant categorical denial of high school equal access. The alleged difference between the general maturity levels of high school and college students would warrant a blanket prohibition upon high school equal access only if all high school students were inherently too immature and impressionable to be able to differentiate between a school's neutral provision of an open forum and its partisan endorsement of religious expression within that forum. Although the Supreme Court stated in *Widmar* that "university students are less impressionable than younger students," it did not reach the question of whether high school students are so impressionable that they would not "be able to appreciate that the [school's equal access] policy is one of neutrality toward religion."[125] In *Brandon* and *Lubbock*, however, the Second and Fifth Circuits did reach this question, and both answered it in the affirmative.[126] Neither of these opinions refers to any evidence concerning the level of high school students' impressionability. Therefore, the courts apparently took judicial notice of the "fact" that this level was sufficiently high to justify a total prohibition upon concerted student religious expression in public schools.[127]

Ironically, the idea that high school students inherently lack the requisite intellectual or emotional maturity to understand the government neutrality implicit in a student forum is logically inconsistent with the conclusion that equal access must be denied to avoid an Establishment Clause violation. If students are inherently bound to perceive a school's equal treatment of student religious groups as conveying its approval of religion, it would logically follow that students would also be likely to perceive the school's unequal treatment of student religious groups as conveying its disapproval of religion.[128] The Estab-

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[124] *See Bender*, 741 F.2d at 552–55; *Lubbock*, 669 F.2d at 1048; *Brandon*, 635 F.2d at 978.

[125] 454 U.S. at 275 n.14.

[126] *See supra* text accompanying note 74.

[127] *See supra* text accompanying notes 71–74.

[128] Judges who have viewed equal access grants to student religious groups as con-

lishment Clause is violated just as much by a governmental act or policy which appears to disapprove of religion as it is by one which appears to approve of religion.[129] Therefore, even assuming for the sake of argument that the asserted presumptions about high school students' relative immaturity were correct (which is a debatable proposition),[130] they could not justify de-

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stitutionally mandated have expressed this opinion. *See, e.g., Bender*, 741 F.2d at 565 (Adams, J., dissenting); *Lubbock*, 680 F. 2d at 426.

This is not the same argument as the one made by proponents of state-mandated, teacher-led prayer in public school classrooms: that the Court's invalidation of such activities manifests hostility toward religion. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 433–34 (1962). Students should be able to understand that the Establishment Clause, as well as the Free Exercise Clause, prohibits the government from sponsoring any religious activity in the public school classroom. This does not mean, however, that students should be able to understand that these constitutional guarantees prohibit students from voluntarily meeting to engage in religious expression at times and places when and where other students voluntarily meet to engage in other types of expression. If students are in fact able to understand that the exclusion of religious groups would not manifest the school's hostility toward religion, then they should also be able to understand that the inclusion of religious groups would not manifest the school's endorsement of religion.

[129] *See supra* note 5.

[130] *See* Wisconsin v. Yoder, 406 U.S. 205, 245 n.3 (Douglas, J., dissenting) ("There is substantial agreement among child psychologists and sociologists that the intellectual and moral maturity of the 14-year-old approaches that of the adult").

Contrary to the unsubstantiated assertions in some equal access decisions that high school students are *less* mature than college students, some experts in adolescent psychology believe that many high school students are less emotionally vulnerable or susceptible to indoctrination than many college students. *See* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499, 507–09 (1983). Based upon research in adolescent psychology, this Note argues that

> [h]igh school may in fact be a time when the distinction between tolerance based on mutual respect and explicit approval of student expression is particularly clear, even more clear, perhaps, than in later stages of life. Thus, not only is the high school student able to make such a distinction, he is also likely to do so.

Id. at 509.

Experts in adolescent psychology have also opined that college students, at least in the early years of college, are in a "late adolescent" stage, when they are extremely impressionable and hence vulnerable to indirect coercion concerning religious beliefs. *See, e.g.*, White, *Problems and Characteristics of College Students*, in ADOLESCENCE, Vol. XV (No. 57), 23, 28 (1980). This analysis is supported by evidence that the typical convert to a nontraditional religion or "cult" is between the ages of eighteen and twenty-five, and a college student. C. STONER & J. PARKE, ALL GOD'S CHILDREN 68, 76 (1977); Schwarz & Kenslow, *Religious Cults, the Individual and the Family*, 5 J. OF MARITAL AND FAMILY THERAPY, 15, 16 (1979).

In contrast with the circuit court equal access decisions which have taken judicial notice of high school students' alleged immaturity, some other decisions have taken judicial notice of these students' maturity and sophistication. *See, e.g.*, Seyfried v. Walton, 668 F.2d 214, 219–20 (3d Cir. 1981) (Rosenn, J., concurring) (taking judicial notice of progressively higher levels of students' intellectual and emotional development in later secondary school grades); Russo v. Central School Dist. No. 1, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (finding tenth graders sufficiently mature that teacher's refusal to lead flag salute would not have "destructive effect" upon them, court asserted that such students "are approaching an age when they form their own judgments"); Wilson v. Chancellor, 418 F. Supp. 1358, 1368 (D. Or. 1976)

nial of equal access; such presumptions or assumptions would dictate the conclusion that the denial of equal access would only substitute one type of Establishment Clause violation for another.[131]

An additional fundamental flaw in these unfounded presumptions or assumptions about high school students' immaturity or impressionability is that they are inconsistent with students' free speech rights. Mere assumptions or presumptions, as opposed to actual evidence, do not justify restricting student speech.[132] As noted by the Supreme Court Justices who dissented in *Bender*, students' free speech rights would not be meaningful if they could be displaced by the "utterly unproven, subjective impressions of some hypothetical students."[133] Following *Tinker*, the federal courts have closely confined school authorities' discretion to curtail students' exposure to various nonreligious ideas or opinions which such authorities do not support.[134] Moreover, the courts have done so even while expressly acknowledging that school authorities have a legitimate interest in avoiding the impression that they endorse such ideas or opin-

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("[T]oday's high school students are surprisingly sophisticated, intelligent, and discerning. They are far from easy prey for even the most forcefully expressed, cogent, and persuasive words.").

[131] A school should be able to avoid either type of violation through the adoption of measures less drastic than either an outright grant of access applicable on the same terms to all other student groups, or an outright denial of access. *See infra* notes 150 & 158.

[132] *See Tinker*, 393 U.S. at 737 ("[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."); *id.* at 738 ("[O]ur independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students."). As discussed *supra* at text accompanying notes 55–62, the Court's recent *Bethel* decision appeared to depart from a strict application of this *Tinker* standard, although the Court acknowledged *Tinker*'s continuing authoritativenss. It is not clear to what extent *Bethel* marks a generalized diminution of the protection accorded to students' speech rights, and to what extent it reflects the Court's particular willingness to insulate minors from sexually explicit speech of the type involved in that case. *See supra* note 60.

[133] 106 S. Ct. at 1337 (Burger, C.J., dissenting).

[134] *Tinker* itself expressly declared that students "may not be confined to the expression of those sentiments that are officially approved." 393 U.S. at 511. *Accord* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 970–72 (5th Cir. 1972) (free speech rights of high school seniors violated when school board suspended them for distributing "underground" newspaper advocating review of marijuana laws and offering birth control information); Gambino v. Fairfax City School Bd., 429 F. Supp. 731, 736–37 (E.D. Va.) (enjoining school board from prohibiting publication of article entitled "Sexually Active Students Fail to Use Contraception" in school newspaper), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977); Bayer v. Kinzler, 383 F. Supp. 1164, 1165–66 (E.D.N.Y. 1974) (students' free speech rights would be violated if high school officials restrained distribution of school newspaper containing information about birth control), *aff'd*, 515 F.2d 504 (2d Cir. 1975).

ions.[135] Instead, directly contrary to the operative presumptions in *Brandon* and *Lubbock*, these cases presume that high school students *are* capable of distinguishing a school's neutral provision of access to a spectrum of ideas and opinions from its partisan endorsement of any particular idea or opinion.[136]

This Article does not aim to prove that the average high school student is sufficiently mature to appreciate the neutrality of a public forum. Rather, it seeks to emphasize that the decisions which have endorsed absolute prohibitions upon equal access do not cite any evidence proving that the average high school student lacks the requisite maturity. The Article further seeks to underscore that, under constitutional authorities, mere presumptions or assumptions about high school students' immaturity cannot justify denying their free speech rights, or making those rights more limited than the corresponding rights of college students. This conclusion is reinforced by the fact that, in the view of some adolescent psychology experts, many high school students are less emotionally vulnerable or susceptible to indoctrination than many college students.[137]

III. Proposed Analytical Framework for Case-by-Case Resolution of Equal Access Issues

The preceding Part of this Article suggests two basic considerations that must both be taken into account in resolving any equal access issue consistently with both nonestablishment and free speech concerns. First, a public high school can, in theory, create a neutral student forum in which content-based restrictions on speech should be strictly limited. Second, due to certain characteristics which generally distinguish high schools from colleges and universities, there is a significant risk that any concerted religious speech in a high school could generate a

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[135] *See, e.g.*, Seyfried v. Walton, 668 F.2d 214, 216 (3d Cir. 1981) ("A school has an important interest in avoiding the impression that it has endorsed a viewpoint at variance with its educational program"); Thomas v. Bd. of Educ., 607 F.2d 1043, 1049 (2d Cir. 1979).

[136] For example, in James v. Bd. of Educ., 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972), the Second Circuit expressly relied on the high school students' ability to distinguish between the official views of the school board and the personal opinions of a teacher as a basis for upholding the teacher's right to wear an armband protesting the Vietnam War. The court noted that "[i]t does not appear that any student believed the armband to be anything more than a benign symbolic expression of the teacher's personal political views." 461 F.2d at 574.

[137] *See supra* note 129.

reasonable perception that the school endorses religion, even when the school has created a neutral student forum.

From the foregoing pair of basic considerations, it follows that concerted student religious speech should be allowed on high school premises if and only if two general criteria are both met: (1) the school has created a neutral, open student forum; and (2) reasonable students do not infer that the school endorses religion.[138] This Part of the Article proposes an analytical framework for determining whether these two general, constitutionally mandated prerequisites for an equal access grant have been met in any particular case.[139]

In sum, a high school would be required to grant equal access to a student religious group if and only if certain showings could be made that were designed to assure compliance with the standards of both the Free Speech and Establishment Clauses. Once such showings were made, a presumption would arise that the equal access grant would be proper. However, this presumption could be rebutted by specific evidence that reasonable students would perceive the equal access grant as manifesting school support for religion. Following any such rebuttal, a school would be permitted to impose a special limitation upon the student religious group meetings, including the outright prohibition of such meetings, only if any such limitation were demonstrated to be the least drastic means available to counter reasonable inferences that the school endorsed religion.

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[138] Although the school should make efforts to ensure that every student understands the neutrality of its open student forum, it should not restrict or exclude student religious groups merely because some students unreasonably misperceive equal access as reflecting school endorsement of religion. *See* Citizens Concerned For Separation of Church and State v. City & County of Denver, 526 F. Supp. 1310, 1315 (D. Colo. 1981) (court permits nativity scene displayed on public property despite evidence that "most sensitive or fastidious citizens" perceive it as conveying government's endorsement of religion). *Cf.* Roth v. United States, 354 U.S. 476, 489 (1957) (test that "judg[es] obscenity by the effect of isolated passages upon the most susceptible persons . . . must be rejected as unconstitutionally restrictive of the freedoms of speech and press").

[139] The proposed framework charts an intermediate course between the evidentiary standards reflected in Free Speech Clause and Establishment Clause precedents, respectively. Under traditional Free Speech Clause doctrine, a presumptive right of access for student religious speech would arise upon the showing of a student forum which is open to a sufficiently broad range of subjects. Following such a showing, the equal access opponent would bear the heavy burden of demonstrating that equal access would violate the Establishment Clause and that no less drastic alternative than denial of access could avert the violation. In contrast, under settled Establishment Clause doctrine, the equal access proponent would bear the heavy burden of disproving the presumptive Establishment Clause dangers deemed inherent in any public school religious expression. *See* Strossen, *supra* note 22, at 175–79.

The evaluation of whether any particular equal access grant to a student religious group is required by the Free Speech Clause or prohibited by the Establishment Clause cannot be completely confined to any codified set of criteria. Part III of this Article articulates factors and standards which should substantially guide the consideration of the ultimate constitutional questions, but the specified factors and standards cannot definitively resolve those questions.[140] The proposed standards represent an intermediate level of particularity, between the imprecise ultimate tests imposed by the Free Speech Clause and Establishment Clause (whether the school has created a forum for student speech and whether reasonable students would infer that it endorses religion) and a detailed code of particular criteria (whether a school has taken certain specific steps, which are deemed both necessary and sufficient for resolving the two underlying constitutional questions). In this respect, the proposed analytical framework departs both from the less structured approaches of the two circuit courts which have resolved equal access disputes on an individualized basis, and from the more rigid approach embodied in the Equal Access Act.[141] It is probably impossible to draw a precise route for assuring compliance with both free speech and Establishment Clause concerns in all equal access controversies. Nevertheless, it is submitted that the proposed intermediate-level approach charts a prudent midway course between the Scylla of vagueness (resulting from a

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[140] See Werhan, *supra* note 47, at 423–24 (advocates evaluation of claims of access to public property according to whether expression is compatible with normal activity of particular place at particular time; acknowledging that such an open-ended test is difficult for courts to administer and somewhat unpredictable, the author concludes that these costs are worth paying because reasons underlying decisions would be consistent with First Amendment values and fully articulated).

[141] The proposed evidentiary approach is more structured than that followed by the two circuit courts, because it focuses largely upon specifically articulated criteria. *See supra* note 14 (describing Third Circuit's uniquely open-ended balancing test). However, the proposed approach is simultaneously more flexible than the one reflected in the Equal Access Act, *see infra* note 164, since it recognizes that the process of answering the ultimate constitutional questions implicated in any equal access dispute can be guided by, but not completely confined to, a set of specified criteria.

For a discussion of the comparative advantages and disadvantages of resolving disputes about free speech access to government property pursuant to a case-by-case balancing process, or pursuant to fixed rules, see Cass, *supra* note 47, at 1317. Like this Article, the Cass piece proposes an intermediate approach; it articulates factors for evaluating each case which "do not eliminate altogether the need for balancing but do generalize some aspects of the balance." *Id.* at 1325. *See also* Farber & Nowak, *supra* note 36, at 1240–42 (for resolving claims concerning speech access to public property, advocates "focused balancing," which is hybrid between categorical approach and ad hoc balancing); *supra* text accompanying notes 64–68; *see also supra* text accompanying notes 76–86.

test which, in its insufficient specificity, provides inadequate guidance and predictability) and the Charybdis of overbreadth (resulting from a test which, in its excessive specificity, either proscribes too much expression that would be protected by the Free Speech Clause or permits too much that would violate the Establishment Clause).[142]

A. *Showing Required to Establish Prima Facie Equal Access Right for Student Religious Speech*

1. There Must Be an Open Student Forum

A public high school is not a traditional public forum. Therefore, a student religious group would have no protected access right to public school property unless it could demonstrate that the school had created a student forum by opening its facilities to student expression and association.[143] To demonstrate that the school had created a forum which is sufficiently open to trigger equal access rights for student religious groups, the equal access proponent should be required to make two essential showings: (1) that the forum was not created to promote religion; and (2) that any subject matter parameters are sufficiently broad to include, but not to single out, religion.

The first required showing mirrors the fundamental tenet that, to survive Establishment Clause scrutiny, a government policy

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[142] *Cf.* L. TRIBE, *supra* note 26, § 1211 at 630–31 ("[T]he dilemma of overbreadth versus vagueness in the context of the fair trial problem is insoluble [because of] . . . the inherently speculative character of any prediction . . . that a particular message will prevent the fair trial of a case."). The dilemma of overbreadth versus vagueness in the context of the equal access problem is also insoluble for an equivalent reason—namely, the inherently speculative character of any prediction that a particular religious student group meeting will be reasonably viewed as conveying the school's support of religion. *See also id.* at 714–16 (discussing general necessity of trading off overbreadth for vagueness whenever limitations upon First Amendment rights cannot be categorically defined, which occurs in any situation where First Amendment limitation aims to prevent harm from occurring rather than to redress consummated harm).

[143] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267 (1981). If a student religious group sought to meet at school independently of any open student forum, not only would it have no right of access under the Free Speech Clause, but also its meeting would almost certainly violate the Establishment Clause. As the Supreme Court stressed in *Widmar*, only the presence of numerous, diverse nonreligious groups could eliminate the perception that the school promoted religion which would otherwise have resulted from the student religious group's campus meetings. *Id.* at 265, 274, 277.

must have a clear secular purpose.[144] The second required showing derives from both Free Speech Clause and Establishment Clause doctrines. Under the Free Speech Clause, no speaker or group could claim a right of equal access to a limited public forum unless the proposed speech fit within permissible subject matter limitations upon that forum.[145] Under the Establishment Clause, religion may be included within a broad class which receive public benefits,[146] but it may not be singled out for such grants.[147] If some secular groups were excluded from the forum, the inclusion of religious groups might constitute a special benefit to religion in contravention of the Establishment Clause. Therefore, a school which barred the meetings of a student political or philosophical group, for example, could have diffi-

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[144] *See supra* note 28. The importance of this requirement in the particular context of public school religious expression is highlighted by the Supreme Court's most recent decision concerning such expression, Wallace v. Jaffree, 105 S. Ct. 2479 (1985). The Court struck down an Alabama statute that mandated a moment of silence in public schools, ostensibly for purposes of meditation, prayer, or any other quiet activity chosen by each individual student. In light of the statute's background, however, the Court concluded that its actual purpose was to promote prayer. *Id.* at 2491. Likewise, a public school forum that is purportedly created to promote student free speech and association but is, in reality, a subterfuge for school-promoted religion would violate the Establishment Clause and not give rise to any free speech rights on the part of student religious groups.

[145] *See, e.g.*, City of Madison Joint School Dist. v. Wisconsin Public Employment Relations Comm'n., 429 U.S. 167 (1976) (school board meeting is limited public forum for speech concerning school board business only).

[146] *See, e.g.*, Walz v. Tax Comm'n., 397 U.S. 664 (1970) (sustaining tax exemptions for religious institutions, because within broad class of nonprofit institutions receiving this tax benefit). *Accord* Mueller v. Allen, 463 U.S. 388 (1983) (in upholding plan allowing parents to claim state tax deduction for children's educational expenses, Court stressed breadth of tax benefits available to all parents, including those with children in public and private nonsectarian schools).

For a discussion of religion as included in a broad class for equal access purposes, see *Widmar*, 454 U.S. at 274 (referring to university's grant of access to over 100 student groups, Court stated that "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect"). *See also* Country Hills Christian Church v. Unified School Dist., 560 F. Supp. 1207 (D. Kan. 1983). Where an elementary school building was made available to community groups during nonschool hours, the school district violated the Free Speech Clause by denying equal access to church for worship services. Such equal access would not violate Establishment Clause, for "[i]t is possible that religion and certain groups may benefit from access to School District facilities, but this is not the direct effect of the equal access policy; it is merely an incidental effect . . . . Religious groups share benefits with all other community groups. If religious groups benefit, it is in spite of, rather than because of, their religious character." *Id.* at 1218.

[147] Justice Brennan drew this distinction in his concurring opinion in School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963). Although he suggested that "hostility, not neutrality, would characterize . . . the denial of the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood," *id.* at 299, he also noted that "[a] different problem may be presented with respect to the regular use of public school property for religious activities." *Id.* at 298 n.74.

culty contending that it had created a sufficiently open forum to permit the meetings of a religious group.[148]

2. The School Must Impose Content-Neutral Restrictions to Minimize Establishment Risks

Because of the establishment dangers inherent in concerted religious expression in the public schools, as well as the difficulty of ascertaining whether such expression in fact violates the Establishment Clause, a school's duty under the Establishment Clause should be construed to go beyond merely avoiding clear violations. Instead, as courts have recognized, the school's duty should be viewed as the broader one of taking reasonably available, constitutionally permissible steps to minimize the risk of an Establishment Clause violation.[149] Accordingly, in addition to demonstrating the existence of an open student forum, the equal access proponent should also be required to show that the school has taken such steps.

In particular, the equal access proponent should show that the school has imposed certain content-neutral time, place, and manner regulations upon student group meetings.[150] The meet-

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[148] *See supra* text accompanying notes 37–45.

[149] *See, e.g.*, Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3226–27 (1985). *See also* Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391, 1407 (10th Cir. 1985) ("[W]e believe that religious activity in the public schools . . . requires stricter separation than does a university campus or a public square."). Some courts have suggested that schools' interests in minimizing risks of Establishment Clause violations could even justify infringing free speech rights. For example, in *Bender*, the Third Circuit squarely held that the school's denial of equal access would violate the students' free speech rights, 741 F.2d at 550, but it nonetheless ordered the school to deny equal access to avoid an Establishment Clause violation. *Id.* at 560–61. In contrast, the recommended measures are fully consistent with free speech principles. *See infra* note 150. *Cf.* Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd*, 443 U.S. 193 (1978) (to enable employers and unions to avoid walking "tightrope" between potential liability for discrimination against minorities and discrimination against white majority, affirmative action plan adopted in collective bargaining agreement should be upheld if it is reasonable remedy for "arguable violation" of Title VII).

[150] The recommended regulations constitute less drastic alternatives to either an unqualified grant of access to a student religious group, with its attendant establishment dangers, or an outright denial of access, with its attendant free speech and establishment dangers. *See infra* note 158. These content-neutral regulations should significantly reduce the risk of an Establishment Clause violation without abridging students' free speech rights. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984):

> Expression . . . is subject to reasonable time, place and manner restrictions . . . provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant govern-

ings should take place at times clearly separated from the compulsory attendance period;[151] the role of any adult supervisor should be as limited as permissible under applicable law[152] and should under no circumstances include participation in student group meetings; and the school should distribute information to students explaining the school's neutral role under an equal access policy in general, and disclaiming any approval or disapproval of religion in particular.[153]

B. *Showing Required to Overcome Prima Facie Equal Access Right for Student Religious Speech*

The proposed requirements for a prima facie showing that student religious speech should have equal access to public high schools can reduce, but cannot completely eliminate, the possibility that an equal access grant would violate the Establishment Clause.[154] Accordingly, under the proposed evidentiary approach, once an equal access proponent had established a

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mental interest, and that they leave open ample alternative channels for communication of the information.

Id. at 293 (citations omitted).

The proposed measures easily satisfy this standard. They are content-neutral because they apply to all student groups, regardless of the subject matter of their speech. They are narrowly tailored to serve the compelling governmental interest in complying with both the Establishment Clause and the Free Speech Clause. Finally, they leave open ample alternative channels for student group communication. All three measures should, in fact, enhance students' expressive rights by de-emphasizing the school's traditional inculcative role.

For a fuller discussion of the rationales for treating the proposed regulations as essential prerequisites for equal access grants to student religious groups, see Strossen, *supra* note 22, at nn.130–35 & accompanying text.

[151] *See* AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, EQUAL ACCESS: INTERPRETATION AND IMPLEMENTATION GUIDELINES 17 (1984) (reporting results of survey conducted in summer of 1984) [hereinafter AASA GUIDELINES] (seventy-eight percent of responding school districts already require noncurriculum related student groups to meet either before or after school).

[152] *See supra* note 122.

[153] Regarding the use of disclaimers and other explanatory statements, see *supra* note 120. For a more expansive discussion of all the proposed content-neutral regulations, see Strossen, *supra* note 22, at nn.136–40 & accompanying text.

[154] As Justice O'Connor recognized in her *Wallace* concurrence, 105 S. Ct. at 2496, even a neutral policy can have the impermissible effect of promoting religion, depending upon its implementation. *See supra* note 114.

prima facie claim, the burden would shift to the opponent to demonstrate that access should be restricted or denied.[155]

In accordance with general public forum doctrine, once a student religious group has established a prima facie right of access to a public high school forum, no special restrictions should be imposed upon the group unless such restrictions were demonstrated to be necessary to promote a compelling governmental interest.[156] The specific compelling interest which is implicated in the equal access context is the interest in avoiding an Establishment Clause violation.[157] Consequently, so limitations should be imposed upon any religious student group meetings unless these limitations were shown to be the least drastic measures necessary to avert an Establishment Clause violation.[158] Likewise, the student religious group should not be de-

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[155] For another proposed framework for evaluating constitutionally permissible access restrictions on speech in public schools, which also recognizes that compelling free speech concerns warrant access but that such concerns can be overcome by countervailing considerations, see Cass, *supra* note 47, at 1342–44. Although Cass does not expressly discuss student religious speech, the application to such speech of factors he identifies as pertinent to school access disputes in general should lead to granting equal access in some cases and denying it in others. On the pro-access side, Cass notes that because students have limited alternative forums for speech, courts should require school officials to make "substantial efforts to harmonize speech and other interests," and that "schools easily could allow . . . student speech . . . during non-class hours." *Id.* at 1344. On the nonaccess side, he cautions that courts "should be especially leery of commanding officials to allow speech that might be disruptive in . . . some schools, where a relatively volatile population is involved." *Id.*

[156] *See supra* text accompanying notes 34–36.

[157] In *Widmar* the Supreme Court concluded that the Establishment Clause did not bar the university from granting equal access to a student religious group. Consequently, it did not "reach the question that would arise if State accommodation of . . . free speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause." 454 U.S. at 273 & n.13. However, the Court did recognize that the university's "interest . . . in complying with its constitutional obligations [under the Establishment Clause and the State constitutional counterpart] may be characterized as compelling." *Id.* at 271.

In McCreary v. Stone, 575 F. Supp. 1133 (S.D.N.Y. 1983), the court held that the avoidance of an Establishment Clause violation was a sufficiently compelling state interest to justify content-based exclusion of speech from a public forum. *Accord* May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761, 766 (S.D. Ind. 1985), *aff'd*, 787 F.2d 1105 (7th Cir. 1986) (school's interest in avoiding Establishment Clause violation that might result from permitting teachers to hold religious meetings at school, before school day, is sufficiently compelling to override countervailing constitutional interests asserted by teachers, including free association, equal protection, and free exercise of religion).

[158] Establishment Clause problems which might result from student religious groups being granted access on the same terms as other student groups could perhaps be avoided through the following types of alternative measures, which are less drastic than either an unqualified grant or an outright denial of access: student religious groups could be barred from using any or all school media to publicize their meetings; student religious group members could be "released" from school in order to meet at other nearby locations; a school could limit the length or frequency of student religious group meet-

nied access altogether unless the equal access opponent could prove that less drastic alternative measures would not suffice to prevent an Establishment Clause violation.

An equal access opponent could potentially meet the burden of proof necessary to overcome an access right by producing some evidence of the following types: testimony of individual students that they perceive the school to be sponsoring religion; opinion testimony by experts in adolescent psychology or education that, under the circumstances, a reasonable student would infer school support for religion; a survey of students demonstrating that some statistically significant portion perceived the school to be endorsing religion;[159] and evidence concerning objective factors which could support a conclusion that a hypothetical "reasonable student" would infer school endorsement of religion.[160] Evidence about objective factors which might support the foregoing conclusion could include, for example, evidence that the forum is not actually utilized by numerous, diverse student groups, or that the forum is used predominantly by one or more religious groups.[161]

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ings; such meetings could be confined to areas of the school that are not normally used for regular classroom instruction; and such meetings could be scheduled for evenings or weekends. *See* Strossen, *supra* note 22, at nn.149–52.

In addition to assisting a school in avoiding both an abridgement of students' free speech rights and a violation of the Establishment Clause by supporting religion (or reasonably appearing to do so), the foregoing measures should also assist a school in avoiding the Establishment Clause violation that could result from its disapproving of religion (or reasonably appearing to do so). *See supra* note 5, text accompanying notes 127–30.

[159] *See* Strossen, *supra* note 22, at nn.146–48.

[160] This could include evidence concerning any steps the school may take to promote its noninculcative role, the particular options the school has in fulfilling its supervisory obligations, and the general intellectual and emotional levels of the school's student body. *See generally* Trachtman v. Anker, 426 F. Supp. 198 (S.D.N.Y. 1976), *rev'd*, 563 F.2d 512 (2d Cir. 1977). The district court in *Trachtman* rejected school authorities' assertion that a student-authored questionnaire concerning eleventh and twelfth grade high school students' sexual attitudes would cause sufficient psychological harm to justify prohibiting its distribution. The district court relied upon the following factors pertaining to the school: that it was located in New York City, where students were confronted with much information about sexuality; that it taught sex education courses; and that it was for intellectually gifted students who were "likely to respond . . . with a higher degree of maturity than other students." *Id.* at 202 & n.3.

[161] Evidence concerning both the forum's actual utilization and the relative predominance of religious groups was central to the Supreme Court's analysis in *Widmar*. *See, e.g.*, 454 U.S. at 275 ("At least in the absence of empirical evidence that religious groups will dominate [the university's] open forum . . . the advancement of religion would not be the forum's 'primary effect.'").

The absence of the suggested actual utilization and nonpredominance factors would neither disprove the existence of a limited public forum nor prove the existence of an Establishment Clause violation. So long as the school property was in fact open and available as a matter of policy, a limited public forum should be found to exist, even if

IV. Constitutional Analysis of Equal Access Act's Standards

The Equal Access Act contains two general provisions that might be invoked to bring it into line with prevailing constitutional doctrines. Initially, the Act provides that it should not be construed as authorizing the United States or any state or political subdivision "to sanction meetings that are otherwise unlawful" or "to abridge the constitutional rights of any person."[162] It also contains a "savings clause" which provides that if any provision of the Act, or its application in any situation, is judicially invalidated, the Act's remaining provisions, and its applications in other situations, will not be affected.[163] In light of these general provisions, the Act could potentially be given limiting constructions that would save it from invalidation, notwithstanding constitutional flaws in certain specific provisions. This Article, however, focuses on the constitutional problems presented by the Act's specific provisions.

A. *The Act's Standards*

The Equal Access Act[164] applies to any public sec-

numerous, diverse student groups did not actually utilize it. *See McCreary*, 739 F.2d at 722 (in concluding that park constituted public forum, court stressed park's *availability* for free speech purposes; that park had not actually been utilized by numerous, diverse speakers was irrelevant). Likewise, so long as the school is neither supporting any student religious group nor perceived by the students as doing so, the student religious group meetings would not violate the Establishment Clause, even if such meetings did predominate. *See* Strossen, *supra* note 22, at n.142.

[162] 20 U.S.C. §§ 4072 (d)(5), (d)(7)(Supp. 1985).

[163] *Id.* § 4073. There is only sparse legislative history concerning these "safety valve" provisions. The "otherwise unlawful" provision was discussed briefly in the floor debates, with the implication that it would apply to some state laws forbidding homosexual conduct. *See* 130 Cong. Rec. S8343 (daily ed. June 27, 1984) (statement of Sen. Hatfield). The "constitutional rights" provision was hardly mentioned at all.

[164] The Equal Access Act, Pub. L. No. 98-377, 1984 U.S. Code Cong. & Admin. News, 98 Stat. 1302 (codified at 20 U.S.C. § 4071 (1984)), reads as follows:

SHORT TITLE

SEC. 801. This title may be cited as "The Equal Access Act."

DENIAL OF EQUAL ACCESS PROHIBITED

SEC. 802 (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical or other content of the speech at such meetings.

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

ondary school that "receives federal financial assis-

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

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

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

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

DEFINITIONS

SEC. 803. As used in this title—

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

SEVERABILITY

SEC. 804. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby.

tance."[165] According to the Act, the determination of which schools are classified as "secondary" is to be made under state law.[166] The Act does not contain any provisions concerning the nature of the financial assistance that will bring a school within its scope. However, numerous federal statutes contain similar provisions, making them applicable to recipients of federal funding, and these provisions have frequently been subject to judicial rulings.[167] The general thrust of such rulings is that this type of statutory language should be broadly construed, to encompass institutions receiving even indirect federal financial assistance.[168] In consequence, because virtually all public secondary schools receive at least some indirect financial aid from the federal government, they will probably be deemed to be covered by the Act.[169]

The Act's central provision prohibits any school within its scope from "deny[ing] equal access or a fair opportunity to, or discriminat[ing] against, any students who wish to conduct a meeting . . . on the basis of the religious, political, philosophical, or other content of the speech at such meetings," so long as the school has a "limited open forum" and the students seek to conduct their meeting within that forum.[170] The Act defines the critical term "limited open forum" as follows: "A public

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CONSTRUCTION

SEC. 805. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this title.

Id. No regulations have been issued under the Act.

[165] 20 U.S.C. § 4071(a) (Supp. 1985).

[166] *Id.* § 4072(1). A compendium of the definitions of secondary schools in all fifty states and the District of Columbia is contained in AMERICAN JEWISH CONGRESS, EQUAL ACCESS: A PRACTICAL GUIDE, app. A 18 (1984) [hereinafter AJC GUIDE].

[167] *See, e.g.*, Grove City College v. Bell, 465 U.S. 555, 557, 569 (1984) (statutory phrase "any educational program or activity receiving Federal financial assistance" construed as encompassing college whose educational programs receive no direct federal funding, but some of whose students receive federal financial aid; Court based this broad reading in part on "longstanding and coherent administrative construction of the phrase 'receiving Federal financial assistance'").

[168] *Id.*

[169] It is estimated that "[o]nly a handful of the approximately 16,000 public school districts in the United States do not receive federal financial assistance of some kind." Stern, *Public Education*, 10 URB. LAW. 497, 497 (1978). The Act's legislative history reveals Congress's assumption that most public secondary schools would be encompassed by the federal funding language. *See, e.g.*, 130 CONG. REC. H3857 (daily ed. May 15, 1984) (statement of Rep. Edwards (D-Cal.)) (noting that Act's predecessor bill, whose scope was defined in similar terms, would have injected "the imperial power of the Federal Government . . . into every one of the 15,517 school districts in the United States").

[170] 20 U.S.C. § 4071(a) (Supp. 1985).

secondary school has a limited open forum whenever such school grants an offering or opportunity for one or more non-curriculum related student groups to meet on school premises during noninstructional time."[171] The operative terms in this definition are "noncurriculum related" and "noninstructional time."

The Act defines "noninstructional time" as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."[172] This definition does not clarify the status of meetings that occur during the compulsory attendance period when no instruction takes place. Two such examples are lunch breaks and "student activity periods" such as the one at issue in the *Bender* case.[173] However, the Act's legislative history indicates that the "limited open forum" concept applies only to student group meetings which occur before or after the entire compulsory attendance period, and not during any portions of that period, even if no classroom instruction is taking place.[174] Therefore, a school should not be deemed to have created a limited open forum, and consequently should not be subject to the Act's requirements, if it only allows student groups to meet during the school day.

The Act contains no definition of the second crucial term in its definition of "limited open forum": namely, "noncurriculum related student groups." However, one section of the Act describes the meetings of these groups as "not directly related to the school curriculum."[175] This language suggests that a school would become subject to the Act's requirements by granting access to a student group which was indirectly related to the school's curriculum. Consistent with this interpretation, the

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[171] *Id.* § 4071(b).

[172] *Id.* § 4072(4).

[173] The student religious group in *Bender* sought to meet during a thirty-minute "student activity period" which was regularly scheduled after the beginning of the school day, two days per week. 741 F.2d at 543; *see also* 563 F. Supp. at 709.

[174] *See* 130 CONG. REC. S8353 (daily ed. June 27, 1984) (statement of Sen. Hatfield) ("The regular instructional period is what the school would have when classes first are scheduled in the morning—maybe it is 8:30, maybe it is 9 o'clock—and it ends at 3:30."). Although the legislative history contains some support for the contrary interpretation, *see* 130 CONG. REC. S8356 (daily ed. June 27, 1984) (statement of Sen. Denton (R-Ala.)), this appears to be the minority view. In contrast, the legislative history of predecessor bills had clearly indicated that those bills sanctioned meetings during non-instructional time during the school day. *See, e.g., Equal Access Amendment: A First Amendment Question, Hearings on S. 815 and S. 1059 Before the Senate Committee on the Judiciary*, 98th Cong., 1st Sess. 13 (Apr. 28 and Aug. 3, 1983).

[175] 20 U.S.C. § 4072(3) (Supp. 1985).

Act's legislative history indicates that the term "noncurriculum related" was intended to be quite broad. For example, the legislative history suggests that the "noncurriculum related" label would apply to the following types of student groups, all of which are, at least arguably, indirectly related to the curriculum of many schools: Latin clubs, soccer clubs, Young Democrats, Young Republicans, religious clubs,[176] and humanitarian clubs that raise funds for charity.[177] In contrast, the legislative history indicates that curriculum related clubs are viewed rather narrowly, as those which are essentially extensions of the curriculum and aid students in learning substantive course material.[178]

The Act's relatively narrow definition of the types of student clubs that may be permitted to meet on campus without triggering an equal access obligation or, alternatively phrased, its relatively broad definition of the types of student clubs that will trigger an equal access obligation, sharply distinguishes it from the applicable constitutional principles. According to the Supreme Court's most recent rulings concerning the limited public forum and nonpublic forum concepts, the government has wide latitude to impose precise definitional limits upon the appropriate subject matter of such forums, and therefore to exclude speakers or groups whose subjects are not within any such tailored definition.[179] Under these decisions, schools may impose a wide range of subject matter limitations upon student

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[176] 130 CONG. REC. H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling).

[177] 130 CONG. REC. H7726 (daily ed. July 25, 1984) (statement of Rep. Roukema).

[178] Senator Hatfield stated that curriculum related clubs are "really a kind of extension of the classroom," citing as an example a French club or a Spanish club that is formed by students in a French or Spanish class for purposes of developing conversational proficiency. 130 CONG. REC. S8342 (daily ed. June 27, 1984). The House debate supports a similarly restrictive definition of curriculum related clubs. Representative Goodling stated that a club would meet this description only if it satisfied both of the following criteria: (1) it involves subject matter of a type that a public school may permissibly sponsor, and (2) participation in it is "require[d]" or "directly encourage[d]" by the school or a teacher "in connection with curriculum course work." 130 CONG. REC. H7732 (daily ed. July 25, 1984).

In response to questioning, Senator Hatfield expressed the general view that the Act does not seek to limit a school's discretion to draw the line between clubs that are curriculum related and those that are not. *See* 130 CONG. REC. S8342 (daily ed. June 27, 1984). However, this general view is inconsistent with the specific criteria which both he and Representative Goodling articulated for defining the curriculum related concept.

Examples of curriculum related clubs that were cited during the congressional debates include language clubs, drama clubs, athletic groups, cheerleading groups, and bands. 130 CONG. REC. S8342–43 (daily ed. June 27, 1984) (statements of Sen. Hatfield and Sen. Gorton (R-Wash.)); 130 CONG. REC. H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling).

[179] *See supra* text accompanying notes 40–45.

clubs, subject only to the strictures that any such limitations must be reasonable, and must not be imposed for the sole purpose of suppressing viewpoints with which school authorities disagree.[180]

Consistent with the Court's most recent holdings, for example, a school might well be permitted to define the student groups eligible for its forum as those relating to its curriculum either directly or indirectly. Such a definition would fairly encompass many of the types of clubs that would likely be deemed "noncurriculum related" under the Act's narrow construction of that term, because they do not directly help students to learn substantive course material. However, such a definition would still not encompass the full panoply of political, philosophical, and religious clubs to which a school would be required to grant access under the Act. Under this type of definition, a school could, for instance, permit political clubs on the rationale that they are indirectly related to the school's civics courses, but exclude philosophical or religious clubs on the rationale that the school's curriculum contains no courses to which they are even indirectly related.[181]

By drawing a dichotomy between the narrowly conceived category of "noncurriculum related" clubs and all other clubs, the Act gives schools virtually an all-or-nothing choice concern-

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[180] *See supra* text accompanying note 134.

[181] *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 105 S.Ct. 3439, 3461–62 (1985) (Blackmun, J., dissenting) (under majority's reasoning, university in *Widmar* could permissibly have limited student forum to nonreligious student groups). Other examples of subject matter distinctions are *Cornelius* and Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). The government, as suggested by the facts of those cases themselves, is apparently authorized to deny access to any property not deemed a general public forum. Just as *Cornelius* upheld the exclusion of "advocacy" groups from a federal government workplace charity drive, so too a school could probably exclude from a student forum student chapters or analogues of the NAACP Legal Defense and Educational Fund, the Sierra Club Legal Defense Fund, and other groups excluded in *Cornelius*. *See Cornelius*, 105 S. Ct. at 3444. Moreover, because *Cornelius* held that the exclusion of any "controversial" group passed the reasonableness test applicable to subject matter limitations upon limited public forums or nonpublic forums, a school could well be allowed to limit a student forum to any group deemed "noncontroversial." *See supra* text accompanying note 45.

Similarly, just as *Perry* upheld the exclusion from school mail facilities of a union seeking to represent teachers, even though such facilities were open to various civic and church organizations, a public school might well be permitted to limit a student forum to civic and church organizations, but to exclude an organization seeking to represent students. Moreover, because *Perry* held that the union which had been designated as the teachers' bargaining representative could use the forum without creating access rights on the part of a rival union, a school could presumably allow the school-recognized student government to use the student forum without creating access rights on the part of other groups also seeking to represent student interests.

ing the subject matter limitations upon student clubs that will be permitted to meet in any limited open forum. To retain the right to enforce any subject matter limitations, a school may not let any club meet which is not directly related to the school curriculum (unless such club meets during instructional time or otherwise fails to comply with the Act's prerequisites for a limited open forum). By leaving schools with only these two, widely disparate choices concerning subject matter limitations upon student clubs,[182] the Act substantially narrows the broad discretion that schools have under current constitutional principles.[183]

Following its core provision, which prohibits any content-based denial of "equal access or a fair opportunity to" student groups in any limited open forum, the Equal Access Act provides that a school "shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum" if the school uniformly complies with five specified conditions:[184] (1) meetings are "voluntary and student-initiated"; (2) there is no school or government "sponsorship";[185] (3) any school or government employees or agents "are present at religious meetings only in a nonparticipatory capacity"; (4) meetings do not "materially and substantially interfere with the orderly conduct of educational activities within the

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[182] *See* Student Coalition for Peace v. Lower Merion School Dist., 776 F.2d 431, 442 n.9 (3d Cir. 1985) ("We read the Act to give affected school districts a choice: either to create a limited open forum open to all student groups on an equal basis, or to refuse access to all noncurriculum groups."). *Accord* YALE Note, *supra* note 23, at 204 n.74 ("Congress intended to present at least one choice under the Act . . . whether to let all student groups, including religious ones, meet, or . . . not to give access to any student groups.").

[183] There is another significant distinction between the constitutional and statutory standards regarding a school's discretion to create a limited student forum. Under constitutional standards, a court will not find that a school created such a forum in the face of evidence of a contrary intent. However, a school's intent not to create a forum for speech concerning certain subjects will not deter a court from finding that it nevertheless did so, by virtue of the Equal Access Act. *See infra* note 266 and accompanying text. According to critics of the Court's recent decisions increasing governmental discretion to impose subject matter limitations upon "limited public forums," this increased discretion enables the government to impose content-based restrictions on speech. *See supra* notes 46 & 47. These critics would probably welcome the Act's constraints upon governmental discretion to limit the subject matter of student forums as a return to traditional free speech principles.

[184] 20 U.S.C. § 4071(c) (Supp. 1985).

[185] The term "sponsorship" is defined to include "promoting, leading, or participating" in a meeting. Furthermore, the Act's definition of "sponsorship" expressly excludes a school employee's assignment to a meeting for "custodial purposes." 20 U.S.C. § 4072(2) (Supp. 1985).

school";[186] and (5) "nonschool persons may not direct, conduct, control, or regularly attend activities of student groups."[187]

Neither the language nor the legislative history of this provision clarifies whether the five conditions are permissive or mandatory.[188] Although there has not yet been any judicial analysis of this section, other analyses support the contention that all of the specified conditions must be satisfied.[189] Regardless of whether Congress intended these conditions to be enforced in all limited open forums, they should all be enforced as a matter of constitutional law with respect to student religious groups.[190]

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[186] This language is apparently derived from Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969) (public school may restrict students' expressive conduct only if it would "materially and substantially interfere with the work of the school or impinge upon the rights of other students").

[187] 20 U.S.C. § 4071(c)(5) (Supp. 1985).

[188] For example, 20 U.S.C. § 4071(c)(5) (Supp. 1985) provides that outsiders "may not direct, control, or regularly attend" student group meetings. This language may be read as evincing a congressional intent to prohibit the outsider participation described, and there are indications in the legislative history that it was so intended. However, the language is also consistent with a reading that schools may, in their discretion, prohibit such outsider participation, and the legislative history also contains support for this alternative reading. *See* AJC GUIDE, *supra* note 166, at 7–8.

[189] *See, e.g.*, YALE Note, *supra* note 23, at 193 & n.35; Note, *Student Religious Groups and the Right of Access to Public School Activity Periods*, 74 GEO. L.J. 163, 214–15 (1985) [hereinafter GEORGETOWN Note]; AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, GUIDELINES FOR THE USE OF THE EQUAL ACCESS ACT 9–11 (1985); ANTI-DEFAMATION LEAGUE, RELIGION AND THE PUBLIC SCHOOLS, THE AFTERMATH OF EQUAL ACCESS: A CRITICAL ANALYSIS 8–9 (1984); AJC GUIDE, *supra* note 166, at 7–8. The United States Government has also espoused the position that these conditions must be complied with before a school will be deemed to have created a limited open forum. *See* Intervenor-United States Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to Defendants' Motion for Final Summary Judgment, Amidei v. Spring Branch Indep. School Dist., No. H-84-4673 (S.D.Tex. Apr. 17, 1985) at 20.

[190] Unless the meetings are voluntary and student-initiated, as required by the first condition, *see supra* text following note 184, no student free speech or associational rights are implicated, and hence no forum is created. *See* FORDHAM Note, *supra* note 42, at 560–61 (any place where audience is "captive," rather than voluntarily present, should not be considered public forum). Moreover, any student religious group meeting that is initiated by a school, or at which attendance is compelled by a school, would violate the Establishment Clause. *See supra* text accompanying note 32. *See also* YALE Note, *supra* note 23, at 193 n.35 (Establishment Clause would be violated by school-initiated meetings, and students' free exercise rights would be implicated by nonvoluntary meetings).

Likewise, if there is any school or government sponsorship, as prohibited by the second condition, *see supra* text accompanying note 185, the meetings of a student religious club would violate the Establishment Clause. Moreover, the prohibition upon school "sponsorship" of any student group meeting—which the Act defines as "promoting, leading, or participating," *see supra* note 185—further ensures that the meetings are voluntarily initiated and run by students, thus giving rise to free speech and associational rights.

The third condition, *see supra* text following note 185, which confines any school or governmental role in a student religious meeting to a nonparticipatory one, is identical to one of the essential criteria that this Article prescribes as a prerequisite for an open

B. *Case Law Interpreting Act*

Only two cases asserting claims under the Equal Access Act have to date resulted in reported judicial rulings. In addition, the author has obtained unreported slip opinions in two other cases which allege claims under the Act. Of these four cases, one involved a teachers' group in a primary school, thus clearly falling outside the Act's scope.[191] In contrast, the other three cases, two of which involved student religious groups, did raise colorable claims under the Act.[192]

1. *Student Coalition for Peace v. Lower Merion School District*

The *Merion*[193] case graphically illustrates the Act's expansion of students' free speech access rights beyond those which the

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student forum. This condition is designed to counter reasonable student perceptions that the school endorses a religious group which meets in the forum. *See supra* text accompanying notes 150–53.

The fourth requirement—that the meetings not materially and substantially interfere with the school's educational activities—simply paraphrases the definition in *Tinker* of the outer boundary of public school students' free speech rights, consistent with both the school's educational mission and the free speech rights of others within the school. *See Tinker*, 393 U.S. at 509; *see supra* text accompanying note 186.

Finally, the fifth condition—which prohibits nonschool personnel from directing or regularly attending student group meetings, *see supra* text accompanying note 187—follows from the fundamental requirement that any meetings must be voluntarily initiated and controlled by students as a precondition for the existence of a forum giving rise to student free speech or associational rights. *See supra* text accompanying note 187.

The Act contains several additional provisions beyond the ones that have been discussed in the text. However, these remaining provisions are less significant for purposes of the present analysis. Rather than prescribing conditions under which covered schools must grant equal access, most of these other provisions disclaim congressional intent to authorize schools to take various actions that would raise problems under either the Establishment Clause (for example, requiring any person to participate in prayer or other religious activity; *see* 20 U.S.C. § 4071(d)(2) (Supp. 1985)), or the Free Speech Clause (for example, limiting the rights of student groups that are not of a specified numerical size; *see* 20 U.S.C. § 4071(d)(6) (Supp. 1985)).

[191] May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761 (S.D. Ind. 1985), *aff'd*, 787 F.2d 1105 (7th Cir. 1986).

[192] Student Coalition for Peace v. Lower Merion School Dist., 633 F. Supp 1040 (E.D. Pa. 1986); Mergens v. Bd. of Educ. of Westside Community Schools, No. CV 85-0-426 (D. Neb. May 23, 1985); Amidei v. Spring Branch Indep. School Dist., No. H-84-4673 (S.D. Tex. July 1, 1985). These cases are discussed in order of the amount of information available about the rationales for the judicial rulings therein. The first case discussed has resulted in four reported decisions, including one by a circuit court of appeals; the second case discussed has resulted in one slip opinion explaining the denial of plaintiffs' motion for preliminary injunction; and the third case discussed resulted in an order of final judgment unaccompanied by any memorandum or opinion.

[193] This lawsuit has generated four reported decisions: 596 F. Supp. 169 (E.D. Pa. 1984) (denying plaintiff's motion for permanent injunction, which was based on Free Speech Clause claim); 618 F. Supp. 53 (E.D. Pa. 1985) (denying plaintiff's motion for

Supreme Court currently recognizes as a matter of constitutional principles. When premised on the Free Speech Clause, the students' access claim was denied.[194] However, when that very same claim was premised on the Equal Access Act, it was granted.[195]

Although the *Merion* litigation concerned a request for equal access by a nonreligious student group, it spawned judicial rulings about the Act's scope which would pertain as well to access claims by student religious groups. The Student Coalition for Peace (SCP), an organization of high school students advocating a nuclear freeze, sought access to various areas on the school premises to conduct a "peace exposition." Outside speakers were to participate, and the public at large was to be invited.[196] When the school denied this request, SCP commenced a lawsuit, asserting that the areas in question were limited public forums, and hence that the school's denial violated SCP's free speech rights.

The district court rejected SCP's claims because it found that the school had not designated any of the disputed areas as limited public forums for "political" speech, as the court characterized SCP's contemplated peace exposition. Although the district court recognized that the school had previously allowed two of these areas to be used for several events lacking school sponsorship, the court characterized such events as "primarily athletic and for the purpose of raising funds for a public charity," and thus distinguishable from SCP's planned peace exposition.[197] The court therefore deemed these areas to be nonpublic forums, and hence subject to any access restrictions which are reasonable and not designed to suppress particular viewpoints. The district court concluded that the school's denial of SCP's

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reconsideration of previous decision, based upon subsequently enacted Equal Access Act); 776 F.2d 431 (3d Cir. 1985) (affirming district court's rejection of plaintiff's constitutional claim, but vacating and remanding its judgment regarding plaintiff's statutory claim); and 633 F. Supp. 1040 (E.D. Pa. 1986) (opinion following circuit court's remand, granting plaintiff's request for permanent injunction, based on Equal Access Act).

[194] 596 F. Supp. 169 (E.D. Pa. 1984).

[195] 633 F. Supp. at 1043.

[196] 596 F. Supp. at 170–71.

[197] *Id.* at 174. The nonschool-sponsored events which the school had previously permitted on its premises included: a "Special Olympics" for handicapped children sponsored by the Jaycees; a "Bike Hike" for mentally handicapped citizens; the American Cancer Society's "Jog-A-Thon"; and a student-organized "Volleyball Marathon" (a charitable event in which participants solicited pledges from the community for each hour of volleyball played). *Id.* at 173.

access request complied with the foregoing standards because the school's "desire[] to keep the podium of politics off school grounds" was reasonable, and because SCP had not produced any evidence that the school sought to censor it because of its viewpoint.[198]

Following the enactment of the Equal Access Act, SCP made a motion for reconsideration of the district court's ruling. SCP contended that, because the school had permitted other student-initiated, noncurriculum related activities to occur on an athletic field and in a gymnasium, the school had made these areas into limited open forums under the Act.[199] In denying SCP's motion, the district court emphasized that SCP planned to invite members of the general public to its peace exposition, and cited legislative history indicating that the Act did not expand the access rights of nonstudents. Consequently, the district court concluded that the Act was

> not applicable to the narrow question raised by the plaintiff, namely, whether or not a school district may deny access to its facilities to a noncurriculum related student group which intends to invite nonstudents/the general public . . . where it has not been a policy or practice of the school to indiscriminately permit the use of the facilities in question . . . for similar purposes.[200]

Although the Third Circuit affirmed the district court's rulings on SCP's constitutional claims, it vacated and remanded the district court's judgment regarding SCP's Equal Access Act claims.[201] The appellate court rejected the school's contention that the Act does not apply to activities involving nonstudents, concluding that "student groups wishing to invite nonstudents onto school property are protected by the Act if the school's limited open forum encompasses nonstudent participation in student events. . . ."[202] However, the Third Circuit expressed no opinion concerning whether the Merion school district had created this type of limited open forum or whether it had created any limited open forum at all. Rather, it noted that the trial had occurred before the Act's effective date, thus necessarily failing to generate any evidence concerning what the Circuit Court

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[198] *Id.* at 174–75.
[199] 618 F. Supp. at 55.
[200] *Id.* at 60.
[201] 776 F.2d at 443.
[202] *Id.* at 442.

deemed the material issue on this point: namely, whether the school had evinced its intent to create a limited open forum *after* the Act's effective date.[203]

On remand, the school renewed the contention which the district court had previously accepted in rejecting SCP's constitutional claim: that its past grants of access for charitable or athletic events did not create a forum to which SCP had an access right for a political event. Although the district court reiterated its view that SCP had no constitutionally-based right of access, it accepted SCP's contention that "the Equal Access Act expands First Amendment rights to free speech."[204] While constitutional authorities permitted a school to designate a limited forum for nonpolitical speech only, the district court explained, the Act prohibits it from doing so.[205] SCP introduced evidence that, after the Equal Access Act's effective date, the school had permitted a student-initiated noncurriculum related event, to which the public was invited (specifically, a charitable volleyball marathon),[206] to take place in the gymnasium during noninstructional time. Accordingly, the district court ruled that SCP had satisfied its burden of proving that the school had made the gymnasium into a limited open forum to which SCP's peace exposition should be granted equal access.[207]

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[203] *Id.* at 442–43. The court explained:

> We read the Act to give affected school districts a choice: either to create a limited open forum open to all student groups on an equal basis, or to refuse access to all noncurricular student groups. For this choice to be a real one, we think schools must be given the opportunity to choose with full knowledge of the consequences of each alternative. We believe it would be inconsistent with this principle for us to find that the appellees here had created a limited open forum under the Act before the Act's adoption, and thus before the choice could be a meaningful one.

Id. at 442.

[204] 633 F. Supp. at 1043.

[205] *Id.* The court asserted that

> [a]t first blush it appears that Congress was attempting to expand the application of the Supreme Court's decision in *Widmar v. Vincent* . . . rather than expand the concept of a limited public forum when it drafted the Equal Access Act. However, after further analysis, I find Congress sought also to prohibit the denial of noncurricular related student groups' meetings on the basis of subject matter, namely as to religious, political, philosophical or other content of the speech. . . . Thus, I find that Congress did, by enacting the Equal Access Act, afford students the right to use school property beyond the constitutional guarantees in the first amendment.

Id. (footnote omitted).

[206] *See* 596 F. Supp. at 173.

[207] 633 F. Supp. at 1042–43. As evidenced by its position in the litigation, the Lower Merion School District had not intended to create a forum open to all student religious, political, philosophical and other speech. The district court's ruling on remand therefore underscores another significant distinction between the Free Speech Clause standards

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

Although the *Mergens*[208] case has not yet resulted in a final judgment,[209] the district court's opinion denying plaintiff's motion for a preliminary injunction contains some discussion of the Equal Access Act.[210] Especially because there are as yet so few judicial discussions of any aspect of the Act, this opinion is noteworthy.

In early 1985, some students at Westside High School (a public secondary school that received federal funds) sought permission to form a Christian fellowship which would meet on school premises on the same terms as other student groups. When the school denied this permission, the students brought a lawsuit, contending that the school had violated the Equal Access Act as well as the First Amendment. The school authorities contended that the Equal Access Act did not apply to Westside High School, because the school had no limited open forum sufficient to trigger the Act's requirements. The school authorities further argued that, if the Act was deemed applicable to Westside High School and required it to grant access to the proposed Christian fellowship, the Act would violate the Establishment Clause.

The central issue concerning the Act's applicability to Westside High School was whether any of the thirty-one student organizations already permitted to meet at the school were "non-

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concerning subject matter restrictions on limited public forums and the Act's standards (aside from the government's reduced discretion, under the Act, to impose such restrictions). Under recent constitutional precedents, evidence that the government does not intend to grant access to certain speakers or subject matter would preclude a conclusion that any forum had been created which did include such speakers or subject matter; under the Act, in contrast, a "limited open forum" is deemed to have been created whenever the government has taken certain actions, regardless of its intent. *See infra* note 261 & accompanying text.

[208] No. CV 85-0-426 (D. Neb. May 23, 1985), which is pending in the U.S. District Court for the District of Nebraska. The author gratefully acknowledges the assistance of Douglas Veith, attorney for plaintiffs, in providing copies of pleadings and other papers which have been filed in the *Mergens* case (on file at HARV. J. ON LEGIS.).

[209] At the time of printing, the trial was scheduled to commence in late March or early April, 1986. Telephone conversation with law clerk to Douglas Veith, attorney for plaintiffs (Dec. 4, 1986).

[210] No. CV 85-0-426, slip op. (D. Neb. May 23, 1985). Pursuant to an order dated November 6, 1985, the court also denied plaintiffs' motion for summary judgment. No. CV 85-0-426, Order Denying Plaintiff's Motion for Summary Judgment (D. Neb. Nov. 6, 1985). However, this ruling was not accompanied by any memorandum or opinion addressing the issues in the case.

curriculum related,"[211] as required for a finding that the school had created a "limited open forum" under the Act.[212] The court noted that some of the student organizations, for example, a volunteer service organization associated with the Rotary Club of America, or a club for students interested in skin and scuba diving, had only a "tenuous" relationship to the school's "actual curriculum," although they could "definitely be linked to the school's educational mission."[213] The court indicated that a final determination of whether any such clubs ought to be classified as "noncurriculum related" should be postponed pending submission of evidence at trial. However, the court expressed its preliminary conclusion that these clubs were noncurriculum related and that therefore the school was subject to the Act's requirements.[214]

The court nonetheless declined to rule that plaintiffs were likely to prevail on the merits. It concluded that serious questions were raised by the schools' contention that construing the Act to mandate access for the proposed Christian fellowship would violate the Establishment Clause. The court based this conclusion on its perception of the danger that granting access to plaintiffs' club could create a reasonable appearance of school support for religion. It explained that this danger arose from several factors which distinguish the typical high school student forum from the university student forum at issue in *Widmar*.[215] Consistent with this posited typical high school situation, the

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[211] *Mergens*, slip op. at 6–7.

[212] *See supra* text accompanying notes 171 & 175–78.

[213] *Mergens*, slip op. at 6.

[214] *Id.* at 6–7. For purposes of ruling on the preliminary injunction motion, the court did not discuss any other reason why the Act might not govern student group meetings at Westside High School. However, in an affidavit submitted in opposition to plaintiffs' subsequently filed summary judgment motion, the Westside High principal made certain allegations which could raise other problems concerning the Act's applicability: that each student club at Westside High is required to be sponsored by a member of the faculty or administration; that each sponsor is obligated to direct, supervise, and control the activities of the sponsored club; and that sponsorship of student clubs is a factor in determining faculty compensation. Affidavit of James E. Findley, Principal of Westside High School, sworn October 28, 1985, at 2 ¶ 9, Mergens v. Bd. of Educ. of Westside Community Schools (D. Neb. May 23, 1985) (No. CV 85-0-426) (on file at HARV. J. ON LEGIS.).

If proven at trial, these facts could lead to the conclusion that Westside High School is not covered by the Act because it has not met the requirements for a "limited open forum"; the Act's provisions at least arguably prohibit school sponsorship of any meeting (20 U.S.C. § 4071(c)(2) (Supp. 1985)), or teacher participation in any religious club meeting (20 U.S.C. § 4071(c)(3) (Supp. 1985)), or the expenditure of public funds beyond the incidental cost of providing the space for student-initiated meetings (20 U.S.C. § 4071(d)(3) (Supp. 1985)). *See supra* text accompanying notes 184–90.

[215] *Mergens*, slip op. at 10.

court noted, Westside High School sought to keep its student clubs "within a reasonably close relationship to the school's mission," and none of the extant clubs were deemed "controversial or potentially divisive in nature."[216]

3. *Amidei v. Spring Branch Independent School District*

The *Amidei*[217] case is the only one of the three discussed in this section that concerns the rights of student religious groups under the Equal Access Act and has been litigated to a conclusion.[218] Without issuing any memorandum or opinion explaining its ruling, the district court entered an order of final judgment in favor of public high school students seeking to conduct religious meetings under the Act. The court permanently enjoined the school district from refusing to permit the student religious group to meet at a high school "during non-instructional time (as defined in the Equal Access Act) at a time any other student club regularly meets."[219] The school district did not appeal from this judgment.

Just as the *Merion* ruling demonstrates the extent to which the Act expands the protection of free speech interests above that accorded by constitutionally-based judicial decisions, so the *Amidei* ruling demonstrates the extent to which the Act contracts the protection of nonestablishment concerns, below

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[216] *Id.* The court also noted that an imprimatur of school approval could potentially be bestowed upon plaintiff Christian fellowship by virtue of the fact that such fellowship would presumably—like other student clubs—be officially recognized and seek to use school media. *Id.* at 11.

The *Mergens* preliminary injunction opinion highlights the discrepancy between the Act's criteria for permitting student religious clubs to meet in public schools and the corresponding Establishment Clause criteria. The Act requires public schools to grant equal access to any religious club as long as at least one other "noncurriculum related" club is given the opportunity to meet. But the term "noncurriculum related" is quite broad, encompassing even clubs that are indirectly related to the curriculum. *See supra* text accompanying notes 175–78. Therefore, even if the only other club or clubs meeting at a school were related to the curriculum—albeit indirectly—a religious club would still have to be granted equal access. Under such circumstances, noting that other student groups were indirectly related to the curriculum, reasonable students might well infer that the school endorsed all student groups meeting at school, including the religious group. This risk was expressly recognized by the *Mergens* court. *Mergens*, slip op. at 11. *See infra* text accompanying note 244.

[217] No. H-84-4673 (S.D. Tex. July 1, 1985). The author gratefully acknowledges the assistance of Harvey G. Brown, Jr. (attorney for plaintiffs), Jeffrey A. Davis (attorney for defendants), and Cathleen A. Farris (secretary to Mr. Davis) in providing copies of the pleadings and other papers which have been filed in the *Amidei* case.

[218] Just as the *Amidei* decision is unreported, so too there may be other unreported decisions which also adjudicate Equal Acess Act claims by student religious groups.

[219] *Amidei*, slip. op. at 1–2.

that accorded by such decisions. The *Amidei* federal district court upheld the equal access claim of a student religious group despite the fact that all four circuit courts of appeals which had considered similar claims had rejected them on Establishment Clause grounds.[220] Moreover, the district court which rendered the *Amidei* decision is within a circuit whose court of appeals had indicated support for a categorical exclusion of student religious groups from public high schools.[221]

Although the *Amidei* court did not issue any written rationale for its ruling, that rationale can be inferred from the parties' written submissions.[222] The material facts involved in *Amidei* were essentially identical to those involved in *Mergens*. A group of students sought to form a "Christian Club" which would meet at Westchester Senior High School one evening per week, during a period which the school had set aside for meetings of "administratively approved" clubs. To receive such approval from the school's principal, a club had to have a faculty sponsor, and had to be "serious, worthwhile" and permissible under state law.[223] The responsibility of each club's sponsoring faculty member, who was expected to attend all meetings, was to ensure the proper use of the school facilities, to supervise the students, and to enforce school rules.[224]

When the school denied plaintiffs' request for administrative approval, apparently on Establishment Clause grounds, plaintiffs instituted a lawsuit asserting that this denial violated both the Equal Access Act and the Constitution. The school district responded that the Act was not applicable, because Westchester High School had not created a limited open forum, and that if

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[220] *See supra* text accompanying notes 69–87.

[221] This indication was contained in the *Lubbock* case discussed *supra* text accompanying notes 72–74.

[222] The parties submitted a lengthy and detailed Stipulation of Facts, and then made cross motions for summary judgment based upon these facts as well as several affidavits. The parties also filed several legal memoranda. (On file at the HARV. J. ON LEGIS.).

[223] Affidavit of Frazier Dealy, Building Principal at Westchester Senior High School, sworn April 25, 1985 at 4, Amidei v. Spring Branch Indep. School Dist. (in support of Defendant's Supplement to Response to Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Final Summary Judgment).

[224] Stipulation of Facts, ¶ 44, filed March 28, 1985, Amidei v. Spring Branch Indep. School Dist. *But see* Affidavit of Frazier Dealy, *supra* note 223, at 4 (both the school district and Westchester High School required each teacher sponsor "to actively promote, supervise, lead and participate in student club activities."). In any event, the plaintiffs offered to forego any participation in their meetings by the faculty sponsor and also to have nonfaculty sponsors who were not ministers or other religious leaders. Stipulation of Facts, ¶¶ 72(a), (g), (o), (p), (q), (w), (x), (z).

the Act were deemed applicable, it violated the Establishment Clause.[225]

The central issue concerning the Act's applicability in *Amidei*, as in *Mergens*, was whether any of the clubs which had previously been granted access fit within the "noncurriculum related" concept. As in *Mergens*, the *Amidei* situation involved no clubs that discussed religion, politics, or philosophy, and none that could be deemed potentially controversial or divisive. Moreover, as in *Mergens*, the clubs involved in *Amidei* could all be viewed as at least indirectly connected to the curriculum.[226] Nevertheless, just as the *Mergens* court indicated it probably would do, the *Amidei* court definitively ruled that at least one noncurriculum related club had been given the opportunity to meet at the school during noninstructional time, therefore triggering the Act's applicability.[227]

The factual similarity between *Mergens* and *Amidei* pertains not only to the issue of whether a limited open forum existed, but also to the issue of whether a student religious group meeting would violate the Establishment Clause. The facts in *Amidei* closely paralleled those particular facts in *Mergens* which the *Mergens* court had cited as raising Establishment Clause problems: the school officials in *Amidei* also "maintain[ed] close supervision over student organizations"; the school in *Amidei* also attempted "to keep its student clubs within a reasonably close relationship to the school's administration"; and none of the extant clubs in the *Amidei* situation were "controversial or potentially divisive in nature."[228] Notwithstanding these facts, which had deterred the *Mergens* court from concluding that the student religious group would be likely to prevail on the Establishment Clause issue, the *Amidei* court concluded that student

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[225] Plaintiff's Motion for Partial Summary Judgment, undated; Response to Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Final Summary Judgment, at 4, 9, filed April 9, 1985, Amidei v. Spring Branch Indep. School Dist.

[226] The examples of Westchester High School's clubs which plaintiff characterized as "noncurriculum related," to support their assertion that the school had created a limited open forum under the Act, were the following: "Senior Girls," "Senior Boys," and "Run Through" (all of which focused on boosting school spirits in connection with football games), "Junior Achievement," and "Students Against Drunk Driving." Stipulation of Facts, ¶¶ 50, 51, 53, 54, 55.

[227] The school district did not press the argument that the Act could be deemed inapplicable for the separate reason that faculty sponsors participated in student club meetings. *See* Stipulation of Facts, ¶ 44. It is unclear from the parties' submissions whether this participation was limited to custodial supervision. *See supra* note 224.

[228] *See also supra* text accompanying notes 215–16; Affidavit of Frazier Dealy, *supra* note 223, at 2–3.

religious group meetings would not violate the Establishment Clause.

Absent any opinion directly stating the judge's reason for concluding that the Christian Club meetings would comply with the Establishment Clause, it must be presumed that those reasons include at least some that were advanced in plaintiffs' legal memoranda. In support of their position that Christian Club meetings in Westchester High School's limited open forum would not be perceived as school-endorsed, the plaintiffs submitted as evidence the fact that the plaintiffs offered to take various steps, which departed from Westchester High School's normal policies, to minimize the risk of reasonable perceptions that the school promoted their Christian Club.[229] The plaintiffs submitted the affidavit of a child psychiatrist, who had treated over 2500 high school students, and set out her opinions that the majority of high school students are sufficiently mature to understand that an equal access policy does not place the government's imprimatur upon religion, and that students would perceive the school district's refusal to permit plaintiffs to meet as hostility toward religion.[230] The plaintiffs also submitted affidavits of individual students at Westchester High School stating that they would not view the school's equal access grant to the Christian Club as school endorsement of religion, but that they would view denial of equal access as the school's hostility toward religion.[231]

Similar evidence had been introduced by the plaintiffs in the *Mergens* case,[232] but had not persuaded the court that the plaintiffs were likely to overcome the school district's Establishment Clause defense. The similarity between the material facts and evidence in *Mergens* and *Amidei*, juxtaposed with the differing

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[229] The plaintiffs made the following offers: to forego use of the school media and inclusion in the school yearbook; to post a disclaimer outside the room where they met; to forego attendance by any teacher or school employee, or to have two different school personnel attend the meetings on a rotating basis to minimize the likelihood that such attendance could be construed as sponsorship; and to have present at their meetings, solely for custodial purposes, an adult who is neither employed by the school district nor a minister or other religious leader. Stipulation of Facts, ¶¶ 72(a)–(z).

[230] Affidavit of Juanita T. Hart, M.D., sworn March 5, 1985, Amidei v. Spring Branch Indep. School Dist.

[231] *See, e.g.*, Affidavit of Steven Morris, sworn March 26, 1985, Amidei v. Spring Branch Indep. School Dist.; Affidavit of Steve Ringer, sworn March 8, 1985, Amidei v. Spring Branch Indep. School Dist.; Affidavit of Courtney Green, sworn March 8, 1985, Amidei v. Spring Branch Indep. School Dist.

[232] *See* Plaintiff's Statement of Material Facts at ¶ 10, Mergens v. Bd. of Educ. of Westside Community Schools (D. Neb. May 23, 1985) (No. CV 85-0-426).

judicial rulings in these two cases, underscores the ambiguous state of current law concerning the Act's constitutionality.

C. *Comparison Between Act and Proposed Constitutionally-Based Standards*

As indicated by both the language and the operation of the Equal Access Act, the Act is more protective of free speech than of nonestablishment values. Moreover, the Act is more protective of free speech values, but less protective of nonestablishment values, than the Court has been. Accordingly, the distinctions between the constitutionally-based analytical approach to equal access issues proposed in this Article, and the one set forth in the Equal Access Act, fall into two basic categories.

On the one hand, some of these distinctions result in the Act's imposing fewer limitations upon equal access grants than are required by constitutional precepts—specifically, those relating to nonestablishment concerns. With respect to this first category of distinctions, an equal access grant may fully comply with the Act, yet nevertheless violate the Establishment Clause. On the other hand, some distinctions between the constitutionally-derived requirements and the ones prescribed in the Act result in the Act's imposing upon schools additional obligations to grant equal access, beyond those they bear under constitutional norms—specifically, those relating to free speech concerns. With respect to this second category of distinctions, a school's denial of equal access may fully comply with Free Speech Clause standards, yet nevertheless violate the Act. These two categories of distinctions are discussed in turn below.

1. Some Grants of Equal Access May Comply with the Act but Violate the Establishment Clause

There is a major, overarching distinction between the constitutionally-grounded approach to equal access problems that is proposed in this Article and the approach embodied in the Act. In accordance with the constitutional law principles from which it is derived, the Article's recommended analytical framework gives the equal access opponent the opportunity to overcome any prima facie showing that a school has created a student

forum which gives rise to an equal access right. This prima facie showing can be overcome by demonstrating a countervailing compelling state interest—that an equal access grant would violate the Establishment Clause.[233] In contrast, the Act provides no opportunity to overcome an access claim by showing countervailing establishment (or other compelling) concerns. The Act thus creates an irrebuttable presumption that compliance with its specifications for a limited open forum necessarily eliminates any potential Establishment Clause problems which could result from student religious meetings on public school premises.

This Article has delineated a number of specific factors that are relevant in determining the constitutionality of an equal access grant to a student religious group. Consistent with applicable constitutional authorities, this Article recognizes that the dispositive issue must remain whether, under all the facts and circumstances involved in any particular case, such an access grant would reasonably be perceived as conveying the school's approval of religion.[234] A court's analysis of this ultimate constitutional issue should be facilitated by focusing on the specific factors articulated in this Article. However, an assessment of these factors, as well as any other factors, cannot displace the court's determination of the ultimate underlying issue. A school's compliance with the specified criteria for creating an open student forum subject to the recommended content-neutral restrictions should minimize the risk that reasonable students would perceive the school's equal access grant as conveying its approval of religion. Nevertheless, this risk cannot be entirely eliminated even by compliance with the proposed conditions.

For the foregoing reasons, it is submitted that no list of particular limitations upon an equal access grant to a student religious group could possibly be devised which would always prevent reasonable students from perceiving the grant as conveying the school's approval of religion.[235] But even putting aside the

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[233] *See supra* text accompanying notes 149–53.

[234] *See supra* note 28; *see also* text following note 139 & text accompanying notes 154–61.

[235] *See supra* notes 142–44; text accompanying note 136. *See also* YALE Note, *supra* note 23, at 206–07 n.82:

> Because of the delicate balance between free exercise and free speech rights on one hand, and the Establishment Clause on the other, decisions on religious issues often turn on the unique facts of the case . . . . Thus the Act may be

hypothetical impossibility of this task, the particular limitations upon equal access grants to student religious groups which are specified in the Equal Access Act clearly leave open a substantial possibility that reasonable students would perceive at least some such grants as conveying the school's approval of religion. Consequently, an equal access grant to a student religious group could fully comply with the Act, yet still violate the Establishment Clause. The following discussion outlines the most significant respects in which the Act's criteria for permissible equal access grants fail to foreclose the possibility that such grants would violate the Establishment Clause.

As outlined above,[236] the Act requires a school within its scope to grant equal access to all student groups regardless of their subject matter, including student religious groups, so long as the school has granted an "opportunity for" at least one "noncurriculum related student group to meet on school premises during noninstructional time."[237] The Act can be read as prescribing no additional preconditions for the creation of equal access rights.

The Act can also be read as prescribing the following additional preconditions for the creation of equal access rights: any meeting must be voluntary and student-initiated; no meeting may be sponsored by the school or the government; school or government employees or agents may be present at any religious meeting only in a nonparticipatory capacity; no meeting may materially and substantially interfere with the school's educational activities; and nonschool persons may not direct, conduct, control or regularly attend any activities of the student groups.[238] Even assuming the debatable proposition that the Act makes the foregoing additional conditions mandatory rather than discretionary,[239] a school's compliance with all of them would still not necessarily prevent reasonable students from viewing an equal access grant to a student religious group as conveying the school's approval of religion. This conclusion can be substantiated by considering the additional prerequisites, beyond those

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> seen as encroaching . . . upon the judiciary's proper role in interpreting the constitutional religion clauses.

Id.

[236] *See supra* text accompanying notes 170–71.

[237] 20 U.S.C. § 4071(b) (Supp. 1985).

[238] 20 U.S.C. §§ 4071(c)(1)–(c)(5) (Supp. 1985).

[239] *See supra* text accompanying notes 184–90.

set forth in the Act, which the present Article has recommended for any such grant to comply with the Establishment Clause.

First, this Article recommends that no student forum should be deemed to exist, sufficient to entitle a student religious group to access, unless it was created for a secular purpose. Absent compliance with this requirement, an equal access grant to a student religious group would violate the Establishment Clause.[240] In contrast, under the Act, a school could create a limited open forum specifically at the behest of one or more student religious groups. Nothing in the Act would prevent a school from designating such a forum for the express purpose of permitting one or more student religious groups to meet on school premises, a scenario that would surely give rise to serious Establishment Clause concerns.

Second, also reflecting constitutional dictates, the Article proposes that a student religious group will not have an equal access right to a student forum unless that forum is open to a sufficiently broad range of subjects to include religion without singling it out. Unless a school complies with this requirement, reasonable students could infer that the school's equal access grant to a student religious group manifests its approval of religion.[241] Under the Act, in contrast, a limited open forum will be deemed to exist, obligating the school to allow student religious groups to meet on its premises, as long as the school has done so little as to grant an opportunity to meet to a single noncurriculum related student group.[242] Indeed, as previously noted, that single group could itself be religious, thus creating a significant danger of reasonably inferred school support for religion.

Even if the forum is not initially opened expressly for the purpose of accommodating a religious group, the Act's failure to require subject matter breadth still engenders substantial risks of Establishment Clause violations. The Act's legislative history indicates that the term "noncurriculum related" is broadly construed, to include all groups except those which are essentially direct extensions of the school's curriculum.[243] Therefore, a school's obligation to allow religious groups to meet could be triggered merely by its permitting one nonreligious student

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[240] *See supra* text accompanying note 144.
[241] *See supra* text accompanying notes 146–48.
[242] 20 U.S.C. § 4071(b) (Supp. 1985).
[243] *See supra* text accompanying notes 175–78.

group to meet to discuss a subject related to the school's curriculum (albeit indirectly). Such a scenario would entail a significant danger that reasonable students would view the equal access grant to the religious group as conveying the school's endorsement of religion, for two major reasons. First, because the other group(s) utilizing the student forum may discuss subjects indirectly related to the curriculum, a reasonable inference could arise that all student groups are essentially indirect extensions of the curriculum, and hence school supported.[244] Second, because the other group(s) utilizing the student forum may be few in number and small in size,[245] the school's creation of the forum could reasonably be perceived as having the purpose or the effect of assisting the student religious groups.[246]

Yet another distinction between the constitutionally-grounded prerequisites for equal access proposed in this Article and the prerequisites specified in the Act leads to additional situations where equal access grants could comply with the Act but nevertheless violate the Establishment Clause. This distinction concerns the content-neutral time, place, and manner regulations that the Article recommends be imposed before student religious groups are entitled to equal access.[247] The Act at least arguably requires schools to impose two of these regulations: that student group meetings be scheduled outside the compulsory attendance period,[248] and that the role of any adult participant in student

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[244] This specific danger has already been recognized in the *Mergens* lawsuit, a case decided under the Equal Access Act, discussed *supra* text accompanying notes 208–16. *See Mergens*, slip op. at 10–11.

[245] The Act could be triggered by a request to meet made by a single group consisting of only two students. *See* 20 U.S.C. § 4071(d)(6) (Supp. 1985) ("Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof . . . to limit the rights of groups of students which are not of a specified numerical size.").

[246] Under the Act, once a school is deemed to have created a limited open forum, it would be required to grant equal access to all noncurriculum related student groups, regardless of subject, as a matter of policy. However, this policy obligation does not assure that, in any particular situation, a school's forum will actually include student groups discussing diverse political, philosophical, religious, or other subjects. The Act's exclusive focus on a school's *policy* of openness to diverse subjects, and its complete disregard for the *actual* diversity, leads to situations where a school may comply with the Act yet still violate the Establishment Clause. *See infra* note 252. *See also infra* text accompanying note 251.

[247] *See supra* text accompanying notes 149–53.

[248] The Act provides that a limited open forum is created when student groups meet during "noninstructional time," 20 U.S.C. § 4071(b) (Supp. 1985), which is defined in 20 U.S.C. § 4072(4) (Supp. 1985) as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." As discussed *supra* at text accompanying notes 172–74, it is not completely clear that this term refers only to

group meetings be confined to a custodial one.[249] However, the Act clearly does not require schools to impose the remaining regulation. Specifically, the Act does not precondition equal access upon a school's making of disclaimers or explanatory statements to assure that students understand its neutral posture.

A school's failure to comply with this final recommended condition (as well as its failure to comply with the other two recommended conditions) would not necessarily cause an equal access grant to violate the Establishment Clause; it would simply increase the likelihood of such a violation.[250] What is disturbing about the Act, then, is not its failure to make this condition an essential prerequisite for the finding of a limited open forum or the granting of equal access to a student religious group. Rather, the Act's critical shortcoming in this regard is its failure to take the school's disclaimer policies into account, to any extent whatsoever, as relevant to the legal propriety of equal access grants. So far as the Act is concerned, a school could fail to give students any explanation of the Equal Access

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times before and after the compulsory attendance period, but the weight of legislative history suggests that it does.

Even if the Act is interpreted to permit student meetings only before or after regular classes, it clearly does not require that the meetings occur only at times clearly separated from the compulsory attendance period, as this Article urges *supra* at text accompanying note 151. Meetings of a student religious group immediately before or after the normal school day are more likely to cause reasonable student perceptions of school approval of religion than are meetings at more clearly separated times. Therefore, a court should carefully scrutinize any student religious group meeting which occurs, for example, immediately before the school day, to determine whether reasonable students infer that the school supports religion. If so, these meetings should be struck down under the Establishment Clause, notwithstanding their compliance with the Equal Access Act. *See* Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391, 1405 n.14 (10th Cir. 1985) (where student religious group met shortly before school day began and was observed by other students arriving for classes, reasonable perceptions could arise that school supported religious group).

[249] *See* 20 U.S.C. § 4071(c)(5) (Supp. 1985) (limiting sponsorship of any meeting by school or government, or their agents or employees) and 20 U.S.C. § 4072(2) (Supp. 1985) (defining sponsorship as including participation in meeting, but not attendance at meeting "for custodial purposes"). As discussed *supra* at text accompanying notes 184–90, however, it is unclear whether this limitation is mandatory or discretionary.

The Act contains another provision concerning the role of school employees in student group meetings, which could potentially lead to Establishment Clause problems. In 20 U.S.C. § 4071(d)(4) (Supp. 1985), the Act provides that it shall not be construed "to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee." If a school implements this provision by assigning to student religious groups adult supervisors whose beliefs accord with those of the students, a risk is created that reasonable students would perceive the school (through its designated supervisors) as endorsing the students' religious beliefs.

[250] *See* Strossen, *supra* note 22.

Act or the constitutional concepts it implicates. Such a failure would increase the risk that reasonable students would perceive a student religious group meeting as conveying the school's approval of religion. Yet it would have no legal impact under the Act.

The Equal Access Act's failure to take account of any other factors besides those it lists further compounds the likelihood that an equal access grant to a student religious group could comply with the Act but violate the Establishment Clause. Under this Article's constitutionally-based analysis, in contrast, any other factors which could indicate reasonable student perceptions that the school endorses religion may be cited to overcome a prima facie equal access right. For example, one such factor would include the relative dominance of student religious groups in the forum. As is the case regarding explanatory statements, these other factors are not absolutely determinative of the constitutional propriety of an equal access grant. For example, it would remain possible, although less likely, for students not to perceive an equal access grant as conveying a school's endorsement of religion, even if religious groups predominate within the forum.[251] Again, the Act's critical flaw is not its failure to treat such factors as controlling, but rather its failure to treat them as having any significance whatsoever.[252]

Another important category of situations where the Act purports to authorize or to require equal access grants which would violate the Constitution results from the Act's application to "secondary schools."[253] Some state laws define "secondary schools" to include junior high or middle schools, with the result

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[251] *See supra* note 161.

[252] In upholding the student religious group's equal access claim in *Widmar*, the Supreme Court emphasized the large number and diversity of student groups meeting in the university forum, and the relatively insignificant role that the single religious group would play in this context. 454 U.S. 263, 274–75. Moreover, the Court expressly indicated that if at some future time these factors should shift, causing student religious groups to predominate in the actual use of the forum, then Establishment Clause concerns might preclude the religious groups from continuing to meet. *See supra* note 161. If the relative number of student religious groups meeting in a university forum could cause university students to perceive the university as endorsing religion, a fortiori, the relative number of student religious groups meeting in a high school forum could cause reasonable high school students to perceive the high school as endorsing religion. *See supra* text accompanying note 68. Therefore, the Act's complete disregard of this predominance factor could lead to situations in which it would sanction an equal access grant that would violate constitutional norms. For example, as noted *supra* at text accompanying notes 241–43, the Act would authorize a school to maintain a forum in which all the student groups are religious.

[253] *See* 20 U.S.C. §§ 4071(a), 4072(1) (Supp. 1985).

that their students could be as young as eleven years old.[254] Therefore, the Act treats these younger students as per se capable of distinguishing between a school's neutral provision of a forum and its partisan endorsement of student speech within the forum.[255] In contrast, two circuit courts of appeals have ruled that even the older students in senior high schools are per se *incapable* of making this distinction,[256] and the Supreme Court's most recent discussion of student free speech rights reflects a presumption that high school students are inherently immature, impressionable, and hence easily harmed by speech which is potentially controversial or upsetting.[257]

In particular cases, evidence may well demonstrate that reasonable younger students cannot appreciate the public forum concept, and that they would consequently view their schools' equal access grants to student religious groups as manifesting the schools' support for religion. In such cases, any equal access grant would violate the Establishment Clause, notwithstanding its compliance with the Equal Access Act.

2. Some Denials of Equal Access May Comply with the Free Speech Clause but Violate the Act

In one significant respect, the distinctions between constitutionally-grounded equal access standards and the statutory standards contained in the Act result in the latter imposing increased obligations upon schools. Specifically, viewed from the schools' perspective, the Act reduces their discretion to define the subject matter encompassed by a student forum, which they would enjoy under recent Supreme Court precedents concerning the

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[254] *See* AJC GUIDE, *supra* note 166, app. A, at 25–27 (New York and South Carolina are examples of states whose laws define "secondary school" as including grades as low as the seventh).

[255] The Act's legislative history suggests that its sponsors actually intended to limit it to high schools. *See, e.g.*, 130 CONG. REC. S8347 (daily ed. June 27, 1984) (statement of Sen. Danforth (R-Mo.)) (stating that Act covers "kids who are freshmen through seniors in high school. It is [applicable to] people who are 14 through 18 years of age").

[256] *See* Brandon v. Board of Educ. of Guilderland Cent. School Dist., 635 F.2d 978; Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1046–47. These decisions are discussed *supra* text accompanying notes 71–75.

[257] *See* Bethel School Dist. v. Fraser, 106 S. Ct. at 3163, *supra* text accompanying notes 55–62.

limited public forum and nonpublic forum concepts.[258] Viewed from the students' perspective, these distinctions increase their free speech and associational rights at school.[259]

Under the Act, so long as a school makes its premises available to even one student group deemed to fit within the expansively conceived "noncurriculum related" category, then it forfeits the discretion to deny access to or exclude any other group that is also noncurriculum related.[260] To cite an example derived from the legislative history, if a school granted access to a student chess club,[261] it probably would not be able to exclude or discriminate against clubs of student Communists, Ku Klux Klansmen, Hare Krishnas, or Black Muslims on the basis of

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[258] *See supra* text accompanying notes 182–83. The Act's imposition of a greater obligation to afford equal access than the one schools bear under constitutional principles is not in itself an unlawful result. Congress has the power to impose such an obligation upon schools receiving federal financial aid, which are the only schools covered by the Act. 20 U.S.C. § 4071(a) (Supp. 1985). *See* Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.").

Nor is there any constitutional impediment to Congress' imposition of this increased obligation to grant equal access. It could be argued that school officials have a constitutional right to avoid the reasonable inference that they endorse ideas with which they do not actually agree. *Cf.* Wooley v. Maynard, 430 U.S. 705 (1977) (striking down New Hampshire's requirement that state motto, "Live Free or Die," be displayed on car license plates, as violating First Amendment right to "refrain from speaking"). However, courts have held that when there is a legal obligation to facilitate the expression of ideas regardless of their content, as in a public forum, then no imputation of endorsement could arise which would be deemed sufficiently reasonable to violate this right. *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). Accordingly, if a school has created a limited open forum under the Act, a school official's free speech right to avoid apparent endorsement of certain ideas should not justify exclusion of student groups that Congress has defined as entitled to participate in such a forum.

[259] *See, e.g.*, HOFSTRA NOTE, *supra* note 23, at 592 ("[T]he Equal Access Act has expanded the freedoms of speech and assembly of public secondary school students in an unprecedented manner."). The Note articulates two major bases for this conclusion: (1) in contrast to *Widmar*, which seemed to require the presence of many student groups before finding a forum sufficient to trigger equal access rights, the Act is triggered by only a single noncurriculum related group, *id.* at 604; and (2) arguments that could have been made under Free Speech Clause principles to restrict access rights of controversial or divisive groups are less forceful under the Act, *id.* at 612–13.

[260] If a school could lawfully bar the meetings of any club for reasons apart from their subject matter, it would retain the authority to do so under the Act. *See* 20 U.S.C. § 4071(c)(4) (Supp. 1985) (school may bar meeting that materially and substantially interferes with orderly conduct of school's educational activities); *id.* § 4071(d)(5) (Act does not authorize school to sanction meetings that are otherwise unlawful); *id.* § 4071(d)(7) (Act does not authorize school to abridge constitutional rights of any person); *id.* § 4071(f) (Act does not limit school's authority to maintain order and discipline, and to protect well-being of students and faculty).

[261] *See* 130 CONG. REC. S8342 (daily ed. June 27, 1984) (statements of Sen. Gorton and Sen. Hatfield) (indicating that a school would have difficulty making a determination that a chess club was curriculum related, notwithstanding the discretion the Act ostensibly grants schools to determine which clubs should be so classified).

subject matter.[262] In short, the Act posits two extremes in terms of a forum's subject matter: either only the narrow range of subjects that are directly related to the curriculum, or the literally infinite range of subjects that are not.

Under current constitutional standards, in contrast, a school should be able to create a student forum that would include some, but not all, noncurriculum related groups.[263] Many schools have apparently chosen such an intermediate option, granting access to clubs that have some indirect relationship to the schools' educational mission, but not those espousing controversial and potentially divisive religious, political, or philosophical views.[264] As demonstrated by the judicial decisions

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[262] The Act's legislative history is unclear as to whether so-called "hate groups," or groups discriminating on the basis of race, sex, religion, or other invidious factors were intended to be excludable. *See* 130 CONG. REC. S8344, S8347 (daily ed. June 27, 1984) (statements of Sen. Gorton and Sen. Hatfield). *See* HOFSTRA Note, *supra* note 23, at 594–97, 612–14 (Act would probably require access to be granted to "hate groups" if any other student political groups are allowed to meet).

For a sample "parade of horribles" that educational institutions would have to tolerate under an open student forum, *see, e.g.*, Gay Alliance of Students v. Matthews, 544 F.2d 162, 167 (4th Cir. 1976) (Markey, J., concurring) (upholding equal access right of gay university student organization) ("[A]ssociations devoted to peaceful advocacy of decriminalization or social acceptance of sadism, euthanasia, masochism, murder, genocide, segregation, master-race theories, gambling, voodoo, and the abolishment of all higher education, to list a few, must be granted registration . . . if [the university] continues to "register" [student] associations.").

Positively viewed, it could be argued that a student forum which is open to such controversial groups would not only enhance students' free speech and associational rights while they are in school, but would also foster their development into citizens who responsibly exercise their rights and are tolerant of the rights of others. These themes pervade the legislative history of the Equal Access Act. *See supra* note 6.

[263] *See supra* text accompanying notes 179–81.

[264] Of the reported equal access cases, only Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986) contains any description of the various student groups which meet at school. Additionally, papers filed in two of the unreported cases—Mergens v. Bd. of Educ. of Westside Community Schools, No. CV 85-0-426, slip op. (D. Neb. May 23, 1985) and Amidei v. Spring Branch Independent School District, No. H-84-4673, slip op. (S.D. Tex. July 1, 1985)—contain information about the student groups which met at the respective schools. All three of these student forums included some clubs that would probably be deemed "noncurriculum related" under the Act (indeed, the courts in *Mergens* and *Amidei* so ruled, *see supra* text accompanying note 214), but all of the clubs seemed to be connected to the curriculum at least indirectly, *see supra* text accompanying notes 226–27. Certainly, none of the clubs meeting at any of these schools centered their activities around politics, philosophy, or any other potentially controversial or divisive subject. *See Bender*, 741 F.2d at 543; *Mergens*, slip op. at 6; *Amidei*, slip op. at 2. *See also* Affidavit of James A. Findley, Principal of Westside High School, *supra* note 214, at ¶¶ 14–17 (the "goals, objectives, and activities" of all student clubs "are related to the curriculum" in that they are "substantially similar to or the same as the activities and requirements of one or more" classes, or are "logical and natural expansions or extensions of the subject matter" of such classes; it is school's intent not to permit student clubs that are "controversial or divisive").

A survey conducted by the American Association of School Administrators, although yielding relatively few responses, is consistent with the pattern revealed by the reported

which have been issued under the Act, this type of line-drawing, although probably authorized by recent Free Speech Clause doctrine, would not be permissible under the Act.[265]

V. EQUAL ACCESS POLICY OPTIONS CONSISTENT WITH BOTH THE CONSTITUTION AND THE EQUAL ACCESS ACT

It is important for schools to be aware of the significant extent to which the Act circumscribes their range of choices in defining a student forum's subject matter. Schools should be cognizant that if they grant access to any group which could be deemed "noncurriculum related," in accordance with the broad construction of that term in the Act's legislative history, then they face a substantial risk that they could be precluded from thereafter denying access to any group based on its subject matter, even if they have not intentionally created a forum for all noncurriculum related speech.[266]

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decisions. *See* AASA GUIDELINES, *supra* note 151, at 19–20. Of the 161 school districts which responded to the question "Are there organizations that are currently barred from free use of school facilities?," only 22 answered that no groups were denied access; 83 responded that "violent/hate or extremist groups" would be barred; 37 said that "subversive groups (advocating the violent overthrow of the government)" would be barred; 25 said that "religious groups" would be barred; 23 said that "religious cults" would be barred; and somewhat smaller numbers of school districts indicated that they would bar various other groups, including "profit-making groups," "groups that advocate illegal activities or offended community morals," "socially controversial groups," and "political clubs/parties."

[265] Although the *Mergens* and *Amidei* courts have manifested divergent views concerning the Establishment Clause issues raised by the Act, both courts agreed that the term "noncurriculum related" must be interpreted broadly, and consequently that the Act becomes applicable whenever a school grants an opportunity to meet to any club not directly related to the curriculum. *See supra* text accompanying notes 214, 226–27.

[266] For example, in the Student Coalition for Peace v. Lower Merion School Dist. case, discussed *supra* at text accompanying notes 193–207, the school was required to grant access to a student-initiated anti-nuclear gathering because it had previously granted access to a student-initiated charitable athletic event. This order was issued even though the school plainly had been unaware that the consequence of allowing the charitable athletic event would be its obligation to host the anti-nuclear event. To the contrary, the school had consistently distinguished between charitable athletic events—to which it did grant access—and political events—to which it did not. *See supra* text accompanying notes 204–07. In contrast, under current constitutional analysis, a school would not be deemed to have created a limited public forum on its property in the face of evidence that it did not intend to do so. *See, e.g.*, Cornelius v. NAACP Legal Defense Educ. Fund, 105 S. Ct. 3439, 3450.

In its opinion denying plaintiffs' motion for a preliminary injunction, the court in *Mergens*, slip op. at 11, noted that the Act "may tend to mandate the opening of a forum well beyond that which the school itself has sought to sanction." As the court explained, the high school had granted access to student groups that should probably be deemed "noncurriculum related" under the Act's relatively broad construction of that term. Nonetheless, the subject matter scope of these groups was still "narrow" and "much more limited" than that of the groups involved in *Widmar*. *Mergens*, slip op. at 11 n.1. In particular, the court stressed that the *Widmar* forum, in contrast with the high school forum, included groups "of various political and philosophical leanings." *Id.*

It is also important for schools to be aware of the equal access policy options that remain available to them, consistent with both the Act and applicable constitutional precepts. First, a school could forego all federal financial aid and thus be exempted from compliance with the Act.[267] Assuming that a school remains subject to the Act's requirements, it still has a range of equal access policy options which would allow it to avoid granting equal access to all noncurriculum related groups, regardless of subject matter.

Even if a school has created a limited open forum, it retains the discretion to discontinue that forum by declaring that it will henceforth not permit noncurricular clubs to meet during noninstructional time.[268] Under current public forum case law, such a change in policy would probably be sustained so long as the school could show that this change was reasonable and not made for the sole purpose of suppressing a particular viewpoint.[269] If the school's decision to prohibit meetings of noncurriculum related student clubs coincided with an access request by a controversial religious, political, or philosophical group, an inference might arise that the school's decision was intended, at least in part, to suppress a particular viewpoint. Even so, it would probably be difficult to demonstrate that the decision had no other purpose.

Although a school could permissibly restrict its forum to those student clubs which satisfy the Act's curriculum related concept, even if it had previously maintained a more open forum, it could well prefer not to do so. Instead, the school might prefer to make its forum available to a broader subject matter range in

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[267] This possibility was noted by the Third Circuit in the *Merion* case. *See* 776 F.2d at 442 n.9.

[268] For example, after passage of the Equal Access Act, the Boulder, Colorado School Board eliminated any limited open forum which had existed in its schools by henceforth granting access only to curriculum related groups whose "function is to enhance the participants' educational experience and supplement the course materials" used at school. 29 CHRISTIANITY TODAY 49 (Feb. 1, 1985).

[269] *See* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 46 (government may designate property as limited public forum subject to access restrictions that are reasonable and not intended to suppress expression merely because public officials oppose speaker's viewpoint; government retains right to revoke designation of such property as limited public forum). It would be unreasonable to construe the Act as requiring a school which had triggered its application to remain subject to the Act's requirements in perpetuity, especially when—as in the *Merion* case—a school may have become subject to the Act unwittingly. This conclusion is supported by the indications in the Act's legislative history that Congress did not intend to limit schools' discretion concerning the institution of a limited open forum. *See, e.g.*, 130 CONG. REC. S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

order both to expand its students' educational opportunities and to promote free speech values.[270] The legislative history indicates that a major purpose of the Act was to promote students' free speech and associational rights.[271] It would therefore be ironic if the Act's practical effect were to reduce these rights by deterring schools from creating student forums.[272] Accordingly, it is essential for schools to understand the ways in which they may continue to grant access to student clubs with a broader subject matter scope than those directly related to the curriculum, while still not waiving the discretion to impose some subject matter limitations on the forum's scope.

A school could accomplish these important goals while probably still retaining the option of precluding any religious, political, or philosophical club from meeting on an equal basis by failing to take other necessary steps to trigger the Act's applicability, besides permitting a noncurriculum related student group to meet. For example, even a school's grant of access to noncurriculum related clubs would fail to trigger its obligation to grant equal access to other clubs if the noncurriculum related clubs met during "instructional" time.[273] Consistent with the reading of that term indicated by the Act's legislative history, a school could, for example, authorize some noncurriculum related student groups to meet during a student activity period occurring during the school day, without thereby incurring the obligation to grant equal access to all noncurriculum related groups.[274]

To the extent that the additional conditions listed outside the Act's central provision might be deemed mandatory rather than discretionary,[275] a school's failure to comply with one or more such conditions could preserve its discretion to impose reasonable, viewpoint neutral, subject matter limitations upon a stu-

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[270] Many schools currently opt for such an intermediate subject matter range, broader than "curriculum related" under the Act, yet narrower than "noncurriculum related." *See supra* note 264.

[271] *See supra* note 6.

[272] *See* GEORGETOWN Note, *supra* note 189, at 223 & n.112 (suggesting that, to avoid discouraging schools from opening their property to expressive activity, courts should construe Act narrowly and uphold any reasonable criteria for restricting access).

[273] 20 U.S.C. § 4071(b) (Supp. 1985).

[274] To comport with current constitutional standards, any definition of the permissible subject matter of the noncurriculum related student groups which could meet during noninstructional time would have to be reasonable and not imposed for the sole purpose of suppressing particular viewpoints. *See supra* text accompanying notes 179–80.

[275] *See supra* text accompanying notes 184–90.

dent forum without forcing it to grant access to all noncurriculum related groups. For example, a school could require teachers to play a participatory role in student group meetings,[276] or it could require that all clubs be school sponsored.[277] Of course, to the extent that these conditions are constitutionally required before a school may grant equal access to a student religious group, the consequence of noncompliance would be the school's forfeiture of discretion to permit religious group meetings.[278]

VI. CONCLUSION

In declining to address the merits of *Bender*, the Supreme Court failed to provide guidance to the numerous courts, schools, and other parties all over the country which confront equal access issues. These parties must therefore devise their own resolutions of the competing free speech and nonestablishment concerns underlying any equal access issue. Moreover, these parties must forge their own reconciliations of the inconsistent judicial and statutory directives specifically applicable to equal access problems. These include the four courts of appeals decisions which unanimously rejected the constitutionally-based equal access claims they considered; the Equal Access Act, which requires schools to grant equal access to student religious groups even under circumstances where the courts of appeals have held that equal access would violate the Establishment Clause, and the Supreme Court has indicated that equal access was not mandated by the Free Speech Clause; and the reported decisions under the Act, which reflect significantly differing views about its constitutionality.

This Article has attempted to provide the guidance to parties involved in equal access disputes which has not been provided by either the Supreme Court or Congress. The Article has suggested standards for resolving the conflicting constitutional con-

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[276] *See supra* note 214 (principal's affidavit submitted in *Mergens* case contended that school policy required teachers to sponsor all student clubs, thus exempting school from Act's coverage).

[277] *But see supra* text accompanying notes 223–24 (in *Amidei*, school was found to have limited open forum under Act, obligating it to grant equal access to student religious group, notwithstanding school rule that all clubs be school sponsored).

[278] *See supra* note 190 and accompanying text (conditions imposed by 20 U.S.C. § 4071(c) (Supp. 1985) may be constitutionally required before school may grant access to student religious club).

cerns implicated in every equal access case which are faithful to both of the fundamental First Amendment rights at issue.

The Article has also contrasted its proposed constitutionally-derived standards for evaluating equal access claims with those prescribed in the Equal Access Act. Based upon this comparative analysis, the Article has demonstrated that the Act is more protective of free speech values than of nonestablishment values, and that in comparison with current Supreme Court doctrine, the Act affords more protection to free speech interests in a limited student forum while affording less protection to nonestablishment interests. Consequently, the Article has shown that an equal access grant may comply with the Act yet violate the Establishment Clause, while an equal access denial could comply with the Free Speech Clause yet violate the Act. Finally, the Article has set out the range of equal access policy options that are available to a school, consistent with the requirements of both the Constitution and the Equal Access Act.

By complying with the constitutionally-based standards proposed in this Article, schools can maximize students' rights of free expression and association, as well as their right to remain free from governmental establishments of religion. Our nation's public schools can thereby promote their essential mission of teaching young people that constitutional liberties are vitally important in the everyday lives of all Americans, including students throughout the nation, and that these precious freedoms should not be "discount[ed] . . . as mere platitudes."[279]

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[279]*See* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("That [boards of education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").