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When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools (Symposium: Freedom of Association)

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WHEN SEPARATE IS EQUAL: WHY ORGANIZED RELIGIOUS EXERCISES, UNLIKE CHESS, DO NOT BELONG IN THE PUBLIC SCHOOLS

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> [T]he grossest discrimination can lie in treating things that are different as though they were exactly alike.[1]

In a junior high school, the prayer meetings had been started by several students and a faculty sponsor so that "youth would be influenced in a positive way to seek God and good in their own lives and in others." As many as forty students attended the meetings held on Thursdays between 8:00 and 8:25 a.m. after the school buses arrived, but prior to classes. Outside speakers sometimes appeared at the invitation of a student but usually at the behest of a teacher or person unrelated to the school. The speakers included a minister and others who talked about the benefits of God and Christianity in their daily lives. The program also included prayers, songs, and "testimony" of students and other individuals concerning the benefits of knowing Jesus Christ. Several teachers supervised the meetings involving students and non-students. Some teachers volunteered to participate by leading students in song and by offering religious testimony. The meetings were advertised by posters in the halls and announcements in school publications. These circumstances allowed junior high school students to pressure their classmates to join in the religious activities.

In one high school, students and teachers gathered every other week for afternoon prayer in a club known as the Christian Youth Alliance. Teachers supervised the Youth Alliance, and the youth director of the nearby Assembly of God church also participated. According to the church youth director, he became "integrally involved" in the Christian Youth Alliance. Typically, he provided guest "Youth for Christ" speakers and with them led students in such exercises as "writing to an imaginary friend on what it means to be a Christian." In addition to the participation of outside speakers and ministers, there also was direct school involvement in the club. Teachers who supervised the club say it was difficult not to participate because "teachers by their nature like to

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[1] Jenness v. Fortsan, 403 U.S. 431, 442 (1971).

talk." Announcements made on the school public address system informed students about guest speakers and about the club schedule and added: "They will talk about what it means to be born again. Come and find out. Bring a friend. Come and be fulfilled."

At another high school, student prayer meetings grew from about six students in 1982 to a high of 150 in 1984. Prayer meetings were held several times a week. The students testified that their purpose was to have their fellow students "repent, follow God and be saved." They sought to reach out to the entire student body by distributing religious tracts throughout the school and by preaching loudly. With as many as 300 students gathered near a schoolbus loading zone, students and a youth minister from the Church of the Rock used bullhorns to broadcast messages entreating students to "accept Christ."

These three scenarios are not hypothetical. The first one is *Bell v. Little Axe Independent School District*,[2] a pre-Equal Access Act[3] prayer club case. The second is *Somer v. Hicksville*,[4] a post-Equal Access Act prayer club case. The last is *Clark v. Dallas Independent School District*,[5] a case now pending in a federal district court in Texas.

Professor Laycock[6] is not troubled enough by such scenarios. He sees both equal access and moment-of-silence laws as strictly "neutral" with respect to first amendment establishment. He suggests that under the provisions of the Equal Access Act there is no state support of or infringement upon religious beliefs in the public schools. Laycock equates establishment concerns with mere dangers of mistaken attribution. He sees little difference between the use for organized prayer of our public parks and our public schools. And Professor Laycock goes on to find equal access legislation to be required by both the first amendment free speech and free exercise clauses.

I. INTRODUCTION

This Article rejects Professor Laycock's equation of the public parks with the public schools. The Equal Access Act mandates government sponsorship of prayer in the public schools; such state sponsorship never has been given to prayer in the public parks. The aegis of the school and required attendance provide state support to those wishing to gather religious adherents. This state support inevitably compromises the religious (or nonreligious) beliefs of public school students. Governmental assistance to propagation of religious beliefs through equal access and mo-

2 766 F.2d 1391 (10th Cir. 1985) (striking down as unconstitutional school-supported equal access prayer club policy that allowed morning meetings in junior high school).

3 Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. 1985).

4 No. 85-3168 (S.D.N.Y. filed Dec. 26, 1985) (eventually settled).

5 No. 85-1203 (N.D. Tex. filed July 13, 1986).

6 Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1 (1986).

ment-of-silence legislation constitutes an establishment of religion, contrary to the mandate of the first amendment.[7]

The neutrality principle that Professor Laycock proposes does not withstand scrutiny. Pre-Equal Access Act public schools are neutral with regard to religion. This Article questions Laycock's assumption of government hostility toward religion, an assumption critical to both his establishment and free exercise analyses. If the schools' alleged hostility to religion is not state coercion sufficient to make out a free exercise claim, then the Equal Access Act's religious purpose and intended religious effect[8] have no compelling justification. Thus, Professor Laycock's analysis must fail, since "nonreligion" in the schools does not amount to hostility.

Finally, Laycock's interpretation of the neutrality principle itself is flawed because it requires identical treatment of religious, political, and other subject areas in the public schools.[9] The first amendment mandates no such similar treatment. Instead, government has differing mandates respecting sponsorship of these types of speech. I propose an analysis, based on principles of equality, that varies according to the kind of speech involved. The highest standard historically has been applied to concerns of government sponsorship of religious speech. To maintain democracy and pluralism, government must treat the religious beliefs of all citizens equally. With respect to government espousal of political or other beliefs, the constitutional mandate is also one of equality, but one limited to questions of discrimination against unorthodox viewpoints. Last, there is virtually no constitutional mandate concerning government support of other speech not involving orthodoxy—that is, presenting no potentiality of viewpoint discrimination.

The Article concludes by applying the proposed equality standard to current issues of religion in the public schools, including the Equal Access Act and moment-of-silence laws.

II. NEUTRALITY TOWARD RELIGION OR EQUALITY AMONG RELIGIOUS VIEWS

Only one concern animates Laycock's neutrality principle: That religion be treated like everything else in the public schools. To do otherwise, claims Laycock, is to "inhibit" religion in violation of the first

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[7] In a previous article, I have shown that a unitary forum analysis of the public schools, considering the nature of schools as government-sponsored fora, affects both first amendment establishment and free speech mandates. On balance, the establishment clause prohibits both equal access and moments of silence and vitiates any countervailing first amendment open forum mandate. *See* Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public Schools: A Proposal for a Unitary First Amendment Forum Analysis Test*, 21 HASTINGS CONST. L.Q. 529 (1986).

[8] *See id.* at 559-62.

[9] Laycock, *supra* note 6, at 2-3.

amendment.[10] In some school contexts, however, treating religion like everything else violates the establishment clause. That benefits are being provided by the state in advancement of religion—most importantly through convenient access to an audience gathered by the state—is irrelevant to Laycock. In his view, the government support is negated by the neutrality of treatment of religious groups and other clubs. Professor Laycock recognizes the benefits of "convenient access to the potential audience congregated at the public school," but concludes that the benefit is merely one of the "incidental effects" of a "neutral policy."[11]

Similarly irrelevant is any concern that the purpose of the legislation may be simply to proselytize in the public schools. So long as the effect is "neutral"—treating religion the same as nonreligion, as defined by Laycock—then any inquiry into legislative purpose is deemed unnecessary.[12] He even suggests that such an inquiry violates the civil liberties of the legislators.[13]

Simply stated, the Equal Access Act is unacceptable because it allows schools to assist the advancement of religion. The desired equality in the government's relationship to religion and to religious viewpoints is altered through the benefits provided by the Act.

Laycock appears not to recognize state action in the public schools beyond the analogy of government provision of rent-free park land.[14] Yet the state's compulsory attendance requirement, the approving aegis of the public school, and the involvement of teachers—state employees—amount to pervasive state action. Recognition of this governmental involvement has been the basis for the Supreme Court's prophylactic rules concerning prayer in the schools.

While acknowledging that it is almost impossible for a teacher to initiate a moment of silence without encouraging or discouraging prayer, and supporting some prophylactic rules regarding teacher participation in prayer clubs,[15] Laycock remains unconcerned with daily teacher supervision of student religious activities. In Laycock's view, teachers presiding over silent group prayer simply represent the school's "set[ting] aside a moment of silence . . . creating an open forum for private thought in the midst of the school day."[16] Laycock similarly is unconcerned with the problems of parents or outsiders participating in religious meetings. Parents may serve as "volunteer monitors"[17] for religious groups, though

10 *Id.* at 24 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

11 *Id.* at 24-25.

12 *Id.* at 22-23.

13 *Id.* at 23.

14 *Id.* at 25.

15 *Id.* at 57-58.

16 *Id.* at 57.

17 *Id.* at 50.

the spirit of volunteerism would seem to presume religious motivation, enhancing the likelihood of unconstitutional establishment.

Even more troublesome is Professor Laycock's treatment of outsider involvement in the clubs through prayer meetings conducted by religious leaders. "All groups hoping to speak to a student audience know that they can find lots of students in one place at a school. That religious groups seek the same convenient access is one more *incidental consequence of neutrality*."[18] And "[e]vangelical students have been quite aggressive about creating their own organizations; any minister can encourage a devout student to organize a voluntary student group."[19] Apparently, school resources also can be used to promote religious groups through use of announcements in the school newspaper and over the public address system.[20]

That Professor Laycock is not troubled by such proselytizing efforts indicates his distorted view of the establishment clause. Under Laycock's view, the establishment clause does not prohibit the state from bringing students together to be proselytized by other students or even by ministers. He concedes, however, that prayer meetings on public school campuses put pressure on other students to change their religious views and that this will cause "friction" among students.[21]

These effects highlight Professor Laycock's mistake in labelling the establishment problems raised as "simply a question of mistaken attribution." The student religious meetings are held under school aegis. The state's compulsory attendance laws bring the students together, providing a ready-made audience upon which student evangelists may draw. These are government benefits provided to evangelical proselytizers. Students quite properly will understand there to be school support. Such support clearly amounts to an establishment of religion.

Moreover, the state support provided to student religious activities is aid for a quintessentially religious purpose—to indoctrinate. Such aid is distinguishable from aid to religion for a secular purpose.[22] Religions have differing propensities to use this benefit:[23] some religions proselytize; others do not.[24] In providing a benefit only to some religious groups, the state is altering the necessary equality it must maintain in its relationship with all religions and religious views. The principle of equal-

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[18] *Id.* at 35 (emphasis supplied).

[19] *Id.* at 54.

[20] *Id.* at 35.

[21] *Id.* at 32.

[22] *Compare* Witters v. Washington Dep't of Social Servs. for the Blind, 106 S. Ct. 748 (1986) (upholding state aid for ministry study) *with* Board of Educ. v. Allen, 392 U.S. 236 (1968) (public school books may be loaned to sectarian institutions free of charge).

[23] *See* McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 2.

[24] *See* Teitel, *supra* note 7, at 557 n.130.

ity among religions, accordingly, conflicts with Laycock's version of the neutrality principle—that religion and nonreligion be treated similarly.

Professor Laycock responds to the establishment problem by pointing to the neutrality of access to and "voluntariness" of the prayer meetings.[25] For Laycock, the existence of alternatives to religious study in *Bender v. Williamsport Area School District*[26] distinguishes that high school prayer-club case from *McCollum v. Board of Education*,[27] in which the Court invalidated multidenominational religious instruction led by outside religious leaders in the public schools.[28] Laycock similarly assesses moment-of-silence legislation. The Alabama statute in *Wallace v. Jaffree*[29] is considered problematic because of its putative lack of alternatives.

Under Laycock's neutrality theory, the provision of alternatives to religious activities under a broad legislative classification offsets the state's assistance to religion. But the wide array of alternatives assumed by equal access legislation is largely fictitious. The Equal Access Act requires no alternative to the prayer club. The statute merely provides that the trigger to equal access protection is one noncurricular club.[30] That one club very well could be a religious club.[31] Thus, the array is merely a hypothetical one and not likely to overcome establishment concerns. Alabama's silent prayer legislation suffers the same defect. While on the face of the statute there were alternatives, the implicit finding of the Court was that the array of choices was a fictitious one.[32]

Moreover, the "array analysis" glosses over the crucial question of primary effect. At issue is whether notwithstanding an array of alternatives—hypothetical or otherwise—state sponsorship still primarily benefits religion, in violation of the establishment clause.[33] Laycock assumes away this question, proclaiming that religious groups simply "seek the *same convenient access*" as other groups.[34] Yet this is plainly incorrect. It is primarily evangelical organizations, not organizations generally, that seek to increase their membership by reaching out to the state-pro-

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25 *See generally* Laycock, *supra* note 6.

26 106 S. Ct. 1326 (1986).

27 333 U.S. 203 (1948).

28 Laycock suggests that *McCollum* was wrongly decided insofar as it relied on a forum analysis of the public schools. *See* Laycock, *supra* note 6, at 32-34; *cf.* Zorach v. Clauson, 343 U.S. 306 (1952).

29 105 S. Ct. 2479 (1985).

30 20 U.S.C. § 4071(b) (Supp. 1985) (A limited forum exists "[w]henever such school grants an offering . . . for one or more non-curriculum-related student groups to meet . . . .").

31 *See* Widmar v. Vincent, 454 U.S. 263 (1981) (upholding preexisting prayer clubs at university with more than 100 student clubs).

32 *See Wallace*, 105 S. Ct. at 2481-82.

33 *E.g.*, Mueller v. Allen, 483 U.S. 388 (1983); *see* Witters v. Washington Dep't of Social Servs. for the Blind, 106 S. Ct. 748, 753 (1986).

34 Laycock, *supra* note 6, at 35 (emphasis supplied).

vided public school audience.[35]

III. Establishment as an Objective Inquiry

Laycock suggests that the fact of establishment is not problematic. His proposed establishment analysis is a subjective one, informed by the Court's current free exercise doctrine. Any government support of religion is either explained away by disclaimers or regarded as constitutionally immaterial because of the voluntariness of student participation in the prayer clubs. Even a legislative purpose to encourage such participation, Laycock asserts, would be immaterial when the statute is facially neutral.[36] But the question of establishment never has been a subjective one. Voluntariness of participation and willingness to accept government assistance have been irrelevant,[37] as have government explanations and disclaimers of that assistance.[38] Proving coercion is not necessary to show state promotion of religion. The problem is promotion per se.[39]

Interestingly, Laycock would find no coercion in equal access clubs—even those with student and outside religious leader proselytizing. Yet he would find that compulsory school attendance is "coercion" justifying equal access clubs in the public schools.[40] This coercion is characterized as a "burden on religion" legitimizing the religious legislative purpose of the Equal Access Act.[41] A free exercise interest is born! Equal access simultaneously becomes both permissible and necessary. Laycock's neutrality principle collapses two distinct first amendment inquiries, justifying an establishment violation with a purported free exercise burden on religion. The legislative purpose of promoting religion is justified by the purported need to accommodate religion.

The collapse of the two inquiries is not helpful. According to Professor Laycock, the purpose and effect of legislation may be justified by a free exercise need. A preexisting government burden perhaps would jus-

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35 *See* Teitel, *supra* note 7, at 557 n.130.

36 Laycock, *supra* note 6, at 22.

37 *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (invalidating recitation of Lord's Prayer and Bible reading despite ability of students to excuse themselves from participation).

38 *See, e.g.*, Aguilar v. Fenton, 105 S. Ct. 3232 (1985); Stone v. Graham, 449 U.S. 37 (1980); *see also* FCC v. League of Women Voters, 468 U.S. 364 (1984). *But see* Board of Trustees v. McCreary, 105 S. Ct. 1859 (1985).

39 *See* Engel v. Vitale, 370 U.S. 421, 430 (1962).

40 Laycock, *supra* note 6, at 19.

41 For a recent discussion of legitimate religious purposes, see Thornton v. Caldor, 105 S. Ct. 2914, 2949 (1985) (O'Connor, J., concurring); *see also* Wallace v. Jaffree, 105 S. Ct. 2479, 2496 (1985) (O'Connor, J., concurring). For an analysis of the religious purpose of the Equal Access Act, see generally Teitel, *supra* note 7.

Moreover, although coercion is irrelevant as a first amendment establishment matter, it is relevant under the Equal Access Act. The statute protects the student's right to choose voluntarily whether to participate in religious activities. *See* 20 U.S.C. § 4071(c)(3) (Supp. 1985). Accordingly, proselytizing, even if countenanced by Laycock's first amendment neutrality principle, would present a violation of the Act.

tify a religious legislative purpose to restore religious equality. Yet to collapse these inquiries discounts the establishment analysis. The collapse pits coercion against coercion and is not the relevant test. Rather, the first amendment requires a balancing of alternatives.[42] It requires an independent examination of establishment concerns, and then an independent analysis whether the government places a burden on religion. These independent analyses help to determine whether accommodations are needed and whether accommodations that do not raise establishment concerns are possible.[43] Finally, existing alternatives must be weighed.

Professor Laycock's accommodationism would promote religion without addressing the questions whether there actually is a preexisting government burden on religion, and if so, what type of counterbalance is necessary. Professor Laycock ignores the threshold issue whether government assistance is required.[44] The accommodationism espoused by Laycock is also more than government assistance in offsetting a preexisting government burden.[45]

Furthermore, a religious legislative purpose presents problems in itself.[46] Such a purpose is a good indicator of intended religious effect. In *Wallace*, without a religious legislative purpose, the Court would not necessarily have found that the moment-of-silence statute at issue had the effect of advancing religion. To the contrary, on its face the statute presented an array of alternatives determined to be fictitious only after examination of the legislative history. The same is true of the antievolution statute invalidated in *Epperson v. Arkansas*[47] because of its religious legislative purpose.

Laycock's neutrality posits a putative free exercise burden in order

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42 *See* Teitel, *The Supreme Court's 1984-85 Church-State Decisions—Judicial Paths of Least Resistance*, 21 HARV. C.R.-C.L. L. REV. 651, 684 (1986).

43 *Id.* at 684.

44 *See, e.g.*, Gillette v. United States, 401 U.S. 437, 453 (1971).

45 *See* Wallace v. Jaffree, 105 S. Ct. 2479, 2504 (1986) (O'Connor J., concurring).

46 *Compare id.* at 2495 (religious purpose of moment-of-silence statute is manifested in legislators' statements and in sequence and history of three statutes); Stone v. Graham, 449 U.S. 39, 40 (1980) (statute's avowed purpose was secular, not religious, when it required notation in small print of Ten Commandments in public school classrooms); Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (statutory requirement that Biblical passages be read or recited held to be religious ceremony and, despite excusal provisions, was intended by state to be religious ceremony) *and* May v. Cooperman, 780 F.2d 240, 251 (3d Cir. 1985) (moment-of-silence statute, though facially neutral, had religious legislative purpose), *juris. postponed sub nom.* Karcher v. May, 55 U.S.L.W. 3507 (U.S. Jan. 27, 1987) (No. 85-1551) *with* Palmer v. Thompson, 403 U.S. 217 (1971) (Court will not invalidate legislation based solely on asserted illicit legislative motivation—here, ideological opposition to racially integrated swimming pools); United States v. O'Brien, 391 U.S. 367 (1968) (government regulation is sufficiently justified if it is within constitutional power of government and furthers important governmental interest) *and* United States v. Darby, 312 U.S. 100, 115 (1941) (motive and purpose of regulation of interstate commerce are matters of legislative judgment not restricted by Constitution and not controlled by courts); *see also* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 685 (1980).

47 393 U.S. 37 (1971).

to overcome the establishment problems posed by equal access clubs. Laycock terms any dissimilar treatment of religion in the schools "discrimination."[48] This "hostility" and the "coercion" of compulsory school attendance together ostensibly pose a free exercise burden. Yet the "discrimination" of the establishment clause and the "coercion" of compulsory attendance do not burden religion.[49] There are many options. Students are able to pray privately and in groups on school premises evenings and weekdays. Similarly, contrary to Professor Laycock's assertion, there are many non-state-sponsored opportunities to proselytize. Prohibiting proselytizing on public school grounds during school hours does not deny the freedom to proselytize. Students may proselytize on school premises at times not associated with the school day, in public parks and streets, and on private property.

The other purported burden on religion is almost tautological. Professor Laycock claims that in the absence of religion clubs, the schools are "antireligion"—that neutrality requires religious clubs in the schools.[50] Laycock's claim takes *Lemon v. Kurtzman*,[51] barring the advancement or inhibition of religion, and guts it of all meaning. The Supreme Court has long stated that the secular curriculum of public schools does not amount to hostility to religion.[52] A program of "nonreligion" has not been considered to "inhibit" religion or to be equivalent to "antireligion." The courts have resisted the "dual model" now fashionable among accommodationists who suggest that there are only two viewpoints regarding religion in the public schools—for and against.[53]

Even if there were a free exercise burden—that is, if a student could show that his religion required him to pray or to proselytize nonadherents at school—the establishment concerns still would be overriding.[54] Under my proposed first amendment least-restrictive-alternative analy-

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48 Laycock, *supra* note 6, at 21-22.

49 *See Wallace*, 105 S. Ct. at 2491 n.45; *see also id.* at 2505 (O'Connor, J., concurring).

50 Laycock, *supra* note 6, at 3, 35.

51 403 U.S. 602 (1971).

52 *See* Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1968); Engel v. Vitale, 370 U.S. 421, 434 (1964); McCollum v. Board of Educ., 333 U.S. 203, 211 (1948).

53 *See, e.g.*, McLean v. Arkansas, 529 F. Supp. 1255, 1267 (E.D. Ark. 1982).

54 The free exercise interest may involve group prayer alone or it may include proselytizing of uncommitted students. The proselytizing claim arguably is stronger—for there are more alternatives to use of the schools for those seeking to pray together than for those seeking to reach uncommitted students. That proselytizing is a central purpose for equal access groups is clear from the case law. *See, e.g.*, Chess v. Widmar, 635 F.2d 1310, 1314 (8th Cir. 1980) (university prayer group's disclosed purpose was to "promote a knowledge of Jesus Christ among students .... [T]he undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting in Jesus Christ."), *rev'd sub nom.* Widmar v. Vincent, 454 U.S. 263 (1981); *see also* Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1039 (5th Cir. 1982) (practice at issue concerned distribution of New Testaments to students, visiting "evangelistic speakers," and "loudspeaker prayer"); *cf.* Brandon v. Board of Educ., 635 F.2d 971, 977 (2d Cir. 1980) (many alternatives to the school day for "group prayer").

sis,[55] there are fewer alternatives for the proselytizee in the public schools than for the proselytizer. The proselytizer may go elsewhere, while the proselytizee, so long as he or she is on the public school premises, may become an unwilling captive to proselytization.

Moreover, the freedom to resist adherence complements the freedom to seek adherents.[56] Given these correlated religious liberty interests, the absence of the religion club from the public school does not necessarily result in a net inhibition of religious freeedom. Those with particular religious tenets burdened by some aspect of the school curriculum simply must seek accommodations of an individual nature.[57]

Laycock claims that the state has treated religion discriminatorily when religious speech is the only speech excluded from a public school.[58] At bottom his argument is that in many circumstances, government sponsorship of religious clubs is not only permissible, but required.

IV. In Search of Equality: The Special Treatment of Religious Speech in the Public Schools

This Article has discussed the sponsorship problems in the public schools that result in the Equal Access Act's promotion of impermissible government endorsement of religion. Part III addressed claims that such government promotion of religion is required because of alleged free exercise burdens in the public schools. I now turn to the question of what the endorsement of religion presented by equal access in the public schools says about whether government must treat religious speech differently from other private speech in the public schools. At some level, the theory of the Equal Access Act itself recognizes that both discriminatory treatment and government support for religious speech are problematic. Neutrality, in the sense of equal treatment, is the ideal. Accordingly, the important question becomes whether it is easier to obtain government neutrality through intervention or without it.

Theorists who equate government support of private political and religious speech would apply similar principles in examining government assistance to each. I propose instead a theory of equality that distinguishes between private religious and political speech. I show how, both historically and today, the response of government to private speech has differed depending on whether the private speech was political or religious. I then analyze equal access and other proposed government assistance programs to determine whether such government intervention advances neutrality.

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55 *See* Teitel, *supra* note 42, at 684

56 Wallace v. Jaffree, 105 S. Ct. 2479, 2488 (1985).

57 *See* Bowen v. Roy, 106 S. Ct. 2147, 2152 (1986).

58 Laycock, *supra* note 6, at 3, 13.

A. Discriminatory Treatment of Religious Speech

Professor Laycock's neutrality principle requires that religion and nonreligion be treated the same. Yet in the public schools they may not be. Even the Equal Access Act, as it regulates student religious speech, takes great precautions to prevent government sponsorship of student—that is, private—religious speech.[59] The danger of such sponsorship on school premises actually requires "discriminatory" treatment of certain religious speech. This treatment is necessary to avoid confusion between religious speech by students and government. The risk of such confusion requires government to treat student religious and secular speech dissimilarly in the public schools. There are two possible "neutrality" principles. One concerns religious speech by government. The other concerns religious speech by private persons. Professor Laycock describes these principles as government neutrality toward religion in its own speech and government neutrality toward private religious and secular speech.[60] The inquiries are separate, yet the results are correlated. There is a distinction between religious government speech and secular government speech: the former is forbidden and the latter permitted. This distinction has consequences for government treatment of private speech. As Laycock concedes, "The school environment is relevant because of the risk that the school may make private speech its own by endorsing or sponsoring it."[61] Because government is unable to exercise its own religious speech, it must remain completely autonomous from the private religious speaker.

A prophylactic distance inheres in the distinction between government religious and secular speech. A special judicial presumption against government support of private religious speech[62] minimizes confusion between religious speech by government, which is barred, and such speech by a private party, which is permitted. A smaller margin of error will be allowed for government support of private religious views than for similar government support of private political or other secular views.

B. Neutrality Through Government Assistance

Professor Laycock glosses over the two differing mandates, suggesting that in the schools, government need only be neutral toward all subject matter. Uniformity of access as provided in the Equal Access Act purportedly ensures this neutrality.[63]

Other commentators similarly have sought to bridge the gap be-

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59 *Id.* at 2 n.8.

60 *Id.* at 3.

61 *Id.* at 9.

62 *See* Lynch v. Donnelly, 485 U.S. 668, 683 (1984) (O'Connor, J., concurring).

63 Laycock, *supra* note 6, at 13.

tween the two differing mandates. Professors McConnell and Kamenshine, like Professor Laycock, would equate religious and political speech.[64] While distinguishing government from private speech, all three argue that the sponsorship limits that separate government and private religious speech similarly govern political speech.

C. Politics Versus Religion—Two Models of Governmental Relations

The equal treatment proposition endorsed by Professors Laycock, McConnell, and Kamenshine, as enacted in the Equal Access Act, protects against discrimination "on the basis of religious, political, philosophical, or other content of the speech at such meetings."[65] The problem with this model is that it assumes away the problem of government sponsorship of religion in the public schools. Government sponsorship of religious and political speech presents two distinct problems relating to the differences in subject matter. Because the problems are dissimilar, the proposed remedy—the Equal Access Act—is not adequate and may be constitutionally suspect. (The Act recognizes this problem, in part, by making certain sponsorship restrictions applicable only to private religious speech.)

Although we do not distinguish religious and political speech when government sponsorship is de minimis—for example, in the public park—the danger of government sponsorship is substantial in the public schools. When government sponsorship is a serious concern, I propose an analysis that varies according to the kind of speech implicated; religious speech, political-partisan-orthodox speech, and other speech should all be treated differently.

This analysis highlights the problems with the Equal Access Act and its underlying neutrality principles. These neutrality principles assume that equal access may remedy the different problems posed by government sponsorship of religion and politics. In contrast, my analysis, based on principles of equality, distinguishes government support of private religious speech from government support of private political speech. Religious equality, I maintain, is best preserved not by uniformity in government assistance to private religious speech, but rather by nonintervention. Historic establishment concerns, as well as the ongoing role of first amendment judicial review, support my equality principle.[66]

There is no parallel in the relationship between government and reli-

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64 *See* Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); McConnell, *supra* note 23.

65 20 U.S.C. § 4071(a) (Supp. 1985).

66 *See* Wallace v. Jaffree, 105 S. Ct. 2479, 2489 n.36 (1985) (goal to cure divisiveness among Christian sects).

As noted by Justice O'Connor in her concurrence in Lynch v. Donnelly, 485 U.S. 668, 683 (1984), "[w]hat is crucial is that government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that

gion and the relationship between government and politics. The business of government is politics. Thus, it would be meaningless to say that the government may not sponsor political speech. Government speaks politically all the time.[67] Further, because governmental institutions are majoritarian, government political speech is the speech of the majority.[68]

In contrast, it is not the role of government to provide a forum for the interchange of private religious views. First, there are nongovernmental fora for religious expression. Second, as I discussed above, government's political speech is permitted while similar government religious speech is prohibited.[69] Finally, in our democratic system, government speaks politically for the majority. Religion, on the other hand, concerns matters of individual conscience, which are not generally regarded as questions for community consensus.[70]

While government has a minimal role in providing fora for private religious speech, it plays an active role in dealing with religious institutions.[71] Government must serve "the political interest in forestalling intolerance."[72] This role requires government to maintain a relationship of equality towards various religious institutions and their beliefs. Protecting this relationship presents problems not posed even by government support of partisan political views.

The distinctions are illustrated by comparing government support for political and religious speech. In the political arena, the protection of the forum for individual expression is the paramount concern. In the area of religious speech, protection of equality among religions is ac-

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effect, whether intentionally or unintentionally, that make religion change, in reality or public perception, its status in the political community."

Determing whether such practices have the effect of violating the principle of equality toward religion is the role of the Court. "[T]he question is . . . in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Id.*

67 Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 568-69 (1980).

68 *See* M. YUDOF, WHEN GOVERNMENT SPEAKS 46 (1983).

69 *See generally* Shiffrin, *supra* note 67.

70 Professor McConnell states in his article, *supra* note 23, that issues of freedom of choice animate both the free speech and religion clauses. Yet this begs the question whether individual freedom of choice is best protected with or without government assistance. As the Supreme Court noted in distinguishing government assistance of the electoral process from such assistance of religion, "[t]he historical bases of the Religion and Speech clauses are markedly different. Intolerable prosecution throughout history led to the Framer's firm *determination that religious worship*—both in method and belief—must be *strictly protected from government intervention.*" Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) (emphasis supplied).

71 Even commentators seeking to make the opposite argument—to equate political and religious establishment—have noted this basic difference:

> The government's interaction with religious organizations is fundamentally different from its interaction with political process. A democratic form of government can operate without controlling or being controlled by religious groups. The same is not true, however, with politics. The political process must control the government if a democratic system is to survive.

Kamenshine, *supra* note 64, at 1119.

72 Wallace v. Jaffree, 105 S. Ct. 2479, 2489 (1985).

corded similar priority. To satisfy these varying interests, government has attempted to ensure uniformity of assistance to political groups on a nonpartisan basis, but to avoid intervention in religious matters.

To what extent may government sponsor a forum for public debate and not compromise or coerce individual political beliefs? When orthodoxy is the specter—that is, government sponsors speech that is ideological or coercive—there are several remedies: either the forum may be closed, the individual may attempt to exempt himself, or the forum may be broadened to allow the presentation of countervailing views.

The power of government must further, and not threaten, public debate of political issues.[73] Accordingly, the closing of the forum should be the least used remedy. Closing fora prevents both private expression and government speech on matters of public import. Yet when the speech is necessarily one-sided (partisan)—as in the case of lobbying—government support of the forum—for instance, tax exemption—has been withdrawn.[74]

Another remedy is exemption. When government supports partisan or ideological speech, the individual may seek to exempt him or herself. The exemption remedy has been difficult to obtain in the area of political-speech financing. The individual taxpayer has been found to have no standing in such cases.[75] In areas other than financing, when government coercion is involved, such exemptions have been available, inside and outside the school system.[76]

The preferred remedy is to cure partisan government support of political speech through amplification of the debate. This remedy is used to allow government support of political campaigns[77] and public broadcasting.[78] The amplification of the debate serves two purposes. It repairs the partisanship problem that occurs when government skews the gathering of adherents for political positions or parties. Beyond this immediate purpose, it serves a fundamental underlying purpose of providing a public forum for interchange on controversial issues of public importance.

In summary, private political expression is often supported by government, although it may not be coerced.[79] In contrast, most government support of religious expression is forbidden, as illustrated by the

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73 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 7 (1979).

74 *See* Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849, 854 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

75 *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). *But see* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

76 *See* Wooley v. Maynard, 430 U.S. 705 (1977); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

77 Buckley v. Valeo, 424 U.S. 1 (1976).

78 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); FCC v. League of Women Voters, 468 U.S. 364, 380 (1984).

79 Wooley v. Maynard, 430 U.S. 705 (1977); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *see also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (uphold-

prayer and Bible reading cases in the 1960s.[80] Even when individual exemptions from these majoritarian religious activities were available, the Court held such individual exemptions were not sufficient.[81] It went on to invalidate legislation providing for Bible reading and for recitation of the Lord's Prayer.[82]

While the preferred remedy for coercion relating to political speech is amplification of the debate, the provision of alternatives to government support for private religious expression was immaterial in *McCollum v. Board of Education*.[83] True, the school in *McCollum* lacked an atheism course. The answer to religious instruction could have been more speech, as Professor Laycock would propose,[84] but the underlying problem would have remained: government—a majoritarian entity—would have been assisting in the gathering of religious adherents.

The neutrality principle espoused by Professor Laycock suggests that government assistance—so long as it is provided neutrally to an array of religious and nonreligious groups—does not collide with the government's mandate of equality in dealing with religious speech.

One problem with the neutrality principle embraced by equal access is its assumption concerning the pre-Equal Access Act religious viewpoint of the public schools. Laycock suggests that neutrality regarding religion is best protected by ostensibly neutral assistance to religion through equal access. The assumption, as discussed in section III, is that schools without equal access are not neutral regarding religion—that they are somehow hostile to religion. The further assumption is that not teaching religion is an expression of a government viewpoint regarding religion and the correlated point that equal access rectifies the "imbalance."

If one does not accept Laycock's premise regarding the current state of the public schools, then equal access does not present impartial government assistance to religion—even if multidenominational. Furthermore, the question whether public schools are currently "neutral" regarding religion is more and more controversial, since it is often linked to calls not only for equal access and moment-of-silence legislation, but also to proposals for the teaching of creationism in the public schools[85]

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ing wearing of black armbands when school previously had permitted variety of symbolic political speech, including campaign buttons and Nazi iron crosses).

80 Epperson v. Arkansas, 393 U.S. 37 (1971); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421, 430 (1962).

81 *Abington*, 374 U.S. at 224-25; *Engel*, 370 U.S. at 430; McCollum v. Board of Educ., 333 U.S. 203, 209 (1948).

82 *See supra* note 81.

83 333 U.S. 203 (1948) (involving voluntary multidenominational religious instruction on public school premises).

84 *See generally* Laycock, *supra* note 6.

85 *See, e.g.*, Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985), *prob. juris. noted*, 106 S. Ct. 1946 (1986).

and censorship of "secular humanism."[86] Parochial aid provides a useful example. Financial aid is given to religious and nonreligious beneficiaries alike. Such aid generally has been sustained when it did not assist a religious purpose and was not intrinsically religious (for example, secular textbooks,[87] buses,[88] and construction grants[89]). Last Term, however, the Court sustained aid, albeit "indirect," for the purpose of training a blind student for the ministry.[90] Yet any allocation of funding or parochial aid—whether per capita or by religious group—results in distortions of equality. In the former, the minority subsidizes the majority; in the latter, the reverse.

Direct aid for religious purposes raises even more serious equality problems. To some extent these are recognized in the Equal Access Act. Notwithstanding the mandate of equal access, government support allowed under the Act varies according to subject matter. Curricular clubs draw the full support of the school. These span athletic teams to the potentially polemic history and philosophy clubs. Noncurricular clubs other than religious clubs may obtain a classroom and adviser. Religious clubs are permitted only a classroom. The Act prohibits school support of the inherently religious functions of worship and proselytizing new adherents. Thus, the law itself shows at least a partial recognition that the problem of government sponsorship cannot be fixed merely by providing an array of alternatives.

The underlying problem may be the special nature of religion. At least one commentator has suggested that religion is not a subject matter, but rather a viewpoint, and hence intrinsically controversial.[91] If it is a viewpoint, then the remaining battle is to define its opposite. Professor Laycock's Article rings the first shot. He and my accommodationist opponents would say "nonreligion." I maintain it is "antireligion." Their call for putative "neutrality" seeks organized religion in the schools through equal access and moments of silence, as well as other religiously based modifications to the curriculum.[92] Whether the public schools may resist this call and remain "nonreligious" will determine their future.

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86 *See* Smith v. Wallace, No. 82-0793-h (D. Ga. filed 1986).

87 Tilton v. Richardson, 403 U.S. 672 (1971).

88 Board of Educ. v. Allen, 392 U.S. 236 (1968).

89 Everson v. Board of Educ., 330 U.S. 1 (1948).

90 *See* Witters v. Washington Dep't of Social Servs. for the Blind, 106 S. Ct. 748 (1985).

91 *See* McConnell, *supra* note 19, at 23.

92 *See, e.g.*, Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985) (involving teaching of creationism), *prob. juris. noted*, 106 S. Ct. 1946 (1986); Mozert v. Hawkins County Pub. Schools, 579 F. Supp. 1051 (E.D. Tenn.) (involving censorship of secular humanism), *aff'd in part and rev'd in part*, 582 F. Supp. 401 (E.D. Tenn. 1984), *rev'd*, 765 F.2d 75 (6th Cir. 1985).