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The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis.

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ARTICLES

The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis

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Introduction

First amendment principles protect both freedom of speech and of religion.[1] The First Amendment also limits governmental involvement in or sponsorship of religious activities.[2] The controversy in recent years over the presence of student religious clubs in the public schools,[3] heightened by the Supreme Court's decision in *Widmar v. Vincent*,[4] raises the issue of whether these two first amendment rights compete, and if so, how they are to be reconciled. This Article analyzes equal access programs, which would allow student-initiated religious activities the same rights in the public high school allowed to other student groups.[5] The

1. The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. The Establishment and Free Exercise Clauses protecting religious freedom provide "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The First Amendment has been held applicable to the states through the Fourteenth Amendment. Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause); Gitlow v. New York, 268 U.S. 652, 666 (1925) (Free Exercise Clause).

2. Everson v. Board of Educ., 330 U.S. at 15.

3. *See infra* note 38.

4. 454 U.S. 263 (1981). *Widmar* concerned the extent to which students in public universities may voluntarily gather for devotional exercises. The Court held that when a state university creates a forum on the university campus open for use by student groups, the university's exclusion of religious student groups is a "content-based exclusion of religious speech" in violation of "the fundamental principle that a state regulation of speech should be content-neutral. . . ." *Id.* at 277. In so holding, the Court declared "[i]t does not follow . . . that an 'equal access' policy would be incompatible with this Court's Establishment Clause cases." *Id.* at 271.

5. The "equal access" theory, that all student-initiated activities in the public schools—religious or nonreligious—must be treated equally, was articulated by the Supreme Court in Widmar v. Vincent, 454 U.S. 263 (1981).

The equal access principles applied in *Widmar* derive from public forum doctrine. This doctrine, premised on both First Amendment free speech, *see* Fowler v. Rhode Island, 345 U.S. 67 (1953), and Fourteenth Amendment equal protection principles, *see, e.g.*, Carey v.

Article proposes that equal access programs in the public secondary schools raise significant establishment clause problems with no countervailing compelling first amendment free speech mandate.

The equal access approach to prayer and other religious activities in the public schools recently gained the approval of Congress with the enactment of the Equal Access Act.[6] The constitutionality of this Act may be implicated in *Bender v. Williamsport Area School District,*[7] a pre-Act case currently before the United States Supreme Court, which involves a

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Brown, 447 U.S. 455 (1980), essentially provides that in a public forum there may be no content discrimination of speech. *See generally* Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) (cited in *Widmar,* 454 U.S. at 267 n.5). The public forum principle was extended to the public university in Healy v. James, 408 U.S. 169, 180 (1972).

In *Widmar,* a public university that had opened its facilities to over one hundred different student groups was held to constitute an open forum, where all groups, religious and nonreligious, must be treated equally. 454 U.S. at 268. This open forum character of the facility, together with the absence of school sponsorship, raised no countervailing establishment problems which might have called for special treatment of the religious student group. *Id.* at 271. *See generally* Note, *The Rights of Student Religious Groups Under the First Amendment to Hold Religious Meetings on the Public University Campus,* 33 RUTGERS L. REV. 1008, 1050-51 (1981).

The logic of the *Widmar* holding, limited by the Court only to those public universities providing a public forum, was extended to a public high school in Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983), but this decision was reversed by the Third Circuit, 741 F.2d 538 (3d Cir. 1984). *Cf.* Bell v. Little Axe Indep. School Dist., 766 F.2d 1391 (10th Cir. 1985); Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied,* 459 U.S. 1155 (1983); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123 (1981) discussed *infra* notes 48-54 and accompanying text.

Proponents of equal access legislation in the U.S. Congress, seeking to extend the *Widmar* decision to those high schools receiving federal funding, have expressed an "equality" thesis similar to that applied by the district court in *Bender. See Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Sen. Comm. on the Judiciary,* 98th Cong., 1st Sess. 5 (1983) (prepared statement of Sen. Mark Hatfield) [hereinafter cited as *Sen. Jud. Comm. Equal Access Hearings*]. "What this all attempts to do is to put voluntary religious activity on an equal footing with other extracurricular activities that are permitted on school premises." *Id.* at 26 (statement of Hon. Terrel Bell, Secretary of Education). *See also* Amicus Brief of Senator Hatfield and Twenty-Three Other U.S. Senators, Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982) *reprinted in Sen. Jud. Comm. Equal Access Hearings* at 6 (stating that failure to extend *Widmar* to the high schools violated the "principle of neutrality" toward religion and violated the free speech rights of students).

6. Pub. L. No. 98-377, 98 Stat. 1302 (1984) (codified at 20 U.S.C. §§ 4071-73). The Equal Access Act was enacted to allow student religious groups to operate on public secondary school premises to the same extent as other noncurricular student activites. *See infra* note 30.

7. 741 F.2d 538 (3d Cir. 1984), *cert. granted,* 106 S. Ct. 518 (1985) (upholding school decision to deny equal access to student religious group on basis that student free speech rights were overridden by establishment concerns). The *Bender* decision discusses the equal access congressional hearings process concerning the Religious Speech Protection Act, predecessor to the Equal Access Act, as evidence of the complex first amendment interests triggered by equal access. 741 F.2d at 554 n.23.

high school prayer club meeting during the school day.[8] The Supreme Court will address whether permission for such club meetings is required under first and fourteenth amendment free speech,[9] equal protection,[10] and free exercise of religion principles,[11] or is prohibited under the First

8. *Id.* at 542. The student proposal provided that "[t]he organization will be a nondenominational prayer fellowship. . . . Regular meetings . . . will be held on school premises during the Tuesday and Thursday morning activity periods." *Id.*

9. The free speech right to equal access has been enunciated in many cases. As applied to the public universities, it was accepted by the Supreme Court in Widmar v. Vincent, 454 U.S. 263 (1981). In contrast, in every case barring one that has considered the issue in the public high school context, it has been rejected. *Lubbock*, 669 F.2d at 1048; *Brandon*, 635 F.2d at 980-81; Stein v. Oshinsky, 348 F.2d 999, 1002 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965); Mary May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761 (S.D. Ind. 1985) (denial of access to school property held not to be a violation of teachers' free speech rights); Hunt v. Board of Educ., 321 F. Supp. 1263, 1266 (S.D. W. Va. 1971); Trietley v. Board of Educ., 65 A.D.2d 1, 8, 409 N.Y.S.2d 912, 916 (1978). *See also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (First Amendment not violated when elected union granted access to interschool mail system while access denied to rival union); Student Coalition For Peace v. Lower Merion School, 776 F.2d 431 (3d Cir. 1985) (no first amendment right of access to school athletic field). *But see* Bender v. Williamsport, 563 F. Supp. 697 (M.D. Pa. 1983), *rev'd on other grounds*, 741 F.2d 538 (3d Cir. 1984) (establishment concern considered more compelling than free speech right), *cert. granted*, 106 S. Ct. 518 (1985). *But cf.* Clergy and Laity Concerned v. Chicago Bd. of Educ., 586 F. Supp. 1408 (N.D. Ill. 1984) (First Amendment violated when board of education allowed military recruiters access to its schools while denying same privilege to activists).

The chief argument for proponents of congressional equal access legislation centers on free speech and the tradition of free exchange of ideas, which it is argued, requires equal treatment of religious and nonreligious speech in public high schools under the constitutional principle of "content neutrality." *Sen. Jud. Comm. Equal Access Hearings, supra* note 5, at 8 (prepared statement of Sen. Hatfield).

10. *See supra* note 5. The only cases finding an equal protection right to religious clubs concern a university setting. *E.g.*, Stacy v. Williams, 306 F. Supp. 963 (N.D. Miss. 1969). In *Widmar*, the Court relied upon public forum cases providing for Fourteenth Amendment protection against content discrimination. *See* Carey v. Brown, 447 U.S. 455, 461, 464-65 (1980) (relied on in *Widmar*, 454 U.S. at 270); Police Dept. v. Mosley, 408 U.S. 92 (1972) (relied on in *Widmar*, 454 U.S. at 267 n.5). *See also* Toms & Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 EMORY L.J. 3, 42 (1978).

To the extent equal protection principles prohibit distinction between the religious and nonreligious, *see, e.g., Widmar*, 454 U.S. at 277; *Bender*, 741 F.2d at 569 (Adams, J., dissenting), as opposed to drawing distinctions among religions, *see, e.g.*, Larson v. Valente, 456 U.S. 228 (1982), these principles would appear to conflict with the establishment mandate. *But see* Everson v. Board of Educ., 330 U.S. 1, 7 (1947).

11. Although the *Bender* case itself does not consider a free exercise right to equal access, this claim has been addressed by courts in the context of religious expression rights, and was raised by the Equal Access Act. Summary judgment had been granted below against the *Bender* plaintiffs' free exercise claims. 563 F. Supp. at 703. This ruling was not disturbed by the Third Circuit which held that appellants' free speech right to gather in order to pray in school clubs was outweighed by establishment concerns. 741 F.2d at 560.

Accordingly, free exercise and free speech concerns have been treated interchangeably by the Supreme Court when public forums were at issue, depending on the form of religious expression. *Compare* Widmar v. Vincent, 454 U.S. 263 (1981) (worship as religious speech); Niemotko v. Maryland, 340 U.S. 268 (1951) (Bible talks treated as exercise of freedom of

Amendment's separation of church and state.[12]

The premise of this Article is that the Equal Access Act is unconstitutional under the First Amendment Establishment Clause. The legislative history shows its purpose was to bring organized prayer, barred by the Supreme Court in the 1960's,[13] back into the public schools.[14] In addition, the extent of school sponsorship contemplated by the Act is unconstitutional.[15]

Bender is not the first time the Court will have considered the role of organized religion in the public schools. The Court has consistently prohibited religious activities organized under presumptive government sponsorship as follows: on public school premises, during the school

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speech); Kunz v. New York, 340 U.S. 290 (1951) (religious meetings on city streets protected as exercise of freedom of speech); *and* Saia v. New York, 334 U.S. 558 (1948) (use of sound amplification devices in public places for religious purposes protected as free speech) *with* Heffron v. International Soc'y of Krishna Consciousness, 452 U.S. 640 (1981) (solicitation in fairgrounds treated as free exercise) *and* Cantwell v. Connecticut, 310 U.S. 296 (1940) (solicitation as free exercise).

The free exercise claim to equal access religious meetings was raised in *Widmar* and many other cases. The Supreme Court did not reach it in *Widmar,* 454 U.S. at 273 n.13. In almost every other case considering the issue the argument has been rejected. *Bender,* 741 F.2d at 560; Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1048 (1982); Karen B. v. Treen, 653 F.2d 897, 902 (1981); Brandon v. Board of Educ., 635 F.2d at 977; Stein v. Oshinsky, 348 F.2d 999, 1001 (2d Cir. 1965); Hunt v. Board of Educ., 321 F. Supp. at 1266-67; Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 16-17, 137 Cal. Rptr. 43, 52-53 (1977); Trietley v. Board of Educ., 65 A.D.2d 1, 8, 409 N.Y.S.2d 912, 916-17 (1978). *But see* Dittman v. Western Wash. Univ., No. 79-1189, slip op. (W.D. Wash. Feb. 28, 1980) (finding free exercise right to prayer meetings in public university but held overridden by establishment interest), *vacated and remanded* in light of *Widmar,* No. 80-3120 (9th Cir. Mar. 30, 1982); Keegan v. University of Del., 349 A.2d 14 (Del. 1975) (upholding free exercise right to religious clubs in public university), *cert. denied,* 424 U.S. 934 (1976).

In the congressional equal access debate, the free exercise claim to equal access represented a minority view advocated in the testimony of Professor Laurence Tribe. *Religious Speech Protection Act: Hearing on H.R. 4996 Before the Subcomm. on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor,* 98th Cong., 2d Sess. 45 (1984) [hereinafter cited as *Religious Speech Protection Act Hearings*]. For full discussion of the free exercise argument, *see infra* text accompanying notes 333-55.

12. *See, e.g., infra* note 38.

13. *See, e.g.,* Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

14. Although the Act strives to mask its religious purpose by providing protection against discrimination for all student clubs, the Act's provisions limiting school sponsorship of clubs—required by the Constitution only for religious clubs—together with legislative history of the Act and its predecessor bills, reveal its true religious purpose. *See infra* notes 125-41 and accompanying text. As stated by its sponsors, the intent of equal access legislation was to "clear up the mistakes of the two circuits and school districts (*Brandon* and *Lubbock*) which have followed *Widmar.*" Memorandum to Senate Staff from March Bell and Karl Moor, Subcomm. on Security and Terrorism at 1 (Jan. 14, 1983).

15. *See infra* notes 165-224 and accompanying text.

day, under faculty supervision, and with attendance required by state law.[16] This Article argues that even the presence of numerous different religious groups in a public school—the "best case scenario," according to equal access proponents—involves the government in the advancement of religion and entangles the state in affairs best left to religious authorities.[17]

Proponents of equal access argue that all student activities should be treated alike.[18] They further claim that because these religious activities are initiated by students rather than the state, they are not barred by the Establishment Clause.[19] This Article argues that equal access religious

16. *See, e.g.,* Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (disallowing teacher-led morning Bible readings); Engel v. Vitale, 370 U.S. 421 (1962) (striking New York state law providing for morning prayer); McCollum v. Board of Educ., 333 U.S. 203 (1948) (disallowing multi-denominational religious instruction classes conducted by private religious instructors on school premises).

17. *See, e.g., Abington,* 374 U.S. at 216; *McCollum,* 333 U.S. at 210-11; *Everson,* 330 U.S. at 15-16.

18. The "equality argument" maintains that it is not a violation of the Establishment Clause to provide a benefit to religion that is provided to all. *See, e.g.,* Mueller v. Allen, 463 U.S. 388 (1983); *Widmar,* 454 U.S. 263; Walz v. Tax Comm'n, 397 U.S. 664 (1970). *See also* Tilton v. Richardson, 403 U.S. 672 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947); Clark, *Comments on Some Policies Underlying the Constitutional Law of Religious Freedom,* 64 MINN. L. REV. 453, 456-57 (1980). This argument was used in *Widmar,* but there the only benefit accorded was the use of public forum premises. Similarly, *Mueller* and *Walz,* concerning parochial aid and tax exemptions, respectively, involved an arguably low level of indirect government advancement of religion as compared to the greater level of sponsorship involved when religious activities are organized in the public schools.

19. The materiality of the "student-initiation" factor was the central argument in the petition for certiorari in *Lubbock,* filed after the Supreme Court decision in *Widmar.* The petition was filed in an amicus brief written by twenty-four Senators seeking reversal of the Fifth Circuit's decision disallowing an equal access policy providing for student prayer clubs before and after school. "Amici believe that neither legislation nor a constitutional amendment is required to permit a school to open its facilities for all appropriate student-initiated and student-managed activities including, if the students wish, religious activities." Amicus Brief of Senator Hatfield and Twenty-Three Other U.S. Senators at 2, Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *reprinted in Sen. Jud. Comm. Equal Access Hearings, supra* note 5, at 22.

The argument that the Supreme Court should extend the *Widmar* decision to "student-initiated" high school student prayer clubs was popular in the literature written subsequent to *Widmar,* which propounded that the decision was based upon the materiality of the student-initiation factor in the establishment clause analysis. *See* Drakeman & Seawright, *God and Kids at School: Voluntary Religious Activities in the Public Schools,* 14 SETON HALL 252 (1984); Loewy, *School Prayer, Neutrality, and the Open Forum: Why We Don't Need a Constitutional Amendment,* 61 N.C.L. REV. 141 (1982); Toms & Whitehead, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech,* 72 GEO. L.J. 135, 155 (1983); Note, *The Constitutionality of Student-Initiated Religious Meetings on Public School Grounds,* 50 U. CIN. L. REV. 740-85 (1981); Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools,* 92 YALE L.J. 499, 502 (1983); Comment, *Widmar v. Vincent and The Public Forum Doctrine: Time to Reconsider Public*

activities are prohibited whether student-initiated or not because a presumption of state sponsorship arises whenever religious activities are organized on public school premises at times associated with the school day. This state support for religious activities organized in the public schools threatens the essence of the establishment bar.[20] Government aid to religion, the Framers believed, erodes that equality among religions necessary for meaningful free exercise of religion.[21] The Framers maintained even if initiated on a multi-denominational basis such aid quickly converts to sectarian benefit.[22] Avoidance of strife among religions for government support yields the principle that government may not assist religions to gather their adherents.[23] Nowhere is this principle more important and nowhere has it been more severely threatened than in the

School Prayer, 1984 WIS. L. REV. 147. *But see* Note, *State University Regulation Prohibiting Use of Facilities for Student Religious Worship or Teaching Violates Free Speech Rights,* 66 MARQ. L. REV. 178 (1982).

This post-*Widmar* initiation theory emerged as a central feature in the development of the "equal access" concept in hearings for the Equal Access Act. As declared by Sen. Hatfield, the principal sponsor of the Equal Access Act, establishment problems due to religion in the public schools relate only to: "state-initiated prayers, or Bible readings or the inculcation of religious belief by the state and not to the state's neutral accommodation of religious meetings." *Sen. Jud. Comm. Equal Access Hearings, supra* note 5, at 7 (prepared statement of Sen. Hatfield).

20. *See* Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) ("Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.") (cited in McCollum v. Board of Educ., 333 U.S. 203, 210 (1948)) (striking multi-denominational religious instruction on public school premises).

21. J. Madison, *A Memorial and Remonstrance Against Religious Assessments,* para. 11 (1784), *reprinted in* W. HUTCHINSON, R. RUTLAND, & W. RACHAL, PAPERS OF JAMES MADISON 295-306 (1962) ("Because it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects."). *See* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3222 (1985) ("Religion . . . can serve also powerfully to divide societies . . ."); Wallace v. Jaffree, 105 S. Ct. 2479, 2489 (1985).

22. J. Madison, *A Memorial and Remonstrance Against Religious Assessments,* II WRITINGS OF MADISON 183, at 185-86 (cited in *Engel,* 370 U.S. at 436: "[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular Sect of Christians, in exclusion of all other Sects?"). *See also Abington,* 374 U.S. at 222 (striking teacher-led Bible reading):

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies.

23. *See, e.g., Abington,* 374 U.S. at 229 (Douglas, J., concurring). *See also* Mueller v. Allen, 463 U.S. 388 (1983) (upholding tuition tax deductions) ("what is at stake . . . is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife").

public schools.[24] The Court has consistently held religious strife in the public schools threatens their uniquely "public function,"[25]—to serve as a training ground for "the habits of community"[26] free of "parochial, divisive or separatist influences."[27]

Prevailing first amendment theory does not reasonably account for the varying establishment problems and free speech, free exercise, and equal protection rights raised by equal access in different government forums.[28] This Article proposes that the first amendment free speech and free exercise rights to religious expression, which are the predicates of equal access theory, are limited by many of the same factors posing the establishment concern: the particular purpose of the public property and the presumption of government function, control, and involvement. These factors will be discussed through a unitary factual inquiry that analyzes the nature of a government forum, which in turn defines the various first amendment concerns raised by equal access. This analysis produces a coherent first amendment theory, which in almost all cases obviates weighing conflicting interests. If the factual inquiry presents conflicting first amendment concerns, these are reconciled through the consideration of available alternative forums for religious expression. The Article concludes that in the absence of other overriding constitutional interests, the First Amendment Establishment Clause bars organized, student-initiated religious activities on public school premises, during times associated with the school day.

24. *See, e.g.*, Wallace v. Jaffree, 105 S. Ct. 2479, 2489 (1985); Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 390 U.S. 941 (1968); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Everson v. Board of Educ., 330 U.S. 1 (1947). *See also McCollum*, 333 U.S. at 216-17 ("Designed to serve as perhaps the most powerful agency for promoting cohesion among heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious. . . .").

25. *Abington*, 374 U.S. at 241-42 (Brennan, J., concurring).

26. *McCollum*, 333 U.S. at 227.

27. *Abington*, 374 U.S. at 242 (Brennan, J., concurring). *See* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3222 (1985) (emphasizing importance of "case[s] involving the sensitive relationship between government and religion in the education of our children"); *see also* Aguilar v. Felton, 105 S. Ct. 3232 (1985).

28. *See, e.g., Bender*, 741 F.2d at 559. *See also* Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 GEO. L. J. 135 (1983) (proposing extension of *Widmar* to the high schools and positing independent free speech right to equal access to public schools which may be limited only to serve a compelling state interest).

I. The History of Equal Access

The term "equal access" describes school policies that treat all extra-curricular school clubs—religious and nonreligious—equally. These policies allow voluntary, student-initiated religious groups access, during noncurricular hours, to school facilities on the same terms as provided to nonreligious groups.[29] The newly enacted federal Equal Access Act[30] is

29. An example of an equal access policy adopted by a school board is that adopted by the Lubbock School Board in the Lubbock Independent School District. That policy, adopted in August 1980, provided in pertinent part:

> The school board permits students to gather at the school with supervision either before or after regular [school] hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

L.I.S.D. policy at para. 4 (cited in *Lubbock*, 669 F.2d at 1041).

30. 20 U.S.C. §§ 4071, 4072 (Supp. 1985) provide in part:

SUBCHAPTER VIII-EQUAL ACCESS

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

DENIAL OF EQUAL ACCESS PROHIBITED

(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.

(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 subchapter shall be construed to authorize the United States or any State or political subdivision thereof —

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

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

(3) to expend public funds beyond the incidental cost of providing the 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 subchapter shall be construed to

an example. It provides uniform guidelines regarding equal access: when a public school allows "one or more noncurriculum related student groups to meet on school premises during noninstructional time,"[31] the school may not "discriminate against any students who wish to conduct a meeting . . . on the basis of the religious, political, philosophical, or other contents of the speech at such meetings."[32]

The development of the equal access concept in cases considering religious activities in public schools has given rise to four different forms of equal access policies. Some equal access policies are adopted by school boards prior to any request for use by student-initiated religious groups.[33] In other instances, permissive equal access policies follow the requests of student-initiated religious groups.[34] Yet a third example is de facto equal access, in which the school allows student religious groups access to school classrooms, but the policy is not a written part of the

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authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Nothing in this subchapter shall be construed to limit the authority of the school, its agent 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. 4072. As used in this subchapter —

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

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

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

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

31. 20 U.S.C. § 4071(b).

32. 20 U.S.C. § 4071(a).

33. *See, e.g.,* Widmar v. Vincent, 454 U.S. 263 (1981). In *Widmar,* the University of Missouri had adopted a policy "to encourage the activites of student organizations," *id.* at 265, and in furtherance of this policy had permitted activities by more than 100 different student groups. Pursuant to this established policy, a student group made a request to use the university's facilities. *See also* Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983) (upholding student-initiated high school prayer clubs during school noninstructional time where high school had preexisting open forum policy), *rev'd,* 741 F.2d 538 (3d Cir. 1984), *cert. granted,* 106 S. Ct. 518 (1985); Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984) (disallowing after hour student-initiated prayer clubs in light of other instances of school support of religious activities, where a high school had preexisting open forum policy).

34. *E.g., Little Axe,* 766 F.2d at 1396-97; *Lubbock,* 669 F.2d at 1039.

school's regulations.[35] In the fourth group are schools which deny access to students who voluntarily seek to organize for prayer on school premises.[36] This group of schools could be considered to have adopted policies of de facto no equal access.

Equal access policies, primarily in the form of de facto no equal access, have been the subject of case law ever since the Supreme Court's 1960's decisions barring state sponsored prayer and Bible reading in the schools.[37] The overwhelming majority of these cases upheld school board denials of access and held student-initiated religious activities in public secondary schools to violate the First Amendment Establishment Clause. No countervailing free speech or free exercise mandates were found.[38]

35. *E.g.,* Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965) (forbidding a school board policy permitting elementary school students to pray in period before class began and after classes ended, in a classroom other than the homeroom).

36. *E.g.,* Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980).

37. Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

38. Many federal and state court decisions have found equal access to be unconstitutional and have either struck down equal access policies or upheld the denial of equal access. Bell v. Little Axe Indep. School Dist., 766 F.2d 1391 (10th Cir. 1985) (striking as unconstitutional school supported equal access prayer-club policy permitting meetings before commencement of elementary and junior high school classes); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984) (upholding a school decision denying right to voluntary prayer meeting during activity period within the school day), *cert. granted,* 106 S. Ct. 518 (1985); Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984) (striking, inter alia, school district equal access policy allowing after-school student prayer group); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied,* 459 U.S. 1155 (1983) (striking school district equal access policy providing for prayer group before and after school); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123 (1981) (holding unconstitutional morning prayer clubs denied access by school); Mergens v. Board of Educ. of Westside School, No. 85-0426, slip op. (D. Neb. May 23, 1985); Trietley v. Board of Educ., 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978) (holding unconstitutional a policy permitting Bible clubs to meet before and after the school day); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977), *cert. denied,* 434 U.S. 877 (1977) (holding unconstitutional Bible study club meeting during the school day). *See also* Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965) (upholding school board authority to prevent group prayer on grounds that free speech and free exercise do not compel it); Hunt v. Board of Educ., 321 F. Supp. 1263 (S.D. W. Va. 1971) (upholding school board authority to prevent organized group prayer not on grounds that establishment bars it but rather that free speech and free exercise do not compel it). *Cf.* Karen B. v. Treen, 653 F.2d 897 (2d Cir. 1981), *aff'd,* 455 U.S. 913 (1982) (striking school policy based on statute allowing voluntary teacher or student-led prayers before school); Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir. 1981) (striking school policy permitting prayer at nonmandatory student assemblies); State Bd. of Educ. v. Board of Educ. of Netcong, 108 N.J. Super. 564, 262 A.2d 21 (Ch. Div.) (striking school program providing a period before each school day for free exercise of religion), *aff'd per curiam,* 57 N.J. 172, 270 A.2d 412 (1970), *cert. denied,* 401 U.S. 1013 (1971). *See also* Mary May v. Evansville-Vanderburgh, 615 F. Supp. 761 (S. D. Ind. 1985) (teachers seeking equal access). *But see* Amidei v. Spring Branch, No. H-84-4673 (S.D. Tex. May 9,

Support for the theory of equal access in the public schools derives from the Supreme Court's decision in *Widmar v. Vincent*.[39] *Widmar* concerned the extent to which students in state universities may voluntarily gather for devotional activities. The Court held that when a state university creates a public forum on its campus, open for use by all student groups, the university's exclusion of student religious groups is a "content-based exclusion of religious speech"[40] violating "the fundamental principle that a state regulation of speech should be content-neutral."[41] The Court found that a public university campus "possesses many of the characteristics of a public forum,"[42] and as such, imposes a burden on the university to justify with a compelling interest its content-based exclusion of "religious speech."[43] The Court determined that, given both the particular characteristics of the University of Missouri campus as a type of public forum[44] and the maturity of university students,[45] no establishment was created.[46] Based on this finding, the Court expressly withheld judgment on the need to strike a balance between potentially competing free speech and establishment concerns.[47]

By 1982, the *Widmar* holding allowing equal access at the public university level co-existed with two federal appellate decisions forbidding equal access in public high schools. In *Brandon v. Board of Education*[48] and *Lubbock Civil Liberties Union v. Lubbock Independent School District,*[49] the Courts of Appeals for the Second and Fifth Circuits, respectively, decided that student-initiated voluntary religious meetings held on

1985) (enjoining school district from barring morning high school Bible study meetings held pursuant to the Equal Access Act); Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965) (upholding school policy allowing voluntary student prayer completed five minutes prior to the school day or beginning subsequent thereto). *But cf.* Clergy and Laity Concerned v. Chicago Bd. of Educ., 586 F. Supp. 1408, 1412 (N.D. Ill. 1984) (holding unconstitutional school denial of access to anti-war activity; dictum affirming applicability of Widmar v. Vincent, 454 U.S. 263 (1981) to high school).

39. 454 U.S. 263 (1981).

40. *Id.* at 277.

41. *Id.*

42. *Id.* at 267 n.5.

43. *Id.* at 276-77.

44. *Id.* at 267 n.5.

45. *Id.* at 274 n.14 ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.").

46. *Id.* at 273-75.

47. *Id.* at 273 n.13.

48. 635 F.2d 971 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123 (1981) (religious meetings organized before classes but after buses delivered the students to school).

49. 669 F.2d 1038 (5th Cir. 1982), *cert. denied,* 459 U.S. 1155-56 (1983) (student-initiated voluntary religious meetings held on public high school premises before buses arrived and after buses departed school).

public school premises, before or after the school day, violated the First Amendment Establishment Clause. These decisions emphasized that certain establishment problems are inherent in equal access to public high school forums. The *Brandon* court found that for public school students, participating in communal prayer meetings occurred in the "captive audience setting" of the school.[50] The court stated, "To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed."[51] Similarly, the court in *Lubbock* found the "policy of allowing religious meetings at a time closely associated with the beginning or end of the school day implies recognition of religious activities and meetings as an integral part of the District's extracurricular program and carries with it an implicit approval by school officials of those programs."[52] Because the Supreme Court denied certiorari in both of these cases, they are controlling precedent in the Second and Fifth Circuits and have had a strong persuasive effect nationwide.

In barring student-initiated religious activities in high schools on establishment clause grounds, *Brandon* and *Lubbock* appeared to conflict with the earlier *Widmar* decision, which found no establishment clause violation on a public university campus. The Supreme Court's failure to reconcile this conflict by granting review led some to conclude that the Court had confined *Widmar*'s approval of equal access to its facts—a public university with a preexisting open forum[53]—and would not extend its reasoning to the high school setting.[54]

50. *Brandon,* 635 F.2d at 978.

51. *Id.*

52. *Lubbock,* 669 F.2d at 1045.

53. *Widmar,* 454 U.S. at 267, 274. *But see* Healy v. James, 408 U.S. 169, 180 (1972) ("the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas' ") (cited in *Widmar,* 454 U.S. at 267 n.5). *Healy* suggests that *Widmar* need not be confined to its particular facts (i.e., a preexisting open forum policy that made university facilities available to over 100 clubs), because the university setting in general is an appropriate forum for equal access.

54. Denials of certiorari generally do not indicate decisions on the merits. *See generally* Linzer, *The Meaning of Certiorari Denials,* 79 COLUM. L. REV. 1227 (1979). However, the denials of certiorari in *Brandon* and *Lubbock* may suggest otherwise. *See* Amicus Curiae Brief of American Jewish Congress at 7, *Nartowicz,* 736 F.2d 646 (11th Cir. 1984), noting that the petitions for certiorari in *Brandon* and *Lubbock* were denied, and claiming that *Widmar* was inconsistent. *But see* Brief for the United States as Amicus Curiae, Petition for Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit at 8, Bender v. Williamsport Area School Dist., 741 F.2d 538, 557-60 & n.26 (3d Cir. 1984) (contending that the *Lubbock* certiorari denial was based on the facts in *Lubbock* and did not indicate that the Court refused to extend *Widmar* to high schools).

The significance of the denials of certiorari in *Lubbock* and *Brandon* need not be diminished by the granting of certiorari in *Bender.* Rather than indicate the judiciary's disagreement

In the wake of these decisions, school boards, parents, and students nationwide were confused over the constitutionality of student-initiated voluntary religious activities in public high schools. After *Widmar,* many schools adopted equal access policies in an effort to constitutionalize student religious meetings.[55] Challenges to these policies appeared to raise issues similar to those in *Widmar.* At issue was whether *Widmar* could, under any set of facts, apply to the high school setting, or whether the *Brandon* and *Lubbock* reasoning prohibited student-initiated religious activity at the high school level. Three circuits would join the *Brandon* and *Lubbock* courts in failing to extend *Widmar* to the high schools.[56] Only one court, the district court in *Bender v. Williamsport Area School District,* held that a high school extracurricular activity period contemplated an equal access policy, thus extending *Widmar's* open forum mandate to the high schools.[57]

In late 1982, the confusion caused by *Brandon* and *Lubbock* in light of *Widmar* captured the attention of members of Congress.[58] Measures guaranteeing equal access—both through constitutional amendments and by federal statutes—were proposed to reverse the *Brandon* and *Lubbock* decisions and to extend *Widmar* to allow student-initiated religious

over equal access in the high schools, the grant in *Bender* may point to a split between the courts and Congress on the issue in light of the passage of the Equal Access Act.

55. For example, after the Court of Appeals for the Eighth Circuit rendered its decision in Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), and one month before its affirmance by the Supreme Court in *Widmar v. Vincent,* the school board in Little Axe County, Oklahoma adopted an "equal access policy" in November 1981 that ratified the morning student-initiated prayer meetings which had begun earlier in the school year. *See* Bell v. Little Axe Indep. School Dist., 766 F.2d 1391, 1397 (10th Cir. 1985).

56. Bell v. Little Axe Indep. School Dist., 766 F.2d 1391 (10th Cir. 1985) (striking elementary and junior high school prayer meetings held before class); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984) (striking as unconstitutional a high school prayer club organized during the school day under teacher supervision, reasoning that the establishment concern overrode the free speech right); Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984) (striking, as an unconstitutional establishment, afternoon high school prayer meetings).

57. 563 F. Supp. 697, 706 (M.D. Pa. 1983). Equal access proponents claim other federal courts have also adopted this position but they rely only on dicta in the *Little Axe* and *Nartowicz* decisions, which actually hold to the contrary. *See* Brief for Petitioners at 24-25 n.23, Bender v. Williamsport, No. 84-773.

58. Some congressmen had already fought in the equal access judicial battles: Senator Hatfield and twenty-three other members of the Senate had taken the extraordinary measure of filing an *amici curiae* brief with the Supreme Court in *Lubbock,* asking the Court to grant review and to extend the holding of *Widmar* to the high school level. The first point of the Senators' brief was: "There is nationwide confusion concerning proper policies for religious activities in public schools that justifies guidance from the Supreme Court." 129 CONG. REC. S2932 (daily ed. March 25, 1983) (statement of Sen. Hatfield).

meetings in the public schools.[59]

In September 1982, Senator Mark Hatfield sponsored the original congressional equal access proposal.[60] It tracked the facts in *Brandon* and *Lubbock*: equal access during "non-instructional periods" only for student-initiated religious groups in secondary schools when preexisting policies allowed other extracurricular activities. "Non-instructional periods" was not defined in the bill. This initial statutory proposal was followed by two proposed constitutional amendments: one authorizing silent prayer together with equal access; the other permitting vocal

59. Proponents of equal access legislation have made clear their intentions to extend the scope of the *Widmar* decision to high schools. In congressional equal access hearings, Senator Hatfield stated: "The bill is a straightforward measure to apply the Supreme Court's decision in Widmar v. Vincent, 454 U.S. 263 (1981), to public high schools which receive federal aid." *Sen. Jud. Comm. Equal Access Hearings, supra* note 5, at 5 (prepared statement of Sen. Hatfield). Similarly, the Reagan Administration's testimony in support of the Denton Equal Access Bill stated: "The concept that we are considering today . . . would simply insure that the public schools of this Nation abide by the constitutional principle that is articulated in the *Widmar* case." *Id.* at 26 (Statement of Hon. Terrel Bell, Secretary of Education). This objective was also set forth by the Senators in the *Lubbock amicus* brief requesting that the Supreme Court extend *Widmar* to *Lubbock*. *See supra* note 58.

Extending *Widmar* to the high schools would, according to equal access proponents, protect from constitutional challenges those religious activities in the schools which are student-initiated: "Our public schools need to mirror the pluralism that we have in America, and by allowing students to initiate voluntary religious activity during noninstructional periods, during, before and after school we affirm the feature of the American character." *Sen. Jud. Comm. Equal Access Hearings, supra* note 5, at 26 (statement of the Hon. Terrel Bell, Secretary of Education). The Amicus Brief of the National Association of Evangelicals in Support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in *Lubbock*, 669 F.2d 1038, similarly stressed "student-initiation":

> The court below ignores critical distinctions between *state*-initiated and sponsored religious rituals and *student*-initiated and run meetings before or after school which have religious content. In so doing, it erroneously applies decisions of this Court concerning state mandated and sponsored prayer and devotional Bible reading to restrict First Amendment rights of public school students, recognized and protected by this Court in Widmar v. Vincent. . . .

Amicus Brief for Nat'l Ass'n of Evangelicals at 3, *reprinted in Sen. Jud. Comm. Equal Access Hearings, supra* note 5, at 187 (emphasis in original).

> In order to enforce the guarantees of the *Widmar* case and to extend its benefits throughout our public school system, I have this week introduced H.R. 2732, the Equal Access Act . . . . [T]he policy of giving religious as well as secular groups equal access to school premises for extracurricular activities accords with the principles laid down by the U.S. Supreme Court [in] Widmar v. Vincent. . . .

129 CONG. REC. S1972 (daily ed. April 28, 1983) (statement of Hon. Trent Lott in part from the remarks of Terrel Bell).

The Congressmen also were aware of and relied upon the one favorable equal access decision in Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983). *See* S. REP. No. 357, 98th Cong., 2d Sess. 5 (1984). They could not, however, have been aware of the reversal of the *Bender* decision on July 24, 1984, in 741 F.2d 538, one day before the enactment of the Act.

60. S. 2928 was introduced Sept. 17, 1982. S. 2928, 97th Cong., 2d Sess., 128 CONG. REC. 11,719 (1982).

prayer.[61] The defeat of the silent prayer and equal access amendment has been attributed to the voting order on the alternative prayer amendments. Many Senators voted against the silent prayer and equal access amendment first because they preferred vocal prayer. Had the vocal prayer amendment been defeated prior to the vote on the silent prayer and equal access amendment, it has been suggested that the latter amendment would have commanded a majority sufficient to amend the Constitution.[62]

Simultaneous with the proposed prayer and equal access constitutional amendments, new statutory equal access legislation developed. Several bills were introduced, sanctioning voluntary prayer clubs during noninstructional periods in the public schools at both primary and secondary school levels, without any limitations on faculty participation and school sponsorship.[63] The broad scope of these prayer club proposals attracted strong church/state separationist opposition at the hearing and therefore went no further than House and Senate committee considerations.[64] An amended version of one of these bills, entitled "The Equal Access Act," which limited participation in equal access religious clubs to students and barred teachers or school officials from influencing religious activities, was reported out of the Senate Judiciary Committee on

61. The "Hatch" amendment—sponsored by Senator Hatch in March 1983—provided for voluntary "silent prayer or meditation in public schools," S.J. Res. 212, 98th Cong., 1st Sess. § 1, and "equal access," S.J. Res. 212, 98th Cong., 1st Sess. § 2, 130 CONG. REC. 93 (daily ed. Jan. 24, 1984). This amendment later developed into the Dixon Amendment, which contained both the silent prayer and the equal access provisions. S. 2782, 98th Cong., 1st Sess. §§ 1-2, 130 CONG. REC. 2678 (daily ed. Mar. 14, 1984). The scope of the amendment extended to both public elementary and secondary schools. *Id.* The Dixon Amendment was considered in conjunction with a vocal prayer amendment sponsored by the Reagan Administration. S.J. Res. 73, 98th Cong., 1st Sess., 129 CONG. REC. 3973 (daily ed. Mar. 24, 1983).

These amendments resulted from an electoral campaign advocating school prayer. *See Reagan As Pandora,* N.Y. Times, July 30, 1984, at A21, (Op. ed.); *Religion Finds A Way to Go to School,* N.Y. Times, July 29, 1984, § 6 (Week in Review), at 16, col. 3 ("The importance attached to the school-prayer issue in 1984 reflects the remarkable success of conservatives—and the Reagan administration—in bringing the cause back into the political and legal mainstream.").

62. *See* N.Y. Times, March 21, 1984, at B7, col. 1.

63. *See* S. 425, 98th Cong., 1st Sess. § 2, 129 CONG. REC. 972 (daily ed. Feb. 3, 1983) (prohibiting federal funding to schools which do not allow religious clubs); S. 1059, 98th Cong., 1st Sess. § 3, 129 CONG. REC. 476 (daily ed. Mar. 14, 1983) (providing a federal court remedy for denial of access); H. 2732, 98th Cong., 1st Sess. §§ 1-2, 129 CONG. REC. 2638 (daily ed. Apr. 26, 1983) (prohibiting federal funding to schools which deny equal access).

64. *See Sen. Jud. Comm. Equal Access Hearings, supra* note 5. For examples of testimony objecting on constitutional grounds but limited to the scope of S. 1059, see *id.* at 271 (testimony, John W. Baker, General Counsel, Baptist Joint Committee on Public Affairs and of the National Council of Churches of Christ (NCC)).

February 22, 1984.[65]

As alternatives to the Hatch Amendment and to the initial bills allowing equal access at the elementary school level, equal access bills limited in scope to secondary school students were introduced in both the Senate[66] and the House.[67] These bills, virtually identical, provided that the protected clubs must be voluntary and student-initiated. In addition, the House bill barred school sponsorship of the clubs.[68] The bills gave rise to the Religious Speech Protection Act, which expressly allowed student-initiated prayer meetings in the secondary schools during noninstructional hours and barred school sponsorship of the clubs.[69]

The narrowed scope of the Religious Speech Protection Act created broad-based support for the concept of equal access contained in that bill. Even traditional advocates of church/state separation favored the concept and worked with the various congressional committees on refining statutory language.[70] Despite this strong support, the Religious

65. S. 1059, § 2(a) *as reported in* S. REP. NO. 357, 98th Cong., 2d Sess. 1 (1984). The remedy for violation of S. 1059 was a cause of action brought by an individual Attorney General rather than a funds cutoff. *See* S. 1059 §§ 3-4, *reported in id.*, at 2. School employees were permitted to monitor student groups but not to participate.

66. S. 815, 98th Cong., 1st Sess., §§ 3-4, *printed in* 129 CONG. REC. 2933 (Mar. 15, 1983) [hereinafter cited as S. 815].

67. H.R. 4172, 98th Cong., 1st Sess. (1983) [hereinafter cited as H.R. 4172].

68. H.R. 4172 § 3.

69. The Act, later renamed the Equal Access Act, consisted in the Senate of a revised S. 815, and its House companion bill, H.R. 5345, successor to H.R. 4172, numbered in hearings as H.R. 4996. Proposed revised S. 815, 98th Cong., 2d Sess., 130 CONG. REC. 2433 (daily ed. Mar. 8, 1984). H.R. 5345, 98th Cong., 2d Sess. (1984) [hereinafter cited as H.R. 5345] changed the penalty for denial of equal access from the judicial remedy provided in H.R. 4172 to a funds cutoff.

70. *See, e.g., Sen. Jud. Comm. Equal Access Hearings, supra* note 5, at 271 (statement of John W. Baker, General Counsel for the Baptist Joint Committee on Public Affairs and of the National Council of Churches, U.S.A. (NCC), testifying in support of S. 1059); *Religious Speech Protection Act Hearings, supra* note 11, at 30, 96 (prepared statements by representatives of the Baptist Joint Committee on Public Affairs and of the NCC).

NCC's support came with certain provisos: *e.g.*, that the clubs should be limited to the secondary schools; faculty supervision should be in a "custodial" rather than a "participant" capacity; and that no rights should be accorded to outsiders. *Sen. Jud. Comm. Equal Access Hearings, supra* note 5, at 226-28. The NCC also proposed specific language concerning the voluntariness of the club activity, which was added to one of the proposed bills. *Id.* at 229 (prepared statement of NCC).

Further, the NCC favored restricting equal access to circumstances in which the school had created a "limited public forum." *Id.* at 227. *See Religious Speech Protection Act Hearings, supra* note 11, at 97 (statement of Rev. D. Kelley, Director, Religious and Civil Liberty, NCC). According to the NCC's "limited public forum" theory, the schools would be bound to allow prayer clubs only when the school permits student-initiated prayers that are not related to "curricular" departments. *Id.* Thus, if a school permits a chess club, it has created a limited public forum "to which religion can legitimately seek access," whereas a French club, glee

Speech Protection Act was narrowly defeated in the House.[71]

The constitutionality of equal access legislative proposals was questioned primarily by religious minority groups.[72] In Congress, opponents of the Religious Speech Protection Act supported a bill known as the Secondary School Equality of Access Act. This bill differed from the Religious Speech Protection Act, and all similar prior initiatives, by providing protection from discrimination for all speech, not just religious speech.[73] This "free speech" approach was to become the thesis of the final Equal Access Act.

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club, and football club are related to school departments and do not create a limited public forum to which a religious right of access would attach. *Id.*

Another separationist group, Americans United For Separation of Church and State, also has expressed support for equal access. *See* Brief for Americans United for Separation of Church and State as Amicus Curiae in Support of Plaintiffs, Bell v. Little Axe Indep. School Dist., 766 F.2d 1391 (10th Cir. 1985) (favoring high school equal access).

71. 130 CONG. REC. H3901 (daily ed. May 15, 1984). For the debate concerning that vote, *see id.* at H3855-79.

72. Constitutional challenges were raised chiefly by Jewish human rights defense groups. *See Sen. Jud. Comm. Equal Access Hearings, supra* note 5, at 229 (testimony of Ruti Teitel, Ass't. Dir., Legal Affairs, Anti-Defamation League); *id.* at 255 (testimony of Marc Pearl, Am. Jewish Cong.); *Religious Speech Protection Act Hearings, supra* note 70, at 109 (testimony of Ruti Teitel); *id.* at 57 (testimony of Barry Ungar, Am. Jewish Cong.).

The Seventh Day Adventists and Lutheran Council commented negatively on equal access because it required teacher supervision of religious clubs, but they did not oppose the Act. *See id.* at 105, 107 (prepared statement of Dr. Carl Bergstrom); *id.* at 103 (statement of Mitch Tyner, Legal Counsel, Gen. Conference of Seventh Day Adventists). Similarly, Americans for Religious Liberty opposed the bill because of concerns about proselytizing and divisiveness. *Id.* at 99 (prepared statement of Edward Doerr, Exec. Dir., Americans for Religious Liberty).

Establishment objections also were raised against H.R. 4996 by the National Education Association (NEA) and the American Civil Liberties Union (ACLU). *See Religious Speech Protection Act Hearings, supra* note 70, at 42, (statement of Linda Tarr-Whelan, NEA); *id.* at 79 (statement of Rev. Barry Lynn, legislative counsel, ACLU) (establishment problem posed by youth and impressionability of high school children). The ACLU reached its Establishment Clause position after arguing earlier only that the Religious Speech Protection Act was imprudent because it provided a general rule in an area in which the Constitution, after *Widmar,* required case-by-case analysis. *See* J. Novik, *The Constitutionality of Extra-Curricular Use of Public School Facilities for Religious Activities* (April 26, 1983) (ACLU Memorandum).

The Religious Speech Protection Act's mandate as limited to religious speech was characterized by the ACLU and by the Seventh Day Adventists as granting a special benefit to religion. *See Religious Speech Protection Act Hearings, supra* note 70, at 78 (statement of Barry Lynn, legislative counsel, ACLU); *id.* at 105 (statement of Mitch Tyner, Legal Counsel, Gen. Conference of Seventh Day Adventists).

73. The Secondary School Equality of Access Act, H.R. 5439, did not expressly protect school religious clubs from discrimination, but rather opened access for all types of clubs in the secondary schools and prohibited discrimination "on the grounds of the content of speech which occurs or may occur at such meeting." H.R. 5439. Under the bill, the remedy for a violation was a civil action for damages.

After over two years of hearings and committee votes on a variety of equal access bills, the Senate and the House passed the Equal Access Act in an amendment to an education bill.[74] As stated by its proponents, the purpose of the Act was to afford secondary school students who wish to gather for religious activities in the schools the same rights of association as those who gather for other purposes, such as "to discuss chess, politics, or philosophy."[75] However, unlike its unsuccessful predecessors, which dealt only with religious clubs, the final version of the Equal Access Act, like the Secondary School Equality of Access Act, protected all student associations from discrimination on the basis of "religious, political, philosophical, or any other content of the speech at such meetings."[76] The wording of the Act attracted a varied coalition, including evangelical supporters of the earlier equal access legislation and civil libertarians who opposed a preference for religion but favored increased protection for other access to the schools.[77]

During the passage of the Equal Access Act and thereafter, three federal circuit courts of appeals held equal access policies to violate the

74. There were strong majorities in favor of the Act. The Act passed in the Senate by a vote of 88 to 11 on June 28, 1984, 130 CONG. REC. S8440 (daily ed. June 28, 1984), and in the House by a vote of 337 to 77 on July 25, 1984, 130 CONG. REC. H7740-41 (daily ed. July 25, 1984).

75. *See* 130 CONG. REC. S8335 (daily ed. June 27, 1984) (comments of Sen. Denton); *id.* at S8337 (remarks of Sen. Hatfield).

76. 20 U.S.C. § 4071(a).

Although the earlier equal access bills had provided for a funds cut-off in case of violation, *see* S. 425, *supra* note 63 and subsequent bills such as S. 1059 and the Religious Speech Protection Act, which provides for a private right of action, the Equal Access Act provided no enforcement provision whatsoever. S. REP. NO. 357, 98th Cong., 2d Sess. 24, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2348.

77. Evangelical groups and their advocates, such as the Christian Legal Society and the National Association of Evangelicals, had supported the equal access legislation from the beginning. *See, e. g., Memorandum,* Christian Legal Society *reprinted in* 129 CONG. REC. S2935 (daily ed. Mar. 15, 1983); *Sen. Jud. Comm. Equal Access Hearings, supra* note 5, at 106-16, 176-79.

The ACLU and the NEA dropped their opposition to equal access when the concept of protecting all speech, contained in H.R. 5439, was adopted. The ACLU policy maintains that the Equal Access Act allows organized student clubs to engage in religious speech or discussion, but not worship. In support of this theory and in exchange for discontinuing its opposition to the Act, the ACLU requested Senator Hatfield to insert into the record language indicating such a limit. This language, however, conflicts both with portions of the text of the Act and with its legislative history, which indicates that it seeks to extend *Widmar* to high schools and to overrule *Brandon* and *Lubbock. See Sen. Jud. Comm. Equal Access Hearings, supra* note 5.

The legislative history of the Equal Access Act indicates mass confusion over the nature and scope of the Act toward the end of the legislative process. As a result of this confusion, the Act drew support from "liberal" congressmen such as Senator Barney Frank who declared the Act "the best empowerment of teen-agers that's come along." *Religion Finds A Way To Go To School,* N.Y. Times, July 29, 1984, § 6 (Week in Review), at 16, col. 3.

Establishment Clause.[78] In *Bender v. Williamsport Area School District,*[79] the Court of Appeals for the Third Circuit disallowed high school religious meetings during a regularly scheduled activity period under teacher supervision at the beginning of the school day. The court held that although a free speech right existed comparable to that in a public university, this right in a high school setting was overridden by establishment clause concerns.[80] Similarly, in *Nartowicz v. Clayton County School District,*[81] the Eleventh Circuit held that a school district's practice of permitting a student religious group to meet on school property, after hours and under faculty supervision, contravened the Establishment Clause.[82]

With the addition of *Little Axe, Bender,* and *Nartowicz* to the *Brandon* and *Lubbock* decisions, five federal courts of appeals had found religious meetings unconstitutional regardless of whether they occurred before, during, or after the school day.[83] Pitted against these five decisions is the Act, sanctioning the very scenario these cases prohibit: organized student religious meetings taking place on school premises, under teacher supervision, at times associated with the school day.[84] The theory of equal access recognizes the extent of government sponsorship

78. Bell v. Little Axe Indep. School Dist., 766 F.2d 1391 (10th Cir. 1985) (striking equal access policy in elementary school and junior high school); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984) (upholding district court on its limited forum characterization of high school but reversing the establishment violation finding); Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984) (striking equal access policy allowing after school student prayer group based on degree of school involvement).

79. 741 F.2d 538 (3d Cir. 1984).

80. *Id.* at 559-60. Paramount to the court's establishment clause conclusion were the facts that meetings were held on school premises, under teacher supervision, and within the scope of the state compulsory attendance laws.

81. 736 F.2d 646 (11th Cir. 1984).

82. No free speech issue was raised. *Id.* at 649.

83. *Little Axe,* 776 F.2d 1391 (clubs meeting before classes but after buses deposited school children deemed to occur within the "school day"); *Bender,* 741 F.2d 538 (clubs meeting during an activity period that occurred about 12 minutes into the school day); *Nartowicz,* 736 F.2d 646 (after the school day); *Lubbock,* 669 F.2d 1038 (before and after the school day); *Brandon,* 635 F.2d 971 (voluntary clubs before the school day). *See also* Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir. 1981) (disallowing voluntary prayers at student council meetings held during the school day).

84. The *Nartowicz, Lubbock,* and *Brandon* holdings proscribe religious activity during the same time periods that the Equal Access Act permits—before and after the hours of compulsory school attendance. Thus, these holdings conflict directly with the Act. The United States Solicitor General, in his Brief for the United States as Amicus Curiae Supporting Petitioners at 2 n.2, Bender v. Williamsport Area School Dist., *cert. granted,* 106 S. Ct. 518 (1985), claims that the Equal Access Act is not confined to the hours outside of the compulsory attendance laws and that it therefore conflicts not only with *Nartowicz, Lubbock,* and *Brandon,* but also with *Bender,* which concerns an activities period occurring during the school day. *Id.* Notwithstanding the Solicitor General's arguments to the contrary, significant legislative his-

of religious activities in the public schools, but responds that this sponsorship is permissible because first, all religions are aided equally, and second, a broad range of nonreligious activities also benefit. To the extent that the equal access theory relies on a view of the Establishment Clause that permits nonpreferential aid to religion, it challenges longstanding establishment principles barring government aid to "any and all religions."[85] To the extent it calls for equal treatment of religious and secular groups based on open forum principles, it relies on an erroneous characterization of the public school and of the student religious activities therein.[86]

II. Equal Access and the Establishment Clause

A. The "Origination" of the Religious Activity—Irrelevance to Establishment Inquiry

Equal access analysis distinguishes between student-initiated religious activities and those initiated by the state legislature or the school.[87] According to this "initiation" or "origination" approach, the genesis of the religious activity determines the constitutional result. Only when the state initiates a religious activity—as opposed to sanctions, recognizes, or assists it—is government sponsorship considered sufficient to constitute an impermissible establishment.[88] Prayer activity originating with students is viewed not to constitute an establishment problem, because the

tory of the Act indicates that its scope is limited to the hours outside of compulsory attendance. *See infra* note 216.

85. Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947). *See supra* note 20. The Supreme Court consistently has applied the establishment principle that government may not aid any or all religions. *See* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3221-32 (1985) ("The Establishment Clause . . . primarily proscribes 'sponsorship, financial support' . . ."); Abington v. Schempp, 374 U.S. at 222; McCollum v. Board of Educ., 333 U.S. at 210. This principle appears to be under some attack, *see supra* notes 5 & 18, and may already have begun to erode. *See* Lynch v. Donnelly, 104 S. Ct. 1355, 1362 (1984) (advocating a departure from the *Lemon* test, *see infra* note 101 and accompanying text, and using language promoting a more fluid establishment analysis not confined to "any single test or criterion.").

86. *See supra* notes 5 & 18. *See, e.g.,* Toms & Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma,* 27 EMORY L.J. 3, 27-30 (1978) (arguing a free exercise right and hence no alternative to government support of organized religious activities in the public schools); Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech,* 72 GEO. L.J. 135, 138-39 (1983) (advocating that in a public forum, the government must be content-neutral and treat religious and nonreligious activities equally). *But see infra* notes 297-323 and accompanying text.

87. *See supra* note 19. The first proviso of the Equal Access Act is that student meetings must be "voluntary and student-initiated." 20 U.S.C. § 4071(c)(1). (For full text of Act, see *supra* note 30.)

88. *See, e.g., Lubbock,* 669 F.2d at 1040. The Lubbock School District hoped to cure the unconstitutionality of Bible reading, religious assemblies, and daily prayer occurring on cam-

state is not involved in initiating the prayer activity.[89] Allowance of student-initiated prayer meetings is characterized not as sponsorship or sanction but as mere "accommodation."[90]

The theoretical underpinnings of this distinction derive from a construction of the *Widmar* decision that grounds the constitutionality of the university prayer club on its student-initiation.[91] Proponents of the "origination" theory similarly distinguish the *McCollum v. Board of Education,*[92] *Engel v. Vitale,*[93] and *Abington School District v. Schempp*[94]

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pus by instructing "that the practices should be student rather than teacher initiated." *Id. See generally* articles cited *supra* note 19.

This argument had significant appeal for the equal access proponents in Congress. *See supra* note 19. It is also the central argument for the petitioners in the *Bender* case. Throughout their brief on appeal, petitioners seek to distinguish the high school prayer club at issue from prior Establishment Clause precedent by emphasizing equal access student initiation. *See* Brief for Petitioners at 10, 11, 15, 20, 25, 37, Bender v. Williamsport Area School Dist., No. 84-773: "The establishment clause decisions of this Court have required the prohibition of state-initiated, not self-initiated, religious speech." *Id.* at 11. *But cf.* McCollum v. Board of Educ., 333 U.S. at 209-12, in which the religious activity was not initiated by the state, but rather by outside religious leaders—ultimately at some parental initiative. Nonetheless, the Court held the state's aid to religion to be unconstitutional when it allowed outside religious teachers the use of school premises to teach religious classes during the school day. *Id.*

89. *See, e.g., Bender,* 741 F.2d at 369 (Adams, J., dissenting) (to deny these students the right to meet . . . is to ignore the fundamental differences between self-initiated and state-sponsored religious activities). *House Religious Speech Protection Act Hearings, supra* note 11, at 45 (prepared statement of Laurence Tribe, Professor, Harvard Law School) (characterizing equal access as "voluntary, student-initiated and student-led religious observance"); S. REP. No. 357, 98th Cong., 2d Sess. 29 (1984) ("An equal access policy in which the State merely permits student-initiated religious activity on the same basis as the student-initiated activity is very different from state-initiated activity."); Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, *Bender v. Williamsport Area School District* at 19 (emphasizing "self-initiated extracurricular activity" at issue in *Bender*).

90. *See, e.g.,* Note, *The Constitutionality of Student-Initiated Religious Meetings on Public Grounds,* 50 U. CIN. L. REV. 740, 742 (1981). The "accommodation" theory derives from the free speech analysis used in *Widmar.* The Court there referred to the university's open forum policy as one of "accommodating" the meetings of student groups. *Widmar,* 454 U.S. at 267. *See* Note, *supra* note 86, at 141.

The application of the *Widmar* free speech accommodation theory to high school prayer clubs has been blurred with the theory of "accommodation" used in free exercise analysis. See Toms & Whitehead, *supra* note 86, at 11, for characterization of Supreme Court's Establishment Clause approach as "accommodating neutrality," which permits "accommodation to and preference of religion in order to safeguard free exercise values." *See generally* M. McConnell, *Accommodation of Religion,* 1985 SUP. CT. REV. — (to be published). *Cf.* Sherbert v. Verner, 374 U.S. 398 (1963) (holding unconstitutional application of state employment compensation provisions denying benefits to Jehovah's Witness who would not work on the Sabbath); Zorach v. Clauson, 343 U.S. 306, 313-14 (1952) (allowing release-time for religious study off school premises).

91. *See supra* note 19.

92. 333 U.S. 203 (1948) (religious instruction at religious outsider/parental initiative).

93. 370 U.S. 421 (1962) (state initiated prayer).

94. 374 U.S. 203 (1963) (state initiated Bible reading).

decisions, which respectively bar religious instruction, prayer, and Bible reading in public schools during the school day. These religious activities, equal access theory claims, rise to a level of constitutional concern because they are not initiated by the students.[95] However, as this Article shall demonstrate, the establishment analysis developed by the Supreme Court considers the origins of a particular religious activity to be immaterial to the question of state sponsorship. The Court's public school prayer cases—*McCollum, Engel,* and *Abington*—as well as its university prayer case—*Widmar*—are consistent with the four high school equal access appellate court cases—*Bender, Nartowicz, Lubbock,* and *Brandon.* Together they provide a framework for establishment analysis that centers upon the extent of government sponsorship or support for religious activities. Accordingly, government sponsorship, and not the origin of religious activity, justifies the differing treatment of equal access in the public schools as opposed to its treatment in other forums.

B. The Establishment Test

1. Relevance of Establishment Test—Equal Access Prayer is Still Prayer

Equal access activities trigger establishment clause review when those activities are religious in nature. Where equal access has been litigated, the activity for which students have sought school access is organized prayer.[96] To the extent that Bible reading and religious discussion

95. In Congress, Equal Access Act proponents proclaimed: "The facts in *McCollum, Engel,* and *Schempp* contrast sharply with those in the situations to which S. 1059 would apply. In all three cases, the State did not merely allow the religious activity, but *initiated* it. . . . None of the cases concerned a student-initiated and student-run activity." S. REP. NO. 357, 98th Cong., 2d Sess. 28, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2348, 2374.

Despite the irrelevance of *Engel* and *Abington* to the issue of student-initiated religious expression, some courts have persisted in viewing those cases as a virtual bar to any religious expression by public school students. *See Religious Speech Protection Act Hearings, supra* note 11, at 88 (prepared statement of Robert P. Dugan, Jr., Director, Office of Pub. Affairs, Nat'l Ass'n of Evangelicals); Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 19-20; Bender v. Williamsport Area School Dist., 741 F.2d 538 (contrasting *Abington, Engel,* and *McCollum* with the "self-initiation" in *Bender*); *see also supra* notes 19 & 89.

The equal access initiation analysis is spurious as concerns *McCollum,* 333 U.S. 203 (1948), which involved religious study on school premises not at school initiative, but rather at that of outside religious leaders and parents.

96. For example, in *Widmar,* access to university facilities was "for purposes of religious worship or religious teaching." *Widmar,* 454 U.S. at 265. Similarly, in *Bender,* the Petros Club requested of the Williamsport School District a school club period to pray, read scriptures, and discuss religious questions. 741 F.2d at 542.

In Engel v. Vitale, 370 U.S. at 424, the Supreme Court held that the Regents' prayer at issue was "a religious activity." Reaffirming the trial court's holding, the Court declared "[t]he religious nature of prayer was recognized by Jefferson and has been concurred in by theologi-

are also involved, outside of the context of an objective presentation or study of the Bible for its literary and historic qualities, these activities too are religious.[97] Thus, student-initiated prayers, Bible reading, and discussion groups organized in the public schools, at times associated with the school day, under teacher supervision, paid for by state and federal taxes intermingle religion and state involvement and trigger first amendment establishment review.[98]

The traditional establishment analysis is set forth in the three-prong test articulated in *Lemon v. Kurtzman*.[99] A government policy will not offend the Establishment Clause only if under its specific facts the policy passes all three requirements: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, [the policy] must not foster an excessive government entanglement with religion."[100] This test was applied initially in *Lemon* to bar direct financial aid to religious institutions. It has since been used, with few exceptions, to determine the constitutionality of other government activity that alleg-

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cal writers, the United States Supreme Court and State courts and administrative officials . . . ." *Id.* at 425.

The religious nature of prayer was recently reaffirmed in Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981) (concerning voluntary morning student prayer before classes), *aff'd,* 455 U.S. 913 (1982). In striking a statute and accompanying school board regulations allowing prayers at the beginning of the school day, the court defined prayer as "an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object. That it may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise." 653 F.2d at 901. The court held "[p]rayer is perhaps the quintessential religious practice. . . . [S]ince prayer is a primary religious activity in itself . . . [e]ven if the avowed objective of the legislature and school board is not itself strictly religious, it is sought to be achieved through the observance of an intrinsically religious practice." *Id.*

97. As the Court noted in *Abington,* "[T]he place of the Bible as an instrument of religion cannot be gainsaid. . . ." 374 U.S. at 224. Discussion about religion, according to the Supreme Court in *Widmar,* cannot be distinguished from prayer. 454 U.S. at 269 n.6. These religious activities are permissible when presented in a curricular context. *See* Stone v. Graham, 449 U.S. 39, 42 (1980) (citing approvingly Abington v. Schempp, 374 U.S. 203, 224 (1963)) (dicta upholding study of religion or the Bible when presented objectively as part of a secular program of education)).

98. The constitutional bar on state-sponsored prayer, both vocal and silent, has recently withstood challenge. Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (striking Alabama moment of silence for prayer legislation), *aff'g in relevant part,* 705 F.2d 1526 (11th Cir. 1983). *See also* Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd,* 455 U.S. 913 (1982). Because prayer is the activity at issue, equal access activities cannot be dismissed as posing no establishment concern, as would a comparative religion course integrated into the school curriculum. *See Stone,* 449 U.S. at 42 (citing *Abington,* 374 U.S. at 225). The Court in *Abington* and *Stone* hypothetically approved the objective study of the Ten Commandments and the Bible integrated into the school curriculum.

99. 403 U.S. 602 (1971).

100. *Widmar,* 454 U.S. at 271 (citing approvingly to *Lemon,* 403 U.S. at 612-13).

edly aids religion.[101]

2. Standard For Unconstitutional Sponsorship

a. Religious Purpose

For an equal access policy to pass establishment review, it must have a secular purpose.[102] Its absence alone has invalidated such government practices as the display of the Ten Commandments on public school walls.[103] Whether the existence of any secular purpose suffices, or whether the purpose must be "clearly secular," is not resolved in the case law. Although the original *Lemon* test required only a finding of a secular purpose, the standard used by the Court in *Stone v. Graham*[104] requires the government to have a "clearly secular [legislative] purpose" to pass establishment muster.[105] On the other hand, the recent decisions in *Wallace v. Jaffree* and *Lynch v. Donnelly* seem to revert back to the earlier formulation of the *Lemon* test and require only a finding of any secular purpose.[106] This weak purpose test allowed the Court in *Lynch* to sustain city sponsorship of a Christmas nativity scene. Whether the test

101. *See, e.g.,* Wallace v. Jaffree, 105 S. Ct. 2479, 2489-90 (1985) (*Lemon* test); Lynch v. Donnelly, 104 S. Ct. 1355, 1362 (1984) (applying *Lemon* to determine constitutionality of government aid to city-sponsored religious display); Widmar v. Vincent, 454 U.S. 263, 271 (1981); Stone v. Graham, 449 U.S. 39 (1980) (disallowing posting of the Ten Commandments on wall of public school classroom).

The Court in certain recent cases has departed from the *Lemon* test and employed a historical test, Marsh v. Chambers, 463 U.S. 783 (1983) (upholding constitutionality of state legislative chaplaincies based on historical first Congress), and a strict scrutiny test, Larson v. Valente, 456 U.S. 228 (1982) (holding tax statute preference to certain religions unconstitutional). Also, in *Lynch,* 104 S. Ct. at 1362, the Court declared it was not "confined to any single test or criterion." However, although the Court prefaced its use of the test with qualifying language, indicating that the test was not dispositive, but was useful only for guidance, *id.* at 1362, the Court then proceeded to apply the *Lemon* test straightforwardly to the question of the constitutionality of a city-sponsored nativity scene. *Id.* at 1370 (Brennan, J., dissenting).

The Court has consistently applied the *Lemon* test in cases concerning religious activities in the schools. It was applied most recently in the 1984-85 Term in Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (holding moment of silent prayer legislation unconstitutional). *See also* Aguilar v. Felton, 105 S. Ct. 3232 (1985); Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985).

102. *Lemon,* 403 U.S. at 612.

103. Stone v. Graham, 449 U.S. 39, 40-41 (1980) (no preeminent secular purpose in posting).

104. *Id.*

105. *Id.* The requirement of a "clearly secular legislative purpose" derives from Committee of Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973).

106. 104 S. Ct. 1355, 1362 (1984). Pursuant to the majority opinion in *Lynch,* even if the purpose of a government practice was almost entirely religious, *one* secular purpose is sufficient to buoy the practice under the establishment test. The city's "secular" purpose—the celebration of Christmas—was held sufficient to allow city sponsorship of the religious symbol as part of a holiday display. *Id.* at 1363.

enunciated in *Stone*—which involved religious activity in the public schools—will survive the *Jaffree* and *Lynch* reformulation may be addressed again in the current Term.[107]

i. The Purpose of Equal Access Policies—The Case Law

Notwithstanding the scrutiny applied to the government's secular purpose, the *Lemon* inquiry requires examination of the particular governmental intent of the statute or policy at issue.[108] In *Widmar,* the central factors considered by the Supreme Court to determine "intent" were first, the role of the timing of the adoption by the educational institution of the equal access policy and second, its intended use as expressed by the text of that policy.[109] Lower courts also have inferred intent from the timing of a school's decision to adopt an equal access policy.[110] When the adoption of the policy is prior to the religious activity request, the text of the policy is secular and does not reflect a purpose of facilitating religious activities; and when the school denies a request for application of an equal access policy to religious activities, the purpose of the policy has been sustained as secular.[111]

107. In the 1985-86, Term the Court will consider several cases concerning the Establishment Clause, at least two of which concern religion and public education: Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *cert. granted,* 106 S. Ct. 518 (1985) (constitutionality of student-initiated prayer clubs); Witters v. Washington, 54 U.S.L.W. 4135, No. 84-1070 (Jan. 27, 1986) (upholding constitutionality of vocational rehabilitation aid to be used in religious ministry studies).

108. *See supra* notes 99-100 and accompanying text; *see, e.g.,* Wallace v. Jaffree, 105 S. Ct. 2479 (1985); Stone v. Graham, 449 U.S. 39 (1980); ACLU v. Rabun, 698 F.2d 1098 (11th Cir. 1983) (cross in public park unconstitutional); May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983), *appeal dismissed,* No. 83-5890 (3d Cir. Dec. 24, 1985) (affirming district court finding of unconstitutional religious purpose to moment of silence statute).

109. 454 U.S. at 271 n.10.

110. The role of the school in defining unconstitutional government purpose is emphasized in Stone v. Graham, 449 U.S. 39 (1980). For cases where school action has resulted in absence of religious purpose *see infra* note 111.

111. Widmar v. Vincent, 454 U.S. 263, 271 (1981) (pre-existing open forum policy with intent of providing for exchange of ideas has a secular purpose); Bender v. Williamsport Area School Dist., 741 F.2d 538, 551 (1984) (in finding no religious objective on the part of the school, the court focused on the preexisting nature of the policy and on the school's denial of the student request: "[N]o assertion has been made that the Williamsport school district *created the activity period* for anything other than valid educational purposes . . . . [I]t would be highly ironic if the school district, which has been *opposing* introduction of Petros into the school . . . were to be charged with a religious motive . . . ." (emphasis in original)); Brandon v. Board of Educ., 635 F.2d at 978 (upholding district court finding of secular purpose: "A neutral policy granting all student groups, including religious organizations, access to school facilities reflects a secular, and clearly permissible purpose—the encouragement of extracurricular activities"); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 12, 137 Cal. Rptr. 43, 49 (1977) (considering preexisting school club policy and denial of use of school premises, the court found that the allowance of school premises to school clubs is "in

In *Widmar,* the secular nature of the university's equal access policy was evidenced by the university's statement of the secular intent "to provide a forum in which students can exchange ideas," and upon the preexisting nature of the forum.[112] The fact that the policy predated the request by the religious group showed that the school could not have intended to sponsor the views of the religious group.[113] This secular purpose was arguably further supported by the university's denial of the request for use of the forum by the religious club.

In contrast, courts have found an impermissible religious purpose on the part of the school when equal access policies are adopted subsequent to a student request for prayer clubs or other religious activities,[114] when the policy refers explicitly to religious activities,[115] and when the school consents to application of this policy for religious use.[116]

Thus, in *Lubbock Civil Liberties Union v. Lubbock Independent School District,*[117] at issue was the constitutionality of an equal access policy adopted after nine years of Bible distributions and school sponsored prayers and Bible readings over the school public address system.[118] The filing of an action challenging these school practices[119]

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the abstract secular in nature"); Keegan v. University of Del., 349 A.2d 14, 16 (Del. 1975) (a university policy allowing religious clubs the "same rights and privileges" allowed other group activities "would not reflect a sectarian legislative purpose"). *See also* Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984) (religious group meetings on school premises and under teacher supervision found to have unconstitutional sectarian purpose, in light of school's apparent support of religious assemblies, signs, announcements, etc.). *But see* Trietley v. Board of Educ., 65 A.D.2d 1, 8, 409 N.Y.S.2d 912, 916 (1978) (finding religious purpose to high school prayer club by projecting to the school the intent of the high school students, which was concededly religious, notwithstanding the fact that the city board of education had denied the students' request for access).

112. *Widmar,* 454 U.S. at 272 n.10:

> Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others. *See, e.g.,* McCollum v. Board of Educ., 333 U.S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

The preexisting nature of the forum indicates the accessibility of the forum for nonreligious activities and is often a measure of religious purpose and effect. *See Widmar,* 454 U.S. at 272-74; *infra* text accompanying notes 288-96, 306-13.

113. *Widmar,* 454 U.S. at 271 n.10.

114. *E.g.,* Bell v. Little Axe Indep. School Dist., 766 F.2d 1391, 1403 (10th Cir. 1985) ("Most importantly, the District's ultimate motive is revealed by its subsequent implementations of policy."); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982).

115. *E.g., Lubbock,* 669 F.2d 1038.

116. *Id.* at 1043; Collins v. Chandler Unified School Dist., 644 F.2d 749, 759 (9th Cir. 1981).

117. 669 F.2d at 1038.

118. *Id.* at 1039, 1040.

119. *Id.* at 1040.

prompted adoption by the school of an equal access policy allowing voluntary student meetings "for any educational, moral, religious or ethical purposes."[120] Although the Court of Appeals for the Fifth Circuit made no specific reference to the timing of the policy, it reversed the district court and concluded that the policy was unconstitutional.[121] The preamble of the policy, according to the court, indicated that it was "concerned with religious belief and the place of *religion* in the public schools."[122] The court concluded that "the purpose of this policy, ostensibly devised to allow many groups to meet, when examined in the *context* of the *total school policy*, is more clearly designed to allow the meetings of religious groups."[123]

A similar religious purpose has been found when a school consents to a student request for equal access. In *Collins v. Chandler Unified School District*, a religious purpose was found when the student council led voluntary prayers in a school assembly with school district permission.[124]

ii. The Equal Access Act—Impermissible Religious Purpose

The religious purpose of the Equal Access Act is reflected both in its legislative history and in its text. The legislative history of the Act spanning two years and many predecessor bills that focused exclusively on religious activities, reflects the congressional purpose of facilitating religious prayer meetings in the schools.[125] This religious purpose ultimately advances a sectarian religious purpose by benefitting those evangelical religions that would derive the greatest gain through access to the public schools.[126]

The earliest of the predecessor bills provided for officially sanctioned voluntary prayer clubs at both elementary and high school levels without limits on faculty participation or school sponsorship.[127] A subsequent proposal, the Religious Speech Protection Act, limited school sponsorship and membership in the clubs to secondary school students, but con-

120. *Id.* at 1041.

121. *Id.* at 1044-45.

122. *Id.* at 1044 (emphasis in original).

123. *Id.* at 1045 (emphasis added).

124. 644 F.2d 759, 762 (9th Cir. 1981).

125. *See* 129 CONG. REC. S2933-34 (daily ed. Mar. 15, 1983) (statement of Sen. Hatfield). *See supra* notes 66-69 and accompanying text. *See also* 130 CONG. REC. S8331, 8334-36 (daily ed. June 27, 1984) (remarks of Sens. Hatch and Denton).

126. *See infra* note 130; Widmar v. Vincent, 454 U.S. 263 (1981) (positing an empirical evidence inquiry regarding religion as the ultimate beneficiary of an equal access policy). *Cf.* Mueller v. Allen, 463 U.S. 388 (1983).

127. *See supra* notes 58-65 and accompanying text.

tinued to provide protection only for voluntary religious clubs.[128] All of the bills, including the final Act, permitted outsider attendance and participation in the equal access meetings[129]—a reason for the strong support of equal access legislation among evangelical religious groups.[130]

The legislative history of the previous bills and the final Act indicates that although the specific references to religion in the predecessor bills were deleted, the Act nevertheless retains their religious purpose.[131]

128. *See supra* note 69.

129. *See* 20 U.S.C. § 4071(c)(5) (Supp. 1985).

130. Sectarian religious purpose may be more problematic for establishment clause scrutiny than a nondenominational religious purpose. *See* Larson v. Valente, 456 U.S. 228 (1982) (striking Minnesota tax statute affording preferential tax exemptions to religion). Evangelists have been preeminent advocates of equal access both in the courts and in Congress. The importance of equal access to the evangelists derives from the importance they ascribe to proselytizing. The major evangelical organizations have set up high school programs including Young Life and Campus Crusade for Christ, through which youth ministers seek to enter the schools to speak to students, both informally and through youth assemblies. *See Young Life Youth Ministries Activities Raise Policy Issues For Educators,* EDUC. WEEK, Oct. 28, 1983, at 1, 14. Such proselytizing youth assemblies were at issue in both Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982) and Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984). Moreover, both cases involved church use of school media, including bulletin boards and loudspeakers. *Lubbock,* 669 F.2d at 1039-40; *Nartowicz,* 736 F.2d at 649. *See also Widmar,* 454 U.S. at 265 n.2 (organization of evangelical students); *Equal Access: A First Amendment Question, 1983: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary,* 98th Cong., 1st Sess. 140 (1983) (statement of Charles Klein, Campus Crusade for Christ, indicating evangelical desire to use school media to announce equal access meetings).

Advocates for evangelicals such as the Christian Legal Society claim to be either counsel for plaintiffs or amicus in every equal access case. *See, e.g., Religious Speech Protection Act, 1984: Hearings on H.R. 4996 Before the Subcomm. on Elementary, Secondary and Vocational Educ. of the House Comm. on Educ. and Labor,* 98th Cong., 2d Sess. 72 (1984) (statement of Samuel E. Ericsson, Director, Washington Office, Christian Legal Society). The Christian Legal Society is handling the appeal in Bender v. Williamsport Area School Dist., 741 F.2d 562 (3d Cir. 1984), *cert. granted,* 106 S. Ct. 518 (1985), possibly unbeknownst to the Court because the address on the brief is a post office box. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, *id.* (Samuel Ericsson, counsel of record and director, Washington Office, Christian Legal Society). In Congress, the chief sponsor of equal access legislation, Senator Hatfield, is himself a financial supporter and member of the board of Young Life. *See supra Young Life Youth Ministries.* In the Congressional hearings on proposed equal access legislation, the National Association for Evangelicals has testified repeatedly. *See, e.g., Religious Speech Protection Act, 1984: Hearings, supra,* at 91 (statement of Forest Montgomery, Counsel, National Association of Evangelicals).

131. Even the legislative history, which attempts to disguise the religious purpose and speaks of a secular purpose, does not mitigate the religious purpose of the Act. *See* 130 CONG. REC. S8337 (daily ed. June 27, 1984) (remarks of Sen. Hatfield) ("The Senator from Alabama has spoken about religious activities . . . . I believe you can equally present this case as purely a matter of freedom of speech and freedom of assembly."). For the establishment test, the Court has held the scope of inquiry to go beyond an "avowed secular purpose." *See, e.g.,* Stone v. Graham, 449 U.S. 39, 41 (1980) (despite legislature's claim of secular purpose, the Court found religious purpose in posting of Ten Commandments); May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983) (district court held moment of silence statute unconstitutional on evidence

The legislative history of the final Act includes express statements concerning the Act's intent to overrule such decisions as *Brandon v. Board of Education*[132] and *Lubbock Civil Liberties Union v. Lubbock Independent School District*.[133]

The text of the Equal Access Act also indicates a religious purpose. Many provisions of the statute are devoted to protecting religious activities from establishment challenge by seeking to limit the extent of government sponsorship of those activities. These provisions, which are constitutionally immaterial to any other type of meeting, reflect the Act's true purpose of facilitating prayer activities. These provisions include requirements that the meetings be voluntary and student-initiated;[134] and that meetings not be sponsored by the school, the government, or its agents or employees.[135] Outsiders may attend and participate, but may not direct, conduct, control or regularly attend the meetings.[136] Employees of the school may be present at religious meetings only in a non-participatory capacity.[137] This last provision singles out religious meetings, further reflecting the Act's religious purpose. In addition, section 4071(d) of the Act expressly states that it does not authorize government to "influence the form or content of any prayer or other religious activity," or "to require any person to participate in prayer or any religious activity."[138] This section, contemplating student-initiated prayers, indicates that the purpose of the Act is to authorize organized prayer meetings in the public high schools nationwide.

Although equal access policies adopted by school boards prior to the enactment of the Equal Access Act[139] appear to be untainted by religious purpose if adopted before requests by religious clubs,[140] those school board policies adopted pursuant to the Act may well be so tainted. In sum, the general purpose of the Equal Access Act—to bring organized religious activities into the public schools—is sufficient to render it un-

of religious purpose in the twenty year legislative history of a variety of prayer statutes leading up to the statute at issue), *aff'd* No. 83-5890 (3d Cir. Dec. 24, 1985).

132. 635 F.2d 971 (2d Cir. 1980).

133. 669 F.2d 1038 (5th Cir. 1982). *See* 130 CONG. REC. S8334, 8336 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

134. 20 U.S.C. § 4071(c)(1) (Supp. 1985).

135. 20 U.S.C. § 4071(c)(5).

136. *Id.*

137. 20 U.S.C. § 4071(c)(3).

138. 20 U.S.C. § 4071(d)(1)-(2).

139. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984).

140. *See, e.g.*, Bell v. Little Axe Indep. School Dist., 766 F.2d 1391 (10th Cir. 1985); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1039 (5th Cir. 1982).

constitutional under the Establishment Clause.[141]

b. Effect—Unconstitutional Advancement of Religion

i. Student Initiation and "Equality" of Access

The second prong of the *Lemon* establishment test proscribes any government sponsorship of activities and policies that have the effect of advancing religion, regardless of the government's otherwise secular intent.[142] Notwithstanding the neutral language of the Equal Access Act, which provides an equal benefit to all extracurricular activities,[143] benefits accruing to religious activities violate this second prong of the *Lemon* establishment test.[144] Even if the benefit to religion were "merely symbolic," this nonetheless would raise establishment concerns.[145] Certainly, religion receives more than a mere symbolic benefit from organized group prayers and Bible reading held in the public school premises during the school day.[146]

The claim that equal access carries no unconstitutional effect of advancing religion rests essentially on two arguments: first, equal access activities are student-initiated and hence not school sponsored, therefore there can be no government effect of advancing religion; and, second, even if equal access does involve a government sponsorship of religion, this sponsorship is not unconstitutional because the sponsorship extends to all activities, religious, and nonreligious alike. This equality, it is argued, "diffuses" the sponsorship, which under the Constitution is barred only as to religion.

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141. Since 1948, this objective has been deemed unconstitutional. In McCollum v. Board of Educ., 333 U.S. 203 (1948), the Supreme Court considered a voluntary religious instruction program which offered study of all faiths in the public schools. The Court held that because the program's purpose was state aid to religion, it was unconstitutional, and to strike it "does not . . . manifest a governmental hostility to religion or religious teachings." *Id.* at 211. For almost forty years since that decision, the Supreme Court has steadfastly found that prayer or Bible instruction in the public schools reflects a religious purpose and thus violates the Establishment Clause. *E.g., Abington,* 374 U.S. at 222-23; *Engel,* 320 U.S. at 430-31.

Most recently, in Wallace v. Jaffree, 105 S. Ct. 3216 (1985), and Stone v. Graham, 449 U.S. 39 (1980), the Court found the state's religious purpose authorizing silent prayer, and in providing for the posting of the Ten Commandments on public school walls was enough to render it constitutionally impermissible.

142. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

143. *See supra* notes 5 & 18.

144. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 783-85 n.39 (1973) (policy with any direct and immediate effect of advancing religion is impermissible even though its primary effect is nonsecular).

145. *See* Larkin v. Grendel's Den, 459 U.S. 116, 125-26 (1982).

146. *See, e.g., Abington,* 374 U.S. at 223-24.

The equal access argument characterizing prayer activities as originating voluntarily with students and not with the state was rejected by the Court in *Widmar*.[147] *Widmar* is consistent with previous decisions holding that private initiation or voluntariness fails to vitiate the establishment problems inherent in conducting organized religious activities in school at times associated with the school day. Voluntary student attendance at religious instruction classes geared to all faiths conducted at outsider initiative,[148] voluntary reading of Bible verses by students,[149] and voluntary student-initiated prayer at the beginning of the school day[150] have all been held to be unconstitutional advancements of religion in the public schools. These Court decisions establish the irrelevance of voluntary student participation or initiation to the constitutional issue.[151]

To argue otherwise, as do proponents of equal access, is to argue that the establishment bar is "limited to precluding the State itself from conducting religious exercises."[152] However, the Supreme Court declared in *Abington* that establishment concerns bar the state from "employ[ing] its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone."[153] This principle is threatened when the state authorizes the use of its schools and attendance requirements for religious clubs.

The other equal access premise—that the religious advancement effect of a government policy is in some way cured by an equal grant of government benefits to religious and nonreligious clubs— is also unconvincing.[154] Although arguably the Court in *Lynch v. Donnelly*[155] has

147. 454 U.S. at 274. *See supra* text accompanying notes 5 & 19.

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

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

150. Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982).

151. Four courts of appeals—in *Brandon, Lubbock, Bender,* and *Nartowicz*—have found that student-initiated prayer activities in the high schools, despite their voluntariness, involve unconstitutional state sponsorship. The Fifth Circuit in *Little Axe* found similar unconstitutional sponsorship at the elementary school level.

152. *Abington,* 374 U.S. at 229.

153. *Id.*

154. *See supra* notes 5 & 18. The equality argument is best set forth in Mueller v. Allen, 463 U.S. 388, 399 (1983) (allowing tuition tax deductions ostensibly equally to parents of public school and private school children, notwithstanding that substantial education costs are incurred only by parents of parochial school children) ("As *Widmar* and our other decisions indicate, a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Id.*). Yet, the limits of the argument are clear. That religion must be treated differently where government sponsorship is at issue is often conceded by equal access proponents. In *Bender*, the student club volunteered to withdraw their request for a faculty "advisor" if necessary to avoid excessive entanglement. 563 F. Supp. at 713-14. Similarly, the Equal Access Act has many limits on sponsorship of all

breathed some life into this "equality" argument, the establishment violations would appear to be cured by "equality" only under limited circumstances, all involving low government sponsorship—for example, where a public forum such as the Court found in *Widmar* gives rise to equal protection principles mandating religious and nonreligious activities be treated "equally."[156] However, as is proposed below, the public schools are not public forums; thus this equality mandate is inapplicable.[157]

Another instance in which equality may cure an establishment violation occurs in the parochial aid cases. In *Mueller v. Allen,*[158] which involved a tax deduction for all education expenses including parochial school tuition, the "indirect" nature of the aid reduces the "imprimatur" of government approval of religion and results in a weaker establishment claim.[159] Insofar as the parochial aid cases and those involving a public forum require only a low level of express government involvement in religious activities, they are distinguishable from equal access activities organized in the public schools.

The Court has justified government assistance to religion on "equality" grounds in only a few other circumstances: First, when it could be argued that to treat religion differently would require more government involvement in religion than "equal" benefits would require;[160] and second, when there is no alternative to the government support to religion. This may occur when the state has a traditional monopoly, such as for fire or police protection,[161] or when the state has a temporary monopoly, such as in an emergency, like the sudden destruction of a religious edifice, requiring the temporary use of state premises.[162]

Equal access programs involve none of these circumstances.[163] Thus, neither the origins of a religious activity nor equality of access are focal to the establishment test effect inquiry. Instead, the two factors

non-curricular clubs because such limits are constitutionally required as to religious clubs. *See supra* text accompanying notes 134-37.

155. 104 S. Ct. 1355, 1362-63 (1984) (activity need only have some secular purpose; clearly secular purpose not required to pass establishment test).

156. *See, e.g., Widmar,* 454 U.S. at 274; Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948) (public parks).

157. For discussion *see infra* text accompanying notes 297-324.

158. 463 U.S. 388 (1983). *See also supra* note 18.

159. *Id.* at 397 (citing *Widmar,* 454 U.S. 263).

160. *See, e.g.,* Walz v. Tax Comm'n, 397 U.S. 664-74 (1970) (holding churches to be tax exempt). *See also Widmar,* 454 U.S. at 272 n.11.

161. *See Widmar,* 454 U.S. at 274-75 (citing Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976) (plurality opinion) (quoted in Committee for Pub. Educ. v. Regan, 444 U.S. 646, 658 n.6 (1980)).

162. *See Abington,* 374 U.S. at 299 (Brennan, J., concurring).

163. *See infra* text accompanying notes 330-32.

relevant to the effect inquiry are the nature and extent of the government benefit and the government "imprimatur" or stamp of approval given to religion.[164]

ii. Direct Benefit to Religion

The organizing of religious activities on public school premises at times associated with the school day provides substantial government aid to religion in violation of basic separation principles. An establishment violation lies in the expenditure of tax-raised public funds to support or promote religious activities in the public schools.[165] Similarly, a violation occurs when tax-raised funds go directly to religious schools.[166] The extension of aid on a nonpreferential basis to all religions does not mitigate its unconstitutionality: "Separation is a requirement to abstain from fusing functions of government and of religious sects, not merely to treat them all equally."[167] Nor is it mitigated by the extension of aid to secular activities,[168] although the Court has indicated that, as an evidentiary matter, aid extended only to religious activities presents a clearer establishment case.[169]

Government confers a number of benefits on religion when religious meetings are organized in the public schools: the provision of the free use of tax-financed classrooms, heat and light, free monitoring by teachers or government authorities, and the use of state compulsory attendance laws to gather an audience all combine to promote religious practice and education. In considering the constitutionality of outside religious

164. *Widmar,* 454 U.S. at 274. *See, e.g.,* Engel v. Vitale, 370 U.S. 421 (1962). In *Widmar,* these two measures of government sponsorship—benefit and imprimatur—were deemed "incidental" because the Court found that the public forum nature of the university and its existing student group policy reflected a low level of government sponsorship. 454 U.S. at 274.

165. *See Grand Rapids,* 105 S. Ct. at 3221-22; *Abington,* 374 U.S. at 229 (Douglas, J., concurring); *McCollum,* 333 U.S. at 210 ("[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions").

166. *E.g.,* Lemon v. Kurtzman, 403 U.S. 602 (1971). *See* Witters v. Washington, 54 U.S.L.W. 4135, No. 84-1070 (Jan. 27, 1986).

167. *McCollum,* 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) (disallowing multidenominational religious instructors from teaching on public school premises). *See* Everson v. Board of Educ., 330 U.S. at 16.

168. *See supra* notes 154-64.

169. *See Widmar,* 454 U.S. at 272 n.10; Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980). The extension of aid to secular activities mitigates the establishment violation only in certain circumstances, such as those involving a public forum. *See, e.g., Widmar,* 454 U.S. at 272 n.10 (distinguishing university forum from public school in *McCollum*). *See* discussion *supra* notes 154-62 and *infra* text accompanying notes 271-73. *See also* Scarsdale v. McCreary, 105 S. Ct. 1859 (1985), *aff'g per curiam,* McCreary v. Stone, 739 F.2d 716, 727 (2d Cir. 1984) ("Boniface Circle is *available* to a broad range of nonreligious and religious organizations, groups and persons" (emphasis in original)).

instructors coming into the public schools to teach, the Court in *McCollum* held that use of rent-free classrooms, together with the benefit derived from the state compulsory attendance laws, constituted an unconstitutional establishment.[170] The attendance laws provided the benefit of gathering a student audience for proselytizing purposes.[171] In *Abington School District v. Schempp,* the Court reaffirmed the *McCollum* holding and recognized the additional benefit posed by free teacher supervision of religious activities.[172]

The Equal Access Act, by allowing religious clubs to meet on classroom public school premises, under teacher supervision and at times associated with the school day, extends to school religious clubs that government aid deemed to be impermissible in *McCollum* and *Abington,* including classroom space, heat and light,[173] free teacher monitoring,[174] and the benefit of state compulsory school attendance laws.[175]

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170. 333 U.S. 203, 209-10 (1948).

171. *See Engel,* 370 U.S. at 439 (Douglas, J., concurring) (characterizing *McCollum* as involving use of the school for proselytizing).

172. 374 U.S. at 223.

173. *See generally* 20 U.S.C. §§ 4071(a), (b), (c)(3) (Supp. 1985). Sections 4071(a) and 4071(d)(3) provide that the equal access meetings may take place on the premises of public secondary schools and that the "incidental costs" incurred in providing the space are authorized. This use of the tax paid premises has been held to be an unconstitutional aid to religion in several cases. *E.g., Abington,* 374 U.S. at 223; *McCollum,* 333 U.S. at 210. *See also* Trietley v. Board of Educ., 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978) (if clubs were to meet, state financial support would flow directly to the club in the form of rent-free classroom space and facilities, heat, lighting, and connected expenses); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977) (rent-free classroom space, heat and light, and teacher monitoring is impermissible).

174. Who shall pay for teacher supervision is a question not specifically addressed in the Act. Although the Act expressly allows expenditure of public funds only for the "incidental costs" in the use of school premises, 20 U.S.C. § 4071(d)(3), there is no provision for non-school payment of teacher supervision time. If volunteered supervision time is contemplated, this demands a motivation in teachers which could result in unconstitutional participation in the religion clubs. For cases addressing the issue of teacher supervision, *see* Bell v. Little Axe Indep. School Dist., 766 F.2d 1391, 1404-05 (1985) (holding unconstitutional benefit in state sponsored teacher monitors) ("[T]he mere appearance of a joint exercise of . . . authority by church and state provides a significant symbolic benefit to religion."); *Johnson,* 68 Cal. App. 3d at 12, 137 Cal. Rptr. at 41; *see also* Larkin v. Grendel's Den, 459 U.S. 116, 125-26 (1982). Equal access cases involving teacher supervision have generally held supervision to be unconstitutional, not on benefit grounds, but because of the appearance of government imprimatur or endorsement resulting from use of school faculty advisors. *See, e.g., Little Axe,* 766 F.2d at 1405 ("We believe that the presence of even one teacher would produce the same aura of school authorization and approval."); *Bender,* 741 F.2d at 552-53; *Nartowicz,* 736 F.2d at 648; *Lubbock,* 669 F.2d at 1046 (also discussing the benefit afforded by compulsory attendance laws).

175. The Act provides that equal access clubs must meet during "noninstructional time." 20 U.S.C. § 4071(b). "Noninstructional time" is defined as time "before actual classroom instruction begins or after actual classroom instruction ends." 20 U.S.C. § 4072(4). Whether

Whether equal access would be similarly unconstitutional if restricted to times *not* contiguous with the public school day—and thus not benefitting from state attendance laws—is unclear. At issue is whether the financial benefit attendant to the rent-free use of the public school premises is itself sufficient to render government aid to religion unconstitutional. In *McCollum,* unconstitutional benefit derived from both the rent-free use of the school premises and the compulsory attendance machinery.[176] In *Widmar,* on the other hand, no state law compelled university classroom attendance and the Court permitted the equal access club the use of the classrooms. Other nonclassroom costs related to student clubs were borne not by taxpayers but rather were paid for out of student fees.[177]

The chief distinction appears to be the purpose and function of the forum.[178] In *Widmar,* where the government property at issue was a public forum, the benefit derived from its use was held to be per se incidental.[179] In contrast, as concerns the public schools, which are not public forums, the rent-free use of the premises may be enough to constitute unconstitutional government aid.[180] Thus, although the Court has not yet ruled on this point, even weekend use of the public schools on a rent-free or artificially low rent basis may afford an unconstitutional benefit to religion.[181]

In addition to the use of public school property, the use of school media, including the school's loudspeaker, newspaper, and bulletin

this is intended to include activity periods during the day is unclear. Nevertheless, under any interpretation a meeting may occur just before the school day begins or just after it ends—thus permitting religion to benefit from the compulsory attendance machinery. This benefit was held unconstitutional in *McCollum,* 333 U.S. 203, 209-10. *See also Bender,* 741 F.2d at 552; *Lubbock,* 669 F.2d at 1046; *Brandon,* 635 F.2d at 978-79.

176. 333 U.S. at 209-10.

177. 454 U.S. at 274.

178. *See infra* notes 277-87 and accompanying text.

179. *Widmar,* 454 U.S. at 273.

180. *See supra* note 165 and accompanying text.

181. *See, e.g.,* Country Hills Christian Church v. Unified School Dist., 560 F. Supp. 1207 (D. Kan. 1983). *See also* Tilton v. Richardson, 403 U.S. 672 (1971) (indicating that government funds may not be used to provide or maintain buildings to be used by religious organizations). *See also* Stone v. McCreary, 575 F. Supp. 1112 (S.D.N.Y. 1983) (mere use of public land, in the absence of a private speaker, constituted unconstitutional government aid to a privately sponsored creche display), *rev'd,* 739 F.2d 716 (2d Cir. 1984), *aff'd per curiam by an equally divided Court,* 105 S. Ct. 291 (1985). That the compulsory attendance laws alone are not enough would also seem clear from the Court's decision in Zorach v. Clauson, 343 U.S. 306 (1952) (sustaining a release-time program allowing students to leave from the public school where they have been collected pursuant to state attendance laws to go to study religion off the school premises). The Court found the absence of the aid posed by use of public school classrooms, heat, and light to be dispositive. *Id.* at 308-09.

boards, to advertise equal access meetings, indicates unconstitutional support of religion.[182] Whether these benefits would be extended to religious clubs pursuant to the Equal Access Act remains to be seen. The extent of permissible school sponsorship under the Act is addressed by two provisions. One bars the "promotion" of meetings.[183] The other authorizes the use of public funds only for the "incidental cost of providing the space for student-initiated meetings."[184]

Funding, other than for classrooms, such as for school publications, bulletin boards, photocopy machines, public address systems, and yearbooks, is not authorized by the Act, although it is not expressly barred.[185] If it is not barred by the Act, this use of school media and funding also raises entanglement problems.[186] Moreover, if this funding is barred, it must be withheld uniformly pursuant to the Act's mandate against content discrimination.[187] However, even when these benefits are equally accorded to all clubs—not just to those that are religious, the Establishment Clause would only bar government aid to religion.[188] The result must be either an excessive government entanglement to monitor this disparate treatment of religious equal access clubs,[189] which itself would violate the Equal Access Act's requirement of equal treatment,[190] or a withholding of all of these benefits from secular and nonsecular groups alike.

Thus, if a variety of noncurricular clubs are accorded access pursuant to the Act, arguably only the religious club is benefitted in that the Act increases the access for religious clubs while diminishing the access for nonreligious clubs. This "equal treatment" results in a loss to all nonreligious clubs and a benefit only to the religious club, indicated in *Widmar* to be evidence of an establishment clause violation.[191]

182. *See, e.g., Bender,* 741 F.2d at 556 (promise not to use school advertisement media insufficient because school enforcement of that promise would constitute excessive entanglement); *Lubbock,* 669 F.2d at 1039 (use of public address system for morning prayer and Bible readings); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 13, 137 Cal. Rptr. 43, 50 (1977). *See also Little Axe,* 766 F.2d at 1406 (ruling use of posters to be unconstitutional as excessive entanglement).

183. 20 U.S.C. §§ 4071(c)(2), 4072(2) (Supp. 1985).

184. 20 U.S.C. § 4071(d)(3).

185. 20 U.S.C. §§ 4071(c)(2), 4072(2).

186. *See, e.g., Bell v. Little Axe,* 766 F.2d at 1404-05; *Nartowicz,* 736 F.2d at 649-50.

187. 20 U.S.C. § 4071(a).

188. *See supra* text accompanying note 154.

189. *See infra* notes 244-73 and accompanying text.

190. 20 U.S.C. § 4071(a).

191. 454 U.S. at 271 n.10.

iii. Imprimatur: Government Sponsorship and the Appearance of Sponsorship

The Establishment Clause bars not only government benefit to religion in the tangible forms discussed above, but also bars "imprimatur," or government endorsement or the appearance of an endorsement which will unconstitutionally advance religion. The Supreme Court in *Widmar* and five court of appeals cases considering the constitutionality of equal access policies have emphasized the importance of the imprimatur inquiry.[192] The inquiry is twofold. It measures objective indicia of government approval of a religious activity;[193] and it encompasses a subjective component—the perception of government endorsement.[194]

A strong presumption of imprimatur or government endorsement arises when equal access clubs are organized in public high schools.[195] Both the objective factors, resulting from government control in the public schools,[196] and the subjective factors, the youth and impressionability of school children,[197] distinguish the consideration of equal access policies in the public high schools from that in a university.[198]

Numerous objective factors constitute government endorsement when equal access clubs are organized in the schools: school approval of

192. *See Widmar,* 454 U.S. at 274; *Little Axe,* 766 F.2d at 1405; *Bender,* 741 F.2d at 551-57; *Nartowicz,* 736 F.2d at 649-50; *Lubbock,* 669 F.2d at 1045-46; *Brandon,* 635 F.2d at 978-79. The importance of imprimatur inquiry to the establishment analysis goes beyond the equal access cases. In *Lynch v. Donnelly,* Justice O'Connor proposed an establishment test alternative to *Lemon,* which reduced *Lemon* to only the purpose plus imprimatur inquiry. *Lynch,* 104 S. Ct. at 1368 (O'Connor, J., concurring). *See also* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (majority opinion appears to adopt O'Connor formulation). Recent parochial aid cases have sustained financial government benefit to religion in the absence of imprimatur. *See, e.g.,* Mueller v. Allen, 463 U.S. 388 (1983).

193. *Engel,* 370 U.S. at 429 ("[O]ne of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer.").

194. *See Widmar,* 454 U.S. at 274 and n.14; Roemer v. Board of Pub. Works, 426 U.S. 736, 750-54 (1976); Abington School Dist. v. Schempp, 374 U.S. 203, 216 (1963).

195. *See infra* text accompanying notes 199-213.

196. *See infra* text accompanying notes 199-213. *See also* Engel v. Vitale, 370 U.S. 421, 431 (1962) ("prestige and financial support of government" results in "indirect coercive pressure on religious minorities to conform").

197. *See infra* text accompanying notes 225-36.

198. *Compare Bender,* 741 F.2d at 552-53; *Nartowicz,* 736 F.2d at 649; *Lubbock,* 669 F.2d at 1045-46 *and Brandon,* 635 F.2d at 978-79 *with Widmar,* 454 U.S. at 274 n.14. Commentators choosing to rely on one aspect, such as the youth and impressionability of high school students, deliberately gloss over the many elements of state involvement present in a high school, discussed *infra* text accompanying notes 199-213, but absent in a university, such as the compulsory attendance laws and teacher supervision. *See* Note, *supra* note 19, 92 YALE L.J. 499, 502 (1983) (describing the decisions barring student-initiated clubs in high schools as resting "in large part on the assumption that high school students are impressionable and immature").

the club, allotment of club time during the school day, the benefit of state compulsory attendance, teacher supervision of the clubs, and use of school media.

When religious clubs are recognized pursuant to equal access school policies, this recognition may constitute unconstitutional government approval.[199] When this approval is accorded to only one religious noncurricular club, which is permissible under the Equal Access Act[200] and as was the case in *Bender v. Williamsport Area School District,*[201] the likelihood of unconstitutionality is even greater.[202] Approval of the one religious club gives an unconstitutional stamp of government sponsorship.[203] This imprimatur or official approval is magnified when the one religious club is large.[204]

In addition to school recognition of religious clubs, allowing these equal access clubs meeting times contiguous with the school day, as with the Regents' prayer in *Engel,* has been held to be a central factor creating the appearance of school approval or endorsement of the clubs.[205] The timing of these meetings is deemed to coincide with the government sponsored school day, whether the equal access club is organized before, during, or after the school day.[206]

199. *E.g.,* Bender v. Williamsport Area School Dist., 741 F.2d 538 (1984). In the Williamsport School District, all equal access clubs had to be approved by the school board. The importance of this school sanction was emphasized by an opinion of the Maryland Attorney General which specified that the only equal access policy that would pass constitutional muster is one involving no school recognition of the clubs or school classroom assignment for the clubs. *See* 69 Op. Md. Att'y Gen. 84-031 (1984); Note, *supra* note 19, 50 U. CIN. L. REV. 740 (1981). "It would seem that a public school treads close to the precipice of unconstitutionality by announcing sponsorship of student groups when such groups include religious ones." *Id.* at 770 n.173.

200. 20 U.S.C. § 4071(b) provides that a limited forum exists "whenever such school grants an offering . . . for one or more noncurriculum-related student groups to meet."

201. 741 F.2d at 543 n.8 (although there were other clubs, none was political, ideological, or religious like Petros).

202. *Widmar,* 454 U.S. at 271-72. The number of clubs is an evidentiary factor important in assessing both the existence of government imprimatur and whether there is a public forum. Given its evidentiary significance, it would seem that actual diversity and not merely hypothetical or potential variety is a predicate for both the establishment and public forum inquiry. *See infra* text accompanying notes 285-290. *But see Widmar,* 454 U.S. at 274; *McCreary,* 739 F.2d at 727 ("no doubt that Boniface Circle is *available* to a broad range of Scarsdale's nonreligious and religious organizations" (emphasis in original)).

203. *See, e.g.,* Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980). *See Widmar,* 454 U.S. 263, 271 n.10.

204. *See* Clark, *Comments on Some Policies Underlying the Constitutional Law of Religious Freedom,* 64 MINN. L. REV. 453 (1980).

205. *See, e.g., Bender,* 741 F.2d at 553; *Lubbock,* 669 F.2d at 1046; *Brandon,* 635 F.2d at 979.

206. *Compare Bender,* 741 F.2d at 553 (clubs meet during the student activity period during the school day) *with Little Axe,* 766 F.2d at 1405 (clubs met in the morning "during the

The use of compulsory attendance laws is an additional factor contributing to government imprimatur. As held by the Court in *Abington* and *Engel,* these laws, by forcing students to come to school, create the appearance of a state-sponsored captive audience for the religious activities.[207] In this regard, the *Bender* court distinguished the public high school from the university in *Widmar:*

> Unlike universities, attendance for most high school students is made compulsory by state law. Moreover, high school instruction is given in a structured and controlled environment and in more confined facilities than is usual in the open, free and more fluid environment of a college campus. Thus, the possible perception by adolescent students that government is communicating an endorsement of religion if it permitted a religious group to meet would be vastly different in a high school setting than the perception of such action by college students in a college setting.[208]

In addition to the use of the school day and the compulsory attendance laws, the use of teacher supervision to monitor the clubs further reflects government imprimatur. Equal access contemplates "exercises . . . held in the school buildings under the supervision . . . of teachers employed in those schools,"[209] a practice stricken in *Abington.*[210] *Little Axe, Bender, Nartowicz, Lubbock,* and *Brandon* all considered the issue whether faculty monitoring constitutes state approval of the religious ac-

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school day" although prior to the commencement of classes); *Lubbock,* 669 F.2d at 1045 (clubs meeting before buses arrive and after the buses run deemed to occur "at a time closely associated with the beginning or end of the school day") *and Brandon,* 635 F.2d at 979 ("[O]fficial school day 'begins' when buses discharge students. Thus, any voluntary student prayer meetings conducted after the arrival of the school buses and before the formal 'homeroom' period . . . would occur during school hours").

207. *See Abington,* 374 U.S. at 223; *Engel,* 370 U.S. at 442 ("captive audience"); *Bender,* 741 F.2d at 553; *Lubbock,* 669 F.2d at 1046; *Brandon,* 635 F.2d at 978; *Johnson,* 68 Cal. App. 3d at 13, 137 Cal. Rptr. at 49-50. The organizing of clubs at times associated with the compulsory school day undermines the volunteerism of the clubs. *See supra* text accompanying notes 125-28; *infra* notes 316-23.

The only possible distinction concerning timing for purposes of the establishment clause analysis is if the religious activities occur on the school premises when the school is not functioning as a school and is a forum open to the public under state law. *E.g.,* OKLA. STAT. tit. 70, § 5-130 (1981). At that time, the compulsory education machinery is not in operation. There are no students or teachers necessarily on the school premises. *See* Country Hills Christian Church v. Unified School Dist., 560 F. Supp. 1207 (D. Kan. 1983); Resnick v. East Brunswick Township Bd. of Educ., 77 N.J. 88, 389 A.2d 944 (1978) (allowing school building to be used at night as temporary facility by religious organizations under a program that grants access to all charitable groups).

208. *Bender,* 741 F.2d at 552.

209. *Abington,* 374 U.S. at 223.

210. *Id.*

tivities.[211] In considering the importance of teacher monitoring—required by state law in high schools but not universities—the *Bender* court again distinguished *Widmar:*

> [I]t is readily apparent that a school teacher or someone associated with the school necessarily must impart the impression to students that the school's authority and the school's endorsement is implicated in the relevant activity, since every monitor must be approved by the school. Even a parent undertaking the role of monitor would necessarily be perceived as a school authority. It goes without saying that no such authority figure or government endorsement was part of the *Widmar* activity program, undoubtedly because of the age and maturity difference of the students.[212]

Other objective imprimatur factors include the use of school media to announce and report on religious activities.[213]

Several of these factors creating imprimatur are present in the equal access policy authorized by the Equal Access Act. School approval or endorsement is contemplated by the Act, which provides that equal access purposes are triggered when the school approves one or more noncurriculum related clubs.[214] The Act also provides that clubs are to

211. *See Little Axe,* 766 F.2d at 1405; *Bender,* 741 F.2d at 552; *Nartowicz,* 736 F.2d at 648; *Lubbock,* 669 F.2d at 1047; *Brandon,* 635 F.2d at 978.

212. *Bender,* 741 F.2d at 552-53.

213. *See, e.g., id.* at 556 (loudspeaker); *Nartowicz,* 736 F.2d at 649 (public address system and bulletin boards); *Lubbock,* 669 F.2d at 1039 (loudspeaker); Johnson v. Huntington Beach Unified School Dist., 68 Cal. App. 3d 1, 13, 137 Cal. Rptr. 43, 50 (school newspaper and bulletin board). *See also* Healy v. James, 408 U.S. 169, 183 (1972) (considering an SDS club on a university campus, the Court found that lack of access to university media is a substantial impediment to a nonrecognized club).

In the Lubbock School District, just as in Clayton County in the *Nartowicz* case, the school used the public address system to announce the prayer meetings. *Lubbock,* 669 F.2d at 1039. In *Little Axe,* the equal access policies specifically provided for student use of student bulletin boards, posters, public address systems, and school funds for religious clubs. 766 F.2d at 1406. Since the enactment of the Equal Access Act, the Hicksville School District, Long Island, N.Y., has used the school's loudspeaker to announce equal access club meetings. Also, teachers organizing equal access meetings for themselves sought access to the school newspaper in Mary May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761 (S.D. Ind. 1985). Interestingly, these aspects of state sponsorship are conceded to be unconstitutional establishments by proponents of equal access. Thus Petros, the student religious group in *Bender,* in its request for school board approval, voluntarily relinquished demands for other school sponsorship, such as the use of the bulletin board or yearbook. In so doing, these students arguably conceded that worship clubs in the school are different from other noncurricular activities and should be governed by different standards.

214. *See* 20 U.S.C. § 4071(b), which provides that it is the school which "grants an offering to the opportunity for one or more noncurriculum related student groups to meet." Implicit in the terms of the Act is a process whereby a request for a club must be initiated by a student and presented to the school principal or school board. This interpretation of the Act was made by at least one state Attorney General. 69 Op. Md. Att'y Gen. 84-031 (Dec. 6, 1984). The Maryland policy provides that students may have clubs on school premises as long as they do

meet on school premises during "non-instructional time." This is defined to mean "time set aside by the school before actual classroom instruction begins or after classroom instruction ends."[215] This definition gives rise to two conflicting interpretations. One is that the meetings are to occur before the first classroom instruction begins and after the last one ends, *i.e.,* before and after the school day. The second is that the equal access meetings are authorized before or after any classroom instruction period, *i.e.,* during free periods as they occur throughout the day such as lunch or student activity periods.

The first interpretation has the most support in the legislative history.[216] However, even under this interpretation of the Act, which would schedule all meetings before and after the school day, the meetings would still fall under the timing and compulsory attendance considerations deemed relevant in the *Little Axe, Nartowicz, Lubbock,* and *Brandon* cases, in which the Courts of Appeals for the Tenth, Eleventh, Fifth, and Second Circuits barred student prayer clubs occurring before and after the school day.[217]

The Equal Access Act allows the teacher monitoring of student prayer clubs for the custodial purposes required by state law. This monitoring function was deemed unconstitutional by the Court in *Abington*[218]

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not inform the school—thus limiting school acknowledgment or imprimatur on the religious activity. *Id.*

215. 20 U.S.C. § 4072(4).

216. *See* 1984 U.S. CODE CONG. & AD. NEWS 2348: One of the "significant differences between S. 1059 and Title VIII" is that "S. 1059 deals with extracurricular activities during school hours while Title VIII deals with extracurricular activities before and after school hours . . . ." Much of the discussion in the congressional debates supports this view. *See* 130 CONG. REC. S8353 (daily ed. June 27, 1984). According to Senator Hatfield, "Regular instructional period is what the school would have when class is first scheduled in the morning . . . and it ends at 3:30." *Sen. Jud. Comm. Equal Access Hearings, supra* note 5, at 13. This definition of "instructional period," rejects the legislative history of predecessor bills, which expressly authorized meetings during noninstructional time during the school day. *See id.* ("[n]on-instructional periods might include recess, lunchtime, study hall, club period, or any other time when a public school allows student clubs or groups to meet") (statement of Sen. Mark Hatfield). *See also Religious Speech Protection Act Hearings, supra* note 11, at 6. A problem with the "school-day" interpretation is that it would not provide a uniform time for meetings, because secondary school students have different schedules. Thus, it is difficult to understand if the noninstructional period is deemed to occur after all the students' classes are over or after an individual student's classes are over. Further, if what legislators meant was before or after the school "day," why did they use the term "classroom instruction"? *See* 130 CONG. REC. S8356 (daily ed. June 27, 1984) (Sen. Denton's "activity period" interpretation).

217. *See Little Axe,* 766 F.2d at 1406 (holding unconstitutional before-class prayers and considering them to take place "during the school day"); *Nartowicz,* 736 F.2d at 648; *Lubbock,* 669 F.2d at 1046-47; *Brandon,* 635 F.2d at 978-79. *See supra* notes 206-07.

218. 374 U.S. at 225.

and by five courts of appeals.[219] Moreover, the Act permits potentially greater teacher involvement because it contemplates monitoring for other purposes. Under the Act, a school is authorized to allow its employees or agents to supervise all meetings, religious and nonreligious alike, as long as such supervision is for "custodial purposes,"[220] and is "nonparticipatory" as to religious meetings.[221] However, in apparent tension with the statute's bar on teacher participation, permissible supervision under the Act extends to maintaining order, protecting the well-being of students and faculty, and to assuring that attendance of students at meetings is voluntary.[222] Indeed, such supervision may even be implicitly required. The Act requires that equal access meetings be "voluntary and student-initiated,"[223] and it also requires that "non-school persons may not direct, conduct, control or regularly attend activities of student groups."[224] Assuring compliance with these provisions would seem to require school employees to supervise the meetings more extensively than the mere custodial supervision required by state law.

iv. Subjective Imprimatur

Central to the presumption of sponsorship in the public schools is the youth and impressionability of school children. This subjective factor compounds the objective government sponsorship to create an even greater appearance of government endorsement of religious activities organized in the public schools.

The Supreme Court has discussed this perception of government sponsorship in its decisions striking religious activities in the public schools,[225] and in its decisions sustaining organized prayer in other fo-

219. *See supra* note 211 and accompanying text.

220. 20 U.S.C. § 4072(2).

221. 20 U.S.C. § 4071(c)(3). The Act expressly bars participation of teachers in prayer meetings, although this bar would appear to be inconsistent with the "free speech theory" of equal access prayer. *See supra* notes 5 & 9. If the Act does create a public forum in the school, it follows that both students and teachers should be able to avail themselves of their free speech rights. *See* Tinker v. Des Moines, 393 U.S. 505, 506 (1969) (holding first amendment speech rights available on public school campus to teachers and students). The issue of teacher participation was recently addressed by a court when a group of teachers challenged the constitutionality of the Equal Access Act's bar on their participation in equal access prayer clubs. Mary May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761 (S.D. Ind. 1985).

222. 20 U.S.C. § 4071(f). This tension is increased by the Act's requirement that teachers volunteer for supervision of the clubs, 20 U.S.C. § 4071(d)(4), since teachers who volunteer would likely be supportive of the particular club such that their supervision would effectively involve participation in the religious club.

223. 20 U.S.C. § 4071(c)(1).

224. 20 U.S.C. § 4071(c)(5).

225. *See Abington,* 374 U.S. 203; *Engel,* 370 U.S. 421; *McCollum,* 333 U.S. 203.

rums.[226] The Court held in *Widmar* that a university equal access policy "does not confer any imprimatur of State approval on religious sects or practices."[227] In the university, the absence of imprimatur of state approval is due to both the absence of objective imprimatur indicia, such as university recognition of the clubs, state compulsory attendance, and teacher supervision, and to the absence of what might be termed "subjective imprimatur."[228] Subjective imprimatur is missing because university students are "young adults" and therefore "less impressionable" than younger students, who might view the extent of state action or sponsorship as approval.[229]

The distinction drawn in *Widmar* between university and younger students is the ability of older students to discern government neutrality versus endorsement of organized religious activities.[230] School religion case law consistently has drawn this bright line and required stricter establishment scrutiny for government sponsorship of religious activities in the public schools than in forums where only adults are present.[231] The minor age of school children operates as a presumptive factor to compound the effect of government aid to religion in the public schools.[232]

The importance of the youth and impressionability of children is emphasized in the many federal district and appellate decisions striking equal access policies in the public high schools.[233] The central question is "to what extent does the impressionability of students affect their per-

226. *See, e.g.,* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding prayer in a state legislature); *Widmar,* 454 U.S. at 274 (upholding prayer in a public university).

227. 454 U.S. at 274.

228. *See id.* at 274 n.14. *Cf. Bender,* 741 F.2d at 552-53.

229. 454 U.S. at 374 n.14.

230. *Id.*

231. *See supra* text accompanying notes 225-26. *See also* Tilton v. Richardson, 403 U.S. 672, 685-86 (1971). The bright line's special government solicitude for children under eighteen as opposed to young adults, is evidenced in many other areas of civil rights where government protection or solicitude of children extends to those under age eighteen because of legislative and judicial presumptions relating to the impressionability and lack of capacity of youth. This presumption of youth and impressionability is evidenced by various examples of assertions of state *parens patriae* power against children and adolescents. Some examples are the compulsory education laws, child labor laws, curfew laws, and laws restricting marriage and voting rights. *See, e.g.,* Moe v. Dinkins, 669 F.2d 67 (2d Cir.), *cert. denied,* 459 U.S. 827 (1982) (no fundamental right to marry for minors). *See generally* M. GUGGENHEIM & A. SUSSMAN, THE RIGHTS OF YOUNG PEOPLE 247-64 (1985).

232. *See supra* notes 225-29 and accompanying text.

233. *See, e.g., Bender,* 741 F.2d at 554; *Nartowicz,* 736 F.2d at 649; *Lubbock,* 669 F.2d at 1045-46; *Brandon,* 635 F.2d at 978. *See also Little Axe,* 766 F.2d at 1404 ("Elementary School children are vastly more impressionable than high school or university students and cannot be expected to discern nuances which indicate whether there is true neutrality toward religion on the part of a school administrator.").

ceptions of the school's actions."[234] *Bender, Lubbock,* and *Brandon* held that the impressionability of the young prevents them from appreciating that a school may allow access by a student religious group, not out of any intent to advance religion, but rather as a part of a policy of neutrality toward religion or for a secular expressive purpose.[235] As the court in *Brandon* declared:

> Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.[236]

The subjective imprimatur component of the presumption in the schools is particularly relevant to the constitutional issue posed by the Equal Access Act. Despite the Act's free speech thesis of nondiscrimination regarding religion, and its intent to treat equally religious and nonreligious activity, the Act may well be regarded by students as seeking to endorse or facilitate religion clubs.[237] This in part may be attributable to the Act's legislative origin in school prayer bills.[238] Moreover, the objective imprimatur factors operative in the Act are compounded by the youth and impressionability of students covered by the Act.[239] This is particularly the case in those states where the Act's scope will extend beyond high school to junior high students. Although the Equal Access Act's authority expressly extends to "secondary school" students only,[240] "secondary school" is reserved for definition by state law.[241] Many state

234. This impressionability of secondary school children was reaffirmed in *Lubbock*: "[T]he impressionability of secondary and primary school age children and the possibility that they would misapprehend the involvement of the District in these meetings, renders the primary effect of the policy impermissible advancement of religion." 669 F.2d at 1045. *See Widmar,* 545 U.S. at 274 n.14. *But see* Note, *supra* note 19, 92 YALE L.J. 499, 502 (1983).

235. *See supra* note 233.

236. 635 F.2d at 928.

237. *See Bender,* 741 F.2d at 552.

238. *See supra* text accompanying notes 61-62. Students "mature" enough to read the newpaper will learn that the purpose of the Act is to introduce prayer into schools. The Washington Post, on May 14, 1984, referred to the Equal Access legislation, declaring, "in Congress they're calling it Son of School Prayer." *President Signs a Bill to Permit Prayer in Schools,* N.Y. Times, Aug. 1, 1984, at A24, col. 1.

239. The youth and impressionability of students exposed to equal access clubs under the Act was testified to repeatedly. *See, e.g., Religious Speech Protection Act Hearings, supra* note 11, at 112-13 (statement of Ruti Teitel, Ass't Dir., Legal Affairs, Anti-Defamation League); *id.* at 79 (statement of Barry Lynn, Legislative Counsel, ACLU). This characterization of high school students, however, was not generally accepted by congressional committees considering the issue. *See* S. REP. No. 357, 98th Cong., 2d Sess. 35 (1984).

240. 20 U.S.C. § 4071(a).

241. 20 U.S.C. § 4072(1).

laws define "secondary school" to include junior high students,[242] who may be eleven and twelve years old and thus presumed even more impressionable. The Court has held that children this age view organized religious exercises in the public schools as state sponsored.[243]

c. Excessive Entanglement

The third prong of the *Lemon* test requires an examination of the extent to which equal access policies cause excessive entanglement of the schools in religious affairs.[244] Many of the same elements suggesting state imprimatur also result in excessive entanglement.[245] The organizing of religious activities on school premises during the school day, under the official supervision of a school monitor, has the effect both of advancing religion and of creating entanglement by "putting the school in a position of governance over religious activity."[246] But in addition, the entanglement inquiry also raises questions of a procedural nature as to whether the policy promotes an ongoing relationship between church and state.[247]

Relying on the Court's *Lemon* standard,[248] the courts in *Little Axe, Bender, Lubbock,* and *Brandon* held that when organized prayer activities occur at times associated with the school day, impermissible entanglement results from faculty supervision of the prayer meetings.[249] Because state laws place the responsibility for students during the day

242. *See, e.g.,* N.Y. EDUC. LAW § 2 (McKinney 1969) (defining "secondary school" to include both junior and senior high school). Presumably, in New York, junior high school students as young as eleven would be subject to the Act. Legislative history suggests Congress intended to limit the Act to "high schools" even though the term "secondary school" was used. *See, e.g.,* 130 CONG. REC. S8347 (daily ed. June 27, 1984) (applicable age group described as "kids who are freshman through seniors in high schools. It is people who are 14 through 18 years of age.") (statement of Sen. Danforth). Despite confusing legislative history, the Act very clearly leaves the definition of secondary school to state law.

243. *See, e.g., Abington,* 374 U.S. at 290 (Brennan, J., concurring), *reaff'd in* Wallace v. Jaffree, 105 S. Ct. 2479 (1985). *See also Little Axe,* 766 F.2d at 1404.

244. *Widmar,* 454 U.S. at 271 (citing approvingly to *Lemon,* 403 U.S. at 612).

245. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 768-69 (1976) (White, J., concurring) (excessive entanglement test is duplicative of secular effect test). *See, e.g., Little Axe,* 766 F.2d at 1406.

246. *Bender,* 741 F.2d at 556. *See Lemon,* 403 U.S. at 621-22.

247. *Roemer,* 426 U.S. at 755. *See Lemon,* 403 U.S. at 621-22; *Brandon,* 635 F.2d at 979.

248. 403 U.S. at 620-21.

249. *Little Axe,* 766 F.2d at 1406; *Bender,* 741 F.2d at 556-57; *Lubbock,* 669 F.2d at 1047; *Brandon,* 635 F.2d at 979. *See Karen B.,* 653 F.2d at 902; *Collins,* 644 F.2d at 762 (excessive entanglement results from school supervision of prayer at student assemblies); *See also Trietley,* 65 A.D.2d at 7, 409 N.Y.S.2d at 917.

with the school,[250] supervision of any meeting is required. As the court in *Brandon* stated, "if the state must engage in continuing administrative supervision of nonsecular activity, church and state are excessively intertwined."[251] This type of entanglement has been held fatal to prayer meetings on school premises, even when supervision is by nonschool employees who are merely approved by the school.[252]

Beyond the entanglement posed by custodial or administrative supervision of equal access meetings is entanglement resulting from supervision to maintain voluntariness at the equal access meetings. To ensure student initiation and the absence of coercion, state employees are put in a position of ongoing monitoring.[253] The Equal Access Act provides for both types of teacher supervision,[254] and clearly contemplates entanglement objections.

On the one hand, the Act requires that the meetings be voluntary and student-initiated,[255] that outsiders not control the meetings,[256] and that teachers be nonparticipatory at religious meetings.[257] On the other hand, other provisions of the Act seek to protect students from control by outsiders that exercise strong proselytizing techniques by authorizing the school 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."[258] Thus, in order to guarantee student voluntariness and avoid outsider control, teachers will have to be-

250. In Little Axe, Oklahoma, for example, supervision of prayer meetings was required because under Oklahoma state law, the state must supervise students during the school day. OKLA. STAT. tit. 70, § 1-1114 (1981).

251. 635 F.2d at 979.

252. *Lubbock,* 669 F.2d at 1047 n.16 (citing McCollum v. Board of Educ., 333 U.S. 208 (1948)). *See supra* note 249.

253. *See, e.g., Lubbock,* 669 F.2d at 1047; *Karen B.,* 653 F.2d at 902; *Collins,* 644 F.2d at 762; *Trietley,* 65 A.D.2d at 6-7, 409 N.Y.S.2d at 916.

254. *Compare* 20 U.S.C. §§ 4071(f) *and* 4072(2) (custodial supervision) *with* 20 U.S.C. §§ 4071(a) (unlawful to discriminate on basis of content of speech at meeting) *and* 4071(c)(1) (meetings must be voluntary and student-initiated).

255. 20 U.S.C. § 4071(c)(1).

256. 20 U.S.C. § 4071(c)(5).

257. 20 U.S.C. § 4071(c)(3).

258. 20 U.S.C. § 4071(f). While the voluntariness provisions are essential to equal access theory, the National Education Association testified repeatedly at equal access legislation hearings that its members cannot supervise for coercion. *Religious Speech Protection Act Hearings, supra* note 11, at 42-43 (statement of Linda Tarr-Whelan, Dir. of Gov't Rel., NEA); *Sen. Jud. Comm. Equal Access Hearings, supra* note 5, 201 ("S. 1059 . . . would require school employees to maintain appropriate discipline at gatherings of religious groups on school property . . . . Any meaningful, productive religious discussion among our children requires facilitation, direction setting and supervision. Obviously Congress cannot provide that supervision in the public school setting.") (statement of Ms. Piccinini, Pres., Maryland Teachers Ass'n, speaking on behalf of NEA). *See also id.* at 206-08.

come involved. This involvement necessarily results in excessive teacher entanglement and could be avoided only through further school employee entanglement involving supervision of teachers to insure their nonparticipation.[259]

The Act's express bar of teacher participation in religious meetings and its attendant but apparently unintended bar of teacher participation in any other nonreligious clubs[260] indicates the anticipation of entanglement objections. How this bar on participation in meetings coexists with the Act's provisions for supervision for voluntariness purposes is a difficult tension which the Act fails to address, but which places the schools in the unenviable position of violating both constitutional requirements and the terms of the Act by merely following the Act's supervision requirements.

In addition to the entanglement resulting from state personnel supervising religion clubs, further entanglement of the state in religion occurs when school funding is used to advance equal access clubs. School funding would be involved, for example, if special salary costs are expended for teacher supervision.[261] Similar entanglement results from the use of school media for the clubs[262] because the school is placed in a position of continually regulating the use of its resources in order not to assist religious activities.[263] Although the Equal Access Act does not authorize use of school media to advance the clubs, neither are they expressly barred by the Act. This use may conflict with sections of the Act that bar school sponsorship.[264] Nevertheless, it is clear that some level of sponsorship is necessitated by the Act, such as recognition of the clubs,

259. *See, e.g., Bender,* 741 F.2d at 556. As the Supreme Court held in *Lemon,* "the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state." 403 U.S. at 620-21. *See also Trietley,* 65 A.D.2d at 7, 409 N.Y.S.2d at 917 ("Without constant supervision, these Bible clubs readily could become exclusively sectarian classes in religious instruction within the publicly supported school system.").

260. Whether or not the Act permits teachers to participate in nonreligious meetings is ambiguous. 20 U.S.C. § 4071(c)(3), which bars teacher participation at religious meetings, suggests that teachers would be permitted to participate in nonreligious meetings. However, school restrictions on school sponsorship in the Act affect all meetings, religious and nonreligious. According to § 4071(c)(2), there must be "no sponsorship of the *meeting* by the school, the government, or its agents or employees . . . ." (emphasis added). Sponsorship, as defined by the Act, includes "the act of promoting, leading or *participating* in a meeting." 20 U.S.C. § 4072(2) (emphasis added). Thus, this section appears to prohibit faculty participation in all noncurricular meetings, not just those that are religious.

261. No provision is made in the Act for reimbursing teachers for supervision.

262. *See supra* note 213. *Cf.* Healy v. James, 408 U.S. 169 (1972) (funding provided for student meetings in university forum).

263. *See Lemon,* 403 U.S. at 619; *Bender,* 741 F.2d at 556.

264. *See* 20 U.S.C. §§ 4071(c)(2), 4071(d)(3), and 4072(2).

the use of classrooms, the provision of light and heat, and possible extra salary requirements for teacher supervision.[265] Use of school media for clubs organized pursuant to the Act results in the same entanglement found in pre-Act equal access clubs' use of school resources to assist worship activities.[266]

Perhaps the most significant entanglement resulting from an equal access policy is the requirement of the daily school management of the religious divisiveness produced by the organizing of sectarian religious meetings on campus. These divisions along religious lines were considered by the Framers,[1] and by the Supreme Court, to be exactly what the Establishment Clause was designed to prevent.[267] This divisiveness is of special concern in the public schools which traditionally have been considered to stand for the antithesis of separatist sectarian instruction.[268] In fact, both pre- and post-Act equal access has caused divisiveness in

265. Section 4071(d)(3) specifically declares that the state is not authorized by the Act to "expend public funds beyond the incidental cost of providing space" for meetings. However, it does not expressly bar expenditures for teachers' salaries.

266. *See supra* text accompanying notes 245-52.

267. "[Government aid] will destroy that moderation and harmony which the forebearance of our laws to intermeddle with religion has produced among its several sects." J. Madison, *A Memorial and Remonstrance Against Religious Assessments,* para. 11 (1784), *reprinted in* W. HUTCHISON, R. RUTLAND, & W. RACHAL, PAPERS OF JAMES MADISON 295-306 (1962). *See Lemon,* 403 U.S. at 622, 624. Although the divisiveness factor in the entanglement inquiry in *Lemon* recently appears to have been limited by the Court to cases involving direct financial support by government to religious institutions, *see Lynch,* 104 S. Ct. at 1364-65, and *Mueller,* 463 U.S. at 403 n.11, *see, e.g.,* Aguilar v. Felton, 105 S. Ct. 3232 (1985), it remains to be seen how this new divisiveness test will be applied to equal access meetings in public schools. Several courts have found divisiveness to result from equal access meetings. Bell v. Little Axe Indep. School Dist., 766 F.2d 1391, 1406-07 (10th Cir. 1985); Trietley v. Board of Educ., 65 A.D.2d 1, 7, 409 N.Y.S.2d 912, 917 (1978); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 14, 137 Cal. Rptr. 43, 50 (1977).

Aside from the entanglement test, eschewal of strife and division among religions is considered to be among the major policy reasons for the separation of church/state mandate. *See Mueller,* 463 U.S. at 399-400 ("what is at stake as a matter of policy . . . is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point") (citing *Nyquist,* 413 U.S. at 796). This is especially important in the public schools. McCollum v. Board of Educ., 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) (students "will thus have inculcated in them a feeling of separation when the school should be the training ground for habits of community . . . .").

268. *See Abington,* 374 U.S. at 242 (Brennan, J., concurring); *McCollum,* 333 U.S. at 231 ("[i]n no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart") (Frankfurter, J., concurring). *But see* Brief For the United State as Amicus Curiae Supporting Petitioner at 15, Bender v. Williamsport Area School Dist., No. 84-773 (U.S. S. Ct.) (a policy of equal access for all groups is precisely the ideal envisioned by the Founders).

communities,[269] which was attested to by the schools both in the legislative process and later as applied.[270]

Manifestly, equal access poses numerous entanglement problems. Denying equal access to religious clubs also raises entanglement problems, as the Court found in *Widmar*.[271] Nevertheless, in the high school, as opposed to the university, given the foregoing entanglement problems, lesser ongoing entanglement is involved when equal access religious clubs are disallowed.[272] Moreover, the minimal entanglement that results when a school official distinguishes between the religious and the nonreligious would appear to be an entanglement contemplated by the Court's school religion decisions.[273]

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269. *See, e.g., Little Axe,* 766 F.2d at 1406-07 ("The question of whether the school board would permit the meetings to continue fomented political divisiveness . . . . [T]his only further embroiled local government in an issue that had already divided a community along religious lines."); *see infra* note 270; *Young Life Youth Ministries Activities Raise Policy Issue for Educators,* EDUC. WEEK, Oct. 28, 1983, at 1, 14 (concerning Inoka High School in Minneapolis—divisiveness resulting from entry of youth ministry into the schools). Recently school board meetings considering implementation of the Equal Access Act have turned into divisive community debates. *See, e.g., Saddleback Trustees Refuse Policy Change on Religious Meetings,* L.A. Times, Jan. 23, 1985, at 1; *Religion-at-School Issue Embroils Local Districts,* The Register, Jan. 20, 1985, at Religion A1-2 (concerning rejection of Equal Access Act in Saddleback Valley Unified School District); *Christians Seek Classroom Use,* The Denver Post, Dec. 7, 1984, at 1-A, 17A (considering rejection of Equal Access Act implementation in Boulder High School, Boulder, Colo.).

270. The former superintendent of the Little Axe, Oklahoma school district, testified that the prayer sessions produced "sensitiveness," "disharmony," and "disruptiveness" in the little community. (Record at 187, *Little Axe*). This behavior resulted in the plaintiffs having to remove students from the Little Axe school district. (Record at 684, *Little Axe*). *See Little Axe,* No. CIV-81-620-T, slip op. at 16 (W.D. Okla. Mar. 11, 1983) ("The angry divisions among citizens of the school district and the hostile, boorish behavior generated by this emotional controversy very clearly establishes the divisiveness along religious lines in the community."). *See also Religious Speech Protection Act Hearings, supra* note 11, at 43 (statement of Linda Tarr-Whelan, Dir. of Gov't Rel., NEA). Post-Equal Access Act schools have attested to the problems engendered by the decision whether to implement the Act. One school even turned to litigation to avoid the strife between religious factions. *See* Commack v. Rossi, No. CIV-85-1288 (E.D.N.Y. 1985).

271. *See, e.g., Widmar,* 454 U.S. at 272 n.11 (barring religious meetings on the university campus would exacerbate the entanglement because the university would have to determine "which words and activities fall within 'religious worship' "). *See Bender,* 741 F.2d at 568 (Adams, J., dissenting).

272. *Bender,* 741 F.2d at 556 (distinguishing *Widmar,* 454 U.S. at 272 n.11 and citing *Mueller,* 463 U.S. at 403, as recent example of the Court holding entanglement test not violated when state officials are required to distinguish between secular and religious textbooks).

273. *See Abington,* 374 U.S. 203, 278-79, 300 (1963) (Brennan, J., concurring); *Bender,* 741 F.2d at 556 (citing *Engel,* 370 U.S. 421 (1962)). *See also Mueller,* 463 U.S. at 388 (upholding the principle of distinguishing between secular and religious texts).

III. The Unitary Forum Analysis

A. Introduction

The Establishment Clause, as a constitutional mandate of content discrimination against government-sponsored religious speech,[274] clearly conflicts with equal access theory which treats religious and nonreligious speech in the same way. Nevertheless, equal access proponents claim that the establishment problems raised by religious activities in public high schools are outweighed by free speech and equal protection rights. These countervailing constitutional rights assertedly flow from a characterization of public schools as "open forums."[275] Proponents claim that this "open forum" characterization overcomes the establishment problems by providing equal access to public facilities to *all* school clubs, religious and nonreligious, so that no special benefit accrues to religious clubs.[276] This argument, however, conflicts with the Establishment Clause.

Characterizing public schools as open forums places schools on the same footing as public parks in which equal access is a mandatory free

274. As declared by the Court in *Widmar,* 454 U.S. at 271 n.9:

> [T]he Establishment Clause requires the State to distinguish between "religious" speech—speech, undertaken or approved by the State, the primary effect of which is to support an establishment of religion—and "nonreligious" speech—speech, undertaken or approved by the State, the primary effect of which is not to support an establishment of religion. This distinction is required by the plain text of the Constitution. It is followed in our cases. *E.g.,* Stone v. Graham, 449 U.S. 39 (1980).

275. The characterization of public schools as "open forums," *see infra* notes 297-332 and accompanying text, triggers free speech rights, *see* Widmar v. Vincent, 454 U.S. 263 (1981), and equal protection rights barring content discrimination, *see* Stacy v. Williams, 306 F. Supp. 963 (M.D. Miss. 1969). The "open forum" doctrine—the basis of the *Widmar* Court's upholding of the right of a religious group to have access to public facilities in the university—essentially requires that there be no content discrimination against speech in the public forum. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). *See generally* Note, *The Rights of Student Religious Groups Under the First Amendment to Hold Religious Meetings on the Public University Campus,* 33 RUTGERS L. REV. 1008, 1050-51 (1981). Equal access proponents seek to extend *Widmar,* claiming that open forum principles barring content-based discrimination against religious speech in universities apply equally to high schools and compel allowance of religious activities there. *See, e.g., Bender,* 563 F. Supp. at 704 (citing *Widmar,* 454 U.S. at 270).

In framing the issue as one of "free speech," equal access proponents recast the issue of prayer in schools. No longer is the question whether establishment principles *forbid* state-assisted, student-initiated prayers, but rather whether free speech principles *compel* their accommodation. *See Widmar,* 454 U.S. at 284 (White, J., dissenting). *Compare* Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965) (free speech does not compel schools to allow religious activity) *with Bender,* 741 F.2d at 538 (free speech rights to equal access are overridden by establishment concerns which compel barring religious club).

276. *E.g., Widmar,* 454 U.S. at 269-70, (cited in *Bender,* 741 F.2d at 562-63 (Adams, J., dissenting)).

speech right.[277] Yet this open forum characterization overlooks the extensive government purpose and involvement in public schools. Open forums must be free of the government purpose, control, and involvement present in public schools. This government involvement prevents any characterization of public high schools as open forums. It also creates the establishment problems inherent in equal access. Accordingly, a single analysis of the government purpose, control, and involvement in public high schools can respond to the establishment, free speech and equal protection issues raised by equal access. This single factual inquiry—which underlies both the characterization of public high schools as open forums and the resolution of the establishment issues raised by equal access—constitutes the proposed "unitary forum analysis."[278]

The unitary forum analysis suggests that the establishment and free speech concerns raised by religious activities on government property are related. Both issues can be resolved by determining the government's purpose and involvement in the forum.[279] The government has different expressive purposes and has varying levels of involvement with respect to different kinds of public property, such as parks, streets, universities,

277. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at 14-15, Bender v. Williamsport, No. 84-773 (filed May 1985); Brief For Petitioners at 14, *id.*

278. The unitary forum analysis in this Article is applied only to cases of organized, group religious speech on government property. The unitary forum analysis itself, however, is applicable to any case in which an equal access justification is raised in an establishment challenge. Applying the analysis in these other cases may raise issues not addressed in this Article. For example, the challenged religious activity may be de minimis under the Establishment Clause, as in the case of individual expressions of religious belief. *See infra* text accompanying note 323. Isolated personal actions may not implicate Establishment Clause concerns. *Cf.* Wallace v. Jaffree, 105 S. Ct. 2479, 2491 (1985).

It may appear that the unitary forum analysis is deficient in some cases involving "limited" public forums, *see* Grayned v. Rockford, 408 U.S. 104 (1972), in which accepted doctrine requires consideration of the incompatibility of the manner in which the speech is expressed with the normal activities occurring in the forum at that time. *Id.* at 116. The unitary forum analysis does not examine the manner of expression of religious speech, nor does it employ an incompatibility analysis. This, however, results from the *scope* of the unitary forum analysis, that is, cases involving religious speech that raise establishment concerns. Because the Establishment Clause requires content discrimination against religious speech, *see supra* note 274, the unitary forum analysis excludes consideration of the manner in which religious speech is expressed. By contrast, the *Grayned* incompatibility analysis applies strict scrutiny to protected political speech. 408 U.S. at 116.

279. Moreover, the validity of free exercise claims to group worship in schools also turns in large part on the extent of government control over the forum. Because the public schools are considered to be under less control by government supervision than, for example, prisons or military bases, free exercise rights to communal prayer in the public schools have not been recognized by the Supreme Court. Students have constitutionally adequate alternative forums in which to exercise their religious beliefs. *See, e.g., Abington,* 374 U.S. at 250-53 (Brennan, J., concurring). *See also* Wood v. Mount Lebanon Township, 342 F. Supp. 1293, 1295 (W.D. Pa. 1972). *See also infra* text accompanying notes 523-530.

schools, and prisons. Under the unitary forum analysis, different first amendment establishment and free speech mandates arise with respect to different government forums. Applied to public high schools, the unitary forum analysis reveals that a coherent first amendment consideration of equal access necessitates two coincident, inversely related findings: (1) equal access violates the Establishment Clause and (2) high schools are not open forums.

Prevailing first amendment theory holds that the first amendment dilemma posed by competing establishment and free speech interests must be resolved by a balancing test to determine the "weightier" interest.[280] By contrast, the unitary forum analysis suggests that in almost all instances the characterization of the forum in which the conflict arises permits inversely correlated establishment and free speech findings, thus obviating the need for a balancing test. In practice, however, there are a few instances in which the unitary forum analysis yields two conflicting characterizations of the forum—which results in competing first amendment interests. In these cases, clashes between establishment and free speech concerns should be reconciled through a search for alternative forums for free religious expression.

B. Application

The Supreme Court has held that equal access is required in public forums, regardless of the Establishment Clause.[281] Accordingly, the characterization of public school forums is central to equal access analysis. The unitary forum analysis examines the purpose of the public property and the extent of government involvement therein. In traditional public forums, there is a strong government purpose of encouraging expression. To facilitate free speech and association, there is a low level of government control and involvement. This purpose, and low level of

280. *See, e.g.*, Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 GEO. L.J. 135, 136-37, 149 (1983). Based on *Widmar*, equal access proponents claim that there is a "compelling interest" test, whereby in a public forum there must be equality of access for nonreligious and religious speech alike. *See Widmar*, 454 U.S. at 270. *See, e.g., Bender*, 741 F.2d at 557. This right is defeated only when exclusion is necessary to serve a "compelling state interest." *Widmar*, 454 U.S. at 270. Under this theory, the establishment problems posed by equal access clubs are "not compelling." *See, e.g., Bender*, 741 F.2d at 561-69 (Adams, J., dissenting). Thus, according to equal access proponents, the First Amendment balance is struck in favor of free speech. *Widmar*, 454 U.S. at 276.

281. Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948). *See also* O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979).

government involvement, raise a presumption in favor of free speech rights and against a finding of establishment.

Accordingly, in the many cases defining public forum rights for religious expression, the focus is on where "the speaking which is regulated take[s] place."[282] In the traditional public forum, whether park or street, there is a free expression "right to be" and "to impart [one's] views to others."[283] Once a forum is characterized as "public," the First Amendment requires equal access to religious groups for expressive purposes, and no impermissible establishment results.

A similar unitary analysis was recently used in *Scarsdale v. McCreary*[284] which concerned an establishment challenge to an unattended nativity scene displayed in a small park in a traffic circle. The Second Circuit made a unitary finding on the nature of the forum, permitting it to find both a public forum right of access and no establishment of religion. The court's free speech analysis began by noting that the government's purpose in the park was expressive and that private citizens exercised control over the park. Crucial to this finding was the court's determination that the park was available to a broad range of expression.[285] This evidentiary factor—the broad array of expression available in the park—caused the court, relying on *Widmar,* to find that the nativity scene only incidentally benefitted religion, so that there was no establishment.[286]

Government property that is not a traditional public forum, such as a public university, also may be characterized as a public forum under the unitary forum analysis. The characterization of such property as a public forum turns on the intended function and use of the property.[287] This requires an examination of (1) whether there is a government purpose in free expression and (2) the extent of government control and involvement in the forum. Just as in the traditional public forum, this inquiry produces inversely correlated establishment and free expression concerns regarding equal access.

In *Widmar,* the Court's analysis commenced with a factual inquiry

282. Niemotko v. Maryland, 340 U.S. at 282 (Frankfurter, J., concurring).

283. Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

284. 105 S. Ct. 1859 (1985), *aff'g per curiam,* McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984).

285. *McCreary,* 739 F.2d at 722. Unlike the *Widmar* Court, which examined the actual preexisting array of clubs as evidence of a public forum, 454 U.S. at 267-68, the *McCreary* Court was satisfied with the mere hypothetical availability of the forum to a broad range of religious and nonreligious groups and individuals. *McCreary,* 739 F.2d at 727.

286. 739 F.2d at 727.

287. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983).

concerning the nature of the public university forum.[288] This factual analysis, which included consideration of the broad array of inquiry possible on a university campus, gave rise to related establishment and free speech considerations. First, the broad spectrum of ideas in the university forum was an indication of the university's communicative purpose as a "generally open forum" or a "marketplace of ideas."[289] Second, this communicative purpose weighed against finding an establishment: by allowing equal access to all ideas, any benefit to religion was "incidental."[290] The inverse but interdependent relationship of the two constitutional concerns permitted the Court in *Widmar* to eschew employing a balancing test.

The results of the unitary analysis in *Widmar* rely on a characterization of the university as a public forum. However, a similar characterization of public high schools has in almost all cases been rejected by the courts.[291] In the one case where it was accepted, *Bender v. Williamsport Area School District,*[292] the district court's approach still followed the unitary analysis. The court's determinations concerning the first amendment concerns raised by equal access in the high school were interdependent: the court made a positive public forum determination, necessitating a negative establishment finding.[293] Following *Widmar,* the court in *Bender* noted that in Williamsport High School there is a "broad . . . spectrum of student groups."[294] This "spectrum" simultaneously created a "limited public forum,"[295] which evidenced a "secular effect," rather than religious establishment.[296]

Notwithstanding the district court's opinion in *Bender,* public schools are not open public forums. The government's educative purpose in public high schools, and the extensive government control and involvement required to implement this goal, at once pose establishment problems and preclude a public forum characterization.[297]

288. 454 U.S. at 267-70.

289. 454 U.S. at 267 & n.5 (citing Healy v. James, 408 U.S. 169, 180 (1972)). *See infra* text accompanying notes 306-309.

290. *Id.* at 273-74 (citing Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 771 (1973)).

291. *See infra* note 297.

292. 563 F. Supp. 697, *rev'd on other grounds,* 741 F.2d 538 (3d Cir. 1984).

293. 563 F. Supp. 707-08.

294. *Id.* at 711 (citing *Widmar,* 454 U.S. at 274).

295. 563 F. Supp. at 706.

296. *Id.* at 711.

297. *See, e.g., Lubbock,* 669 F.2d at 1048; *Brandon,* 635 F.2d at 980; Hunt v. Board of Educ., 321 F. Supp. 1263, 1266 (S.D. W. Va. 1971); Trietley v. Board of Educ., 65 A.D.2d 1, 4,

The public forum inquiry is a factual one.[298] Courts have uniformly rejected the proposition that public property necessarily constitutes a public forum.[299] The Supreme Court has held that government has the power to preserve property under its ownership and control for lawful purposes other than expression.[300] Accordingly, to determine whether a public forum has been created, one must assess the nature of the property at issue.[301] As the Court held most recently in *Perry Education Association v. Perry Educators' Association,*[302] it is necessary to examine the purpose and use to which the public property has been dedicated.

The presumptive purpose of the public schools is education, not equal access communication.[303] Public schools may be compared with government buildings with specific government purposes other than free

409 N.Y.S.2d 912, 915 (1978). *Cf.* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-47 (1983); Ellis v. Dixon, 349 U.S. 458 (1955).

In certain circumstances courts have held the public schools to be limited free speech forums. *See, e.g.,* Tinker v. Des Moines, 393 U.S. 503, 507 (1969) (distinguishable from equal access cases because speech at issue did not involve government). *See also Little Axe,* 766 F.2d at 1401; *Bender,* 741 F.2d at 548; International Center for Krishna Consciousness v. New Jersey Sports & Exposition Auth., 691 F.2d 155, 160 (3d Cir. 1982) (dictum considering public school to be limited public forum). For case law concerning the establishment holding, see *supra* note 38.

298. *E.g., Bender,* 741 F.2d at 541-42.

299. United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981); Poulos v. New Hampshire, 345 U.S. 395, 405 (1953); Bell v. Little Axe Indep. School Dist., 766 F.2d 1391, 1401; Stein v. Oshinsky, 348 F.2d 999, 1001 (2d Cir. 1965); Hunt v. Board of Educ., 321 F. Supp. 1263, 1266 (S.D. W. Va. 1971) (quoting Poulos v. New Hampshire, 345 U.S. 395, 405) ("The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time for a group discussion or instruction"). *See* Greer v. Spock, 424 U.S. 828 (1976).

300. United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981); Greer v. Spock, 424 U.S. 828 (1976); Stein v. Oshinsky, 348 F.2d 999, 1001 (2d Cir. 1965).

301. *See, e.g., Bender,* 563 F. Supp. at 705 ("The forum is limited by the nature and purpose of the university's action."); *McCreary,* 575 F. Supp. at 1122 ("[i]n assessing whether a free speech right of access to public property has been impermissibly denied, the court must make an initial determination as to the nature of the property involved." (footnote omitted)).

302. 460 U.S. 37, 46-49; *see also* International Center for Krishna Consciousness v. New Jersey Sports & Exposition Auth., 691 F.2d 155, 160 (3d Cir. 1982) ("primary factor in determining whether property owned or controlled by the government is a public forum is how the locale is used").

303. *See* Board of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 869 (1982); Ambach Comm'r of Educ. v. Norwick, 441 U.S. 68, 76-77 (1979) (purpose of public high school is not marketplace of ideas but rather "preparation of individuals for participation as citizens"); Ellis v. Dixon, 349 U.S. 458 (1955); *Lubbock,* 669 F.2d at 1048; *Brandon,* 635 F.2d at 980; *Stein,* 348 F.2d at 1001, 1002; *Hunt,* 321 F. Supp. at 1266; *Trietley,* 65 A.D.2d at 4, 6, 409 N.Y.S.2d at 915, 917. *See also Abington,* 374 U.S. at 230 (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government"); *McCollum,* 333 U.S. at 231 (Frankfurter, J., concurring)

expression, such as courthouses,[304] and distinguished from traditional public forums, such as parks and streets, which are designated for free expression.[305]

The nature of public high schools may also be contrasted with that of public universities. The university has been characterized as a "marketplace of ideas,"[306] dedicated by the state in part for use as a public forum.[307] By contrast, the courts have determined the government purpose in public high schools to be educative. This determination relies on a variety of indicia, chief among which is the limited range of inquiry characteristic of public high schools. This limited inquiry distinguishes high schools from open forums such as public parks and universities. Comparing the secondary school function with the broad goals of higher education, the Third Circuit in *Bender* noted:

> The educational mission of a high school, in contrast, is more circumscribed. The curriculum consists less of, and indeed is less conducive to an unfettered inquiry. . . .
>
> [I]t is unlikely that school authorities would seek to create a truly open forum in a high school environment for unregulated di-

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

304. As the Second Circuit stated in Stein v. Oshinsky, 348 F.2d at 1001:

> Neither the Free Exercise Clause nor the Free Speech Clause requires a state to permit persons to engage in public prayer in state-owned facilities wherever and whenever they desire. Poulos v. State of New Hampshire, 345 U.S. 395, 405 (1953). It would scarcely be argued that a court had to suffer a trial or an argument to be interrupted any time that spectators—or even witnesses or jurymen—desired to indulge in collective oral prayer.

305. *See Perry Educ. Ass'n.*, 460 U.S. at 45-46; *Trietley*, 65 A.D.2d 1, 6, 309 N.Y.S.2d 912, 917. Parks and streets "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," Hague v. CIO, 307 U.S. 496, 515 (1939) (cited in *Perry Educ. Ass'n*, 460 U.S. at 45.) Characteristic of parks and streets is a diversity of uses, religious and nonreligious, which diffuse any semblance of government sponsorship of religion. Thus, all forms of expression have been upheld. Niemotko v. Maryland, 340 U.S. 268 (1951) (upholding Bible talks with permits in parks); Saia v. New York, 334 U.S. 558 (1948) (permitting religious lectures through loudspeakers in parks); Murdoch v. Pennsylvania, 319 U.S. 105 (1943) (upholding distribution of religious literature as a noncommercial religious enterprise); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding right of religious group to hold street parade); Cantwell v. Connecticut, 310 U.S. 296 (1940) (upholding distribution of religious literature). *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (upholding religious solicitation in public fair); O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) (upholding papal Mass in national mall).

306. Healy v. James, 408 U.S. 169, 180 (1972) (presumption of university as marketplace of ideas places burden on college to deny right of expression). *See also* Note, *supra* note 275, at 1052; Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969); Gay Rights Student Org. v. Bonner, 509 F.2d 652 (1st Cir. 1974).

307. *Widmar*, 454 U.S. at 267.

alogue and inquiry.[308]

The Supreme Court has found that such limited inquiry is characteristic of nonpublic forums.[309]

Because public high schools are forums of limited inquiry, the content discrimination necessary to the development of the school curriculum has been held to be constitutional.[310] High schools may exercise content discrimination in their choice of curriculum and clubs to further educative goals.[311] A fortiori, content discrimination to avoid establishment challenges may be sustained.[312] Only the drawing of distinctions among religious clubs would raise constitutional concerns.[313]

Aside from its independent significance, the educative purpose of public high schools creates the necessity for extensive government control and involvement to further this goal. The extent of government control and involvement in public high schools has been discussed in the context of school sponsorship of religious clubs.[314] The chief factors evidencing government control, in addition to curriculum-related content restrictions, are the use of compulsory attendance laws to bring students to the school and the use of teacher monitors to supervise students during the day to ensure attendance, order and student well-being.[315]

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308. 741 F.2d at 548.

309. *Perry Educ. Ass'n,* 406 U.S. at 47 ("selective access does not transform government property into a public forum").

310. *See, e.g.,* Seyfried v. Walton, 668 F.2d 214 (3rd Cir. 1981). *Cf. Perry Educ. Ass'n,* 460 U.S. at 55 ("on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used").

311. *See, e.g., Little Axe,* 766 F.2d at 1402. *See Perry Educ. Ass'n,* 460 U.S. at 55; Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981) (no First Amendment right for students to use school facilities to present play of their choice).

312. Courts have sustained content discrimination to avoid establishment problems. *See, e.g., Lubbock,* 669 F.2d at 1048; *Brandon,* 635 F.2d at 980; *Trietley,* 65 A.D.2d at 8, 409 N.Y.S.2d at 917. This has been true even in one university forum case. *See* Dittman v. Western Wash. Univ., No. 79-1189 (W.D. Wash. Feb. 28, 1980) (state university limited use of classrooms for religious purposes; court held that the university had interfered with free exercise, but that compelling interest existed in not violating the Establishment Clause), *vacated and remanded in light of Widmar,* No. 80-3120 (9th Cir. Mar. 30, 1982).

313. Equal protection concerns would result if distinctions were made among religions, as opposed to between religion and nonreligion, in making access decisions. *Brandon,* 635 F.2d at 980; *Hunt,* 321 F. Supp. at 1266; *Trietley,* 65 A.D.2d at 8, 409 N.Y.S.2d at 917. *Cf.* Larson v. Valente, 456 U.S. 228, 255 (1982) (striking Minnesota statute according tax exemptions to religious organizations preferentially according to size). *But see* Stacy v. Williams, 306 F. Supp. 963 (N.D. Miss. 1969).

314. *See supra* text accompanying notes 164-213.

315. *Bender,* 741 F.2d at 552-53. Compulsory attendance is required nationwide with almost no exceptions. *E.g.,* Bell v. Little Axe Indep. School Dist., 766 F.2d 1391, 1406 (10th Cir. 1985) (citing Oklahoma law requiring school attendance: OKLA. STAT. tit. § 105 (1981)). *See* Wisconsin v. Yoder, 406 U.S. 205, 226-29 (1972); *McCollum,* 333 U.S. at 209. Teacher

These factors negate the possibility of characterizing public high schools as public forums[316] and undermine the premises— indispensable in an open forum—that attendance and association in the forum are voluntary.[317]

The importance of government control and involvement in the unitary forum analysis is highlighted in cases in which these factors are missing. When religious meetings are held off school premises,[318] on weekends or at night, so that neither compulsory school attendance nor teacher supervision is in effect, there is a lesser establishment problem.[319]

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monitoring on school premises during the school day is also required nationwide. *See, e.g., Little Axe*, 766 F.2d at 1406 (citing Oklahoma law requiring such supervision: OKLA. STAT. tit. 70 § 6-114 (1981)); *Brandon*, 635 F.2d at 979 (noting New York law requires schools to provide student supervision).

316. Determination of what occurs in the public schools is largely controlled by school authorities. *See* Ellis v. Dixon, 349 U.S. 458, 459-60 (1955); Stein v. Oshinsky, 348 F.2d 999, 1002 (2d Cir. 1965); Trietley v. Board of Educ., 65 A.D.2d 1, 5, 409 N.Y.S.2d 912, 915. Because of this school structure, even those courts finding a public forum in the public school have determined that at best the schools are "limited forums." *See* International Center for Krishna Consciousness v. New Jersey Sports and Exposition Auth., 691 F.2d 155, 160 (3d Cir. 1982). *See also* Tinker v. Des Moines, 393 U.S. 503, 507 (1969).

317. *See Bender*, 741 F.2d at 552 ("Within this more restricted environment, therefore, involuntary contact between nonparticipating students and religious groups is inevitable."); *id.* (distinguishing *Widmar*, 454 U.S. at 274 ("high school instruction is given in a structured and controlled environment and in more confined facilities than is usual in the open, free, and more fluid environment of a college campus")); *see also* Greer v. Spock, 424 U.S. 828, 838 (1976) (authority of commanding officer to exclude civilians from area of command as factor against public forum finding).

318. *See* Zorach v. Clauson, 343 U.S. 306 (1952).

319. *See, e.g.*, Country Hills Christian Church v. Unified School Dist., 560 F. Supp. 1207 (D. Kan. 1983) (upholding "equal access policy," finding that access should not be denied to a religious worship group when school facilities are used during nonschool hours and open to nonschool community groups). *See also* Resnick v. East Brunswick Township, 135 N.J. Super. 257, 262-63, 343 A.2d 127, 130 (1975) (dictum affirming constitutionality of rentals of public school facilities to religious bodies). *Compare* Wood v. Mount Lebanon Township, 342 F. Supp. 1293, 1295 (W.D. Pa. 1972) (address by clergy to high school graduation held to occur during noncompulsory school hours and therefore not in violation of the Establishment Clause) *with Bender*, 741 F.2d 538, 552 (allowing religious clubs to meet during school day implicates compulsory attendance and state supervision).

The importance of state sponsorship in determining establishment concerns has been compared to the state action determination in equal protection analysis, although a lesser showing of state involvement is required for the latter. *See* Norwood v. Harrison, 413 U.S. 455, 469-70 (1973). *Compare* Country Hills Christian Church v. Unified School Dist., 560 F. Supp. 1207 (D. Kan. 1983) (upholding the religious use of the schools on weekends with no state sponsorship) *with* Knights of the KKK v. East Baton Rouge, 578 F.2d 1122, 1128 (5th Cir. 1978) (upholding KKK use of school facilities open to the public after hours) ("[T]here is simply *no* state involvement here in KKK's ideas or practices, whatever they may be, and no state action endorsing them"); National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1014 (4th Cir. 1973) (upholding use by Party of high school auditorium during "non-school hours" for "non-school use") (emphasis in the original); Lawrence Univ. Bicentennial Comm'n v. City of Appleton, 409 F. Supp. 1319 (E.D. Wis. 1976) (holding unconstitutional

The distinction between the extent of state involvement implicated when schools are functioning as schools, rather than as buildings for rental use during nights or weekends, is well recognized in constitutional theory.[320] Similarly, absolutely private or individual activities, such as those involved in *Tinker v. Des Moines,*[321] and *West Virginia v. Barnette,*[322] do not implicate a level of government involvement sufficient to create establishment concerns.[323]

The mere labeling of a school as a "limited public forum," as provided for in section 4071(a) of the Equal Access Act, does not make it so. However, the question remains whether there are any circumstances under which a "limited public forum"[324] could be created in the public schools that would reverse the presumption of government establishment when religious clubs are involved.

When public school premises are used during the school day, the government educative purpose is preeminent. This purpose has two effects: It requires selective access to the school educational program in contravention of public forum principles; and all activities that occur with school involvement and within the school day are defined as occurring in furtherance of this government educative purpose. Thus, formidable establishment problems result when organized religious activities are permitted during the school day.

Both the free speech and establishment consequences of the government educative purpose are reversed when the public school property is rededicated from the government educative purpose to the purpose of individual communication. For instance, an equal access policy at a time

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school board guidelines barring religious or political activities, unless nonpartisan or nondenominational, applicable to the rental of a college gym on evenings for use by the community.

320. As Professor Tribe has noted:

> A distinction might be drawn where the school buildings are not otherwise in use, as at night or during a vacation period, when the building is, in a sense, surplus land. A religious activity conducted on the premises at such a time may not be viewed as part of the educational enterprise of all.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 825 n.12 (1978).

321. 393 U.S. 503 (1969) (sustaining symbolic student armband display).

322. 319 U.S. 637 (1943) (sustaining student right not to recite pledge of allegiance or to salute the flag).

323. Moreover, retention of personal free speech rights does not convert a school to a public forum. *See Lubbock,* 669 F.2d at 1048; *Brandon,* 635 F.2d at 980. *Cf.* Tinker v. Des Moines, 393 U.S. 503 (1969).

324. *See Widmar,* 454 U.S. at 267 n.5. "Limited public forum" qualifies the nature of the forum to include only those persons who have a "right" to be at the forum. *See Perry Educ. Ass'n,* 460 U.S. 37 (1983). The Equal Access Act considers the forum rights under the statute to extend only to students and not to outsiders. A claim by teachers to equal access under the Act is currently in the courts. Mary May v. Evansville-Vanderburgh, 615 F. Supp. 761 (S.D. Ind. 1985).

that does not conflict with the government educative purpose, such as evening and weekend use of the public school premises, may create a valid public forum.[325] However, even in these circumstances, establishment problems may be avoided only if the school is in no way involved in the religious meetings. Thus the school may not recognize or sanction the clubs nor assign the classrooms; teachers may not supervise the clubs; and no school medium may be used to announce the evening clubs.[326] Costs to cover club expenditures should be paid from student fees.[327] A reasonable rent should be charged to all groups for the use of the classrooms.[328]

Notwithstanding all of these limitations on government involvement, establishment problems may result when the religious club is the only club, or one of the only clubs which meets on government property. This would suggest, as an evidentiary matter, that the purpose of the equal access policy was religious rather than expressive.[329]

This analysis demonstrates that although the establishment and free speech determinations are interdependent, the nature of the forum alters the relevant presumption.[330] Thus, because of the government purpose, control, and involvement in the public schools, the government carries the burden to disprove an establishment violation when a religious activity is organized on school premises.[331] In contrast, where government exercises less control and involvement, in parks and universities for instance, the presumption is in favor of free speech principles, with the

325. *See, e.g.,* Country Hills Christian Church v. Unified School Dist., 560 F. Supp. 1207 (D. Kan. 1983); Resnick v. East Brunswick Township Bd. of Educ., 77 N.J. 88, 389 A.2d 944 (1978) (use of school facilities by religious groups on Sundays for religious worship and instruction); Pratt v. Arizona Bd. of Regents, 110 Ariz. 466, 520 P.2d 514 (1974) (en banc) (upholding rental of Arizona State University Stadium by evangelical organization). *See also* Bell v. Little Axe, 766 F.2d at 1406 (holding that religious services cannot be held during times the school grounds are used for school purposes and that they should occur instead when school facility is available by state law to any group).

326. *See infra* note 327.

327. *See* Op. Md. Att'y Gen. 84-031 (1984). *See also Widmar,* 454 U.S. 263 (student fees paid for all equal access costs beyond cost of classrooms); Note, *supra* note 90, 50 U. CIN. L. REV. 741, 781-83.

328. *See, e.g., supra* note 325.

329. *See, e.g., Widmar,* 454 U.S. at 274-75. More than 100 clubs used the university equal access policy. Whether the availability of access rather than actual range of access suffices is unclear. *See* McCreary v. Stone, 739 F.2d 716, 727 (2d Cir. 1984) (holding park to be a public forum because of availability for range of displays, notwithstanding that the only recurring use was for a religious display), *aff'd per curiam,* 105 S. Ct. 1859 (1985).

330. The presumptions reflect "judicial interpretation of social facts." Lynch v. Donnelly, 104 S. Ct. 1355, 1369 (1984) (O'Connor, J., concurring).

331. *See, e.g., Brandon,* 635 F.2d 971.

burden on the plaintiff seeking to show an establishment problem.[332]

IV. The Free Exercise Arguments For Equal Access

While equal access theory is grounded on public forum, free speech, and equal protection principles, some of its proponents find further support for equal access in the Free Exercise Clause.[333] This position regards student organization of religious clubs not only as a free speech right, but also as an exercise of freedom of religion, and thus doubly protected under the First Amendment.[334] A school's refusal to allow access to a student prayer club purportedly violates student free exercise rights.[335] The asserted free exercise rights are rights to engage in communal prayer,[336] Bible reading, and discussion.

It is difficult to characterize rights to equal access and group prayer in the schools as free exercise rights. Ordinarily, communal prayer is not central to a student's religious beliefs, a requirement necessary to achieve free exercise right status.[337] Accordingly, in addition to raising free exercise claims to "group worship," the equal access right has been characterized as including a free exercise right to proselytize to uncommitted students.[338] This free exercise right to proselytize is sectarian—only a

332. *See, e.g., Widmar,* 454 U.S. 263 (1981); Fowler v. Rhode Island, 345 U.S. 67 (1953); McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984).

333. Proponents of this argument are relatively few. *See, e.g., Religious Speech Protection Act Hearings, supra* note 11, at 46 (statement of Prof. Laurence Tribe, Harvard Law School); *see also* S. REP. NO. 357, 98th Cong., 2d Sess. 24 (1984), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2348, 2370.

334. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

335. *See, e.g., Brandon,* 635 F.2d at 975.

336. *Id.*

337. *See* McDaniel v. Paty, 435 U.S. 618, 627 (1978); Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

338. *See, e.g.,* Chess v. Widmar, 480 F. Supp. 907 (W.D. Mo. 1979), *remanded,* 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom.* Widmar v. Vincent, 454 U.S. 263 (1981). Students asserted part of the purpose of the meeting was to encourage and challenge the undecided and the uncommitted so that students make "a personal decision in favor of trusting in Jesus Christ. . . . Our purpose as a group is to promote a knowledge and awareness of Jesus Christ on the campus . . . ." *Id.* at 911. *See also* Note, *supra* note 275, at 1047.

Whether assertion of an equal access free exercise right to proselytizing would be any weightier than other equal access free exercise claims remains to be seen. The Supreme Court in *Widmar* noted only the establishment aspects of such proselytizing. It did not address the free exercise claims. *Widmar,* 454 U.S. at 269-70 n.6.

In addition to the claimed right of students to group worship, another potential free exercise claim, which has yet to be asserted in equal access cases, is a right of access to the schools by outsiders for proselytizing purposes. *See supra* text accompanying notes 129-130. Although a free exercise right to proselytizing is longstanding, *see, e.g.,* McDaniel v. Paty, 435 U.S. 618, 626 (1978) (free exercise "encompasses the right to preach, proselyte [sic] and per-

few religions consider proselytizing to be a central tenet.[339] None of these free exercise arguments has gained acceptance. In considering student-initiated clubs in schools, both state and federal courts have consistently found that free exercise does not compel a right to equal access.[340]

The long-standing determination that there is no free exercise right to organized group worship in the public schools dates from the Court's 1960's school prayer cases. Neither *Abington School District v. Schempp* nor *Engel v. Vitale,* which respectively barred Bible study and organized religious worship from the schools, recognize any free exercise rights that might prevail against the establishment violation caused by these religious activities.[341] The presence of alternative facilities to the schools for religious activities is dispositive.[342]

The bar on group religious activity in the schools does not present a coercive government obstacle to a religious practice necessary to establish a free exercise claim.[343] To succeed, a free exercise claim requires

form other similar religious functions"); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise includes freedom to solicit on public street), it has been sustained only in traditional public forums, *id.,* and otherwise limited where other state interests so require, *e.g.,* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (limiting right to solicit in state fairgrounds to a booth in interest of crowd control). In light of the nonpublic forum nature of schools and the existence of many other alternatives for outsider proselytizing purposes, *see Cantwell,* 310 U.S. 296, the proselytizing free exercise claim is of little merit.

339. *See* Note, *supra* note 275, at 1047 (evangelical Christians, who have as a central tenet to their religion the mission to proselytize, are the sect most adversely affected by denials of equal access).

340. *See, e.g.,* Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1048 (5th Cir. 1982); Brandon v. Board of Educ., 635 F.2d 971, 976 (2d Cir. 1980); Bender v. Williamsport Area School Dist., 563 F. Supp. 697, 701, *rev'd. on other grounds,* 741 F.2d 538 (3d Cir. 1984); Hunt v. Board of Educ., 321 F. Supp. 1263, 1266 (S.D. W. Va. 1971); Trietley v. Board of Educ., 65 A.D.2d 1, 6, 40 N.Y.S.2d 912, 917 (App. Div. 1978); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977). *See also Abington,* 374 U.S. 203 (1963) (holding no free exercise right for students to Bible reading in school); Collins v. Chandler Unified School Dist., 644 F.2d 759, 763 (9th Cir. 1981); Stein v. Oshinsky, 348 F.2d 999, 1001-02 (2d Cir. 1965). *Contra* Dittman v. Western Wash. Univ., No. 79-1189 slip op. (W.D. Wash. Feb. 28, 1980) (public university), *vacated and remanded in light of Widmar,* No. 80-3120 (9th Cir. Mar. 30, 1982); Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965); Keegan v. University of Del., 349 A.2d 14 (Del. 1975). Indeed, at least one court has gone so far as to find that the free exercise rights of students who are not equal access club members would be threatened should the clubs be permitted. *See* Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 7, 14; 137 Cal. Rptr. 43, 50 (1977).

341. *See Abington,* 374 U.S. 203; *Engel,* 370 U.S. 421.

342. "The student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others." *Abington,* 374 U.S. at 299 (Brennan, J., concurring).

343. The question of the extent of alternatives goes to the essence of the free exercise test. To determine whether there is a violation of the Free Exercise Clause, one must determine the importance of a particular religious practice and the extent to which exercise of that practice has been burdened by the government action. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205

that the combination of government action and the absence of alternatives effectively foreclose the practice of one's religion.[344]

The absence of free exercise rights to the use of the public school forum stems from the many alternatives available to students.[345] These alternatives include the use of the school premises when they are not used as a school, and the use of other facilities during school hours or at any other time.[346] Given the many alternative forums, barring religious clubs from the schools does not diminish the potential for religious worship.

In this regard, the public high schools may be distinguished from universities, where students both study and reside, ostensibly without alternative sites for worship.[347] Yet, even when the United States Supreme Court had the opportunity to find a free exercise right to organized stu-

(1972); Sherbert v. Verner, 374 U.S. 398 (1963). When no alternatives exist to a particular practice and that practice is burdened by government action, there is sufficient coercion to constitute a free exercise violation. As declared in *Abington*, "It is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." 374 U.S. 203, 223 (1963).

344. At issue is whether the school's failure to provide access to its facilities for religion clubs would "effectively foreclose a person's practice of religion." *Lubbock*, 669 F.2d at 1048. Refusal to allow prayer clubs to meet does not "force them to forego their religious belief in group worship." *Bender*, 563 F. Supp. at 703. *See also Abington*, 374 U.S. at 223. Instances in which a government practice was found to foreclose the exercise of religion are rare. Thomas v. Review Bd., 450 U.S. 707, 717 (1981) (state's denial of unemployment compensation to worker who quit employment for religious reasons violated free exercise right); *cf.* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

345. *See, e.g., Abington*, 374 U.S. at 299 (Brennan, J., concurring); *Lubbock*, 669 F.2d at 1048; *Bender*, 563 F. Supp. at 703. Noting that alternatives were available, the court in *Brandon* declared: "While school attendance is compelled for several hours per day, five days per week, the students, presumably living at home, 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. *See also* Resnick v. East Brunswick Township Bd. of Educ., 135 N.J. Super. 257, 263, 343 A.2d 127, 131 (1975). *Cf.* McCreary v. Stone, 575 F. Supp. 1112, 1121 (S.D.N.Y. 1983) (finding no free exercise right to private display of nativity scene in public park, because there are alternative forums on private property), *rev'd on other grounds*, 739 F.2d 716, *aff'd per curiam sub nom.* Scarsdale v. McCreary, 105 S. Ct. 1859 (1985).

346. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306 (1952) (release time for religious study held constitutional).

347. *See, e.g., Abington*, 374 U.S. at 299 (Brennan, J., concurring) (compulsory school attendance does not render community facilities any less available). In Keegan v. University of Del., 349 A.2d 14 (Del. 1975), the free exercise rights of university students to gather to pray on campus were upheld. The Court emphasized that unlike high schools, the residential nature of a university places students in the position of having to choose between praying at school or not at all. 349 A.2d at 18 (discussing Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965)); Hunt v. Board of Educ., 321 F. Supp. 1263 (S.D. W. Va. 1971). *See also* Note, *supra* note 275, at 1052. *Compare Keegan*, 349 A.2d at 18 *with Widmar*, 454 U.S. at 273 n.13 (not inquiring into extent to which free exercise interests may be infringed by university policy denying equal access to schools for religious groups).

dent prayer clubs in a public university context, the Court did not do so. Instead, it grounded its decision on the university students' free speech rights.[348]

The reluctance to find a free exercise right to student-initiated religious clubs in the schools may be due in part to the desire to avoid a confrontation between the religion clauses, which would require the balancing of competing free exercise and establishment interests.[349] This conflict is bypassed when courts elect not to find a free exercise interest in organizing student-initiated clubs in the schools.[350]

The courts' refusal to recognize the free exercise interest as an important one has, by and large, circumvented the potential tension between free exercise and establishment interests that might be posed by student prayer clubs.[351] However, at least one court has determined that even if an important free exercise interest exists, in the university forum, the establishment interests are overriding.[352] In *Dittman v. Western Washington University,*[353] a district court prior to *Widmar* held free exercise and establishment concerns were raised by the regular use of university classrooms for religious worship. In balancing these concerns, the

348. Widmar v. Vincent, 454 U.S. 263, 273 n.13. ("we need not inquire into the extent, *if any,* to which free exercise interests are infringed by the challenged University regulation") (emphasis added). Notwithstanding the Court's failure to rule on the free exercise issue, equal access proponents have claimed the contrary. *See Religious Speech Protection Act Hearings, supra* note 11, at 45. Professor Tribe cited *Widmar,* 454 U.S. at 272 n.11, to support the proposition that free exercise rights are violated where equal access is denied to religious clubs.

349. It has been suggested that the Supreme Court in *Widmar* characterized the right to worship as freedom of speech in order to avoid a conflict between the religion clauses, even though the question of free exercise was not argued in the lower court. *See* Note, *Widmar v. Vincent: The Use of a Freedom of Speech Analysis in the Context of Religion,* 27 ST. LOUIS U.L.J. 707, 715 (1983). This is a tension that, as the Court recognizes, results when free exercise of religion cannot be promoted without offending establishment. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 788 (1973); Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). The Court has steadfastly gone out of its way to avoid this issue. *See* Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment,* 64 MINN. L. REV. 561, 569, 583-84 (1980).

350. *See supra* note 340.

351. *Compare supra* note 5 *with supra* note 11 and note 340.

352. This despite commentators' suggestion that when the two clauses conflict, Free Exercise must prevail. *See* Kurland, *The Supreme Court, Compulsory Education and the First Amendment's Religion Clauses,* 75 W. VA. L. REV. 213, 244 (1973); Note, *supra* note 275, at 1024 n.126 (citing to L. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 320, at 833-34). *See also* McDaniel v. Paty, 435 U.S. 618, 638 (1973) (Brennan, J., concurring); Wisconsin v. Yoder, 406 U.S. 205, 240 (1972) (White, J., concurring); Abington School Dist. v. Schempp, 374 U.S. 203, 296 (1963) (Brennan, J., concurring); Resnick v. East Brunswick Township Bd. of Educ., 77 N.J. 88, 105, 389 A.2d 944, 952 (1978). *But see* Pfeffer, *supra* note 349, at 569, 583-84.

353. No. 79-1189, slip op. at 4-5 (W.D. Wash. Feb. 28, 1980), *vacated and remanded in light of Widmar,* No. 80-3120 (9th Cir. Mar. 30, 1982).

court held compliance with the Establishment Clause was a compelling interest sufficient to justify the infringement of free exercise.[354] Crucial to the court's decision was the recognition that restricting the free exercise right at issue did not effect a total ban on worship and that alternatives existed, such as meeting off campus.[355]

Conclusion

Notwithstanding the mandate of the Equal Access Act, permitting student-initiated religious activities on public high school premises at times associated with the school day raises substantial establishment problems. When religious clubs are organized at times associated with the school day, it is actually the state that gathers the students for religious purposes. The use of school premises and machinery to hold the meetings provides state sanction to religion. Mandatory teacher supervision of religious groups aggravates the establishment problem. This state sponsorship of religion in public schools has been barred by the Supreme Court's interpretation of our first amendment principle of separation of church and state.

State sponsorship is characteristic of the equal access programs that have been challenged in the courts. *Bender v. Williamsport Area School District,*[356] currently on appeal before the United States Supreme Court, typifies the constitutional difficulties of equal access. Beyond school sanction of religious clubs, use of the school premises, and teacher supervision, *Bender* raises the added problem of scheduling organized religious activities during the school day.

Many of these unconstitutional sponsorship factors are permitted by the newly enacted Equal Access Act. The Act permits organization of religious clubs under faculty supervision before and after the school day, although it does not clearly address the issue of meetings held during the school day. The Act's establishment problems are not abated by the requirements of student-initiation and equal access for all clubs. These re-

354. *Dittman,* slip op. at 5-6.

355. *Id. Cf.* Committee of Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (disallowing direct aid to nonpublic schools for maintenance and tuition tax deductions to parents of parochial school children). The Court did not reach the balancing test because it found insufficient infringement of free exercise, but dicta suggests that establishment would have prevailed, as in *Dittman. Nyquist,* 413 U.S. at 788-89. *But cf.* Keegan v. University of Del., 349 A.2d 14 (Del. 1975), in which the court held that even when infringement on free exercise is only incidental, the burden shifts to show a compelling interest to justify banning worship. Contrary to *Dittman,* the court in Keegan found that the establishment clause problems that may arise from the use of the university premises for prayer did not constitute a compelling interest to justify banning the worship.

356. 741 F.2d 538 (3d Cir. 1985), *cert. granted,* 106 S. Ct. 518 (1985).

finements do not diminish the extent of unconstitutional state sponsorship under the Act, which is the essence of the prohibition of the First Amendment Establishment Clause.

Moreover, the unconstitutional state sponsorship of religion is not overridden by asserted countervailing first amendment free speech and free exercise interests. In the context of the public high school forum, the same factors that create establishment concerns undermine these claims. Public high schools are dedicated to a specific pedagogical function and require extensive government supervision. Accordingly, the free speech and equal protection principles compelling equal treatment of religious and nonreligious speech in the public forum do not arise in the public high schools. In the absence of persuasive countervailing constitutional interests, the establishment problems created by equal access and sanctioned by the Equal Access Act require prohibition of equal access to religious groups at times associated with the school day in our nation's public high schools.