From *Widmar* to *Mergens*: The Winding Road of First Amendment Analysis

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Introduction

In 1981, the Supreme Court decided *Widmar v. Vincent,*[1] holding that a state university that created a "limited open forum" by opening its facilities to student organizations must grant equal access to religiously affiliated groups. The university's failure to do so constituted content-based discrimination that violated the First Amendment to the United States Constitution.[2] The Court rejected the university's argument that its policy to disallow religious meetings on campus was implemented to avoid contravening establishment clause principles.[3] The Court's opinion was inconclusive as to whether the *Widmar* rationale would apply to secondary schools.

During the same period, Congress and state legislatures mounted numerous efforts to permit prayer in public schools. As the political debate over school prayer raged on, moderate forces in Congress seized

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1. 454 U.S. 263 (1981). In *Widmar*, the Court held that the University of Missouri at Kansas City's policy prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching," while permitting such use by other groups, violated the students' free speech rights under the First Amendment. *Id.* at 265. Having created a "limited open forum," the university could not exclude speech based on its religious content absent a compelling state interest. The Court further held that an "equal access" policy in this setting would not violate the Establishment Clause. *Id.* at 275-76.

2. U.S. CONST. amend. I. The First Amendment states in part: "Congress shall make no law . . . abridging the freedom of speech . . . ." This is commonly known as the Free Speech Clause. The First Amendment applies to the states by incorporation through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Gitlow v. New York, 268 U.S. 652, 666 (1925); *see* U.S. CONST. amend. XIV.

3. U.S. CONST. amend. I. The first amendment clauses include the Religion Clauses, which state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." These are commonly referred to as the Establishment Clause and the Free Exercise Clause respectively.

upon the "equal access" concept of *Widmar* as a reasonable compromise. Thus, in 1984, Congress enacted the Equal Access Act,[4] which applied the *Widmar* doctrine to the secondary school setting. The Equal Access Act was a bipartisan legislative attempt to provide legal protection for student-initiated religious speech while avoiding the constitutional pitfalls of school-sponsored prayer. The ambiguous language and legislative history of the Equal Access Act, however, left school districts confused about the intricacies of applying the Act's provisions to a particular educational context.

The Supreme Court attempted to define the Equal Access Act's parameters and lay to rest the constitutional concerns raised by the statute's opponents in *Board of Education v. Mergens*.[5] The Court faced a multifaceted constitutional dilemma interpreting the Equal Access Act in the context of the *Mergens* facts. The *Mergens* Court strained to uphold a congressional enactment derived from heated controversy, tough negotiation, and ultimate compromise that left a legislative history rife with internal contradictions and ambiguities.

Mergens, as *Widmar*, further set the Court to balancing the conflicting values underlying the Free Speech and Religion Clauses of the First Amendment. But the Court's membership, ideology, and constitutional doctrine had evolved during the years between *Widmar* and *Mergens*. The Justices in *Mergens* faced the tasks of (1) weaving together free speech and religion clause developments and (2) reconciling the inconsistencies between the Court's expressed views in more recent secondary school cases and those expressed in the past.

Two freedom of expression cases played a key role in the various *Mergens* opinions, in addition to a line of establishment clause decisions[6] dating from the mid-1980s. In the first case, *Tinker v. Des Moines In-*

4. Equal Access Act of 1984, 20 U.S.C. §§ 4071-74 (1989). The Act states:

> 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.

Id. § 4071(a). The Equal Access Act of 1984 will be referred to herein as the Equal Access Act or the Act.

5. 110 S. Ct. 2356 (1990). For the first time, the Court in *Mergens* directly addressed the constitutionality of the Equal Access Act. The Court had dismissed an earlier case on procedural grounds. Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986). In *Bender*, however, Chief Justice Burger and Justices White, Powell, and Rehnquist would have upheld the Act as constitutional. *Id.* at 551 (Burger, C.J., dissenting); *id.* at 555 (Powell, J., dissenting).

6. County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984).

dependent Community School District,[7] the Court recognized broad constitutional rights for secondary school students. In the second case, *Hazelwood School District v. Kuhlmeier*,[8] the Court seemingly signaled a retreat from *Tinker*; the holding, however, may have been based on factual distinctions.

On a practical level, *Mergens* successfully provides school officials with guidelines for implementing the Equal Access Act. On a theoretical level, the case reaffirms the Court's development of a more constrained perspective as to its role vis-à-vis the legislative branch. When we scratch beneath the surface and examine the reasoning underlying the several opinions generated by the case, several problems emerge. The most obvious of these is the Justices' failure to reach a consensus on establishment clause doctrine. While a majority of the Justices have adopted Justice O'Connor's "endorsement test" spin on *Lemon v. Kurtzman*,[9] Justices Kennedy and Scalia have blatantly criticized and rejected Justice O'Connor's approach in favor of their own analysis. More fundamentally, Justice O'Connor's plurality opinion in *Mergens* applies both establishment clause and free speech clause principles in a manner inconsistent with the Court's prior views on public education, free speech rights, and the limits of local school discretion. This Article discusses

7. 393 U.S. 503 (1969). In *Tinker*, the Court upheld the right of students to wear armbands protesting the Vietnam War as an exercise of symbolic speech protected under the First Amendment.

8. 484 U.S. 260 (1988). In *Hazelwood*, the Court held that secondary school officials could delete articles from a school newspaper when they had not created a public forum, and so long as their actions were "reasonably related to legitimate pedagogical concerns." *Id.* at 273.

9. 403 U.S. 602 (1971). In *Lemon*, the Court articulated a three-part test for addressing establishment clause challenges. First, "the statute must have a secular legislative purpose"; second, "its principal or primary effect must be one that neither advances nor inhibits religion"; and third, "the statute must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1980)). Over the years, the Court has continued to rely on this test although several Justices have seriously questioned its validity and utility in recent cases. In a series of opinions dating from 1984, Justice O'Connor has refined the three-part *Lemon* test and transformed it into a two-part inquiry: "whether government's purpose is to endorse religion and whether the statute [or action] actually conveys a message of endorsement." Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring). According to Justice O'Connor, "[e]ndorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). For Justice O'Connor, the test is "whether an objective observer, acquainted with the text, legislative history, and implementation of the [challenged action] . . . , would perceive it as a state endorsement of [religion]. . . ." *Jaffree*, 472 U.S. at 76 (O'Connor, J., concurring). The question must be answered not in the abstract but according to the "unique circumstances" of the challenged action. *County of Allegheny*, 109 S. Ct. at 3118 (O'Connor, J., concurring) (citing *Lynch*, 465 U.S. at 694) (O'Connor, J., concurring)).

the theoretical flaws inherent in the majority's approach and the administrative concerns raised by the Court's disposition of *Mergens*. It further suggests that Justice Marshall's concurring opinion in *Mergens* represents a more reasoned attempt to preserve the spirit and promote the legislative goals of the Equal Access Act while balancing the conflicting values underlying the First Amendment, thus remaining true to constitutional precedent.

I. Equal Access: A Cautious Concession to School Prayer

More than four decades have elapsed since the Court first banned religious activities in public schools. In *Illinois ex rel. McCollum v. Board of Education*,[10] the Court held that a school district impermissibly advanced religion by permitting religious instructors to provide religious education on a voluntary basis during the school day. In two controversial cases from the early 1960s, the Court directly prohibited religious worship in the schools. In *Engel v. Vitale*,[11] a 1962 decision, the Court ruled that a prayer composed by the New York Board of Regents and authorized for use in local public schools violated the Establishment Clause.[12] The following year, in *Abington Township v. Schempp*,[13] the Court declared it unconstitutional for schools to require or conduct devotional use of the Lord's Prayer or Bible reading in the classroom. These rulings called attention to changes in American society that some found difficult to acknowledge. America was no longer the homogeneous Christian community that it once was considered to be.

The Court's decisions on school prayer were met with strong public opposition and open defiance. Within twenty-four hours after the Court handed down its decision in *Engel*, ten members of Congress entered caustic criticism of the Court into the *Congressional Record*.[14] As opposition mounted at the national level, overt noncompliance with the Court's rulings continued in certain localities. Data gathered from the 1964-1965 school year reveal only slight compliance in the southern states and the states bordering Mexico, with greater degrees of compliance demonstrated in the remainder of the country.[15] In their study of five towns in a midwestern state in the late 1960s, Dolbeare and Ham-

10. 333 U.S. 203 (1948).

11. 370 U.S. 421 (1962).

12. U.S. CONST. amend. I.

13. 374 U.S. 203 (1963).

14. P. Blanshard, RELIGION AND THE SCHOOLS: THE GREAT CONTROVERSY 52 (1963). For a discussion of national reaction to the *Engel* and *Schempp* decisions, see generally *id.*

15. Way, *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 W. POL. Q. 189, 198-200 (1968).

mond found widespread prayer recitation, Bible reading, and other religious observances in the public schools.[16] A North Carolina survey conducted in the early 1980s found religious exercises in thirty-nine of the state's one hundred counties. More than eighteen percent of the state's schools conducted prayer on a daily basis.[17]

In the years following the *Engel*[18] and *Schempp*[19] decisions, hundreds of bills were introduced in Congress to override the Court's ban on school prayer. Through the strategy of constitutional amendment, proponents of organized public school prayer repeatedly attempted to bring such exercises within the ambit of the Constitution. By 1975, some 215 such amendments had been introduced in Congress.[20]

The religious revival of the 1980s pushed the school prayer issue to the fore of public policy debate. In the 1980 and 1984 presidential elections, the Republican Party promised as part of its campaign platform to return prayer to the schools. In fact, the early years of the decade witnessed an almost feverish rise in judicial and legislative activity regarding the prayer issue. That activity took place in both the federal and state arenas and brought to public awareness a range of legal and political strategies to overstep the widely perceived finality of Supreme Court decisions.[21] Among these strategies were the constitutional amendment[22] and congressional attempts to remove school prayer cases from the federal courts' subject matter jurisdiction.[23]

This flourish of activity directed toward school prayer also forced politicians, lawyers, and educators to address policy alternatives. A principal alternative was the "equal access" concept, whereby prayer was linked to free speech rights. As previously noted, under this theory schools must permit student-initiated prayer meetings on school grounds once school authorities have created an "open forum" by permitting other groups to hold meetings at school.[24] Other alternatives included the "moment of silence" in the place of vocal prayer, as well as the con-

16. K. DOLBEARE & P. HAMMOND, THE SCHOOL PRAYER DECISIONS (1971).

17. PEOPLE FOR THE AMERICAN WAY, RELIGION IN NORTH CAROLINA'S PUBLIC SCHOOLS (1983).

18. Engel v. Vitale, 370 U.S. 421 (1962).

19. Abington Township v. Schempp, 374 U.S. 203 (1963).

20. H. ABRAHAM, FREEDOM AND THE COURT 328 n.245 (1977).

21. For a broad discussion of national and local activity during this period, see Salomone, Church, State, and Education: A Preliminary Analysis of Legislative and Judicial Policymaking (1985) (report submitted to the National Institute of Education, Law and Government Program).

22. *Id.* at 53-59.

23. *Id.* at 51-52.

24. *Id.* at 59-69.

cept of "voluntary," as opposed to school-organized and mandated, prayer.[25] These proposals raised complex political and constitutional questions resulting in fierce political battles in Congress, state legislatures, and local communities.

Early on, the Reagan administration established the constitutional amendment as its preferred strategy for circumventing the Supreme Court's position on organized school prayer as expressed in *Engel*[26] and *Schempp*.[27] Between 1982 and 1984, the administration's proposal to permit vocal prayer in the schools was the subject of heated congressional debate.[28] In March of 1984, after several revisions, the Senate voted on the proposal. The proposed constitutional amendment fell eleven votes short of the two-thirds required to be submitted for state ratification.[29]

With the constitutional amendment issue temporarily laid to rest, the proponents of school prayer redirected their energies toward several "equal access" bills that had been weaving their way through Congress since early 1983. President Reagan immediately urged the Senate to consider one such proposal sponsored by Senator Jeremiah Denton.[30]

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25. *Id.* at 69-75. As of 1985, at least 25 states had enacted legislation calling for a moment of silence or prayer. Wallace v. Jaffree, 472 U.S. 38 (1985) (O'Connor, J., concurring). Courts generally have looked unfavorably on any statutory language related to "prayer." *See id.*; *see also* Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.N.M. 1989); May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983), *aff'd*, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed sub nom.* Karcher v. May, 484 U.S. 72 (1987); Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982), *appeal dismissed sub nom.* Beck v. Alexander, 718 F.2d 1098 (6th Cir. 1983); Opinions of the Justices to the House of Representatives, 387 Mass. 1201, 440 N.E.2d 1159 (1982). In *Jaffree*, the Justices asserted that at least some moment of silence statutes may be constitutional. *Jaffree*, 472 U.S. at 70. These statutes typically call for a moment of silence at the beginning of the school day during which students may meditate, pray, or reflect on the activities of the day. *See* Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. REV. 364, 407-08 (1983). Karcher v. May considered a New Jersey moment of silence statute that permitted "students to observe a 1 minute period of silence to be used solely at the discretion of the individual student . . . for quiet and private contemplation or introspection." *Karcher*, 484 U.S. at 74-75. The Court, however, unanimously dismissed the appeal for want of jurisdiction. *Id.* at 83. The two legislative leaders who had taken the appeal to the Supreme Court had lost their posts and the new presiding legislative officers withdrew the legislature's appeal. *Id.*

26. Engel v. Vitale, 370 U.S. 421 (1962).

27. Abington Township v. Schempp, 374 U.S. 203 (1963).

28. As originally worded, the proposed amendment read as follows: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer." S.J. Res. 199, 97th Cong., 2d Sess. (1982).

29. *See* Salomone, *supra* note 21, at 57.

30. The Senate Judiciary Committee had approved Senator Denton's (R.-Ala.) bill by a 12-4 vote earlier that year. In a press conference immediately following the vote on the school prayer amendment, Senator Lowell P. Weicker, Jr. (R.-Conn.), the amendment's most vocal

The Christian Legal Society was the chief architect and guiding force behind the equal access strategy. Groups such as the American Civil Liberties Union, the American Jewish Congress, and Americans United for Separation of Church and State initially were opposed to the concept.[31] They eventually came to view "equal access," however, as a necessary political tradeoff. As public opinion grew in support of school prayer, equal access presented a more acceptable alternative to organized prayer in the public schools.[32]

The equal access concept raises constitutional questions concerning first amendment rights to free speech and the free exercise of religion. As developed through litigation and through more recent federal legislation, at the core of the equal access rationale lies the view of prayer as a type of speech.[33] Government cannot restrain speech because of its content, whether political, ideological, or religious.

Before the equal access bills were proposed, four federal courts of appeals had ruled against student religious groups meeting on school grounds.[34] Although the Supreme Court had upheld the equal access concept at the university level in *Widmar v. Vincent*,[35] the Court demonstrated a reluctance to address the constitutionality of voluntary prayer meetings in secondary schools. In 1982, the Court denied review to the Second Circuit opinion in *Brandon v. Board of Education*[36] and the Fifth Circuit opinion in *Lubbock Independent School District v. Lubbock Civil Liberties Union*.[37]

In denying certiorari to the *Lubbock* case, the Court ignored the concerns expressed in an amicus brief submitted by a bipartisan group of twenty-four senators.[38] In supporting the school district's petition for

opponent, stated that he "might very well" vote for an equal access bill. EDUC. WEEK, Mar. 28, 1984, at 1.

31. *See* Salomone, *supra* note 21, at 60.

32. *Id.*

33. *See* Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143 (1985).

34. Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986); Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984); Lubbock Civil Liberties Union v. Lubbock Ind. 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).

35. 454 U.S. 263 (1981).

36. 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

37. 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

38. Brief for Members of the United States Congress in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, *Lubbock Ind. School Dist.*, 669 F.2d 1038 (No. 82-805) [hereinafter Congressional Amicus Brief]. The senators warned the Justices of more drastic alternatives pending before Congress, namely the adminis-

certiorari, the senators noted that the lower federal courts were "interpreting the Constitution in a way that is hostile to religion."[39] The congressional brief, in substance, asked the Court to extend its *Widmar* ruling from the previous year[40] to primary and secondary educational institutions.[41]

In *Widmar*, members of a registered religious group at the University of Missouri at Kansas City challenged the university's policy of prohibiting religious groups from having access to university facilities. The group's claims were based on first amendment free speech and free exercise grounds. Under the university's open forum policy, university buildings were available for activities of registered student groups. Writing for an eight-member majority, Justice Powell used free speech doctrine as the linchpin of his analysis. The Court held that the university policy constituted a content-based exclusion from a public forum and could withstand constitutional attack only if the policy served a compelling state interest and was narrowly drawn to achieve that end.[42]

The University claimed a compelling interest in maintaining a strict separation between church and state in compliance with the Establishment Clause of the First Amendment and with applicable provisions of the Missouri Constitution.[43] The *Widmar* Court recognized that the University's concerns may be characterized as compelling.[44] These interests, however, were not "sufficiently 'compelling' to justify content-based discrimination against [the students'] religious speech."[45] In fact, the Court concluded that the University's asserted state interest in achieving greater separation of church and state than required under the Establishment Clause was limited in this case by the content-based prohibitions of the Free Speech Clause.[46]

In discussing the establishment clause claim per se, the Court applied the three-part *Lemon* test.[47] The Court determined that allowing equal access would not have a primary purpose or effect of advancing

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tration's proposed constitutional amendment and the Helms bill to remove federal court jurisdiction from school prayer cases. They urged the Court to reaffirm the first amendment principle of neutrality by resolving this "issue of unusual importance." *Id.* at 3.

39. *Id.*

40. Widmar v. Vincent, 454 U.S. 263 (1981).

41. Congressional Amicus Brief, *supra* note 38, at 11.

42. *Widmar*, 454 U.S. at 270.

43. *See* MO. CONST. art. 1, §§ 6, 7; art. 9, § 8.

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

45. *Id.* at 276.

46. *Id.* at 267.

47. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

religion, nor would it entail excessive government entanglement with religion.

Proponents of equal access legislation have argued that if religious worship is protected speech for college students, then the same expression should be protected for elementary and secondary school students.[48] The critics of equal access legislation have read into the *Widmar* dicta a distinction to be drawn based on the age of the students in question.[49] In addressing the "effects" prong of the *Lemon* test and the potential danger of conferring an "imprimatur of state approval on religious sects or practices,"[50] the Court stated that university students are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."[51]

Between February 1983 and June 1984, several alternative equal access measures were introduced and debated in Congress.[52] After a series of compromises among the competing forces, the Equal Access Act was

48. *See generally* Note, *Beyond Neutrality: Equal Access and the Meaning of Religious Freedom,* 12 U. ARK. LITTLE ROCK L.J. 335 (1989-90); Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers,* 81 NW. U.L. REV. 1 (1986); Strossen, *supra* note 33.

49. Rossow & Rossow, *Student Initiated Religious Activity: Constitutional Argument or Psychological Inquiry,* 19 J.L. & EDUC. 207 (1990); Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Acitivities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis,* 12 HASTINGS CONST. L.Q. 529 (1985).

50. *Widmar,* 454 U.S. at 274.

51. *Id.* at 272 n.14.

52. In February 1983, Senator Jeremiah Denton (R.-Ala.) introduced the administration-backed Equal Access Act, S. 425, 98th Cong., 1st Sess. (1983), which sought to provide "equal access and opportunity to public school students who wish to meet voluntarily for religious purposes." The measure further provided for a cutoff of federal aid to school districts that deny "students or faculty . . . or groups of students . . . [or] faculty . . ." the opportunity to "seek to engage in voluntary prayer, religious discussion or silent meditation on school premises during noninstructional periods." The following month, Senator Mark Hatfield (R.-Ore.) and fourteen colleagues representing both the Democratic and Republican parties introduced an alternative bill entitled The Religious Speech Protection Act of 1983, S. 815, 98th Cong., 1st Sess. (1983). The Hatfield bill provided that:

> [it] shall be unlawful for a public secondary school receiving Federal financial assistance, which generally allows groups of students to meet during noninstructional periods, to discriminate against any meeting of students on the basis of the religious content of the speech at such meeting, if (1) the meeting is voluntary and orderly, and (2) no activity which is in and of itself unlawful is permitted.

The bill further provided that no political or governmental authority can "influence the form or content of any prayer or other religious activity" nor may it "require any person to participate in prayer or other religious activity." In April 1983, Rep. Trent Lott (R.-Miss.) introduced legislation in the House that was almost identical to the Denton bill pending in the Senate. H.R. 2732, 98th Cong. 1st Sess. (1983).

signed into law by President Reagan in August 1984.[53]

In an immediate effort to avoid litigation and to assist school districts in complying with the law, a broad coalition of education and legal groups drafted guidelines for implementing the Equal Access Act.[54] But questions concerning the constitutionality and applicability of the law persisted. Lawyers on both sides of the issue believed that litigating the nuances of the law would occupy court calendars for years to come. Would the law require access to public schools for groups such as the Ku Klux Klan? Could school administrators bypass the law's "limited open forum" provisions by prohibiting all noncurriculum activities from using school facilities? The most significant and immediate concern was the inherent conflict between the Act and federal court rulings declaring it unconstitutional for schools to permit student-run religious meetings on school grounds. In the twelve states of the Second, Third, Fifth, and Eleventh Circuits, school districts ran the risk of violating court orders if they attempted to implement the statute.[55] Some but not all of these

53. Equal Access Act of 1984, 20 U.S.C. §§ 4071-74 (1989). The proposal adopted by the Senate, S. 815, 98th Cong., 1st Sess. (1983), did not provide special sanctions, such as the termination of federal funding. It would merely have made it unlawful for a public secondary school that receives federal financial assistance "to discriminate against any meeting of students on the basis of the religious content of the speech at such meeting." In a compromise reached with Senate opponents, the measure would allow student political and philosophical groups to meet in public high schools. The bill covered only secondary, not elementary, schools and required that all such meetings be student-initiated, voluntary, and without school sponsorship. A compromise engineered by the Baptist Joint Committee on Public Affairs limited the access of outside groups. In July 1984, a similar compromise measure was cleared by a vote of 377 to 77 in the House. H.R. 5439, 98th Cong., 2d Sess. (1984).

54. *The Equal Access Guidelines, reprinted in* 130 CONG. REC. S14,473-76 (daily ed. Oct. 11, 1984). Among the principal participants were the American Association of School Administrators, the Christian Legal Society, the American Civil Liberties Union, the National Education Association, Americans for Democratic Action, the National Association for Evangelicals, and the Baptist Joint Committee for Public Affairs. The guidelines, presented in a question and answer format, addressed concerns over the rights of student groups and the responsibilities of school administrators. The American Jewish Congress (AJC) steadfastly opposed the equal access legislation. Rather than sign off on this joint set of guidelines, the AJC published its own guide to implement the Act, which it believed to be "ill advised, badly drafted and likely to be held unconstitutional by the Supreme Court." AMERICAN JEWISH CONGRESS, COMMISSION ON LAW AND SOCIAL ACTION, EQUAL ACCESS: A PRACTICAL GUIDE (1984). In a further effort to minimize local controversy over implementation of the Equal Access Act, the Christian Legal Society, the American Association of School Administrators, and the American Civil Liberties Union decided to operate separate hotlines from their respective Washington offices to answer questions regarding the Equal Access Act. *See* Salomone, *supra* note 21, at 68.

55. *See supra* note 34 and accompanying text. In the years following the enactment of the Equal Access Act, two additional circuits held that allowing student religious groups to meet during noninstructional time would violate the Establishment Clause. *See* Garnett v. Renton School Dist. No. 403, 865 F.2d 1121 (9th Cir. 1989); Bell v. Little Axe Indep. School Dist., 766 F.2d 1391 (10th Cir. 1985).

concerns would ultimately be resolved by the Court six years later in *Board of Education v. Mergens*.[56]

II. *Board of Education v. Mergens*

A. Background of the Case

Westside High School is part of the Westside community school system, a public school district in Omaha, Nebraska. As a public school, Westside receives federal funds. The school permits students to join any number of approximately thirty student groups that meet on a voluntary basis after school hours on school grounds. All the clubs have faculty sponsors, and the clubs are recognized as a " 'vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.' "[57]

In January 1985, the plaintiffs, students at Westside, presented school officials with their request to form a Christian Bible study club. Until that date, no club had ever been denied access to the school. Nevertheless, Westside's principal, the associate superintendent, and the superintendent of schools for the Westside Community Schools each successively denied the students' request. The students petitioned the school board, assuring the board members that the students were not requesting a faculty sponsor, but if one was required by board policy, the sponsor would serve only a custodial function. The board denied the petition, stating that the proposed club was inconsistent with board policy that school buildings be used exclusively for school-sponsored curriculum-related activities.

In April 1985, the students filed suit in the District Court for the District of Nebraska. They alleged violations of the Equal Access Act and violations of their rights (1) under the First and Fourteenth Amendments to the United States Constitution, (2) under Article I of the Nebraska Constitution, and (3) to freedom of speech, assembly and association, and free exercise of religion. On the claim under the Act, the dispute focused on ten of the thirty voluntary student clubs at Westside. The students maintained that these ten clubs were noncurriculum related and thus constituted evidence that the school had created a "limited open forum" that triggered the Act's provisions.[58] School officials,

56. 110 S. Ct. 2356 (1990).

57. *Id.* at 2362 (quoting School Board Policy 5610).

58. Although the Equal Access Act does not specifically define "noncurriculum related," § 4071(b) of the Act defines "limited open forum" as follows: "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 noninstruction

on the other hand, maintained that all of these student activities were curriculum related because they furthered the goals of particular aspects of the school's curriculum. The district court entered judgment for the defendant school district.[59] The court held that the Act did not apply because all of Westside's student clubs were tied to the educational function of the school and therefore were curriculum related.[60] In other words, Westside had not created a "limited open forum" as defined by the Act. The court further rejected the plaintiffs' constitutional claims. Distinguishing the case from the Supreme Court's 1981 decision in *Widmar v. Vincent*,[61] the court reasoned that Westside had not created a "limited public forum."[62] Applying the reasonableness standard articulated by the Supreme Court in *Hazelwood School District v. Kuhlmeier*[63] the Court concluded that Westside's denial of the students' request was "reasonably related to legitimate pedagogical concerns."[64]

The students appealed to the United States Court of Appeals for the Eighth Circuit, which reversed the lower court's decision.[65] The appellate court rejected the district court's conclusion that all the student clubs at Westside were curriculum related. The appellate court reasoned that such a "broad interpretation" would render the Equal Access Act meaningless and would allow school officials unfettered discretion in choosing which student groups to permit merely "by tying the purposes of those student clubs to some broadly defined educational goals."[66] The appellate court further rejected Westside's contention that the Act violated the Establishment Clause. Relying on legislative history, the court noted that the Act extended the Supreme Court's ruling in *Widmar*[67] to public secondary schools. The court dismissed as insignificant any distinction between the maturity level of secondary and university students for purposes of establishment clause analysis. The Supreme Court

time." 20 U.S.C. § 4071(b) (1984). The clubs in dispute included Interact (a service club related to Rotary International); Chess; Subsurfers (a club for students interested in scuba diving); National Honor Society; Photography; Welcome to Westside (a club to introduce new students to the school); Future Business Leaders of America; Zonta (the female counterpart to Interact); Student Advisory Board (student government); and Student Forum (student government).

59. Mergens v. Board of Educ., No. CV 85-0-426, slip. op. at 20 (D. Neb. Feb. 2, 1988) (LEXIS, Genfed library, Dist file).

60. *Id.* at 17.

61. 454 U.S. 263 (1981).

62. *Id.*

63. 484 U.S. 260 (1988).

64. *Mergens*, No. CV85-0-426, slip op. at 19 (citing *Hazelwood*, 484 U.S. at 273).

65. 867 F.2d 1076 (8th Cir. 1989).

66. *Id.* at 1078.

67. Widmar v. Vincent, 454 U.S. 263 (1981).

granted certiorari and affirmed the appellate court's decision.[68]

B. The Supreme Court's Views

In *Board of Education v. Mergens*,[69] the Supreme Court addressed the applicability of the Equal Access Act[70] to Westside High School and the constitutionality of the Act itself. Eight Justices upheld both the Act's applicability and its constitutionality. Although a six-member majority agreed on the rationale underlying the statutory interpretation,[71] only a plurality of four, in an opinion by Justice O'Connor, agreed completely on the rationale underlying the establishment clause discussion.[72]

1. The Majority on Statutory Interpretation

The Court's interpretation of the Equal Access Act as applied to Westside centered on the statute's use of the term "noncurriculum related student groups" in its definition of a "limited open forum." Rejecting the legislative history as too ambiguous to offer clear guidance on the interpretation of the Equal Access Act's terms, the Court looked to the Act's broad legislative purpose to address perceived widespread discrimination against religious speech in public schools.[73] In view of this purpose, the Court concluded that Congress had intended to provide a low threshold for triggering the Act and interpreted the term "noncurriculum related student group" broadly to include "any student group that does not *directly* relate to the body of courses offered by the school."[74] Expanding on this definition, the Court addressed the obverse concept of "curriculum related" as follows:

> A student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.[75]

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68. Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990).

69. *Id.*

70. 20 U.S.C. §§ 4071-74 (1989).

71. Chief Justice Rehnquist, along with Justices White, Blackmun, Scalia, and Kennedy, joined in Parts I and II of Justice O'Connor's opinion.

72. Chief Justice Rehnquist, along with Justices White and Blackmun, joined in Part III of Justice O'Connor's opinion.

73. *Mergens*, 110 S. Ct. at 2366 (citing H.R. REP. No. 98-710, 98th Cong., 2d Sess. 4 (1984)); *see* S. REP. No. 98-357, 98th Cong., 2d Sess. 10-11 (1984).

74. *Mergens*, 110 S. Ct. at 2366 (emphasis in original).

75. *Id.* The Equal Access Act states that "[t]he 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." 20 U.S.C. § 4072 (3) (1989).

Applying these guidelines to Westside, the Court concluded that one or more "noncurriculum related" student groups were meeting at the school, including Subsurfers and Chess, that were not required by any course and did not result in extra academic credit for any class.[76]

On the issue of "equal access" per se, the Court maintained that although school officials had allowed the student group to meet informally after school, this allowance fell short of the statutory mandate.[77] The students had requested official school recognition and all the incidental benefits such recognition carries, including access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair.[78] The Court upheld the students' rights on statutory grounds, while it expressly set aside the question of whether the Free Speech Clause would require the same result. The students' free speech rights, however, weighed heavily in the plurality's discussion of the Establishment Clause.

2. *The Plurality Opinion on the Establishment Clause*

After determining that the Equal Access Act applied to Westside, Justice O'Connor's plurality opinion turned to the facial validity of the Act; here Justices Kennedy and Scalia parted ways with the plurality. The defendant school board had argued in the alternative that the Act violated the Establishment Clause. According to school officials, student groups that received official recognition were an integral part of the school's educational mission. Therefore, if the school officially recognized the proposed religious club, such recognition would "endorse par-

76. *Mergens*, 110 S. Ct. at 2369; *cf.* Garnett v. Renton School Dist., 865 F.2d 1121 (9th Cir. 1989). In *Garnett*, the Ninth Circuit affirmed the district court's finding that all 15 student clubs existing at Lindbergh High School were curriculum related and thereby did not trigger the Equal Access Act for purposes of religious club approval. Some of these clubs, such as the Bowling Club and Chess Club, were strikingly similar to the clubs found to be noncurriculum related by the Court in *Mergens*. The Ninth Circuit clearly read the legislative history of the Act as providing evidence of congressional intent to grant local school districts discretion in defining cirriculum relatedness. *Id.* at 1127.

77. The Equal Access Act provides:

> Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—(1) the meeting is voluntary and student-initiated; (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees; (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity; (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

20 U.S.C. § 4071(c) (1989).

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

ticipation in the religious club, and provide the club with an official platform to proselytize other students."[79] In other words, compliance with the Act's protection of religious groups would run counter to establishment clause principles.

In rejecting this argument, Justice O'Connor relied on two decades of Supreme Court precedents and applied the three-part "*Lemon* test"[80] as revised by her "endorsement test." Having concluded that Congress intended to incorporate *Widmar v. Vincent*[81] into the Equal Access Act, the plurality reasoned that the logic of *Widmar* applied with equal force to the Act. According to the plurality, the Act has an avowedly secular purpose, granting on its face equal access to both secular and religious groups.[82] The plurality further rejected the school's principal argument that the Act has the primary effect of advancing religion. Here, Justice O'Connor applied her endorsement test and the concept of the "objective observer" to the secondary school setting. Citing her concurring opinion from the previous term in *County of Allegheny v. ACLU*,[83] she identified the essential establishment clause inquiry here as whether the government is "conveying a message that religion or a particular religious belief is favored or preferred."[84] The plurality rejected the school's reliance on the compulsory nature of schooling and the impressionability of secondary school students. Citing *Tinker v. Des Moines Independent Community School District*,[85] they concluded that such students are "mature enough . . . to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[86]

Unlike the school funding cases, which concerned government speech endorsing religion (prohibited by the Establishment Clause), equal access concerns private speech endorsing religion (protected by the

79. *Id.*

80. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

81. 454 U.S. 263 (1981).

82. *Mergens*, 110 S. Ct. at 2361.

83. 109 S. Ct. 3086 (1989) (O'Connor, J., concurring). For discussions in support of the endorsement test and a history of its development, see Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987); Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1049 (1986); Note, *County of Allegheny v. ACLU: Justice O'Connor's Endorsement Test*, 68 N.C.L. REV. 590 (1990).

84. *Mergens*, 110 S. Ct. at 2371 (quoting *County of Allegheny*, 109 S. Ct. at 3119 (O'Connor, J., concurring) (citing Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring))).

85. 393 U.S. 503 (1969).

86. *Mergens*, 110 S. Ct. at 2372 (citing *Tinker*, 393 U.S. 503).

Free Speech and Free Exercise Clauses).[87] The plurality maintained that the Act's requirement that religious meetings be held during noninstructional time and be student-initiated, coupled with the prohibition on faculty sponsors, lessened the risk of official state endorsement or coercion. The absence of faculty sponsorship further led the plurality to dismiss the school's argument that compliance with the Act would create excessive governmental entanglement with religion. Although the Act permits the assignment of a teacher or administrator to religious groups to ensure order and good behavior, such custodial oversight "does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities."[88]

3. *The Kennedy-Scalia Concurrence*

Justice Kennedy, joined by Justice Scalia, concurred with the plurality's interpretation of "noncurriculum related groups" and with its conclusion as to the Equal Access Act's constitutionality. They sharply disagreed, however, with the plurality's analysis of the establishment clause question. Justice Kennedy openly rejected the plurality's endorsement test on the ground that the word "endorsement has insufficient content to be dispositive."[89] In its stead, Justice Kennedy would have applied the two-part test he had articulated the previous term in his separate opinion in *County of Allegheny v. ACLU*.[90] Justice Kennedy's inquiry was much narrower than Justice O'Connor's endorsement test and was based on two principles. The first principle precludes the government from giving " 'direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." ' "[91] The second principle provides that the government "cannot coerce any student to participate in a religious activity."[92]

The groups protected by the Act were those that were student-initiated and voluntary, that met during noninstructional time, and that did not compel school employees to participate or attend. Thus, enforcement of the Equal Access Act would not coerce students to participate in a religious activity.

87. *Id.* (citing Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385 (1985)).

88. *Id.* at 2373-78.

89. *Id.* at 2377 (Kennedy, J., concurring).

90. 109 S. Ct. 3086 (1989).

91. *Mergens*, 110 S. Ct. at 2377 (Kennedy, J., concurring) (quoting County of Allegheny v. ACLU, 109 S. Ct. at 3136 (Kennedy, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984))).

92. *Id.*

4. The Marshall-Brennan Concurrence

Justice Marshall, joined by Justice Brennan, wrote a concurring opinion differing from the other Justices in its focus and its underlying rationale. Reaching the constitutional heart of the equal access issue—the tension between the Establishment Clause and the Free Speech Clause—the opinion integrates linguistically and conceptually the endorsement test of the Establishment Clause with the Free Speech Clause's public forum doctrine.[93] In so doing, it tracks and updates the Court's analysis in *Widmar v. Vincent*,[94] which predated the endorsement test developments of recent years and further places the discussion within the Court's developing ideology of schooling as consistently articulated in a series of cases beginning in the mid-1970s.

Justice Marshall agreed with the majority's disposition of the legal issues and with the plurality's use of the endorsement analysis in its discussion of the Establishment Clause. He did not take exception to the majority's interpretation of terms used in the Equal Access Act nor did he disagree about the Act's facial constitutionality. He did, however, raise serious questions as to the constitutionality of the Act as applied in any given secondary school setting. His opinion assumed that the Act applied to the circumstances of Westside High School and then proceeded to caution that the school must take certain steps to ensure that the Act's implementation did not run afoul of the Establishment Clause.

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93. Over the years, the Court has developed the public forum doctrine to address the rights of individuals to engage in expressive activity on government property. In Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), the Court identified three types of fora: (1) traditional public fora, which "by long tradition or by government fiat have been devoted to assembly and debate," and which include public streets and parks; (2) public fora created by government designation for use by the public at large for assembly or speech, for use by certain speakers, or for the discussion of certain subjects; (3) nonpublic fora. Regulation concerning the first two categories must be narrowly drawn to serve a compelling state interest. In the third category, control over access may be based on subject matter and speaker identity, as long as the distinctions made are reasonable in light of the purpose served and are viewpoint neutral. *Id.* at 45-46. In Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1984), the Court appeared to empty the second category (limited public forum) of any meaning by describing it in a manner indistinguishable from a traditional public forum. Here the majority held that when the government has granted "selective access, unsupported by evidence of purposeful designation for public use," then a public forum is not created. *Id.* at 805. As evidence of intent, the Court would look to the "policy and practice" of the government as well as the "nature of the property" and its "compatibility with expressive activity." *Id.* at 802. The majority in *Cornelius* appeared to grant the government unfettered discretion in defining the particular forum and its boundaries. *Id.* at 826 (Blackmun, J., dissenting). *See* Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109 (1986). The Court's subsequent decision in Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988), reflects this narrowing of the public forum doctrine. *See infra* notes 121-24 and accompanying text.

94. 454 U.S. 263 (1981).

For Justice Marshall, the crucial question is how the Act affects each school.

Within this analytical framework, Justice Marshall proceeded to distinguish the facts of *Mergens*[95] from those of *Widmar*,[96] a distinction that the majority easily dismissed. For Justice Marshall, there is a critical dichotomy between toleration of religious speech on one hand, and its endorsement on the other—a distinction addressed at length in *Widmar*. In his view, this difference between toleration and endorsement depends not on the maturity of students but on the type of forum created by the school and the role that the school plays in students' lives.[97] Translated into Justice O'Connor's words, these factors bear on the school's behavior and thereby determine the "message" that is conveyed to the student "observers."

In *Widmar*, the University of Missouri had recognized a broad group of advocacy-oriented clubs, thereby creating a "truly robust forum."[98] By contrast, no such forum existed at Westside. In fact, enforcement of the Equal Access Act required Westside High School to recognize religious speech through a religion club when the school had not recognized political or other ideological speech through other student groups. Coupled with the broad access to school facilities afforded by the Act, this recognition may create in students the perception that the school is endorsing religious speech rather than merely permitting it on a nondiscriminatory basis. In other words, although the safeguards built into the Equal Access Act[99] may be sufficient to prevent school "sponsorship" as defined by the Act itself,[100] the Establishment Clause may require more affirmative acts of disassociation on the part of schools so that they do not convey a message of endorsement.

In *Widmar*, the university had taken affirmative steps to disassociate itself from the " 'aims, policies, programs, products, or opinions of any

95. 110 S. Ct. 2356.

96. 454 U.S. 263.

97. *Mergens*, 110 S. Ct. at 2381 (Marshall, J., concurring). Justice Marshall's apparent refusal to distinguish between high school and college students reaffirms the broad view of student free speech rights he has espoused in other cases. *See, e.g., Hazelwood*, 484 U.S. at 285 (Brennan, J., dissenting) ("educators cannot act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position.")

98. *Mergens*, 110 S. Ct. at 2381 (Marshall, J., concurring).

99. 20 U.S.C. § 4071(c) (1989).

100. The Equal Access Act states as follows:

> 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.

Id. § 4072(2).

organization or its members.' "[101] Westside High School, on the other hand, explicitly promoted its student clubs " 'as a vital part of the total education program [and] as a means of developing citizenship.' "[102]

Justice Marshall viewed this specific distinction as reflective of a more general difference in the respective functions and missions of colleges and secondary schools:

> To the extent that a school emphasizes the autonomy of its students, as does the University of Missouri, there is a corresponding decrease in the likelihood that student speech will be regarded as school speech. Conversely, where a school such as Westside regards its student clubs as a mechanism for defining and transmitting fundamental values, the inclusion of a religious club in the school's program will almost certainly signal school endorsement of the religious practice.[103]

According to Justice Marshall, two factors present in *Mergens* required Westside to disassociate itself from the activities and goals of religious clubs. The first factor was the existence of the religious club as the sole advocacy-oriented group in the forum (or one of a very limited number of such groups). The second factor was that the school promoted its student club program as instrumental to citizenship.[104]

Justice Marshall suggested that the compulsory nature of public schooling could further lead to peer pressure for which the state could be responsible, a danger that the majority acknowledged but dismissed as de minimis. Given the nature of public education in general, and the function of student groups as defined by Westside High School in particular, Justice Marshall determined that schools like Westside must "effectively disassociate themselves from the religious speech that may now become commonplace in their facilities."[105] Such disassociation could be accomplished in two ways. The school could "entirely discontinue encouraging student participation in clubs and clarify that the clubs are not instrumentally related to the school's overall mission,"[106] or the school could continue to endorse clubs that do not engage in controversial speech while affirmatively disclaiming any endorsement of religious clubs.[107]

101. Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) (quoting 1980-81 University of Missouri at Kansas City student handbook at 25).

102. *Mergens*, 110 S. Ct. at 2381 (Marshall, J., concurring) (quoting School Board Policy 5610).

103. *Id.*

104. *Id.* at 2380.

105. *Id.* at 2382-83.

106. *Id.* at 2382.

107. *Id.*

5. Justice Stevens's Dissent

Justice Stevens was the sole dissenter in *Mergens*. Although his opinion raises valid administrative and political concerns, its narrow interpretation of the Equal Access Act's coverage finds no support in the language of the Act and appears to undermine its broad legislative purpose. Like the other Justices, Justice Stevens juxtaposed the facts of *Mergens* against those of *Widmar*. His comparison, however, focused not on the dangers of endorsement under the Establishment Clause but rather on the extent to which the respective schools had created an "open" or "public" forum (using the terms synonymously in contrast to the majority view)[108] under the Free Speech Clause.

Justice Stevens agreed with the other Justices that Congress had intended to apply the *Widmar* decision to secondary schools when enacting the Equal Access Act. Justice Stevens, however, interpreted the congressional intent more narrowly than the majority and included only those schools that had established a public forum similar to the forum created by the University of Missouri in *Widmar*. In his view, Westside High School did not fall into that group. The University of Missouri forum involved the participation of more than one hundred officially recognized student groups, many of which were not only unrelated to any courses but were of such a controversial nature that the university could not endorse them. For Justice Stevens, these were the type of "noncurriculum related" student groups that Congress had in mind in enacting the Equal Access Act—organizations that have as their purpose "the advocacy of partisan theological, political, or ethical views."[109] In other words, the recognition of advocacy groups signals the creation of a "limited open forum" under the Act. Given this narrow definition of a "noncurriculum related" group, with no support from the language of the Act and scant support from legislative history, Justice Stevens concluded that Westside High School had not created a "limited open forum." Therefore, the school was not required to grant official recognition and status to the plaintiffs' proposed group in *Mergens*.

By relying on statutory construction, Justice Stevens could have avoided the constitutional issues raised in the case. He seized the opportunity, however, to criticize the majority for dismissing establishment clause concerns too lightly and for getting "perilously close to an outright command to allow organized prayer . . . on school premises."[110]

108. *Id.* at 2389 n.18 (Stevens, J., dissenting), (contrasting the plurality discussion, *id.* at 2367).

109. *Id.* at 2385.

110. *Id.* at 2391.

Justice Stevens further suggested that the majority had misapplied the Court's free speech clause precedents.[111] In this regard, he cast *Mergens* as closer to *Hazelwood School District v. Kuhlmeier*[112] than *Tinker v. Des Moines Independent Community School District.*[113] As in *Hazelwood*, the students in *Mergens* sought "active assistance in the dissemination of their ideas,"[114] not mere assistance "to prevent state interference with their communicative activities"[115] as in *Tinker*. If we carry this analogy and distinction further, then the Court should have recognized the dangers of symbolic state endorsement in *Mergens* as it had in *Hazelwood*.

Finally, Justice Stevens raised federalism concerns, viewing the majority's interpretation of the Equal Access Act as a "sweeping intrusion by the federal government into the operation of our public schools . . . ."[116] For Justice Stevens, such a broad interpretation of "noncurriculum related groups" limited the discretion of local school officials to exclude controversial groups once the school is opened to any traditional extra-curricular activities.

III. *Mergens* and Prior Case Law

When we examine the rationales underlying the four opinions in *Mergens*, we find both consistency and inconsistency with trends in the Court's thinking. In terms of overall judicial philosophy, the Court assumes a more restrained view of its role vis-à-vis the legislature. The

111. *Id.* at 2392 n.22.

112. 484 U.S. 260 (1988).

113. 393 U.S. 503 (1969). See Green, *The Misnomer of Equality Under the Equal Access Act*, 14 VT. L. REV. 369 (1990) for a discussion of the rights of individual student expression exemplified in *Tinker* versus claims for organized group speech on public school campuses represented by the equal access concept. According to Green, schools are granted greater latitude in restricting the second type of expression, especially where it is inconsistent with the " 'special interests of [the school in] overseeing the use of the property.' " *Id.* at 393 (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980)).

114. *Mergens*, 110 S. Ct. at 2392 n.2 (Stevens, J., dissenting) (citing Stewart, *The First Amendment, The Public School, and the Inculcation of Community Values*, 18 J. LAW & EDUC. 23, 36 (1989)).

115. *Id.* (citing Stewart, *supra* note 114, at 36).

116. *Mergens*, 110 S. Ct. at 2393 (Stevens, J., dissenting). Justice Stevens demonstrated similar deference to local officials in both *Widmar* and *Hazelwood*. In *Widmar*, he voted with the majority but, in a separate concurrence, questioned whether public universities, because of their educational purpose, could ever be considered true public fora. He further argued that they should not be required to establish a compelling state interest to defend their decisions to limit access to particular student groups. Widmar v. Vincent, 454 U.S. 263, 277-81 (1981) (Stevens, J., concurring). Justice Stevens also joined the majority opinion in *Hazelwood*, which expressly granted greater latitude to secondary school administrators in defining the parameters of acceptable student speech and explicitly lowered the standard to one of "reasonableness." Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

reluctance of eight Justices to invalidate the Equal Access Act on constitutional grounds underscores a traditional deference to the decisions of coordinate branches of government and a more recent heightened concern for the structural limits built into separation-of-powers doctrine. Related to this trend, the majority's rejection of legislative history and its reliance on the "plain meaning" of statutory language gives evidence that the conservative Justices may be moving the Court toward a "textualist" approach to statutory interpretation.[117]

These philosophical shifts in the Court's reasoning may serve to justify the majority's broad interpretation of "noncurriculum related groups" and the "limited open forum" that trigger the Equal Access Act's provisions. If we consider the opinions of Justices O'Connor and Kennedy to represent the views of a six-member Court majority, however, then the case reveals several startling inconsistencies with other trends in Court thinking. The majority's analysis departs significantly from recent Court pronouncements on the function and mission of public schooling, on the limits of free speech rights enjoyed by secondary school students, and on the discretion of local officials to make curricular determinations.

Over the years, the Court has struggled to balance the conflicting goals of public education. Prior to the 1970s, the Court's decisions reflected a "progressive" theory of schooling, as exemplified by the writings of John Dewey. For Dewey, education's primary function was to develop the child's thought processes. According to this view, education should be a participatory process with goals of maximizing interaction and independent thought.[118] Beginning in the mid-1970s, however, the Court began to move toward a model of "cultural transmission," emphasizing education as the means through which societal values are inculcated.[119] Underlying this shift away from the liberty interests recognized in previous decades and towards a concern for community preservation, constitutional values sit framed in the language of school authority and local control.[120] The *Mergens* majority paid lip service to this trend in

117. *See* Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277 (1990). Chief Judge Wald reviews recent Supreme Court decisions and concludes that the "textualist" approach focusing on the primacy of statutory language has made significant gains among the Justices.

118. J. DEWEY, DEMOCRACY AND EDUCATION (1916).

119. Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647 (1986); Note, *Education and the Court: The Supreme Court's Educational Ideology*, 40 VAND. L. REV. 939 (1987).

120. *See* Chesler, *Imagery of Community, Ideology of Authority: The Moral Reasoning of Chief Justice Burger*, 18 HARV. C.R.-C.L. L. REV. 457 (1983); Salomone, *Children Versus the*

Court thinking, but the reasoning underlying Justice O'Connor's opinion does not support it.

The Court's strongest affirmation of this shift in values came in *Hazelwood School District v. Kuhlmeier.*[121] In *Hazelwood*, the Court upheld the action of a high school principal in deleting several articles from the school newspaper that he deemed "inappropriate." According to the six-member majority, when the school has not established a "public forum," educators do not violate free speech rights under the First Amendment by exercising editorial control over school-sponsored activities "so long as their actions are reasonably related to legitimate pedagogical concerns."[122] According to the Court, "a school must be able to take into account the emotional maturity of the intended audience" and "retain the authority to refuse . . . to associate the school with any position other than neutrality on matters of political controversy."[123] Absent any "clear intent to create a public forum" by policy or practice and thereby open the school newspaper to "indiscriminate use," school officials could regulate the content of the newspaper in "any reasonable manner."[124]

In *Hazelwood*, the Court drew a clear distinction between toleration and promotion of student speech. Unlike the symbolic speech upheld in *Tinker v. Des Moines Independent Community School District*,[125] publication of the newspaper articles in *Hazelwood* required the school not merely to tolerate speech, but to "lend its name and resources" to its dissemination.

> [Toleration] addresses the educators' ability to silence a student's personal expression that happens to occur on the school premises. [Promotion] concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.
>
> Educators are entitled to exercise greater control over this second form of student expression to assure that . . . the views of the

State: The Status of Students' Rights, in CARING FOR AMERICA'S CHILDREN 182 (F. Macchiarola & A. Gartner eds. 1989); Stewart, *supra* note 114; Urofsky, *Mr. Justice Powell and Education: The Balancing of Competing Values*, 13 J.L. & EDUC. 581 (1984); Whitman, *Individual and Community: An Appreciation of Mr. Justice Powell*, 68 VA. L. REV. 303 (1982).

121. 484 U.S. 260 (1988).

122. *Id.* at 273.

123. *Id.* at 272.

124. *Id.* at 270.

125. 393 U.S. 503 (1969).

individual speaker are not erroneously attributed to the school.[126]

The views expressed in *Hazelwood* stand in stark contrast to those expressed by many of the same Justices just two years later in *Mergens*.[127] If the perception of school sponsorship were the real fear underlying *Hazelwood*, then any distinctions that may be drawn between the facts of this case and those of *Mergens* are not sufficiently significant to lead to a different result. Under the broad definition laid out by the *Hazelwood* majority, one could reasonably conclude that the student-run groups at Westside High School were "curriculum related" and therefore outside the provisions of the Equal Access Act in view of the school's policy statement that represented the clubs as "a vital part of the total education program"[128] and "as a means of developing citizenship . . . knowledge and skills."[129] These groups were not mere vehicles for student expression that "happened" to occur on school premises; they furthered the school's specific educational goals. Yet the Court in *Mergens* unleashed a significant segment of these clubs from the curriculum, straining a broad interpretation of an ambiguous statute, and then dismissed any potential for symbolic school endorsement of the expressed views.

Even if we accept the majority's conclusion that at least some of the groups were sufficiently noncurriculum related to create a limited open forum that triggered the Equal Access Act's application, Justice Marshall's discussion of the type of forum created and its impact on establishment clause analysis deserves attention. Justice Marshall recognized variations within the category of the limited open forum. The more "robust" the forum—that is, the broader the range of controversial ideas expressed by student run groups—the less likely the dangers of government endorsement of any religious speech.

The plurality's discussion of the Establishment Clause appears to run counter to Justice O'Connor's own prior analyses. In previous cases she had described her endorsement test as applicable to the "unique circumstances" of each case. Nevertheless, in *Mergens* she failed to consider key factual distinctions between that case and *Widmar* that should have called for an opposite result. On the one hand, she recognized as a

126. *Hazelwood*, 484 U.S. at 271.

127. Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990). In *Hazelwood*, Justice White wrote the majority opinion, joined by Chief Justice Rehnquist and Justices Scalia, O'Connor, and Stevens. In *Mergens*, all but Justice Stevens joined in the majority, including Justice Blackmun, who, along with Justice Marshall, had joined in the *Hazelwood* dissent written by Justice Brennan.

128. *Id.* at 2362.

129. *Id.*

general proposition that schools have control over the impressions they make upon their students. To support this assertion, she cited the University of Missouri's handbook disclaiming any identification with the aims, policies, or opinions of any student group.[130] Yet, unlike Justice Marshall, Justice O'Connor failed to draw the obvious and significant distinction between this disclaimer and Westside's broadly stated policy on the curricular goals of its student groups. In so doing, she completely overlooked one of the key factors in the Court's determination of "effect" in *Widmar*.

Justice O'Connor characterized the speech in *Mergens* as "private" rather than "government" speech endorsing religion.[131] This characterization disregards the actual and symbolic perception of state action inherent in the compulsory nature of schooling. Any form of expression exercised by anyone within the public school runs the risk of appearing to be endorsed by government officials. The *Hazelwood* Court recognized the magnitude of this concern and held that it outweighed the free speech rights of student editors, at least where the school had not created a public forum by opening the newspaper to indiscriminate use. Justice Marshall's recommendation in *Mergens* that schools "disassociate" themselves from certain forms of student speech, even where a limited open forum exists,[132] recognized the special implications of compulsory schooling when the speech exercised is of a religious nature.

These inconsistencies raise many questions. Was the *Mergens* Court straining to breathe life into an ambiguously worded and perhaps unworkable statute enacted in the heat of the school prayer controversy? Does the real distinction between the results reached in *Hazelwood* and *Mergens* rest on curriculum relatedness, or is this merely a term of art whose definition may vary from context to context? Does the distinction between the two cases lie in the difference between *sponsorship* under the Free Speech Clause and *endorsement* under the Establishment Clause? Does the Free Speech Clause impose a lower threshold for sponsorship than does the Equal Access Act? Or was the *Mergens* Court suggesting that, from the perspective of the listening audience, secondary school students are better able to distinguish government neutrality from sponsorship when confronted with religious speech than when exposed to political or other controversial speech?

The Court may be suggesting, from the view of protecting the speaker's rights, that religious speech deserves greater constitutional pro-

130. *Id.* at 2372.
131. *Id.*
132. *Id.* at 2382 (Marshall, J., concurring).

tection than other forms of speech. The Court may be totally dismissing the potential for "coercion" inherent in religious exercises in the school. In doing so, the *Mergens* decision not only flies in the face of the Court's general views of schooling and prior free speech precedent, but contradicts prior case law on church and state. In fact, prior to *Mergens*, the Court had struck down every instance of state-sanctioned religious expression in the public schools.[133] In all these cases, the Court had repeatedly expressed a fear of the coercive influence of religious expression given the compulsory nature of schooling and the impressionability of young students.[134]

Is the distinguising feature here the difference between the elementary school context represented in prior cases and the specific high school setting of *Mergens*? *Hazelwood*'s broad dicta do not support that distinction. In fact, if Justice O'Connor's fears of official endorsement are superimposed on the *Hazelwood* dicta concerning the public perception of school sponsorship, the dangers inherent in equal access policies rise to a level of greater constitutional concern. Given the mission and function of public education and the values and concerns underlying the Establishment Clause, organized religious expression may deserve less constitutional protection than other forms of organized speech, not more.

More fundamentally, the inconsistencies in these cases may stem from the Court's insistence on straightjacketing free speech analysis into the public forum doctrine. It could be that the doctrine itself is inherently incompatible with the very nature of public schools as vehicles for

133. *See, e.g.*, Edwards v. Aguillard, 484 U.S. 578 (1987) (invalidating a statute prohibiting public schools from teaching the theory of evolution unless accompanied by instruction in "creation science"); Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating a statute requiring a moment of silence for prayer); Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (invalidating a statute requiring the posting of the Ten Commandments in public school classrooms); Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating a statute that forbade the teaching of evolution); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (invalidating Bible reading and the recitation of the Lord's Prayer); Engel v. Vitale, 370 U.S. 421 (1962) (invalidating daily reading of a prayer composed by the state); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (invalidating a "released time" program in which religious teachers provided sectarian instruction in public schools); *see generally* Note, *Developments in the Law: Religion and the State*," 100 HARV. L. REV. 1606, 1659 & n. 94 (1986).

134. In *Edwards*, the Court noted as follows:

> The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. Furthermore, '[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . . .'

Edwards, 482 U.S. at 584 (citation omitted) (quoting *Illinois ex rel. McCollum*, 333 U.S. at 231 (opinion of Frankfurter, J.)).

transmitting societal values. Given the broad responsibilities vested in school officials to carry out that charge, it may prove irrelevant to apply the doctrine's distinctions to public education in the first instance.[135] Whatever the rationale for the inconsistencies, *Hazelwood's* concept of sponsorship, combined with Justice Marshall's recommendations for "disassociation," provide a more meaningful and effective conceptual framework for protecting student rights to freedom of expression, including religious expression, while preserving the autonomy of local officials to govern their schools.

IV. The Road Ahead

The implications of *Mergens*[136] for school practice are significant and may be far-reaching. Under the Equal Access Act, once a secondary school has opened its facilities to even one student-run group that is neither directly tied to a particular course in the curriculum nor grants course credit, then school officials must grant "equal access" to all the school's resources to any philosophical, religious, or political club, regardless of how controversial its mission or message. The language of the Act limits the schools' control such that the schools may limit student expression "to maintain order and discipline . . . and to protect the well-being of students."[137] Whether this reservation of local school autonomy is strong enough to prevent meetings of the Ku Klux Klan or other hate groups remains to be seen.

The *Mergens* ruling may dissuade school districts from recognizing any student-run groups in order to avoid the pitfalls of coming under the Equal Access Act's provisions. Schools may be well advised to extend Justice Marshall's recommendation that they "disassociate" not only from religious expression but from all views expressed by student-run groups that are not officially recognized as curriculum related. Such disclaimers would serve to protect school officials from the potential public perception that they endorse any controversial views while preserving a

135. When we consider *Mergens* and *Hazelwood* in light of the Court's 1985 decision in Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1984), perhaps Congress in enacting the Equal Access Act incorporated from *Widmar* a construct—the limited open forum—that the Court has subsequently collapsed into the nonpublic forum. If so, the statutory term itself is now out of sync with more recent constitutional developments.

136. Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990).

137. The Act provides: "Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." 20 U.S.C. § 4071(f) (1989).

climate conducive to the free exchange of ideas.[138] Finally, the Court's ruling in *Mergens* may throw the constitutionality of the Equal Access Act into the state court arena because most states, by constitution or statute, require separation of church and state. If school districts resist the equal access concept, a considerable body of litigation may be generated throughout the state court systems.[139]

Aside from these direct and practical consequences flowing from *Mergens*, the views expressed by the Justices convey several broader interpretive messages that ultimately may bear on educational policy and practice, particularly in view of Justice Brennan's retirement from the Court. The majority's adherence to a "textualist" approach to statutory interpretation undoubtedly will lead to a narrower view of legislative acts. Because a significant portion of education litigation is brought under federal statutes providing educational rights and defining school obligations, a more strict interpretation of these statutes could well lead to a general tightening of currently recognized rights.

Beyond general interpretive approaches, *Mergens* may signal the Court's willingness to grant religious speech greater protection than other forms of speech, at least on the secondary school level. For the *Mergens* majority, both the real and symbolic effects that flow from the perception of school sponsorship of student speech are of less concern when the speech is of a religious nature. The question remains whether this reasoning will support the use of school facilities by outside religious

138. In *Hazelwood*, Justice Brennan, joined by Justices Marshall and Blackmun, suggested that a school may protect itself from public perceptions of sponsorship by requiring student publications to include a disclaimer or by itself publishing a response that clarifies its own position. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 289 (1988) (Brennan, J., dissenting).

139. In recent years, state courts have begun to emphasize the distinctive language and history of their state constitutions as justification for interpreting them independently of the federal constitution. Several state courts have applied this independent approach to the church-state question. *See, e.g.*, California Teachers Assoc. v. Riles, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981) (striking down a textbook loan program); Epeldi v. Egelking, 94 Idaho 390, 488 P.2d 860 (1971) (striking down state law that authorized the transportation of nonpublic school students); Bloom v. School Committee of Springfield, 376 Mass. 35, 379 N.E.2d 578 (1978) (striking down textbook loan program). The possibility of a state constitutional violation in the equal access context was raised by the district court in Garnett v. Renton School Dist. No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987), *aff'd*, 865 F.2d 1121 (9th Cir. 1989). For a discussion of recent reliance on state constitutional law, see Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); Howard, *The Renaissance of State Constitutional Law*, in 1 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 1 (1988); Tarr, *Religion Under State Constitutions*, 496 ANNALS 65 (1988).

groups that do not fall under the Equal Access Act.[140] This issue looms on the Court's horizon. Based on *Mergens*, at least six of the Justices probably agree that once a public school opens its facility to any community group, it may not deny access to others based on the content of their speech. This equal access policy is compelled by the Free Speech and perhaps the Free Exercise Clauses, and would not contravene the Establishment Clause. Whether the Court applies Justice O'Connor's endorsement test or Justice Kennedy's narrower inquiry, the results would be identical.

V. Conclusion

Although the *Mergens*[141] decision appears facially to focus narrowly on the issue of student-run religious groups, the majority's interpretive approach and the Justices' views on the conflicting values underlying the First Amendment may potentially bear far-reaching implications for educational policy and practice. How the Court will strike the balance between individual rights on the one side, and school autonomy and community preferences on the other, will depend on the alliances formed among a changing Court membership.

140. At least one federal appeals court has required a school district to open its facilities to religious groups on the same basis established for other community groups. According to the appeals panel, the district had created an "open forum" and could not deny access based upon the religious content of speech. Gregoire v. Centennial School Dist., 907 F.2d 1366 (3d Cir. 1990).

141. Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990).