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Mergens v. Board of Education of Westside Community Schools: Equal Access Upheld as The Lemon Test Sours

Introduction

Public high schools throughout the United States allow a wide variety of student groups and clubs to meet on their facilities. A typical high school has a student government, several language clubs, a chess club, a debate team, a ski club and a variety of other student groups reflecting the interests of the students at the individual high school. However, when a group of students wishing to form a club that would meet and discuss their interest in religion, attempts to hold its meetings on public high school grounds, school authorities typically have denied that privilege to them. Public high schools around the country fear that allowing student religious groups to meet creates an impermissible establishment of religion.

The Equal Access Act ("EAA" or "Act")1 addresses the problem faced by student religious groups that wish to meet on public high school

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1. 20 U.S.C. § 4071 (Supp. II 1984) [hereinafter "EAA" or "Act"]. The EAA provides:

(a) Restriction of limited open forum on basis of religious, political, philosophical or other speech content prohibited

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) "Limited open forum" defined

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) Fair opportunity criteria

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) Federal or State authority nonexistent with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof to influence the form or content of any
grounds. The EAA prohibits public secondary schools receiving federal financial assistance from denying access to student groups on the basis of the groups' religious, political or philosophical speech. Several courts, however, have circumvented the requirements of the EAA and have continued to deny equal access to public high school students. In February, 1989, the Eighth Circuit Court of Appeals upheld the EAA in Mergens v. Board of Education. The Eighth Circuit ultimately reached the correct decision in affirming the constitutionality of the EAA. However, it is clear that under the present test applied by courts to determine whether a statute or policy violates the establishment clause the EAA would not pass muster.

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2. The EAA was signed into law on August 11, 1984.
4. See, e.g., Garnett v. Renton School Dist., 865 F.2d 1121 (9th Cir. 1989) (public high school did not provide a "limited open forum," as defined by the EAA, as the school district policy required that student activities be curriculum related); Clark v. Dallas Indep. School Dist., 671 F. Supp. 1119 (N.D. Tex. 1987) (where prior constitutional interpretation of the Fifth Circuit is contrary to the provision of the EAA, the Act will not be applied because constitutional interpretation can only be overruled by constitutional amendment and not by act of Congress); Thompson v. Waynesboro Area School Dist., 673 F. Supp. 1379 (M.D. Pa. 1987) (distribution of religious literature in the hallways of a public junior high school was not a "meeting" under the EAA and, therefore, not protected by the Act); Perumal v. Saddleback Valley Unified School Dist., 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (1988) (as long as school district maintains a closed forum policy, it may constitutionally refuse to recognize religious groups).
5. 867 F.2d 1076 (8th Cir. 1989).
6. The present test applied by courts to determine whether a statute or policy violates the establishment clause was set forth by the Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971). See discussion of the requirements set forth in Lemon infra notes 75-77 and accompanying text.
This Note will show that students' free speech and free exercise rights outweigh any threat of an establishment clause violation in cases involving equal access to public secondary schools, thus supporting the outcome in the Mergens decision. The Note will begin by discussing the constitutional rights of high school students and then examine the establishment clause concerns present when government allows students equal access to a high school activities forum. This Note will also examine the constitutionality of the Equal Access Act and the scope of its applicability. Finally, this Note will attempt to show the insufficiency of the present test for establishment clause violations and the need for a new formulation to examine establishment clause concerns.

I. BACKGROUND

Any examination of an equal access policy in public secondary schools involves the balancing of two opposing constitutional concerns. These concerns are, on the one hand, the interest in protecting the students' free speech and free exercise of religion rights and, on the other hand, the threat of an establishment clause violation.

A. Free Speech Rights

1. In General

The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech." Not all speech, however, is protected by the first amendment. Obscenity, advocacy of imminent lawless behavior,

7. U.S. Const. amend. I.
8. The Supreme Court first described obscenity as not within the area of constitutionally protected speech in Roth v. United States, 354 U.S. 476 (1957).

The Court established the present day test for obscenity in Miller v. California, 413 U.S. 15 (1973). The test asks the following:

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

9. Advocacy of lawless action was first addressed by the Court in the landmark case of Schenck v. United States, 249 U.S. 47 (1919), in which Justice Holmes introduced the "clear and present danger" test. Id. at 52.

The present day test for advocacy of imminent lawless behavior was enunciated by the Court in Brandenburg v. Ohio, 395 U.S. 444 (1969). Under the test the advocacy must be: (1) "directed to inciting or producing imminent lawless action" and (2) "likely to incite or produce such action." Id. at 447.
and defamation are examples of categories of speech which have been denied first amendment protection by the Supreme Court. In general, therefore, speech which does not fall into an unprotected category of speech will receive first amendment protection. However, even speech which is fully protected by the first amendment can sometimes be restricted by the government. Whether these governmental restrictions will be upheld depends on the nature of the restriction and the forum in which the speech occurs.

Government restrictions on speech can be divided into two broad categories. Under the first category, the government restriction is aimed at the ideas or information conveyed by the speaker. Restrictions in this category are commonly referred to as content-based restrictions on speech. The government cannot make content-based restrictions on speech absent a compelling state interest and a showing that the restriction was narrowly drawn to achieve that interest.

Under the second category, the government restricts the flow of information and ideas without aiming at ideas or information. Restrictions in this category have been termed content-neutral. Courts analyzing content-neutral restrictions apply a balancing test which examines the extent to which communicative activity is inhibited against the interests served by enforcing the inhibition.

10. The Supreme Court initially gave no first amendment protection to defamatory speech. In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the Court classified libel as wholly outside first amendment protection. Today, however, the exclusion of defamation from first amendment protection is not absolute. In order to maintain a libel suit, a public official must show that the defamatory statement was made with "actual malice." This means that the public official must show that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. New York Times v. Sullivan, 376 U.S. 254 (1964).

Private individuals, on the other hand, need not prove "actual malice" but are still required to show simple negligence. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

11. See Chaplinsky, 315 U.S. at 571-72, where the Court stated that there are certain limited classes of speech, the restriction of which does not pose any constitutional problem. The Court then gives examples including "the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words." Id.


13. Id.

14. Id. § 12-2, at 794-97. One who is convicted for wearing a jacket bearing the words "Fuck The Draft" in the corridor of a county courthouse is the subject of a content-based restriction on speech. See Cohen v. California, 403 U.S. 15 (1971).

Another example of a content-based restriction on speech would be a ban on the teaching of a foreign language. See Meyer v. Nebraska, 262 U.S. 390 (1923).


17. A government restriction on the use of sound trucks which emit loud noises while operating on the streets is an example of a content-neutral restriction on speech. See Kovacs v. Cooper, 336 U.S. 77 (1949).

Another example of a content-neutral restriction on speech is a government restriction on the distribution of all leaflets. See Schneider v. State, 308 U.S. 147 (1939).

In addition to reviewing the nature of the restriction, courts must look to the nature of the forum in which the speech has occurred. Courts recognize three types of public fora. The first is the "traditional public forum" or "open forum." Open fora are "places which by long tradition or by government fiat have been devoted to assembly and debate." In an open forum, such as a street or a public park, the state may not prohibit all communicative activity. The state may, however, enforce a content-based exclusion in an open forum, if it shows "that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Content-neutral restrictions in an open forum will only be upheld if they are narrowly tailored to achieve a significant government interest and ample alternative means for communication are left open.

A second type of forum is the "limited open forum." The limited open forum consists of "public property which the state has opened for use by the public as a place for expressive activity." A municipally owned theater and the grounds of a state fair are examples of areas which the Supreme Court has held to constitute limited public fora. The limited public forum status is revocable by the government and its existence is contingent on the government's intent to create such a forum. Although the government is not required to maintain a limited open forum indefinitely, as long as it does so, it will be bound by the same standards that apply to traditional public fora.

Finally, any other public property falls into the category of nonpublic fora. Prisons and city transit systems are examples of nonpublic forums.

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21. Id.
22. Id. (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).
24. Perry, 460 U.S. at 45.
25. It is important to note that a municipally owned theater does not become a limited open forum merely because it is municipally owned. It is the government's intent to open the forum for expressive activity that creates the open forum. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (the Court held that the theaters involved were "public forums designed for and dedicated to expressive activities").
26. See Heffron v. International Soc'y for Krishna Consciousness Inc., 452 U.S. 640, 655 (1980) (the state fair "is a limited public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views").
29. See Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (a prison is not a public forum because the exercise of free speech rights by the inmates would sometimes conflict with the operations of the prison).
30. See Lehman v. Shaker Heights, 418 U.S. 298 (1974) (a city transit system is not a first amendment forum since it is not a public thoroughfare with open spaces and passengers are a captive audience).
The government can restrict a speaker's access to a nonpublic forum provided that the restriction is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." 31

To date, courts have not readily classified public high schools as any particular type of forum. 32 The Supreme Court has held, however, that a newspaper created as part of a high school journalism class is not an open forum and that school officials could regulate the contents of the newspaper in any reasonable manner. 33 As equal access cases involve access to a high school activities forum, courts must determine what type of forum a public high school has created when allowing an activity's program on its facilities.

In examining any free speech issue, the Court has held that where a public forum 34 exists, discrimination against speech will only be permissible if the state has a compelling interest and the restriction is narrowly drawn to achieve that end. While this is the case for adults in a public forum, the standard changes somewhat when considering students in the public high school setting. 35

2. Students' Free Speech Rights

The United States Supreme Court expressed its willingness to construe student expression in the public high school setting as protected speech in the landmark case of Tinker v. Des Moines Independent School Community District. 36

The Court held that students in public schools do not "shed their constitutional rights to freedom or expression at the schoolhouse gate." 37 In Tinker,

31. Perry, 420 U.S. at 46.
32. A public high school certainly would not constitute a traditional public forum since that category applies to fora which are open to the entire population. It may be considered a limited public forum, but this classification is also problematic. The existence of a limited public forum is contingent on the government's intent to create it and is revocable at anytime. The Supreme Court protected high school students' right to speak in Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). Nothing in Tinker suggests that student's rights depend on the school's intent to grant those rights nor does anything in Tinker suggest that a school can revoke students' constitutional rights at any time. Id. This leaves the possibility that public high schools are nonpublic fora. Although this classification would appear somewhat restrictive of students' rights and inconsistent with the Tinker holding, the case law suggests that public high schools would best be characterized as nonpublic fora.

For a discussion of where schools fit in forum analysis see Laycock, supra note 27, at 45-49 (Laycock suggests that the best view is to consider schools as open fora for students and faculty where students and faculty are free to discuss any topic but where the rest of the world is excluded).

34. Be it an open forum or a limited forum.
35. Hazelwood School Dist., 484 U.S. at 266 ("[T]he First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings and must be applied in light of the special characteristics of the school environment.") (citations omitted).
37. Id. at 506.
two public high school students and a junior high school student were
suspended from school after wearing black armbands in school to protest
the hostilities in Vietnam. The Court held that the wearing of armbands
was protected speech under the first amendment and that the students’
speech could not be restricted unless school authorities had reason to believe
that such expression would “substantially interfere with the work of the
school or impinge upon the rights of other students.”

Although students’ first amendment rights have suffered setbacks in cases
since Tinker, the Tinker holding remains good law. In order to justify a
content based discrimination against a student’s speech, therefore, the state
must show that the restriction is necessary to avoid a substantial interference
with school discipline or the rights of others.

The Supreme Court has also held that religious speech by public university
students is within the first amendment protection. In Widmar v. Vincent,
the Court held that college students’ religious worship and discussion are
“forms of speech and association protected by the First Amendment” and,
therefore, granted a university student religious group the right to meet on public university facilities. In *Widmar*, eleven students at the University of Missouri, all members of a group named "Cornerstone," sought permission to use school facilities for religious activities. The university, however, would not permit students to use its facilities "for purposes of religious worship or religious teaching," despite the fact that the university had already recognized over 100 student groups. The Court held that the university had created a limited open forum by opening its facilities for general use by the recognized student groups. The university, therefore, could not make content-based discriminations against any group, religious or otherwise. The Court reasoned that the state's interest "in achieving greater separation of church and state than is already ensured under the establishment clause" was not sufficiently compelling to justify an impingement on the free speech and free exercise rights of the students. Thus, an impingement on religious worship and discussion is considered a violation of free speech rights.

Since high school students have free speech rights protected by the first amendment and since religious worship and discussion are considered speech, it follows that religious worship and discussion by high school students are protected by the students' first amendment speech rights.

B. Free Exercise of Religion Rights

In addition to the students' first amendment speech rights, equal access policies raise the issue of the free exercise of religion. The Constitution's free exercise clause guarantees freedom from governmental interference.

45. *Id.* at 265-66. Cornerstone is made up of Evangelical Christian students from various denominational backgrounds. Their meetings attracted up to 125 students and included prayer, hymns, Bible commentary, and discussion of religious views and experiences. *Id.* at 265 n.2.
46. *Id.* at 265.
47. *Id.*
48. *Id.* at 267. The Court made a distinction between the forum created at the university and fora such as streets or public parks since the school's forum was not open to students and nonstudents alike. Thus, while not stating so, the implication is that the university constituted a limited open forum. *Id.* at 267 n.5.
49. *Id.* at 277.
50. *Id.* at 276. For a discussion of the establishment clause and its requirements see infra notes 73-134 and accompanying text.
51. 454 U.S. at 276.
52. Several courts which have upheld a school board's denial of student religious groups' right to meet on public high school facilities have, nonetheless, conceded that the students have valid first amendment interests to engage in their proposed activity. See, e.g., *Bell v. Little Axe Indep. School Dist.*, 766 F.2d 1391, 1400-02 (10th Cir. 1985); *Bender v. Williamsport Area School Dist.*, 741 F.2d 539, 550 (3d Cir. 1984), *rev'd* 563 F. Supp. 697 (M.D. Pa. 1983), cert. granted, 469 U.S. 1206, vacated and remanded with instruction to dismiss for want of jurisdiction, 475 U.S. 534 (1986).
53. U.S. Const. amend. I. provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."
with religious practice. Free exercise includes the right to carry on religious activities, the right to pray, the right to build churches, and the right to hold services. The free exercise clause protects religious actions as well as religious beliefs. The Supreme Court, however, has drawn a distinction between action and belief. While the freedom of individual belief is absolute, the freedom of individual conduct is not. Generally, the government may not regulate religious conduct unless the conduct poses a substantial threat to public safety, peace or order.

The government's ability to regulate religious beliefs is even more circumscribed. Where a state regulation has the unintended effect of burdening religious beliefs, it will only be upheld if the regulation serves a compelling state interest and it is the least restrictive means of achieving that interest. Accordingly, the Supreme Court concluded in Sherbert, that one cannot be forced to forsake or alter religious beliefs in order to secure a state benefit. In Sherbert, a Seventh Day Adventist was fired for refusing to work on Saturdays, her religion's day of rest. The Court held that the state had violated her right to free exercise of religion by refusing to give her unemployment compensation. The Court reasoned that the state's interest in preventing fraudulent claims by claimants feigning religious objection to Saturday work was not sufficiently compelling to justify an impingement on the free exercise of religion.  

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56. Reynolds, 98 U.S. at 166 ("Laws are made for the government of actions and while they cannot interfere with mere religious beliefs and opinions, they may with practices.").
58. Sherbert, 374 U.S. at 403 (citing Cleveland v. United States, 329 U.S. 14 (1946); Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Reynolds v. United States, 98 U.S. 145 (1878)).
59. Sherbert, 374 U.S. at 406-07. See also Smith, Constitutional Rights of Students, Their Families, and Teachers in the Public Schools, 10 CAMPBELL L. REV. 353, 375-79 (1988) (concluding that "students and their families whose religious beliefs are subject to impairment in the public schools are entitled by the free exercise clause to some form of relief").
61. Id. at 410.
62. Id. at 399. The Seventh-day Adventist was unable to find other work because of her religious objection to Saturday work. The State Unemployment Commission denied her application for unemployment compensation based on the South Carolina Unemployment Compensation Act which states that a claimant is ineligible for benefits if he has failed, without good cause, to accept available suitable work. Id. at 400-01.
63. Id. at 403.
64. Id. at 407. The Court felt that even if the threat of false claims were a legitimate concern, the state would have the burden of showing that there were not alternative means to combat such abuses. Id.

The Supreme Court extended free exercise rights to the families of public high school students in Wisconsin v. Yoder, 406 U.S. 205 (1972). In Yoder, an Amish family declined to send its
The standard presently applied in free exercise cases, is derived from *Thomas v. Review Board of the Indiana Employment Security Division.*\(^6\) In *Thomas*, the petitioner was denied unemployment compensation after refusing to work. The petitioner, a Jehovah's Witness, terminated his employment after being transferred to a department that produced weapons.\(^6\) The Court, following *Sherbert*, granted the petitioner the right to collect unemployment compensation.\(^6\) The Court stated that in order to prove a violation of free exercise rights, the claimant must show one of two things: (1) that the state has conditioned receipt of an important benefit upon conduct proscribed by a religious faith; or (2) that the state has denied such a benefit because of conduct mandated by religious belief.\(^6\) In light of these cases, student religious groups which have been denied access to public high schools have argued that they were being denied the benefit of meeting at the school, a benefit granted to other groups, based on the group's religious beliefs.\(^6\)

The case law indicates that the Supreme Court has granted both free speech and free exercise rights to public high school students. Although the Court has declared that the first amendment rights of students are not co-extensive with the rights of adults in other settings,\(^7\) the state, nevertheless, cannot restrict the free speech rights of students absent an interest in main-

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children to public or private school beyond eighth grade for fear that sending the children to school would expose the family to censure by the church and endanger the salvation of the entire family. The Court exempted the Amish children from the state compulsory education laws on the grounds that the religious rights of Amish families outweigh the state's interest in preparing children for effective participation in the political system and preparing the children for self-sufficiency in society. *Id.* at 222. While the *Yoder* Court failed to specifically state that high school students possess free exercise rights, that conclusion can certainly be implied from the case. The dissent in *Yoder* attacks the Court's failure to specifically address the constitutional rights of the children involved. *Id.* at 241-46 (Douglas, J., dissenting in part). Justice Douglas argues that "religion is an individual experience" and, therefore, the views of the child are critical in this case. *Id.* at 243. He supports his argument by citing several Supreme Court cases which hold that children have constitutionally protected interests. *Id.* at 243-44. *E.g.*, *In re Winship*, 397 U.S. 358 (1970); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *Board of Educ. v. Barnette*, 319 U.S. 624 (1943).

66. *Id.* at 709.
67. *Id.* at 720.
68. *Id.* at 717-18.
69. *See, e.g.*, *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), rev'g 563 F. Supp. 697 (M.D. Pa. 1983), *cert. granted*, 469 U.S. 1206, vacated and remanded with instruction to dismiss for want of jurisdiction, 475 U.S. 534 (1986) (student group, which initiated a nondenominational prayer club, argued it should be permitted to meet at school during a half hour activity period designated as a time for school clubs); *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980) (high school students argued they should be permitted to have communal prayer meetings immediately before the schoolday commenced).
70. *Bethel School Dist. v. Fraser*, 478 U.S. 675, 682 (1986) (the court declared that while adults may use an offensive form of expression to make what the speaker considers a political point, it does not follow that children in a public school must be given the same latitude).
taining order and discipline. Further, the state must have a compelling interest in order to restrict the free exercise of religion. Whenever free speech and free exercise claims are asserted in equal access cases, however, the courts must balance those claims against the threat of an establishment clause violation.

C. The Establishment Clause

The establishment clause of the first amendment declares that "Congress shall make no law respecting an establishment of religion." The purpose of the establishment clause, as set out by the Founding Fathers, was to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." The Supreme Court, in Lemon v. Kurtzman, established the modern test for evaluating whether a particular statute or government policy violates the establishment clause. The three-prong test requires: (1) that the government policy has a secular purpose; (2) that the policy has the primary effect of neither advancing nor inhibiting religion; and (3) that it does not foster an excessive entanglement between government and religion. If all three of these prongs are satisfied, there is


73. U.S. CONST. amend. 1.

74. Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970) (tax exemptions to religious organizations for properties used solely for religious worship did not violate establishment clause since they were not aimed at establishing, sponsoring or supporting religion).

75. 403 U.S. 602 (1971) (striking down Pennsylvania and Rhode Island statutes that authorized the state to reimburse nonpublic schools for their secular expenses for teacher's salaries, textbooks, and instruction materials).

76. Id. at 612-13. The three-prong test in Lemon was not an original creation by the Lemon Court but was, instead, a culmination of several establishment clause decisions which preceded it. While several cases had an impact on the Lemon decision, the immediate source for the prongs themselves can be found in two Supreme Court decisions. The source for the first two prongs of the test is the Court's decision in Abington School Dist. v. Schempp, 374 U.S. 203 (1963). In Abington, the Court struck down a Pennsylvania statute which required public school teachers to read the Bible at the beginning of each school day while excluding some children upon the request of their parents. Id. In striking down the law, the Court stated that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion." Id. at 222. The third and final prong of the Lemon test was taken from the Court's holding in Walz v. Tax Comm'n,
no establishment clause violation. A violation of any one of the three prongs, however, is sufficient to constitute an establishment clause violation. 77

1. Secular Purpose

The inquiry under this prong focuses on whether the government policy in question has a secular purpose. 78 Decisions based on the secular purpose prong have been inconsistent. A municipality's display of a nativity scene has been held to have a valid secular purpose. 79 The Supreme Court stated that the nativity scene served the secular purpose of celebrating the Christmas Holiday and depicting the origins of the Holiday. 80 Four Justices, however, dissented stating that the nativity scene promotes religion and is not denominationally neutral. 81

Similarly, in Marsh v. Chambers, 82 the Court upheld the practice of opening each daily session of a legislature with a prayer by a state paid chaplain. 83 The Court reasoned that the practice is "deeply embedded in the history and tradition" of the United States and was, therefore, permissible. 84

397 U.S. 664 (1970). In Walz, the Court upheld New York City's practice of exempting religious organizations from taxes on religious properties used solely for religious worship. Id. The Court stated that this practice would prevent active entanglement between government and religion that would result if the state attempted to eliminate the exemption. Id. at 674.

77. Lemon, 403 U.S. at 612.

78. Id.


80. Id. at 681 (Burger, C.J., White, Powell, Rehnquist, and O'Connor, J.J., joined in the majority opinion).

81. Id. at 700-01 (Brennan, Marshall, Blackmun, and Stevens, J.J., dissenting). Justice Brennan, who authored the dissent, argues that the city could have accomplished its proposed secular objectives just as readily with the display of Santa Claus, reindeer and wishing wells. Id. at 699. Justice Brennan argues that the city understood the inclusion of the nativity scene to serve a wholly secular purpose. He cites the Mayor's statement that to eliminate the nativity scene would be "a step towards establishing another religion, non-religion that it may be." Id. at 700.

The Supreme Court most recently had occasion to examine the constitutionality of certain religious Christmas displays in County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989). There, the Court upheld the display of a menorah while striking down the display of a creche. The decision was very fact-specific and turned on the context within which the religious symbols were displayed. The thrust of the opinion focused on the second prong of the Lemon test rather than examining the secular purpose. The Court held that the context within which the creche was displayed would give the reasonable viewer the impression that the government is endorsing religion thus violating the establishment clause, while the menorah was displayed among several secular symbols thus not endorsing religion. Id. See The Supreme Court—Leading Cases, 103 Harv. L. Rev. 137, 228-39 (1989) (discussion and criticism of the Allegheny decision).


83. Id. at 786.

84. Id. The Court did not examine the Nebraska legislature's practice under the traditional Lemon test analysis. Instead, it appears the Court carved out an exception to the Lemon test based on history and tradition. Id. at 796 (Brennan and Marshall, J.J., dissenting).
Conversely, a statute requiring balanced treatment in the teaching of creationism and evolution has no secular purpose despite the state legislature's express statement that the statute served the secular purpose of "protecting academic freedom." The Supreme Court in Edwards v. Aguillard, after examining the legislative history, concluded that the primary purpose of the statute was to endorse a particular religious doctrine and that the proposed secular purpose was not advanced by the statute.

Likewise, in Stone v. Graham, the Court held that the posting of the Ten Commandments, purchased with private funds in public school classrooms, has no secular purpose. In Stone, the legislature required the following notation after the Ten Commandments on the text of each posted page: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." The Court concluded that the legislature's proposed secular purpose was insufficient to outweigh the fact that the purpose here was plainly religious in nature.

A further example of a nonsecular purpose appears in Wallace v. Jaffree, where the Court struck down an Alabama statute authorizing a one minute period of silence in public schools "for meditation or voluntary prayer." The Court looked to the legislative history of the statute and, specifically, to the statement of the bill's sponsor, Senator Donald Holmes, who stated that the legislation was an "effort to return voluntary prayer" to the public schools. The Court concluded that the statute was not motivated by any clearly secular purpose and, as a result, it violated the first prong of the Lemon test.

It is unclear exactly what the standard is regarding violations of the secular purpose prong. The Court may strike down a statute for lack of secular purpose based on the legislative history, as in Edwards and Jaffree, or it may uphold a policy despite a largely religious purpose, as in Lynch. Much has been written by Justices and commentators considering the adequacy of the secular purpose prong and the effects it has on the consistency of establishment clause decisions. Justice O'Connor has proposed a modifi-
cation of the secular purpose prong which would ask whether the government intends the statute to convey a message of endorsement of religion or disapproval of religion, rather than merely requiring a secular purpose.96

Justice Scalia has proposed eliminating the first prong entirely because of the inconsistent decisions produced by the Court based on the secular purpose prong.97 In his dissent in Edwards,98 joined by Chief Justice Rehnquist, Justice Scalia argues that the secular purpose test requires an inquiry into the “subjective motivation of those enacting the statute.”99 According to Justice Scalia, determining subjective motivation is “almost always an impossible task.”100 He argues that legislative histories, post-enactment testimony from legislators and postenactment floor statements are all manipulable and, therefore, there is no dependable source for determining the subjective intent of legislators.101 He concludes that it is time for the Court to sacrifice the “flexibility” provided by the Lemon test in exchange for “clarity and predictability.”102 Abandoning the secular purpose prong, Justice Scalia argues, “would be a good place to start.”103

Despite the controversy surrounding the secular purpose prong, courts have consistently held that equal access policies have a secular purpose.104

(assuming that the secular purpose prong prohibits the government from taking affirmative action to protect the free exercise of religion since that would be construed as state action with a religious purpose); Comment, The Lemon Test and Subjective Intent in Establishment Clause Analysis: The Case for Abandoning the Purpose Prong, 76 Ky. L.J. 1061 (1988) (arguing for the abandonment of the purpose prong because it requires inquiries into subjective intent, therefore, producing inconsistent decisionmaking and pointing out that the Supreme Court has refused to look into legislative intent in other contexts) (hereinafter Comment, The Lemon Test); Comment, Lemon Reconstituted: Justice O'Connor's Proposed Modifications of the Lemon Test for Establishment Clause Violations, 1986 B.Y.U. L. Rev. 465 (concluding that Justice O'Connor's modification of the purpose prong improves the Lemon test by invalidating a policy with any improper purpose and by demanding that a government policy not convey a message of endorsement of religion); Note, Wallace v. Jaffree: The Lemon Test Sweetened, 22 Hous. L. Rev. 1273 (1985) (discussing the proposed refinement of the Lemon test as suggested by Justice O'Connor); Note, The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis, 37 Vand. L. Rev. 1175 (1984) (analyzing the threat posed to the Lemon test by the Marsh and Lynch decisions both of which ruled on a historical recognition of religion in society as a justification for establishment clause encroachments).

97. Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (the secular purpose prong “exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the Amendment, and . . . has wonderfully flexible consequences”).
99. Id. at 636 (Scalia, J., dissenting).
100. Id.
101. Id. at 638.
102. Id. at 640.
103. Edwards, 482 U.S. at 640.
104. Courts generally concede that an equal access policy has the secular purpose of providing a forum for the free exchange of ideas. See, e.g., Widmar v. Vincent, 454 U.S. 263, 271 (1981) (stating that an equal access policy is not necessarily incompatible with the court's establishment
Although the Court has only rarely struck down a policy for lack of a secular purpose,\textsuperscript{105} the general rule remains that a government policy or statute must have a secular purpose and the chief motivating force behind it cannot be religious, in order for the policy to satisfy the secular purpose prong.

2. Primary Effect

Under the second prong of the \textit{Lemon} test, the policy in question must have the effect of neither advancing nor inhibiting religion.\textsuperscript{106} In \textit{Grand Rapids School District v. Ball},\textsuperscript{107} for example, the Court struck down a shared time program under which teachers, hired by the public school system, taught classes to nonpublic school students. The classes were taught in classrooms leased from nonpublic schools, the financing for which came from the public school system.\textsuperscript{108} The Court concluded that the program would impermissibly advance religion in three ways.\textsuperscript{109} First, the teachers may intentionally or inadvertently inculcate particular religious beliefs.\textsuperscript{110} Second, the "symbolic union of church and state" may convey the image
of government support of a particular religion to students and the general public.\textsuperscript{111} Finally, the program may provide a subsidy to the religious mission of the particular institution affected.\textsuperscript{112}

The second of the three religious effects outlined by the Court in \textit{Grand Rapids} involves the perceived effect of the policy rather than the actual effect. Neither an actual nor a perceived effect of advancing religion will be tolerated. As one court stated, “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.”\textsuperscript{113} Similarly, the inference of state hostility towards religion will also not be permitted.\textsuperscript{114}

The \textit{Widmar} Court held that university students are capable of perceiving a policy of equal access as one which is neutral towards religion, thus satisfying the primary effect prong.\textsuperscript{115} When examining equal access to public high schools, therefore, the issue is whether the difference between university and high school students is so great that high school students are not capable of perceiving equal access as neutral. Most courts have held that high school students are too impressionable to recognize equal access as a policy of neutrality.\textsuperscript{116} These courts reason that compulsory education laws make students a captive audience and that young and impressionable high school students will perceive the state's action in allowing a religious group to meet as the state's endorsement of that religious group.

\textsuperscript{111} \textit{Grand Rapids}, 473 U.S. at 397.
\textsuperscript{112} \textit{Id.}
\textsuperscript{114} Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
\textsuperscript{116} \textit{Id.} at 3115.
In other cases which discuss student maturity and do not involve religion, however, courts have ruled that students are able to discern between state and nonstate action.\textsuperscript{117} There is also much research and data in the area of adolescent psychology\textsuperscript{118} which indicates that high school students possess sufficient cognitive skills to make them realize "the difference between 'neutral accommodation' and 'indoctrination.'\textsuperscript{119} Thus, while psychologists feel that high school students are mature enough to recognize a policy of equal access as one of neutrality and while the courts themselves have conceded that high school students are able to discern state from nonstate action, the courts have been unwilling to rule that high school students have the same cognitive skills when it comes to religious issues.

The third religious effect mentioned in \textit{Grand Rapids} is another means by which the second prong of the \textit{Lemon} test is sometimes violated. This occurs when a government program provides a subsidy to religion.\textsuperscript{120} Thus, the free use of tax-financed classrooms, the light and heat used in these rooms, and the free monitoring by teachers of religious groups might grant a subsidy to

\textsuperscript{117} See, \textit{e.g.}, Russo v. Central School Dist., 469 F.2d 623, 633 (2d Cir. 1972) (holding that teacher's first amendment rights were violated when she was discharged for standing silently during the pledge of allegiance and the court noted that high school students "are approaching an age when they form their own judgments. They readily perceive the existence of conflicts in the world around them"), \textit{cert. denied}, 411 U.S. 932 (1973); James v. Board of Educ., 461 F.2d 566, 574 (2d Cir. 1972) (holding that teacher could not be dismissed for wearing a black armband in class to protest the Vietnam War and concluding that "[i]t does not appear... to be anything more than a benign symbolic expression of the teacher's personal views"), \textit{cert. denied}, 409 U.S. 1042 (1972), \textit{reh'y denied}, 410 U.S. 947 (1973). \textit{See also} The Equal Access Act, 16 J.L. & Educ. 225, 230-33 (1987) (concluding that high school students are capable of distinguishing between school sponsored and student-initiated activities based on Supreme Court decisions regarding student maturity).

\textsuperscript{118} See Note, \textit{The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools}, 92 Yale L.J. 499, 507-09 (1983) (suggesting that high school students are "generally independent and capable of critical inquiry") [hereinafter Note, \textit{Constitutional Dimensions}]; Note, Religion in Public Schoolrooms—Striking a Balance Between Freedom of Speech and Establishment of Religion: Bender v. Williamsport Area School District, 1984 B.Y.U. L. Rev. 671, 679 (explaining studies conducted in the field of adolescent psychology regarding the maturity of high school students) [hereinafter Note, \textit{Religion in Public Schoolrooms}]. \textit{See also} Piaget, \textit{The Intellectual Development of the Adolescent}, \textit{A Development} 23 (1969) (Piaget developed a four-stage theory of cognitive and moral development suggesting that by the fourth stage, typically between the ages of twelve and fifteen, the adolescent is capable of forming his own ideas, debating and disagreeing with his peers and acting on his own beliefs as an autonomous individual). \textit{See also} Erickson, \textit{Identity: Youth and Crisis} (1968) (Erickson stresses that adolescence is a stage in which the individual seeks to establish a new identity. This process of self-identification requires the adolescent to make distinctions between his views and those of others); Coleman, \textit{Friendship and the Peer Group in Adolescence}, \textit{Handbook of Adolescent Psychology} 424-25 (1980) (stating that while conformity is prevalent among early adolescents, by the age of fourteen or fifteen, individuals begin to see the advantages of independence and conformity decreases rapidly).

\textsuperscript{119} See Note, \textit{Constitutional Dimensions}, supra note 118, at 509.

religion in violation of the establishment clause.\textsuperscript{121} Providing a subsidy to a religious organization may also cause excessive entanglement between government and religion, a violation of the third prong of the \textit{Lemon} test.

3. Excessive Entanglement

Under the third and final prong of the \textit{Lemon} test, the policy in question must not foster an excessive entanglement between government and religion.\textsuperscript{122} The inquiry into excessive entanglement focuses on procedural questions.\textsuperscript{123} Some appellate courts have held that if the government must engage in continuing supervision of religious activity, church and state become excessively entangled.\textsuperscript{124} Thus, a group which needs supervision or monitoring by government employees, as most high school groups would require, may excessively entangle church and state.\textsuperscript{125}

The government may also become excessively entangled in religion through the expenditure of public funds as an aid to religion.\textsuperscript{126} The issue here is whether a school monitor and the expenditure of public funds are benefits which cause an excessive entanglement between government and religion or whether they are merely incidental benefits which accommodate religion.\textsuperscript{127} The principle of religious accommodation was first articulated by the Supreme Court in \textit{Zorach v. Clauson}.\textsuperscript{128} In \textit{Zorach}, the Court examined a New


\textsuperscript{122} Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).


\textsuperscript{124} See, e.g., Garnett v. Renton School Dist., 865 F.2d 1121, 1126 (9th Cir. 1989) (the district was responsible for safety and discipline of students and the action taken to satisfy this duty, that is, supervision, would cause excessive entanglement), \textit{modified}, 814 F.2d 608 (9th Cir. 1989); Bell v. Little Axe Ind. School Dist., 766 F.2d 1391, 1406-07 (10th Cir. 1985) (policy requiring school officials to monitor all student meetings in order to scrutinize the content would create excessive entanglement when enforced upon religious groups); Lubbock Civil Liberties Union v. Lubbock Ind. School Dist., 669 F.2d 1038, 1047 (5th Cir. 1982) (policy permitting students to meet before and after school hours for religious purposes created excessive entanglement because under Texas law all such meetings had to be supervised by school officials); Brandon v. Board of Educ., 635 F.2d 971, 979 (2d Cir. 1980) (because student prayer sessions would be taking place during school hours, while school officials were responsible for students' care, the officials would be forced to monitor the prayer groups' activities causing excessive entanglement).

\textsuperscript{125} The Court in \textit{Widmar}, stated that government is more entangled when it attempts to enforce its exclusion of "religious worship" and "religious speech" because it must continuously monitor the speech of students meeting on school facilities to ensure compliance with the rule. \textit{Widmar} v. Vincent, 454 U.S. 263, 272 n.11 (1981).

\textsuperscript{126} Teitel, \textit{supra} note 121, at 576-77.

\textsuperscript{127} For a discussion of the concept of religious accommodation see McConnell, \textit{Accommodation of Religion}, 1985 Sup. Ct. Rev. 1.

\textsuperscript{128} 343 U.S. 306 (1952).
York City program which allowed public schools to release students during the school day so that the students could leave the school building and attend religious instruction at religious centers.\textsuperscript{129} The Court held that, because there was no expenditure of public funds and no coercing of students who did not want to attend religious instruction, the city’s policy merely served to accommodate the school day to the spiritual needs of some of the students.\textsuperscript{130}

Accommodation has been defined as the following:

An accommodation to religion is a practice undertaken specifically for the purpose of facilitating the free exercise of religion, usually by ‘exempt[ing], where possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or [by creating] without state involvement an atmosphere in which religious exercise may flourish.\textsuperscript{131}

Under the doctrine of religious accommodation, some state entanglement with religion is permissible if the policy in question has a secular purpose and effect.\textsuperscript{132} The Court has stated that “not every law that confers an ‘indirect,’ ‘remote,’ or ‘incidental’ benefit upon religious institutions is, for that reason alone, constitutionally invalid.”\textsuperscript{133} Thus, while some entanglement may be tolerated, the entanglement cannot be excessive.\textsuperscript{134}

D. Equal Access

1. Pre-EAA Cases

The competing constitutional concerns discussed above have come into conflict on several occasions when voluntary student religious groups wished to meet on public school grounds. In 1978, a school board in New York denied permission to a voluntary student prayer group which desired to conduct communal prayer meetings in a classroom immediately before the start of the school day. The Second Circuit Court of Appeals in \textit{Brandon v. Board of Education},\textsuperscript{135} upheld the school board’s denial of permission.\textsuperscript{136} The court held that the students’ free exercise rights were not violated since

\begin{itemize}
\item \textsuperscript{129} \textit{Id}. at 308.
\item \textsuperscript{130} \textit{Id}. at 312-14. \textit{But see} McCollum v. Board of Educ., 333 U.S. 203 (1948) (striking down a policy which allowed students voluntarily to attend religious class on public school premises, during school hours, taught by privately-employed religious teachers).
\item \textsuperscript{131} \textit{See} McConnell, \textit{supra} note 127, at 3-4 (citing McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring)).
\item \textsuperscript{132} \textit{Note}, \textit{Constitutional Dimensions, supra} note 118, at 512.
\item \textsuperscript{134} Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).
\item \textsuperscript{135} 635 F.2d 971, 978 (2d Cir. 1980), \textit{cert. denied}, 454 U.S. 1123 (1981).
\item \textsuperscript{136} \textit{Id}.
\end{itemize}
the students had the option of praying elsewhere\textsuperscript{137} and that the students’ free speech rights were outweighed by establishment clause concerns.\textsuperscript{138} Shortly thereafter, the United States Supreme Court delivered the \textit{Widmar} opinion\textsuperscript{139} granting a student religious group the right to meet on public university facilities.

Although the \textit{Widmar} decision made clear that the denial of equal access to students would not be tolerated on a university campus, the Court did not provide guidance as to whether its holding would apply to the public high school setting. This created some confusion in the lower courts. Several circuit courts continued to deny equal access to student initiated religious groups in public high schools.\textsuperscript{140} The most notable of these cases is \textit{Bender v. Williamsport Area School District}.\textsuperscript{141} In \textit{Bender}, a group of students requested permission to form a voluntary club called “Petros” that would meet during the activity period at Williamsport Area High School.\textsuperscript{142} Williamsport had already allowed 29 other student clubs to meet on its premises.\textsuperscript{143} After the organizational meeting of “Petros” the school no longer permitted the group to meet.\textsuperscript{144} The students brought suit alleging that their first amendment rights to free speech and free exercise had been violated.\textsuperscript{145} The district court granted summary judgment in favor of the school board on the free exercise claim and in favor of the students on the free speech claim, thus allowing the student group to meet.\textsuperscript{146} The Court of Appeals for the Third Circuit reversed, holding that: (1) the students had a “valid first amendment right to engage in their proposed activity;”\textsuperscript{147} (2) the Williamsport Area School District had created a limited open forum;\textsuperscript{148} (3) the school district may object to the presence of Petros as violative of the establishment clause;\textsuperscript{149} and (4) “the interest in protecting free speech within the context

\textsuperscript{137. Id. at 977-78.}
\textsuperscript{138. Id. at 979-80.}
\textsuperscript{139. 454 U.S. 263 (1981).}
\textsuperscript{140. See, e.g., Bell v. Little Axe Ind. School Dist., 766 F.2d 1391 (10th Cir. 1985); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984); 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).}
\textsuperscript{141. 741 F.2d 538 (3d Cir. 1984); See Note, Religio in Public Schoolrooms, supra note 118, at 671 (concluding, after analyzing Bender under the Lemon test and after applying a freedom of speech v. establishment clause balancing test, that the students’ free speech rights should have outweighed the establishment clause claim).}
\textsuperscript{142. Bender, 741 F.2d at 542.}
\textsuperscript{143. Id. at 543-44.}
\textsuperscript{144. Id. at 543.}
\textsuperscript{145. Id.}
\textsuperscript{146. 563 F. Supp. 697 (M.D. Pa. 1983). The court held that the students had sufficient alternative means for religious worship, thus their free exercise rights were not impaired. Id. at 703. However, the district court rejected the school board’s claim of an establishment clause violation and upheld the students’ free speech rights. Id. at 715-16.}
\textsuperscript{147. Bender, 741 F.2d at 550.}
\textsuperscript{148. Id. at 550.}
\textsuperscript{149. Id. at 557.}
of the activity period as it exists at Williamsport Area High School is outweighed by the establishment clause."150 The court’s conclusion meant that the school could deny equal access. In 1985, the Supreme Court granted certiorari to *Bender*.151 However, rather than deciding the case on the merits, the Court held that the respondent had no standing to appeal, and the court of appeals had no jurisdiction to hear his appeal.152

Chief Justice Burger, along with Justices White and Rehnquist, dissented from the *Bender* opinion and addressed the issue on the merits.153 Their dissent stressed that the issue in question was about an individual’s participation and advocacy of religion and that this could not be transformed into state advancement of religion.154 Since the state was not leading or participating in religious discussion, there was no state action. State inaction, therefore, could not result in an establishment clause violation.155 Justice Powell dissented separately, stressing that the *Bender* decision is controlled by *Widmar*156 and that the age difference between high school and college students does not justify a departure from *Widmar*.157

2. The Equal Access Act

In an attempt to clear up the confusion engendered by the equal access decisions, Congress enacted the Equal Access Act.158 Senator Mark Hatfield sponsored the original congressional equal access proposal in September of 1982.159 The legislative history of the EAA reveals that the one of the purposes behind the Act is the desire to end widespread religious discrimination against student religious speech.160 The legislative history and the text of the Act itself are both dominated by discussions of religion161 and some have argued

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150. *Id.* at 559.
152. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986) (respondent, John C. Youngman, had no standing to appeal in his individual capacity since he could not invoke the school board’s right to appeal nor could he appeal as a parent, a capacity in which he was not a party in the district court).
153. *Id.* at 551 (Burger, C.J., dissenting).
154. *Id.* at 553.
155. *Id.*
156. *Id.* at 555.
157. *Id.*
161. Consider the following examples:

"Today we consider an equal access amendment that will permit the name of God to be uttered once again in our public schools other than profanely." 130
that the Act was prompted by the failure of Congress to enact a school prayer amendment or school prayer legislation.162

The EAA applies to any public secondary school that "receives federal financial assistance."163 Any school to which the Act applies is prohibited from "deny[ing] equal access or a fair opportunity to, or discriminat[ing] against, any students who wish to conduct a meeting . . . on the basis of the religious, philosophical, or other content of the speech at such meetings," provided that the school has a "limited open forum" and the students seek to conduct their meeting within that forum.164

Thus, the crucial inquiry in any equal access case is whether the high school in question has created a limited open forum, thereby subjecting it to the requirements of the Act. Under Supreme Court case law concerning public fora, the Court has defined a limited public forum as a forum designated by the government for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.165 Once the government has created a limited public forum, only a compelling state interest can justify the restriction of speech within that forum.166

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 noninstructional time."167 "Noninstructional time" and "noncurriculum related" are crucial terms for the understanding of the Act.

"Noninstructional time" is defined in the Act as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."168 The wording of this definition and the legislative history

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163. Other members of Congress expressed their concern that the Act was an attempt to bring religion back into the public schools through the back door. Id. at S8352 (daily ed. June 27, 1984) (statement of Sen. Metzenbaum). See also Teitel, supra note 121, at 543-49.


166. Id.


168. Id. § 4072(4).
of the Act indicate that noninstructual time occurs either before or after the entire compulsory attendance period and not during lunch breaks or activity periods, as was the case in *Bender*.169

The Act contains no definition of "noncurriculum related student groups." The legislative history of the Act, however, provides some guidance. It shows that the definition of "noncurriculum related" was intended to be quite broad while curriculum related was to be construed quite narrowly.170 Thus, unless the student club is essentially an extension of the curriculum and aids students in learning substantive course material, it will not be deemed curriculum related.171 Where a public high school allows a noncurriculum related student group the opportunity to meet on its premises during non-instructional time, it has created a limited open forum and the Equal Access Act will apply.

Even after the passage of the EAA, however, several courts have continued to deny equal access to student initiated groups. In *Clark v. Dallas Independent School District*,172 a district court upheld a school district's policy of not allowing student groups to meet, before or after school, for religious purposes.173 The court conceded that the EAA applied to the facts in that case, but refused to apply it claiming that its application would lead to an unconstitutional result.174 The court stopped short of declaring the Act unconstitutional, but held that only a constitutional amendment could change the Fifth Circuit precedent to which it was bound.175

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171. The Supreme Court had occasion to discuss curriculum relatedness in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). There the Court held that a public high school could censor two pages of a student newspaper which was produced as part of a journalism class and described three of the high school students' experiences with pregnancy. The Court reasoned that the newspaper was not a public forum since it was closely tied to the curriculum, that is, the journalism class, and that the school, as publisher, could edit for grammatical mistakes, poor grammar, vulgar or profane speech, or for speech unsuitable for immature audiences. *Id.* at 268-70. Thus, the Supreme Court's interpretation of curriculum-relatedness seems to be somewhat in accordance with the legislative history of the EAA. Both conclude that if an activity is an extension of the classwork or a product of the class, that activity is curriculum related.
173. *Id.*
174. *Id.* at 1124.
175. *Id.* The Fifth Circuit had decided in *Lubbock Civil Liberties Union v. Lubbock Ind. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), that religious meetings, either before or after regular school hours, were violative of the establishment clause.

The *Clark* court later granted a motion to amend the decision and limited its holding only to loud and disruptive meetings of the student group. The court again stated that it would not apply the EAA and expressly stated that it would not express any view on the constitutionality of the Act. *Id.*
In *Garnett v. Renton School District*, the Ninth Circuit avoided applying the EAA by holding that the school had not created a limited open forum as defined by the Act. The court held that all clubs meeting at the high school in question were curriculum related since they "are all supervised by faculty advisers and are so closely related to course work or are so integral a part of the traditional and official school programs that they cannot reasonably be termed 'noncurriculum related.'" In *Garnett*, the school had already allowed several student groups to meet on its facilities including the Chess Club, the Bowling Club and the Special Kiwanis Youth Club. The court accepted the school board's argument that the Chess Club is an extension of the math program, the Bowling Club is an extension of the physical education program and the Special Kiwanis Club meets the school board's educational goal of fostering communicative skills.

Despite Congress's attempt to insure that religious groups would be granted equal access, however, some religious groups have still been denied access to public high schools. The first appellate court decision to uphold the EAA was the Eighth Circuit's decision in *Mergens v. Board of Education*.

II. The *Mergens* Case

A. Facts and Procedure

A group of students at Westside High School ("WHS") in Omaha, Nebraska, wished to form a Christian Bible Study Club which would meet after school on school grounds. WHS is part of the Westside Community School System and is controlled by the Board of Education of Westside Community Schools. WHS is a public secondary school which receives federal funds. The school allows thirty different groups to meet on school grounds on a strictly voluntary basis. Until the appellants attempted to

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176. 865 F.2d 1121 (9th Cir. 1989).
177. *Id.*
178. *Id.* at 1127 (citing *Garnett*, 675 F. Supp. 1268, 1274 (W.D. Wash. 1987)).
180. *Id.* (accepting the district court's findings on the issue of the curriculum relatedness of each group at the high school).
181. See also *Thompson v. Waynesboro Area School Dist.*, 673 F. Supp. 1379 (M.D. Pa. 1987) (distribution of religious newspapers is not a meeting within the definition of the Act, and therefore the Act does not apply); *Perumal v. Saddleback Valley Unified School Dist.*, 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (1988) (the EAA did not apply where a religious club sought to advertise in the school yearbook since the school had not adopted a limited open forum and since the yearbook announcements were not "meetings" within the meaning of the Act).
182. 867 F.2d 1076 (8th Cir. 1989).
183. *Id.*
184. *Id.* at 1077.
185. *Id.*
186. *Id.*
form their club at Westside, no club had ever been denied access to the school. Among the groups allowed to meet at WHS are the Chess Club, Interact, Subsurfers, Zonta, the Student Advisory Board, and Student Forum.

The district court held that the Christian Bible Study Club meetings would violate the establishment clause of the first amendment. Specifically, the court held that the EAA did not apply since WHS had not created a limited open forum. Because there was no limited open forum, the high school could impose restrictions on the speech of students which were "reasonably related to legitimate pedagogical concerns." The Eighth Circuit reversed the decision of the district court and held that the EAA applied to the facts of the case and that the EAA was constitutional.

B. The Court's Opinion

In the first part of the decision, the Eighth Circuit court examined whether WHS had created a limited open forum thereby triggering the application of the Act. The appellants argued that several of the student clubs already meeting at WHS were noncurriculum related. The high school countered that all of its student groups, including the Chess Club, Interact and Subsurfers, were somehow related to the curriculum. The school board in Garnett, as noted above, asserted this argument claiming that all of its clubs are closely related to course work and that they cannot reasonably be termed "noncurriculum related." While the Garnett court accepted this argument, the Mergens court refused to do so. The court stated that such a broad interpretation of curriculum-related would render the EAA meaningless.

187. Mergens, 867 F.2d at 1077. WHS had no written policy regarding the formation of clubs. Students wishing to form a club present their goals and objectives to a school official who determines whether the club is consistent with Board Policy 5610. Board Policy 5610 recognizes student clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." Id.

188. A service club peripherally connected to Rotary International. Id. at 1078.

189. A club for students and community members interested in scuba diving. Id.

190. The female counterpart to Interact. Id.

191. See Mergens v. Board of Educ., No. 85-0-426, slip op. at 11 (D. Neb. filed Feb. 2, 1988). Appellants listed ten clubs meeting at Westside which they contended were noncurriculum related. In addition to the six mentioned, appellants claim that The National Honor Society, Photography, Welcome to Westside, and Future Business Leaders of America are also noncurriculum related. Id.

192. Id. slip op. at 2.

193. Id.

194. Id. slip op. at 14 (citing Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

195. Mergens, 867 F.2d 1076.

196. Id. at 1078.

197. Id.

198. Id.


200. Mergens, 867 F.2d at 1078.
The court reasoned that "[a] school’s administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal."201 The court then concluded that WHS maintains a limited open forum and that the EAA forbids discrimination against the students’ proposed club on the basis of its religious content.202

Further, the court analyzed the constitutionality of the EAA.203 The court applied the three part Lemon test and held that each prong was satisfied. Therefore, there was no establishment clause violation.204

Under the secular purpose prong of the Lemon test, the court concluded that the EAA has the secular purpose of providing a forum for the exchange of ideas between students.205 On the issue of whether the EAA has the primary effect of advancing or inhibiting religion, the court held that any benefits to religion would be merely incidental.206 The court refuted the argument that high school students are more impressionable than university students and extended Widmar to the high school setting.207 The court did not agree that high school students were so immature and impressionable that they could not distinguish an equal access policy as one of neutrality.208 Instead, the court deferred to the legislative findings on the maturity of high school students.209 Finally, on the issue of entanglement, the court held that any entanglement between church and state would not be excessive.210 The court, again citing Widmar, declared that a policy of religious censorship is more likely to cause entanglement than an equal access policy since a policy of religious censorship would require the university to constantly monitor the meetings of registered student groups.211

The court ultimately stated that the EAA is a codification of the Supreme Court’s Widmar decision.212 Consequently, any constitutional attack on the Act must be premised on the difference between secondary school students and university students, a difference which the Mergens court refused to recognize.213 The Mergens court went as far as to say that its decision would have been the same under Widmar alone.214

201. Id.
202. Id. at 1079.
203. Id.
204. Id. at 1079-80.
205. Mergens, 867 F.2d at 1079 (citing Widmar v. Vincent, 454 U.S. 263, 271 n.10 (1981)).
206. Id.
207. Id. at 1080.
208. Id.
209. Id.
210. Mergens, 867 F.2d at 1079.
211. Id. at 1079-80 (citing Widmar, 454 U.S. at 272 n.11).
212. Id. at 1079.
213. Id. at 1080.
214. Id.
III. Analysis

The Mergens court opinion goes against the weight of authority regarding equal access to public secondary schools. It is the first appellate court decision to apply and uphold the requirements of the EAA in a case regarding a student-initiated religious group in a public high school. Rather than applying the traditional free exercise/free speech vs. establishment clause balancing test, the court reached its decision by first analyzing whether the EAA applies and then examining the constitutionality of the Act.215 The court apparently determined that Congress had already considered the free exercise/free speech vs. establishment clause balancing test involved in situations where a student religious group wishes to meet on public high school facilities. The Act assumes that if the high school maintains a limited open forum, the balancing test is satisfied and the students should be allowed to meet. Thus, if the EAA applies, there is no need to go through the balancing test for each individual school. The court's task was to determine the applicability and constitutionality of the Act.

A. Applicability of the Act

In determining whether or not WHS maintained a limited open forum, the Mergens court refused to let the school board have the final discretion as to whether or not a particular student group was curriculum related. This is a much sounder analysis than the Garnett court approach, which accepted the school board's argument that none of its student clubs were noncurriculum related despite the fact that the Chess Club and the Special Youth Kiwanis Club both met at the high school in Garnett.216 As stated by the Mergens court, the Garnett court approach would allow public high schools to discriminate at will against student groups which they do not desire to have on their premises.217 A circular argument is created by high schools which argue that they maintain a closed forum but allow several groups which are arguably not curriculum related to meet on school facilities. They "permit a student activity to meet if it is curriculum related, and an activity is curriculum related if they permit it to meet."218 The Mergens decision eliminates this type of circular argument.

Whether or not a student group is curriculum related must be determined by analyzing the school's actions and examining the groups that are already

215. Id. at 1078-79.
216. Garnett v. Renton School Dist., 865 F.2d 1121, 1127 (9th Cir. 1989) (agreeing with the factual findings of the district court that all the activities allowed to meet at the high school are "closely related to course work" and "cannot reasonably be termed 'noncurriculum related'").
217. Mergens, 867 F.2d at 1078-79 ("Congress did not intend for the EAA to be easily circumvented by administrative decree").
allowed to meet on school premises. The determination of whether a school has created a limited open forum must be based on what the school does and not on what it says it does.\textsuperscript{219} If a school board accepts the argument that a chess club fosters logic and critical thinking and is, therefore, related to the math curriculum, it can then accept similar arguments about other clubs. Perhaps the Republican Club is directly related to a course in government. Perhaps the Existentialist Club is directly related to French courses which cover twentieth century French literature. And perhaps a student chapter of the Ku Klux Klan is directly related to an American history course. One can dream up a multitude of absurd justifications for how an organization ties in with the school curriculum and, according to the Garnett court's approach, if the school board says it is curriculum related then it is curriculum related. It is clear that leaving the final discretion to the school leaves the requirements of the Act open to abuse and, as stated by the Mergens court, renders the Act meaningless. The school board's policy concerning student activities should, without question, be given some deference. However, when a content-based discrimination has occurred, the courts must ultimately decide whether a school has created a limited open forum. The Mergens court's conclusion that the Chess Club, Zonta, and other clubs at WHS are noncurriculum related, therefore triggering the applications of the EAA, comports with the language of the EAA and Congress's intended meaning of curriculum related.

B. Constitutionality of the Equal Access Act

After determining that the Act applied to the facts of this case, the court properly concluded that the EAA is constitutional.\textsuperscript{220} However, while the EAA is constitutional, under the traditional application of the three-prong Lemon test, it fails the secular purpose prong. The fact that the EAA is neutral on its face and neutral in effect while still failing under the traditional Lemon test approach, indicates a need for an altering and restructuring of the Lemon test.

1. Secular Purpose

While equal access policies, in general, have a primarily secular purpose,\textsuperscript{221} the motivational factor behind the passage of the EAA is dominated by the

\textsuperscript{219} This may appear inconsistent with the following exchange from the legislative history cited by the Garnett court: "Mr. Gorton: Would the school district have the full authority to determine where the line is to be drawn between curriculum-related activities and noncurriculum related? Mr. Hatfield: We in no way seek to limit that discretion." Garnett v. Renton School Dist., 675 F. Supp. 1268, 1272-73 (W.D. Wash. 1987) (citing 130 Cong. Rec. S8342 (daily ed., June 27, 1984)). But see Laycock, supra note 27, at 39 ("It is hard to know what courts should or will do with all this-[referring to the legislative history]. Hatfield can be quoted to prove anything, which means he proves nothing.").

\textsuperscript{220} Mergens, 867 F.2d at 1079-80.

\textsuperscript{221} As noted supra note 104, courts have consistently held that equal access policies have the secular purpose of providing a forum for the free exchange of ideas and to contribute to the intellectual, physical or social development of students.
goal of advancing religion.\textsuperscript{222} An examination of the legislative history and the actual wording of the Act reveals that religion dominated this legislation from start to finish.\textsuperscript{222} The primary purpose of the Act was to "permit the name of God to be uttered again in our public schools"\textsuperscript{224} and it was initiated by the defeat of school prayer legislation.\textsuperscript{222} Proponents of the Act claim that the purpose of the Act is to end discrimination against student groups based on the content of the groups' speech.\textsuperscript{226} However, the legislative history of the EAA reveals that some supporters of the Act believed that the EAA would still allow high schools to discriminate against groups like the Ku Klux Klan or the Nazis.\textsuperscript{227} Thus, the supporters aim to allow religious groups to meet but to discriminate against groups with controversial views. Simply stated, they want to let religious groups in while keeping other select groups out.

It is relatively clear that, under traditional analysis, the EAA does not pass muster under the secular purpose prong of the \textit{Lemon} test. This, however, should not be sufficient to strike down legislation that is neutral on its face and neutral in effect. The first prong of the \textit{Lemon} test should not be dispositive of an establishment clause violation since it requires courts to determine the subjective intent of legislators. Legislative intent should not determine the constitutionality of a statute.\textsuperscript{228} What if fifty percent of the legislators are found to have had a nonsecular purpose? Would that be sufficient grounds to strike down legislation for lack of secular purpose? This type of inquiry can never provide consistent decisionmaking.

Justice O'Connor's proposed modification to the \textit{Lemon} test,\textsuperscript{229} which would ask whether the government intends the statute to convey a message of endorsement or disapproval of religion, more clearly defines the inquiry under this prong. This approach, however, would still require a court to inquire into the subjective intent behind the statute and this would result in inconsistent decisionmaking.\textsuperscript{230}

Perhaps the best approach, as proposed by Justice Scalia,\textsuperscript{231} would be to eliminate the first prong entirely and leave the remaining two prongs intact.

\begin{itemize}
\item \textsuperscript{222} See supra notes 159-61 and accompanying text.
\item \textsuperscript{223} See Teitel, supra note 121, at 556-59.
\item \textsuperscript{225} See supra note 161 and accompanying text.
\item \textsuperscript{226} S. REP. NO. 357, 98th Cong., 2d Sess. 10, 11 (1984).
\item \textsuperscript{228} Laycock, supra note 27, at 22-23 ("If secular and religious speech really do get equal access, it does not matter what motivated Congress"). Laycock cites several cases in which bad motive was held not to invalidate an otherwise permissible statute. See, e.g., Palmer v. Thompson, 403 U.S. 217, 224 (1971); United States v. O'Brien, 391 U.S. 367, 383 (1968); United States v. Darby, 312 U.S. 100, 115 (1941).
\item \textsuperscript{230} See Comment, The Lemon Test supra note 95, at 1061.
\end{itemize}
as the test for establishment clause violations. Establishment clause analysis
should focus on whether the state actually sponsors, financially supports or
becomes actively involved in religious activity. The effects of the actions
of the state, and the message that those actions actually convey, should be
determinative of whether the state is endorsing or disapproving of religion,
not the subjective motivation of the legislators. While the EAA was wrong
to dismiss the secular purpose issue by holding that the EAA has a secular
purpose, its analysis with regard to the remaining two prongs was more
sound.

2. Primary Effect

The Mergens court's conclusion that there would be no effect of advancing
or inhibiting religion is the primary place where its decision deviates from
case precedent on equal access to public high schools. Appellate courts have
consistently held that the impressionability of high school students and
compulsory attendance laws which make students a "captive" audience will
give students the impression that the state is placing its imprimitur on
religion if it allows a religious group to meet on its premises. The
impressionability and captive audience arguments are both without merit.

Several decisions, in nonreligious cases involving high school students,
have held that students of high school age are able to distinguish student
speech from speech endorsed by the school. "In cases involving political,
social, and moral issues, the courts, following the principles laid down in
Tinker, have denied local school boards the authority to censor or control
the student body's exposure to ideas that the school board does not sup-
port." If students are mature enough not to impute nonreligious speech
to the school board, it follows that the same is true when religious speech
is involved. Furthermore, several studies on adolescent psychology have
shown that high school students are independent and capable of critical
inquiry. Thus, the immaturity and impressionability arguments are not
sufficient to raise establishment clause concerns. High school students are
capable of thinking on their own even when it comes to religious issues.

Equal Access opponents further argue that, unlike the university setting,
compulsory attendance laws for high schools make students a captive audi-
ence and, because of this, students will somehow have religious dogma
forcibly thrust upon them. The argument that compulsory attendance laws

234. See supra note 116.
235. See supra note 117.
236. Note, Constitutional Dimensions, supra note 118, at 505-06.
237. See sources cited supra note 118.
238. See Teitel, supra note 121, at 562-68. Courts which have struck down equal access
policies have also argued that compulsory attendance laws add to the primary effect of advancing
make students a captive audience is not applicable where the EAA is concerned. The Act applies only to meetings which take place during noninstructional time, which is before or after the compulsory attendance period. They are free to come to school just before class begins and leave immediately after the school day ends. Therefore, any exposure to a student-initiated religious group would be completely voluntary.

Thus, the Mergens court properly held that the difference between college and high school students and the difference between the two educational settings is not sufficient to support the conclusion that meetings of student initiated religious groups would violate the second prong of the Lemon test.

3. Excessive Entanglement

Finally, the court correctly concluded that any entanglement between government and religion would not be excessive. The court’s argument that a policy of religious censorship is more likely to cause entanglement is rather tenuous. Certainly, under that logic, the argument could then be made that any nonpublic forum excessively entangles government with religion since the government would have to constantly monitor the speech in nonpublic forums and censor any religious speech therein. Thus, a prison’s nonpublic forum, for example, would violate the establishment clause since the government would become excessively entangled by having to make sure that prisoners do not form religious groups.

However, even when the government opens a forum for speech and provides equal access to that forum, it is clear that any entanglement between government and religion would be de minimis at best and certainly not excessive. Entanglement can be engendered by a need for government supervision of the student activity or by expenditure of public funds in support of the activity.

Although most schools require that a teacher be present at student meetings, this requirement does not excessively entangle government with religion. In general, monitors attend meetings in a nonparticipatory capacity and are there to insure order and discipline. Because these monitors are granted to other student groups, religious groups should not be denied this benefit on the basis of the content of their speech. Perhaps there is some entanglement when a government employee monitors the meeting of a student religious

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240. Mergens v. Board of Educ., 867 F.2d 1076, 1079 (8th Cir. 1989).
241. Id.
242. See supra notes 122-34 and accompanying text (discussion of entanglement).
group. Religious entanglement, however, is permissible when it has the effect of accommodating, and not endorsing religion. Here, because the monitor is required by the school and is merely a passive attendant, entanglement is certainly not excessive. The student group in Mergens did not request a monitor nor, presumably, does it want one unless the school requires one. The student religious group should not suffer because of a benefit that it does not want to begin with and which is forced upon them by the school.

The use of public funds in aid of religion also may serve to entangle government and religion. This arises in equal access to public school decisions when considering the light and heat needed at the student meetings and the salary paid to the government employee who must monitor the meetings. It is difficult to consider these expenses as "benefits" to religion when every other club receives them and a religious club will only be denied them because of the content of its speech. These expenses are arguably not even an accommodation since the school is not going out of its way to do something for or give something to a religious group. Accommodation implies that the government does something out of the ordinary to facilitate religious beliefs, such as exempting Amish children from compulsory education laws or granting tax exemptions to religious organizations. If a school gives light, heat and faculty monitors to all organizations, they are required to do the same for a religious group. Furthermore, even if this were considered an accommodation, the expenditures are certainly de minimis and cannot be construed to constitute an excessive entanglement between government and religion.

Overall, any threat of an establishment clause violation derives from the minimal expenditures the state must exert in order to accommodate the meetings of student religious groups. If this de minimis threat is held to outweigh the first amendment rights of high school students then certainly the rights of high school students have become illusory.

IV. IMPACT

Perhaps one of the greatest and most onerous effects of upholding the EAA and implementing a policy of equal access would be the possible onset of "hate groups" wishing to meet on public high school premises. Under the Act, groups such as the KKK, the Nazi party or the Society for Satan Worship would have to be granted access to school classrooms. Denying access to these groups would be an impermissible prior restraint on speech.

243. Id.
244. Teitel, supra note 121, at 562-65.
247. See Note, The Equal Access Act: A Haven for High School "Hate Groups"?, 13 Hofstra L. Rev. 589 (1985) (EAA greatly enhances the likelihood of hate groups meeting in public secondary schools since the Act limits the schools' authority to restrict a forum once it has been created).
If the groups were to cause disruption, however, the speech could be restricted under *Tinker* or under the provisions of the Act itself. The onset of hate groups, while an unpleasant consequence of equal access, is somewhat unlikely to occur. In order to be protected under the Act, any group wishing to meet must be student initiated. "Hate groups" cannot send representatives to high schools in order to start a club at a given high school. Perhaps some isolated hate groups will form at certain high schools, but this threat is a small price to pay in exchange for giving our high school students a forum for the free exchange of ideas and the opportunity to be exposed to as many viewpoints as possible.

Another possible effect of upholding the EAA would be that several schools may decide to eliminate student activities programs entirely. Public schools are not required to allow any groups or clubs to form and even at schools where student activities programs already exist and several groups have already formed, the school can still eliminate the forum entirely. It is difficult, however, to imagine any school board which would eliminate an entire student activities program merely to prohibit a religious or other undesirable group from meeting on its facilities. Such action would likely meet opposition from that school's community since student activities programs are important for the educational and social development of high school students.

The Supreme Court granted certiorari to *Mergens* and may clear the air in regards to equal access to public high school decisions by upholding *Mergens* and establishing a new establishment clause test that will provide consistency in church and state analysis. Eliminating the first prong of the *Lemon* test would represent a step in that direction by focusing establishment clause analysis on the effect of a given policy rather than leaving courts guessing as to the subjective intent of legislators.

Affirming *Mergens* would also reaffirm the first amendment rights of high school students which have recently suffered severe setbacks. High school students are young adults and while there are several valid reasons for not granting them the same rights as adults in an open forum, there are, nevertheless, more reasons for honoring the constitutional rights that they possess and which have been recognized by the Supreme Court. High schools train the future leaders of the world and exposing students to an open forum for the exchange of ideas is certainly better preparation for participation in the "real world" than censoring every word and action in the high school setting. "The classroom is peculiarly the 'marketplace of ideas.' The Nation's
future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'

V. Conclusion

The first amendment and free exercise rights of the students in Mergens certainly outweigh the threat of an establishment clause violation. The Equal Access Act is an effort by Congress to let student religious groups meet in public high schools; to "get religion back in the schools," so to speak. A predominant religious motivation, however, should not be enough to strike down legislation which has the neutral effect of preserving the free speech and free exercise rights of high school students. The Lemon test needs to be restructured so that the actual effect of state action is measured in determining establishment clause violations rather than the subjective intent behind the drafting of statutes or policies. Eliminating the first prong of the Lemon test would take a big step towards clearing up church and state analysis which, to date, has been subjective and inconsistent at best.

VI. Postscript: The Supreme Court Decision

On June 4, 1990, the Supreme Court handed down its decision in Mergens. Although eight Justices agreed that Westside High School had violated the EAA and that the Act did not violate the establishment clause, the case produced four separate opinions.

A. Justice O'Connor's Opinion

Justice O'Connor, joined by Chief Justice Rehnquist and Justices White, Blackmun, Scalia and Kennedy first addressed the language of the EAA. In particular, the majority focused on defining a "noncurriculum related student group" under the Act. Interestingly, the Court actually did so by defining a "curriculum related student group." The Court, working from both dictionary definitions of "curriculum" and the EAA's definition of a "meeting," concluded that a "curriculum related student group" must have a "direct relationship" to the courses taught at a school. A student group will be deemed "curriculum related":

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

254. Id. at *20.
255. Id. at *21-22.
required for a particular course; or if participation in the group results in academic credit. 258

The majority then gave examples of different types of clubs. Curriculum related clubs might include: A French club, if French was or were soon to be taught at a school; student government, if its activities related to the entire body of courses offered at a school; the school band, if participation is required for a music class or is offered for credit. 257 Conversely, service-oriented clubs, such as Zonta and Interact, would be classified as noncurriculum related student groups. 258

Because Westside had allowed noncurriculum groups to meet before and after classes, the majority found that Westside had created a "limited open forum" under the Act and could not deny similar access to religious groups. 259 The majority explicitly rested its decision on statutory grounds, leaving open the question of whether the result would have been the same under the first amendment by itself. 260

After finding that Westside had triggered the EAA by creating a limited open forum, the Court turned to the question of whether the Act violated the establishment clause. Justice O'Connor, writing for herself, Chief Justice Rehnquist and Justices White and Blackmun, held that the arguments which validated equal access to university facilities in Widmar also applied to high schools under the EAA. 261 The plurality found that the purpose of preventing discrimination on religious grounds was secular. 262 In addition, the plurality cited three reasons why the EAA did not have the effect of advancing religion. First, the plurality found that high school students were mature enough to understand that high schools, by allowing access to religious groups, were not endorsing religious views. 263 Second, the Act explicitly limited the involvement of school officials in meetings of religious clubs. 264 Third, the fact that Westside recognized a wide variety of clubs prevented students from inferring a message of endorsement. 265 Finally, the plurality

256. Id. at *24-25.
257. Id. at 25.
258. See id. at *25-26, *33-35. A more comprehensive list of clubs at Westside which were deemed curriculum related by the Court can be found at *36.

The majority acknowledged that they had formulated a broad definition for noncurriculum related student groups. The majority offered two suggestions for schools who wish to avoid triggering the EAA. Schools may offer courses that would allow directly related clubs to qualify as curriculum related. Schools also have the legal authority to ban meetings which would interfere with the school's educational activities. Id. at *26-27. The majority did not address the possibility that schools may choose a path of least resistance, namely, to simply close the forum to all groups. See supra note 250 and accompanying text.
259. 1990 U.S. LEXIS 2880, at *37.
260. Id.
261. Id. at *40.
262. Id.
263. Id. at *42-43.
264. Id. at *44.
265. Id. at *45-46.
DEPAUL LAW REVIEW

held that the EAA did not create an excessive entanglement of government with religion because the Act prohibited both participation in club meetings by faculty monitors and official school sponsorship of religious meetings.266

B. Justice Kennedy’s Concurrence

Justice Kennedy, joined by Justice Scalia, filed an opinion concurring in part and concurring in the judgment of the Court. While these two justices agreed with the majority’s construction of the EAA,267 they disagreed with the plurality’s establishment clause analysis. Writing that “endorsement cannot be the test[,]”268 because religious activities on school property imply endorsement, Justices Kennedy and Scalia would require instead that government refrain from giving direct benefits to a religious group or coercing students to engage in religious activities.269

C. Justice Marshall’s Concurrence

Justice Marshall, joined by Justice Brennan, agreed with the majority’s definition of noncurriculum related student groups. Justice Marshall’s concurrence, however, emphasized the differences between the forums created by the EAA and the forum recognized in *Widmar*.270 In particular, the concurrence noted that the forum recognized in *Widmar* had already been an open forum to over 100 student groups, including political groups.271 In contrast, Westside did not previously recognize any club with a controversial viewpoint. Moreover, Westside encouraged participation in student clubs as part of its broader educational mission, which included the inculcation of values necessary to representative democracy.272

Justice Marshall drew two conclusions from the difference in the two institutions’ educational missions. First, where an institution does not have a forum open to a broad spectrum of viewpoints, a religion club which “is the sole advocacy-oriented group in the forum, or one of a very limited number,” official encouragement of participation in student clubs may be construed as an endorsement of religion.273 Second, if the forum is not employed by a diversity of groups, “a religious club could provide a fertile ground for peer pressure” amounting to endorsement where the state has

266. *Id.* at *47-48.
267. *Id.* at *56. Nevertheless, it is interesting that Justices Kennedy and Scalia expressly leave open the question of whether high schools must meet all of the “fair opportunity criteria” of section 4071(c). The concurrence thus suggests that, for example, faculty might be able to participate in the meetings of religious clubs. See *id.* at *58.
268. *Id.* at *60.
269. *Id.* at *58.
270. *Id.* at *62-63.
271. *Id.* at *66-67.
272. *Id.* at *67-68.
273. *Id.* at *69.
"structured the school environment."  
Consequently, the concurrence suggests that Westside, and presumably any similar school, take active steps to ensure that the school is not seen as endorsing religion. Not only should faculty members be prohibited from participating in religious club meetings, but the school should also either discontinue its policy of encouraging participation in clubs or expressly disclaim endorsement of religious clubs.  

D. Justice Steven's Dissent

Justice Stevens was the lone dissenter in this decision, and relied heavily on his interpretation of congressional intent in passing the EAA, a method rejected by the majority due to the confused way in which the Act was passed. Justice Stevens agreed with some of the majority’s general statements in discerning the congressional intent behind the EAA. Nevertheless, these general proposition led Justice Stevens to infer that the term "non-curriculum related student group" should be interpreted as "ensur[ing] that the rule of Widmar applied to high schools as it did to colleges."

Thus, the dissent would extend Widmar to high schools only if the forum at Westside were comparable to the forum at issue in Widmar and the EAA did not violate the establishment clause. Justice Stevens then pointed out the differences between the two forums which were discussed in Justice Marshall's concurrence. These differences led Justice Stevens to define a "noncurriculum related student group" as a club which "has as its purpose (or as part of its purpose) the advocacy of partisan theological, political or ethical views." In Justice Stevens' opinion, a high school could not validly discriminate among controversial viewpoints, but Justice Stevens did not feel that Westside had done so "by recognizing clubs like Swim Timing Team and Subsurfers which, though they may not correspond directly to anything in Westside's course offerings, are no more controversial that a grilled cheese sandwich."  

274. Id. at *73, *74.  
275. Id. at *75-76.  
276. Id. at *88-99.  
277. Id. at *30.  
278. Id. at *78.  
279. Id. at *79-80. On this point, the majority held that the statute created a "limited open forum" which differed from the Court's "limited public forum" doctrine. See id. at *28-29. Justice Stevens argued that the difference was unintentional. Id. at *98.  
280. Id. at *81.  
281. Id. at *81-85.  
282. Id. at *86.  
283. Id. at *86. The dissent is quite concerned with the possible introduction of controversial viewpoints into the high school forum, stating that "[n]othing in Widmar implies that the existence of a French club, for example, would create [a] constitutional obligation to allow
Although Justice Stevens, by concluding that Westside had not triggered the EAA, did not need to address whether the Act violated the establishment clause, he did not feel the issue required more careful analysis than the majority had provided. In particular, the dissent stressed the "special sensitivity" the Court had previously shown when applying the establishment clause to primary and secondary public schools. The dissent also argued that the students' first amendment rights could be restrained because the religious club was seeking affirmative support from the school in expressing its opinions, rather than merely the prevention of school interference with that expression.

Frank Calabrese

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student members of the Ku Klux Klan or the Communist Party to have access to school facilities."' Id. at *87 (footnote omitted). The danger of high schools being invaded by the Klan is not illegitimate. See supra note 247 and accompanying text. Nevertheless, school officials are not without legal authority to prevent the ill effects of such an invasion. See supra notes 248-49 and accompanying text.

More interesting on this point is Justice Stevens' later elaboration of the distinction between viewpoint-based discrimination and a blanket exclusion of controversial speech. Justice Stevens wrote that "the fact that the history of the Republican party might be taught in a political science course could not justify a decision to allow the young Republicans to form a club while denying Communists, white supremacists, or Christian Scientists the same privilege." 1990 U.S. LEXIS 2880, at *88. It would not be surprising if the Christian Scientists or other religious groups were to be offended by being lumped in with communists and white supremacists, a characterization which lends further support to Professor Laycock's argument that Justice Stevens' opinions in religion cases are seemingly motivated by a hostility toward religion. Laycock, Formal Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993 (1990).

285. Id. at *102.