E. RELIGIOUS ACTIVITIES OF STUDENTS IN PUBLIC SCHOOLS

Several cases have arisen in which students (and occasionally faculty) have been restricted in their efforts to practice their faith in their "workplace," the school. When the school is a public one, an element of *state* action is involved that creates the ingredients of church-state case law. This situation, however, is different from those dealt with in Part C above. In these instances, the state is not the religious "actor"; the students are. Thus, the guiding principle in these instances, it is argued, is not the Establishment Clause (forbidding the state to sponsor religious activities), but the Free Exercise Clause (forbidding the state to interfere with the religious practices of individuals except in furtherance of a compelling state interest). Therefore, this poses the opposite kind of problem from the school-prayer situation, in which the public school sponsors and/or promulgates the religious practice. The first case to begin to define students' rights in such matters arose during the conflict in Vietnam and was dealt with by the Supreme Court under the rubric of the Free Speech Clause.

1. *Tinker v. Des Moines* (1969)

In Des Moines, Iowa, in 1965 several students wore black armbands in protest against the conflict in Vietnam. The principals of the Des Moines schools learned of the plan to wear black armbands in advance and decided to suspend any student who insisted on carrying out the plan. Knowing that they risked suspension, John and Mary Beth Tinker and Christopher Eckhardt nevertheless wore armbands to school and were sent home and suspended from school until they were willing to forego the wearing of armbands. They stayed home until the end of the period they had planned to wear armbands, which was after New Year's Day. Suit was filed on their behalf by their fathers (one of whom, the Reverend Tinker, was a well-known peace advocate) seeking an injunction and nominal damages. After a hearing, the federal district court dismissed the complaint on the ground that the school authorities' action was reasonable in order to prevent disturbance of school order, refusing to follow a Fifth Circuit holding to the contrary in a similar case.[1] The Eighth Circuit *en banc* was equally divided. The U.S. Supreme Court granted *certiorari* and rendered an opinion written by Justice Fortas.

1. *Burnside v. Byars*, 363 F.2d 744 (1966).

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment.... As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech," which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment....

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate....

* * *

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.... Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities....

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone....

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take that risk..., and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that this action was caused by something more than a mere desire to avoid

the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

* * *

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this nation's part in the conflagration in Vietnam....

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views....

* * *

But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech....

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the

> four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.
>
> If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.... In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands," as one of the children called it, is no less offensive to the Constitution's guarantees.[2]

Justice Stewart and Justice White each concurred in one-paragraph opinions noting minor reservations about the court's opinion. Justice Black filed an irascible dissent complaining that the court was taking over the management of schools. He intimated that the children in question were acting out their parents' political predilections.

> Ordered to refrain from wearing the armbands in school by the elected school officials and the teachers vested with state authority to do so, apparently only seven out of the school system's 18,000 pupils deliberately refused to obey the order. One defying pupil was Paul Tinker, 8 years old, who was in the second grade; another, Hope Tinker, was 11 years old and in the fifth grade; a third member of the Tinker family was 13, in the eighth grade; and a fourth member of the same family was John Tinker, 15 years old, an 11th grade high school pupil. Their father, a Methodist minister without a church, is paid a salary by the American Friends Service Committee. Another student who defied the school order and insisted on wearing an armband in school was Christopher Eckhardt, an 11th grade pupil and a petitioner in this case. His mother is an official in the Woman's International League for Peace and Freedom.[3]

It is not clear what follows from this recital. Knowing the Rev. Tinker, this author was not surprised that his children should be caught up in his concern for peace and that they should want to communicate that concern to others. There is certainly nothing subversive in sharing one's moral convictions with one's children—would that other parents were as effective in doing so!—or in being a "Methodist minister without a church" or in working for a non-Methodist religious organization, as others have been known to do.

> Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment,... the crucial remaining questions are whether students and teachers may use the schools at their whim as a

2. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
3. Ibid., Black dissent.

platform for the exercise of free speech—"symbolic" or "pure"—and whether the courts will allocate to themselves the function of deciding how the pupil's school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases....

Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband.... There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration."... While the absence of obscene remarks or boisterous and loud disorder perhaps justified the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war.

* * *

The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all their elders....

* * *

Of course students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and dead being their friends and neighbors. It was, of course, to distract the attention of other students that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands....

* * *

Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of them school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens. Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not have to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins.... Students engaged in such activities are apparently confident that they

> know far more about how to operate public school systems than do their parents, teachers, and elected school officials. It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools.... This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students....[4]

Justice Harlan also dissented, but briefly, and in a much more restrained fashion, observing that "I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion."[5] Seeing nothing of that sort in the record, he voted to affirm the judgment of the court below, making the score apparently seven to two for reversal.

Although *Tinker* is viewed as a free-speech and students'-rights case, it really arose out of the religious and moral convictions of the Tinkers and their colleagues and represents a vindication of the right of students to express such convictions in a non-disruptive way to their peers in their common "workplace," which is a significant element in the practice of the faith by the faithful as part of their regular role in the world.

2. *Keegan v. University of Delaware* (1975)

An intermediate question arose at the University of Delaware in the early 1970s. A group of students had been meeting for worship with a priest from a nearby parish, who occasionally celebrated mass for them in the commons room of a student dormitory. The university authorities ordered the students to discontinue this practice because the premises were state property, and the Establishment Clause of the First Amendment—in their view—required the banning of religious worship services from the campus of a state university. The priests and students contended that this policy violated their free exercise of religion. The university sought an injunction in state court against the continuation of the practice, and the Court of Chancery granted the injunction. The defendant students and priests appealed to the Supreme Court of Delaware, which ruled on November 12, 1975, in an opinion by Justice McNeilly for the court, consisting of Chancellor Quillen, President Judge

4. Ibid.
5. Ibid., Harlan dissent.

Stiftel and himself. The court held that the ban was not required by the Establishment Clause.

> University policy without the worship ban could be neutral toward religion and could have the primary effect of advancing education by allowing students to meet together in the commons rooms of their dormitory to exchange ideas and share mutual interests. If any religious group or religion is accommodated or benefited thereby, such accommodation or benefit is purely incidental, and would not, in our judgment, violate the Establishment Clause. The commons room is already provided for the benefit of students. It is not a dedication of the space to promote religious interests.[6]

Thus, the university was not *obliged* to *prohibit* worship on its premises, but was it *required* to *permit* it? Or was that a decision within the range of the university's discretion, as the lower court had held? "Can the University prohibit student worship in a common area of a University dormitory which is provided for student use and in which the University permits every other student activity?" The court was inclined to think it could not unless it was able to show a compelling state interest (other than purported compliance with the Establishment Clause) that would outweigh the students' right to use the common "living room" of their residential space for the free exercise of their religion. Since the state had not been asked to advance any such justification, the Supreme Court reversed the lower court's injunction and remanded the case to allow the state to show such justification if it could. Apparently it did not do so, for no further references to this case appear in the literature. The U.S. Supreme Court declined to hear the case.[7]

3. "Equal Access" for Religion

In the 1980s a series of lawsuits arose over student religious clubs' seeking to meet in public high schools and colleges, which efforts were viewed by some as attempts to get around the legal strictures against state-sponsored prayer in public schools. Such is the prevailing "pistaphobia"[8] of our times that this seemingly harmless phenomenon excited intense controversy and litigation. People who seem willing to indulge campus organizations devoted to Marxism, Gay Pride or the occult can become very threatened by the prospect of students meeting at school (on their own initiative and their "own" time) for religious discussion, mutual encouragement and prayer.

a. *Brandon v. Guilderland* (1980). In 1978, several students at Guilderland High School in New York State organized a group called "Students for Voluntary Prayer" and asked the principal for permission to meet in a classroom to pray together before

6. *Keegan v. University of Delaware*, 349 A.2d 934 (1975).
7. Cert. denied, 424 U.S. 934 (1976).
8. See discussion of this term, meaning "fear of faith," at beginning of Vol. II.

classes began. They added that they were not seeking faculty involvement or supervision. The principal refused permission. So did the superintendent of schools and the school board. Six students sued the school board, the superintendent and the principal for violating their rights to free exercise of religion, freedom of speech, freedom of association and equal protection of the law. The complaint prayed for monetary damages as well, which kept the case from becoming moot on appeal after the students graduated.

The trial court found against them, and a panel of the Second Circuit Court of Appeals unanimously affirmed in an opinion by Judge Irving R. Kaufman.

> To many Americans, the state's noblest function is the education of our nation's youth.... In this immigrant nation of dreamers and dissidents, however, no broad consensus regarding the spiritual side of the human condition exists. Our Founding Fathers recognized the disharmony and drafted the Bill of Rights to require the separation of church and state. Accordingly, religious activity under the aegis of the government is strongly discouraged, and in some circumstances—for example, the classroom—is barred. The sacred practices of religious instruction and prayer, the Framers foresaw, are best left to private institutions— the family and houses of worship. In short, logic, tradition and law create in our nation "a wall between church and state...." In this case, brought by students seeking to force a public school to allow joint prayer sessions in the school before classes begin, we are asked to dismantle that wall. Because the First Amendment does not require—or even allow—such permission, we affirm the dismissal... of the students' complaint.
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> * * *
>
> We find that the free exercise rights of the "Student for Voluntary Prayer" were not limited by the Guilderland School District's refusal to permit communal prayer meetings to occur on school premises. The students assert in their complaint that "God has directed them to join together with one another and pray to him as a group whenever possible and that such communal prayer is particularly rewarding and effective...." We do not challenge the students' claim that group prayer is essential to their religious beliefs. The effect of the schools' actions, however—denying the students the opportunity to pray together at the commencement of a school day—is hardly analogous to the coercive restraints on religious observation imposed by state action in *Sherbert* or *Yoder*.[9]
>
> The dilemma presented to individuals in *Sherbert* and *Yoder* was absolute. Individuals were forced to choose between neglecting their religious obligations and rendering themselves liable for criminal sanctions or ineligible for state benefits. The choice for the students in this case is much less difficult because the school's rule does not place an absolute ban on communal prayer, nor are sanctions faced or benefits

9. *Sherbert v. Verner*, 374 U.S. 398 (1963), discussed at IVA7c above; *Wisconsin v. Yoder*, 406 U.S. 205 (1972), discussed at § B2 above.

forfeited. While school attendance is compelled for several hours per day, five days per week, the students, presumably living at home, are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place....

Several cases have noted that the free exercise rationale set forth above does require the state to permit prayer in certain special circumstances. But, none of them is applicable here. Authorization for prayer at public universities, for example, has been required because students both study and reside there. Frequently they are unable to hold prayer meetings off campus.[10]

* * *

Even if we were to accept the students' contention that the School Board's refusal to allow school prayer [*sic*] significantly encumbered their free exercise rights, a "compelling state interest" against the prayer meetings was present.... The school board... argues as a compelling state interest... that an authorization of student-initiated voluntary prayer would have violated the Establishment Clause by creating an unconstitutional link between church and state. We agree.

* * *

Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.... An adolescent may perceive "voluntary" school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the "captive audience" setting of a school.... Misconceptions over the appropriate roles of church and state learned during one's school years may never be corrected....

* * *

The record indicates that school buses discharge students at the Guilderland High School between 7:20 a.m. and 7:40 a.m. and that the official school day "begins" at this point. Any voluntary student prayer meetings conducted after the arrival of the school buses and before the formal "homeroom" period at 7:50 a.m., therefore, would occur during school hours. The prayer meetings would create an improper appearance of official support, and the prohibition against impermissibly advancing religion would be violated.

* * *

The final element of the [establishment clause] test is the prohibition of "entanglement," and the School Board has demonstrated that an excessive

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10. Citing *Chess v. Widmar*, 635 F.2d 1310 (CA8 1980), discussed under *Widmar v. Vincent* (1981), immediately following, and *Keegan v. Univ. of Delaware*, 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976), discussed immediately above.

> involvement of the state in religious matters would have resulted if the students' requests were granted....
>
> School officials in this case would be forced to monitor the activities of "Students for Voluntary Prayer." The School Board has a duty under New York law to provide adequate supervision of all students in its "care and charge" during school hours.... Since the voluntary prayer meetings... occur during school hours, official supervision is required by law to ensure the smooth functioning of the schools' secular schedule and the maintenance of the school's safety and order. More importantly, surveillance will be required to guarantee that participation in the prayer meetings would always remain voluntary....
>
> This leaves for our disposition the students claim that the School Board's refusal violates their rights to free speech, freedom of association, and equal protection. The students' argument, in short, is that they merely seek to exercise their rights to free speech in a public forum, unencumbered by governmental regulation of the context [*sic*] of their speech....
>
> Two significant factors, however, defeat the claims. First, a high school is not a "public forum" where religious views can be freely aired.... The expression of religious points of view, and even the performances of religious rituals, is permissible in parks and streets when subject to reasonable time, place, and manner regulations.[11] The facilities of a university have also been identified as a "public forum," where religious speech and association cannot be prohibited....[12] A high school classroom, however, is different.... While students have First Amendment rights to political speech in public schools,[13] sensitive Establishment Clause considerations limit their right to air religious doctrines. Equally compelling, the students in this case propose to conduct *prayer* meetings [emphasis in original] in the high school, not merely discussions about religious matters. When the explicit Establishment Clause proscription against prayer in the public schools is considered,...[14] the protections of political and religious speech are inapposite.... In short, these two vital distinctions indicate that the students' free speech and associational rights, cognizable in a "public forum," are severely circumscribed by the Establishment Clause in the public school setting. Because of the symbolic effect that prayer in the schools would produce, we find that Establishment Clause considerations must prevail in this context.[15]

Judge Kaufman also considered the equal protection claim outweighed by the establishment issue. He was joined by Judges Kearse and Bright in this decision.

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11. Citing *Niemotko v. Maryland*, 340 U.S. 268 (1951), discussed at IIA2q and *Kunz v. New York*, 340 U.S. 290 (1951), discussed at IIA3a.

12. Citing *Widmar* and *Keegan, supra.*

13. Citing *Tinker v. Des Moines*, 393 U.S. 503 (1969), discussed at § 1a above.

14. Citing *Abington v. Schempp*, 374 U.S. 203 (1963), discussed at § C2b(2) above.

15. *Brandon v. Board of Education of Guilderland Central School District*, 635 F.2d 971 (CA2 1980).

It is sometimes contended that this decision was reached without the benefit of the Supreme Court's holding in *Widmar* (discussed below), but the *Brandon* opinion included several references to the Eighth Circuit's decision in that case (*sub nomine Chess v. Widmar*), and distinguished it (and *Keegan*) as pertaining to *college* rather than *secondary* (public) schools.

The court noted that students arrived at the Guilderland High School by bus "between 7:20 and 7:40 a.m." If many of the "Students for Voluntary Prayer" group came in at the latter end of that interval, it is hard to imagine their getting much praying done before home rooms took up at 7:50.

The same data, however, suggest that Guilderland Central District's high school drew its student body from a wide area (as is the case with most consolidated high schools in semi-rural territory), and that many or most of them arrived by bus, thus creating a temporary five-hour community of young people who might live at some distance from one another and who might not see one another outside of school hours on school days, certainly not before school. Thus the court's querulous implication, "Why can't they do their praying some other time in some other place?" seems a bit disingenuous. The high school is a state-created community whose members might otherwise not have or seek occasion to be together other than when they are brought together by bus in the high school building. They have a continuing, if intermittent, experience together there as a significant community with its own absorbing interests, concerns, anxieties and fulfillments. Its members, who might not necessarily have anything else in common, do share that in-school experience, and some of them might want to seek spiritual strengthening and mutual encouragement together in prayer, not making a separate and independent expedition to some other place at some other time removed from the school community, but in conjunction with it in some way not preempted by academic or other secular activities.

They were not asking the school to organize, supervise or sponsor this spiritual sharing, but simply to "get out of the way" so that the few of them who wished, on their own initiative and under their own independent guidance, to get together privately for a few minutes each day might do so. But the court saw in that prospect the peril that an "impressionable student" might get the idea that the state thereby had "placed its imprimatur on a particular religious creed." Such a "symbolic inference," said the court, "is too dangerous to permit"! Every official, from the school principal up through the superintendent and the school board and the judges of trial court and appellate panel, seemed of like mind in rejecting this alarming possibility, but within a few years the Supreme Court and Congress had accepted a different view of the matter.

b. *Widmar v. Vincent* (1981). The next year the U.S. Supreme Court considered the case referred to in *Brandon* as *Chess v. Widmar* and delivered an opinion written by Justice Powell, who had served on the school board in Richmond, Virginia, for many years.

This case presents the question whether a state University, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

It is the stated policy of the University of Missouri at Kansas City to encourage the activities of student organizations. The University officially recognizes over 100 student groups. It routinely provides University facilities for the meetings of registered organizations. Students pay an activity fee of $14 per semester (1978-1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities. In 1977, however, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation adopted by the Board of Curators in 1972, that prohibits the use of University buildings and grounds "for purposes of religious worship or religious teaching."

Eleven University students, all members of Cornerstone, brought suit to challenge the regulation.... They alleged that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech....

* * *

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.... With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities....

Here the University of Missouri has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion.... In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

In this case the University claims a compelling interest in maintaining strict separation of church and state... [derived] from the "Establishment Clauses" of both the Federal and Missouri Constitutions....

* * *

We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not

> follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the [policy] must not foster an `excessive government entanglement with religion.'"[16]
>
> In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including non-discrimination against religious speech, would have a secular purpose and would avoid entanglement with religion. But... the University argues... that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.
>
> The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech.... In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.
>
> We are not oblivious to the range of an open forum's likely effects. It is possible —perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion....
>
> We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.
>
> First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University... to religious goals," than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities.
>
> Second, the forum is available to a broad class of non-religious as well as religious speakers; there are over 100 recognized groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect.... At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

With respect to the University's claim that the state constitution required a stricter separation of church and state than the federal First Amendment, the court said:

16. Citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at § D5 above.

> [T]he State interest asserted here... is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.
>
> Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations. Nor do we question the right of the University to make academic judgments as to how to allocate scarce resources or "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study...." Finally, we affirm the continuing validity of cases... that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.
>
> The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.[17]

Justice Stevens supplied an opinion which concurred in the judgment but put greater emphasis on academic freedom.

> Today most major colleges and universities are operated by public authority. Nevertheless, their facilities are not open to the public in the same way that streets and parks are. University facilities—private or public—are maintained primarily for the benefit of the student body and the faculty....
>
> Because every university's resources are limited, an educational institution must routinely make decisions concerning the use of the time and space that is available for extracurricular activities. In my judgment, it is both necessary and appropriate for those decisions to evaluate the content of a proposed student activity. I should think it obvious, for example, that if two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet—the First Amendment would not require that the room be reserved for the group that submitted its application first. Nor do I see why a university should have to establish a "compelling state interest" to defend its decision to permit one group to use the facility and not the other....
>
> Thus, I do not subscribe to the view that a public university has no greater interest in the content of student activities than the police chief has in the content of a soap box oration on Capital Hill. A university

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

> legitimately may regard some subjects as more relevant to its educational mission than others. But the university, like the police officer, may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted....
>
> In this case I agree with the Court that the University has not established a sufficient justification for its refusal to allow the Cornerstone group to engage in religious worship on the campus.... Quite obviously... the University could not allow a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege. It seems apparent that the policy under attack would allow groups of young philosophers to meet to discuss their skepticism that a Supreme Being exists, or a group of political scientists to meet to debate the accuracy of the view that religion is the "opium of the people." If school facilities may be used to discuss anti-clerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted. The fact that their expression of faith includes ceremonial conduct is not, in my opinion, a sufficient reason for suppressing their discussion entirely.
>
> Accordingly, although I do not endorse the Court's reasoning, I concur in its judgment.[18]

Justice White filed a lone dissent in which he insisted that the state could bar student groups from using campus facilities for religious worship in deference to the Establishment Clause—a curious position for Justice White, whose solicitude for the Establishment Clause was not notable. However, in this instance it may have been solicitude for the state's or a state university's autonomy more than anything else. He predicated his uneasiness on the remarkable contention that religious worship was not just religious speech and so was controlled by the Establishment Clause.

> [T]he majority rejects [the University's] argument that the Establishment Clause of the Constitution prohibits the use of university buildings for religious purposes. A state university may permit its property to be used for purely religious services without violating the First and Fourteenth Amendments. With this I agree.... The Establishment Clause, however, sets limits only on what the State may do with respect to religious organizations; it does not establish what the State is *required* to do.... The step from the permissible to the necessary... is a long one.... In other words, I believe the states to be a good deal freer to formulate policies that affect religion in divergent ways than does the majority....
>
> * * *
>
> A large part of the [students'] argument..., accepted by the majority, is founded on the proposition that because religious worship uses speech, it is protected by the Free Speech Clause of the First Amendment. Not only is it protected, they argue, but religious worship *qua* speech is not different from any other variety of protected speech as a matter of constitutional principle. I believe that this proposition is plainly wrong. Were it right, the

18. Ibid., Stevens opinion concurring in the judgment.

> Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech....
>
> If the majority were right that no distinction may be drawn between verbal acts of worship and other verbal acts, all of our cases [barring verbal expressions of religion banned by the Establishment Clause[19]] would have to be reconsidered. Although I agree that the line may be difficult to draw in many cases, surely the majority cannot seriously suggest that no line may ever be drawn. If that were the case, the majority would have to uphold the University's right to offer a class entitled "Sunday Mass." Under the majority's view, such a class would be—as a matter of constitutional principle—indistinguishable from a class entitled "The History of the Catholic Church."... This case involves religious worship only; the fact that that worship is accomplished through speech does not add anything to [the] argument.[20]

Justice Powell (for the majority) responded in a footnote.

> 6. The dissent argues that "religious worship" is not speech generally protected by the First Amendment.... [It creates] a new class of religious "speech act[s]," ... comprising "worship" [not thus protected]. There are at least three difficulties with this position.
>
> First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," cease to be "singing, teaching, and reading"—all apparently forms of "speech," despite their religious subject matter—and become unprotected "worship."
>
> Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.
>
> Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win converts[21] than for religious worship by persons already converted. It is far from

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19. *Stone v. Graham*, 449 U.S. 39 (1980)(posting of Ten Commandments on public school classroom walls impermissible); *Engle v. Vitale*, 370 U.S. 421 (1962) and other school prayer cases; "as a speech act, apart from its content, a prayer is indistinguishable from a biology lesson," according to Justice White in *Widmar*.

20. *Widmar v. Vincent, supra,* White dissent.

21. Citing *Heffron v. ISKCON*, 452 U.S. 640 (1981), discussed at IIC5a. That case upheld the free speech rights of Krishna proselytizers at a state fair.

> clear that the State gives greater support in the latter case than in the former.[22]

Justice White concluded his dissent as follows:

> [R]esolution of this case is best achieved by returning to first principles. This requires an assessment of the burden on [the students'] ability freely to exercise their religious beliefs and practices and of the State's interest in enforcing its regulation.
>
> [The students] complain that compliance with the regulation would require them to meet "about a block and a half" from campus under conditions less comfortable than those previously available on campus. I view this burden on free exercise as minimal. Because the burden is minimal, the state need do no more than demonstrate that the regulation furthers some permissible state end. The state's interest in avoiding claims that it is financing or otherwise supporting religious worship—in maintaining a definitive separation between church and state—is such an end. That the state truly does mean to act toward this end is amply supported by the treatment of religion in the state constitution. Thus, I believe that the interest of the state is sufficiently strong to justify the imposition of the minimal burden on respondent's ability freely to exercise their religious beliefs.[23]

Unresolved by this decision, however (since it was not before the court), was the further question whether the same principles would apply to public high schools. More would be heard on that issue in the next few years.

c. *Lubbock Civil Liberties Union v. Lubbock School District* (1982). Within three months of *Widmar* another decision on religious clubs was announced by the Fifth Circuit, this time pertaining to (public) high schools. It was not in this case a school board *refusing* student requests for permission to meet at school for religious purposes but a school board *providing* for such meetings. The Lubbock, Texas, school board had developed a ten-year-long pattern of resisting complaints about blatantly unconstitutional practices in the public schools.

> Included in these practices were morning Bible readings over school public address systems, classroom prayers led by teachers, a period of silent prayer ended by "Amen" over school public address systems and distribution of "Gideon" Bibles to fifth and sixth grade students.
>
> These allegedly unconstitutional practices had occurred for almost ten years prior to the filing of [this] suit, and were traced to at least 1971, when the record indicates that several complaints were made to the District concerning the presentation of school assemblies "of a Protestant Christian evangelical variety." An attorney for the [Lubbock Civil Liberties Union] discussed the complaint with the District at that time. As a result, a policy

22. *Widmar, supra,* n. 6.
23. Ibid., White dissent.

relating to religious activities was formulated and is reflected in a letter... from the District's counsel to the attorney for the LCLU. The policy reflected in the letter called for neutrality of all personnel regarding religious activities, a prohibition against the encouragement of any particular religious activity, the prohibition of any speakers on religion in any assembly, and the discontinuance of what apparently had been a practice of Gideon's Camp's "placing New Testaments in the hands of students." Additionally, the District agreed that prayers given over school public address systems would be stopped, although the letter advised that its recipients should "not be misled" into believing that the District was prohibiting "open prayer."[24]

The evidence adduced at trial, uncontroverted by the District, indicated that the practices complained of in 1971 continued unabated after the "adoption" of the "policy" in 1971. The District wholly failed to discontinue loud speaker prayer and Bible readings in the schools, continued to have assemblies with evangelistic speakers and continued distribution of the Gideon Bibles.

In January, 1979, after further complaints were received in December, 1978, from patrons of the District, the District Board of Trustees... authorized the first written "policy" on religious activities in the District....

The adoption of the January, 1979 policy did not, however, stem the allegedly unconstitutional Bible reading, religious assemblies, and daily prayers. To the contrary, the District apparently had no intention of altering the practices about which the LCLU had complained as early as 1971 but rather instructed that the practices should be student rather than teacher initiated. The desire to maintain the status quo is, in fact, clearly reflected in the minutes of... the Board of Trustees.... "*Basically, this will fairly well continue following our present practice*...." [emphasis added by the Fifth Circuit] The District does not dispute on appeal that, even after the adoption of the January, 1979 policy, the practices engaged in by the district "fell short of constitutional standards."

In September, 1979, the LCLU filed suit against the District.... In August, 1980, after receipt of the pretrial order and docketing of the case for trial, the District radically altered its religious practices policy. A new and detailed policy was approved by the Board of Trustees. The LCLU, contending that adoption of the new policy did not render moot the question of the prior practices and alleging that the adoption of the policy was no indication that the District would discontinue its former practices, proceeded to trial, requesting a declaratory judgment that the prior practices had been unconstitutional and injunctive relief to enjoin continuation of those practices.

The LCLU also challenged the new August, 1980 policy, particularly Paragraph 4 of the policy which states:

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24. This was eight years after school-sponsored prayer had been declared unconstitutional by the Supreme Court in *Abington v. Schempp*, 374 U.S. 203 (1963), discussed at § C2b(2) above.

> The school board permits students to gather at the school with supervision either before or after regular hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purpose so long as attendance at such meetings is voluntary.
>
> The LCLU claimed that this part of the newly devised policy was unconstitutional.
>
> * * *
>
> The trial court determined... that the District practices cited above under both the unofficial policy prior to 1979 and the first written policy of January, 1979 infringed on the first amendment rights of students. The trial court, however, also determined that the newly adopted August, 1980 policy on religious practices was not facially unconstitutional.[25]

The LCLU appealed the trial court's decision because it failed to enjoin the District from continuing past practices and because it refused to find Paragraph 4 unconstitutional. Those who wanted to see "equal access" in public high schools given a chance to prove itself were apprehensive that the "dirty linen" in the Lubbock case—the history of bad-faith tergiversation by the school board—would prejudice the "equal access" provision, and indeed it did. In fact, it is quite possible that the Lubbock school board, as alleged, intended it only as a "stalking horse" for continuing the pious practices of the past, or at least mollifying those numerous patrons in the "Bible Belt" who were attached to them. Whatever the influences or affinities at work may have been, the Fifth Circuit was indeed alarmed by the prospect of students gathering at schools before or after school for religious purposes, and, quoting copiously from *Brandon*, but not from *Widmar*, arrived at a negative conclusion. It applied the *Lemon*[26] tests of establishment:

> **1. Secular Purpose.**
>
> The District states that the avowed purpose of Paragraph 4 is to "encourage the development of leadership, communicative skills, and social and cultural awareness by allowing the voluntary association of students for educational, moral, religious, or ethical purposes...."
>
> If the policy before us was merely a neutral policy contained in a neutral section of the District rules and regulations, our examination might be less difficult. Paragraph 4 must, however, be analyzed in the context in which it is written. It appears in the middle of a policy concerned with religious activities in the schools. The preamble of the policy is obviously concerned with religious beliefs and the place of *religion* in the public schools. The language of the paragraph itself, stating that students may gather "on the same basis as other groups" indicates that the *focus* of this paragraph is with students who wish to met for educational, *religious*, moral and ethical purposes. [T]he purpose of this policy, ostensibly devised to allow many

25. *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (1982).
26. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at § D5 above.

> groups to meet, is, when examined in the context of the total school policy, more clearly designed to allow the meetings of religious groups. The District's justification for the religious meetings, the development of leadership and communicative skills, cannot withstand scrutiny when those goals can be attained through non-religious student associations.... "The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests."[27]
>
> **2. Primary Effect of the Policy.**
>
> ...The primary effect test necessarily inquires whether the consequence of the district's policy is to place its imprimatur upon religious activity.... In the case before us, the articulated policy of allowing religious meetings at a time closely associated with the beginning or end of the school day implies recognition of religious activities and meetings as an integral part of the District's extracurricular program and carries with it an implicit approval by school officials of those programs. This, in combination with the impressionability of secondary and *primary* age school children and the possibility that they would misapprehend the involvement of the District in these meetings, renders the primary effect of the policy impermissible advancement of religion. We reiterate from *Brandon*:
>
> > *... To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the State has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.*

This was the second time the Fifth Circuit had quoted these alarmist words of the Second Circuit in this opinion, and this time it italicized them! One gets the impression that court thought the school board had really engrafted religious meetings right into the regular curricular schedule. But then it turned out that such meetings were not to be held after the buses had arrived or before they departed, but "before or after school buses run," which for some students—or many, depending upon the size of the school's territory and the availability of alternative modes of transportation—could mean a real inconvenience.

> The District... places great emphasis on its contention that the meetings take place before or after "regular hours," and claims that meetings must take place before or after school buses run.... The District [therefore] claims that the compulsory education machinery is not involved; thus there is no [state] advancement of religion. We find, however, that it is the Texas compulsory education machinery that draws the students to school and provides any audience at all for the religious activities, whether the buses have run or the school day has "officially" begun.

The opinion included another quotation from *Brandon* about adolescents' seeing the football captain or student body president engaged in "communal prayer

27. Ibid., quoting *Karen B. v. Treen*, 653 F.2d 897 (CA5 1981), discussed at § C2d(5) above.

meetings in the `captive audience' setting of a school" and acquiring "misconceptions over the appropriate roles of church and state" that "learned during one's school years may never be corrected"—though the "captive audience" aspect was somewhat attenuated by the fact that the students participating had voluntarily had to forego their bus rides to be there.

The fact that Lubbock's 1980 policy apparently included children in the primary grades— potentially or actually—distinguished it from the "equal access" provisions contemplated by Congress in the Equal Access Act[28] (and by most proponents of "equal access") which are *limited to secondary schools*, not only for the reasons of "impressionability" cited in *Brandon* and *Lubbock*, but because most elementary schools do not have an arrangement for a broad spectrum of noninstructional extracurricular activities that would constitute any kind of limited public forum. The strictures of the Fifth Circuit—and the Second—might be more persuasive as applied to elementary school children. Certainly the imputation of "impressionability" to high school students is contrary to most people's experience with modern teenagers and was at odds with the Supreme Court's characterization of them in *Tinker v. Des Moines*[29] as mature enough to understand that the school is not sponsoring everything it does not forbid.

> **3. Entanglement with Religion.**
>
> "The entanglement analysis focuses on procedural questions...," and, "if the state must engage in continuing administrative supervision of nonsecular activity church and state are excessively intertwined." *Brandon*... Here the District admitted... that, in compliance with Texas state law, it would exercise supervision over the students.... This admitted supervision is precisely the type of entanglement struck down in *Brandon* and *Karen B.* as impermissible entanglement.

The court disposed of defenses raised by the District.

> The District argues that Paragraph 4 is necessary to avoid violation of the free exercise clause. This defense is insupportable in law and in fact.
>
> Paragraph 4 is in no way mandated by the free exercise clause. A school is obligated to provide religious facilities only if its failure to do so would effectively foreclose a person's practice of religion.... Here, there is no problem with students being foreclosed from practicing religion. The students attend school only several hours a day, five days a week, nine months during the year. The other hours are effectively open for their attendance at religious activities at places other than state supported schools.
>
> The District also argues that the school is a public forum, relying on *Widmar*.... This reliance is misplaced.... The holding of student meetings at

28. See § 3e below.

29. 393 U.S. 503 (1969), discussed at § 1a above.

> a *public* school does not turn that school into a public forum.... This public forum argument was, in fact, explicitly rejected in *Brandon*.
>
> * * *
>
> Our examination of Paragraph 4 according to the purpose, effect and entanglement analysis articulated by the Supreme Court indicates that, as to all three questions, impermissible establishment of religion exists.

There was no dissent. As in the case of *Brandon*, the Supreme Court denied *certiorari*.

d. *Bender v. Williamsport* (1984). A similar case arose in Williamsport, Pennsylvania, where several high school students sought to organize a group to be known as "Petros" and asked for permission for that group to meet during the schools' regularly scheduled activity period (which occupied a thirty-minute span beginning at 7:57 AM on Tuesdays and Thursdays) for the purpose of "aiding each other in... social, emotional and intellectual personal growth and development by prayer, the application of God's Holy Word to their problems and sharing of personal experiences."[30] They held one organizational meeting, at which about forty-five students were present (out of a student body of about 2,500). Selections from Scripture were read and some students prayed. The school administration, however, revoked its permission for any further meetings until legal counsel was sought, and eventually the president of the school board wrote to Lisa Bender to say that the board's solicitor had advised that such meetings were contrary to existing case law (probably *Brandon* and *Lubbock*) and therefore would be impermissible in the Williamsport schools.

The students then sued the school board under the Civil Rights Act[31] charging violation of their constitutional rights to free exercise of religion and freedom of speech. At trial it developed that no proposed student club or activity had ever been denied school sponsorship within the memory of the principal (who had held that position since 1974) *except Petros*. The students had agreed not to use the school bulletin boards, newspaper or public address system to promote their meetings or to be featured in the school annual as all other student extracurricular groups normally were. The activity period on the two days indicated was common to all students, who could attend any one of the twenty-five permitted student activity groups for which they qualified, study in the library, visit the school's computer station, examine career or college placement materials or remain in their home rooms until the next class period began. Their choice among these options was entirely voluntary, and students did not necessarily know which option other student chose unless they happened to be participating in the same one. Students were not free to leave the school grounds, and attendance was recorded at each activity so that all students were accounted for. Petros met (on its one occasion) in the school cafeteria. A faculty

30. *Bender v. Williamsport Area School District*, 741 F.2d 538 (1984), quoting the Complaint.
31. 42 U.S.C. § 1983.

monitor was present, took attendance and spent the remainder of the period grading papers, not participating in any way in the meeting.

The federal 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.

> Finding that the activity period constituted an open forum, the court held that the school board had impermissibly excluded the religion club because of the content of its speech. It dismissed the argument that the establishment clause justified such content-based discrimination and ordered the school to permit Petros to meet.[32]

The school board was willing to comply, but one of its members, John C. Youngman, appealed to the Third Circuit on his own motion, acting *pro se*.[33]

The Third Circuit Court of Appeals—unlike the Second in *Brandon* or the Fifth in *Lubbock*—divided on the decision. Judge Leonard Garth wrote the opinion of the court for himself and Judge Stanley Brotman (a district court judge sitting by designation). An extensive and cogent dissent was filed by Judge Arlin Adams. Judge Garth took due note of *Widmar v. Vincent*,[34] but felt that a university setting was constitutionally distinguishable from a public high school.

> *Widmar*, of course, bears many similarities to the present case, at least insofar as the students' free speech rights are concerned. In both situations, there exists a policy of open access to state-owned facilities in an educational setting, a policy which certainly implies the existence of some type of forum. Indeed, it is the very nature and purpose of any school, be it college or high school, to communicate knowledge.... The fact that *Widmar* involves a *university*, while we here are concerned with a *high school*, does not mean that we are free to ignore the nature of the free speech rights enjoyed by the students. As is discussed below, however, the opportunity to exercise those rights is not necessarily coextensive with that which exists in an adult environment.... The university... is—at least for its students—a most logical location for an open forum, albeit one limited to the student body.
>
> The educational mission of a high school, in contrast, is more circumscribed. The curriculum consists less of, and indeed is less conducive to, an unfettered inquiry. As a secondary school, emphasis is placed more on a structured program "for inculcating fundamental values

32. Adams, Arlin M., and Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* (Philadelphia: University of Pennsylvania Press, 1990), p. 78.

33. The Christian Legal Society represented Bender, *et al.* Amicus briefs were filed in the Third Circuit by the Catholic League for Religious and Civil Rights, the Baptist Joint Committee on Public Affairs and the National Association of Evangelicals in support of the students, and by Americans United for Separation of Church and State, the American Jewish Congress and the Anti-Defamation League of B'nai B'rith in support of Mr. Youngman.

34. 454 U.S. 263 (1981), discussed at § 3b above.

> necessary to the maintenance of a democratic political system...."[35] Local school boards therefore commonly "establish and apply their curriculum in such a way as to transmit community values...."
>
> Nevertheless, nothing precludes the existence of a forum in a high school setting. The best indication of the accommodation afforded in this case to the students comes from the school principal's own description of the activity period, in which he states that "*any student activity or club which is considered to contribute to the intellectual, physical or social development of the students*" would likely be approved. The roster of clubs which exist or have existed at Williamsport reveals a wide range of pursuits and interests, which do not indicate adherence to any curricular plan or educational scheme, beyond this general criterion.... Indeed... no organization proposed by students has ever been denied permission to meet during the activity period. The record therefore reveals that the activity period... provides a forum for self-expression, by which students exercise their own discretion in deciding which organization, if any, to support. Indeed, unlike compulsory instructional classes, which are created and designed by the school authorities, the very existence of such organizations depends entirely upon voluntary student participation and interest.... Thus the latitude allowed to student groups, and the manner in which it encourages students to exercise independent judgment, supports the conclusion that the Williamsport Area School District did indeed create a forum—albeit a limited one—restricted to high school students at Williamsport and also restricted to the extent that the proposed activity promote the intellectual, physical, or social development of the students.
>
> We therefore must determine whether the activities of Petros fall within the parameters of the limited forum as it exists at Williamsport. It is clear to us that religious discussion, religious study, and even prayer, fall within the articulated qualification that student organizations promote the intellectual and social welfare of students. The Constitution, of course, in no way requires that, because establishment of religion is forbidden, religious activity must be deemed unintellectual or irrelevant to a student's social growth. Since the scope of the activity period has been framed in terms so broad that virtually any program which can be said to benefit the development of the students is permissible, we are able to conclude without further discussion that the activities of Petros fall within the bounds of a "limited forum" as it exists at Williamsport High School. The student members of Petros, therefore, have a valid first amendment interest to engage in their proposed activity.

After this generous concession that religious study and discussion—and even prayer!— might not be deleterious—or "dangerous"—to the students' social growth, the court turned to the question whether the school could constitutionally restrict the students' exercise of their first amendment rights.

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35. Citing *Island Trees v. Pico*, 457 U.S. 853 (1962).

> It first should be noted that the restriction which the School Board would seek to place on "Petros" is content-based, since it is undisputed that the students were denied permission to organize Petros solely because their activity was religiously oriented. Thus, any restriction which was placed on Petros cannot be justified as a "time, place or manner" limitation, which must be content neutral.... Moreover, because the restriction imposed by the school district... is content-based, Williamsport ("the State") must demonstrate that it is narrowly drawn to meet a compelling state interest.... The sole justification advanced by Williamsport... is that [giving its] permission might violate the Establishment Clause.

To this justification the court applied the three-pronged *Lemon* test[36] to see whether giving permission for Petros to meet during the student activity period would create an "establishment of religion."

> **A. Secular Purpose**
>
> Perhaps the most fundamental requirement of the Establishment Clause is that state action have a valid secular purpose, and that religious considerations may not motivate governmental decision.... In the present case, no assertion has been made that the Williamsport School District *created the activity period* for anything other than valid educational purposes.... The secular benefit of establishing such an activity policy is manifest....
>
> **B. Primary Effect: Would Permitting Petros to Meet Advance or Inhibit Religion?**
>
> We encounter greater difficulty in considering whether the second *Lemon* test has been satisfied, i.e., whether the policy of allowing religious groups access to an otherwise open forum would have the effect of advancing religion....
>
> The question of religious "effect" was discussed extensively in *Widmar*. The Court noted... that the policy of accommodating religious groups in university facilities would not lead to the perception that the school was promoting religion....
>
> In the matter before us, however, different considerations present a more serious question of state advancement or endorsement of religion than was present in *Widmar*. All are an outgrowth of the difference between a high school and a university....
>
> As the *Widmar* Court itself noted, high school students stand in a very different position than university students in terms of maturity and impressionability.... They thus would be less able to appreciate the fact that permission for Petros to meet would be granted out of a spirit of neutrality toward religion and not advancement. Compounding this problem is the more obvious presence which a religious group would unavoidably have within a high school setting. Unlike universities,

36. *Lemon v. Kurtzman, supra.*

attendance for most high school students is made compulsory by state law. Moreover, high school instruction is given in a more structured and controlled environment and in more confined facilities than is usual in the open, free, and more fluid environment of a college campus....

In Williamsport, for instance, meetings of Petros would be held in a classroom which, in a few minutes after the meeting, is also used for regular secular classes. Within this more restricted environment, therefore, involuntary contact between nonparticipating students and religious groups is inevitable. Students of differing or conflicting creeds would therefore be less able to overlook the activities of such a group within their school, and by the same token would be more likely to perceive a message of endorsement by school authorities that religious activities were approved.

Moreover, the record here discloses that such activity was to be monitored by a teacher, parent, or other adult. It is true that the monitor was not required to participate in the program's activities, although many adult supervisors did so[37].... While the students in their affidavits characterized the monitor's activities as benign and neutral, designed only to maintain order, it is readily apparent that a school teacher or someone associated with the school necessarily must impart the impression to students that the school's authority and the school's endorsement is implicated in the relevant activity, since every monitor must be approved by the school.... It goes without saying that no such authority figure or government endorsement was part of the *Widmar* [college-level] activity program, undoubtedly because of the age and maturity difference of the students. When the monitor factor is added to the other considerations which we have discussed..., it becomes evident that, if Petros were allowed to meet under these circumstances, Williamsport would be perceived as endorsing and encouraging religious practice.

The constitutional significance of the fact that organized religious activity occurs within the physical confines of a public school... is demonstrated by the coordinated cases of... *McCollum*...[38] and *Zorach*....[39] In *McCollum*, the Court considered the propriety of using public classrooms for voluntary religious instruction, during the hours of compulsory attendance. It found such a practice violative of the Establishment Clause.... In *Zorach*, however, the Court approved the practice of allowing students release time so that they could attend religious instruction away from the school during class hours.... Thus the only affirmative act by the school was allowing students to leave the premises early....

In the present case, the activity period in which Petros would meet occurs within *school* classrooms *during the hours of compulsory attendance*. It therefore presents many of the circumstances which *McCollum* found constitutionally unacceptable. We recognize that the facts of this case and

37. Presumably in the permitted, nonreligious activities?

38. 333 U.S. 203 (1948), discussed at § C1a above.

39. 343 U.S. 306 (1952), discussed at § C1b above.

McCollum differ, since... in *McCollum* only religious activity was allowed special access to school facilities.... Nevertheless, the Court did not find special treatment of religious activity to be constitutionally defective in *Zorach*, provided that such activity was removed, and took place *away* from the school premises. We find that distinction to be critical.

* * *

Unlike a university, where it is generally understood that a student is, with reason, responsible for the conduct of his or her own affairs, the behavior of a high school student is subject to the constant regulation and affirmative supervision of adult school authorities. Indeed, during the time that students are present on school premises, the State does stand, in large measure, *in loco parentis*.... [W]e think it asking much of a thirteen, fifteen, or seventeen year old student to comprehend the subtleties and intricacies of the first amendment about which judges and legislators themselves find reason to pause....[40]

Activity which is permitted to exist within the school, therefore, especially when conducted in the constant presence of school-appointed monitors, carries with it the impression of official approval and endorsement, particularly when the state compulsory educational system encourages attendance at meetings of such groups....

We do not suggest that a school board has a duty to propagate falsehood among its students by denying the very existence of religion.... However, the Establishment Clause does become implicated when the existence of religion within the school creates the perception among school children that the State has approved a religious activity and thus has placed its imprimatur on religion. We believe that the danger of communicating such state approval of religion is presented in this case....

C. Excessive Entanglement

It would... appear that [the] circumstances [just cited]... create the type of "intimate and continuing relationship" between church and state with which the entanglement test is concerned....

Furthermore, we note that Petros, in an attempt to lessen the effect of the Establishment Clause on the permissibility of their meetings, represented that it would voluntarily agree not to use the school's bulletin boards or public address system in connection with their activities. This arrangement in itself, however, raises entanglement concerns. In order to enforce this agreement, school authorities would be required to police the activities of Petros as new students took over the organization, to insure that no religiously oriented material was posted on the bulletin board, published in the school newspaper, or announced over the public address system.... "If the state must engage in continuing administrative supervision of

40. Ibid., citing in footnote 23 the various versions of the Equal Access Act then pending in Congress (which was enacted the day after this decision was announced!) and several law review articles: Drakeman, Donald and Seawrights, "God and Kids at School," 14 *Seton Hall L. Rev.* 252 (1984); Comment: "Widmar v. Vincent and the Public Forum Doctrine," 1984 *Wis. L. Rev.* 147 (1984); Note, "Religious Expression in the Public School Forum," 72 *Geo. L.J.* 135 (1983), etc.

nonsecular activity, church and state are excessively intertwined." *Brandon*....

Reconciling Free Speech with the Establishment Clause

... We have already concluded that the students of Petros enjoy a free speech right to engage in religious activity. We have also held, however, that allowing such religious activity would violate the mandate of the Establishment Clause. We are thus faced with a constitutional conflict of the highest order. Moreover, in deciding *Widmar*, the Supreme Court explicitly declined to "reach the questions that would arise if state accommodation of free exercise and free speech should... conflict with the prohibitions of the Establishment Clause...." We are therefore left with no definitive guidance from the Court as to the proper direction to take in this unique circumstance.

Two other courts of appeals have addressed circumstances comparable to those presented here, but... did not reach the ultimate question raised in this case of how to reconcile free speech with the proscriptions of the Establishment Clause....[41] We therefore treat this question as one of first impression....

* * *

[W]e conclude that the interest in protecting free speech within the context of the activity period as it exists at Williamsport Area High School is outweighed by the Establishment Clause concerns described earlier.

First, although we have found that the students did enjoy a free speech right to engage in religious activity within the activity period, that right exists only within the context of a "limited forum." The continuation of that right is therefore at the complete discretion of the school authorities, who may abolish the activity period altogether, or limit it to strictly curricular subject matter, which would not embrace the religious communication engaged in by Petros.

The opportunity for expression which would be lost if this limited forum were closed to religious speech, therefore, would not be one to which the students enjoyed an absolute right of entitlement, but rather one which existed in the first place only as permitted by school officials. Moreover, the loss of that opportunity would be compensated in substantial measure by alternative means of communication which exist throughout the community....

Second, public schools have never been a forum for religious expression. The free speech right enjoyed by the students is therefore of a dramatically different character than the right to communicate in a traditional public forum such as a park or on a sidewalk, or through the press, where the overriding importance of allowing free expression has been deeply and firmly rooted throughout our history.

On the other hand, the Establishment Clause dangers described... above would be unavoidable, and to a large extent unremediable, if Petros were granted access to school facilities during the curricular day....

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41. Referring to *Brandon* and *Lubbock*, discussed at §§ c(1) and (3) above.

> We therefore conclude that, in balancing the respective constitutional interests which would be lost and gained if Petros were granted access to the activity period, as against those which would be lost and gained if it were not granted access, there is a greater vindication of the protections of the Constitution if the Establishment Clause prevailed in this instance, as we hold that it does. To this extent, therefore, it can be said that the interest of Williamsport in complying with its constitutional obligations provides a compelling state interest.... Under other circumstances, of course, this same analysis could work to override the Establishment Clause, if a sufficiently compelling interest were shown. We need not address those circumstances here, however, since the record in this case does not lend itself to such a conclusion.[42]

The dissenting judge, Arlin Adams, had long had an interest in church-state issues, taught a seminar on them every year at the University of Pennsylvania Law School (of which he was a trustee) and coauthored a text on them for the University of Pennsylvania Press.[43] He was also the author of the often-cited concurring opinion in *Malnak v. Yogi*[44] that included a cogent discussion of three essential elements in any legal description of religion. He was the first judge at the appellate level to challenge the "pistaphobia" (not his term) that had dominated the treatment of "equal access" in *Brandon* and *Lubbock*.

> Long before Lisa Bender and her fellow students formed Petros, the Williamsport Area High School had adopted its policy permitting any student group, so long as "legal and constitutionally proper," to meet during the activity period. Nothing in the record, the briefs, or the oral argument suggests that the high school sought by this policy to promote religious activity, or that a teacher or other school employee sponsored Petros, or that the activity period in any way encouraged attendance at Petros. Nonetheless, the majority holds that Petros must be excluded. Given the high school's conceded neutrality toward all student activities and the unquestioned voluntariness of an individual student's decision to attend any particular activity, the majority's conclusion essentially rests on the view that collective religious speech simply may not take place within the walls of a public secondary school without violating the Constitution.... I cannot join the majority's conclusion that the Establishment Clause... requires exclusion of Petros solely because of the religious content of its speech. In particular, I do not believe that Petros can be meaningfully distinguished from the student religious group permitted to meet in a public university by *Widmar*.... Because I cannot subscribe to the majority's wooden reading of the First Amendment, and because I believe the result reached today is at variance with controlling precedent, I respectfully dissent.

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42. *Bender v. Williamsport, supra.* Emphasis in original.
43. Adams and Emmerich, *supra*.
44. 592 F.2d 197 (CA3 1979), discussed at VF1.

* * *

The situation at Williamsport is strikingly similar to that presented in *Widmar*. As in *Widmar*, Williamsport adopted a policy permitting all student groups to meet during the activity period, and thereby created a forum generally open to student activities. Also as in *Widmar*, a group of students, on their own initiative, decided to form Petros to pray as well as to read and discuss the Bible, rather than go to the French Club, the Bowling Club, the library or any number of other activities. Also, like *Widmar*, Williamsport's activity period is open to a wide variety of interests—some 25 student clubs, in addition to a number of other non-club activities. However, unlike *Widmar*, the open forum at Williamsport is not at a public university, but at a high school.

The majority believes that the distinction between a university and a high school forum is itself dispositive. To my mind, however, Williamsport still bears the burden of coming forward with a compelling state interest to support exclusion of Petros. The high school's contention that the Establishment Clause supplies such a compelling interest must be analyzed in the same manner as was the identical claim by the university in *Widmar*. Permitting Petros to meet during a generally open activities period would, in my view, clearly have a secular purpose and avoid excessive entanglement. The only difficult issue is, therefore, whether accommodation of Petros would be perceived as government endorsement of religion and would, as a result, have the primary effect of advancing religion....

To support the conclusion that Petros must be excluded, the majority focuses primarily on the fact that high school students are less mature and more impressionable than university students.

As a general matter, high school students are on the average less mature and more impressionable than college students. Nonetheless, this generalization does not end the inquiry in this case. As I read the case law governing speech rights of students in publicly-supported schools, there is no clear constitutional distinction based on the comparative intellectual capacities of 14-18 year olds as opposed to 18-20 years olds. Particularly in this case, where the school authorities have previously determined that Williamsport students are sufficiently independent to make good use of a period open to student-initiated activities, it seems improvident for a court to forge a constitutional principle, with all the rigidity which it so frequently creates, from vague impressions of the emotional sophistication of high school students.

As the Supreme Court has made clear, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate...." This teaching has been applied by the Supreme Court to protect the right of students attending junior or senior high school to wear armbands in protest against the Vietnam War,[45] and the right of

45. Citing *Tinker v. Des Moines*, 393 U.S. 503 (1969), discussed at § 1 above.

elementary and secondary school students not to salute the flag or pledge allegiance to it....[46]

* * *

It is inconsistent to accept, on the one hand, a level of intellectual sophistication among high school students sufficient to consider and contribute to the exchange of controversial views and yet, on the other hand to declare them incapable of discerning the distinction between a school's creation of a public forum that may permit religious speech and an endorsement of such activity.

* * *

To the extent the majority is concerned about impressionability of high school students, they are required to consider that the exclusion of Petros will introduce content-based restrictions in an otherwise open forum that may in fact be understood as a manifestation of official hostility towards religion. It is well settled that the First Amendment proscribes governmental hostility towards religion, as well as governmental promotion of religion.... When this Court sustains Williamsport's decision not to permit meetings by Petros, it sanctions a policy singling out a religious group as the only student activity ever to be excluded in this high school's history. In light of its view of the maturity of high school students, the majority it seems to me, is obligated to explain why such a selective exclusion does not raise First Amendment problems of perceived government disapproval of religion.

* * *

Seeking to bolster its conclusion that permitting Petros to meet will have a primary effect of advancing religion, the majority points to three institutional distinctions between the high school and the university: (1) that high school's students are compelled to attend by the state's truancy laws; (2) that a high school needs an adult monitor to insure discipline; and (3) that a high school building is physically more confining than a college campus. The predicted effect of these institutional differences—that the presence of Petros will be perceived as state endorsement of religion—represents uncorroborated speculation without any basis in the record. Inasmuch as *Widmar* commands that the state produce evidence of a compelling interest to justify a content-based exclusion from a generally open forum, the majority's reliance on these three distinguishing factors appears misplaced.

It is true that under Pennsylvania law, school attendance is compulsory until age seventeen. But in view of the voluntariness of a student's decision to attend a specific activity, the fact of compulsory attendance is irrelevant.... The coercive power of the state in no way favors a student's decision to select any particular activity.....

The majority's concern that the presence of an adult monitor at Petros meetings would create an impression of official endorsement is similarly not justified by the record. According to the affidavits, the faculty monitor

46. Citing *West Virginia v. Barnette*, 319 U.S. 624 (1943), discussed at IVA6b above.

at the first meeting of Petros did not in any way participate in the meeting. The monitor took attendance, then spent the remaining time grading papers.... Moreover, before the district court the students offered to withdraw the request for an advisor, for any purpose.... Nonetheless, out of an abundance of caution, I would, if I were in the majority, require that Petros meetings be monitored by a non-teacher. Having taken this extra measure of protection, I can see no possibility that the monitor's presence—"only to insure orderly meetings..."—could be misconstrued as school endorsement of Petros.

The majority's other suggestion—that the small size of a high school campus increases the visibility of a group such as Petros—is also pure conjecture. Although *Widmar* never intimated that the constitutionality of an equal access policy depends on the visibility of a group, the Court there did note that some prayer group meetings were held in the student center,... a location that is generally highly visible in a university community. By contrast, the affidavits here indicate that Petros was assigned to meet in the school cafeteria,... a location that is typically *not* in use at the beginning of a high school day. Given that 2,500 students attend Williamsport High School (more than at the campuses of some state colleges), and that 20 to 45 students attended Petros, it seems particularly speculative for the majority to suggest that "students of differing or conflicting creeds would... be less able to overlook" Petros than would be the case in a university campus.

Besides distinguishing the high school from the university, the majority also looks to the distinction between permitting religious activity within a school building, rather than away from school premises. The majority seeks support from... *McCollum*... and *Zorach*... for the proposition that accommodating *any* religious activity in a public school building will convey an impermissible message of government endorsement. In my view, this reading of *Zorach* and *McCollum*, while perhaps helpful in explaining the somewhat inconsistent results of those two decisions, is of little assistance outside their setting of school-sponsored religious activity.... Focusing on the fact that in these two excused time cases only the *McCollum* arrangement [on school premises] was struck down, the majority suggests that in the case before us the Establishment Clause boundary should likewise be set at the walls of the school facility. This attempt to extend *Zorach* and *McCollum* is, I believe, misguided because those cases so clearly raised the spector [*sic*] of government-endorsed and even government-coerced religious activity.... Indeed, the *Widmar* Court emphasized the peculiar problem of government sponsorship inherent in a released time period established solely for religious activity:

> Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others....

Thus, notwithstanding any suggestions of *McCollum* and *Zorach* to the contrary, *Widmar* makes clear that equal access of a prayer group in a

generally open forum, even within a school building, does not itself constitute official promotion of religion....

Conceding that the case could be decided on the basis of the "primary effect" test alone, the majority nevertheless goes on to argue that permitting meetings by Petros would violate the "excessive entanglement" test as well....

To eliminate any possible entanglement, the students of Petros agreed to forego completely the use of the bulletin board, the public address system, the school newspaper and the yearbook.... As I understand the record, the students' proposal represents a simple, easily-administered rule: the Petros club shall not use any school media. I cannot see how this rule would require the sort of policing the majority fears....

* * *

In considering the larger implications of the present dispute, it is critical not to lose sight of the distinctions between this case and others involving religious activity in a secondary school. This is not a case like *Engel v. Vitale*[47] or *Abington v. Schempp*[48] in which the state was commanding every student to participate in a prayer or Bible reading exercise, in a setting where excusal might well embarass the student. Nor is this case like *McCollum* where the school authorities set aside a time dedicated to religious instruction. Here, by contrast, the religious activity is not traceable to any state law or school regulation. Rather, a small group of high school students wishes to gather on a purely voluntary basis to read the Bible and to pray. They seek to do this while their classmates are attending French Club, or Ski Club, or Drama Club. To deny these students the right to meet on the same basis as their fellow students is to ignore the fundamental difference between self-initiated and state-sponsored religious activity.

Perhaps the majority's concern stems not from the prospect of establishment of religion by the presence on the campus of Petros, but from the possibility of unconstitutional extensions of the Williamsport arrangement elsewhere. Motivated, for example, by the desire to promote religion, a school board might create a student activity period that in fact amounts to no more than a prayer period. Given the emotion surrounding the school prayer issue, the majority's apparent concern with extensions of the Williamsport case is perhaps understandable. I would first point out, however, that the clearly unconstitutional cases are different from the one before us, and can be dealt with as they arise. I would then suggest that we openly confront the dilemma of Establishment Clause adjudication that underlies these school prayer cases.

On the other hand, we can eliminate all uncertainty by adopting the *per se* rule implicitly used by the majority today: no prayer shall be permitted in public secondary schools. The clarity of that approach has its advantages. But on the other hand, we can continue to engage in the

47. 370 U.S. 421 (1962), discussed at § C2b(1) above.

48. 374 U.S. 203 (1963), discussed at § C2b(2) above.

> delicate task of balancing two distinct First Amendment interests. The presence of any religious activity in the public schools does evoke some concern regarding mandatory school prayer. At the same time, content-based restrictions on access to an open forum by state actors strikes at the heart of competing First Amendment values.... Admittedly, sifting between these considerations on a case-by-case basis involves a considerably more difficult adjudicative task than a *per se* rule.
>
> Nonetheless, on balance I am persuaded that the purposes of the First Amendment are better served by rejecting a *per se* rule, even in cases involving religion and the school. One of the great triumphs of America's constitutional experiment has been the avoidance of religious factionalism in the political sphere. Our country's continued progress in this endeavor ultimately depends on the individual citizen's tolerance and respect for religious diversity. When the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, I believe the Constitution and the Nation are the better for it. At Williamsport, I believe that allowing Petros access to an open forum that has been created for no improper purpose falls on the permissible side of the First Amendment dividing line. Accordingly, I must respectfully dissent.[49]

The further adventures of *Bender v. Williamsport* will be continued below.

e. The "Equal Access" Act (1984). The foregoing decision of the Third Circuit Court of Appeals was announced on July 24, 1984. The next day, Congress approved the Equal Access Act, P.L. 98-377 (Title VIII), and President Ronald Reagan signed it on August 11, 1984. The House of Representatives acted on July 25, apparently unaware of the Third Circuit's decision—not that it would have made much difference, since most members of Congress had long since made up their minds one way or the other.

The original form of the act had been introduced in the U.S. Senate by Senator Mark Hatfield several years earlier, at the urging of many evangelicals and the Christian Legal Society, which helped to draft it. It was seen by them and its other early supporters as a better way to afford appropriate recognition of the existence of religion by public schools and to provide opportunity for its free exercise than the frenetic efforts to reinstate state-sponsored collective prayer and devotional Bible-reading through a constitutional amendment.

Senator Hatfield had been a consistent and articulate opponent of the successive school-prayer amendments, as had several of the religious organizations that were early supporters of "equal access," such as the National Council of Churches and the Baptist Joint Committee on Public Affairs.

After it became apparent that President Reagan's school prayer amendment was facing difficulties, even in the Republican-controlled Senate, attention began to shift to the equal access idea. Senator Jeremiah Denton introduced an "equal access" bill of

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49. *Bender v. Williamsport, supra,* Adams dissent.

his own and held hearings on it in the subcommittee of the Senate Judiciary Committee that he chaired. It was much broader than the Hatfield proposal, and would have included teachers as well as pupils and elementary as well as secondary schools in its provisions. The bill that eventually emerged from the Senate, however, was much closer to the Hatfield original.

Senator Orrin Hatch, chairman of another Judiciary subcommittee, included an "equal access" proviso in a school "silent-meditation-or-prayer" amendment that he authored, which— as a constitutional amendment (if adopted)—would not necessarily have carried with it the case-law qualifications of the "limited public forum" that had developed in a series of free-speech cases. His proposal, however, was not adopted by the Senate.

When President Reagan's school-prayer amendment was defeated in the Senate, many of its supporters, including the president, turned their attention to the equal-access proposal, which they had previously disdained as failing decisively to reverse the Supreme Court's school prayer decisions, and with this added support it began to move toward passage. But with the influx of this new support came new opposition from "liberals" who had opposed the school prayer amendments and now saw "equal access" as "son of school prayer" designed to spirit state-sponsored prayers back into public schools in free-speech clothing. A great deal of infighting ensued in the House, in the course of which the bill was broadened to provide "equal access" for *all* student speech, not just *religious* speech (though the only form of speech that had been denied access to the limited forum of student extracurricular activities, at least by actions upheld by several circuit courts, was *religious* speech).

Eventually legislation was adopted in the following form (operative sections only):

> DENIAL OF EQUAL ACCESS PROHIBITED
>
> Sec. 802. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
>
> (b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.
>
> (c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that
>
> (1) the meeting is voluntary and student-initiated;
>
> (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
>
> (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

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

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

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

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

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

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

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

(5) to sanction meetings that are otherwise unlawful;

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

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

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

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

DEFINITIONS

Sec. 803. As used in this title

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

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

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

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.[50]

After the enactment of the Equal Access Act into law, some school boards concluded that the equal-access principle was too troublesome to apply and so

50. P.L. 98-377, Title VIII, reprinted from the Cong. Rec., Proceedings of the 98th Congress, Second Session.

discontinued *all* noncurriculum-related extracurricular student activities, thus eliminating the "open forum" to which the Act applied. That, of course, was their privilege under the Act, but it was bemoaned by many who mourned the demise of the chess club or the stamp club or the camera club. Others considered that there were many more important things for high school students to be devoting their energies to during the school day, such as physics and trigonometry and English, in which student performance has not been distinguished in many instances, and that the elimination of an "open" forum from which religion was solely and systematically excluded represented no great loss.

f. *Bender v. Williamsport* (1986). At long last, the Supreme Court of the United States agreed to hear an "equal-access" case. In its long-awaited decision on the Equal Access issue, the court disappointed both its friends and foes. Rather than deciding the case on its merits, a slim majority of five justices vacated the decision by the Court of Appeals on a procedural point, per Justice Stevens.

> The importance of the question presented by the students' petition for certiorari persuaded us that the case merited plenary review.... After granting certiorari, however, we noticed that neither the [school] Board nor any of the defendants except Mr. Youngman [who was then still a member of the Board] opposed the students' position and that only Mr. Youngman had challenged the District Court's judgment by invoking the jurisdiction of the Court of Appeals. We therefore find it necessary to answer the question whether Mr. Youngman had a sufficient stake in the outcome of the litigation to support appellate jurisdiction....
>
> * * *
>
> Since the judgment against Mr. Youngman was not in his individual capacity, he had no standing to appeal in that capacity.
>
> As a member of the School Board sued in his official capacity Mr. Youngman has no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal....
>
> Mr. Youngman's status as a School Board member does not permit him to "step into the shoes of the Board" and invoke its right to appeal. In this case, Mr. Youngman was apparently the lone dissenter in a decision by the other eight members of the School Board to forgo an appeal.... Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take.
>
> * * *
>
> We therefore hold that because the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded with instructions to dismiss the appeal for want of jurisdiction.[51]

51. *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986).

Justice Stevens' opinion was joined by Justices Brennan, Marshall, Blackmun and O'Connor. Justice Marshall added a caustic concurrence.

> [The] controversy ended with the entry of the District Court judgment; the school board, voting 8-1 with Mr. Youngman in the minority, abandoned its earlier position and agreed to allow plaintiffs to conduct the prayer group activities they sought. There was therefore nothing left to litigate between those parties.
>
> * * *
>
> [Concerning Mr. Youngman's claim at oral argument to have standing as a parent of a child in school, t]here is not one word in the *record* indicating that Mr. Youngman is a father at all.... Assertions in the parties' briefs are not part of the record.... [Therefore] I join the opinion and judgment of the Court....

At least the most senior members of this coterie, Brennan and Marshall, have been characterized as "activist" or "liberal" jurists, who would overlook procedural niceties to get to the merits. On the other hand, several members of the court who are often sticklers for procedural correctness, viz., Chief Justice Burger and Associate Justices Rehnquist, White and Powell, appeared in vehement dissent, willing to recognize Mr. Youngman's capacity as a parent to bring the appeal in order to reach the merits. The dissent was written by the chief justice.

> I agree with the Court that the judgment of the District Court allowing Petros to meet during the student extracurricular activity period must be reinstated. Because Respondent Youngman has standing to appeal, however, I would reach the merits of this dispute and reverse the judgment of the Court of Appeals.
>
> * * *
>
> *Widmar* clearly controls the resolution of this case. Petros is a student-initiated and student-led group seeking the same forum available to other student extracurricular activity groups. The students would have been allowed to meet to discuss moral philosophy or Marxism, to practice French, or to play chess; but, since they chose to worship, the school decided that it could not allow the group to meet without violating the Establishment Clause.
>
> The Court of Appeals agreed that the Establishment Clause prohibited Petros from meeting on school premises because to allow them to meet could have been misinterpreted by other students as active state support of religion. Under that analysis, because an individual's discussion of religious beliefs may be confused by others as being that of the State, both must be viewed as the same. Yet the several commands of the First Amendment require vision capable of distinguishing between *state* establishment of religion, which is prohibited by the Establishment Clause, and *individual* participation and advocacy of religion which, far from being prohibited by the Establishment Clause, is affirmatively protected by the Free Exercise and Free Speech Clauses of the First Amendment. If the

> latter two commands are to retain any vitality, utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform *individual* expressions of religious belief into *state* advancement of religion.
>
> No one would contend that the State would be authorized to dismantle a church erected by private persons on private property because overwhelming evidence showed that other members of the community *thought* the church was owned and operated by the State. That the "primary effect" of state inaction might turn out to advance the cause of organized religion has no bearing upon the threshold question of whether the challenged activity is conducted by the State or by individuals.
>
> The Establishment Clause mandates state neutrality, not hostility, toward religion....
>
> * * *
>
> Although I would have reached the issue on the merits, it is appropriate that the Court, by vacating the judgment of the Court of Appeals, restores the sound analysis and judgment of the District Court.[52]

Justice Powell, who found himself in the unusual position of being in dissent in a church-state case, since during this period of the court's history he usually provided the "swing vote" that tipped the balance for or against in close decisions, wrote a separate dissent dealing with an important consideration (surprisingly) not addressed by Chief Justice Burger.

> The only arguable distinction between *Widmar* and this case is that *Widmar* involved university students while the groups here are composed of high school students. We did note in *Widmar* that university students are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality to a religion." Other decisions, however, have recognized that the First Amendment rights of speech and association extend also to high school students.[53] I do not believe—particularly in this age of massive media information—that the few years difference in age between high school and college students justifies departing from *Widmar*.[54]

What was the effect of the court's action on this case? Some of the press reports at the time were very obscure on this point, and many readers may have been left in doubt about who "won." The students won. The Supreme Court reinstated the District Court's decision (without, however, ruling on its merits). Thus it did not affect the validity of *Brandon v. Guilderland* or the *Lubbock* case in their respective circuits. Neither did it deal in any way with the Equal Access Act, which was not in effect at the time that the events litigated in *Bender* occurred. But the students

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52. Ibid., Burger dissent.

53. Citing *Island Trees v. Pico*, 457 U.S. 853 (1982), and *Tinker v. Des Moines*, 393 U.S. 503 (1969).

54. *Bender v. Williamsport, supra,* Powell dissent.

wishing to meet as Petros in the Williamsport, Pennsylvania, high school now had the full sanction of the U.S. Supreme Court to do so, and Mr. Youngman (whose term on the school board expired while the case was on appeal) could not say them nay—nor can anyone else, unless the Williamsport school board decides to eliminate the student activity period altogether, as a number of public school districts have done to avoid having to permit student religious clubs to meet in extracurricular time—a regrettable demonstration of "pistaphobia."

What were the implications for the equal access issue in general? It was clear that there were four solid votes for extending the *Widmar* principle to the public high school level (including that of Justice White, who was the sole dissenter in *Widmar*). One more vote would decide the issue favorably to equal access. There must have been some "unreadiness" to embrace that principle among the five justices in the majority to have led them to dispose of the matter on procedural grounds—an uncharacteristic stance for some of them. Justice O'Connor may have joined the majority for procedural reasons and perhaps in a future case might vote with the dissenters.

It seemed likely that the four dissenters would be enough to grant *certiorari* in one of the similar cases coming up through the circuits, perhaps one arising under the Equal Access Act, so that the question would soon be decided on the merits. And indeed it was, a few years later, in a case from Omaha, Nebraska, discussed below.

g. *Westside Board of Education v. Mergens* (1990). The Supreme Court of the United States at long last ruled on the merits of the "equal access" principle at the high school level in 1990 in the case of *Board of Education of the Westside Community Schools v. Bridget C. Mergens*, apparently putting to rest, at least in its main lines, the long-running controversy described in the preceding pages. This case reached the court by way of the U.S. Circuit Court of Appeals for the Eighth Circuit, having originated in Westside High School, a public secondary school in Omaha encompassing grades 9 through 12 and enrolling around two thousand students. Some of those students sought to form a Christian club at the school in which members could meet during extracurricular activity time to read and discuss the Bible, have fellowship and pray together.

Westside High School already had about thirty student clubs that met after school hours on school premises, including a chess club, a camera club and a scuba-diving club. Permission to form a Christian club, however, was denied by the principal, by the superintendent of schools and by the school board on the strength of School Board Policy No. 5610, which provided that each club must have a faculty sponsor and that "clubs and organizations shall not be sponsored by any political or religious organization that denies membership on the basis of race, color, creed, sex or political belief." Although the students envisioned that the Christian club would not need a faculty sponsor, the principal ruled that every club must have a sponsor and that such sponsorship of a religious club would violate the Establishment Clause.

The students then took the matter to court by and through their parents as next friends, alleging that the school's refusal of their request violated the recently enacted Equal Access Act,[55] which prohibited public secondary schools receiving federal financial assistance and maintaining a "limited open forum" for student extracurricular clubs from denying "equal access" to students who wished to meet within that forum on the basis of the content of their speech at those meetings. The students also alleged that the school's actions denied them First and Fourteenth Amendment rights to freedom of speech, assembly and religious exercise.

The school authorities responded that the Equal Access Act did not apply to Westside High School because all of its clubs were curriculum-related, and that, if it did apply, it violated the Establishment Clause. The United States intervened on the side of the students to defend the constitutionality of the Act. The federal district court for the District of Nebraska agreed with the local school authorities, and the students appealed. The Eighth Circuit Court of Appeals reversed, and the school board appealed to the U.S. Supreme Court, which granted *certiorari* and heard oral argument—most of which was devoted to arguing about what was "curricular" and what was not—on January 9, 1990. Decision was rendered on June 4, 1990, per Justice O'Connor. The case turned on whether the school had created a "limited open forum" by permitting one or more "noncurriculum related student groups" to meet on campus before or after classes, thus triggering application of the Equal Access Act.

(1) The Court's Opinion.

> Unfortunately, the Act does not define the crucial phrase "noncurriculum related student group".... The common meaning of the term "curriculum" is "the whole body of courses offered by an educational institution or one of its branches."[56]... Any sensible interpretation of "noncurriculum related student group" must therefore be anchored in the notion that such student groups are those that are not related to the body of courses offered by the school. The difficult question is the degree of "unrelatedness to the curriculum" required for a group to be considered "noncurriculum related."
>
> * * *
>
> We think it significant... that the Act, which was passed by wide, bipartisan majorities in both the House and the Senate, reflects at least some consensus on a broad legislative purpose. The committee reports indicate that the Act was intended to address perceived widespread discrimination against religious speech in public schools, and, as the language of the Act indicates, its sponsors contemplated that the Act would do more than merely validate the status quo....
>
> [W]e think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school. In our view, a student group

55. 20 U.S.C. §§ 4071-4074, discussed at § e above.

56. Citing "*Webster's Third New International Dictionary*, 557 (1976)."

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

For example, a French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future. A school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school. If participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum. The existence of such groups at a school would not trigger the Act's obligations.

On the other hand, unless a school could show that groups such as a chess club, a stamp collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be "noncurriculum related student groups" for purposes of the Act. The existence of such groups would create a "limited open forum" under the Act and would prohibit the school from denying equal access for any other student group on the basis of the content of the group's speech....

[The school authorities] contend that our reading of the Act unduly hinders local control over schools and school activities, but we think that schools and school districts nevertheless retain a significant measure of authority over the type of officially recognized activities in which their students participate. First, schools and school districts maintain their traditional latitude to determine appropriate subjects of instruction. To the extent that a school chooses to structure its course offerings and existing student groups to avoid the Act's obligations, that result is not prohibited by the Act.... Second, the Act expressly does not limit a school's authority to prohibit meetings that would "materially and substantially interfere with the orderly conduct of educational activities within the school." The Act also preserves "the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." Finally, because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forego federal funding. Although we do not doubt that in some cases this may be an unrealistic option, Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it opens its facilities to noncurriculum related student groups.

* * *

The parties in this case focus their dispute on 10 of Westside's approximately 30 voluntary student clubs: Interact (a service club related to Rotary International); Chess; Subsurfers (a club for students interested in scuba diving); National Honor Society; Photography; Welcome to Westside (a club to introduce new students to the school); Future Business Leaders of America; Zonta (the female counterpart of Interact); Student Advisory Board (student government); and Student Forum (student government). [The school] contend[s] that all of these student activities are curriculum-related because they further the goals of particular aspects of the the school's curriculum.... Subsurfers furthers "one of the essential goals of the Physical Education Department—enabling students to develop lifelong recreational interests." Chess "supplement[s] math and science courses because it enhances students' ability to engage in critical thought processes"....

To the extent that [the school] contend[s] that "curriculum related" means anything remotely related to abstract educational goals, however, we reject that argument. To define "curriculum related" in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory.... As the court below explained:

> "Allowing such a broad interpretation of `curriculum related' would make the [Act] meaningless. 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 clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit...."

* * *

Rather, we think it clear that Westside's existing student groups include one or more "noncurriculum related student groups." Although Westside's physical education classes apparently include swimming, counsel stated at oral argument that scuba diving is not taught in any regularly offered course at the school.... Moreover, participation in Subsurfers is not required by any course at the school and does not result in extra academic credit. Thus, Subsurfers is a "noncurriculum related student group" for purposes of the Act. Similarly, although math teachers at Westside have encouraged their students to play chess, chess is not taught in any regularly offered course at the school, and participation in the chess club is not required for any class and does not result in extra credit for any class. The chess club is therefore another "noncurriculum related student group" at Westside.... The record therefore supports a finding that Westside has maintained a limited open forum under the Act.... Because Westside maintains a "limited open forum" under the Act, it is prohibited from discriminating, based on the content of the students'

> speech, against any students who wish to meet on school premises during noninstructional time.
>
> The remaining statutory question is whether [the school's] denial of [the students'] request to form a religious group constitutes a denial of "equal access" to the school's limited open forum. Although the school permits [these students] to meet informally after school, [they] seek equal access in the form of official recognition by the school. Official recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair.... [W]e hold that Westside's denial of [these students'] request to form a Christian club denies them "equal access" under the Act.
>
> Because we rest our conclusions on statutory grounds, we need not decide— and therefore express no opinion on—whether the First Amendment requires the same result.[57]

(2) The Plurality Opinion. The opinion thus far was the opinion of the court and was joined by Chief Justice Rehnquist and Associate Justices White, Blackmun, Scalia and Kennedy. On the next section of the opinion Justice O'Connor lost Justices Scalia and Kennedy, who went their own way in a separate opinion written by the latter, discussed below. Justice O'Connor continued with a section on the Establishment Clause in which she was joined only by Rehnquist, White and Blackmun.

> [The school] contend[s] that even if [it] has created a limited open forum within the meaning of the Act, its denial of official recognition to the proposed Christian club must nevertheless stand because the Act violates the Establishment Clause of the First Amendment, as applied to the States through the Fourteenth Amendment. Specifically, [the school authorities] maintain that because the school's recognized student activities are an integral part of its educational mission, official recognition of [the] proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students.
>
> We disagree. In *Widmar [v. Vincent*[58]], we applied the three-part *Lemon* test to hold that an "equal access" policy, at the university level, does not violate the Establishment Clause....
>
> We think the logic of *Widmar* applies with equal force to the Equal Access Act. As an initial matter, the Act's prohibition of discrimination on the basis of "political, philosophical, or other" speech as well as religious speech is a sufficient basis for meeting the secular purpose prong of the *Lemon* test. Congress' avowed purpose—to prevent discrimination against religious and other types of speech—is undeniably secular....

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57. *Westside Board of Education v. Mergens*, 496 U.S. 226 (1990).

58. 454 U.S. 263 (1981), discussed at § 3b above.

[The school's] principal contention is that the Act has the primary effect of advancing religion. Specifically, [the school] urge[s] that, because the student religious meetings are held under school aegis, and because the state's compulsory attendance laws bring the students together (and thereby provide a ready-made audience for student evangelists), an objective observer in the position of a secondary school student will perceive official school support for such religious meetings....

We disagree. First, although we have invalidated the use of public funds to pay for teaching state-required subjects at parochial schools, in part because of the risk of creating "a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school,"[59] there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.... The proposition that schools do not endorse everything they fail to censor is not complicated....

Indeed, we note that Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion.... [W]e do not lightly second-guess such legislative judgments....

Second, we note that the Act expressly limits participation by school officials at meetings of student religious groups, and that any such meetings must be held during "noninstructional time".... To be sure, the possibility of *student* peer pressure remains, but there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate. Moreover, [the school's] fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impression it gives its students. To the extent a school makes clear that its recognition of the [students'] proposed club is not an endorsement of the views of the club's participants, students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.

Third, the broad spectrum of officially recognized student clubs at Westside, and the fact that Westside students are free to initiate and organize additional student clubs, counteract any possible message of official endorsement of or preference for religion or a particular religious belief.... Thus, we conclude that the Act does not, at least on its face and as applied to Westside, have the primary effect of advancing religion.

[The school's] last argument is that by complying with the Act's requirement, [it] risks excessive entanglement between government and

59. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 385 (1985), discussed at § D7l above.

> religion. The proposed club, [the school] urge[s], would be required to have a faculty sponsor who would be charged with actively directing the activities of the group, guiding its leaders, and ensuring balance in the presentation of controversial ideas. [It claims] that this influence over the club's religious program would entangle government in day-to-day surveillance of religion of the type forbidden by the Establishment Clause.
>
> Under the Act, however, faculty monitors may not participate in any religious meetings, and nonschool persons may not direct, control or regularly attend activities of student groups. Moreover, the Act prohibits school "sponsorship" of any religious meetings. Although the Act permits "[t]he assignment of a teacher, administrator, or other school employee to the meeting for custodial purposes," such custodial oversight of the student-initiated religious group, merely to insure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities. Indeed, as the Court noted in *Widmar*, a denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur.
>
> Accordingly, we hold that the Equal Access Act does not on its face contravene the Establishment Clause.... For the foregoing reasons, the judgment of the Court of Appeals is affirmed.[60]

(3) Justice Kennedy's Opinion. Justice Kennedy wrote separately on the Establishment Clause issue to advance his own concept of that clause, which he had set forth at some length in *Allegheny County*.[61] Rejecting the *Lemon* analysis, he thought it sufficient for Establishment Clause purposes if the Act did not give direct benefits to religion or coerce any student to participate in religious activity.

> The plurality uses a different test, one which asks whether school officials, by complying with the Act, have endorsed religion. It is true that when government gives impermissible assistance to a religion it can be said to have "endorsed" religion; but endorsement cannot be the test. The word endorsement has insufficient content to be dispositive. And for reasons I have explained elsewhere, see *Allegheny County, supra*, its literal application may result in neutrality in name but hostility in fact when the question is the government's proper relation to those who express some religious preferences.
>
> I should think it inevitable that a public high school "endorses" a religious club, in a common-sense use of the term, if the club happens to be one of many activities that the school permits students to choose in order to further the development of their intellect and character in an extracurricular setting. But no constitutional violation occurs if the school's action is based upon a recognition of the fact that membership in a religious club is one of many permissible ways for a student to further his

60. *Westside v. Mergens*, *supra*, plurality opinion.

61. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), discussed at VE2i.

> or her own personal enrichment. The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity. This inquiry, of course, must be undertaken with sensitivity to the special conditions that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw. No such coercion, however, has been shown to exist as a necessary result of the statute, either on its face or as [the students] seek to invoke it on the facts of this case.
>
> For these reasons, I join Parts I and II of the Court's opinion, and concur in the judgment.[62]

Justice Scalia joined the Kennedy opinion, which thus represented two votes for a more permissive reading of the reach of the Establishment Clause than the plurality had stated in its use of the *Lemon* standard.

(4) Justice Marshall's Opinion. Justice Marshall wrote an opinion concurring in the judgment—joined by Justice Brennan—that offered a more cautious rationale emphasizing the possibility of abuses of the "equal access" principle if public high schools did not observe certain safeguards.

> I agree with the majority that "noncurriculum" must be construed broadly to "prohibit schools from discriminating on the basis of a student group's speech".... In this respect, the Act as construed by the majority simply codifies in statute what is already constitutionally mandated: schools may not discriminate among student-initiated groups that seek access to school facilities for expressive purposes not directly related to the school's curriculum.
>
> The Act's low threshold for triggering equal access, however, raises serious Establishment Clause concerns where secondary schools with fora that differ substantially from the [university] forum in *Widmar* are required to grant access to student religious groups. Indeed, as applied in the present case, the Act mandates a religious group's access to a forum that is dedicated to promoting fundamental values and citizenship as defined by the school. The Establishment Clause does not forbid the operation of the Act in such circumstances, but it does require schools to change their relationship to their fora so as to dissociate themselves effectively from religious clubs' speech. Thus, although I agree with the plurality that the Act as applied to Westside *could* withstand Establishment Clause scrutiny, I write separately to emphasize the steps Westside must take to avoid appearing to endorse the Christian club's goals. The plurality's Establishment Clause analysis pays inadequate attention to the differences between this case and *Widmar* and dismisses too lightly the distinctive pressures created by Westside's highly structured environment.
>
> This case involves the intersection of two First Amendment guarantees—the Free Speech Clause and the Establishment Clause. We

62. *Westside v. Mergens, supra*, Kennedy opinion.

> have long regarded free and open debate over matters of controversy as necessary to the functioning of our constitutional system.... That the Constitution requires toleration of speech over its suppression is no less true in our Nation's schools. See *Tinker v. Des Moines*....[63]
>
> But the Constitution also demands that the State not take action that has the primary effect of advancing religion. The introduction of religious speech into the public schools reveals the tension between these two constitutional commitments, because the failure of a school to stand apart from religious speech can convey a message that the school endorses rather than merely tolerates that speech. Recognizing the potential dangers in school-endorsed religious practice, we have shown particular "vigilan[ce] in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*[64].... This vigilance must extend to our monitoring of the actual effects of an "equal access" policy. If the public schools are perceived as conferring the imprimatur of the State on religious doctrine or practice as a result of such a policy, the nominally "neutral" character of the policy will not save it from running afoul of the Establishment Clause.[65]

Here Justice Marshall inserted the only footnote in the opinion, designed to align his view and Justice Brennan's with that of the plurality in contradistinction to the Kennedy-Scalia view of the Establishment Clause.

> * As a majority of the Court today holds, the Establishment Clause proscribes public schools from "conveying a message `that religion or a particular religious belief is preferred,'" even if such schools do not actually "impos[e] pressure upon a student to participate in a religious activity," (Kennedy, J.).

Having sided with Justice O'Connor's "endorsement" test again (as he did in *Allegheny County, supra)* against the two most junior justices, who rejected it then and now, Justice Marshall proceeded to distinguish the Westside situation from *Widmar*.

> [T]he plurality fails to recognize that the wide-open and independent character of the student forum in *Widmar* differs substantially from the forum at Westside.
>
> Westside currently does not recognize any student club that advocates a controversial viewpoint.... Given the nature and function of student clubs at Westside, the school makes no effort to dissociate itself from the activities and goals of its student clubs.
>
> The entry of religious clubs into such a realm poses a real danger that those clubs will be viewed as part of the school's effort to inculcate fundamental values. The school's message with respect to its existing clubs

63. 393 U.S. 503 (1969), discussed at § 1 above.

64. 482 U.S. 578, 583-584 (1987), discussed at § C3b(6) above.

65. *Westside v. Mergens*, *supra,* Marshall opinion.

is not one of toleration but one of endorsement.... But although a school may permissibly encourage its students to become well-rounded as student-athletes, student-musicians, and student-tutors, the Constitution forbids schools to encourage students to become well-rounded as student-worshippers....

If a school already houses numerous ideological organizations, then the addition of a religion club will most likely not violate the Establishment Clause because the risk that students will erroneously attribute the views of the religion club to the school is minimal.... But if the religion club is the sole advocacy-oriented group in the forum, or one of a very limited number, and the school continues to promote its student-club program as instrumental to citizenship, then the school's failure to dissociate itself from the religious activity will reasonably be understood as an endorsement of that activity....

* * *

[T]he underlying difference between this case and *Widmar* is not that college and high school students have varying capacities to perceive the subtle differences between toleration and endorsement, but rather that the University of Missouri [in *Widmar*] and Westside actually choose to define their respective missions in different ways. That high schools tend to emphasize student autonomy less than universities may suggest that high school administrators tend to perceive a difference in the maturity of secondary and university students. But the school's behavior, not the purported immaturity of high school students, is dispositive. If Westside stood apart from its club program and expressed the view, endorsed by Congress through its passage of the Act, that high school students are capable of engaging in wide-ranging discussions of sensitive and controversial speech, the inclusion of religious groups in Westside's forum would confirm the school's commitment to nondiscrimination. Here, though, the Act requires the school to permit religious speech in a forum explicitly designed to advance the school's interest in shaping the character of its students.

* * *

Given these substantial risks posed by the inclusion of the proposed Christian Club within Westside's present forum, Westside must redefine its relationship to its club program. The plurality recognizes that such redefinition is necessary to avoid the risk of endorsement and construes the Act accordingly. The plurality... states that schools bear the responsibility for taking whatever further steps are necessary to make clear that their recognition of a religious club does not reflect their endorsement of the views of the club's participants.

Westside thus must do more than merely prohibit faculty members from actively participating in the Christian Club's meetings. It must fully dissociate itself from the Club's religious speech and avoid appearing to sponsor or endorse the Club's goals. It could, for example, entirely discontinue encouraging student participation in clubs and clarify that the clubs are not instrumentally related to the school's overall mission. Or, if

> the school sought to continue its general endorsement of those student clubs that did not engage in controversial speech, it could do so only if it affirmatively disclaimed any endorsement of the Christian Club.
>
> The inclusion of the Christian Club in the type of forum presently established at Westside, without more, will not assure government neutrality toward religion. Rather, because the school endorses the extracurricular program as part of its educational mission, the inclusion of the Christian Club in that program will convey to students the school-sanctioned message that involvement in religion develops "citizenship, wholesome attitudes, good human relations, knowledge and skills." We need not question the value of that message to affirm that it is not the place of schools to issue it. Accordingly, schools such as Westside must be responsive not only to the broad terms of the Act's coverage, but also to this Court's mandate that they effectively dissociate themselves from the religious speech that now may become commonplace in their facilities.[66]

Justice Marshall's strictures conjure up the vision of a regimen in some public high schools in which religious student clubs would be only grudgingly or resentfully allowed to exist, but relentlessly stigmatized by obtrusive disclaimers making all too clear that the religion club—and only the religion club—did not enjoy the approval of the school, thus allowing it to exist but placing it in a ghetto of pariah status visible to all—hardly the outcome Congress had in mind in enacting the Equal Access Act.

(5) Justice Stevens' Dissent. The views of Justice Marshall and Justice Brennan were lenient toward the Act compared to those of the lone dissenter, Justice Stevens, who at oral argument had intimated apprehensions about the perils of the Act for public high schools that would be compelled to permit, under the rubric of student clubs, organizational beachheads for the Ku Klux Klan, Neo-Nazi "skinheads" and fundamentalist evangelism. Not surprisingly, he took a dim view of the Act, but his dissent was more reasonable than his questioning at oral argument might have adumbrated.

> The dictionary is a necessary, and sometimes sufficient, aid to the judge confronted with the task of construing an opaque act of Congress. In a case like this, however, I believe we must probe more deeply to avoid a patently bizarre result. Can Congress really have intended to issue an order to every public high school in the nation stating, in substance, that if you sponsor a chess club, a scuba diving club, or a French club—without having formal classes in those subjects—you must also open your doors to every religious, political, or social organization, no matter how controversial or distasteful its views may be? I think not. A fair view of the legislative history... discloses that Congress intended to recognize a much narrower forum than the Court has legislated into existence today.
>
> * * *

66. Ibid., Marshall opinion.

[T]he Act's legislative history reveals that Congress intended to guarantee student religious groups access to high school fora comparable to the college forum involved in *Widmar v. Vincent*....

* * *

The forum at Westside is considerably different from that which existed at the University of Missouri. In *Widmar*, we held that the University had created "a generally open forum." Over 100 officially recognized student groups routinely participated in that forum. They included groups whose activities were not only unrelated to any specific courses, but also were of a kind that a state university could not properly sponsor or endorse. Thus, for example, they included such political organizations as the Young Socialist Alliance, the Women's Union, and the Young Democrats.... Since the University had allowed such organizations and speakers the use of campus facilities, we concluded that the University could not discriminate against a religious group on the basis of the content of its speech....

The Court's opinion in *Widmar* left open the question whether its holding would apply to a public high school that had established a similar public forum. That question has now been answered in the affirmative by the District Court, the Court of Appeals, and by this Court. I agree with that answer. Before the question was answered judicially, Congress decided to answer it legislatively in order to preclude continued unconstitutional discrimination against high school students interested in religious speech.... As the Court of Appeals correctly recognized, the Act codified the decision in *Widmar*, "extending its holding to secondary public schools." What the Court of Appeals failed to recognize, however, is the critical difference between the university forum in *Widmar* and the high school forum involved in this case. None of the clubs at the high school is even arguably controversial or partisan.

Nor would it be wise to ignore this difference. High school students may be adult enough to distinguish between those organizations that are sponsored by the school and those which lack school sponsorship even though they participate in a forum that the school does sponsor. But high school students are also young enough that open fora may be less suitable for them than for college students. The need to decide whether to risk treating students as adults too soon, or alternatively to risk treating them as children too long, is an enduring problem for all educators. The youth of these students, whether described in terms of "impressionability" or "maturity," may be irrelevant to our application of the constitutional restrictions that limit educational discretion in the public schools, but it surely is not irrelevant to our interpretation of the educational policies that have been adopted. We would do no honor to Westside's administrators or the Congress by assuming that either treated casually the differences between high school and college students when formulating the policy and the statute at issue here.

For these reasons I believe that the distinctions between Westside's program and the University of Missouri's program suggest what is the best understanding of the Act: an extracurricular student organization is

"noncurriculum related" if it has as its purpose (or as part of its purpose) the advocacy of partisan theological, political, or ethical views. A school that admits at least one such club has apparently made the judgment that students are better off if the student community is permitted to, and perhaps even encouraged to, compete along ideological lines. This pedagogical strategy may be defensible or even desirable. But it is wrong to presume that Congress endorsed that strategy—and dictated its nationwide adoption—simply because it approved the application of *Widmar* to high schools. And it seems absurd to presume that Westside has invoked the same strategy 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 than a grilled cheese sandwich....

Nothing in *Widmar* implies that the existence of a French club, for example, would create a constitutional obligation to allow student members of the Ku Klux Klan or the Communist Party to have access to school facilities. More importantly, nothing in that case suggests that the constitutional issue should turn on whether French is being taught in a formal course while the club is functioning.

Conversely, if a high school decides to allow political groups to use its facilities, it plainly cannot discriminate among controversial groups because it agrees with the positions of some and disagrees with the ideas advocated by others. Again, 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. In my judgment, the political activities of the young Republicans are "noncurriculum related" for reasons that have nothing to do with the content of the political science course. The statutory definition of what is "noncurriculum related" should depend on the constitutional concern that motivated our decision in *Widmar*.

In this case, the district judge reviewed each of the clubs in the high school program and found that they are all "tied to the educational function of the institution." He correctly concluded that this club system "differs dramatically from those found to create an open forum policy in *Widmar* and *Bender*." I agree with his conclusion that, under a proper interpretation of the Act, this dramatic difference requires a different result.

As I have already indicated, the majority, although it agrees that Congress intended by this Act to endorse the application of *Widmar* to high schools, does not compare this case to *Widmar*. Instead, the Court argues from two other propositions: first, that Congress intended to prohibit discrimination against religious groups; and, second, that the statute must not be construed in a fashion that would allow school boards to circumvent its reach by definitional fiat. I am in complete agreement with both of these principles. I do not, however, believe that either yields the conclusion which the majority adopts.

First, as the majority correctly observes, Congress intended the Act to prohibit schools from excluding—or believing that they were legally obliged to exclude—religious student groups solely because the groups were religious.... It is obvious that Congress need go no further than our *Widmar* decision to redress this problem, and equally obvious that the majority's expansive reading of "noncurriculum related" is irrelevant to the congressional objective of ending discrimination against religious student groups.

Second, the majority is surely correct that a "`limited open forum should be triggered by what a school does, not by what it says.'" If, however, it is the recognition of advocacy groups that signals the creation of such a forum, I see no danger that school administrators will be able to manipulate the Act to defeat Congressional intent. Indeed, it seems to me that it is the majority's own test that is suspect on this score. It would appear that the school could alter the "noncurriculum related" status of Subsurfers... simply by, for example, including one day of scuba instruction in its swimming classes, or by requiring physical education teachers to urge student participation in the club, or even by soliciting regular comments from the club about how the school could better accommodate the club's interest within coursework. This may be what the school does rather than what it says, but the "doing" is mere bureaucratic procedure unrelated to the substance of the forum or the speech it encompasses.

* * *

For all these reasons, the argument for construing "noncurriculum related" by recourse to the facts of *Widmar*, and so by reference to the existence of advocacy groups, seems to me overwhelming. It provides a test that is both more simple and more easily administered than what the majority has crafted.

* * *

My construction of the Act makes it unnecessary to reach the Establishment Clause question that the Court decides. It is nevertheless important to point out that the question is much more difficult than the Court assumes. The Court focuses upon whether the Act might run afoul of the Establishment Clause because of the danger that some students will mistakenly believe that the student-initiated religious clubs are sponsored by the school. I believe that the majority's construction of the statute obliges it to answer a further question: whether the Act violates the Establishment Clause by authorizing religious organizations to meet on high school grounds even when the high school's teachers and administrators deem it unwise to admit controversial or partisan organizations of any kind.

Under the Court's interpretation of the Act, Congress has imposed a difficult choice on public high schools receiving federal financial assistance. If such a school continues to allow students to participate in such familiar and innocuous activities as a school chess or scuba diving club, it must allow religious groups to make use of school facilities.

> Indeed, it is hard to see how a cheerleading squad or a pep club, among the most common student groups in American high schools, could avoid being "noncurriculum related" under the majority's test. The Act, as construed by the majority, comes perilously close to an outright command to allow organized prayer, and perhaps the kind of religious ceremonies involved in *Widmar*, on school premises....
>
> Testimony in this case indicated that one purpose of the proposed Bible Club was to convert students to Christianity. The influence that could result is the product not only of the Equal Access Act and student-initiated speech, but also of the compulsory attendance laws, which we have long recognized to be of special constitutional importance in this context.

(Query: Compulsory attendance at the high school level? How many states require attendance through high school? Justice Stevens seemed to be reaching afar for this point. Most students are not in school in grades 9 through 12 because compelled by law but for economic or career reasons, and the number of dropouts and expulsions suggests that for many students neither incentive is availing.)

> The Court's construction of this Act... leads to a sweeping intrusion by the federal government into the operation of our public schools, and does so despite the absence of any indication that Congress intended to divest local school districts of their power to shape the educational environment. If a high school administration continues to believe that it is sound policy to exclude controversial groups, such as political clubs, the Ku Klux Klan, and perhaps gay rights advocacy groups, from its facilities, it must now close its doors to traditional extracurricular activities that are noncontroversial but not directly related to any course being offered at the school.... I see no reason—and no evidence of congressional intent—to constrain that discretion any more narrowly than our holding in *Widmar* requires.
>
> Against all these arguments the Court imposes Noah Webster's famous dictionary. It is a massive tome but no match for the weight the Court would put upon it. The Court relies heavily on the dictionary's definition of "curriculum." That word, of course, is not the Act's; moreover, the word "noncurriculum" is not in the dictionary. Neither Webster nor Congress has authorized us to assume that "noncurriculum" is a precise antonym of the word "curriculum." "Nonplus," for example, does not mean "minus".... Purely as a matter of defining a newly-coined word, the term "noncurriculum" could fairly be construed to describe either the subjects that are "not a part of the current curriculum" or the subjects that "cannot properly be included in a public school curriculum".... When one considers the basic purpose of the Act, and its unquestioned linkage to our decision in *Widmar*, the latter definition surely is the more "sensible."
>
> I respectfully dissent.[67]

67. Ibid., Stevens dissent.

Justice Stevens' dissent seems plausible as well as ingenious, but it projected retrospectively upon the court's earlier decision in *Widmar* a rationale that was not present in Justice Powell's statement of the court's holding or its reasons therefor.

> The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.[68]

There was no indication in the court's opinion in *Widmar* that its conclusions were limited to fora on college campuses that involved "controversial," "partisan," or "advocacy"- oriented speech. Perhaps it might have been wise for the court to have drawn a narrower focus or for Congress to have defined such a narrower focus in the Equal Access Act, but neither did so. Justice Stevens thus sought to import into both a concept derived from the fact that some of the clubs existing on the University of Missouri campus were indeed "partisan" or "controversial" and were indeed included in the sweep of the court's holding in *Widmar*, but there was no intimation in that decision that they were in any way essential to it.

Justice Stevens had mentioned such groups in his opinion concurring in the judgment in that case, but solely for the purpose of making his usual equal-protection argument—that "the University could not allow a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege"—but he did not indicate at that time that the judgment in which he concurred was limited to fora that included "partisan" or "controversial" student groups. His *Mergens* dissent relied instead on creative hindsight and did not win any converts among the other justices.

(6) What Is the Law? So what was the upshot of all the above creative judicial writing for the principle of "equal access"?

1. Justice O'Connor concluded that Westside High School had violated the Equal Access Act because it had denied access by a religious extracurricular student group to the forum it had created, which was a "limited open forum" described by the Act because it included several "noncurriculum related" student clubs such as chess and scuba diving. She was joined in this conclusion by five other justices, making it the opinion of the court.

2. Justice O'Connor concluded that the Equal Access Act did not violate the Establishment Clause because it met all three elements of the *Lemon* test. She was joined in that conclusion by only three other justices, making it only a plurality opinion. Two justices—Kennedy and Scalia—agreed with the plurality's judgment on this issue, but used a less demanding test of Establishment.

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68. *Widmar v. Vincent*, 454 U.S. 263 (1981), discussed at § 3b above.

3. Justice Marshall, joined by Justice Brennan, agreed that the Equal Access Act prohibited Westside High School from barring student extracurricular groups because of the content of their speech from the "limited open forum" it had created, and that the Act's term "noncurriculum related" must be broadly defined to prevent schools from evading application of the Act. In order to avoid Establishment Clause problems, however, the school must affirmatively dissociate itself from religious student clubs operating within this forum, since it does not now include any "controversial" groups and actively promotes student involvement in its extracurricular organizations.

To what degree are Marshall's strictures obligatory on public high schools? He expressed agreement with the plurality's requirements:

a. Public officials and school employees cannot participate actively in the affairs of religious student clubs;

b. Religious club meetings must be held during noninstructional time;

c. Public schools may not sponsor any religious meetings.

(Those requirements were also included in the statute.[69]) Thus there were six votes upholding these requirements of the Act as implementative of Establishment Clause concerns.

What more? Justice Marshall had continued,

> Finally, and most importantly, the plurality states that schools bear the responsibility for taking whatever further steps are necessary to make clear that their recognition of a religious club does not reflect their endorsement of the views of the club's participants.

Was that what the plurality had said? At the point cited by Justice Marshall, the plurality opinion stated the following:

> [T]he school itself has control over any impressions it gives students. To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech [citing the reference in *Widmar* to the university's disclaimer in its student handbook].

Justice Marshall proceeded to elaborate what he thought the plurality's view of the school's duty required: Westside must do "more than merely prohibit faculty members from actively participating in the Christian Club's meetings." It must also "fully dissociate itself from the Club's religious speech and avoid appearing to sponsor or endorse the club's goals." Beyond that, it could either "entirely discontinue encouraging student participation in clubs" or else "affirmatively disclai[m] any endorsement of the Christian Club."

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69. At §§ 4071(c)(2), (3), 4071(b), 4072(2), respectively; see § e above.

Is that the law? Only if five or more justices agreed to it. The plurality of four seemed satisfied to cite note 14 in *Widmar*, characterizing it as follows: "(noting that university student handbook states that university's name will not be identified with the aims, policies, or opinions of any student organization or its members)." Some sort of general disclaimer of that type would seem to be all that could fairly be said to be *required* by a majority of the court. Justice Marshall's suggestion that the school could continue to endorse some clubs, but only if it would "affirmatively disclaim" any endorsement of the Christian Club, then, remains only a *suggestion*, and it runs counter to the principle of the Equal Access Act—that insofar as possible religious clubs be treated as other noncurricular student clubs are treated. That would seem to imply an across-the-board disclaimer rather than one specifically targeting the religious group(s) alone.

Whether the court had successfully put the equal access issue to rest, only the passage of time would tell.

h. *Lamb's Chapel v. Center Moriches* (1993) (School Rental to Church). The "equal access" principle was again invoked in a case that did not involve student clubs but the after-hours use of public schools. An evangelical church known as Lamb's Chapel approached the Union Free School District of Center Moriches, Long Island, and requested permission to use the facilities of the public schools to show a series of films on child-rearing and family values featuring a noted lecturer, Dr. James Dobson, a licensed psychologist, former associate clinical professor of pediatrics at the University of Southern California, best-selling author and radio commentator. The theme of the six films in the series was said to be that the undermining influence of the media could be counteracted only by a return to traditional Christian family values inculcated at an early age. The school district denied the request, saying that the film appeared to be "church related" and therefore could not be shown in public schools.

The church brought an action against the school district under 42 U.S.C. §1983, charging violation "under color of state law" of the plaintiffs' rights under the Free Speech and Assembly, Free Exercise and Establishment Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The District Court rejected all of these claims in a summary judgment in favor of the school board, and the Second Circuit Court of Appeals affirmed that holding. These courts viewed the case as being controlled by the New York Education Law, Section 414 of which permitted local school boards to let community groups use the schools (when not in use for school purposes) for ten kinds of uses, among which were "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." The list did not include religious purposes, and prior court decisions had ruled that use for religious purposes would be improper.[70]

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70. *Trietley v. Bd. of Ed. of Buffalo*, 409 N.Y.S.2d 912, 915 (App. Div. 1978); *Deeper Life Christian Fellowship v, Sobol,* 948 F.2d 79, 83-94 (CA2, 1991).

The Center Moriches school board had issued rules prohibiting use of school premises for religious purposes.

Justice White announced the opinion of the Supreme Court, zeroing in on the area in dispute by summarizing the areas of agreement.

> There is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated. It is also common ground that the District need not have permitted after-hours use of its property for any of the uses permitted by §414 of the state education law. The District, however, did open its property for 2 of the 10 uses permitted by §414. The Church argued below that because under Rule 10 of the rules issued by the District, school property could be used for "social, civic, and recreational purposes," the District had opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public fora such as parks and sidewalks. Hence, its view was that subject-matter or speaker exclusions on District property were required to be justified by a compelling state interest and to be narrowly drawn to achieve that end.... The argument has considerable force, for the District's property is heavily used by a wide variety of private organizations, including some that present a "close question," which the Court of Appeals resolved in the District's favor, as to whether the District had in fact already opened its property to religious uses.[71] We need not rule on this issue, however, for even if the courts below were correct in [rejecting this claim]—and we shall assume for present purposes that they were—the judgment below must be reversed.
>
> With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[72] The Court of Appeals appeared to recognize that the total ban on using District property for religious purposes could survive First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral. The court's conclusion was that Rule 7 met this test. We cannot agree with this holding, for Rule 7 was unconstitutionally applied in this case.
>
> The Court of Appeals thought that the application of Rule 7 in this case was viewpoint neutral because it had been and would be applied in the same way to all uses of school property for religious purposes. That all religions and all uses for religious purposes are treated alike under Rule 7,

71. Among the uses allowed by the District were: "A New Age religious group known as the `Mind Center,' a Salvation Army Youth Band, `Southern Harmonize Gospel Singers,' Hampton Council of Churches Billy Taylor Concert," etc.

72. *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 788 (1985).

however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint.

There is no suggestion from the courts below or from the District or the State that a lecture or film about child-rearing and family values would not be a use for social or civic purposes otherwise permitted by Rule 10. That subject matter is not one that the District has placed off limits to any and all speakers. Nor is there any indication in the record before us that the application to exhibit the particular film involved here was or would have been denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view, denial on that basis was plainly invalid under our holding in *Cornelius*... that

> "[a]lthough a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum...or if he is not a member of the class of speakers for whose special benefit the forum was created... the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."

The film involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the film dealt with the subject from a religious standpoint. The principle that has emerged from our cases "is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."[73] That principle applies in the circumstances of this case....

The District, as a respondent, would save its judgment below on the ground that to permit its property to be used for religious purposes would be an establishment of religion forbidden by the First Amendment. This Court suggested in *Widmar v. Vincent*[74]... that permitting use of University property for religious purposes under the open access policy involved there would not be incompatible with the Court's Establishment Clause cases.

We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental. As in *Widmar, supra,* permitting District property to be used to exhibit the film involved

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73. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

74. 454 U.S. 265, 271 (1981), discussed above at § 3b.

> in this case would not have been an establishment of religion under the three-part test articulated in *Lemon v. Kurtzman*:[75] The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.[76]
>
> The District also submits that it justifiably denied use of its property to a "radical" church for the purpose of proselytizing, since to do so would lead to threats of public unrest and even violence. There is nothing in the record to support such a justification, which in any event would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject the District otherwise makes open to discussion on District property.
>
> * * *
>
> For the reasons stated in this opinion, the judgment of the Court of Appeals is
>
> *Reversed*.[77]

The court did not reach the somewhat harder question—because it was not presented by the facts of the case—whether use of public school premises for explicitly religious purposes in after-school hours could be categorically prohibited when the schools were open to a wide range of other uses by community groups. Would the state law banning such use stand up to the equal access principle? Churches rent public school auditoriums for Sunday services in other states, particularly when the congregation may have been displaced from its regular quarters by fire or other disaster, but the Supreme Court has never agreed to hear any of the cases arising from such circumstances.

There were no dissenters from the conclusion reached by the court in this case, but Justice Scalia found fault with the court's passing reference to the *Lemon* test of establishment. In language even more vivid than usual for him, he denounced that test and the majority for even referring to it.

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: our decision in *Lee v. Weisman* conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart

75. 403 U.S. 602 (1971), discussed at § D5 above.

76. Here the Court introduced a footnote responding to Justice Scalia's objection to utilization of the *Lemon* test of establishment of religion, which will be recounted in due course.

77. *Lamb's Chapel v. Center Moriches*, 113 S.Ct. 2141 (1993).

(the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.[78]

The secret of the *Lemon* test's survival, I think, is that is it so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. See, *e.g., Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (noting instances in which Court has not applied *Lemon* test). When we wish to strike down a practice it forbids, we invoke it...; when we wish to uphold a practice it forbids, we ignore it entirely, see *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding state legislative chaplains).... Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.... I will decline to apply *Lemon*—whether it validates or invalidates the government action in question—and therefore cannot join the opinion of the Court today.

I cannot join for yet another reason: the Court's statement that the proposed use of the school's facilities is constitutional because (among other things) it would not signal endorsement of religion in general. What a strange notion, that a Constitution which *itself* gives "religion in general" preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general. The Attorney General of New York not only agrees with that strange notion, he has an explanation for it: "Religious advocacy," he writes, "serves the community only in the eyes of its adherents and yields a benefit only to those who already believe." That was *not* the view of those who adopted our Constitution, who believed that the public virtues inculcated by religion are a public good. It suffices only to point out that during the summer of 1789, when it was in the process of drafting the First Amendment, Congress enacted the famous Northwest Territory Ordinance of 1789, Article III of which provides, "Religion, morality, and knowledge, *being necessary to good government and the happiness of mankind,* schools and the means of education shall forever be encouraged."

* * *

For the reasons given by the Court, I agree that the Free Speech Clause of the First Amendment forbids what [the school district] has done here.

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78. E.g., *Lee v. Weisman*, 505 U.S. 577 (1992), (Scalia, J., joined by Thomas, J., dissenting); *Allegheny County v. ACLU*, 492 U.S. 573, 655-657 (1989), (Kennedy, J., concurring in judgment in part and dissenting in part); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 346-349 (1987), (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 107-113 (1985), (Rehnquist, J., dissenting); *Grand Rapids v. Ball*, 473 U.S. 373, 400 (1985), (White, J., dissenting); *Widmar v. Vincent*, 454 U.S. 263, 282 (1981), (White J., dissenting); *New York v. Cathedral Academy*, 434 U.S. 125, 134-135 (1977), (White, J., dissenting); *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736, 768 (1976), (White, J., concurring in judgment); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 820 (1973), (White, J., dissenting); all of these discussed at the appropriate place in this treatise.

> As for the asserted Establishment Clause justification, I would hold, simply and clearly, that giving Lamb's Chapel nondiscriminatory access to school facilities cannot violate that provision because it does not signify state or local embrace of a particular religious sect.[79]

Justice Kennedy entered a brief concurrence in which he expressed agreement with Justice Scalia's objection to the reference to *Lemon* and added his own objection to the court's use of the phrase "endorsing religion," reiterating his insistence (expressed in *Allegheny County v. ACLU*) that "endorsement" is an inadequate standard for use in questions of establishment of religion.

Justice White, for the majority, uttered a disdainful footnote in response to these demurrers.

> 7. While we are somewhat diverted by JUSTICE SCALIA'S evening at the cinema, we return to the reality that there is a proper way to inter an established decision, and *Lemon*, however frightening it might be to some, has not been overruled.

Obviously, although there was widespread discontent among the members of the court with the three-pronged *Lemon* test of establishment, it was not jettisoned because the members of the court were even less agreed on what should take its place.

i. *Rosenberger v. Rector and Visitors of the University of Virginia* (1995) (Payment for Printing Students' Religious Journal). The equal-access principle was invoked again in a case involving the University of Virginia, founded by Thomas Jefferson in 1819. The university, as an "instrumentality of the Commonwealth," was bound by the restrictions on state action found in the First and Fourteenth Amendments of the Constitution. For that reason it refused to pay for the printing of a student periodical called "Wide Awake" because it was an avowedly religious publication, and the University considered that subsidizing a religious publication would violate the Establishment Clause. After vainly pursuing appeals within the University structure, the students took the matter to federal court, claiming that their rights to freedom of speech, press and free exercise of religion had been violated. Their suit was dismissed on motion for summary judgment, and that ruling was upheld by the Fourth Circuit Court of Appeals.

(1) The Supreme Court's Opinion. The Supreme Court agreed to hear the case and issued a decision written by Justice Kennedy for a majority of five.

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be

79. *Lamb's Chapel v. Center Moriches*, *supra*, Scalia dissent.

unconstitutional. These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers because of the content of their expression. When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. [citations omitted]

These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation.... Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set....

The [Student Activities Fund (SAF) from which the students sought payment of their printing costs] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.... The most recent and apposite case is our decision in *Lamb's Chapel*.... Our conclusion was unanimous: "[I]t discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint."[80]

The University... insists that... [its] Guidelines draw lines based on content, not viewpoint.... As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophical inquiry throughout human history. We conclude, nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake. By the very terms of the [Student Activities Fund] prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the [University's] refusal to make [printing] payments, for the subjects discussed were otherwise within the approved category of publications....

The University tries to escape the consequence of our holding in *Lamb's Chapel* by urging that this case involves the provision of funds rather than

80. *Lamb's Chapel v. Center Moriches*, 508 U.S. 384 (1993), discussed immediately above.

> access to facilities. The University begins with the unremarkable proposition that the State must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission.... [T]he University argues that content-based funding decisions are both inevitable and lawful.... [W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message....
>
> It does not follow, however,... that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles....
>
> The distinction between the University's own favored message and the private speech of students is evident in the case before us.... The University declares [in the agreement each student group must sign] that the student groups eligible for [Student Activities Fund] support are not the University's agents, are not subject to its control, and are not its responsibility. Having offered to pay the third-party contractors [for printing, etc.] on behalf of private speakers who convey their own message, the University may not silence the expression of selected viewpoints.

Justice Kennedy expatiated on the history of higher education from ancient Athens through the growth of the first universities at Bologna, Oxford and Paris to make the point that viewpoint discrimination by government could stultify "free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses." That disquisition focused on considerations more central to this treatise when he began to reflect on the religious aspect of student discourse.

> The prohibition on funding on behalf of publications that "primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality"... has a vast potential reach.... Were the prohibition applied with much vigor at all, it would bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes.... If any manifestation of beliefs in first principles disqualified the writing, as seems to be the case, it is indeed difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy. Plato could contrive perhaps to submit an acceptable essay on making pasta or peanut butter cookies, provided he did not point out their (necessary) imperfections.

> Based on the principles we have discussed, we hold that the regulation... is a denial of [the students'] right to free speech guaranteed by the First Amendment.

The remaining issue to be addressed was whether that consideration was trumped by the necessity of complying with the Establishment Clause, as the University had claimed in the courts below and as the Fourth Circuit had agreed. However, a strange thing had happened on the way to the Supreme Court. The University had abandoned that position and announced instead that its "fundamental objection to the [students'] argument is not that it implicates the Establishment Clause but that it would defeat the ability of public education at all levels to control the use of public funds." This switch seemed to jettison a constitutional claim for one based on lesser considerations. The court was not impressed.

> That the University itself no longer presses the Establishment Clause claim is some indication that it lacks force; but as the Court of Appeals rested its judgment on the point and our dissenting colleagues would find it determinative, it must be addressed.
>
> The Court of Appeals ruled that... the University's action was justified by the necessity of avoiding a violation of the Establishment Clause, an interest it found compelling. Recognizing that this Court has regularly "sanctioned awards of direct nonmonetary benefits to religious groups where the government has created open fora to which all similarly situated organizations are invited," the Fourth Circuit asserted that direct monetary subsidization of religious organizations and projects is "a beast of an entirely different color."... It reasoned that because Wide Awake is "a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy," the University's provision of SAF funds for its publication would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values."...
>
> A central lesson in our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion....
>
> The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause.... The University's SAF Guidelines have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." The category of support here is for "student news, information, opinion, entertainment...," of which Wide Awake was 1 of 15 in the 1990 school year. [Wide Awake] did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was.
>
> The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches. A tax of that

sort, of course, would run contrary to Establishment Clause concerns dating from the earliest days of the Republic. The apprehensions of our predecessors involved the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting certain sects. The exaction here, by contrast, is a student activity fee designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission. The fee is mandatory.... We must treat it, then, as an exaction upon the students. But the $14 paid each semester by the students is not a general tax designed to raise revenue for the University.... The SAF cannot be used for unlimited purposes, much less the illigitimate purpose of supporting one religion. Much like the arrangement in *Widmar*, the money goes to a special fund from which any group of students... can draw for purposes consistent with the University's educational mission; and to the extent the student is interested in speech, withdrawal is permitted to cover the whole spectrum of speech, whether it manifests a religious view, an antireligious view, or neither. Our decision, then, cannot be read as addressing an expenditure from a general tax fund. Here, the disbursements from the fund go to private contractors for the cost of printing that which is protected under the Speech Clause of the First Amendment. This is a far cry from a general public assessment designed and effected to provide financial support for a church.

Government neutrality is apparent in the State's over-all scheme in a further meaningful respect. The program respects the critical difference "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[81]... The University has taken pains to dissociate itself from the private speech involved in this case....

The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized Establishment Clause dangers where the government makes direct money payments to sectarian institutions.... The error is not in identifying the principle but in believing that it controls this case. Even assuming that [Wide Awake] is no different from a church and that its speech is the same as the religious exercises conducted in *Widmar* (two points much in doubt), the Court of Appeals decided a case that was, in essence, not before it, and the dissent would have us do the same. We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity. Neither the Court of Appeals nor the dissent, we believe, takes sufficient cognizance of the undisputed fact that no public funds flow directly to [Wide Awake's] coffers.... The government usually acts by spending money.... The error made by the Court of Appeals, as

81. Quoting *Board of Ed. v. Mergens*, 496 U.S. 226, 250 (1990), opinion of O'Connor, J., discussed at § g above.

well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient.... [A] public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion-neutral, say first-come-first-served basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall. There is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf. The latter occurs here.... Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life.

By paying outside printers, the University in fact attains a further degree of separation from the student publication, for it avoids the duties of supervision, escapes the costs of upkeep, repair and replacement attributable to student use, and has a clear record of costs. As a result..., the University can charge the [Student Activity Fund], and not the taxpayers as a whole, for the discrete activity in question. It would be formalistic for us to say that the University must forfeit these advantages and provide the services itself in order to comply with the Establishment Clause. It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse. That is not a danger here, based on the considerations we have advanced and for the additional reason that the student publication is not a religious institution, at least in the usual sense of that term as used in our case law, and it is not a religious organization as used in the University's own regulations. It is instead a publication involved in a pure forum for the expression of ideas, ideas that would be both incomplete and chilled were the Constitution to be interpreted to require that state officials and courts scan the publication to ferret out views that principally manifest a belief in a divine being.

Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question—speech otherwise protected by the Constitution—contain too great a religious content.... That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. To impose that standard on student speech at a university is to imperil the very sources of free speech and expression....

To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of

> action. The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophical assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which would undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.[82]

The majority joining Justice Kennedy consisted of Chief Justice Rehnquist and Justices O'Connor, Scalia and Thomas.

(2) Justice O'Connor's Concurring Opinion. Justice O'Connor added a concurring opinion as a sort of "anchor to windward" to keep the majority's opinion from drifting too far from the separationist shore.

> This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities.... Not to finance Wide Awake, according to [the students], violates the principle of neutrality by sending a message of hostility toward religion. To finance Wide Awake, argues the University, violates the prohibition on direct state funding of religious activities.
>
> When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause.... The nature of the dispute does not admit of categorical answers, nor should any be inferred from the Court's decision today. Instead, certain considerations specific to the program at issue lead me to conclude that by providing the same assistance to Wide Awake that it does to other publications, the University would not be endorsing the magazine's religious perspective.
>
> First, the student organizations, at the University's insistence, remain strictly independent of the University.... [E]very... publication [must contain a written]... disclaimer.... Any reader of Wide Awake would be on notice of the publications' independence from the University.
>
> Second, financial assistance is distributed in a manner that ensures its use only for permissible purposes.... [t]he funds are paid directly to the third-party vendor and do not pass through the organization's coffers....
>
> Third, assistance is provided to the religious publication in a context that makes improbable any perception of government endorsement of the religious message. Wide Awake does not exist in a vacuum. It competes with 15 other [student] magazines and newspapers for advertising and readership.The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly

82. *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, *passim* (1995).

> diminishes the danger that the message of any one publication is perceived as endorsed by the University....
>
> Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees.... Unlike monies dispensed from state or federal treasuries, the Student Activity Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee. The government neither pays into nor draws from this common pool, and a fee of this sort appears conducive to granting individual students proportional refunds. The Student Activities Fund, then, represents not government resources, whether derived from tax revenues, sales of assets, or otherwise, but a fund that simply belongs to the students.... Subject to these comments, I join the opinion of the Court.

Once again, as she had in *Lynch v. Donnelly*, *Bowen v. Kendrick* and *Oregon v. Smith*,[83] Justice O'Connor wrote a concurring opinion that showed an affinity for the views expressed in the dissent, but then cast her vote with the other four justices, giving them the majority. (She had also occasionally voted with the separationist side in other cases, giving *them* the majority.[84])

Justice Thomas uttered a concurring opinion also, but as it was directed against the dissent, it can best be understood after the dissent is discussed.

(3) The Dissent. Justice Souter wrote a strong dissent in which Justices Stevens, Ginsberg and Breyer joined.

> The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so, however, only after erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Speech Clauses, and by viewing the very funds in question as beyond the reach of the Establishment Clause's funding restrictions....
>
> The central question in this case is whether a grant from the Student Activities Fund to pay Wide Awake's printing expenses would violate the Establishment Clause. Although the Court does not dwell on the details of Wide Awake's message, it recognizes something sufficiently religious in the publication to demand Establishment Clause scrutiny. Although the Court places great stress on the eligibility of secular as well as religious activities for grants from the Student Activities Fund, it recognizes that such evenhanded availability is not by itself enough to satisfy constitutional requirements for any aid scheme that results in a benefit to religion. Something more is necessary to justify any religious aid. Some

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83. *Lynch v. Donnelly*, 465 U.S. 668 (1984), discussed at VE2d; *Bowen v. Kendrick*, 487 U.S. 589 (1988), discussed at IID2d; *Oregon v. Smith*, 494 U.S. 872 (1990), discussed at IVD2e.

84. Cf. *Allegheny County v. ACLU*, 492 U.S. 573 (1989), discussed at VE2i; *Lee v. Weisman*, 505 U.S. 577 (1992), discussed at § C2d(11) above.

members of the Court, at least, may think the funding permissible on the theory that it is indirect, since the money goes to Wide Awake's printer, not through Wide Awake's own checking account. The Court's principal reliance, however, is on an argument that providing religion with economically valuable services is permissible on the theory that services are economically indistinguishable from religious access to governmental speech forums, which sometimes is permissible. But this reasoning would commit the Court to approving direct religious aid beyond anything justifiable for the sake of access to speaking forums. The Court implicitly recognizes this in its further attempt to circumvent the clear bar to direct governmental aid to religion.... The opinion of the Court makes the novel assumption that only direct aid financed with tax revenues is barred, and draws the erroneous conclusion that the involuntary Student Activities Fund is not a tax....

The Court's difficulties will be all the more clear after a closer look at Wide Awake than the majority opinion affords. The character of the magazine is candidly disclosed on the opening page of the first issue, where the editor-in-chief announces Wide Awake's mission...: it is "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means."...

Each issue of Wide Awake contained in the record makes good on the editor's promise...:

> "The only way to salvation through Him is by confessing and repenting of sin. It is the Christian's duty to make sinners aware of their need for salvation. Thus, Christians must confront and condemn sin, or else they fail in their duty of love...."
>
> * * *
>
> "The Spirit provides access to an intimate relationship with the Lord of the Universe, awakens our minds to comprehend spiritual truth and empowers us to serve as effective ambassadors for the Lord Jesus in our earthly lives."[85]

* * *

This writing is no merely descriptive examination of religious doctrine or even of ideal Christian practice in confronting life's social and personal problems. Nor is it merely the expression of editorial opinion that incidentally coincides with Christian ethics and reflects a Christian view of human obligation. It is straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teaching of Jesus Christ. These are not the words of "student news, information, opinion, entertainment, or academic communicatio[n]..." (in the language of the University's funding criteria), but the words of "challenge [to] Christians to live... according to the faith they proclaim...." The subject is not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the

85. Here follow several pages of illustrative excerpts of the same nature.

pulpit. It is nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life.

Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money. Evidence on this subject antedates even the Bill of Rights itself, as may be seen in the writings of Madison, whose authority on questions about the meaning of the Establishment Clause is well settled.[86] Four years before the First Congress proposed the First Amendment, Madison gave his opinion on the legitimacy of using public funds for religious purposes in the Memorial and Remonstrance Against Religious Assessments, which played the central role in ensuring the defeat of the Virginia tax assessment bill in 1786 and framed the debate upon which the Religion Clauses stand:

> "Who does not see that... the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"...

Madison wrote against a background in which nearly every Colony had exacted a tax for church support, the practice having become "so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence." Madison's Remonstrance captured the colonists' "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."[87] Their sentiment as expressed by Madison in Virginia, led not only to the defeat of Virginia's tax assessment bill, but also directly to passage of the Virginia Bill for Establishing Religious Freedom, written by Thomas Jefferson. That bill's preamble declared that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical"..., and its text provided "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."[88]

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86. Citing *PEARL v. Nyquist*, 413 U.S. 756, 770, n.28 (1973), discussed at § D7a above, and *Everson v. Bd. of Ed.*, 330 U.S. 1, 13 (1947), discussed at § D2 above.

87. This and the previous quotation are from *Everson*, *supra,* p. 11.

88. Justice Souter cited and quoted passages from Laycock, D., "`Nonpreferential' Aid to Religion: A False Claim About Original Intent," 27 *Wm. & Mary L. Rev.* 875, 921, 923 (1986): "If the debates of the 1780's support any proposition, it is that the Framers opposed government financial support for religion.... They did not substitute small taxes for large taxes; three pence was as bad as any larger sum. The principle was what mattered. With respect to money, religion was to be wholly voluntary. Churches either would support themselves or they would not, but the government would neither help nor interfere." Curiously, Professor Laycock wrote an *amicus* brief for the Christian Legal Society and several other religious bodies supporting the *students* in this case, but Justice Souter, who frequently quoted Laycock with approval (as in this instance) was evidently not persuaded by

> The principle against direct funding with public money is patently violated by the contested use of today's student activity fee. Like today's taxes generally, the fee is Madison's threepence. The University exercises the power of the State to compel a student to pay it..., and the use of any part of it for the direct support of religious activity thus strikes at what we have repeatedly held to be the heart of the prohibition on establishment.[89]...
>
> The Court, accordingly, has never before upheld direct state funding of the sort of proselytizing published in Wide Awake and, in fact, has categorically condemned state programs directly aiding religious activity.[90]...
>
> Even when the Court has upheld aid to an institution performing both secular and sectarian functions, it has always made a searching enquiry to ensure that the institution kept the secular activities separate from the sectarian ones, with any direct aid flowing only to the former and never to the latter.[91]
>
> Reasonable minds may differ over whether the Court reached the correct result in each of these cases, but their common principle has never been questioned or repudiated. "Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed... indoctrination into the beliefs of a particular religious faith."[92]
>
> Why does the Court not apply this clear law to these clear facts and conclude, as I do, that the funding here is a clear constitutional violation? The answer must be in part that the Court fails to confront the evidence set out in the preceding section. Throughout its opinion, the Court refers uninformatively to Wide Awake's "Christian viewpoint" or its "religious perspective," and in distinguishing funding of Wide Awake from the funding of a church, the Court maintains that "[Wide Awake] is not a religious institution, at least in the usual sense." The Court does not quote the magazine's adoption [on its masthead] of Saint Paul's exhortation to awaken to the nearness of salvation, or any of its articles enjoining readers

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that *amicus* brief. Justice Souter also quoted from "Curry, T., *The First Freedom*, 217 (1986) and Choper, J., *Securing Religious Liberty*, 16 (1995)," in support of his position.

89. Citing and quoting from *Everson, supra,* 15-16; *Grand Rapids v. Ball,* 473 U.S. 373, 385 (1985), discussed at § D7l above; *PEARL v. Nyquist, supra*, at 780, 772; *Lee v. Weisman*, 505 U.S. 577, 640 (1992)(Scalia, J., dissenting), discussed at § C2d(11) above; *Flast v. Cohen*, 392 U.S. 83, 103-104 (1968), discussed at § D4 above.

90. Citing and quoting from *Ball, supra*, at 395; *Wolman v. Walter,* 433 U.S. 229, 254 (1977), discussed at § D7g above; *Meek v. Pittenger*, 421 U.S. 349, 365 (1975), discussed at § D7f above; *Nyquist, supra*, at 774; *Levitt v. PEARL*, 413 U.S. 472, 480 (1973), discussed at § D7c above; *Tilton v. Richardson*, 403 U.S. 672, 683 (1971), discussed at § D6 above.

91. Citing and quoting from *Bowen v. Kendrick*, 487 U.S. 589, 614-615 (1988), discussed at IID2d; *Roemer v. Maryland*, 426 U.S. 736, 746-748, 755, 759-61 (1976), discussed at § D8b above; *Hunt v. McNair*, 413 U.S. 734, 742-745 (1973), discussed at § D8a above; *Tilton, supra,* 679-82; and *Bd. of Ed. v. Allen*, 392 U.S. 236, 244-248 (1968), discussed at § D3 above.

92. *Ball, supra*, at 385.

to accept Jesus Christ, or the religious verses, or the religious textual analyses, or the suggested prayers. And so it is easy for the Court to lose sight of what the University students and the Court of Appeals found so obvious, and to blanch the patently and frankly evangelistic character of the magazine by unrevealing allusions to religious points of view.

Nevertheless, even without the encumbrance of detail from Wide Awake's actual pages, the Court finds something sufficiently religious about the magazine to require examination under the Establishment Clause, and one may therefore ask why the unequivocal prohibition on direct funding does not lead the Court to conclude that funding would be unconstitutional. The answer is that the Court focuses on a subsidiary body of law, which it correctly states but ultimately misapplies. That subsidiary body of law accounts for the Court's substantial attention to the fact that the University's funding scheme is "neutral," in the formal sense that it makes funds available on an evenhanded basis to secular and sectarian applicants alike. While this is indeed true and relevant under our cases, it does not alone satisfy the requirements of the Establishment Clause, as the Court recognizes when it says that evenhandedness is only a "significant factor" in certain Establishment Clause analysis, not a dispositive one.... This recognition reflects the Court's appreciation of two general rules: that whenever affirmative government aid ultimately benefits religion, the Establishment Clause requires some justification beyond evenhandedness on the government's part; and that direct public funding of core sectarian activities, even if accomplished pursuant to an evenhanded program, would be entirely inconsistent with the Establishment Clause and would strike at the very heart of the Clause's protection....

In order to understand how the Court thus begins with sound rules but ends with an unsound result, it is necessary to explore those rules in greater detail than the Court does.... At the heart of the Establishment Clause stands the prohibition against direct public funding, but that prohibition does not answer the questions that occur at the margins of the Court's application. Is any government activity that provides any incidental benefit to religon likewise unconstitutional? Would it be wrong to put out fires in burning churches, wrong to pay the bus fares of students on the way to parochial schools, wrong to allow a grantee of special education funds to spend them at a religious college? These are the questions that call for drawing lines, and it is in drawing them that evenhandedness becomes important.... In the doubtful cases (those not involving direct public funding), where there is initially room for argument about a law's effect, evenhandedness serves to weed out those laws that impermissibly advance religion by channeling aid to it exclusively. Evenhandedness is therefore a prerequisite to further inquiry into the constitutionality of a doubtful law, but evenhandedness goes no further. It does not guarantee success under Establishment Clause scrutiny.

* * *

Since conformity with the marginal or limiting principle of evenhandedness is insufficient of itself to demonstrate the constitutionality of providing a government benefit that reaches religion, the Court must identify some further element in the funding scheme that does demonstrate that permissibility. For one reason or another, the Court's chosen element appears to be the fact that under the University's Guidelines, funds are sent to the printer chosen by Wide Awake, rather then to Wide Awake itself.

If the Court's suggestion is that this feature of the funding program brings this case into line with [our earlier decisions[93]], the Court has misread those cases, which turned on the fact that the choice to benefit religion was made by a non-religious third party standing between the government and a religious institution. Here there is no third party standing between the government and the ultimate religious beneficiary to break the circuit by its independent discretion to put state money to religious use. The printer, of course, has no option to take the money and use it to print a secular journal instead of Wide Awake. It only gets the money because of its contract to print a message of religious evangelism at the direction of Wide Awake, and it will receive payment only for doing precisely that. The formalism of distinguishing between payment to Wide Awake so it can pay an approved bill and payment of the approved bill itself cannot be the basis of a decision of Constitutional law. If this indeed were a critical distinction, the Constitution would permit a State to pay all the bills of any religious institution....

It is more probable, however, that the Court's reference to the printer goes to a different attempt to justify the payment. On this purported justification, the payment to the printer is significant only as the last step in an argument resting on the assumption that a public university may give a religious group the use of any of its equipment or facilities so long as secular groups are likewise eligible. The Court starts with the cases[94]... in which religious groups were held to be entitled to access for speaking in government buildings open generally for that purpose. The Court reasons that the availability of a forum has economic value (the government built and maintained the building, while the speakers saved the rent for a hall); and that economically there is no difference between the University's provision of the value of the room and the value, say, of the University's printing equipment; and that therefore the University must be able to provide the use of the latter. Since it may do that, the argument goes, it would be unduly formalistic to draw the line at paying for an outside

93. Citing *Mueller v. Allen*, 463 U.S. 388 (1983), discussed at § D7j above; *Witters v. Washington*, 474 U.S. 481 (1986), discussed at § D8d above; *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), discussed at § D7n above.

94. Citing *Widmar v. Vincent*, 454 U.S. 263 (1981), discussed at § 3b above; *Bd. of Ed. v. Mergens*, 496 U.S. 226 1990), discussed at § 3g above; and *Lamb's Chapel v. Center Moriches*, 508 U.S. 384 (1993), discussed immediately above. These are the leading "equal access" cases.

printer, who simply does what the magazine's publishers could have done with the University's own printing equipment.

The argument is as unsound as it is simple, and the first of its troubles emerges from an examination of the cases relied upon to support it. The common factual thread running through *Widmar, Mergens,* and *Lamb's Chapel* is that a governmental institution created a limited forum for the use of students in a school or college, or for the public at large, but sought to exclude speakers with religious messages.... In each case the restriction was struck down either as an impermissible attempt to regulate the content of speech in an open forum... or to suppress a particular religious viewpoint. In each case, to be sure, the religious speaker's use of the room passed muster as an incident of a plan to facilitate speech generally for a secular purpose, entailing neither secular entanglement with religion nor risk that the religious speech would be taken to be the speech of the government or that the government's endorsement of a religious message would be inferred. But each case drew ultimately on unexceptionable Speech Clause doctrine treating the evangelist, the Salvation Army, the millenialist or the Hare Krishna like any other speaker in the public forum. It was the preservation of free speech on the model of the street corner that supplied the justification going beyond the requirement of evenhandedness.

The Court's claim of support from these forum-access cases is ruled out by the very scope of their holdings. While they do indeed allow a limited benefit to religious speakers, they rest on the recognition that all speakers are entitled to use the street corner (even though the State paves the roads and provides police protection to everyone on the street) and on the analogy between the public street corner and open classroom space. Thus, the Court found it significant that the classroom speakers would engage in traditional speech activities in these forums, too, even though the rooms (like street corners) require some incidental state spending to maintain them. The analogy breaks down entirely, however, if the cases are read more broadly than the Court wrote them, to cover more than forums for literal speaking. There is no traditional street corner printing provided by the government on equal terms to all comers, and the forum cases cannot be lifted to a higher plane of generalization without admitting that new economic benefits are being extended directly to religion in clear violation of the principle barring direct aid. The argument from economic equivalence thus breaks down on recognizing that the direct state aid it would support is not mitigated by the street corner analogy in the service of free speech. Absent that, the rule against direct aid stands as a bar to printing services as well as printers.

It must, indeed, be a recognition of just this point that leads the Court to take a third tack, not in coming up with yet a third attempt at justification within the rules of existing case law, but in recasting the scope of the Establishment Clause in ways that make further affirmative justification unnecessary. JUSTICE O'CONNOR makes a comprehensive analysis of the manner in which the activity fee is assessed and distributed. She concludes

> that the funding differs so sharply from religious funding out of government treasuries generally that it falls outside Establishment Clause purview in the absence of a message of religious endorsement (which she finds not to be present). The opinion of the Court concludes more expansively that the activity fee is not a tax, and then proceeds to find the aid permissible on the legal assumption that the bar against direct aid applies only to aid derived from tax revenue....
>
> Allowing non-tax funds to be spent on religion would, in fact, fly in the face of clear principle.... [A]ny such use of them would ignore one of the dual objectives of the Establishment Clause, which was meant not only to protect individuals and their republics from the destructive consequences of mixing government and religion, but to protect religion from a corrupting dependence on support from the Government.... Since the corrupting effect of government support does not turn on whether the Government's own money comes from taxation or gift or the sale of public lands, the Establishment Clause could hardly relax its vigilance simply because tax revenue was not implicated. Accordingly, in the absence of a forthright disavowal, one can only assume that the Court does not mean to eliminate one half of the Establishment Clause justification.
>
> Nothing in the Court's opinion would lead me to end this enquiry into the application of the Establishment Clause any differently from the way I began it. The Court is ordering an instrumentality of the State to support religious evangelism with direct funding. This is a flat violation of the Establishment Clause.
>
> * * *
>
> Since I cannot see the future I cannot tell whether today's decision portends much more than making a shambles out of student activity fees in public colleges. Still, my apprehension is whetted by Chief Justice Burger's warning in *Lemon v. Kurtzman* (1971): "in constitutional adjudication some steps, which when taken were thought to approach `the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a `downhill thrust' easily set in motion but difficult to retard or stop."[95]

(4) Justice Thomas' Concurrence. Justice Thomas took pen in hand to set Justice Souter straight on Establishment Clause history, reiterating the nonpreferentialist doctrine that was voiced by then-Justice Rehnquist at great length in dissent in *Wallace v. Jaffree*.[96] The thrust of this theory was that the Madison-Jefferson views cited by the court's opinions from *Everson* (1947) on do not take account of the contrary views of other Founders. This revisionist idea has been advanced by various writers, some of whom were cited by Justice Thomas, but has been effectively countered by others, particularly Professor Laycock in the work cited by Justice Souter, and has never been adopted by the Supreme Court, though

95. *Rosenberger v. Rector, supra*, Souter dissent.

96. 472 U.S. 38 (1985), discussed at § C2d(8) above.

there are some decisions that are somewhat consonant with it. Here is Justice Thomas' contribution:

> I agree with the Court's opinion and join it in full, but I write separately to express my disagreement with the historical analysis put forward by the dissent. Although the dissent starts down the right path in consulting the original meaning of the Establishment Clause, its misleading application of history yields a principle that is inconsistent with our Nation's long tradition of allowing religious adherents to participate on equal terms in neutral government programs.
>
> Even assuming that the Virginia debate on the so-called "Assessment Controversy" was indicative of the principles embodied in the Establishment Clause, this incident hardly compels the dissent's conclusion that government must actively discriminate against religion. The dissent's historical discussion glosses over the fundamental characteristic of the Virginia assessment bill that sparked the controversy: The assessment was to be imposed for the support of clergy in the performance of their function of teaching religion....
>
> James Madison's Memorial and Remonstrance... must be understood in this context. Contrary to the dissent's suggestion, Madison's objection to the assessment bill did not rest on the premise that religious entities may never participate on equal terms in neutral government programs. Nor did Madison embrace the argument that forms the linchpin of the dissent: that monetary subsidies are constitutionally different from other neutral benefit programs. Instead, Madison's comments are more consistent with the neutrality principle that the dissent inexplicably discards. According to Madison, the Virginia assessment was flawed because it "violate[d] that equality which ought to be the basis of every law." The assessment violated the "equality" principle not because it allowed religious groups to participate in a generally available government program, but because the bill singled out religious entities for special benefits....
>
> Legal commentators have disagreed about the historical lesson to take from the Assessment Controversy. For some, the experience in Virginia is consistent with the view that the Framers saw the Establishment Clause simply as a prohibition on governmental preference for some faiths over others.[97] Other commentators have rejected this view, concluding that the Establishment Clause forbids not only government preferences for some religious sects over others, but also government preferences for religion over irreligion.[98]
>
> I find much to commend the former view.... In any event, the views of one man [Madison] do not establish the original understanding of the First Amendment.

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97. Citing "R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982); Smith, "Getting Off on the Wrong Foot and Back on Again," 20 *Wake Forest L. Rev.* 569 (1984)."

98. Citing Laycock, *supra*, 875.

> But resolution of this debate is not necessary to decide this case. Under any understanding of the Assessment Controversy, the history cited by the dissent cannot support the conclusion that the Establishment Clause "categorically condemn[s] state programs directly aiding religious activity" when that aid is part of a neutral program available to a wide array of beneficiaries....
>
> Stripped of its flawed historical premise, the dissent's argument is reduced to the claim that our Establishment Clause jurisprudence permits neutrality in the context of access to government *facilities* but requires discrimination in access to government *funds*. The dissent purports to locate the prohibition against "direct public funding" at the "heart" of the Establishment Clause, but this conclusion fails to confront historical examples of funding that date back to the time of the founding. To take but one famous example, both Houses of the First Congress elected chaplains..., and that Congress enacted legislation providing for an annual salary of $500 to be paid out of the Treasury.... Madison himself was a member of the committee that recommended the chaplain system in the House.... This same system of "direct public funding" of congressional chaplains has "continued without interruption ever since that early session of Congress."[99]
>
> The historical evidence of government support for religious entities through property tax exemption is also overwhelming. As the dissent concedes, property tax exemptions for religious bodies "have been in place for over 200 years without disruption of the interests represented by the Establishment Clause." In my view, the dissent's acceptance of this tradition puts to rest the notion that the Establishment Clause bars monetary aid to religious groups even when the aid is equally available to other groups. A tax exemption in many cases is economically and functionally indistinguishable from a direct money subsidy. In one instance, the government relieves religious entities (along with others) of a generally applicable tax; in the other, it relieves religious entities (along with others) of some or all of the burden of that tax by returning it in the form of a cash subsidy. Whether the benefit is provided at the front or back end of the taxation process, the financial aid to religious groups is undeniable. The analysis under the Establishment Clause must also be the same: "Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise."[100]

In this argument, Justice Thomas ventured out into the morass of taxation theory, which is not settled with regard to the point he was trying to make. He quoted *Walz v. Tax Commission* for the commonplace point that tax exemption of churches (and

99. *Marsh v. Chambers*, 463 U.S. 783,788 (1983), discussed at VD3.
100. Quoting *Walz v. Tax Commission*, 397 U.S. 664, 676-677 (1970).

other nonprofit entities) is of venerable provenance, but he neglected to quote the passage from *Walz* that negates the very point he was trying to make:

> Obviously a direct money subsidy [of churches] would be a relationship pregnant with involvement and, as with most government grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, *but that is not this case*.... The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.[101]

In the court's view in *Walz*, a tax exemption was *not* a subsidy, and was in fact operationally very different from a subsidy, as the court suggested and as is spelled out in greater detail in the discussion of taxation and exemption of churches later in this treatise.[102] Justice Thomas continued:

> Consistent application of the dissent's "no aid" principle would require that "`a church would not be protected by the police and fire departments, or have its public sidewalk kept in repair.'"[103] The dissent admits that "evenhandedness may become important to ensuring that religious interests are not inhibited." Surely the dissent must concede, however, that the same result should obtain whether the government provides the populace with fire protection by reimbursing the costs of smoke detectors and overhead sprinkler systems or by establishing a public fire department. If churches may benefit on equal terms with other groups in the latter program—that is, if a public fire department may extinguish fires at churches—then they may also benefit on equal terms in the former program.
>
> Though our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus: The Clause does not compel the exclusion of religious groups from government benefits that are generally available to a broad class of participants.[104] Under the dissent's view, however, the University of Virginia may provide neutral access to the University's own printing press, but it may not provide the same service when the press is owned by a third party. Not surprisingly, the dissent offers no logical justification for this conclusion, and none is evident in the text or original meaning of the First Amendment.
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> * * *
>
> Thus, history provides an answer for the constitutional question posed by this case, but it is not the one given by the dissent. The dissent identifies

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101 . *Walz* at 675.

102 . See VC6a.

103 . Quoting *Zobrest supra*, quoting *Widmar, supra*.

104 . Citing *Lamb's Chapel, supra*; *Zobrest, supra*; *Mergens, supra*; *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), discussed at VC6b(4); *Witters, supra*; *Mueller, supra*; *Widmar, supra*; and he could have cited *Walz, supra*.

> no evidence that the Framers intended to disable religious entities participating on neutral terms in evenhanded government programs. The evidence that does exist points in the opposite direction and provides ample support for today's decision.[105]

(5) Fracas in the Footnotes. Justice Souter responded in the margin of his opinion to some of Justice Thomas's criticisms, only a fraction of which is reproduced here.

> [1] Justice Thomas suggests that Madison would have approved of the assessment bill if only it had satisfied the principle of evenhandedness. Nowhere in the Remonstrance, however, did Madison advance the view that Virginia should be able to provide financial support for religion as part of a generally available subsidy program.... The fact that the bill, if passed, would have funded secular as well as religious instruction did nothing to soften Madison's opposition to it.
>
> Nor is it fair to argue that Madison opposed the bill only because it treated religious groups unequally. In various paragraphs of the Remonstrance, Madison did complain about the bill's peculiar burdens and exemptions, but to identify this factor as the sole point of Madison's opposition to the bill is unfaithful to the Remonstrance's text.... Indeed, Madison's Remonstrance did not argue for a bill distributing aid to all sects and religions on an equal basis, and the outgrowth of the Remonstrance and the defeat of the Virginia assessment was not such a bill; rather, it was the Virginia Bill for Establishing Religious Freedom, which... proscribed the use of tax dollars for religious purposes.
>
> In attempting to recast Madison's opposition as having principally been targeted against "governmental preferences for *particular* religious faiths," Justice Thomas wishes to wage a battle that was lost long ago, for "this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another,"[106]
>
> [2] Justice Thomas attempts to cast doubt on this accepted version of Establishment Clause history [that the Framers opposed government financial support of religion] by reference to historical facts that are largely inapposite. As I have said elsewhere, individual Acts of Congress, especially when they are few and far between, scarcely serve as an authoritative guide to the meaning of the religion clauses, for "like other politicians, [members of the early Congresses] could raise constitutional ideals one day and turn their backs on them the next. [For example,]... [t]en years after proposing the First Amendment, Congress passed the Alien and Sedition Acts, measures patently unconstitutional by modern standards. If the early Congress's political actions were determinative, and not merely relevant, we would have to gut our current First Amendment

105 . *Rosenberger, supra*, Thomas concurrence. References to the Northwest Ordinance, copyright protections and postage benefits not excluding religion omitted.

106 . *Abington v. Schempp*, 374 U.S. 203, 216 (1963), discussed at § C2b(2) above.

doctrine to make room for political censorship."[107] The legislation cited by Justice Thomas, including the Northwest Ordinance, is no more dispositive than the Alien and Sedition Acts in interpreting the First Amendment. Even less persuasive, then, are citations to constitutionally untested Acts [regarding copyrights and postage rates] dating from the mid-19th century, for without some rather innovative argument, they cannot be offered as providing an authoritative gloss on the Framers' intent.

Justice Thomas's references to Madison's actions as a legislator also provide little support for his cause. Justice Thomas seeks to draw a significant lesson out of the fact that, in seeking to disestablish the Anglican Church in Virginia in 1776, Madison did not inveigh against state funding for religious activities. That was not the task at hand, however.... That Madison did not speak in more expansive terms than necessary in 1776 was hardly surprising for, as it was, his proposal was defeated by the Virginia Convention as having gone too far.

Similarly, the invocation of Madison's tenure on the congressional committee that approved funding for legislative chaplains provides no support for the more general principles that run counter to settled Establishment Clause jurisprudence. As I have previously pointed out, Madison, upon retirement, "insisted that `it was not with my approbation, that the deviation from [the immunity of religion from civil jurisdiction] took place in Congs., when they appointed Chaplains, to be paid from the Natl. Treasury.'"[108] And when we turned our attention to deciding whether funding of legislative chaplains posed an establishment problem, we did not address the practice as one instance of a larger class of permissible government funding of religious activities. Instead, *Marsh v. Chambers, supra*, explicitly relied on the singular 200-year pedigree of legislative chaplains, noting that "[t]his unique history" justified carving out an exception for the specific practice in question. Given that the decision upholding the practice was expressly limited to its facts, then, it would stand the Establishment Clause on its head to extract from it a broad rule permitting the funding of religious activities.

* * *

7 ...Justice Thomas's assertion that "[a] tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy" assumes that the "natural" or "correct" tax base is so self-evident that any provision excusing a person or institution from taxes to which others are subjected must be a departure from the natural tax base rather than part of the definition of the tax base itself.... Even granting that Justice Thomas's assertion of equivalence is reasonable, he cannot and does not deny the fact that the Court in *Walz* explicitly distinguished tax

107 . *Lee v. Weisman*, 505 U.S. 577, 626 (1992), Souter, J., concurring, discussed at § C2d(11).
108 . Ibid., at 625, n.6.

> exemptions from direct money subsidies and rested its decision on that distinction.[109]

(6) Some Thoughts on *Rosenberger*. At some point the valid concept of "equal access" for religion to a public forum becomes something more and different. In an earlier case, the Supreme Court observed that a law passed by Congress allowing churches to hire their own members in preference to others did not violate the Establishment Clause.

> A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence.[110]

Justice O'Connor, concurring in that decision, warned against the open-ended quality of that rule. "Almost any government benefit to religion could be recharacterized as simply `allowing' a religion to better advance itself." That seems to be what happened in the case of *Wide Awake*. What it claimed—and received at the hand of the Supreme Court—was not just equal *access*, but equal *advancement*. The plaint of the students for their evangelistic publication was that they were being discriminated against if the University did not pay their printer's bills. To fail to be subsidized, it seems, was to be persecuted! In this facile claim, the difference between a "freedom" and a "right" was lost from sight. The government must get out of the way of those who seek to exercise their freedoms, as the University did by allowing the students who published *Wide Awake* free access to meeting rooms and computer terminals—as it did to other student groups. But that does not entitle the exerciser to have the government *finance* that exercise. That distinction was explained by the Supreme Court in 1980:

> [I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.... [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.[111]

Religion is not so feeble or resourceless that it must depend on government to sustain it, unless it is of the enervated, acculturated variety that is acceptable and compliant to government. *Wide Awake*, to judge by the excerpts quoted by Justice Souter, was certainly not—yet—of that ilk, but might soon become so under the prospective regime commanded by the court. Its content was of the most commendable kind, religiously speaking, but that did not entitle it to support by

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109. *Rosenberger, supra*, Souter dissent, notes 1,2,7.

110. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), discussed at IC4b (emphasis in original).

111. *Harris v. McRae*, 448 U.S. 297 (1980).

other than the voluntary contributions of those who shared its laudable convictions, and it would inevitably become increasingly captive to the wishes of its broader constituency when they began to pay its bills. "Who pays the piper calls the tune" is one of the ineluctable truisms of human affairs, and financial dependency is one of its clearest results. The result of that dependency is that the recipient becomes increasingly attached to its sources of support and incurs obligations that cannot readily be discharged when those sources are withdrawn.

Like a tree whose roots grow and expand to avail themselves of sources of water and nourishment, it is hard for human institutions too readily to redeploy themselves in search of new resources when the ones to which they are attached are cut off. Anyone who doubts this should give ear to the howls of outrage that are heard from communities across the land whose defense-related facilities are threatened with reduction or elimination by the federal base-closing commission, as though the jobs thus funded have become welfare entitlements to which those communities have a right irrespective of the nation's greatly diminished need for vast defense installations. The same dynamic is at work when churches and other religious undertakings become dependent upon governmental support.

The plaint of the students was that government today is involved in subsidizing and regulating everything, so to be left out of that system is to be condemned to obscurity and disadvantage in the culture-forming process. But the fact that government is getting into more areas of life does not nullify the Establishment Clause or the perils of corruption of religion by governmental influence against which James Madison warned in his "Memorial and Remonstrance." It only makes those perils more pervasive and difficult to guard against.

j. *Hsu v. Roslyn Union Free School District No. 3* (1996). Almost as a footnote to the foregoing was an "equal access" case dealing with a question left largely open by the Equal Access Act itself and the decisions discussed above. In September 1993, Emily Hsu (a senior) and her brother Timothy (a freshman) approached the principal of their high school with the request that they be allowed to form an after-school Christian Bible Club along the lines of the thirty-five extracurricular student clubs already functioning within the school. The principal consulted the district superintendent. The superintendent consulted the school board. Three months later the board held a hearing at which the Hsus and other students explained the purpose and form of their proposed organization. (The Hsus recall that at that board meeting one board member said the school officials did not want the club to meet, but that they were required by a new law [the Equal Access Act, presumably] to let them meet; another board member suggested that the board should stop accepting federal funds in order to be freed of the mandate of that law!) Several weeks later, the Hsus were asked to submit a written constitution for the club to be reviewed by the board. In January 1994 a written constitution was submitted, making clear—among other things—that the club was open to all students at the school, but that the officers of

the club must be "professed Christians either through baptism or confirmation." After numerous further meetings between the applying students and school officials, the school board had not yet reached a decision.

Emily Hsu had spent five months of her senior year trying to set up the club and had been repeatedly put off until her last year at school was more than half over. On February 16, 1994, she and her brother brought suit against the school district and its leaders under the Equal Access Act. On March 10, the school board announced that it would recognize the club if the students removed the provision limiting eligibility for officers to Christians on the ground that that limitation was contrary to the school's policy of nondiscrimination; all student clubs must be open to all students—even to the selection of their officers. The students refused to accept that stipulation and proceeded with their suit.

The federal district court held a hearing on the plaintiff's request for an injunction and issued a decision nine months later, on February 21, 1995, denying the request. Emily had long since graduated, but her brother was a sophomore, and the case was appealed on his behalf to the Second Circuit Court of Appeals, which issued a decision May 15, 1996, per Judge Dennis Jacobs, joined by Judge Fred I. Parker, with Judge Ellsworth Van Graafeiland concurring in part and dissenting in part.

The court chose to construe the issue as one of speech rights, broadly conceived.

> The Hsus claim that having Christian leaders necessarily shapes the content of the religious speech at their meetings, because the nature and quality of the speech at the meetings is dependent upon the religious commitment of the officers.

This was perhaps an overly rationalistic way to view the matter. It was not just their "commitment," but their *understanding* of the club's purpose and character. They had to know the "music" as well as the "words" of the Christian experience and community.

> We can accept this claim to the extent that there is an integral connection between the exclusionary leadership policy and the "religious speech" at their meetings....
>
> However,... we see that some of the activities [of the club] are not unambiguously "religious." Although meetings will consist mostly of prayers, "singspiration" (a form of musical prayer), Bible readings, and testimonies about the impact of Jesus Christ in the students' lives, the Club's constitution also lists guest speakers, skits, and games as possible activities at the meetings. There is no reason to limit the range of activities that may be undertaken by an after-school religious club that discriminates, so long as the activities are integral to a sectarian religious experience. But to the extent that such a group engages in social and community activities that are not integral to a sectarian religious experience, it is in danger of becoming merely a religious affinity group practicing social exclusion...

[T]here is no reason to believe... that the planning of a picnic or a service project must be done by a Christian in order to make it meaningful to Christian members.... [T]he planning of these non-school activities is the sole responsibility of the Activities Coordinator.... But an agnostic... might plan these activities as well as any other student. Similarly, it is very difficult to understand why the "religious speech" at the [club] meetings would be affected by having a non-Christian "Secretary," whose principal duties are "to accurately record the minutes of the meetings and be involved in the Club's financial accounting and reporting."

The Hsus claim that all officers, including the Secretary and Activities Coordinator, must be prepared to "open or close a meeting with prayer... or to lead a Bible study" and that this duty justifies the exclusion of non-Christians from those posts. But this assertion has no limiting principle. Anyone in attendance at a religious meeting may be called upon for a benediction or to "lead a Bible study."...

The leadership provision is defensible, however, as to the President, Vice President, and Music Coordinator of the Club, because their duties consist of leading Christian prayers and devotions and safeguarding the "spiritual content" of the meetings. Guaranteeing that these officers will be dedicated Christians assures that the Club's programs, in which any student is of course free to participate, will be imbued with certain qualities of commitment and spirituality....

We can conclude at this point... that when an after-school religious club excludes people of other religions from conducting its meetings, and when that choice is made to protect the expressive conduct of the meetings, a school's decision to deny recognition to the club because of the exclusion is a decision based on "the content of the speech at [the] meetings," within the meaning [and contrary to the provisions] of the Equal Access Act.

The District argues that "equal access" has not been denied. It claims that it is applying its nondiscrimination policy neutrally to all after-school clubs, that this equal treatment amounts to "equal access," and that recognition of... [this] club, with its discriminatory constitution, would accord [that] Club special treatment, a level of accommodation that the [Equal Access] Act does not demand.

The District's focus on the even application of its nondiscrimination rule misses the point. The Act mandates that students be given "equal access," not that the School's internal rules be administered uniformly. A rule against wearing hats in the school building, perfectly and consistently enforced, might deprive Jewish students of equal access to after-school facilities for shared religious observances....

The District argues that allowing the Hsus to discriminate on the basis of religion would grant them special rights: since the Chess Club may not limit its officers to Muslims, even if its founding members trust only Muslims to lead them.... But the District's argument ignores the facts that the [Hsu's] Club is a religious club and the Chess Club is not.... The [religious] club's leadership eligibility requirement on the basis of religion is therefore similar to a chess club's eligibility requirement based on chess

> [proficiency].... [O]ne of the principal ways in which many extracurricular clubs typically define themselves [is] by requiring that their leaders show a firm commitment to the club's cause.... [I]t would be sensible—and unremarkable in light of the clubs' particular purposes—for the Students Protecting the Environment Against Contamination Club to require that officers have a demonstrated commitment to conservation or recycling; for Students Against Drunk Driving to require that officers have taken the pledge....
>
> All of these "tests" of an officer's commitment to the group's cause allow the group to ensure that its agenda will be advanced at its meetings. One can expect that students in favor of contaminating the environment will lead different meetings than those against contamination.... Seen in this light, the discrimination practiced by the [religious] Club merely requires that its officers have a certain level of commitment to the program and purpose of the Club. Because that program and purpose are religious and sectarian, the requisite level of commitment and belief is quite naturally expressed in terms of religious belief. Equal treatment should mean that the [religious] Club enjoys the same latitude that other clubs may have in determining who is qualified to lead the Club.... [E]xempting the Club from the nondiscrimination policy simply puts the Club on the same footing as non-religious clubs who make distinctions among their members on the basis of commitment. In this situation, an exemption is a policy of neutrality.[112]

The court wrestled with the constitutional issues and concluded, applying the *Lemon* test, that recognition of the Bible club with its restriction of eligibility for the three top officers would not violate the Establishment Clause. Judge Van Graafeiland concurred in all but the court's holding that the Secretary and Activities Coordinator should be subject to the nondiscrimination requirement. He thought the club should be able to require Christians in *all* its offices: "I believe that the Club members are better qualified than are we to determine the duties and necessary qualities of all their leaders." That would certainly have been a better solution than solomonically "dividing the baby," with some officers on one side and others on the other, but it was at least a great improvement over the district court's decision against the students, and left the school board with only two options to preserve its religion-free zone—either to eliminate all non-curriculum-related after-school student clubs or forego federal funds for education.

The concluding comment just above evokes a consideration pertinent to much that has gone before in this volume. When substantial federal aid to education was initiated in the Elementary and Secondary Education Act of 1965, many public school boards—possibly including the one in Roslyn, New York—welcomed the

112 . *Hsu v. Roslyn*, 85 F.3d 839 (CA2 1996).

infusion of federal funds to ease the local tax burden, usually without any consideration of what "strings" might be "attached." There were no "strings" pertaining to recognition of student extracurricular religious clubs in 1965, but Congress added such a provision in 1984, thus unilaterally modifying the "contract" with local school boards. Of course, local boards were always free to terminate their use of such funds—at the price of a noticeable increase in local school taxes—not an attractive prospect for them.

An unavoidable feature of governmental funding is that the legislature can always change the terms on which it is available, often after the recipient school has come to be substantially dependent upon it, so that the option of abstinence is difficult, if not illusory. Yet such is the attraction of being able to tap into the ostensibly munificent reservoir of tax-raised resources that not only public but private schools hope to find a way to do so, thus laying themselves open to precisely the kind of problem that the Roslyn school board and others have encountered: that public money is "political" money and *always* comes "with strings attached"—many of which are not visible at the time of making the initial choice to sign up for it, and may not even be known to the parties making the decision—on either side—until years later, when it may be too late to revisit the original decision.

THE EQUAL ACCESS ACT

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20 USC 4071

TITLE 20--EDUCATION

CHAPTER 52--EDUCATION FOR ECONOMIC SECURITY

SUBCHAPTER VIII--EQUAL ACCESS

Short Title:
Section 801 of title VIII of Pub. L. 98-377 provided that: "This title [enacting this subchapter] may be cited as 'The Equal Access Act'."

Sec. 4071. Denial of equal access prohibited

(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) Construction of subchapter with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof--
(1) to influence the form or content of any prayer or other religious activity;
(2) to require any person to participate in prayer or other religious activity;
(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
(5) to sanction meetings that are otherwise unlawful;
(6) to limit the rights of groups of students which are not of a specified numerical size; or
(7) to abridge the constitutional rights of any person.

(e) Federal financial assistance to schools unaffected

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

(f) Authority of schools with respect to order, discipline, well-being, and attendance concerns

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

(Pub. L. 98-377, title VIII, Sec. 802, Aug. 11, 1984, 98 Stat. 1302.)