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Beyond Mergens: Balancing a Student's Free Speech Right Against the Establishment Clause in Public High School Equal Access Cases

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NOTES

BEYOND *MERGENS*: BALANCING A STUDENT'S FREE SPEECH RIGHT AGAINST THE ESTABLISHMENT CLAUSE IN PUBLIC HIGH SCHOOL EQUAL ACCESS CASES

On June 4, 1990, the United States Supreme Court decided *Board of Education v. Mergens*,[1] a case that forced the Court to evaluate the constitutionality of the Equal Access Act[2] and address the equal access dilemma in the public high school context for the first time.[3] The Court upheld the Equal Access Act[4] but could not agree on why the Act is constitutional.[5] The Justices' theoretical dissonance is understandable. Public high school equal access disputes pose an especially divisive constitutional question because they reveal a tension between two central first amendment values: the right of free speech and the establishment clause's separation of church and state.[6]

The facts of *Mergens* provide a timely illustration of the circumstances in which equal access claims arise. In *Mergens*, two public high school students sought to form a Christian Bible Club that would meet during the school's extracurricular club time.[7]

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1. 110 S. Ct. 2356 (1990).

2. 20 U.S.C. §§ 4071-4074 (1988).

3. In Bender v. Williamsport Area School District, 475 U.S. 534 (1986), the Court decided an equal access case on the issue of standing without reaching the constitutional questions.

4. *Mergens*, 110 S. Ct. at 2373, 2378.

5. The Justices aligned behind five different opinions. Justice O'Connor worded the Court's opinion and Chief Justice Rehnquist and Justices White, Blackmun, Scalia, and Kennedy joined. *Id.* at 2362-70. The final section of O'Connor's opinion garnered the support of only Rehnquist, White, and Blackmun. *Id.* at 2370-73 (O'Connor, J., plurality). Scalia joined Kennedy's concurrence. *Id.* at 2376-78 (Kennedy, J., concurring). Justice Marshall wrote a concurrence which Justice Brennan joined. *Id.* at 2378-83 (Marshall, J., concurring). Finally, Justice Stevens offered a lone dissent. *Id.* at 2383-93 (Stevens, J., dissenting).

6. Strossen, *A Constitutional Analysis of the Equal Access Act's Standards Governing Public School Student Religious Meetings*, 24 HARV. J. ON LEGIS. 117, 123 (1987).

7. *Mergens*, 110 S. Ct. at 2362. This Note addresses only the equal access situation in which student-initiated religious groups seek access to school facilities. Equal access disputes, however, cover a much broader range. *See generally* Gregoire v. Centennial School Dist., 907 F.2d 1366 (3d Cir.) (unconstitutional for school district to bar Christian

School policy required clubs to meet after school hours and to have faculty sponsors.[8] The high school allowed students to choose voluntarily from thirty different afterschool groups, including a chess club, a scuba-diving club, and various community service groups.[9] The high school administrators denied access to the student-initiated Bible Club because of establishment clause concerns.[10]

Although equal access cases place two compelling constitutional values in contest, some school administrators in similar situations have shown extreme favoritism for the establishment clause interest in an effort to avoid lawsuits.[11] For example, an administrator in Orlando, Florida, prevented an eight-year-old from distributing Christmas cards to her classmates; a Colorado school district forbade two or more students from sitting together if they were having a religious discussion; another school district prohibited students from praying in their car while in a school

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evangelical youth organization from using school auditorium when facility was rented regularly to other community groups), *cert. denied*, 59 U.S.L.W. 3276 (U.S. Oct. 9, 1990); Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676 (2d Cir. 1988) (church granted preliminary injunction after board of education refused to renew permit allowing church to use public school building during nonschool hours); Rivera v. East Otero School Dist. R-1, 721 F. Supp. 1189 (D. Colo. 1989) (official policy banning student dispersion of material that proselytizes particular religious or political belief was unconstitutional); Bacon v. Bradley-Bourbonnais High School Dist. No. 307, 707 F. Supp. 1005 (C.D. Ill. 1989) (school district policy barring plaintiff from distributing Bibles on sidewalk in front of high school violated first amendment rights); Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. No. 5, No. 89-0275-B, slip op. (D. Me. Dec. 11, 1989) (denied request for restraining order that would have required school to allow religious group to use the cafeteria for a religious celebration open to the public); Thompson v. Waynesboro Area School Dist., 673 F. Supp. 1379 (M.D. Pa. 1987) (school district policy restricting students' distribution of religious literature to area outside school violated students' freedom of speech).

This Note singles out the equal access claims of student-initiated religious clubs because such cases place the free speech and establishment clause interests in direct confrontation. The discussion of the public forum doctrine and the "impressionability rationale" in the final section of the Note, however, applies fully to other equal access scenarios. The proposed test will apply any time a limited public forum is found or the Court otherwise strictly scrutinizes a content-based speech restriction.

8. *Mergens*, 110 S. Ct. at 2362-63.

9. *Id.* at 2362. The thirty clubs included Band, Chess Club, Cheerleaders, Choir, Class Officers, Distributive Education, Speech & Debate, Drill Squad & Squires, Future Business Leaders of America, Future Medical Assistants, Interact, International Club, Latin Club, Math Club, Student Publications, Student Forum, Dramatics, Creative Writing Club, Photography Club, Orchestra, Outdoor Education, Swimming Timing Team, Student Advisory Board, Intramurals, Competitive Athletics, Zonta Club, Subsurfers, Welcome to Westside Club, Wrestling Auxiliary, and National Honor Society. *Id.* at 2373-76.

10. *Id.* at 2362-63.

11. Crewdson, *The Equal Access Act of 1984: Congressional and the Free Speech Limits of the Establishment Clause in Public High Schools*, 16 J. L. & EDUC. 167, 167-68 (1987).

parking lot; and an El Paso school district instructed a student to desist from praying publicly and telling other students about her beliefs.[12]

In response to such excessive applications of the establishment clause, Congress passed the Equal Access Act[13] in 1984 to "clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion which accrue to public school students who desire voluntarily to exercise those rights during extracurricular periods of the school day when the school permits extracurricular activities."[14] *Mergens* forced the Court to determine the Equal Access Act's constitutionality and provided an opportunity for the Court to engage in the difficult task of balancing fundamental constitutional interests. The Court made little of the opportunity.[15]

This Note examines the tension between the establishment clause and the student's right of free speech in the equal access context. First, the Note discusses the constitutional doctrines that evolved from the Court's past establishment clause and free speech cases involving public schools. Second, the Note considers the quintessential equal access case, *Widmar v. Vincent*;[16] the Equal Access Act; *Mergens*; and the different balancing approaches adopted by the courts of appeals and some Justices in *Mergens*. Third, the Note probes the inadequacies of the "impressionability rationale"[17] and urges its abandonment. Finally, the Note proposes an evidentiary test which provides a doctrinally sensitive method for balancing free speech rights against the establishment clause by blending the various standards that the Court used traditionally to measure those interests.

CONSTITUTIONAL VALUES AT ISSUE IN EQUAL ACCESS CASES

The Establishment Clause and Public High Schools

Pursuant to the first amendment, the Supreme Court has restricted repeatedly any attempt to use public high schools to

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12. *Id.*

13. 20 U.S.C. §§ 4071-4074 (1988). *See infra* notes 108-21 and accompanying text.

14. S. REP. NO. 357, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2306, 2349.

15. *See infra* notes 201-08 and accompanying text.

16. 454 U.S. 263 (1981).

17. See *infra* note 214 and accompanying text for a description of the impressionability rationale.

inculcate religious beliefs.[18] Justice Frankfurter articulated the establishment clause's import in *McCollum v. Board of Education*[19]:

> Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a "wall of separation," not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.[20]

The test set forth in *Lemon v. Kurtzman*[21] determines establishment clause violations. The *Lemon* test requires that the government policy in question have a secular purpose, that its "principle or primary effect must be one that neither advances nor inhibits religion," and that the policy must not foster excessive government entanglement with religion.[22]

In *McCollum*, the Court's only establishment clause case addressing a school access policy, the Court struck down a program through which religious teachers provided religious instruction in public school classrooms during the school day to students who voluntarily chose to attend.[23] As in other high school establishment clause cases, the Court in *McCollum* expressed a fear that high school students' impressionability would cause them to perceive government support for religion when religious expression occurred within school walls.[24]

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18. *See* Edwards v. Aguillard, 482 U.S. 578 (1987) (struck down statute requiring the teaching of creationism); Wallace v. Jaffree, 472 U.S. 38 (1985) (struck down moment of silence); Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (struck down the posting of the Ten Commandments on classroom wall); School Dist. v. Schempp, 374 U.S. 203 (1963) (struck down classroom Bible readings); Engel v. Vitale, 370 U.S. 421 (1962) (struck down reading of state-composed prayer); McCollum v. Board of Educ., 333 U.S. 203 (1948) (struck down release time for voluntary religious instruction).

19. 333 U.S. 203 (1948).

20. *Id.* at 231.

21. 403 U.S. 602, 612-13 (1971).

22. *Id.* Professor Strossen argues that establishment concerns focus on the public school's actions while performing its inculcative role. Strossen, *supra* note 6, at 147. She suggests the school's role when addressing equal-access-type decisions or policy is non-inculcative. *Id.*

23. *McCollum*, 333 U.S. at 209-12, 227-31 (Frankfurter, J., concurring). In Zorach v. Clauson, 343 U.S. 306, 311-15 (1952), however, the Court upheld a program that permitted students to leave school *during the school day* to attend religious instruction at another location. Importantly, neither *McCollum* nor *Zorach* involved student-initiated activities.

24. *McCollum*, 333 U.S. at 227-28 (Frankfurter, J., concurring). Justice Frankfurter

The Right to Free Speech in Public High Schools

In limited circumstances, the government may constitutionally restrict a citizen's right to free expression when an important public interest outweighs that right.[25] This section examines two independent strands of free speech jurisprudence which apply to public high school equal access disputes: the Court's decisions regarding non-establishment clause related student speech[26] and the public forum doctrine.[27]

Non-establishment Clause Restrictions on Student Speech

Throughout this century, the role of a high school's educational mission as a limitation on student speech grew in importance as America placed increased emphasis on public education's inculcative role.[28] Not only must public high schools instruct students in academic subjects, but they also must inculcate society's values and teach good citizenship.[29]

In pursuing the secondary part of their mission, public high schools have an interest in maintaining order and control.[30] This interest is inconsistent with a student's right to complete freedom of expression.[31] As Professor Levin notes:

> The dilemma is clear: Education necessarily involves the process of selection, but it also requires some degree of order within the institution to carry out the educational mission. On the other hand, if the educational institution is wholly unde-

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argued that even the voluntary nature of student attendance at the religious classes did not "eliminate the operation of influence by the school in matters sacred to conscience . . . . The law of imitation operates, and non-conformity is not an outstanding characteristic of children." *Id.* at 227 (Frankfurter, J., concurring).

25. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel or defamation of limited public figures); Miller v. California, 413 U.S. 15 (1973) (obscene material); Brandenburg v. Ohio, 395 U.S. 444 (1969) (advocacy of illegal action); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel or defamation of public officials); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

26. *See infra* notes 28-56 and accompanying text.

27. *See infra* notes 57-84 and accompanying text.

28. *See* Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1647-49 (1986).

29. *See, e.g.*, Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion) (community interest in developing respect for authority and traditional values); Ambach v. Norwick, 441 U.S. 68, 76 (1979) (preparation for citizenship in a democracy).

30. Levin, *supra* note 28, at 1649.

31. *Id.* at 1662.

> mocratic, students are likely to get mixed signals with regard to the democratic values needed to function as citizens in our society: The way in which school administrators operate schools may have a more powerful influence on students than the lessons in their civics textbooks.[32]

The Supreme Court sought to balance the public educators' interest in order against the students' free speech right in three primary cases: *Tinker v. Des Moines Independent Community School District*[33]; *Bethel School District v. Fraser*[34]; and *Hazelwood School District v. Kuhlmeier*.[35]

In *Tinker*, the Court determined that a school regulation prohibiting several students from wearing black armbands to protest the Vietnam War while on school premises violated their free speech rights.[36] The Court reasoned that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[37] Before a school could limit expression, the Court required the school to prove that "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.' "[38]

In *Bethel*, the Court ruled that a school district acted within its authority when it suspended a student for making an "offensively lewd and indecent speech" at a school assembly.[39] The majority stated, "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[40] In essence, *Bethel* lowered *Tinker*'s requirement of a specific finding of harm,[41] thus weakening students' free speech rights.[42]

Finally, in *Hazelwood*, the Court upheld a school administrator's decision to remove two pages from the student newspaper because an included article on divorce and pregnancy was "inap-

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32. *Id.* at 1649.
33. 393 U.S. 503 (1969).
34. 478 U.S. 675 (1986).
35. 484 U.S. 260 (1988).
36. *Tinker*, 393 U.S. at 512-14.
37. *Id.* at 508.
38. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
39. Bethel School Dist. v. Fraser, 478 U.S. 675, 685 (1986).
40. *Id.* at 681.
41. Strossen, *supra* note 6, at 131-32. *But see infra* notes 49-56 and accompanying text.
42. Strossen, *supra* note 6, at 132.

propriate" and risked identifying pregnant students.[43] The opinion stated, "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[44] The Court in *Hazelwood* relied on the public forum doctrine,[45] ruling that the school newspaper was not a public forum.[46] Rather, the school officials " 'reserve[d] the forum for its intended purpos[e].' "[47] This apparent application of the nonpublic forum to restrict high school speech rights is disturbing because it invites censorship by school officials.[48]

Bethel and *Hazelwood* appear to weaken *Tinker*'s "substantial disruption or material interference standard."[49] Specifically, *Hazelwood* requires only that the school's speech restrictions "reasonably relate[ ] to legitimate pedagogical concerns."[50] Equal access cases, however, are similar to the *Tinker* facts and distinguishable from those encountered in *Bethel* and *Hazelwood*.[51]

Unlike the equal access disputes that this Note contemplates,[52] *Hazelwood* and *Bethel* involved student speech inconsistent with the school's role of inculcating social values.[53] In other words, the school officials in *Hazelwood* and *Bethel* objected legitimately to the *content* of the speech. In equal access scenarios, however, the establishment clause precludes school officials from seeking to influence what religious views their students may hold or express. Equal access cases are similar to *Tinker* in this respect. Like *Tinker*'s symbolic speech,[54] access requests by student relig-

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43. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 262-63 (1988).

44. *Id.* at 273.

45. *See infra* notes 57-84 and accompanying text.

46. *Hazelwood*, 484 U.S. at 267-70.

47. *Id.* at 270 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).

48. *See infra* notes 73-77 and accompanying text.

49. Strossen, *supra* note 6, at 131-32.

50. *Hazelwood*, 484 U.S. at 273.

51. Professor Rodney A. Smolla, Arthur B. Hanson Professor of Law and Director of the Institute of Bill of Rights Law at the College of William and Mary, suggested the distinctions used to support this section of analysis in an advisory conversation during the Note-writing process.

52. Student-initiated religious groups seeking access to public high school facilities. *See supra* note 7.

53. In *Bethel*, a student government campaign speech used "an elaborate, graphic, and explicit sexual metaphor" in front of most of the student body. Bethel School Dist. v. Fraser, 478 U.S. 675, 678 (1986). *Hazelwood* involved the schoolwide publication of an article discussing and identifying pregnant students. *Hazelwood*, 484 U.S. at 262-63.

54. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 504 (1969).

ious clubs involve situations in which the school may hold no position regarding the content of the students' expression. Furthermore, the students' speech is "passive."[55] Noncurricular religious clubs do not actively address a schoolwide audience as did the communicators in *Hazelwood* and *Bethel.*

If the students do speak to a schoolwide audience and the expressed viewpoints actively contradict values the school is rightfully inculcating, these circumstances warrant *Hazelwood*'s "reasonably related to legitimate pedagogical concerns"[56] test. In the equal access situation, however, the speech is passive; the student group is not a schoolwide audience; and the school may not claim any interest in affirming or denying the speech content without violating the establishment clause. In equal access cases, *Tinker*'s requirement of a concrete injury is most appropriate.

The Public Forum Doctrine

The public forum doctrine concerns mostly the location, rather than the content, of the speech in question.[57] Under the doctrine's original premise, when the government opens up a certain forum—usually a physical location—to free speech, the government cannot limit speech on the basis of content unless a compelling state interest exists and the government's policy is the least restrictive means.[58]

The Supreme Court has delineated four types of forums: traditional public forums, designated public forums, nonpublic forums, and limited public forums.[59] Traditional public forums have a long tradition of public assembly and debate.[60] Commonly, such forums exist in town squares, street corners, or public parks that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[61] In a traditional public forum, courts strictly scrutinize any content-based exclusions.[62]

A designated public forum contemplates

55. *Id.* at 508.
56. *Hazelwood,* 484 U.S. at 273.
57. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).
58. *Id.* at 45.
59. *See id.* at 54-55.
60. Hague v. CIO, 307 U.S. 496, 515 (1939).
61. *Id.*
62. *Perry,* 460 U.S. at 45 (relying on Carey v. Brown, 447 U.S. 455 (1980)).

> public property which the State has opened for use by the public as a place for expressive activity . . . . Although a State is not required to indefinitely retain the open character of [this forum,] as long as it does so it is bound by the same standards as apply in a traditional public forum.[63]

In contrast, in a nonpublic forum, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[64] The State may distinguish between speakers on the basis of "subject matter and speaker identity."[65] Importantly, "[t]he touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves."[66]

The existence of a fourth forum—the limited public forum—is arguably unsettled. *Perry Education Association v. Perry Local Educators' Association*[67] suggests that a limited public forum "may be created for a limited purpose such as use by certain groups."[68] The opinion referenced *Widmar v. Vincent*,[69] an important equal access case, to illustrate a limited public forum.[70] The Court's 1985 decision in *Cornelius v. NAACP Legal Defense & Education Fund*,[71] however, "effectively eliminated the limited public forum as an analytically separate category."[72]

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63. *Id.* at 45-46.

64. *Id.* at 46 (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981)).

65. *Id.* at 49.

66. *Id.* "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." United States v. Kokinda, 110 S. Ct. 3115, 3122 (1990) (quoting Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 808 (1985)).

Commentators have criticized the nonpublic forum category because it permits ad hoc decisions that easily lead to censorship. *See, e.g.*, Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984); *see infra* notes 73-77 and accompanying text. In the Court's most recent public forum case, however, the Court reaffirmed the nonpublic forum's existence. *Kokinda*, 110 S. Ct. at 3121-22.

67. 460 U.S. 37 (1983).

68. *Id.* at 46 n.7.

69. 454 U.S. 263 (1981) (prohibiting a state university's content-based exclusion of religious speech from a forum generally open to students).

70. *Perry*, 460 U.S. at 46 n.7.

71. 473 U.S. 788 (1985).

72. Strossen, *supra* note 6, at 127. United States v. Kokinda, 110 S. Ct. 3115 (1990), the Court's most recent public forum case, also lends support to this proposition. The Court stated that *Perry* "announced a tripartite framework" for resolving public forum cases: the traditional public forum; the designated public forum; and the nonpublic forum. *Id.* at 3119-20. *Kokinda* never mentioned the limited public forum.

If the nonpublic forum subsumes the limited public forum, high school administrators will be free to limit access on the basis of "subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum."[73] Unlike limited public forum review, this reasonableness standard never requires the court to strictly scrutinize content-based discrimination. Although *Cornelius* recognized that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses,"[74] without strict scrutiny the courts rarely will be able to distinguish meaningfully content-based discrimination from viewpoint-based discrimination. Such a situation invites public school administrators to overextend the nonpublic forum doctrine with impunity[75] and thus precludes any religious group speech rights[76] other than those guaranteed by the Equal Access Act.[77]

The Supreme Court should avoid potential abuses of the nonpublic forum by rejecting the nonpublic forum in high school equal access cases and adopting *Widmar*'s limited public forum. *Widmar* required courts to strictly scrutinize content-based denials of access to limited public forums.[78] This approach is doctrinally consistent with current law. First, the various opinions in *Board of Education v. Mergens*[79] use *Widmar* as their analytical starting point.[80] In other words, the opinions in the only Supreme Court decision addressing high school equal access relied heavily on *Widmar* and the implications of *Widmar*'s limited public forum to high school access disputes.[81] Second, the only free speech

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73. *Cornelius*, 473 U.S. at 806 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983)).

74. *Id.*

75. Strossen, *supra* note 6, at 128.

76. Most equal access cases involve the speech rights of student *groups*. Although courts have recognized that speech rights do not disappear when individuals act as a group, one commentator suggested that group speech rights are inherently incompatible with the secondary school environment. Teitel, *Equal Access Policies*, 12 HASTINGS CONST. L.Q. 529, 580-81 (1985).

77. 20 U.S.C. §§ 4071-4074 (1988).

78. Widmar v. Vincent, 454 U.S. 263, 269-70 (1981); see *infra* notes 85-107 and accompanying text for a complete discussion of *Widmar*.

79. 110 S. Ct. 2356 (1990).

80. *See id.* at 2364; *id.* at 2370-71 (O'Connor, J., plurality); *id.* at 2376 (Kennedy, J., concurring); *id.* at 2378 (Marshall, J., concurring); *id.* at 2383-84 (Stevens, J., dissenting).

81. *Id.* at 2371 (O'Connor, J., plurality) ("We think the logic of *Widmar* applies with equal force to the Equal Access Act."); *id.* at 2376-78 (Kennedy, J., concurring) (*Widmar* alone should not determine the Equal Access Act's constitutionality); *id.* at 2378-82 (Marshall, J., concurring) (*Widmar*'s effect on high school access cases depends, in part, on factual comparisons between the forum in dispute and the forum at issue in *Widmar*); *id.* at 2383-86 (Stevens, J., dissenting) (because the Equal Access Act adopts *Widmar* entirely, the Court must rely exclusively on *Widmar* to interpret congressional intent).

decision finding that a nonpublic forum existed at a public high school, *Hazelwood School District v. Kuhlmeier*,[82] is distinguishable from the equal access situation. Unlike *Hazelwood*, the student speech that occurs when student groups seek access to school facilities is passive,[83] and, at least in the context of religious student groups, the school has no interest in either hindering or supporting the students' viewpoint.[84]

BALANCING THE COMPETING CONSTITUTIONAL VALUES

Widmar v. Vincent

Although *Board of Education v. Mergens*[85] was the Supreme Court's first equal access ruling addressing public high schools,[86] the Court in *Mergens* considered the constitutionality of only the Equal Access Act.[87] In 1981, however, the Court directly addressed the tension between free speech and the establishment clause in the context of public universities in *Widmar v. Vincent*.[88] The University of Missouri at Kansas City had opened its facilities to student-initiated, voluntary, nonreligious student groups.[89] An evangelical Christian student group used the school facilities to pray and worship for four years before the University changed its policy to exclude facility use for the purposes of worship and religious teaching.[90] The student group sued, and the Supreme Court required the University to grant the Christian group use of the facilities.[91]

Writing for the Court, Justice Powell found that the University created a limited public forum by making its facilities generally accessible to student groups.[92] Because the revised regulations[93] prohibiting use for religious purposes discriminated between groups on the basis of speech content, the University needed to

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82. 484 U.S. 260, 267-70 (1988).
83. *See supra* note 55 and accompanying text.
84. *See supra* notes 51-54 and accompanying text.
85. 110 S. Ct. 2356 (1990).
86. The Court previously faced, but chose not to address, the merits of a high school equal access case. Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986).
87. *Mergens*, 110 S. Ct. at 2370, 2373.
88. 454 U.S. 263, 269-70 (1981).
89. *Id.* at 265.
90. *Id.*
91. *Id.* at 277.
92. *Id.* at 267, 272.
93. *Id.* at 265 n.3.

show that a compelling state interest existed and that the University narrowly drew the regulations to pursue the compelling interest.[94] The Court acknowledged that an establishment clause violation constitutes a compelling state interest[95] but found that no violation occurred.[96]

Applying the *Lemon* test,[97] Justice Powell reasoned that only one prong of the three-pronged test was in dispute[98]: Would permitting religious groups' entry into the limited public forum have the primary effect of advancing religion?[99] Because more than 100 student groups could access the facilities, Powell reasoned that permitting the Christian group's access posed no danger of a reasonable perception that the state endorsed a particular religious expression.[100] Thus, "any religious benefits of an open forum at UMKC would be 'incidental.' "[101]

In supporting his argument, Powell suggested implicitly that the danger of state imprimatur which flows from granting religious groups access to limited public forums is greater for younger students: "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."[102] Although the statement is nebulously broad, the Court's observation suggested that *Widmar*'s resolution of the *Lemon* test's third prong is not blindly transferable to the high school situation.[103]

Finally, the presumptions inherent in the *Widmar* opinion are instructive. The Court assumed that "the interest of the University in complying with its constitutional obligations may be characterized as compelling."[104] Although the Court found no establishment clause violation, its assumption holds serious analytical consequences. If proof of an establishment clause violation

94. *Id.* at 269-70.

95. *Id.* at 271.

96. *Id.* at 270-75.

97. *See supra* notes 21-24 and accompanying text.

98. "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 nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion." *Widmar*, 454 U.S. at 271-72 (footnotes omitted).

99. *Id.* at 272.

100. *Id.* at 273-74, 274 n.14.

101. *Id.* at 274.

102. *Id.* at 274 n.14.

103. In addition, Powell's comment in footnote 14 does not, logically speaking, suggest an opposite conclusion in high school cases. Strossen, *supra* note 6, at 134.

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

automatically meets the "compelling state interest" requirement under free speech analysis, the Court implicitly places the establishment clause ahead of free speech concerns. In the equal access context, this paradigm permits public high school administrators to veto the access requests of religious student groups any time they see an establishment clause violation.[105]

As Powell recognized, the school must use the least restrictive means available to achieve a compelling state interest.[106] Thus, a school administrator must narrowly draw a policy to avoid the appearance of state endorsement of religion. In some equal access cases, however, courts overlooked this requirement.[107] As a result, the establishment clause preempted the free speech doctrines. In this manner, those courts undermined the important task of balancing students' free speech rights against the establishment clause.

The Special Case of Noncurricular Activity Periods

The Equal Access Act

The Equal Access Act of 1984[108] represented an unusually bipartisan effort[109] to "clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion which accrue to public school students who desire voluntarily to exercise those rights during extracurricular periods of the school day when the school permits extracurricular

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105. One court did not construe this aspect of the *Widmar* analysis broadly. The Court of Appeals for the Third Circuit recognized the problem in the *Widmar* statement and interpreted the statement narrowly:

> Although the Supreme Court has noted . . . that the Establishment Clause "may" provide a compelling state interest which would override free speech rights, [*Widmar*, 454 U.S. at 271], it clearly did not state that such supersession would be automatic whenever the two clauses conflict. Such a holding would place the Establishment Clause in a position of permanent supremacy over the free speech clause, a constitutional hierarchy which we do not think the Framers intended.

Bender v. Williamsport Area School Dist., 741 F.2d 538, 558 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986).

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

107. *See, e.g.*, Garnett v. Renton School Dist. No. 403, 874 F.2d 608 (9th Cir. 1989); Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676 (2d Cir. 1988); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986).

108. 20 U.S.C. §§ 4071-4074 (1988).

109. Crewdson, *supra* note 11, at 172.

activities."[110] Essentially, the Act sought to extend statutorily the *Widmar v. Vincent*[111] holding to public high school equal access disputes.[112]

The Act defines a noncurricular period designated for student groups and activities as a "limited open forum."[113] If such a forum exists in a public secondary school, the Act prohibits any school decision or policy that "[denies] equal access or a fair opportunity to, or discriminate[s] 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."[114]

The definitions of "noninstructional time" and "noncurriculum related" are essential to the Act's application. The Act defines "noninstructional time" as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."[115] This definition apparently prevents access for religious clubs during, for example, activity periods that occur within school hours.[116]

The Act, however, offers no explicit definition for "noncurriculum related" activities and groups.[117] If courts adopted a narrow definition, administrators would be free to deny access to groups they disfavor by construing their "curriculum" to contemplate all groups except groups they dislike.[118]

Opponents of the Equal Access Act were vocal from the beginning,[119] and since 1984, some states have cooperated only

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110. S. REP. NO. 357, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2348, 2349.

111. 454 U.S. 263 (1981).

112. Board of Educ. v. Mergens, 110 S. Ct. 2356, 2364 (1990); *see also* 130 CONG. REC. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin) (The Equal Access Act "extends a similar constitutional rule as enunciated by the Court in Widmar to secondary schools.").

113. 20 U.S.C. § 4071(b).

114. *Id.* § 4071(a).

115. *Id.* § 4072(4).

116. Strossen, *supra* note 6, at 161. The legislative history, however, does not unanimously support that reading of the Act. *Id.* at 161 n.174.

117. Section 4072(3) impliedly refers to noncurriculum related activities as "not directly related to the school curriculum." 20 U.S.C. § 4072(3). As Professor Strossen notes, "This language suggests that a school would become subject to the Act's requirements by granting access to a student group which was *indirectly* related to the school's curriculum." Strossen, *supra* note 6, at 161 (emphasis added). *But see infra* notes 122-27 and accompanying text.

118. Crewdson, *supra* note 11, at 183-84. *But see infra* notes 122-27 and accompanying text.

119. Wood, *Equal Access: A New Direction in American Public Education*, 27 J. CHURCH & ST. 5, 12 (1985). Congressman Gary Ackerman (D-N.Y.) offered this insight: "[The Act] looks like school prayer, tastes like school prayer, and smells like school prayer." *Id.*

nominally with the Act.[120] Congress published a definitional guide to provide clarification, but some state officials apparently have ignored the Act and have issued opinions concluding that the Act violates the establishment clause.[121]

Board of Education v. Mergens

In *Board of Education v. Mergens*,[122] the Supreme Court upheld the Equal Access Act,[123] addressed only the ambiguity surrounding "noncurriculum related," and defined that term.[124] Phrasing the opinion, Justice O'Connor stated:

> "[N]oncurriculum 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 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.[125]

O'Connor argued that this definition avoids the dangers of hinging the determination of what is "curriculum related" on "abstract educational goals."[126] Although the definition creates "a low threshold for triggering the Act's requirements,"[127] the Court insisted that the definition preserves school officials' traditional freedoms to determine what students will study in their courses[128] and to maintain the order and discipline necessary to meet educational objectives.[129]

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120. Crewdson, *supra* note 11, at 181-82.

121. *Id.*

122. 110 S. Ct. 2356 (1990).

123. Six Justices in *Mergens* concluded that the Equal Access Act clearly passed constitutional muster. *Id.* at 2373 (O'Connor, J., plurality); *id.* at 2376 (Kennedy, J., concurring).

124. *Id.* at 2365-70.

125. *Id.* at 2366.

126. *Id.* at 2369. "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." *Id.*

127. *Id.* at 2366.

128. *Id.* at 2367.

129. *Id.*

Mergens also upheld the Equal Access Act against an establishment clause challenge.[130] The Justices, however, disagreed as to why the Act did not violate the establishment clause.[131] O'Connor argued that *Widmar v. Vincent*[132] applies with equal force to high school equal access disputes governed by the Act.[133] The speech that the Act protected, like the speech in *Widmar*, was only "*private* speech endorsing religion."[134] Furthermore, the Act specifically limits teacher participation,[135] and "students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech."[136]

In contrast, Justice Kennedy argued that the Act avoided an establishment clause violation by providing only incidental benefits to religion and not coercing students to participate in religious endeavors.[137] Justice Marshall, however, argued that *Widmar*'s applicability and the Act's constitutionality depend on whether the forum in question, like that in *Widmar*, includes many controversial or ideological clubs, which better determines the access policy's practical effect on students' perceptions.[138]

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130. *Id.* at 2373 (O'Connor, J., plurality); *id.* at 2376 (Kennedy, J., concurring); *id.* at 2378 (Marshall, J., concurring).

131. Three opinions refused to strike down the Act as unconstitutional: O'Connor's approach garnered the support of Chief Justice Rehnquist and Justices White and Blackmun. *Id.* at 2370-73 (O'Connor, J., plurality). Justice Scalia joined Justice Kennedy's concurrence. *Id.* at 2376-78 (Kennedy, J., concurring). Justice Marshall also concurred and Justice Brennan joined his reasoning. *Id.* at 2378-83 (Marshall, J., concurring).

132. 454 U.S. 263 (1981).

133. *Mergens*, 110 S. Ct. at 2371 (O'Connor, J., plurality) ("We think the logic of *Widmar* applies with equal force to the Equal Access Act").

134. *Id.* at 2372 (O'Connor, J., plurality).

135. 20 U.S.C. § 4071(c)(2)-(3) (1988).

136. *Mergens*, 110 S. Ct at 2372-73 (O'Connor, J., plurality).

137. *Id.* at 2377 (Kennedy, J., concurring). Kennedy urged the two-question standard as an alternative to the traditional establishment clause focus on whether the government "endorses" religion:

> 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 or her own personal enrichment.

Id. at 2378.

138. *Id.* at 2379-82 (Marshall, J., concurring). Marshall would further require that the school take substantive steps to disassociate itself from religious student groups. *Id.* at 2382-83 (Marshall, J., concurring) ("The inclusion of the Christian Club in the type of forum presently established at Westside, without more, will not assure government neutrality toward religion.").

The Equal Access Act after Mergens

Even after *Mergens*, the Equal Access Act is a poor resolution of the free speech and establishment clause tension implicit in equal access disputes because it essentially vetoes the anti-establishment interest. By forcing the *Widmar* analysis[139] on the high school context, Congress ignores the establishment clause concerns which may arise in particular circumstances.[140] Surely context ought to have some effect, and five Justices in *Mergens* agreed that the Act, constitutional or not, fails to accommodate the important factual differences with *Widmar* that may occur in high school access disputes.[141]

In addition, definitional ambiguities continue to exist. One commentator argued, for example, that the Act's definitional ambiguities could feasibly result in the Act's application to junior high and elementary schools, where the anti-establishment interest is greatest.[142] Furthermore, the Act's definitional uncertainty causes unusually broad consequences to follow from normal administrative decisions.[143] These definitional problems have chilled activity periods because some school districts ended all noncurriculum-type activities in order to avoid the community discord that religious groups would likely cause.[144] The Court's definition of "noncurriculum related"[145] does little to remove this problem.[146]

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139. *See supra* notes 85-107 and accompanying text.

140. *See generally* Note, *The Equal Access Act: Is It A Solution or Part of the Problem?*, 8 GEORGE MASON L. REV. 353 (1986) (Act is unconstitutional).

141. *Mergens*, 110 S. Ct. at 2376 (Kennedy, J., concurring) (The student clubs recognized at Westside school are "a far cry" from the groups officially recognized in *Widmar*; "one of the consequences of the statute, as we now interpret it, is that clubs of a most controversial character might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind"); *id.* at 2380 (Marshall, J., concurring) ("[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"); *id.* at 2383-93 (Stevens, J., dissenting) (The Act adopts *Widmar* and the Court should compare to *Widmar*'s facts in interpreting what the law requires in particular circumstances).

142. Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1, 51 (1986).

143. For example, "[b]y drawing a dichotomy between the narrowly conceived category of 'noncurriculum related' clubs and all other clubs, the Act gives schools virtually an all-or-nothing choice concerning the subject matter limitations upon student clubs that will be permitted to meet in any limited open forum." Strossen, *supra* note 6, at 163-64.

144. Crewdson, *supra* note 11, at 183.

145. [A] student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the

In addition, *Mergens*' "noncurriculum related" definition may create as many problems as it solves. For instance, although the definition prevents administrators from using "abstract educational goals" to discriminate against certain groups,[147] those officials who do discriminate may exercise their authority to determine course content to accomplish the same result.[148] For example,

> [i]t would appear that the school could alter the "noncurriculum related" status of [the scuba diving club] 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.[149]

Thus, the Court's definition permits—indeed, even forces—those school officials who would discriminate through "definitional fiat"[150] to do so in a way that is less vulnerable to constitutional review.[151] Finally, the Equal Access Act, as currently written, invites certain types of speech, such as that of hate groups, that even many free speech advocates do not support.[152]

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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.

Mergens, 110 S. Ct. at 2366.

146. *Id.* at 2383-93 (Stevens, J., dissenting). Justice Stevens pointed out:

> 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 also 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.

Id. at 2391 (Stevens, J., dissenting).

147. *Id.* at 2391 (Stevens, J., dissenting).

148. *Id.* at 2387 (Stevens, J., dissenting).

149. *Id.* (citations omitted).

150. *Id.* at 2386 (Stevens, J., dissenting).

151. The Court stated clearly that it will respect school officials' decisions regarding what students will learn and how they will learn it. *Id.* at 2367.

152. If the "limited open forum" exists, then anyone may gain access. *Id.* at 2373 (O'Connor, J., plurality) ("Under the Act, a school with a limited open forum may not lawfully deny access to a Jewish students' club, a Young Democrats club, or a philosophy club devoted to the study of Nietzsche."); *id.* at 2393 (Stevens, J., dissenting) (if a public school permits noncontroversial "traditional extracurricular activities," it cannot then exclude controversial groups such as the Ku Klux Klan); *see also* Note, *The Equal Access*

Considering these inadequacies, Congress should modify the Equal Access Act. Currently, the Act, coupled with *Mergens*' multiple opinions, only confuses the balancing process that ought to occur in equal access cases. By emphasizing unconditionally the free speech interest, the Act prevents thoughtful consideration of legitimate establishment clause concerns. Importantly, legislative action or further judicial interpretation may modify the Act in the future as facts warrant.[153]

Approaches To Balancing The Competing Constitutional Interests

The United States Courts of Appeals

Five courts of appeals have dealt with the equal access claims of student-initiated groups in public high schools outside of the Equal Access Act context.[154] None of these courts found that the free speech interest outweighed the establishment clause concern, but they provide examples of different approaches to resolving equal access cases. The two earliest cases, *Brandon v. Board of Education*[155] and *Lubbock Civil Liberties Union v. Lubbock Independent School District*,[156] did not attempt to balance the competing constitutional values. Both cases involved disputes over the constitutional appropriateness of student religious groups meeting in school facilities before or after regular school hours.[157] The Second and Fifth Circuits decided that the danger of a "symbolic inference"[158] of government approval of a particular religious

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Act: A Haven for High School "Hate Groups"?, 13 HOFSTRA L. REV. 589, 613 (1985) (The Equal Access Act "has created, or greatly enhanced, the likelihood of a Nazi, KKK, or other 'hate group' meeting in a public secondary school.").

The Act inspires further criticisms. For example, the Act includes no explicit enforcement provision. Furthermore, potential federalism barriers in a court action exist and may render the Act unenforceable in some contexts. *See* Note, *Using Federal Funds to Dictate Local Policies: Student Religious Meetings Under the Equal Access Act*, 3 YALE L. & POL'Y REV. 187 (1984).

153. The Act contains a safety clause providing that if any part of the Act is ruled unconstitutional, the remaining provisions will not be affected. 20 U.S.C. § 4073 (1988). Any modification may therefore be achieved via judicial or legislative routes.

154. Garnett v. Renton School Dist. No. 403, 874 F.2d 608 (9th Cir. 1989); Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980).

155. 635 F.2d 971 (2d Cir. 1980).

156. 669 F.2d 1038 (5th Cir. 1982).

157. *Brandon*, 635 F.2d at 973; *Lubbock*, 669 F.2d at 1039.

158. The Court of Appeals for the Second Circuit explained: "To an impressionable

view constituted an advancement of religion in violation of the *Lemon* test.[159] Significantly, neither court recognized any student free speech interest because, in the courts' view, "a high school is not a 'public forum' where religious views can be freely aired."[160] At least one commentator observed that the *Brandon* and *Lubbock* decisions suggested "a categorical rule precluding concerted student religious expression in public schools."[161]

In 1984, the Third Circuit endeavored a serious balancing of free speech and anti-establishment interests in *Bender v. Williamsport Area School District*.[162] In *Bender*, the school denied permission to a student-initiated prayer club to meet during the high school's regularly scheduled activity period.[163] To qualify for access to the activity period, the school required the club to aid students' growth socially, physically, or intellectually.[164] The student prayer club was the first group ever denied admittance to the activity period.[165]

The court of appeals first addressed the students' free speech right.[166] Following the *Widmar* analysis, the court determined

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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." *Brandon*, 635 F.2d at 978; *Lubbock*, 669 F.2d at 1045 (quoting *Brandon*, 635 F.2d at 978). The opinion in *Brandon* hinges that conclusion on some rather bold speculation:

> 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. As Alexander Pope noted, "Tis Education forms the common mind,/Just as the twig is bent, the tree's inclin'd."

635 F.2d at 978 (citation omitted).

159. *Brandon*, 635 F.2d at 978-79; *Lubbock*, 669 F.2d at 1047.

160. *Brandon*, 635 F.2d at 980; *Lubbock*, 669 F.2d at 1048 (quoting *Brandon*, 635 F.2d at 980). Notably, the Second Circuit decided *Brandon* before Widmar v. Vincent, 454 U.S. 263 (1981), and thus did not incorporate *Widmar*'s application of the limited public forum to an educational setting. In *Lubbock*, however, the Fifth Circuit faced a claim by the school district that the district created a limited public forum when it allowed student groups to meet before or after school hours. 669 F.2d at 1048. The *Lubbock* opinion sidestepped the issue by stating that "[t]his public forum argument was, in fact, explicitly rejected in *Brandon*." *Id.* *Brandon*, of course, predated *Widmar*. As a post-*Brandon* Supreme Court holding, the Fifth Circuit should have discussed *Widmar* and its implications.

161. Strossen, *supra* note 6, at 135.

162. 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986).

163. *Id.* at 541.

164. *Id.* at 544 (citing the Affidavit of Wayne Newton, the school principal).

165. *Id.* at 543, 548.

166. *Id.* at 545-50.

that the activity period was a limited public forum.[167] Writing for the court, Judge Garth recognized that high schools were less likely than universities to create limited public forums because of the high schools' more circumscribed educational mission.[168] Nevertheless, a high school may create a limited public forum.[169]

Garth observed that the high school created a limited public forum by articulating access requirements for its activity period.[170] Because the student prayer club met the requirements of promoting the intellectual and social growth of students, the students' right to participate vested.[171] Once a school creates a limited public forum, exclusion of qualifying clubs must serve a compelling state interest and the school must narrowly draw its exclusion policy.[172]

Turning to the establishment clause issue, the court held that although the limited public forum had a valid secular purpose, the primary effect of including the religious group was the advancement of religion.[173] In reaching this conclusion, Garth focused on the high school students' relative immaturity when compared to the university students affected in *Widmar*.[174] He argued that high school students "would be less able to appreciate the fact that permission for [the prayer club] to meet would be granted out of a spirit of neutrality toward religion and not advancement."[175] The court cited compulsory attendance and the structured environment of high school as additional contributors to the "*danger* of communicating . . . state approval of religion."[176] Finally, the court reasoned that the required supervision of a teacher caused an excessive entanglement between the state and religion.[177]

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167. *Id.* at 547-49.
168. *Id.* at 548-49.
169. *Id.* at 548.
170. *Id.* at 548-49.
171. *Id.* at 549-50.
172. *Id.* at 550. The court later assessed the stature of the establishment clause to be a potentially "compelling state interest." *Id.* at 550-58. Importantly, however, the court never returned to the free speech analysis to ask whether the school used the least restrictive means. The absence of this important aspect of the public forum analysis prevented the court from giving adequate weight to the free speech interest when the court subsequently estimated the constitutional net benefit.
173. *Id.* at 551-55.
174. *Id.* at 552-53.
175. *Id.* at 552.
176. *Id.* at 555 (emphasis added).
177. *Id.* at 555-57.

After concluding that an establishment clause violation occurred and that a free speech right existed, the Third Circuit weighed the interests.[178] Garth began by stating that *Widmar*'s classification of anti-establishment goals as a compelling state interest did not automatically require that the establishment clause "override free speech rights."[179] He argued that both doctrines may need to bend in reasonably approaching the constitutional dilemma.[180] The court suggested a fact-specific balancing test to apply that principle:

> [T]he appropriate analysis requires weighing the competing interests protected by each constitutional provision, *given the specific facts of the case*, in order to determine under what circumstances the net benefit which accrues to one of these interests outweighs the net harm done to the other. Recognizing that, under these circumstances, some constitutional protections must unavoidably be abridged, we believe that our role is to maximize, as best as possible, the overall measure of the fundamental rights created by the Framers, by deciding which course of action will lead to the lesser deprivation of those rights. [181]

Garth's application of his net-benefit test arguably undershot the test's potential. In fact, the two arguments supporting the court's ultimate finding did very little "weighing" if any. Garth concluded that the application of the test to the *Bender* facts tipped the balance in favor of the school's anti-establishment policy.[182] The court grounded this conclusion on two observations. First, the opinion recounted that the students' speech right was not absolute; the right depended on the existence of the limited public forum, and school authorities could abolish or further limit that forum.[183] Emphasizing that fact, however, begged the ques-

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178. *Id.* at 557-60.

179. *Id.* at 558; *see supra* notes 104-07 and accompanying text.

180. Thus, while it is true that the Establishment Clause *might* provide a compelling state interest to restrain speech, it does not do so in every case. The parameters of the Establishment Clause may bend somewhat in order to accommodate another fundamental interest—free speech, just as the speech clause must, depending on the circumstances, accommodate the objectives of the Establishment Clause.

Bender v. Williamsport Area School Dist., 741 F.2d 538, 559 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986).

181. *Id.*

182. *Id.*

183. *Id.* at 559-60.

tion in favor of the establishment clause. If the school could limit the forum on the basis of speech content without constitutional review, the court did not need to reach the establishment clause issue: the school district could freely limit the students' speech right. Read literally, the court's observation allows any administrator to single out particular religious speech for exclusion from a new, more limited forum. Such a consequence does not constitute "balancing" in search of a constitutionally minded net benefit; rather, it suggests a method by which a public school administrator may limit free speech without constitutional review. *Widmar* sought to end this very evil.[184]

Second, the court asserted that "public schools have never been a forum for religious expression."[185] In other words, "[t]he 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."[186]

The court's attempt to distinguish the high school activity period from a traditional public forum is confusing. The students claimed that the activity period was a limited public forum; indeed, the court had already so held.[187] This contrast with a traditional public forum seems irrelevant and offers no "balancing" or "weighing" of constitutional concerns in search of a net benefit. Thus, although the Third Circuit created a "novel, open-ended balancing test,"[188] it failed to apply the test in an understandable manner.

In *Bell v. Little Axe Independent School District No. 70*,[189] decided a year after *Bender*, the Tenth Circuit faced an equal access situation involving a public elementary school.[190] A parent group sued the school district after an elementary school failed to cancel voluntary student religious meetings despite parents' anti-establishment concerns.[191] The court applied *Bender*'s "net benefit" test[192] and concluded that, considering the age and im-

184. Widmar v. Vincent, 454 U.S. 263, 273 (1981).

185. *Bender*, 741 F.2d at 560.

186. *Id.*

187. *Id.* at 550.

188. Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143, 156 (1985).

189. 766 F.2d 1391 (10th Cir. 1985).

190. *Id.* at 1396-98.

191. *Id.*

192. *Id.* at 1400-07; see *supra* notes 178-81 and accompanying text for an explanation of the "net-benefit" test.

pressionability of elementary school children, the establishment clause interest was especially compelling and thus outweighed the rights that flow from the creation of a limited public forum.[193]

Finally, in *Garnett v. Renton School District No. 403*,[194] the defendant school district initiated a "co-curricular" activity period.[195] The district's access criteria required that the clubs' purposes "be an extension of a specific program or course offering."[196] The Ninth Circuit, citing heavily from *Brandon v. Board of Education*,[197] reasoned that granting access to the religious student group would result in an establishment clause violation.[198] The violation would be unavoidable, the court stated, given the impressionability of students and the district's faculty supervision requirement.[199] Further, the court argued that the district's policy did not violate free speech rights because the policy did not create a limited public forum.[200]

The Mergens *Opinions*

Because *Board of Education v. Mergens*[201] addressed only the constitutionality of the Equal Access Act,[202] the Court established no precedent governing the resolution of equal access disputes that do not arise from a noncurricular activity period as defined by the Act. Two of the opinions, however, suggest possible resolutions for the broader range of high school equal access cases. Justice O'Connor's plurality opinion[203] and Justice Kennedy's concurrence[204] suggest that future establishment clause chal-

193. *Id.* at 1404, 1407. The court did conclude that the previous access of religious groups along with other groups created a limited public forum. *Id.* at 1402.

194. 874 F.2d 608 (9th Cir. 1989).

195. *Id.* at 609.

196. *Id.*

197. 635 F.2d 971 (2d Cir. 1980).

198. *Garnett*, 874 F.2d at 610-12.

199. *Id.* at 612.

200. *Id.* at 612-13. Because the activity period was open only to co-curricular clubs compatible with the school's educational mission, the court held that the Equal Access Act was inapplicable. *Id.* The Act requires access of student groups into activity periods only if the school allows other "noncurriculum related student groups" to participate. 20 U.S.C. § 4071(b) (1988).

201. 110 S. Ct. 2356 (1990).

202. *Id.* at 2370 ("[W]e need not decide—and therefore express no opinion on—whether the First Amendment requires the same result."); *id.* at 2373 (O'Connor, J., plurality) ("Because we hold that petitioners have violated the Act, we do not decide respondents' claims under the Free Speech and Free Exercise Clauses.").

203. *Id.* at 2370-73 (O'Connor, J., plurality).

204. *Id.* at 2376-78 (Kennedy, J., concurring).

lenges to equal access policies may fail more often than not as a matter of establishment clause doctrine.

If the Court refuses to find that an establishment clause violation exists, then no need will exist to balance the anti-establishment interest against free speech claims. For example, O'Connor's rejection of traditional legal notions about high school students' impressionability[205] vitiates the establishment clause analysis offered in the appellate decisions[206] addressing other equal access scenarios. Indeed, Kennedy rejected the "endorsement test" altogether and would recognize an establishment clause violation only if the equal access policy provided more than incidental benefits to religion and actually coerced students to participate in religious activities.[207] Although neither opinion instructs courts on how to balance the free speech and establishment clause interests if both manifest, they suggest that the Court will rarely recognize an establishment clause violation and, as a result, will avoid reaching the balancing issue in many cases.[208]

THE IMPRESSIONABILITY RATIONALE

Neither *Mergens* nor the equal access decisions of the courts of appeals[209] presented a unified approach to equal access disputes. The decisions were, however, similar in that most of the circuit opinions[210] applied what this Note entitles the "impression-

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205. *Id.* at 2371-73 (O'Connor, J., plurality).

206. *See* Garnett v. Renton School Dist. No. 403, 874 F.2d 608, 611 (9th Cir. 1989); Bender v. Williamsport Area School Dist., 741 F.2d 538, 551-55 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1045 (5th Cir. 1982); Brandon v. Board of Educ., 635 F.2d 971, 978 (2d Cir. 1980).

207. *Mergens*, 110 S. Ct. at 2377-78 (Kennedy, J., concurring).

208. The two opinions comprise the views of six Justices: Chief Justice Rehnquist and Justices White and Blackmun joined Justice O'Connor. *Id.* at 2370-73 (O'Connor, J., plurality). Justice Scalia joined Justice Kennedy's concurrence. *Id.* at 2376-78 (Kennedy, J., concurring). Significantly, these Justices upheld a statute that favors unconditionally the free speech interest over the risk of an establishment clause violation. *See supra* notes 139-41 and accompanying text.

209. The circuits evidenced two basic approaches. The first approach, seen in *Lubbock*, 669 F.2d 1038, and *Brandon*, 635 F.2d 971, suggested a "categorical rule precluding concerted student religious expression in public schools." Strossen, *supra* note 6, at 135. The second approach, seen in Bell v. Little Axe Independent School District No. 70, 766 F.2d 1391 (10th Cir. 1985), and *Bender*, 741 F.2d 538, employed "ad hoc analyses . . . . [f]ocusing upon the particular facts presented." Strossen, *supra* note 6, at 135.

210. *Garnett*, 874 F.2d at 611; *Bender*, 741 F.2d at 551-55; *Lubbock*, 669 F.2d at 1045; *Brandon*, 635 F.2d at 978.

ability rationale," and three opinions in *Mergens* integrated this rationale into their analysis.[211]

Both *Widmar v. Vincent*[212] and *Bender v. Williamsport Area School District*[213] applied the impressionability rationale, which contends that the relative impressionability of students in high schools distinguishes high schools from universities for equal access purposes. Professor Levin provides a concise description:

> The "special characteristics" of the elementary and secondary school environment include the fact that students, being compelled to attend school, are a captive audience, that the students are not yet fully developed intellectually or emotionally, that the educational enterprise has an obligation to protect the safety of all students and to provide them with an atmosphere conducive to education, and that the purpose of compulsory education is to inculcate the social, moral and political values of the community (however defined) and, in particular, to prepare the young to participate as citizens in our democratic society.[214]

In equal access cases, the impressionability rationale is inconsistent with case law concerning student rights[215] and is factually unsupported.[216] Furthermore, the rationale analytically hinders the process of balancing the competing anti-establishment and free speech values because it blends and thus muddles those values.[217]

Inconsistencies with Non-equal Access Student Rights

The glaring inconsistencies between impressionability assumptions regarding high school students affected by equal access cases and that which some courts assume about high school students involved in other controversies are obvious wherever the contrast is made. For example, if courts consider students mature enough to access contraceptives,[218] to read articles in the

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211. *Mergens*, 110 S. Ct. at 2371-73 (O'Connor, J., plurality); *id.* at 2380-82 (Marshall, J., concurring); *id.* at 2385 (Stevens, J., dissenting).

212. 454 U.S. 263, 274 n.14 (1981).

213. 741 F.2d at 551-55.

214. Levin, *supra* note 28, at 1678 (citation omitted).

215. *See infra* notes 218-27 and accompanying text.

216. *See infra* notes 228-37 and accompanying text.

217. *See infra* notes 238-47 and accompanying text.

218. Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).

school newspaper that map out sexual behavioral trends within the student body,[219] and to hold controversial political meetings on campus,[220] then courts cannot contend logically that students are too impressionable to understand that the allowance of certain groups within a forum does not mean the endorsement of the beliefs of those groups.

The United States Court of Appeals for the Fifth Circuit determined that a school barring students from distributing a newspaper with articles questioning the validity of drug laws compromised students' free speech rights;[221] yet, the same court later found the students' relative impressionability too tender to risk exposure to a student religious group meeting on school premises after class hours.[222] Judge Kaufman of the Second Circuit reasoned that students would not perceive a teacher's wearing of a black armband to protest Vietnam as the position of the school or state.[223] When he wrote the opinion in *Brandon v. Board of Education*,[224] however, Kaufman refused to risk the "symbolic inference" he imagined would arise if a religious club met during noninstructional time.[225] Indeed, some high school students may seek an abortion without parental consent[226] but may be unable to see through the mist of equal access policies and avoid the impression of state imprimatur.[227]

Factually Unsupported and Inherently Illogical

Additionally, the impressionability thesis is factually unsupported. After the Supreme Court declared in *Widmar v. Vin-*

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219. Gambino v. Fairfax City School Bd., 429 F. Supp. 731 (E.D. Va.), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977).

220. Dixon v. Beresh, 361 F. Supp. 253 (E.D. Mich. 1973).

221. Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 970-72 (5th Cir. 1972).

222. Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1045 (5th Cir. 1982); *see supra* notes 158-59 and accompanying text.

223. James v. Board of Educ., 461 F.2d 566, 574 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

224. 635 F.2d 971 (2d Cir. 1980).

225. *Id.* at 978. In Kaufman's words, this unproven risk was "too dangerous to permit." *Id.*

226. Bellotti v. Baird, 443 U.S. 622 (1979).

227. Board of Education v. Mergens, 110 S. Ct. 2356 (1990), evidenced this inconsistency as well. In *Mergens*, the school denied access for fear of an establishment misinterpretation by sensitive students. *Id.* at 2362-63. Yet, the same school administrators deemed students discerning enough to permit a teacher to show *The Omen* in class pursuant to a class discussion regarding Satanism. *MacNeil/Lehrer News Hour: Scripture in School* (PBS television broadcast, Jan. 9, 1990) (interview with Douglas Veith, counsel for Bridget Mergens).

cent[228] that university students "are less impressionable than younger students,"[229] the courts of appeals boldly interpreted that statement to establish high school students' prohibitive impressionability. The courts offered no other evidence and disregarded the fact that the *Widmar* statement, expressed in a footnote, did not address high schools specifically.[230]

Most scientific evidence suggests that exposure to a breadth of ideas poses little danger to high school students.[231] One expert suggested that traditional assumptions about the differences between students at high school and college ages are less reliable today.[232] In truth, the presumptions implicit in the impressionability rationale—that high school students are easily persuaded and college students are more discerning—run counter to both past studies and current developmental theories.[233]

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228. 454 U.S. 263 (1981).

229. *Id.* at 274 n.14.

230. Strossen, *supra* note 6, at 146.

231. Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499, 508-09 (1983).

232. S. PARKS, THE CRITICAL YEARS: THE YOUNG ADULT SEARCH FOR A FAITH TO LIVE BY 2 (1986).

233. Studies that William Perry conducted at Harvard's Bureau of Study Counsel, W. PERRY, FORMS OF INTELLECTUAL AND ETHICAL DEVELOPMENT IN THE COLLEGE YEARS 57-176 (1970), set out nine stages of cognitive development, which Professor Parks of Harvard's Divinity School applied to the issue of how young adults grow intellectually and spiritually. S. PARKS, *supra* note 232, at 44-53.

Prior to and at the time when students enter college, their form of cognition is authority-bound and dualistic. *Id.* at 44-47. Because these students ground their ultimate convictions in some authority, sometimes their religious heritage, they do not exercise true intellectual independence, although they are often very "opinionated." *Id.* Their concept of truth, tied into a particular symbol of authority, changes only when the authority is released. *Id.* The college experience, Parks explains, is usually the impetus for that release. *Id.* at 47-49.

Yet, the young adults who recognize the obvious limits of their authority-based beliefs do not suddenly gain "a critically aware sense of responsibility for self and world." *Id.* at 2. Rather, these university students experience an unqualified relativism as they realize that "all knowledge is conditioned by the particularity of the relation or context in which it is composed." *Id.* at 47.

In other words, the high school student is not likely to be "impressionable" in matters of faith and ultimate truth because they are tied to a "felt relationship to an ethos of assumed Authority." *Id.* at 55. Professor Parks emphasizes that this level of cognitive development may characterize some persons "throughout the whole of biological adulthood . . . . [D]evelopment of cognition beyond this Authority-bound form of knowing does not inevitably occur." *Id.* at 46. University students, in contrast, have not fully matured intellectually either, but the form of cognition for many college students is unqualified relativism. *Id.* at 47.

These observations illustrate the misguided simplicity of the courts' assumptions regarding cognitive development of high school students. Furthermore, Professor Parks' analysis suggests that one cannot generalize regarding human intellectual and religious development on the basis of age or school grade.

Even assuming that high school students are more impressionable than university students, high school students will not necessarily misunderstand a school's neutral position on equal access.[234] Indeed, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated."[235] Furthermore, if students are such bold speculators that they will conclude that an open forum constituted the school's endorsement of religion, then students may make the opposite inference, that the school seeks to inhibit religion, if the school restricts access.[236] Finally, if students are such sensitive recipients of information that they draw broad conclusions from an open forum, then they will surely understand a clear disclaimer by the school, written in plain English.[237]

Muddling Constitutional Values and Standards

Regardless of the use of a disclaimer, however, the continued application of the impressionability thesis is highly undesirable from a doctrinal standpoint: the rationale muddles equal access deliberation because it mixes the anti-establishment and social inculcation interests of the school without adjusting the evidentiary burdens.

The establishment clause interest flows from the first amendment and justifies a school's avoidance of policies appearing to advance one religious view over another.[238] In establishment clause cases, evidence of a danger that students will perceive a state imprimatur justifies finding an establishment clause violation.[239] For example, in *Brandon v. Board of Education*,[240] the Second Circuit claimed an establishment clause violation because

234. Strossen, *supra* note 188, at 162-63.

235. *Mergens*, 110 S. Ct. at 2372 (O'Connor, J., plurality). *But see id.* at 2382 (Marshall, J., concurring).

236. *Id.* at 2371 ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion"); *see also* Strossen, *supra* note 6, at 146 ("If students are inherently bound to perceive a school's equal treatment of student religious groups as conveying its approval of religion, it would logically follow that students would also be likely to perceive the school's unequal treatment of student religious groups as conveying its disapproval of religion.").

237. *Mergens*, 110 S. Ct. at 2372-73 (O'Connor, J., plurality). Often a disclaimer or explanatory statement will be the least restrictive means available in pursuing the state's compelling anti-establishment interest.

238. Lemon v. Kurtzman, 403 U.S. 602 (1971); *see supra* notes 18-24 and accompanying text.

239. Strossen, *supra* note 6, at 124-25, 125 n.33.

240. 635 F.2d 971 (2d Cir. 1980).

"[t]o 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."[241] A foundation as nebulous as a fear of "symbolic inferences," therefore, may justify establishment clause violations.[242]

By contrast, the school's inculcation interest flows from the line of cases defining students' free speech rights.[243] The high school has an interest in inculcating social values, such as teaching good behavior and good citizenship.[244] This role justifies the restriction of student speech when the school proves that the speech in question will effect a concrete injury to the school's inculcative role. As the Supreme Court recognized in *Tinker v. Des Moines Independent Community School District*,[245] an "*undifferentiated fear or apprehension* of disturbance is not enough to overcome the right to freedom of expression."[246] Rather, school officials must show that "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.' "[247]

Considering the inculcation and anti-establishment interests together, as they are in the impressionability rationale, their evidentiary standards collide. If a school administrator restricts a student's free speech right, he or she may not base that action on a hunch or fear of certain consequences; the official must establish a "material and substantial" harm.[248] Through the impressionability thesis, however, that same administrator may use an anti-establishment purpose to circumvent students' free speech rights by discriminating on the basis of content without specifically finding a material harm. As an evidentiary factor in equal

241. *Id.* at 978 (emphasis added).

242. Significantly, courts in equal access cases use the inculcative function of schools, including mandatory attendance, to prove the existence of "symbolic inferences." The inculcative function, however, is a policy interest related to the school's educational mission, not a description of student development or sensitivities. *See infra* notes 243-44 and accompanying text.

243. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel School Dist. v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). As previously noted, although *Bethel* and *Hazelwood* weaken *Tinker* in the purely free speech arena, they do not overrule *Tinker* and are distinguishable in the equal access context. *See supra* notes 49-56 and accompanying text.

244. *See supra* notes 28-30 and accompanying text.

245. 393 U.S. 503 (1969).

246. *Id.* at 508 (emphasis added).

247. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

248. *Id.*

access cases, the impressionability rationale subtly preempts the student free speech case law and frustrates any serious attempt to balance the competing constitutional values.[249]

In conclusion, courts should cease to rely on the impressionability thesis and should acknowledge that the distinction between high school students and college students is not as dramatic as formerly construed. Discarding the impressionability rationale, however, does not solve the problem of properly balancing the anti-establishment and free speech interests when determining whether an establishment clause violation constitutes a compelling state interest. Courts should not use rejection of the impressionability rationale as an excuse to ignore establishment clause concerns.[250] Yet, when both establishment clause and free speech interests are manifest, courts must somehow balance them. This Note suggests an evidentiary test to fill the analytical void.

BLENDING THE ESTABLISHMENT CLAUSE AND FREE SPEECH STANDARDS: A PROPOSED TEST

The proposed test focuses on the evidentiary burdens that distinguish establishment clause doctrine from that governing the restriction of student speech rights. The test seeks to raise the establishment clause evidentiary standard in equal access cases in order to more realistically determine whether a compelling state interest exists. When a court deciding an equal access dispute finds both a limited public forum and an establishment clause violation, it should reapproach the establishment clause issue using the following test.

First, the court should ask whether a *substantial likelihood* exists that students will interpret the access grant to communicate government endorsement of a particular religious view. This element of the test focuses on the student body as a broad group, as does the analysis in most findings of establishment clause

249. Professor Strossen suggests that establishment clause interests should not apply to equal access policy decisions because the school, in making such policy decisions, would be acting in its noninculcative role. Strossen, *supra* note 6, at 147. High schools serve a "dual role: not only to inculcate the majoritarian views and values deemed necessary for meaningful citizenship, but also to provide a 'marketplace of ideas,' stimulating free individual inquiry." *Id.* (citing Board of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion)). Under Professor Strossen's argument, even the misuse of the inculcation interest would not be persuasive.

250. *See supra* notes 139-41, 203, 205-06, 208 and accompanying text.

violation,[251] but this element raises the traditional establishment clause evidentiary standard to require a substantial likelihood that students will read the access to mean a government imprimatur. Courts should interpret substantial likelihood to require more than a mere fear of a potential pro-establishment reading by students, but less than a preponderance of the evidence.

Second, if the school permitted access by student religious groups, the court should ask whether *specific evidence of actual harm to students* exists. This part of the test satisfies *Tinker*'s concern that a school show a "material and substantial" injury before restricting student speech.[252] Furthermore, because this prong requires proof that at least one person took offense or misread the school's neutrality, it further ensures that the school actually met the substantial likelihood standard.

This test requires affirmative answers to both questions, assuming the second question is applicable, if the establishment clause is to outweigh free speech interests. If the anti-establishment concern meets the first two prongs of this test and is thus a compelling interest, the court should ask the final question: Is the policy that denies access the *least restrictive means* available? This third prong ensures completion of the two-stepped strict scrutiny applicable under the limited public forum doctrine.[253]

Courts should concentrate primarily on the schoolwide impact of the equal access in dispute. In other words, specific instances of student misperception ought to validate, if possible, the finding that a substantial likelihood of a schoolwide student perception of state religious partisanship exists. Specific instances do not prove, however, the existence of a substantial likelihood of a schoolwide pro-establishment reading.[254]

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251. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (struck down statute requiring the teaching of creationism); Wallace v. Jaffree, 472 U.S. 38 (1985) (struck down moment of silence); Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (struck down the posting of the Ten Commandments on classroom wall); School Dist. v. Schempp, 374 U.S. 203 (1963) (struck down classroom Bible readings); Engel v. Vitale, 370 U.S. 421 (1962) (struck down reading of state-composed prayer); McCollum v. Board of Educ., 333 U.S. 203 (1948) (struck down release time for voluntary religious instruction).

252. *Tinker*, 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

253. *See supra* notes 92-94 and accompanying text.

254. This qualification precludes the possibility of a "heckler's veto." Although the heckler's veto is possible under the Equal Access Act, Crewdson, *supra* note 11, at 181, courts should avoid such a veto in equal access cases that the Act does not cover and to which this test potentially applies.

The proposed test's three principal advantages link directly to the doctrinal weaknesses that this Note criticizes.[255] First, the test facilitates a more realistic balancing of the competing constitutional values by replacing a presumed condition—the impressionability rationale—with a concrete evidentiary standard.[256] Second, the test moves the equal access case law towards increased consistency with other student rights decisions by presuming the intelligence of students instead of relative immaturity.[257] As a matter of analytic coherence, this second advantage ensures the importance of addressing the limited public forum doctrine's least restrictive means requirement.[258] A presumption that students enjoy reasonable cognitive abilities recognizes the possibility of a reasonable disclaimer or explanatory statement by the school.[259] Finally, this evidentiary standard will encourage high schools to expand the right of religious students to free expression on religious topics, although such expression will not be as protected as secular speech in the equal access context.

CONCLUSION

Equal access disputes present free speech and the establishment clause, two compelling first amendment interests, in direct tension. Because both interests represent fundamental constitutional values grounded in our national conscience, the equal access necessity of favoring one over the other should prompt unusual care by the courts.

Regrettably, the Equal Access Act precludes detailed weighing, rather than encouraging it. The Equal Access Act, however, does not govern most high school access scenarios. Unfortunately, the

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255. The test's value and applicability depend on a court's agreement with the analysis set out above. Specifically, a court must agree with three conclusions underlying the test. First, *Tinker*'s substantial injury and material interference standard applies to equal access cases more appropriately than the standards flowing from *Bethel* and *Hazelwood*. *See supra* notes 49-56 and accompanying text. Second, as a matter of public forum law, courts should apply *Widmar*'s limited public forum to high school equal access cases and, thus, strictly scrutinize content-based access denials. *See supra* notes 67-84 and accompanying text. Third, the impressionability rationale is an unrealistic and illogical judicial assumption in the 1990's, and the courts should not rely on it. *See supra* notes 209-250 and accompanying text.

256. *See supra* notes 209-50 and accompanying text.

257. *See supra* notes 218-27 and accompanying text.

258. *See* Widmar v. Vincent, 454 U.S. 263, 270 (1981).

259. *See* Strossen, *supra* note 6, at 144.

Court did not address the larger issue or offer a clear precedent in *Mergens*.

In many equal access cases, confusion over the current state of public forum law invites unrestrained censorship by school administrators. The Supreme Court should preserve the limited public forum because it provides a useful method of approaching the free speech interest in equal access disputes. The limited public forum will require a school official who restricts students from meeting on campus facilities to rely on a compelling state interest pursued through the least restrictive means available. America's students, who learn of their free speech heritage during high school, deserve no less.

Finally, the courts should abandon their use of the highly manipulable and illogical impressionability rationale which invites judges to shortcut the essential constitutional balancing in equal access cases. Instead, the courts should adopt this Note's proposed test.

A court should apply the proposed test in equal access cases if it concludes that an establishment clause violation exists and that the students' free speech rights have vested. The test reapproaches the establishment clause evaluation with a heightened standard that affirms a schoolwide focus while ensuring that the predicted imprimatur is grounded in the real-world experience of at least some students. If the test is met, the establishment concern will outweigh the free speech interest, assuming that the school's policy constitutes the least restrictive means to avoid the appearance of religious partisanship.

This test represents a doctrinally sensitive compromise between free speech and the establishment clause in the public high school equal access situation. Its adoption will move current jurisprudence towards a more precise and candid engagement of this "constitutional conflict of the highest order."[260]

D. Jarrett Arp

260. Bender v. Williamsport Area School Dist., 741 F.2d 538, 557 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986).