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Constitutional Law - The Equal Access Act Passes the Test - Even Though Leniently Graded - Board of Education of Westside Community Schools v. Mergens

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CONSTITUTIONAL LAW—The Equal Access Act Passes the Test—Even Though Leniently Graded. *Board of Education of Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990).

In January 1985, Bridget Mergens, a Westside High School student, requested permission from her school principal to form a religious fellowship club.[1] The proposed club was designed to be identical in its formation, privileges and obligations to all other Westside student groups,[2] but a faculty sponsor would not be required.[3] The club's purpose was to permit students to read and discuss the Bible, have fellowship, and pray together. Regardless of religious affiliation, all students could attend and membership would be voluntary.[4]

Westside High School students could join, on a voluntary basis, various student groups that met before or after school on school premises.[5] Such groups were organized by students, because Westside had no written school board policy governing formation of student clubs.[6] Administrators accepted or rejected proposed groups based on whether such clubs were consistent with the school district's "Mission and Goals."[7]

Westside's principal, Dr. James Findley, denied Mergens' request for permission to form a Christian club.[8] The school administration based its decision on a school policy that required a faculty sponsor for all student clubs, a requirement the administrators claimed the

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1. Board of Educ. of Westside Schools v. Mergens, 110 S. Ct. 2356, 2362 (1990).

2. *Id.* When this case was being heard, all Westside groups participated in the annual Club Fair and had access to the school's bulletin boards, public address system, the school newspaper, and the yearbook. Brief of Petitioners at 9, Board of Educ. of Westside Community Schools v. Mergens, 110 S. Ct. 2356 (1990) (No. 88-1597) [hereinafter Brief for Petitioners].

3. *Mergens*, 110 S. Ct. at 2362.

4. *Id.*

5. *Id.* There were approximately thirty recognized clubs available for students at Westside High School. They included Band, Chess Club, Speech & Debate, Interact and Zonta Clubs (volunteer organizations), and Competitive Athletics. *Id.* at 2373-76.

6. *Id.* at 2362. School Board Policy 5610, "Student Clubs and Organizations," recognized student groups as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." *Id.* (citing Joint Appendix at 488).

7. *Id.* "Mission and Goals" of Westside High School expressed the district's "commitment to teaching academic, physical, civic, and personal skills and values." *Id.* (citing Joint Appendix at 473-78).

8. Brief for the United States at 4, Board of Educ. of Westside Community Schools v. Mergens, 110 S. Ct. 2356 (1990) (No. 88-1597) [hereinafter Brief for United States]. Mergens then presented her request to Dr. Findley and Dr. James Tangdall, Associate Superintendent of Schools. These two school administrators discussed the request with Superintendent Kenneth Hansen and all three agreed that the request should be denied. Brief for Respondents at 4, Board of Educ. of Westside Community Schools v. Mergens, 110 S. Ct. 2356 (1990) (No. 88-1597) [hereinafter Brief for Respondents].

proposed club could not meet.[9] Furthermore, the school officials believed that the proposed club would violate the establishment clause of the first amendment.[10] Mergens appealed this denial to the Westside Community School Board of Education, which unanimously upheld the administrative decision.[11]

Respondents[12] brought suit in the United States District Court for the District of Nebraska.[13] They alleged that Westside School officials and the Westside School Board had violated the Equal Access Act.[14] This Act prohibits public secondary schools that receive federal funds, and that maintain a limited open forum,[15] from denying equal access to any student group on the basis of the content of speech at such group meetings.[16] Petitioners[17] denied that the Equal Access Act

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9. *Mergens*, 110 S. Ct. at 2363. Petitioners asserted that the proposed club would be required to have school sponsorship, meaning that school personnel would play a role in directing the activities of the group. Petitioners claimed that this would excessively entangle the government in surveillance of religion, which is forbidden by the establishment clause. *Id.*

10. *Id.* "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST., amend. I, § 1.

11. Brief for Respondents, *supra* note 8, at 5.

12. Respondents included Bridget Mergens and fellow students through their parents. *Mergens*, 110 S. Ct. at 2363.

13. *Id.*

14. *Id.*; *see also* Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988). Respondents also alleged that they had been denied their first and fourteenth amendment rights to freedom of speech, association, and the free exercise of religion. *Mergens*, 110 S. Ct. at 2363.

15. "A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." Equal Access Act, 20 U.S.C. § 4071(b) (1988).

16. Equal Access Act, 20 U.S.C. §§ 4071-4072 (1988).

> § 4071. Denial of equal access prohibited
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> (a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited
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> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
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> (b) "Limited open forum" defined
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> A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.
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> (c) Fair opportunity criteria
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> Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—
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> (1) the meeting is voluntary and student-initiated;
> (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
> (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
> (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

applied to Westside High School and, alternatively, argued that if the Act did apply, it violated the establishment clause of the first amendment.[18]

The district court entered judgment for the Petitioners, holding that the Act was not applicable to Westside High School because the school offered only curriculum-related student clubs.[19] The United States Court of Appeals for the Eighth Circuit reversed and held that the Equal Access Act applied to Westside's activity program.[20] Noting that the Act's language parallels the United States Supreme Court's decision in *Widmar v. Vincent*,[21] the Eighth Circuit upheld the constitutionality of the Act. On appeal, the United States Supreme Court affirmed and concluded that the Equal Access Act does not contravene the establishment clause of the first amendment.[22] The Court thus resolved the split of authority that had developed from several lower federal court decisions.[23]

This casenote discusses the strength of the Supreme Court's holding in light of its fragmented decision. It analyzes the Court's establishment clause review standard and compares that to the test used by

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

§ 4072. Definitions

As used in this subchapter-
(1) The term "secondary school" means a public school which provides secondary education as determined by State law.
(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.
(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.
(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

17. Petitioners were the Board of Education of Westside Community Schools (District 66); Wayne W. Meier, Westside School Board President; James E. Findley, Westside High School Principal; Kenneth K. Hansen, Westside Community Schools Superintendent; and James A. Tangdall, Westside Community Schools Assistant Superintendent. *Mergens*, 110 S. Ct. at 2362.

18. *Id.* at 2363.

19. Brief for United States, *supra* note 8, at 7. The district court therefore did not address the constitutionality of the Equal Access Act. *Id.*

20. *Mergens*, 110 S. Ct. at 2363. The Eighth Circuit found that the district court erred in determining that all of Westside's student groups were curriculum-related. *Id.*

21. Mergens v. Board of Educ. of Westside Community Schools, 867 F.2d 1076, 1080 (8th Cir. 1989), *aff'd*, 110 S. Ct. 2356 (1990) (citing Widmar v. Vincent, 454 U.S. 263, 277 (1981)). The Court in *Widmar* found that "[h]aving created a forum generally open to student groups, the University [sought] to enforce a content-based exclusion of religious speech. Its exclusionary policy violated the fundamental principle that a state regulation of speech should be content-neutral, and the University [was] unable to justify this violation under applicable constitutional standards." *Widmar*, 454 U.S. at 277.

22. *Mergens*, 110 S. Ct. at 2373.

23. *See infra* notes 51-58 and accompanying text.

several federal circuit courts. Finally, this casenote commends the Court for achieving a proper result, but suggests that the plurality could have been more rigorous in its application of the sound establishment clause test set forth in *Lemon v. Kurtzman*.[24]

BACKGROUND

For many years courts have struggled with the controversial issue of whether students can constitutionally meet on school premises for religious purposes. Recent history shows that courts have continued in their attempt to decide what interaction between government and religion is permissible. In *Lemon*, a Rhode Island statute providing state aid to church-related schools was challenged as violating the establishment clause.[25] On appeal, the United States Supreme Court formulated a three-part test for analyzing establishment clause claims: first, the government policy must have a secular legislative purpose;[26] second, its principal effect must not advance or inhibit religion;[27] and finally, the policy must not induce excessive government entanglement with religion.[28] A policy that could meet each of the three requirements of the *Lemon* test would pass establishment clause scrutiny.

During the 1980's, courts began to apply this test to student religious activities in public schools. In *Brandon v. Guiderland Board of Education*, the Second Circuit used the *Lemon* test in reviewing a student challenge to a refusal to allow prayer meetings on school premises.[29] The court found that there was a permissible secular purpose, but the "effects" and "entanglement" portions of the test were not satisfied. The court determined that the prayer meetings would create an improper appearance of state support, impermissibly advancing religion. It also found that school administrative supervision would have resulted in excessive government entanglement.[30]

In 1981, the United States Supreme Court decided *Widmar v. Vincent*, where it applied the three-prong *Lemon* test in a public uni-

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

25. *Id.* at 606.

26. *Id.* at 612-13. The purpose behind the policy cannot be to advance religion. Enhancing the quality of secular education in all schools is a legitimate purpose. *Id.* at 613.

27. *Id.* at 612-13. Neutral accommodation of religion is allowed, but sponsorship of religion is unconstitutional. Garnett v. Renton School Dist., 874 F.2d 608, 610 (9th Cir. 1989), *vacated*, 110 S. Ct. 2608 (1990).

28. *Lemon*, 403 U.S. at 612-13. To avoid entanglement the policy must prevent the intrusion of either government or religion into the precincts of the other. While total separation is impossible, one must look at the character and purpose of the institution and the relationship that results between government and religion. *Id.* at 615.

29. Brandon v. Guiderland Bd. of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

30. *Id.* at 978-79.

versity setting.[31] In *Widmar*, the University of Missouri informed a student religious group that, after four years of conducting meetings, it could no longer meet on university grounds for religious worship.[32] The district court upheld the challenged regulation, finding that such a policy was essential to comply with the establishment clause and promote separation of church and state.[33] The Eighth Circuit Court of Appeals reversed,[34] and the United States Supreme Court affirmed, holding that to justify exclusion from the University's forum based on speech content, the University had to show the policy was necessary to serve a compelling state interest.[35] The University claimed that its compelling state interest was to avoid violating the establishment clause.

The Court, relying upon its previous decisions, applied the *Lemon* test and held that an equal access policy would not be incompatible with the establishment clause.[36] The Court found that the University's previous open-forum policy, including nondiscrimination against religious speech, promoted the secular purpose of providing a forum where students could exchange ideas.[37] The Court was unpersuaded that the effect of the public forum was the advancement of religion. Because the forum was available to a broad class of religious and nonreligious speakers, the Court determined that the open forum did not confer any imprimatur of state approval on religious activities.[38] Finally, the Court found the policy avoided entanglement with religion.[39] Though the United States Supreme Court upheld this equal access policy permitting worship at a university, it left open the question of whether such policies were appropriate in secondary school settings.

Lower federal courts, however, refused to extend the *Widmar* equal access principle to religious groups in secondary schools. In *Lubbock Civil Liberties Union v. Lubbock Independent School District*,[40] for example, the Court of Appeals for the Fifth Circuit struck down a school policy that allowed students to meet voluntarily for religious purposes before or after school. The appellate court applied the *Lemon* test, but at each element it held that there was impermissible establishment of religion. The court found that the preeminent purpose of the policy was not neutral but instead was to promote religious meetings.[41] Because the religious activity was close to the begin-

31. Widmar v. Vincent, 454 U.S. 263 (1981).
32. *Id.* at 265.
33. *Id.* at 266.
34. *Id.* at 267.
35. *Id.* at 270.
36. *Id.* at 271.
37. *Id.*
38. *Id.* at 274.
39. *Id.* at 272.
40. 669 F.2d 1038, 1048 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).
41. *Id.* at 1044.

ning and end of the school day and also due to the impressionability of the students, the court found that the policy implied recognition of the activity as a part of the school's extracurricular program. This was deemed an impermissible advancement of religion, and the policy failed the second prong of the *Lemon* test.[42] Finally, the Fifth Circuit noted that use of school facilities and the need for continued supervision of student activities created entanglement which led to the establishment of religion.[43]

Likewise, in *Bender v. Williamsport Area School District*,[44] school officials denied students' requests to hold religious meetings on school grounds. The district court ruled in favor of the students, holding that such fellowship would not violate the Constitution.[45] A school board member appealed and the Third Circuit Court of Appeals reversed, concluding that the constitutional balance weighed against conducting this religious activity in the school.[46] Later, the United States Supreme Court vacated the appellate court's judgment because the board member lacked standing to appeal.[47] This effectively reinstated the decision of the federal district court, and the Supreme Court majority did not address the merits of the equal access issue.[48] Four justices dissented, all agreeing that the earlier *Widmar* decision should control the outcome in *Bender*.[49]

In short, both before and after the *Widmar* decision, apprehension that led to prejudice aimed against student religious groups was prevalent in American schools.[50] Congress sought to eliminate this

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42. *Id.* at 1045.

43. *Id.* at 1047.

44. 563 F. Supp. 697 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984), *rev'd on other grounds*, 475 U.S. 534 (1986).

45. *Id.* at 716.

46. Bender v. Williamsport Area School Dist., 741 F.2d 538, 561 (3d Cir. 1984). The school district did not challenge the judgment of the district court by taking an appeal or requesting a stay. Instead, it decided to comply with the judgment and allow the student group to conduct the meetings it had requested. Bender v. Williamsport Area School Dist., 475 U.S. 534, 539 (1986).

47. Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986). The judgment was vacated because the lone board member had no personal stake in the outcome of the litigation and therefore no standing to file an appeal either as an individual, a member of the board, or as a parent. *Id.* at 541-49.

48. *Id.* at 551 (Burger, C.J., dissenting).

49. *Id.* at 553. In dissent, Chief Justice Burger, joined by Justices White and Rehnquist, held that the lone school board member did have standing to appeal, and they determined that they would reach the issue the Court granted *certiorari* to address—the constitutionality of an equal access policy. *Id.* at 551-52. Justice Powell, in a separate dissent, agreed that the school board member had standing to appeal. *Id.* at 555 (Powell, J., dissenting).

50. *See, e.g.*, Brandon v. Guiderland Bd. of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); Widmar v. Vincent, 454 U.S. 263 (1981); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1159 (1983); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *rev'd on other grounds*, 475 U.S. 534 (1986); Mergens v. Board of Educ. of Westside Community Schools, 867 F.2d 1976 (8th Cir. 1989), *aff'd*, 110 S. Ct. 2356 (1990); Garnett v. Renton School Dist., 874 F.2d 608 (9th Cir. 1989), *vacated*, 110

aversion toward religious expression and to ensure the protection of all student rights. So, in 1984, Congress passed the Equal Access Act.[51] Under the Act, public secondary schools that receive federal funding and operate a limited open forum cannot deny equal access based on speech content to students who wish to meet within that forum.[52] This was Congress' attempt at eradicating the official "hostility" that had built up in school systems, hoping to reverse the misperception that government is adverse to religious expression.[53]

Senator Hatfield, co-sponsor of the bill ultimately enacted, said that "where there is an action that is taken by [a school board] . . . which denies a right that is guaranteed under the Constitution, the Congress of the United States . . . has a duty and an obligation to step in and remedy that violated right."[54]

This legislation was designed to correct federal court decisions that established the constitutional impropriety of equal access policies. However, despite the enactment of the Equal Access Act, courts continued to reach different conclusions regarding the constitutionality of religious fellowship among students in secondary schools.[55] The courts were divided as to what standard should be applied—Congress' Equal Access Act or existing precedent.

For example, in *Garnett v. Renton School District No. 403*, the plaintiffs invoked the Equal Access Act to guarantee student-led religious activities access to school facilities.[56] The Ninth Circuit Court of Appeals held that the Act was not triggered if school officials defined all student clubs as curriculum related. It also found that allowing a religious group to meet in the school would violate the establishment clause.[57] The court determined that while such a policy might arguably have a secular purpose of allowing equal access to school facilities,[58] it would fail the other two *Lemon* criteria. To pass the "effects"

S. Ct. 2608 (1990).

51. Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988).

52. *Id.* § 4071(a).

53. Brief for United States, *supra* note 8, at 15 (citing S. Rep. No. 357, 98th Cong., 2d Sess. (1984)).

54. *Id.* (citing 130 Cong. Rec. 19,217 (1984)). The Act was passed by overwhelmingly bipartisan majorities in both the House of Representatives and the Senate. The House vote tallied 377 for and 73 against. 130 Cong. Rec. H7740-41 (daily ed. July 25, 1984). The Senate voted 88 in favor and 11 opposed. 130 Cong. Rec. S8370 (daily ed. June 27, 1984).

55. *See, e.g.*, Garnett v. Renton School Dist., 874 F.2d 608 (9th Cir. 1989), *vacated*, 110 S. Ct. 2608 (1990); Mergens v. Board of Educ. of Westside Community Schools, 867 F.2d 1076 (8th Cir. 1989), *aff'd*, 110 S. Ct. 2356 (1990).

56. *Garnett*, 874 F.2d at 609. "Allowing a student religious group to hold meetings in a public secondary school classroom at a time closely associated with the school day would violate the Establishment Clause. The school district's refusal to approve a student religious group as a district activity is, therefore, not only reasonable, but required. Because Lindbergh High School does not have a 'limited open forum' as defined by the Equal Access Act, the Act's requirements do not apply." *Id.* at 614.

57. *Id.* at 614.

58. *Id.* at 610.

portion, the government could not even appear to sponsor religious activities. Since the group would meet in tax-supported classrooms at a time when most students were at school, the policy would fail this element of the test.[59] Excessive entanglement would be found because all student activities required school personnel supervision.[60]

Subsequently, the Eighth Circuit decided *Mergens v. Board of Education of Westside Community Schools*.[61] This appellate court reasoned that the Act codified *Widmar*, extending that holding to secondary public schools.[62] Applying the *Widmar* rationale, the Eighth Circuit concluded that an equal access policy would not violate the *Lemon* test.[63] The court noted that the only possible constitutional attack on the Act would be the maturity differences between secondary school students and university students. However, the Eighth Circuit accepted Congress' findings on the similarities between these two groups of individuals.[64]

To clarify the conflicting rulings and to remedy the inconsistency, the United States Supreme Court granted *certiorari* in 1989.[65]

PRINCIPAL CASE

In *Mergens*, the United States Supreme Court addressed whether the Equal Access Act prohibits a public secondary school from denying a student religious group permission to meet on school grounds before or after school, and if so, whether the Act contravenes the establishment clause of the first amendment. First, the Court discussed its prior decision in *Widmar* and the extension of that ruling to Congress' enactment of the Equal Access Act.[66] Then the Court considered the Westside High School activity program and concluded that a limited open forum existed which rendered the Equal Access Act applicable.[67] Finally, the Court addressed the relationship between the Act and the establishment clause of the first amendment.[68] Among

59. *Id.* at 611.
60. *Id.* at 612.
61. 867 F.2d 1076 (8th Cir. 1989), *aff'd*, 110 S. Ct. 2356 (1990).
62. *Id.* at 1078.
63. *Id.* at 1079.
64. *Id.* at 1080. "This assumption of impressionability was investigated in detail by Congress in its consideration of the [Equal Access Act] and was rejected. After observing the maturity and capabilities of the students who testified, as well as psychological information related to impressionability, the Senate Committee on the Judiciary found that 'students below the college level are capable of distinguishing between State-initiated, school sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other.' " Brief for Respondents, *supra* note 8, at 43-44 (quoting S. Rep. No. 357, 98th Cong., 2d Sess. (1983)).
65. Mergens v. Board of Educ. of Westside Community Schools, 867 F.2d 1076 (8th Cir. 1989), *cert. granted*, 109 S. Ct. 3240 (1989).
66. *Mergens*, 110 S. Ct. at 2364.
67. *Id.* at 2370.
68. *Id.* at 2371-73.

other things,[69] the Court upheld the constitutionality of the Equal Access Act.[70] The Petitioners argued that regardless of whether Westside fit into the forum pattern required by the Act, the Act itself violated the establishment clause by incorporating religious activities into the school's official program.[71] The Court disagreed, relying on the reasoning of its earlier *Widmar* decision which it found particularly applicable to the Equal Access Act.[72] If a policy could pass each element of the *Lemon* test, it would not offend the establishment clause.

In evaluating the first element of the *Lemon* test, the Court held that prohibiting discrimination based on "religious, political, philosophical, or other" speech meets the secular-purpose prong of the test. According to the Court, allowing equal access to both religious and nonreligious speech is clearly a secular purpose, as the Act does not create endorsement or disapproval of religion.[73]

Petitioners claimed that the Act advanced religion and that students would see the school as supporting religious groups, contrary to the second requirement of the *Lemon* test.[74] The Court disagreed and addressed Petitioner's claims with three separate arguments. The Court found that secondary school students are mature enough to determine whether a school is endorsing an activity or merely allowing it on a nondiscriminatory basis.[75] The Court explained that, based on empirical data, Congress rejected the notion that high school students could not discern between merely giving permission and actual endorsement.[76] The Supreme Court then accepted the findings of its coequal branch of government.[77]

Next, the Court reasoned that because the Act establishes specific limits on student religious activities, there would be no inference of school endorsement.[78] For example, student groups can convene only during noninstructional time;[79] meetings must be student-initiated

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69. The Court's analysis focused on the similarities between its decision in *Widmar* and Congress' enactment of the Equal Access Act. The Court looked at the statutory language, logic and legislative purpose to determine that Westside maintained a limited open forum as described by the Act. The Court determined that several of Westside High School's student groups were noncurriculum related and it concluded that Westside's denial of Respondent's request to form a Christian group denied them equal access under the Act. *Id.* at 2364-70.

70. *Id.* at 2373.

71. *Id.* at 2370.

72. *Id.* at 2371.

73. *Id.*

74. *Id.*

75. *Id.* at 2372.

76. *Id.* "Students below the college level are capable of distinguishing between State-initiated, school sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other." *Id.* (quoting S. Rep. No. 357, 98th Cong., 2d Sess. 8 (1984)).

77. *Id.*

78. *Id.*

79. Equal Access Act, 20 U.S.C. § 4071(b) (1988).

and voluntary;[80] and, school personnel can attend only in a nonparticipatory capacity.[81] To minimize indicating official endorsement, these requirements prohibit mandatory attendance and avoid the use of teachers as role models. The Court also noted that schools have explicit control over impressions they give to students, and administrators can therefore ensure that recognition given to religious groups is merely evidence of the school's neutrality.[82]

The Court concluded that when a school allows several student-initiated clubs to meet, one of which is a religious group, the school does not convey a message of school/government endorsement. Therefore, the Act's principal effect is not the advancement of religion.[83]

Finally, the Court addressed the entanglement element of the *Lemon* test. Petitioners argued that the requirement of faculty sponsorship would cause excessive government entanglement with religion.[84] The Court again looked to specific statutory language. The Act provides that the school cannot sponsor the students' meetings;[85] that school employees can be present only in nonparticipatory roles;[86] and that nonschool persons cannot control or even regularly attend the group meetings.[87] These safeguards help to eliminate excessive entanglement between government and religion. In fact, the Court commented that denying equal access may create greater entanglement by increasing monitoring of meetings where religious speech might occur.[88]

Justice Kennedy, joined by Justice Scalia, wrote separately and concurred that the Equal Access Act is constitutional.[89] However, these two Justices applied an alternative test to determine whether the Act violated the establishment clause. That test consisted of two principles: the government cannot "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so,' "[90] and "the government cannot coerce any student to participate in a religious activity."[91] Justices Kennedy and

80. *Id.* § 4071(d)(1).
81. *Id.* § 4071(c)(2)-(3).
82. *Mergens*, 110 S. Ct. at 2372.
83. *Id.* at 2373.
84. *Id.*
85. *Id.*; *see also* Equal Access Act, 20 U.S.C. § 4071(c)(2) (1988).
86. Equal Access Act, 20 U.S.C. § 4071(c)(3) (1988).
87. *Id.* § 4071(c)(5).
88. *Mergens*, 110 S. Ct. at 2373. The Court referred back to its decision in *Widmar* where it found that "the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.' . . . [T]he University would need to determine which words and activities fall within 'religious worship and religious teaching' [and,] [t]here would also be a continuing need to monitor group meetings to ensure compliance with the rule." *Widmar*, 454 U.S. at 272 n.11.
89. *Mergens*, 110 S. Ct. at 2376 (Kennedy, J., concurring).
90. *Id.* at 2377 (citing County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086, 3136 (1989)) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).
91. *Id.* (citing *County of Allegheny*, 109 S. Ct. at 3136).

Scalia found the Act consistent with these standards.[92]

Justice Marshall wrote a concurring opinion, joined by Justice Brennan, agreeing with the plurality that the Equal Access Act could withstand establishment clause scrutiny.[93] However, they found that the analysis set forth by Justice O'Connor in the plurality opinion failed to assess the differences between the student forum in *Widmar* and the one at Westside. Ultimately, Marshall and Brennan emphasized the need for the Court to give more concrete direction to Westside and similarly situated schools so educational systems could avoid the appearance of religious endorsement.[94]

In dissent, Justice Stevens agreed that Congress' passage of the Equal Access Act codified the Court's earlier *Widmar* decision.[95] He asserted, however, that to extend *Widmar* to high school settings would involve a two-part inquiry: first, discerning whether the high school had established a forum comparable to the one that existed in *Widmar*; and then, if the forums were comparable, discovering whether the establishment clause had different consequences when applied to the high school's open forum.[96] Justice Stevens maintained that the two forums were dissimilar, and he criticized the plurality for giving minimal attention to their differences.[97] In Stevens' view, the plurality failed to really compare this case to *Widmar*, a comparison that, in his opinion, the Equal Access Act requires.[98]

Because of his view of the Act, Justice Stevens found it unnecessary to reach the establishment clause issue.[99] He did, however, assert that the constitutional question was much more difficult than the Court assumed.[100] Thus, he stated that while the Equal Access Act might nevertheless comply with the criteria of the *Lemon* test, "that conclusion requires more explanation than the Court provide[d]."[101] Stevens also found that the plurality's interpretation of the Act resulted in a "sweeping intrusion" by the government into the operation of public schools.[102]

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92. *Id.*
93. *Id.* at 2378 (Marshall, J., concurring).
94. *Id.* at 2382.
95. *Id.* at 2384 (Stevens, J., dissenting).
96. *Id.*
97. *Id.* at 2385. Stevens claimed that none of the Westside High School clubs was "arguably controversial or partisan." *Id.* He noted that officially recognized groups at the University of Missouri "included such political organizations as the Young Socialist Alliance, the Women's Union, and the Young Democrats." *Id.* at 2384 (citing *Widmar*, 454 U.S. at 274).
98. *Id.* at 2386.
99. *Id.* at 2390.
100. *Id.* at 2390.
101. *Id.* at 2391 n.21. In Justice Stevens' view, Congress had a considerably expansive purpose—that of authorizing religious groups to meet in schools that do not even allow meetings of partisan organizations. *Id.* at 2390.
102. *Id.* at 2393.

ANALYSIS

While the *Mergens* decision appears fractured because it is divided into four separate opinions, actually the pieces come together in a cohesive pattern. The Court, by its interpretation of the Equal Access Act, gives overdue guidance to school systems on how to comply with the Act and avoid violating the establishment clause. On the question of the Act's constitutionality, the plurality opinion and the separate opinion of Justices Kennedy and Scalia clearly find that the Act does not violate the first amendment. This decision shifts the direction of establishment clause cases involving public schools. What was once seen as a stationary wall separating church and state, and more particularly church and school, is now viewed as a movable barrier.

Indeed, the decision of the Supreme Court may appear divided, but the common thread running through the *Mergens* opinions[103] is the need for government neutrality. The United States Constitution provides, "Congress shall make no law respecting an establishment of religion . . . ."[104] The establishment clause was designed to prevent government from exercising control over religion, and in its simplest form, this means that government must take a strictly neutral position.

As early as 1947, Justice Black, writing for the Court, stated that the first amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used to handicap religions than to favor them."[105] In *Bender v. Williamsport Area School District*, Chief Justice Burger wrote that the "Establishment Clause mandates state neutrality, not hostility, toward religion."[106] The Supreme Court's prior interpretation of the establishment clause required that schools accommodate the needs of all students, including religious needs. As the Court has recognized, the Constitution does not require "complete separation of church and state; it affirmatively mandates accommodation, not merely toleration, of all religions, and forbids hostility towards any."[107]

In the plurality opinion, Justice O'Connor emphasized that in evaluating the Act, "the message is one of neutrality . . . ; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[108] Justice Kennedy also acknowledges that "[t]he accommodation of re-

103. The plurality and concurring opinions mention this common thread, but the opinion of Justice Stevens does not. *Id.* at 2383-93.
104. U.S. CONST., amend. I, § 1.
105. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).
106. *Bender*, 475 U.S. at 554 (Burger, C.J., dissenting).
107. *Lynch*, 465 U.S. at 673.
108. *Mergens*, 110 S. Ct. at 2371.

ligion mandated by the Act is a neutral one . . . ."[109] And, while Justice Marshall focused on the steps a school must take to avoid the appearance of endorsing or sponsoring religious clubs' goals, his position was that the school must "fully disassociate itself" and remain neutral.[110]

So, the members of the Court generally agreed that the government must maintain a position of neutrality. This common thread, woven throughout the opinions,[111] is the strength of the *Mergens* decision. However, in an attempt to ensure neutrality, the disparity among the opinions surfaces in deciding what test should be used to determine whether a policy passes establishment clause scrutiny. Also at issue is how such a test should be applied.

Though the plurality examined Westside's policy in light of the three-part *Lemon* test,[112] the Court's application of the test was considerably relaxed from applications of lower federal courts.[113] As evidenced by this Court's earlier decision in *Widmar*, the use of the *Lemon* test could have and should have been much more rigorous.

First, the Court held that the Act passes the secular-purpose prong of the *Lemon* test merely because it grants equal access to religious and nonreligious groups.[114] While there need not be an "exclusive" secular purpose, to exhibit a thorough analysis the Court should have explained the other ways the Act passes this standard. The Court could have accomplished this by incorporating the secular purposes recognized by other federal courts. For example, according to *Widmar*, providing a forum where students can exchange ideas is a secular purpose.[115] Also, in *Lubbock II*,[116] the development of leadership and communicative skills was deemed a valid secular interest.[117] The Court should have utilized these additional secular purposes.

In the plurality opinion, Justice O'Connor mentioned that "Congress' avowed purpose—to prevent discrimination against religious and other types of speech—is undeniably secular."[118] The endorsement of a policy by Congress should not allow the Supreme Court to change its analysis and somehow diminish the rationale used in applying the secular-purpose prong of the *Lemon* test. The Court cannot

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109. *Id.* at 2377 (Kennedy, J., concurring).
110. *Id.* at 2382 (Marshall, J., concurring).
111. *See supra* note 103.
112. *Mergens*, 110 S. Ct. at 2370-71.
113. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (1970); Widmar v. Vincent, 454 U.S. 263 (1981); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).
114. *Mergens*, 110 S. Ct. at 2371.
115. *Widmar*, 454 U.S. at 271.
116. Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 680 F.2d 424 (5th Cir. 1982) (Reavely, J., dissenting from denial of rehearing en banc), *cert. denied*, 459 U.S. 1159 (1983).
117. *Id.* at 426.
118. *Mergens*, 110 S. Ct. at 2371.

simply shun its role by affording overarching acceptance to Congress' reasoning, but rather must carefully examine whether the elements of *Lemon* are met.

The Court seems most lenient in its application of the *Lemon* test's second prong. Analyzing whether a policy has the effect of advancing or inhibiting religion involves a sensitive inquiry. It concerns a question of degree, as the issue is not whether there is any religious effect, but rather whether that effect is "principal" or "primary."[119]

In the plurality opinion, Justice O'Connor found that the primary effect of the Equal Access Act is not the advancement of religion.[120] The Court based its holding on the maturity of the students, the limits the Act places on school personnel involvement, and the variety of student groups available.[121]

A more rigorous and detailed application was used by the Court in its *Widmar* decision. There the Court noted that where a policy affords religion "incidental" benefits, it will still satisfy this element of *Lemon*.[122] The Court then explained that the first requirement of an incidental benefit was that it be available to religious and nonreligious groups alike.[123] Also, a merely incidental benefit does not confer an imprimatur of state approval on religious activities.[124]

In *Mergens*, the Court should have used a similar reasoning process. It appears that the Equal Access Act would allow schools to provide incidental benefits to religious groups. The same benefits, however, would also be extended to nonreligious activities. The Court should have discussed more thoroughly whether such benefits would confer the school's imprimatur on the religious group. Justice O'Connor gave cursory attention to this issue by deferring to the judgment of Congress on the ability of high school students to discern the difference between equal access and state sponsorship of religion.[125] But again, the Court accepted Congress' findings without any further consideration. Because the *Mergens* decision concerns secondary school students, it seems particularly important that the Court proceed with a careful inquiry. Though further examination would probably yield consistent results, the Court cannot merely relinquish its responsibilities in such a manner. Also, since this decision remedies the inconsistent rulings handed down by lower federal courts, the majority should have developed a deeper, more exacting rationale. The same second-prong analysis used by the Court in *Widmar* should be applied to public secondary schools as well as universities, especially

119. *Lemon*, 403 U.S. at 612.
120. *Mergens*, 110 S. Ct. at 2373.
121. *Id.* at 2371-73.
122. *Widmar*, 454 U.S. at 273.
123. *Id.* at 274. Providing benefits to a broad range of groups is an important index of a secular effect. *Id.*
124. *Id.*
125. *Mergens*, 110 S. Ct. at 2372.

since no controlling differences between the two groups of students were found to exist.[126]

Finally, to pass the entanglement element of *Lemon*, Justice O'Connor explained that although the Act permits the assignment of school personnel to the meeting for custodial purposes, this "does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities."[127] Again, the Court's reliance on Congress' enactment, without further inquiry, is troublesome. Because the establishment clause serves as a check on congressional legislation, the Court should not simply defer to Congress' findings. Mere congressional endorsement should not change the extent of the Court's analysis.

In *Walz v. Tax Commission*,[128] the Court held that it would find excessive entanglement when a policy requires an improperly high level of administrative surveillance over religious practices.[129] The Court in *Mergens* should have analyzed more closely how the Equal Access Act avoids this problem. In fact, a teacher's presence as required by the Act, for safety or security purposes, does not constitute the type of surveillance that the Court faced in *Lemon v. Kurtzman*. There the surveillance was aimed at detecting religious activity,[130] and here it is safety-related.

Justice O'Connor did point out that the excessive entanglement test is a double-edged sword.[131] Just as a state may foster entanglement by permitting activities that require excessive administrative surveillance, it may also advance entanglement by denying equal access rights.[132] For example, a policy excluding religious worship may risk greater entanglement by attempting to determine what speech and action constitute religious expression.[133] This rationale was set forth in *Widmar*,[134] so the Court has consistently acknowledged this concern when addressing the entanglement criterion of *Lemon*.

At each element of the *Lemon* test, the Court should have engaged in a more stringent application as it had done in past establishment clause cases. Because this decision now controls all lower court rulings, the structured *Lemon* test should have been set forth and consistently applied.

It is particularly troubling that in addition to the relaxed version of the *Lemon* test applied by the plurality, two Justices supported

126. *Id.*
127. *Id.* at 2373.
128. 397 U.S. 664 (1970).
129. *Id.* at 674-75.
130. *Lemon*, 403 U.S. at 619-21.
131. *Mergens*, 110 S. Ct. at 2373.
132. *Id.*
133. *Id.*
134. *Widmar*, 454 U.S. at 272 n.11.

instituting an even lower standard. In a concurring opinion, Justices Kennedy and Scalia proposed what appears to be an even more accommodating two-part test to determine that the Act clears the establishment clause hurdle. They claimed that the government cannot give "direct" benefits to religion so that it in fact establishes a state religion, and it cannot coerce students to participate in any religious activity.[135] The exceedingly lenient approach suggested by Justices Kennedy and Scalia virtually eliminates the structure set forth by *Lemon*'s three criteria. The Supreme Court Justices should have rigorously applied the established *Lemon* test, as it enables a court to ensure government, and more particularly school, neutrality toward religion.

CONCLUSION

Equal access to student groups in public high schools would promote a policy of government neutrality toward religion. The Supreme Court sought to establish an attitude of impartiality toward religious expression in the university setting when it decided *Widmar*. By enacting the Equal Access Act, Congress extended this principle to public secondary students. However, lower federal courts continued to maintain a wall of separation between church and secondary schools. The proper ruling of the Supreme Court in *Mergens*, though applying an improperly relaxed version of the *Lemon* test, upheld the constitutionality of the Equal Access Act. This decision transformed the rigid wall of separation between church and school into a movable barrier.

TRACY BYRD

135. *Mergens*, 110 S. Ct. at 2377 (Kennedy, J., concurring).