THE WRITING IS ON THE WALL: EQUAL ACCESS ERODES THE ESTABLISHMENT CLAUSE

Scott J. Wilkov*

INTRODUCTION

In *Board of Education of the Westside Community Schools v. Mergens*,[1] the United States Supreme Court ruled that sectarian student groups must be afforded the same benefits, opportunities, and considerations as secular clubs under the Equal Access Act.[2] The Equal Access Act forbids public secondary schools receiving federal funds to deny student groups a fair opportunity to meet on school premises based upon the content of those meetings.[3] Thus, religion is reserved a place in the public schools.[4]

The *Mergens* decision represents a dramatic shift in the Supreme Court's interpretation of the First Amendment's Establishment Clause.[5] *Mergens* weakens considerably the previously strict limitations on the presence and role of organized religion in the public schools. As a result of this ruling, school authorities will have less discretion to exclude religious groups from existing extracurricular programming.

This Note argues that the *Mergens* result contravenes the First Amendment. The terms of the Equal Access Act, when viewed against the backdrop of the Court's Establishment Clause precedent, mandate this conclusion. The analysis begins with a study of the *Lemon v. Kurtzman*[6] test for Establishment Clause violations[7] and the Court's application of it over the past twenty years. What follows is an assessment of the *Mergens* decision and its

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* This Note is dedicated to the memory of the Author's grandfather, Louis Farber. His concern for the freedom of religion remains a source of inspiration.

1. 110 S. Ct. 2608 (1990).
2. 20 U.S.C. §§ 4071-4074 (1988).
3. *Id.* § 4071(a).
4. The Supreme Court has avoided defining religion, but has indicated that it might be characterized by any of the following: (1) a shared belief by an organized group, (2) a relationship between that belief and certain theocratic principals or interpretations of religious literature, (3) a system of beliefs that both pervades and regulates the daily lives of its adherents, and (4) the resulting lifestyle is one which has existed for a substantial period of time. Wisconsin v. Yoder, 406 U.S. 205, 215-17 (1972).
5. The First Amendment provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof ...." U.S. CONST. amend. I. The Court applied this prohibition to the states, through the Fourteenth Amendment, in Cantwell v. Connecticut, 310 U.S. 296 (1940).
6. 403 U.S. 602 (1971).
7. *See infra* note 47 and accompanying text.

use of the *Lemon* test. This Note continues with an inquiry into free speech jurisprudence arising in the public school context, and suggests that the students' claim against the school board could have been rejected on those grounds. The discussion concludes that, in light of *Mergens'* broad interpretation of the Equal Access Act, the Court will be required to clarify the scope of permissible government regulation in the public schools.

THE EQUAL ACCESS ACT: PLAGUED BY AMBIGUITY

The Equal Access Act makes it unlawful for a public secondary school that receives federal funds and has created a "limited open forum" to deny any of its students the opportunity to meet on campus because of the political or religious nature of their speech.[8] A school creates a "limited open forum" whenever it permits a single noncurriculum-related student group to meet on its premises outside normal class hours.[9] The Act requires that religious group meetings under the auspices of the statute be voluntary, student-initiated, and free of school sponsorship.[10] Meetings may not interfere with the conduct of the school, feature the regular attendance of any nonschool persons, or allow active participation by school employees.[11] The Act includes a caveat that the statute shall not be construed to authorize the government or school to influence the content of, or participation in, any religious activity.[12] Accordingly, the Act bars the expenditure of public funds for anything beyond the incidental cost of providing meeting space.[13]

Because it triggers the Act's operation, the most critical Equal Access provision is the "limited open forum" requirement. The Equal Access Act is not applicable until a school allows a single noncurriculum-related student group to meet on its premises. However, the statute fails to define the term "noncurriculum related"; therefore, the *Mergens* Court interpreted its meaning broadly in light of congressional debate on the subject.[14] Unfortunately, congressional intent is anything but clear.

Legislative History Provides Little Insight

Congress enacted the Equal Access Act in reaction to two lower court decisions that lawmakers believed would threaten children's religious freedom.[15] *Brandon v. Board of Education of Guilderland Central School District*[16]

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8. 20 U.S.C. § 4071(a) (1988).
9. *Id.* § 4071(b).
10. *Id.* § 4071(c).
11. *Id.*
12. *Id.* § 4071(d).
13. *Id.*
14. The Court referred to a statement by Senator Hatfield that curriculum-related clubs are those that are "really a kind of extension of the classroom" (130 CONG. REC. 19223 (1984)) and ruled that a noncurriculum-related group is one whose subject matter is not "taught[] in a regularly offered course." *See Mergens*, 110 S. Ct. at 2366.
15. S. REP. NO. 357, 98th Cong., 2d Sess. 12 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2349, 2358 [hereinafter S. REP. NO. 357].
16. 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 455 U.S. 983 (1981). The court found that the trial court properly enjoined a group named "Students for Voluntary Prayer" from holding communal prayer meetings in a classroom prior to the start of homeroom.

and *Lubbock Civil Liberties Union v. Lubbock Independent School District*[17] both denied secondary school students the right to conduct voluntary prayer meetings on public school premises. The Senate Judiciary Committee criticized these cases as being based upon three questionable assumptions: (1) high school students are overly influenced by peer pressure;[18] (2) teacher involvement in the content of meetings creates an aura of school sponsorship;[19] and (3) compulsory education laws give rise to a captive audience for prayer sessions.[20] The problem with the Committee's theory, however, is that it runs directly counter to previous judicial findings. Specifically, the Supreme Court had consistently expressed concern over the potential for coercion in the form of either peer pressure[21] or faculty influence.[22] Thus, the Judiciary Committee rejected longstanding Supreme Court precedent in its evaluation of the assumptions underlying *Brandon* and *Lubbock*.

Additionally, Congress expressed concern that these two cases would confuse school administrators because they conflicted with the Supreme Court's earlier ruling in *Widmar v. Vincent*.[23] In *Widmar*, the Court invalidated a university policy that denied religious groups the use of campus facilities on an equal basis with secular groups.[24] Congress feared that *Brandon* and *Lubbock* would send local school officials mixed signals because *Widmar* required equal access for religious groups, while the two lower court cases permitted the exclusion of religious groups from the school environment. Had Congress been persuaded by the distinctions between the university and secondary school environments, it might not have enacted the Equal Access Act in its existing form.

Failure to Distinguish Between High School and College

There are fundamental differences between a university and a secondary school. In *Widmar*, the university students created the forum themselves, while at the high school level, the faculty often establishes the

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Establishment Clause effects and entanglement concerns justified imposing such a limit on the students' rights to freedom of speech and association. *Id.* at 979-80.

17. 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155, 1156 (1983). The court held that a school district policy allowing voluntary, after-school meetings of religious groups with faculty supervision violated the Establishment Clause.

18. S. REP. NO. 357, *supra* note 15, at 8-9, *reprinted in* 1984 U.S.C.C.A.N. 2349, 2354-55. The Committee dismissed this concern because it felt that high school students were sufficiently mature to know that a religious presence in the public schools did not represent official endorsement of the group's beliefs.

19. *Id.* The Committee dismissed this concern on the grounds that teachers are professionals and know better than to disobey rules confining their roles to those of behavior monitors.

20. *Id.* The Committee dismissed this concern by emphasizing that although students' presence at school is mandatory, participation in voluntary, student-initiated religious activity is not required.

21. *See infra* text accompanying notes 93-94.

22. *See infra* text accompanying note 119.

23. 454 U.S. 263 (1981).

24. *Id.* at 267.

extracurricular program by offering school sponsorship of various clubs.[25] The *Widmar* Court acknowledged this distinction by noting that while a university can transform itself into a public forum, a public secondary school can rarely do so in view of the degree of control retained by education officials.[26] Until students reach the college level, their extracurricular options are generally limited to whatever clubs their teachers make available to them. The Judiciary Committee's failure to note this critical distinction seriously erodes its foundation for criticizing *Brandon* and *Lubbock* and supporting the Equal Access Act.

Further undermining the credibility of the legislative intent behind the Act is the Committee's doubt as to the continuing validity of the *Lemon* test.[27] While this may have been a legitimate observation when the Equal Access Act was passed, the seven years of church-state litigation since that time proves that the *Lemon* test is alive and well.[28] In light of the inaccuracy of Congress's forecast, the *Mergens* decision accords undue deference to the legislative history underlying the Equal Access Act.[29]

The problems associated with the rationale underlying the Equal Access Act cast considerable doubt upon the true legislative intent. Therefore, legislative history is not a helpful guide in construing the terms of the Act. The better course would have been for the Court to keep its statutory construction consistent with Establishment Clause jurisprudence.

EARLY ESTABLISHMENT CLAUSE PRECEDENT

The drafters of the First Amendment's religion clauses sought to guarantee religious freedom while maintaining a separation between church and state.[30] This dichotomy gives rise to tension between the Free Exercise and Establishment Clauses because the terms of both are absolute and tend to conflict with one another.[31] The Free Exercise Clause protects religious *beliefs* absolutely, but religious *actions* only to a limited extent.[32] Majoritarian

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25. S. REP. NO. 357, *supra* note 15, at 23, *reprinted in* 1984 U.S.C.C.A.N. 2349, 2369.

26. *Widmar*, 454 U.S. at 276-77 n.20 ("Our holding is limited to the context of a public forum created by the university itself...."). *See infra* text accompanying notes 89-91. For an explanation of the public forum, see *infra* note 130 and accompanying text.

27. S. REP. NO. 357, *supra* note 15, at 32, *reprinted in* 1984 U.S.C.C.A.N. 2349, 2378. Congress based this conclusion upon the Supreme Court's decision in Marsh v. Chambers, 463 U.S. 783 (1983), which upheld the historic practice of employing legislative chaplains by applying a superficial test of whether or not that government action constituted an endorsement of religion.

28. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) ("This trilogy of tests has been applied regularly in the Court's later Establishment Clause cases"). *See also* Bowen v. Kendrick, 487 U.S. 589 (1988); Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984).

29. *See infra* text accompanying notes 77-78.

30. *Cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1160 (2d ed. 1988).

31. Walz v. Tax Commission, 397 U.S. 664, 668-69 (1970).

32. "Laws ... are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." Reynolds v. United States,

religious practices that threaten individual rights trigger Establishment Clause protections to ensure that majority religions are not imposed on the minority.[33]

In an early Establishment Clause case, the Supreme Court struck down an Illinois program releasing public school children from secular education so that they could attend voluntary religious study sessions on school premises.[34] The Court held that the use of public funds for this program violated the constitutional requirement of a separation of church and state.[35]

However, the Establishment Clause prohibits more than just the funding of religious programs. It also bars the state from abusing its police power to compel school attendance by subjecting students to the teachings of any one religious sect.[36] The First Amendment prohibits the use of such coercion to favor one religious group over another or all religions over nonbelievers.[37] On this basis, the Court forbids beginning the school day with the "Lord's Prayer,"[38] the voluntary recitation of a non-denominational blessing,[39] and a moment of silence for prayer or meditation at the start of class.[40]

The Supreme Court has consistently noted the need for vigilance in guarding against Establishment Clause violations in elementary and secondary schools.[41] Families entrust public schools with the education of their children, but they condition that trust on the assurance that the classroom will not be used to advance religious views that conflict with those of the student or his family.[42] This reasoning underlies many lower court decisions that have also grappled with the equal access issue.[43]

The uniformity with which the courts have denied organized religion a role in the public schools is a function of the consistent application of the *Lemon* test to Establishment Clause issues. The *Mergens* decision, however,

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98 U.S. 145, 166 (1879), *cited with approval in* Employment Div. v. Smith, 110 S. Ct. 1595, 1600 (1990).

33. *See generally* TRIBE, *supra* note 30, § 14-6, at 1183-88.

34. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

35. *Id.* at 211.

36. *Cf.* Zorach v. Clauson, 343 U.S. 306 (1952). *See infra* note 100 and accompanying text.

37. Even a measure that benefits all religions alike would violate the Establishment Clause. "A state policy of aiding 'all religions' necessarily requires a governmental decision as to what constitutes 'a religion.' Thus is created a governmental power to hinder certain religious beliefs by denying their character as such." *Zorach*, 343 U.S. at 318 n.4 (Black, J., dissenting).

38. *See* School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203 (1963).

39. *See* Engel v. Vitale, 370 U.S. 421 (1962).

40. *See* Wallace v. Jaffree, 472 U.S. 38 (1985). This case is noteworthy in light of the insight it provides into the bent of the current Chief Justice. Then Associate Justice Rehnquist's dissenting opinion rejected *Lemon v. Kurtzman* on the grounds that the Establishment Clause only prohibits government designation of a national church or assertion of a preference for one religious sect over another. *Id.* at 113 (Rehnquist, J., dissenting).

41. Edwards v. Aguillard, 482 U.S. 578, 584 (1987) (striking down the Louisiana Creationism Act which required equal teaching time for "creation science" whenever evolution was taught in public schools).

42. *Id.* at 584.

43. *See, e.g.*, Garnett v. Renton School Dist. No. 403, 874 F.2d 608 (9th Cir. 1989) (denying student religious group permission to meet at high school before school hours).

reaches the opposite result as a consequence of its highly superficial *Lemon* analysis.[44]

The Lemon *Test*

Lemon v. Kurtzman[45] is the seminal decision regarding the extent to which the Establishment Clause requires a separation of church and state. In *Lemon*, the Supreme Court ruled that a Pennsylvania statute allowing reimbursement for parochial school teachers' salaries and instructional materials, and a Rhode Island law mandating salary supplements for nonpublic schoolteachers of certain secular subjects were unconstitutional.[46] In reaching this decision, the Court instituted a three prong test for determining Establishment Clause violations.[47] Under the *Lemon* analysis, a government action violates the First Amendment if it has a nonsecular purpose, a nonneutral effect, or more than minimal entanglement in religious affairs.[48]

The purpose prong of the *Lemon* test requires that the legislature have intended its enactment to advance predominantly secular educational goals.[49] The effects prong asks whether the application of the measure is neutral, so that it neither favors one religion over another, nor all of them over none at all.[50] The entanglement prong is the most amorphous of the three. It developed out of a concern that too close a relationship between church and state would endanger religious freedom and lead to political strife along religious lines. Recognizing that some relationship between government and religion is inevitable, the entanglement prong examines the extent to which the government intrudes in religious affairs and religion invades the political arena.[51]

Lemon's *Strict Application*

From its inception, the lower courts effectively used the *Lemon* test to invalidate a number of statutory attempts to allow religion into the public schools. The *Mergens* reasoning, however, casts doubt on the continued validity of many of these decisions. For example, *Jager v. Douglas County School District*[52] refused to allow prayers by either clergy or members of the lay community at the start of high school football games. The Eleventh Circuit held that the voluntary, nondenominational nature of these activities did not overcome the implication that the school endorsed the religious message contained in the prayers.[53] In the future, similar cases may be decided differently

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44. *See infra* text accompanying notes 93-95.
45. 403 U.S. 602 (1971).
46. *Id.*
47. *Id.* at 612-13 ("First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'") (quoting *Walz*, 397 U.S. at 674).
48. *Id.* at 612.
49. *Id.* at 613.
50. *Cf. Allegheny*, 492 U.S. at 593.
51. *See Lemon*, 403 U.S. at 615.
52. 862 F.2d 824 (11th Cir. 1989).
53. *Id.* at 834-35.

in light of *Mergens*' new-found tolerance for voluntary participation in school-related religious activities.[54]

Prior to *Mergens*, only a government enactment that was strictly neutral on its face could survive the traditional *Lemon* inquiry. For instance, in *Karen B. v. Treen*,[55] the Fifth Circuit invalidated a school district's decision to allow public school teachers to begin the day with a voluntary student-led prayer.[56] The purported secular goal of the policy was to increase religious tolerance by exposing children to beliefs different from their own.[57] This purpose, however, was deemed insufficient to avoid a constitutional conflict.[58] Presumably, after *Mergens*, courts will accord considerably greater deference to the expressed intentions of the architects of a government policy.[59]

Additionally, the *Mergens* decision transforms the entanglement test into a far less extensive inquiry.[60] Prior to *Mergens*, school programs had to withstand a strict application of *Lemon*'s entanglement prong. In *Nartowicz v. Clayton County School District*,[61] for example, the Eleventh Circuit upheld an injunction forbidding a school from providing meeting space to sectarian groups and announcing upcoming events of local religious organizations. The court held that such activity would excessively entangle the school in religious matters.[62] From now on, however, such practices may be constitutional under the *Mergens* mandate that religious groups receive the same privileges of recognition as any other club.[63]

THE *MERGENS* DECISION

Board of Education of the Westside Community Schools v. Mergens[64] is the first United States Supreme Court case to interpret the constitutionality of the 1984 Equal Access Act.[65] The Court issued four separate opinions, with a majority of the Justices joining on only a single aspect of the case. Six

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54. *See infra* text accompanying notes 93-95.
55. 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982).
56. *Id.* at 900.
57. *Id.*
58. *Id. See also* Stone v. Graham, 449 U.S. 39 (1980) (striking down a Kentucky statute requiring public elementary and secondary schools to post in every classroom a donated poster depicting the Ten Commandments).
59. *See infra* text accompanying notes 81-83.
60. *See infra* text accompanying notes 113-18.
61. 736 F.2d 646 (11th Cir. 1984).
62. *Id.* at 649-50.
63. Although *Mergens* would not require the announcement of religious groups' upcoming events unless that were a privilege accorded to existing clubs, the Court's apparent receptiveness to religion in the public schools may lead the way to increased permissiveness. *See infra* text accompanying notes 70-72.
64. 496 U.S. 226 (1990).
65. 20 U.S.C. § 4071 (1988). An earlier case concerning religious group meetings in a public high school was dismissed on technical grounds. In Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986), the Court vacated a Third Circuit Court of Appeals decision due to a lack of standing, without addressing the substantive issues. As a result, the Supreme Court let stand a ruling (prior to the passage of the Equal Access Act) that required a public high school to permit student-initiated religious activities. Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986).

Justices agreed that the Westside Community Schools were subject to the Equal Access Act and that such an application did not violate the Establishment Clause.[66] Significantly, the Court was split on how to reconcile the Equal Access Act with earlier Establishment Clause jurisprudence.[67]

Justice O'Connor, writing for the plurality, construed the Act to require public high schools that recognize any "noncurricular" group to extend the same support to student-run religious clubs.[68] The Court broadly defined a "noncurriculum-related student group" as any student club not directly related to the body of courses offered by the school.[69] According to this definition, the ruling mandates that any school that offers a chess club, for example, must afford the same privileges to students wishing to form a religious or political club.

Significantly, the *Mergens* decision grants more than just the right to meet during non-instructional time.[70] The Court held that equal access entitles a religious or political group to the same official recognition afforded other extracurricular organizations at the school.[71] Consequently, any school that provides a single noncurricular group with meeting space, a faculty advisor, or access to the school newspaper, bulletin boards, public address system or club fair, must do the same for any other student-run group that requests it.[72] Because the Equal Access Act only requires that all groups be given a "fair opportunity to ... conduct a meeting,"[73] the *Mergens* Court's broad grant of benefits represents a most expansive interpretation of the statute.

Contrary to *Mergens*, previous Establishment Clause cases[74] indicate that when the government provides such benefits to a particular religious

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66. Justice O'Connor, joined by the Chief Justice and Justices White and Blackmun, formed a plurality. Justices Kennedy and Scalia concurred with the result but favored a more lenient constitutional test. *Mergens*, 110 S. Ct. at 2376. Justices Marshall and Brennan concurred with the plurality's standards but differed over their application to the facts of this case. *Id.* at 2378. Justice Stevens dissented on the grounds that the Act should not have applied to Westside, but even if it did, he felt the plurality's Establishment Clause inquiry was not sufficiently thorough. *Id.* at 2383.

67. The plurality purported to adopt the endorsement test. *See infra* text accompanying notes 86-87. Justices Kennedy and Scalia called for a coercion standard. *See infra* text accompanying notes 97-98. Justices Marshall and Brennan agreed with the application of the endorsement test, but felt the Act could not satisfy it unless Westside High School took steps to disassociate itself from its extracurricular offerings. *See Mergens*, 110 S. Ct. at 2382.

68. *See id.* at 2370-71.

69. *Id.* at 2366.

70. The respondents' Christian club already had permission to meet informally after school, but sought to be included among the thirty other student groups that were officially recognized by Westside High School. School authorities denied this request on the ground that the club's mission would contravene a board of education policy prohibiting groups sponsored by religious or political organizations, or those selective in their membership. *Id.* at 2370.

71. *Id.*

72. *Id.*

73. *See* 20 U.S.C. § 4071(a) (1988). A school is only exempt from accommodating those groups whose meetings would "materially and substantially interfere" with the orderly conduct of educational activities within the school. *Id.* § 4071(c)(4). *See also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969), discussed, *infra*, at note 141.

74. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 769 (1973) (invalidating a New York law providing grants for maintenance and repair of

group, it risks violating the "effects" and "entanglement" prongs of the test announced in *Lemon v. Kurtzman.*[75] The *Mergens* Court circumvented this obstacle by refusing to apply these First Amendment requirements to its sweeping interpretation of the Act.[76] The majority based its decision solely upon a facial analysis of the statute. The Court justified its broad reading of the Act by relying on the apparent intentions of its drafters.[77] However, Justice O'Connor's deference to the statute's overwhelming support in Congress,[78] coupled with the plurality's highly superficial *Lemon* analysis,[79] conflicts with Establishment Clause jurisprudence.

MERGENS' APPLICATION OF THE *LEMON* TEST

The *Mergens* ruling does not expressly overrule *Lemon,* however, it considerably dilutes the extent of the three-prong inquiry. The *Mergens* plurality found that the Equal Access Act has a secular purpose and is therefore constitutional under the *Lemon* standard and the *Widmar* ruling.[80] It reached this conclusion by focusing on the Act's ostensibly neutral objective in its prohibition against discrimination based on the political, philosophical, or religious content of a student group's speech.[81] The plurality ruled that any possible religious motives on the part of the legislators who enacted the statute[82] provided an insufficient basis for invalidating the law.[83] Thus, the Court departed from its decision in *Stone v. Graham.*[84] In *Stone,* the Court held that *Lemon's* secular purpose requirement would not be satisfied if the Court perceives some ulterior religious intentions, no matter how benign a legislature's articulated reasons for a government enactment may be.[85] *Mergens* relaxes this standard, in view of its deference to the legislative intent behind the Equal Access Act.

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nonpublic schools, and tuition reimbursements to parents sending their children to such schools).

75. 403 U.S. 602. *See also supra* note 47 and accompanying text.

76. 110 S. Ct. at 2370 ("Because we rest our conclusion on statutory grounds, we need not decide — and express no opinion on — whether the First Amendment requires the same result"). *See supra* note 66 and accompanying text.

77. *See Mergens,* 110 S. Ct. at 2366.

78. *Id.* The Court announced, "We think it significant, however, that the Act, which was passsed by wide, bipartisan majorities in both the House and the Senate, reflects at least some consensus on a broad legislative purpose." Yet, the plurality later conceded that "the legislative history of the Act, even if relevant, is highly unreliable." *Id.* at 2368.

79. *See infra* text accompanying notes 93-96.

80. *Widmar,* 454 U.S. 263. The decision that university facilities open to a variety of secular groups had to be opened to religious groups, as well, was based on a free speech analysis. *See supra* text accompanying notes 23-24.

81. *See Mergens,* 110 S. Ct. at 2371.

82. The legislative history behind the Act emphasized that it was the intention of some members of Congress to reverse the effects of the *Lubbock* and *Brandon* decisions, and to assure religious groups a place in the public schools. *See supra* text accompanying notes 15-20.

83. *See Mergens,* 110 S. Ct. at 2371.

84. 449 U.S. 39. *See supra* note 58 and accompanying text.

85. *See Stone,* 449 U.S. at 41. The Kentucky legislature's expressed purpose behind the law was to show children the impact of religion on civilized society. The Court, on the other hand, regarded the measure as an attempt to promote a set of religious beliefs.

The "Effects" of Mergens' *Equal Access*

In *Mergens*, the "effects" prong of the *Lemon* test also falls short of the rigorous scrutiny imposed in earlier Supreme Court decisions. Justice O'Connor's opinion purports to apply an "endorsement test." This test was introduced by Justice O'Connor in *Lynch v. Donnelly*[86] to bar any government activity appearing to advance or hinder religion in any way. According to this analysis, the effects prong "asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[87]

The *Mergens* plurality concluded that there was no endorsement of religion based on its blind acceptance of *Widmar*'s holding[88] and its failure to distinguish between the university and high school environments. Westside High School was devoid of both of the critical indicators of secular effect[89] which were an integral part of the *Widmar* ruling.

First, in *Widmar*, the university's extracurricular offerings comprised an open forum in which over 100 groups with varying purposes and viewpoints were represented. Consequently, no religious group appeared to be state sponsored.[90] Second, because so many secular and religious groups received the same benefits, it was clear that none were getting special treatment.[91]

Mergens' analysis of *Widmar* is superficial, at best, because it fails to note the differences between Westside High's limited extracurricular forum and the wide-open forum existing in *Widmar*. Under a proper analysis of the two essential factors set forth in *Widmar*, the application of the Equal Access Act to Westside High School would be unlikely to survive the *Lemon* effects test.[92]

Mergens' *Superficial Version of Endorsement*

Prior to *Mergens*, it seemed clear that any risk of indirect coercion, even absent any official compulsion, would render an equal access program unconstitutional.[93] For example, the state still had a duty to guard against

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86. 465 U.S. at 688 (O'Connor, J., concurring).

87. *Id.* at 690. The Supreme Court has fully adopted this test through a series of recent decisions. *See* Joel T. Ireland, Note, *The Transfiguration of the* Lemon *Test: Church and State Reign Supreme in* Bowen v. Kendrick, 32 ARIZ. L. REV. 365, 375 (1990).

88. *Mergens*, 110 S. Ct. at 2371 ("We think the logic of *Widmar* applies with equal force to the Equal Access Act.").

89. The absence of an aura of governmental endorsement of any or all religious organizations and the availability of the forum to a wide variety of groups were critical factors in the *Widmar* analysis. *See Widmar*, 454 U.S. at 274.

90. *Id.*

91. *Id.*

92. *Id.* Recall that the Equal Access Act is triggered merely by a limited open forum. *See supra* text accompanying note 9. Moreover, the *Widmar* Court noted that college students are generally less impressionable than those in high school, and would understand that the university's access policy was neutral, and not an endorsement of religion. *See Widmar*, 454 U.S. at 274 n.14.

93. *See* TRIBE, *supra* note 30, at 1169-70 n.4.

student-initiated coercion, even though it was not considered state action.[94] The implication was that an individual might perceive the government as supporting religion. In contrast, the *Mergens* plurality acknowledged that the possibility of student peer pressure exists, but asserted that there is little or no risk of official state endorsement or coercion, so long as religion is not incorporated into formal classroom activities.[95]

This argument is less a reflection of the endorsement test than it is of the more lenient coercion inquiry advocated by Justice Kennedy.[96] According to Justice Kennedy's analysis, an "effects" prong violation results only when the government either attempts to coerce support for a particular religion or directly benefits one to such an extent as to establish a state religion.[97] Applying this test in *Mergens*, Justice Kennedy concluded that the Equal Access Act passes muster because it is merely a neutral accommodation of religion.[98]

The Act survives the plurality's supposed endorsement inquiry in the same manner. *Mergens* departs from the traditional endorsement standard[99] through its explicit use of an accommodation analysis similar to the one introduced in *Zorach v. Clauson*.[100] That case concluded:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.[101]

The First Amendment accommodation theory is intended to promote religious liberty rather than to perpetuate a strict separation between church and state.[102] The purpose of a governmental accommodation is to enable a person to practice his or her faith, usually by removing societal or legislative

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94. *Id.* at 1177. *Cf.* School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985) ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."); *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring in part and dissenting in part) ("The law of imitation operates, and nonconformity is not an outstanding characteristic of children").

95. *Mergens*, 110 S. Ct. at 2372.

96. *See Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part).

97. *Id.*

98. 110 S. Ct. at 2377 (Kennedy, J., concurring).

99. *See supra* text accompanying notes 86-87.

100. 343 U.S. at 315. Rejecting as unfeasible the notion of any sort of true separation of church and state, the *Zorach* Court upheld a New York City program allowing public schools to release students for one hour each week to attend sectarian instruction at their chosen religious centers. *Id.* at 313.

101. *Id.* at 313-14.

102. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 3.

obstacles.[103] In *Wisconsin v. Yoder*,[104] for example, the Court upheld an exemption from compulsory education requirements for children of the Old Order Amish sect. The Court based the exemption upon the Amish conviction that public secondary education undermined their religious faith.

In contrast, religious meetings at public schools are not essential to one's religious faith, as these meetings can be conducted after school hours. A school policy prohibiting organized religious worship or Bible study sessions does not impinge on one's right to practice his religion.[105] Thus, *Mergens* did more than just facilitate the free exercise of religion; the Court permitted affirmative assistance. This goes beyond the purpose of an accommodation.[106]

Affirmative assistance intensifies an existing problem in that whenever the government accommodates one person's religious practices it has the potential to either hinder or facilitate the adoption of that particular faith or practice at the expense of others.[107] The *Mergens* plurality appears to disregard this risk in concluding that the Equal Access Act's application to Westside High does not constitute an endorsement of religion. Justice O'Connor focused on the voluntary, student-initiated character of the religious groups benefitted by the Act.[108] It is noteworthy, though, that Westside's forum encompassed only one such group.

The extracurricular program at Westside High School differs substantially from the wide-open and independent character of the university forum in *Widmar*.[109] The highly controlled environment of a high school, shaped by mandatory attendance laws, tends to create and foster a problem of peer pressure.[110] The *Mergens* Court clearly failed to heed Justice O'Connor's warning in *Lynch v. Donnelly* that, in examining for endorsement, "courts must keep in mind ... the myriad, subtle ways in which Establishment Clause values can be eroded."[111]

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103. *Id.* at 35.
104. 406 U.S. 205 (1972).
105. *See Bender*, 563 F. Supp. at 703 ("Inasmuch as the school district's refusal to let the [students] meet during the activity period does not force them to forego their religious belief in group worship, the [students'] free exercise rights have not been violated").
106. *See* McConnell, *supra* note 102, at 41. *See also* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989). *Bullock* invalidated a Texas statute providing sales tax exemptions to religious periodicals because it violated the Establishment Clause:

> [W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that ... cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, ... it provides unjustifiable awards of assistance to religious organizations.

Id. at 15.
107. *See* McConnell, *supra* note 102, at 35.
108. *See Mergens*, 110 S. Ct. at 2373.
109. *Id.* at 2380 (Marshall, J., concurring).
110. *Id.* at 2382.
111. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

Equal Access Implicates Entanglement

The *Mergens* plurality also paid little attention to possible "entanglement" problems.[112] Although the Equal Access Act requires any faculty advisor of a religious club to be restricted to a nonparticipatory capacity,[113] schools are prohibited from compelling an employee to attend a meeting inconsistent with her religious beliefs.[114] It follows that faculty sponsors may often be adherents of their respective clubs' ideologies. As a result, there is a real danger that teacher support for the religious groups they supervise might carry over into the classroom. Even the most conscientious instructors may find themselves unwittingly endorsing the religious club's activities or encouraging student participation. A teacher with strong religious beliefs, combined with such an outlet for them, poses a danger to the separation of religion from the purely secular aspects of public school education.[115]

Senator Howard Metzenbaum of Ohio voiced the same concern in his minority report on the Equal Access Act.[116] He asserted that supervision by school officials, no matter how limited in scope, gives rise to an inference of sponsorship of student religious activity. This, in turn, creates an impermissible entanglement of government and religion because it gives school officials a role in religious affairs.[117]

The absence of coercion and a mere limitation on teacher involvement cannot save a school policy from an Establishment Clause challenge.[118] Reliance on teachers' good faith efforts to segregate their religious beliefs from their secular educational duties is insufficient whenever there is the potential for inculcating students with an instructor's religious values.[119] By failing to address this concern, the *Mergens* Court adopts a far more lenient version of *Lemon*'s entanglement analysis.

Mergens *Provides Inadequate Direction*

Mergens' liberal accommodation of religion through its expansive reading of the Equal Access Act creates a most unwelcome prospect. The switch from complete neutrality to providing affirmative assistance to religious groups promotes divisiveness and excessive entanglement by encouraging sectarian groups to use the public schools as a means to further their own particular agenda.[120] In the future, the lower courts will have to adjust to *Mergens'* liberal standard for deciding Establishment Clause cases.

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112. See *supra* text accompanying note 51 for an explanation of the entanglement prong.
113. 20 U.S.C. § 4071(c)(3) (1988).
114. *Id.* § 4071(d)(4).
115. *Lemon*, 403 U.S. at 617.
116. S. REP. NO. 357, *supra* note 15, at 49, *reprinted in* 1984 U.S.C.C.A.N. 2349, 2395.
117. *Id.*
118. *See supra* text accompanying note 93.
119. *Cf.* Meek v. Pittenger, 421 U.S. 349, 369 (1974) (Pennsylvania statute granting funds for the benefit of children in nonpublic schools held unconstitutional).
120. Arval A. Morris, *The Equal Access Act After Mergens*, 61 EDUC. L. REP. (West) 1139, 1164-65 (1990).

The long line of Supreme Court cases interpreting *Lemon*[121] has successfully guided the lower courts through church-state controversies arising in the public schools. Until *Mergens*, the federal courts were relatively consistent regarding the types of government policies that could or could not withstand Establishment Clause challenges.[122] The *Mergens* decision threatens this consistency.

In light of *Mergens*, there is no longer a clear standard for judging when a government action violates the Establishment Clause.[123] The Court failed to formulate any clear doctrine for determining how far the government can go to accommodate religion.[124] In fact, the two years since the *Mergens* decision have only cast further doubt on the appropriate standard to apply in Establishment Clause cases. With the retirement of Justices Brennan and Marshall, the endorsement test loses two consistent supporters.[125] Although *Mergens* leaves the framework of the *Lemon* test intact, it provides a highly superficial analysis of the three-prong inquiry.

MERGENS OVERLOOKED LIMITATIONS ON FREE SPEECH

Instead of diluting Establishment Clause standards in the manner it did, the *Mergens* Court could have relied on a free speech rationale. Such an analysis would have yielded a different result from the one reached in *Mergens*. Blindly applying *Widmar*'s public forum discussion to secondary schools not only gives too little weight to the purpose of the Establishment Clause, but also undermines the authority of local school officials.[126] School authorities have traditionally had great discretion regarding student expression;[127] the right to free speech has never been absolute in the public schools.[128]

Mergens represents a major triumph for students' free speech rights. Rather than discussing its precedent for school control over student expression, the Court's entire free speech analysis consisted of distinguishing the Equal Access Act's "limited *open* forum"[129] from the "limited *public* forum"

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121. *See supra* note 28.

122. *See supra* text accompanying notes 52-63.

123. *See* Morris, *supra* note 120, at 1164.

124. Although eight Justices in three separate opinions found that the Equal Access Act satisfies the *Lemon* test, it is not clear why. *See supra* text accompanying note 66.

125. *See, e.g., Texas Monthly*, 489 U.S. at 8 ("The Constitution prohibits, at the very least, legislation that constitutes endorsement of one or another set of religious beliefs or religion generally"); *Edwards*, 482 U.S. at 585 ("*Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion").

126. *See* Charles E. Ares, *Religious Meetings in the Public High School: Freedom of Speech or Establishment of Religion*, 20 U.C. DAVIS L. REV. 313, 315 (1987).

127. *See, e.g.*, Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1987) (permitting high school principal to censor school newspaper articles whose discussions were incompatible with the school's educational mission); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (allowing school to discipline student for delivering a sexually explicit, though not obscene, speech on the grounds that it was inconsistent with the educational values that officials sought to instill).

128. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). *See also infra* note 141 for a discussion of the case.

129. *See supra* text accompanying note 9.

described in *Perry Education Association v. Perry Local Educators' Association.*[130] The *Mergens* Court favored form over substance by failing to apply the reasoning of prior cases to the facts of the instant one.

In fact, the *Perry* rationale is equally applicable to the forum created at Westside High School. *Perry* held that a school's internal mail system does not become a traditional public forum for First Amendment purposes simply because it is open for use by a variety of groups.[131] The state may reserve such a forum for its intended purposes as long as the regulation on speech is reasonable and not an effort to suppress expression on the basis of its content.[132] Based upon this justification, the school could deny access to a teachers union even though it granted this right to a rival union, the Girl Scouts, YMCA, and other outside organizations. The Court found that the school determined access based upon the *status* of the groups rather than their views.[133] The Court allowed the school to justify its exclusion of the rival union as a means to ensure labor peace within the school district.[134]

Had the *Mergens* Court followed the *Perry* rationale, it could have permitted Westside officials to exclude all viewpoint-oriented groups on the ground that they divide the student body. The Equal Access Act would not have applied to Westside High if the Court had concluded that the school was not a "limited open forum."[135] The Court imposed the Act's requirements because it refused to find that all of the nonideological groups sponsored by the school[136] were related to the curriculum. Thus, *Mergens* construed "noncurriculum related" in such a narrow fashion as to readily trigger the Equal Access Act. This denies school officials the discretion to run extracurricular programs as they deem appropriate.

Local school authorities require this degree of control because states and cities are entrusted with educational responsibilities which must be uniquely tailored to fit local needs.[137] The Court has traditionally recognized

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130. 460 U.S. 37 (1983). The Court defined public forums as those places "which by long tradition or by government fiat have been devoted to assembly and debate, [so] the rights of the State to limit expressive activity are sharply circumscribed." *Id.* at 45. By contrast, a limited public forum is public property which the State itself has opened for use by the public for expressive activity. *Id.*

131. *Id.* at 53-54.

132. *Id.* at 46.

133. *Id.* at 49. The Girl Scouts, YMCA, and other groups were allowed to use the mail system because their activities were of interest or educational relevance to students. A union chosen by the teachers as their official bargaining representative was granted access in view of its responsibility to the school district. The excluded union did not fit in either category. *Id.* at 48.

134. *Id.* at 52.

135. Recall that a school creates a limited open forum once it permits a single noncurricular group to meet on the premises. *See supra* text accompanying notes 9 & 14.

136. *See Mergens*, 110 S. Ct. at 2373-76, for a listing of the student clubs that comprised Westside High's "limited open forum." Clearly, "[n]one of the clubs at the high school is even arguably controversial or partisan." *Id.* at 2385 (Stevens, J., dissenting).

137. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 741 (1973) (recognizing that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools").

the importance of allowing local entities to shape their individual educational environments.[138]

Authorized Limitations on Student Speech

Hazelwood School District v. Kuhlmeier[139] held that a school must retain the authority to refuse to sponsor student speech that advocates inappropriate behavior, or associates the school with any non-neutral position on matters of political controversy.[140] The *Hazelwood* Court concluded that the *Tinker* standard,[141] which determines when a school may punish student expression, is not intended to confine the extent to which a school may refuse to provide its resources to facilitate student expression.[142]

This language suggests that, at least prior to *Mergens*, school officials had wide discretion to limit the scope of their extracurricular offerings. In fact, the *Hazelwood* Court ruled that the First Amendment allows school officials editorial control over student speech in school-sponsored expressive activities, so long as their actions are "reasonably related to legitimate pedagogical concerns."[143] In other words, *Hazelwood* permitted school authorities to decide what speech (or what types of groups) they wished to sponsor depending upon its consistency with the school's educational mission. Under this standard, it appears that the Westside Community Schools exercised lawful authority in setting up an extracurricular arena that excluded all religious and political organizations.

The *Mergens* Court improperly interfered with the structure of a school's extracurricular environment. School officials rather than judges should make these decisions. Consequently, the effect of *Mergens* is to deprive local authorities of much of their control over their respective educational systems.

Implications of Mergens' *Commitment to Free Speech*

A further effect of *Mergens* will be to confuse the lower courts by suddenly restricting the amount of extracurricular control they are accustomed to affording education officials. As a result of *Mergens*' low threshold for triggering Equal Access Act requirements, school authorities will have less lati-

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138. *See, e.g.*, Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 208 (1982) (allowing local authorities to formulate their own methods for educating the handicapped); Wood v. Strickland, 420 U.S. 308, 326 (1975) (individual school officials have the discretion to discipline students as they see fit); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (local authorities have the power to prescribe their own school curricula).

139. 484 U.S. 260 (1988). The Court rejected a First Amendment challenge to a high school principal's censorship of news articles on teen pregnancy slated for publication in the school paper.

140. *Id.* at 266.

141. *See Tinker*, 393 U.S. 503 (overturning the suspensions of high school students who violated school policy by persisting to wear black armbands in protest of the Vietnam conflict). The Court ruled that a school may not abridge a student's right to free expression unless that speech "substantially interfere[s] with the requirements of appropriate discipline in the operation of a school." *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

142. *Hazelwood*, 484 U.S. at 266.

143. *Id.* at 267.

tude than they had previously. Either schools open their doors to every group that students wish to form, or they limit their offerings to those clubs that are directly related to the curriculum. In this regard, *Mergens* removes some flexibility from school authorities and, therefore, is a departure from past rulings.

In *May v. Evansville-Vanderburgh School Corp.*,[144] the Seventh Circuit upheld a school policy prohibiting a group of evangelical teachers from meeting on the premises before the school day began. The court noted that the administration of a public school is difficult enough without the federal courts telling officials that they must provide forums for meetings on the issue of the day.[145] Although the school hosted meetings of the PTA, Boy and Girl Scouts, and the Booster Club, Judge Posner denied that this created a public forum.[146] He ruled that the mere fact that a school houses a kitchen, gym, and other areas for informal conversations does not make it an arena for teachers to express themselves on matters unrelated to school.[147]

Although the Equal Access Act only applies to student groups, *May*'s basis for excluding the teacher-formed club should apply with equal force to the extracurricular forum at Westside High School. By offering after-school activities such as a cheerleading squad, the school should not become obligated to recognize any political or religious group that students wish to form. Westside, much like the Evansville school, should have the prerogative to exclude all groups of this sort.[148] A school's conduciveness to teaching and studying may not last long if controversial groups with opposing viewpoints, or at least strong ideologies, are allowed to meet before and after school and during lunch.[149] Judge Posner apparently feared the prospect of this increased divisiveness in the schools when he remarked, "this is not the American tradition in public elementary education, and is not the First Amendment's command."[150]

Mergens suggests that schools must now welcome the very type of educational environment that the *May* court feared. By denying schools the discretion to define their own extracurricular forums, limited resources for the facilitation of student expression can no longer be allocated according to the status of student organizations. The *Mergens* Court has opened the schoolhouse doors to more than just a Christian club. As a consequence of this ruling, any group of students assembled for any purpose is entitled to the same privileges as are the innocuous chess club or cheerleading squad.

This incongruous result overlooks the legitimate fear of some school officials that religious activities during school will develop into attempts to

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144. 787 F.2d 1105 (7th Cir. 1986).
145. *Id.* at 1112.
146. *Id.* at 1115. *See also supra* note 130 and accompanying text.
147. *See May*, 787 F.2d at 1118.
148. Recall that the *Perry* Court allowed discrimination in school access policies so long as it was based on the *status* of the group as opposed to the *content* of its speech. *See supra* note 133 and accompanying text.
149. *See May*, 787 F.2d at 1109.
150. *Id.*

proselytize other students.[151] Tension and animosity among competing religious factions will only complicate the public schools' mission — one which is already sufficiently difficult.

Mergens interferes with local school officials' need to shape their respective educational environments by divesting them of the authority to eliminate potential conflicts and distractions.[152] In glossing over the relevancy of the *Perry* and *Hazelwood* precedents, the *Mergens* Court reached a result that is inconsistent with its own student speech jurisprudence.

RAMIFICATIONS OF EQUAL ACCESS

In the years between the passage of the Equal Access Act and the *Mergens* decision, judges on the lower federal courts indicated serious misgivings about the Act. For example, in *Bell v. Little Axe Independent School District*,[153] the Tenth Circuit upheld a ban on voluntary religious group meetings because they would conflict with the effects and entanglement prongs of the *Lemon* test.[154] The majority felt that the presence of even a single teacher at a religious group meeting would produce an aura of school approval in the eyes of impressionable youth.[155] Furthermore, the court feared excessive entanglement between government and religion because the school district would have to compensate a faculty monitor and publicize group meetings as it did for other clubs.[156]

The concern over government spending for private group meetings on school premises surfaced again in *Student Coalition for Peace v. Lower Merion School District Board*.[157] Although the court found the school had created a "limited open forum" within the terms of the Equal Access Act, it upheld the administration's denial of a politically-oriented student group's request to use the gymnasium for a rally.[158] The court ruled that under the Act,[159] the school district could not be compelled to bear the cost of wear and tear on the gym likely to result from the group's meeting there.[160]

Mergens *Impacts More Than High Schools*

In another case interpreting the language of the Equal Access Act, one district court upheld a junior high school's prohibition against a religious club's distribution of leaflets on the premises.[161] Significantly, the court recognized

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151. *See* Ares, *supra* note 126, at 336-37 ("[r]eligious proselytization has a particular capacity for creating religious tensions, and school officials should have the constitutional power to decide that a program that may generate those tensions is incompatible with a stable educational atmosphere").

152. *Cf. id.* at 337.

153. 766 F.2d 1391 (10th Cir. 1985).

154. *Id.* at 1406.

155. *Id.* at 1405.

156. *Id.* at 1406.

157. 633 F. Supp. 1040 (E.D. Pa. 1986).

158. *Id.* at 1043.

159. 20 U.S.C. § 4071(d)(3).

160. 633 F. Supp. at 1043.

161. Thompson v. Waynesboro Area School Dist., 673 F. Supp. 1379, 1383 (M.D. Pa. 1987). The court found that the distribution of leaflets in a hallway was not the type of

that a junior high may fall within the coverage of the Equal Access Act depending on the state's statutory definition of "secondary school."[162]

This decision indicates that *Widmar*'s interpretation of the Act extends to both high school and pre-teen students. Therefore, the breadth of the *Mergens* ruling permits a religious presence even in those schools with a less mature student body. Psychologists generally regard peer pressure as a serious problem among children up to age fifteen.[163] At this age, the need to conform with the behavior and ideas of one's classmates is at its height; the typical adolescent may not yet be capable of engaging in critical inquiry or debate.[164]

Because *Mergens* arose at the high school level, it appears that the Court failed to consider the implications of its language when applied to the lower grades. The Court's expansive interpretation of the Equal Access Act and dismissal of First Amendment concerns may have the effect of preempting a junior high school student's Establishment Clause challenge to the Equal Access Act.[165]

In fact, *Mergens*' generous assessment of students' maturity has already been applied to satisfy the effects prong of *Lemon*'s Establishment Clause inquiry. In *Minnesota Federation of Teachers v. Nelson*,[166] the federal district court relied on Justice O'Connor's faith in secondary school students,[167] rather than any empirical psychological evidence, to determine that beneficiaries of the program would not construe it as an endorsement of the particular religion controlling the participating colleges.[168] *Nelson*'s superficial application of the *Lemon* test is indicative of the direction in which post-*Mergens* cases are heading.

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activity in which student groups at the school were already allowed to engage. Therefore, the plaintiffs' conduct did not bring them within the Act's definition of a meeting under 20 U.S.C. § 4072(3).

162. 673 F. Supp. at 1383. In fact, statutes or administrative regulations in 22 states, plus the District of Columbia, include the seventh grade within their definitions of "secondary schools": Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Idaho, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, Vermont, and Washington. COMMISSION ON LAW AND SOCIAL ACTION, AMERICAN JEWISH CONGRESS, EQUAL ACCESS: A PRACTICAL GUIDE 17 (1985).

163. *See* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499, 507-08 nn.42 & 43 (1983) (citing James S. Coleman, *Friendship and the Peer Group in Adolescence*, *in* HANDBOOK OF ADOLESCENT PSYCHOLOGY 424-25 (Joseph Adelson ed. 1980).

164. *Id.*

165. Because *Mergens* defeated a high school student's First Amendment claim, there may be nothing to stop a court from doing the same with a case arising out of a junior high.

166. 740 F. Supp. 694 (D. Minn. 1990). This case upheld the state's Post-Secondary Enrollment Options Act which allocated public funds for selected eleventh and twelfth graders to take courses at religiously affiliated colleges.

167. *See Mergens*, 110 S. Ct. at 2372 ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.").

168. *Nelson*, 740 F. Supp. at 706.

*Post-*Mergens *Cases Reflect a More Lenient Standard*

On petition for a writ of certiorari, the Supreme Court remanded *Garnett v. Renton School District No. 403*[169] to the Ninth Circuit for reconsideration in light of the *Mergens* decision.[170] The Court's suggestion that this case may be decided differently based on *Mergens'* interpretation of the Equal Access Act signals the Court's increased receptiveness to organized religion in the public schools.

Thus, in the two years since the Supreme Court decided *Mergens*, a noticeable departure from traditional Establishment Clause doctrine has emerged. The lower courts have construed this decision to legitimate the presence of religion in the public schools, and the Supreme Court itself has reinforced the new trend. As a result of this change, considerably fewer government restrictions on religion in the schools will be upheld on the basis of the First Amendment.

CONCLUSION

Mergens' broad interpretation of the Equal Access Act will eliminate a substantial amount of governmental regulation of the public schools under the First Amendment. In light of *Mergens'* low threshold for triggering the Act's requirements, a school that offers any noncurricular activity cannot legally bar a religious or politically-oriented group from its premises. Additionally, whenever existing organizations are provided with meeting space or school publicity, school authorities must allow the same opportunities to newly-proposed groups, regardless of their appropriateness in the public school environment. In general, local school officials may no longer have the same degree of control over their extracurricular programming.

As a result of *Mergens*, many more governmental accommodations of religion will now withstand Establishment Clause challenges, however, it is not clear just where the courts will draw the line. Justice O'Connor's astute conclusion of several years ago is especially relevant today: "[t]he challenge posed ... is how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion."[171] The *Mergens* Court was apparently not up to this challenge in view of its superficial analysis of the equal access issue.

The Court upheld the Equal Access Act on the ground that it is facially neutral, and deemed it applicable to virtually every high school (and some junior highs) through an overbroad construction of the phrase, "limited open forum." The Court thereby allowed religious groups unprecedented access to public schools by discounting those concerns once tantamount to a finding of an Establishment Clause violation. *Mergens* paves the way for far less

169. 874 F.2d 608 (9th Cir. 1989). The appeals court upheld a ban on religious groups meeting before school on the grounds that the Equal Access Act was inapplicable because a "limited open forum" had not been created. *Id.* at 613. In addition, the court feared violations of the *Lemon* effects and entanglement prongs in view of district requirements of faculty supervision. *Id.* at 612.

170. 110 S. Ct. 2608 (1990).

171. Wallace v. Jaffree, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring).

intense scrutiny of school policies, or government actions generally, which has the effect of diminishing the separation between church and state.