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Of Equal Access and Trojan Horses

Robert C. Boisvert, Jr.*

These provisions honor, in a public school setting, this country's heritage of freedom of thought and speech, and I am delighted that they now become the law of the land.¹

*President Ronald Reagan,
upon signing
the Equal Access Act.*

On August 11, 1984, President Reagan signed the Equal Access Act,² making it the "law of the land." The Equal Access Act³ makes it

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

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1. President's Statement Upon Signing H.R. 1310 (Education for Economic Security Act), 20 Weekly Comp. Pres. Doc. 1120, 1121 (Aug. 11, 1984).

2. Pub. L. No. 98-377, 98 Stat. 1302 (to be cited as 20 U.S.C. § 4071 (1984)).

3. SUBCHAPTER VIII—EQUAL ACCESS

§ 4071. Denial of equal access prohibited

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

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially in-

meetings.⁴

In effect, once a secondary school permits a "noncurriculum re-

terfere with the orderly conduct of educational activities within the school; and

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

(d) Federal or State authority nonexistent with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof—

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

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

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

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

(5) to sanction meetings that are otherwise unlawful;

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

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

(e) Unaffected Federal financial assistance to schools

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

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

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

§ 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.

§ 4073. Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

§ 4074. Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

4. 20 U.S.C.A. § 4071(a) (West Supp. 1985).

lated⁵ student group to meet on school premises during noninstructional time,"⁶ the school must permit "voluntary and student-initiated"⁷ religious⁸ groups the same right of access.

This article examines Congress' commitment to giving secondary students a right to engage in diverse activities and concludes that, although in enacting the Equal Access Act Congress' intent was to encourage religious meetings in public schools, the Act's language and supporting first amendment case law actually strengthen secondary students' rights to participate in and be exposed to intellectual diversity. The Act provides an additional means for unpopular student groups to gain recognition and the right to meet, adding to the diversity of student activity and benefiting all secondary students.

Part I examines the politics and history of the Equal Access Act and reveals that Congress was more concerned with protecting religious speech than with protecting political and philosophical speech. Part II analyzes the constitutionality of the Act and predicts that the conservative Burger Court will hold that the Equal Access Act does not violate the establishment clause. Part III discusses the construction of the Act and focuses on its scope and remedies. Finally, Part IV assesses the wisdom of the Equal Access Act and concludes that religious meetings do not belong in public schools. If, however, the Supreme Court upholds its constitutionality, the Act will effectively strengthen students' rights to free speech and recognize that secondary students are mature enough to be exposed to a spectrum of ideas and viewpoints, including unpopular ones.

I. The History and Politics of the Equal Access Act

To understand the background of the Equal Access Act, one must view the Act for what it is: a law intended to enable student organizations to use public secondary school facilities for *religious* meetings.⁹ Although the Act protects political and philosophical

5. The Act does not define "noncurriculum related." See *infra* text accompanying notes 128-139.

6. The Act defines "noninstructional time" as "time set aside by the school before . . . or after actual classroom instruction." 20 U.S.C.A. § 4072(4) (West Supp. 1985). See *infra* text accompanying notes 140-146.

7. 20 U.S.C.A. § 4071(c)(1) (West Supp. 1985). The Act prohibits nonschool persons from organizing religious meetings using public school facilities. 20 U.S.C.A. § 4071(c)(5) (West Supp. 1985).

8. Although the Equal Access Act appears to guarantee access for religious, political, and philosophical student organizations, this article will refer most often to access for religious organizations.

9. See, e.g., 130 Cong. Rec. S8331-32 (daily ed. June 27, 1984) (statement of Sen.

speech, the drafters added those provisions only to appease critics¹⁰ and garner additional congressional support.¹¹ Indeed, Senator Jeremiah Denton, a conservative co-author of the bill, admitted that he had not considered any evidence that students' political or philosophical speech was being abridged by the schools.¹² While some legislators hoped the Act would protect the speech rights of all students,¹³ many legislators hoped the primary effect would be to advance or support religion in public schools.¹⁴

It would be disingenuous to argue that those who supported the bill on religious grounds did not wish to advance religion in the schools but merely hoped to create diversity among high school student organizations. President Reagan, the Moral Majority, and the Christian Voice did not support the Act because it would allow in almost all speech, regardless of its popularity or general acceptability; they supported the Act because, although not as good as a school prayer amendment, it was a step forward in the campaign to get religion into the schools. Thus, the primary concern of the legislators was access for religious organizations.

Despite public support,¹⁵ earlier legislative attempts to legal-

Hatch) (Equal Access Act intended to end confusion about permissibility of religious activities in public secondary schools); 130 Cong. Rec. S8335 (daily ed. June 27, 1984) (statement of Sen. Denton) ("[The Equal Access Act will] make it clear that secondary school students engaging in religious speech have the same rights to associate together and to speak as do students who wish to meet to discuss chess, politics, or philosophy.").

The sole harm that Congress sought to remedy was schools' refusal to recognize religious organizations and allow them to use school facilities. For a litany of examples of such denials see 130 Cong. Rec. S8331-35 (daily ed. June 27, 1984).

10. The American Civil Liberties Union and the National Education Association opposed earlier drafts of the Equal Access Act but remained neutral concerning the version of the bill, the Denton-Hatfield amendment, which eventually passed. 130 Cong. Rec. S8338 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

11. 130 Cong. Rec. S8344 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

12. 130 Cong. Rec. S8349 (daily ed. June 27, 1984) (statement of Sen. Denton). This does not mean that such discrimination does not exist, but merely that it was not researched.

Student free speech rights have been recognized. The Supreme Court in *Tinker v. Des Moines Indep. School Dist.* (students wearing black armbands to protest Vietnam War), held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. 503, 506 (1969). See *infra* text accompanying notes 154-160.

13. Stuart Taylor, *School Prayer: A Trojan Horse*, N.Y. Times, July 27, 1984, § 2, at 11, col. 1.

14. *Id.* See, e.g., 130 Cong. Rec. S8365 (daily ed. June 27, 1984) (statement of Sen. Baucus) ("I support this Equal Access Bill because it puts religion in the schools, but in a way that is consistent with the Constitution.").

15. According to a Media General-Associated Press poll, 61% of Americans who were asked said they would support a constitutional amendment allowing organized prayer in public schools. *Most favor prayer in schools, poll says*, Minneapolis Star & Tribune, Jan. 3, 1985, at A9, col. 5.

ize organized prayer in public schools failed.¹⁶ The equal access amendment, also known as the Denton-Hatfield amendment,¹⁷ provided an opportunity for legislators to get some religion into the schools but in a form more palatable to organized opponents. Noted the *New York Times*:

Bending itself out of shape to accommodate the pressure for prayer in the schools, the Senate has now acted to admit a little prayer before or after classes, but in a perversely liberal way: it would also admit some atheism, politics and perhaps even homosexual agitation on an equal basis.¹⁸

The amendment was written on the floor of the Senate¹⁹ and, because it was an amendment and not a bill, was never subject to Senate hearings or committee reports.²⁰ After only minor alterations,²¹ the amendment was attached to the House-passed Emergency Mathematics and Science Education and Jobs Act.²² The Senate overwhelmingly approved the modified Denton-Hatfield amendment²³ and sent it to the House of Representatives.

Upon reaching the House,²⁴ the amendment was referred to both the Judiciary Committee and the Education and Labor Committee.²⁵ At this point, while the bill was in committee, substan-

16. On March 20, 1984, the Senate failed to get the two-thirds vote necessary to pass S.J. Res. 73, a proposed amendment to the Constitution permitting voluntary prayer in public schools. S.J. Res. 73, 98th Cong., 1st Sess. (1983). The Senate vote favoring the resolution was 56 to 44. 130 Cong. Rec. S2901 (daily ed. Mar. 20, 1984).

Meanwhile, the House has avoided considering school prayer amendments. 130 Cong. Rec. H3820 (daily ed. May 14, 1984) (statement of Rep. Weber) ("[I]t ha[s] been over 20 years since that school prayer amendment was initially introduced and we ha[ve] had only one opportunity, and that 13 years ago, to debate school prayer.").

17. Senator Denton offered the original amendment on June 6, 1984. Senator Hatfield revised the amendment on June 27, 1984. See 130 Cong. Rec. S8331 (daily ed. June 27, 1984).

18. *Schoolhouse Free-for-All*, *N.Y. Times*, July 25, 1984, at A22, col. 1.

19. 130 Cong. Rec. H7727 (daily ed. July 25, 1984) (statement of Rep. Edwards).

20. *Id.* at H7728.

21. See 130 Cong. Rec. S8338-39, S8341 (daily ed. June 27, 1984).

22. H.R. 1310, 98th Cong., 1st Sess., 130 Cong. Rec. H7745-56 (1984). The Emergency Mathematics and Science Education and Jobs Act provides for funds to upgrade mathematics, science, computer technology, and foreign languages instruction and provides assistance for employment-based vocational training programs. The equal access amendment was added to the Emergency Mathematics and Science Education and Jobs Act as Title VIII.

23. The Senate approved the amendment 88 to 11. See 130 Cong. Rec. S8370 (daily ed. June 27, 1984).

24. In May, the House failed to pass its own version of the Equal Access Act, H.R. 5345, under suspension of the rules, 270 to 151. 130 Cong. Rec. H3901 (daily ed. May 15, 1984).

25. 130 Cong. Rec. H7727 (daily ed. July 25, 1984) (statement of Rep. Edwards). According to Jeffrey Arnold, a legislative assistant to Sen. Hatfield, it is very unusual to refer a House-passed bill back to a House committee. Arnold said that this was a tactic of the House leadership designed to keep the bill off the floor of the

tial political jockeying occurred. Representative Carl Perkins threatened to call the bill up for a vote pursuant to a seldom-used procedure called "Calendar Wednesday."²⁶ Negotiation ensued and House leadership agreed to permit a vote on the amendment under suspension of the rules,²⁷ a procedure which requires a two-thirds vote and prohibits amendment. The House leadership agreed that if the vote on the Denton-Hatfield amendment was successful, a vote on the entire package would follow.²⁸ In the meantime, President Reagan contacted numerous representatives and warned them that he would veto the mathematics and science bill if it did not include the equal access amendment.²⁹ On July 25,

House, where it would probably have passed. Telephone interview with Jeffrey Arnold, legislative assistant to Sen. Hatfield (Jan. 24, 1985).

26. Telephone interview with Jeffrey Arnold, legislative assistant to Sen. Hatfield (Jan. 24, 1985).

27. *Id.* The political jockeying and the expedited procedure led at least one representative to question the validity of the amendment itself:

I am ashamed to say that we cannot fully debate the merits [of the Equal Access Bill] today. At 6 o'clock yesterday evening, the decision to bring this bill to the floor was made. This bill's language was passed by the Senate on June 27, 2 days before we recessed. Now on our second day back, we have this bill before us. I wonder how many of my colleagues have had their staff read the almost 40 pages of Senate debate in the CONGRESSIONAL RECORD? How many of us know what this language means? Even the House and Senate sponsors don't.

. . . .

Just as the sponsors are confused over the interpretation of the equal access bill, they have created a great deal of consternation and confusion over the procedure for consideration of the bill. A "Dear Colleague" letter dated July 24 asked for Republican Members' support for the bill under Calendar Wednesday, allowing 2 hours of general debate and opportunity for amendment. This morning, we received a "Dear Colleague" [letter] addressed to all Members urging support of the legislation under suspension of the rules, so that the time-consuming Calendar Wednesday procedure may be avoided. The obvious question is why were amendments touted yesterday and today we are being asked to expedite the process? I think the answer is the sponsors of the bill are not on a firm substantive or procedural grounds [sic].

130 Cong.Rec. H7736 (daily ed. July 25, 1984) (statement of Rep. Fish).

28. Telephone interview with Jeffrey Arnold, legislative assistant to Sen. Hatfield (Jan. 24, 1985).

29. *Id.* President Reagan, the Moral Majority, the Christian Voice, the United States Catholic Conference, the Christian Legal Society, and numerous other conservative and religious organizations endorsed the Denton-Hatfield amendment. 130 Cong. Rec. S8336 (daily ed. June 27, 1984)(statement of Sen. Denton). Commented Rep. Schumer:

[Y]ou should reject this [equal access] bill on the basis of the establishment clause. It was said by none other than Jerry Falwell why "our supporters" are backing this bill. Mr. Falwell said the real reason is to get prayer back into the schools, but he said, "We knew we couldn't win on school prayer but equal access gets us what we wanted all along."

1984, without House committee hearings or reports,³⁰ the House agreed 337 to 77 to pass the equal access amendment.³¹ The following month, President Reagan signed the bill.

II. The Constitutionality of the Equal Access Act

The enactment of the Equal Access Act was preceded by much debate concerning the first amendment's protection of free speech and the free exercise of religion, as well as by its prohibition of government establishment of religion.³² This part discusses Supreme Court decisions concerning conflicts between religion and free speech and lower federal court decisions specifically regarding equal access in public secondary schools. Finally, this part analyzes the Equal Access Act in light of these opinions.

A. *The Foreshadowing: Widmar v. Vincent*

In *Widmar v. Vincent*,³³ the Supreme Court dealt with equal access in a university setting. In *Widmar*, members of a university religious group named Cornerstone³⁴ were denied permission to use the facilities at the University of Missouri at Kansas City.³⁵ The students challenged a university regulation which prohibited use of university facilities for religious worship or teaching.³⁶ The district court upheld the regulation, holding that religious speech

130 Cong. Rec. H7725 (daily ed. July 25, 1984) (statement of Rep. Schumer).

President Reagan, in his State of the Union Address, thanked Congress for passing the Equal Access Act. Stated Reagan: "[N]o citizen need tremble, nor the world shudder, if a child stands in a classroom and breathes a prayer. We ask you again: Give children back a right they had for a century and a half or more." *Text of President's State of the Union Address to Congress*, N.Y. Times, Feb. 7, 1985, § 2, at 8, col. 4.

President Reagan's plea is somewhat deceptive. In calling for organized prayer in public schools, President Reagan intimates that students are prohibited from praying in school. This is incorrect. Although public schools cannot sanction or supervise student prayer, neither can they bar individual students from praying on their own time. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2496 (1985) (O'Connor, J., concurring) ("Nothing in the United States Constitution as interpreted by this Court . . . prohibits public schools from voluntarily praying at any time before, during, or after the school day.").

30. See 130 Cong. Rec. H7736 (daily ed. July 25, 1984) (statement of Rep. Fish).

31. See 130 Cong. Rec. H7740-41 (daily ed. July 25, 1984). Having passed Title VIII (the equal access provisions), the House passed Title I through VII (the original Emergency Mathematics and Science Education and Jobs Act) by a vote of 393 to 15. 130 Cong. Rec. H7745 (daily ed. July 25, 1984).

32. U.S. Const. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .")

33. 454 U.S. 263 (1981).

34. Cornerstone is an evangelical Christian student group. *Id.* at 265 n.2.

35. *Id.* at 265.

36. *Id.*

is entitled to less constitutional protection than other types of expression and that the establishment clause in fact *requires* such a regulation.³⁷ The Eighth Circuit Court of Appeals reversed.³⁸ It held that the regulation constituted content-based discrimination against religious speech for which the court could find no compelling justification.³⁹ According to the Eighth Circuit, the establishment clause does not bar a policy of equal access.⁴⁰

The Supreme Court affirmed the Eighth Circuit's ruling. The Court found that the University had created a public forum by permitting other student organizations to use university facilities and that singling out religious organizations for exclusion constituted content-based discrimination.⁴¹ The Court rejected the University's argument that the exclusion was justified by the compelling state interest of ensuring strict separation of church and state,⁴² holding that equal access is not necessarily incompatible with separation of church and state.⁴³ The Court engaged in a three-pronged analysis of the challenged regulation under the establishment clause:

First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster "an excessive government entanglement with religion."⁴⁴

The Court noted that both lower courts had agreed that two of the prongs were easily satisfied: the open forum policy would have a secular purpose and would avoid entanglement with religion.⁴⁵ The district court, however, had concluded that the policy failed the second requirement of the three-prong test because allowing religious groups to use university facilities would have the primary effect of advancing religion.⁴⁶ The Supreme Court disagreed.⁴⁷ Justice Powell, writing for an 8-1 majority, stated that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices."⁴⁸ In a footnote, Justice Powell suggested that the outcome might be different

37. *Chess v. Widmar*, 480 F. Supp. 907 (W.D. Mo. 1979).

38. *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980).

39. *Id.* at 1315-20.

40. *Id.* at 1317.

41. 454 U.S. at 269-70.

42. *Id.* at 270-71.

43. *Id.*

44. *Id.* at 271 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

45. *Id.* at 271-72.

46. *Id.* at 272.

47. *Id.* at 273.

48. *Id.* at 274.

in a public primary or secondary school setting, reasoning that "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."⁴⁹ Additionally, argued Justice Powell, the university forum was already open to a wide variety of nonreligious groups, all of which benefited from open access.⁵⁰ Powell reasoned that this diversity indicated that the University's equal access policy had a secular effect.⁵¹

B. *The Lower Federal Courts and Equal Access in Public Secondary Schools*

The Supreme Court recently granted certiorari in a case which may become the first test of the Equal Access Act. The Third Circuit Court of Appeals decided *Bender v. Williamsport Area School District* just one month before the passage of the Act.⁵² In *Bender*, the Third Circuit rejected a student religious group's challenge to a school policy prohibiting religious groups from using school facilities. The case involved a student-initiated nondenominational prayer club that had been refused permission to meet during a regularly scheduled activity period.⁵³ The district court concluded that the school had abridged the students' first amendment rights and rejected the school district's argument that the establishment clause justified the infringement.⁵⁴

The Third Circuit reversed. Referring to *Tinker* and *Widmar*, the court noted that both student speech and religious speech have some degree of protection under the first amendment.⁵⁵ While the first amendment does not guarantee access to all government facilities, commented the court, the school district's encouragement of extracurricular activities created a limited

49. *Id.* at 274 n.14.

50. *Id.* at 274. The Court suggested that the result might have been different had the University been able to prove empirically that religious groups would "dominate" the open forum. *Id.* at 275.

51. *Id.* at 274.

52. 741 F.2d 538 (3d Cir. 1984), *reh'g denied*, 741 F.2d 538 (Aug. 15, 1984), *cert. granted*, 105 S. Ct. 1167 (1985). The Supreme Court might, however, sidestep the Equal Access Act issue by deciding the case does not present a case or controversy as "the school board itself no longer opposes the students' position, and . . . the individual who brought the initial appeal no longer holds any official position." *Court to Rule on Meetings of Religious Clubs in High Schools*, N.Y. Times, Feb. 20, 1985, at A13, col. 5.

53. 741 F.2d at 541-42.

54. *Bender v. Williamsport Area School Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983).

55. 741 F.2d at 545 (citing *Tinker*, 393 U.S. at 503, and *Widmar*, 454 U.S. at 269).

open forum.⁵⁶ This, in turn, obligated the district "to explain its exclusion of a qualified group under applicable constitutional criteria."⁵⁷ Because the restriction was content-based, the court determined that the proper test was whether the district's restriction was "narrowly drawn to meet a compelling state interest."⁵⁸

In analyzing the district's contention that the exclusion was justified by the establishment clause, the court first examined whether the policy had a secular purpose. The court quickly disposed of this first prong, noting that the purpose of the general activity policy was to contribute to student development.⁵⁹ The policy failed the second prong, however, because the presence of religious groups during the school day would create the appearance of government endorsement so as to have the effect of advancing religion.⁶⁰ The court distinguished *Widmar* by the lesser maturity of the students in *Bender* and the more controlled, compulsory nature of high schools.⁶¹

Having established that the district had advanced a compelling state interest, the court weighed the free speech rights of the students against the district's interest in honoring the establishment clause.⁶² The court concluded that, in this case,⁶³ free speech rights must yield to the establishment clause. This conclusion was based on the limited nature of the high school forum and the divisiveness and pressures likely to result from religious activities in a high school setting.⁶⁴ Reasoned the court:

Instead of uniting students from varying backgrounds and beliefs, prayer in the public schools segregates students along religious lines. This works to the detriment of all students, and may particularly ostracize and stigmatize those students who are atheists or adhere to religious beliefs not shared by the majority of their fellow students. . . . Accordingly, we are of the view that "Sacred practices of religious instruction and prayer, [as] the Framers [of the Constitution] foresaw, are best left to private institutions—the family and houses of worship."⁶⁵

56. *Id.* at 545-50.

57. *Id.* at 546.

58. *Id.* at 550.

59. *Id.* at 551 ("A purpose which is nonsecular . . . will not be inferred lightly.").

60. *Id.* at 552-55.

61. *Id.*

62. *Id.* at 557-61.

63. The court emphasized that the weighing of competing interests must be handled on a case-by-case basis. *Id.* at 559.

64. *Id.* at 560-61.

65. *Id.* at 561 (quoting *Brandon v. Board of Educ.*, 635 F.2d 971, 973 (2d Cir. 1980)).

The Supreme Court has denied certiorari in two other cases involving student religious groups' use of public secondary school facilities.⁶⁶ The lower courts' analyses in these two cases are helpful in understanding the issues raised in the public school setting and in predicting courts' reactions to future claims under the Equal Access Act.

In *Brandon v. Board of Education*,⁶⁷ several high school students involved in a group called "Students for Voluntary Prayer" sued the school board⁶⁸ after it refused them permission to conduct communal prayer meetings in a classroom before the start of the school day.⁶⁹ The Second Circuit Court of Appeals affirmed the district court's dismissal of the students' complaint for three reasons.⁷⁰ First, the Second Circuit held that the students had not shown that their free exercise rights had been abridged because they had failed to prove they otherwise lacked facilities for communal prayer.⁷¹ Second, the court agreed with the defendants' argument that the refusal was justified by a compelling state interest in preventing the authorization of student-initiated voluntary prayer from violating the establishment clause.⁷² Allowing plaintiffs access would violate the establishment clause, reasoned the court, because it would impermissibly advance nonsecular interests: "To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit."⁷³ Similarly, supervision of the group would result in impermissible state entanglement in religion.⁷⁴

Finally, the court rejected the students' contention that the refusal violated their rights of free speech, free association, and equal protection.⁷⁵ The court stated that a high school classroom,

66. *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983).

The reason for the denial of certiorari in *Brandon* is unclear and could have been a misreading of the facts of the case. S. Rep. No. 357, 98th Cong., 2d Sess. 7, *reprinted in* 1984 U.S. Code Cong. & Ad. News 2348, 2353.

67. 635 F.2d 971 (2d Cir. 1980).

68. The complaint listed as defendants the Board of Education and its individual members, the school district superintendent, and the high school principal. *Id.* at 973.

69. *Id.*

70. *Id.*

71. *Id.* at 977-78.

72. *Id.* at 978-79.

73. *Id.* at 978.

74. *Id.* at 979.

75. *Id.* at 979-80.

unlike a university,⁷⁶ is not a "public forum" and that students' free speech and free associational rights "are severely circumscribed by the Establishment Clause in the public school setting."⁷⁷ No equal protection violation existed, the court concluded, because all religious organizations were denied access and groups permitted access did not raise establishment clause problems.⁷⁸

In *Lubbock Civil Liberties Union v. Lubbock Independent School District*,⁷⁹ the Lubbock Civil Liberties Union challenged a school district policy⁸⁰ permitting student religious groups to use school facilities.⁸¹ The district court upheld the policy but the Fifth Circuit Court of Appeals reversed.⁸² The court found that the policy failed all three prongs of the tripartite establishment clause test,⁸³ commenting in dicta that a truly neutral policy giving access to all organizations, including religious organizations, would have the permissible secular purpose of encouraging extracurricular activities.⁸⁴ Although this was the stated purpose of the policy, the court noted that the language had to be analyzed in the context in which it was written.⁸⁵ In so analyzing the policy's language, the court concluded that the primary purpose was to

76. *Id.* at 980 (citing *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980)).

77. *Id.* at 980.

78. *Id.*

79. 669 F.2d 1038 (5th Cir. 1982).

80. The policy, adopted in 1980, read:

The school board permits students to gather at the school with supervision either before or after regular hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

Id. at 1041. The school district had a long history of establishment clause violations. The Lubbock Civil Liberties Union (LCLU) had, for almost 10 years, challenged school district practices including assemblies with evangelistic speakers, "morning Bible readings over school public address systems, classroom prayers led by teachers, a period of silent prayer ended by 'Amen' over school public address systems and distribution of 'Gideon' Bibles to fifth and sixth grade students." *Id.* at 1039.

In 1971, under pressure from the LCLU, the district adopted a policy calling for religious neutrality and prohibition of the complained of activities. *Id.* Despite this policy, the religious activities continued. *Id.* at 1039-40. Further complaints prompted the Board of Trustees in 1979 to adopt formal procedures to limit religious activities in the school district. *Id.* at 1040. The procedures, however, merely instructed that religious practices should be student- rather than teacher-initiated. *Id.* According to the minutes of the Board of Trustees, the procedures would "fairly well continue . . . our present practice [of religious activities in the schools]." *Id.*

81. *Id.* at 1039-41.

82. *Id.* at 1039.

83. *Id.* at 1044-47.

84. *Id.* at 1044.

85. *Id.*

encourage religious meetings.⁸⁶

The policy also ran afoul of the primary effect prong of the establishment clause test.⁸⁷ The court held that the policy had the primary effect of advancing religion by placing the school district's imprimatur on religious activity.⁸⁸ The court, citing *Brandon* and the Supreme Court's footnote in *Widmar*, stated that primary and secondary school students were immature, and, therefore, would view religious meetings at the beginning or end of the school day as vital to the schools' extracurricular programs and as implicitly endorsed by the school district.⁸⁹ The court rejected the school district's contention that the policy was permissible because students were not coerced into holding or attending religious meetings held at school.⁹⁰

Finally, the court concluded that use of public school facilities and teacher supervision of religious meetings constituted impermissible entanglement.⁹¹ Thus, having failed all three prongs of the establishment clause test,⁹² the policy constituted an impermissible establishment of religion. The court rejected the district's argument that the free exercise clause mandated the policy,⁹³ holding that students were not foreclosed from practicing religion at other times and places.⁹⁴ Finally, the court refused to recognize primary and secondary schools as "public forums."⁹⁵

In summary, lower federal courts have held that schools' equal access policies are unconstitutional. Invoking the tripartite test for violation of the establishment clause, these courts have concluded that equal access policies violate the establishment clause because their primary purpose and effect is the advancement of religion. Following this reasoning, the Supreme Court could hold that references to religious speech in the Equal Access Act are unconstitutional.

86. *Id.* at 1044-45. The court noted that the preamble to the policy was "concerned with religious beliefs and the place of religion in the public schools." *Id.* at 1044 [emphasis in original]. Indeed, the focus of the language was on students wishing to meet for religious purposes, stated the court. *Id.* at 1044-45.

87. *Id.* at 1045-47.

88. *Id.* at 1045.

89. *Id.* at 1045-46.

90. *Id.* at 1046. Additionally, the court held that the district's "compulsory education machinery" made students available to attend the meetings, which were implicitly supported by the district. *Id.*

91. *Id.* at 1047.

92. The failure of even one prong of the tripartite test constitutes a violation of the establishment clause. To pass constitutional muster, the challenged activity or procedure must pass all three prongs of the test. *Id.* at 1044.

93. *Id.* at 1048.

94. *Id.*

95. *Id.*

C. The Constitutionality of the Equal Access Act

Second-guessing the Supreme Court is risky business. Yet, Court decisions and trends provide a strong indication that the Court will uphold the Equal Access Act. Although the Court denied certiorari in *Brandon* and *Lubbock*, as a matter of legal principle this does not indicate the Court's position on the merits.⁹⁶

In *Widmar* the Court had very little difficulty finding that equal access in a university setting does not violate the establishment clause but is, in fact, required by the free speech clause once a public forum is established.⁹⁷ The *Widmar* Court disposed of two prongs of the tripartite establishment clause test in short order. First, the Court ruled that equal access does not constitute an excessive government entanglement.⁹⁸ In fact, the Court suggested that attempting to *exclude* religious groups risked greater entanglement.⁹⁹ Although teacher supervision is more crucial at the secondary level, the Court's argument applies with equal force to public secondary schools. While equal access requires some teacher supervision of religious groups to determine whether a group practices "good" religion or "bad" religion,¹⁰⁰ barring religious organizations altogether requires constant review of student groups and their activities.¹⁰¹

Second, the *Widmar* Court quickly concluded that equal ac-

96. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) ("[T]his Court has rigorously insisted that . . . a denial [of certiorari] carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review.").

97. 454 U.S. 263, 277 (1981). See *supra* text accompanying notes 33-51.

98. 454 U.S. at 271-72.

99. *Id.* at 272 n.11.

100. 130 Cong. Rec. S8348 (daily ed. June 27, 1984) (statement of Sen. Danforth).

101. See 454 U.S. at 272 n.11.

Only last term the Supreme Court struck down New York City's use of federal funds to pay the salaries of public employees teaching in parochial schools. In a 6-3 decision, the Court held that New York City's use of tax money to finance "shared time" parochial school programs constituted an excessive government entanglement in religion. *Aguilar v. Felton*, 105 S. Ct. 3232 (1985). The Court, pointing to the "pervasively sectarian environment" in which the aid was provided and the "ongoing inspection . . . required to ensure the absence of a religious message," held that New York City's shared time program required a "pervasive State presence" and therefore violated the establishment clause. *Id.* at 3238.

Although the Supreme Court in *Aguilar* reaffirmed the vitality of the excessive entanglement prong, it is unlikely that the Court will find the Equal Access Act violated that prong. The program in *Aguilar* required administrative cooperation between public and private sectarian schools and regular state monitoring of religious schools to insure that shared time classes remained free from religious content. *Aguilar*, 105 S. Ct. at 3238. While the Equal Access Act involves some degree of entanglement in the form of public school teachers monitoring religious meetings in the public classrooms, the Court is likely to view this contact as *de minimus*. See *Widmar*, 454 U.S. at 272 n.11 ("We agree with the Court of Appeals

cess has a secular purpose of providing a broad forum for the interchange of ideas.¹⁰² The courts have generally found a sufficient secular purpose whenever the state's motive is arguably nonreligious.¹⁰³ This argument is undoubtedly available in the context of public secondary schools.

Still, this prong is open to challenge. Even cursory examination of the legislative history of the Equal Access Act reveals that the primary purpose of the bill was to protect religious speech and permit some degree of religion in public schools.¹⁰⁴ As in *Lubbock*, the primary purpose of advancement of religion is only thinly disguised in broader language.¹⁰⁵

Last term the Supreme Court in *Wallace v. Jaffree*¹⁰⁶ invoked the primary purpose prong in striking down Alabama's "moment of silence" law. The Court, in a 6-3 decision, held the statute authorizing a period of silence "for meditation or voluntary prayer"¹⁰⁷ "was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose."¹⁰⁸

Despite the Court's use of the primary purpose prong in invalidating Alabama's moment-of-silence law, it is unlikely the Court will similarly strike down the Equal Access Act. *Wallace v. Jaffree* involved a particularly egregious violation of the establishment clause. The legislative history unambiguously stated that the statute was an "effort to return voluntary prayer" to public schools¹⁰⁹ and the bill's chief sponsor testified to the same effect before the district court, adding that he had "no other purpose in mind."¹¹⁰ Simply put, "[t]he State did not present evidence of *any* secular purpose."¹¹¹

On the other hand, the legislative history of the Equal Access Act suggests at least one secular purpose: protecting the first amendment rights of secondary school students.¹¹² Careful scrutiny of this ostensibly secular purpose, however, reveals that the

that the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.'").

102. 454 U.S. at 271-72 n.10.

103. Laurence Tribe, *American Constitutional Law* § 14-8, at 835 (1978) ("[I]f [the state action] is 'arguably nonreligious,' it is sufficiently secular.").

104. *See, e.g.*, 130 Cong. Rec. S8335 (daily ed. June 27, 1984) (statement of Sen. Denton).

105. *See supra* notes 9-14 and accompanying text.

106. 105 S. Ct. 2479 (1985).

107. Ala. Code § 16-1-20.1 (Supp. 1985).

108. 105 S. Ct. at 2490.

109. *Id.*

110. *Id.* at 2483 (quoting State Sen. Donald Holmes).

111. *Id.* at 2490-91.

112. 130 Cong. Rec. S8337 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

primary purpose of the Act is to protect *religious* speech.¹¹³ Still, the Supreme Court will unlikely inquire beyond the Act's pretextual purpose of protecting first amendment freedoms.¹¹⁴

Review of the Equal Access Act will undoubtedly focus on the second prong of the establishment clause test: is the primary effect of the Act advancement or inhibition of religion? In *Widmar*, a Court footnote indicated that this question may ultimately rest on the Court's perception of the maturity of secondary school students and whether the students are likely to view equal access as placing the state's imprimatur on religious activities.¹¹⁵ *Tinker* foreshadowed the result of this inquiry and provides support for the constitutionality of the Act. In *Tinker*, the Supreme Court concluded that high school students have certain first amendment rights, including the freedom to express views on controversial subjects.¹¹⁶ In light of the Court's weakening of the wall of separation of church and state,¹¹⁷ it would be a very small step for the Court to extend *Tinker* to religious speech.¹¹⁸

Indeed, Professor Laurence Tribe has predicted that the Court will extend *Widmar* to public secondary schools:

Notwithstanding the additional problems that might arise when religious meetings are conducted on the campus of a public secondary school, I believe that the same conclusion [as the Court reached in *Widmar*] should follow in that context, provided only that the student meetings at issue are not state-initiated, school-sponsored, or teacher-led in any way that might lead to direct or indirect coercion of any student.¹¹⁹

The Equal Access Act avoids the problems that Professor Tribe enumerates and is likely to survive intact the Supreme Court's scrutiny.

113. See *supra* notes 9-14 and accompanying text.

114. See 105 S. Ct. at 2490 ("For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, . . . the First Amendment requires that a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion.") (emphasis added) (citing *Abington School Dist. v. Schempp*, 374 U.S. 203, 296-303 (1963) (Brennan, J., concurring)); *Id.* at 2495 (Powell, J., concurring) ("[T]he Court is 'reluctan[t] to attribute unconstitutional motives to the state, particularly when a plausible secular purpose may be discerned from the face of the statute.'") (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983)).

115. See *supra* text accompanying note 49.

116. *Tinker*, 393 U.S. at 511.

117. See *infra* note 194.

118. For a discussion see Lowell Sturgill & Nancy Oliver, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 Geo. L.J. 135 (1983); Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983).

119. *Equal Access: A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) (letter of Laurence Tribe, prof. Harvard Law School).

A slight chance exists, however, that the Supreme Court will find that the Equal Access Act has the primary effect of advancing religion and therefore violates the establishment clause. In *Grand Rapids School District v. Ball*,¹²⁰ the Court held that paying public school teachers with public funds to teach parochial school programs had the primary effect of advancing religion and was unconstitutional. Justice Brennan, writing for a 5-4 majority, observed that the aid, in effect, subsidized the religious schools and that public school employees teaching in parochial schools might "become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs."¹²¹ Furthermore, the shared time programs had the primary effect of advancing religion because they "may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school."¹²²

A public school employee teaching in a parochial school admittedly communicates a stronger message of state endorsement of a particular religion than does a general public school policy allowing all student religious groups access to classrooms during noninstructional time. Nonetheless, permitting religious groups to use public school facilities conveys a message of governmental endorsement of religion. Additionally, as schools start restricting access to conventional religions only and barring unpopular religions and cults, they will convey a message of government endorsement of particular religions. In both cases, the primary effect is the advancement of religion in violation of the establishment clause.¹²³

Using the reasoning of *Lubbock*, *Brandon*, and *Bender*, the Supreme Court could and should sever the references to religious groups from the Act as violative of the establishment clause, leaving only the protections for political and philosophical speech.¹²⁴ This approach adheres to the establishment clause and still pro-

120. 105 S. Ct. 3216 (1985). *Ball*, decided the same day as *Aguilar v. Felton*, 105 S. Ct. 3232 (1985), held that New York City's shared time program excessively entangled government and religion and therefore was unconstitutional.

121. 105 S. Ct. at 3223.

122. *Id.* at 3223-24. Wrote Justice Brennan: "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." *Id.* at 3226.

123. "[T]he government [must] maintain a course of neutrality among religions, and between religion and nonreligion." *Id.* at 3222.

124. The Act contains a severability clause. See 20 U.S.C.A. § 4073 (West Supp. 1985).

vides students with diverse viewpoints a right of access, as well as providing all secondary students with the benefits of diversity.

III. Construing the Equal Access Act

A. *Threshold Definitions*

To activate the Equal Access Act, a public secondary school¹²⁵ receiving federal financial assistance must have a "limited open forum."¹²⁶ A limited open forum exists when "noncurriculum related student groups . . . meet on school premises during noninstructional time."¹²⁷ This definition raises two issues. First, what is a "noncurriculum related student group?" Second, what is "noninstructional time?"

The Equal Access Act does not define "noncurriculum related student groups." The definition is of initial importance because a school can avoid the reach of the Act by permitting only curriculum related student groups to meet.

The issue of defining a noncurriculum related student group is likely to arise in one of two scenarios. In the first scenario, the Act will force a school administration wishing to establish a policy barring student religious organizations from using school facilities either to drop noncurriculum related activities or to redefine and reorganize such activities to make them curriculum related. In the second scenario, the Act will force a school administration considering ad hoc a student religious group's request to use school facilities to analyze its roster of student organizations to determine if some groups are noncurriculum related so as to create a limited open forum and thus require equal access.

A dictionary definition of "curriculum" is "courses offered by an educational institution."¹²⁸ The Act's legislative history supports this definition¹²⁹ and indicates that the Equal Access Act

125. The original bill, S. 1059, applied to all public schools, primary and secondary. S. 1059, 98th Cong., 2d Sess. (1984).

126. 20 U.S.C.A. § 4071(a) (West Supp. 1985).

127. 20 U.S.C.A. § 4071(b) (West Supp. 1985).

128. Webster's New Collegiate Dictionary 277 (8th ed. 1981).

129. Senator Mark Hatfield, a co-author of the Denton-Hatfield amendment which later became the Equal Access Act, defined curriculum related activities as "extension[s] of the classroom." A key factor in this determination is school sponsorship. Thus, examples of curriculum related activities include Spanish or French clubs, school bands, and football teams. Examples of noncurriculum related activities include chess clubs, Young Democrats, and Young Republicans. 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield). The outer limits of this definition are unclear. For example, could a school make a quasi-religious course (e.g., history of religion) part of the curriculum so as to permit orthodox religious groups to meet as curriculum related activities without creating a limited open fo-

does not limit the discretion of the school district to draw the line between curriculum related and noncurriculum related activities.¹³⁰ The legislative history suggests factors for determining whether or not an activity is curriculum related. An activity is more likely to be considered curriculum related if it corresponds to at least one course offered by the school and if it is faculty supervised.¹³¹ These factors are manifestly imprecise. Therefore, while part of the purpose of the Equal Access Act was to reduce the confusion surrounding use of public school facilities by student religious organizations,¹³² confusion and litigation will continue as school districts search for a workable definition of curriculum related activities.¹³³

The Equal Access Act's inclusion of political and philosophical speech creates an interesting problem. To bolster its constitutionality in the face of the establishment clause,¹³⁴ the Act requires that religious meetings be voluntary and student-initiated,¹³⁵ and prohibits teacher participation.¹³⁶ Ironically, the drafters included political and philosophical speech in the bill merely to ensure passage of the religious speech portion and by including them, needlessly subjected them to the bill's separation of church and state provisions. In other words, "[t]he teacher or administration employee participation in the political [i.e., nonreligious, noncurricular] club can be no greater than its very limited participation in the religious club" ¹³⁷ Thus, "[a] school-sponsored political debate, a teacher-led political discussion, or a school-financed noncurricular United Nations Day" all could violate the Equal Access Act.¹³⁸ Such a restriction serves no useful purpose¹³⁹ and will, in all likelihood, harm the development of stu-

rum? This approach probably violates the establishment clause. *See supra* text accompanying notes 32-95.

130. 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (colloquy between Sen. Hatfield and Sen. Gorton).

131. *Id.*

132. 130 Cong. Rec. S8335 (daily ed. June 27, 1984) (statement of Sen. Denton).

133. 130 Cong. Rec. S8367 (daily ed. June 27, 1984) (statement of Sen. Gorton).

134. 130 Cong. Rec. S8342-43 (daily ed. June 27, 1984) (colloquy between Sen. Hatfield and Sen. Gorton).

135. 20 U.S.C.A. § 4071(c)(1) (West Supp. 1985).

136. 20 U.S.C.A. § 4071(c)(3) (West Supp. 1985).

137. 130 Cong. Rec. S8343 (daily ed. June 27, 1984) (statement of Sen. Gorton).

138. 130 Cong. Rec. S8349 (daily ed. June 27, 1984) (statement of Sen. Denton).

139. Observed Senator Evans:

No one would object to a faculty adviser working with the chess club or the debate team; however, if these activities are now considered noncurriculum related they are no different than a student religious group, thus subject to the school board's same uniform requirements. What we are really saying is that a school cannot sponsor a noncur-

dent political and philosophical groups.

"Noninstructional time" is another term which is important in the operation of the Act. A limited open forum exists when schools permit noncurriculum related student groups to meet on school premises during noninstructional time.¹⁴⁰ The Act defines "noninstructional time" as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."¹⁴¹ It appears that school authorities could permit noncurriculum related groups to meet only during instructional periods so as to avoid creating a limited open forum requiring access by religious organizations. Neither the Act nor its legislative history addresses such questions of circumvention,¹⁴² perhaps because school authorities probably would not choose such a disruptive or circuitous route of circumvention.

The Equal Access Act defines noninstructional time as all time before or after the school day.¹⁴³ Some debate exists as to whether this interpretation excludes lunch periods and free periods set aside during the school day. Senator Mark Hatfield, a co-sponsor of the bill and the author of the perfecting amendment which passed in final form,¹⁴⁴ interpreted noninstructional time as all time before or after the school day, not including lunch and free periods. Senator Jeremiah Denton, a co-sponsor and the author of the predecessor bill,¹⁴⁵ accepted the perfecting amendment but interpreted noninstructional time as including lunch and free periods.¹⁴⁶ It is unclear which position is correct, although Senator Hatfield's approach is closer to the literal wording of the Act.

riculum activity whether that activity is debate, chess, or organized religious devotions.

130 Cong. Rec. S8367-68 (daily ed. June 27, 1984) (statement of Sen. Evans).

140. 20 U.S.C.A. § 4071(b) (West Supp. 1985).

141. 20 U.S.C.A. § 4072(4) (West Supp. 1985).

142. The House did briefly mention possible attempts to define "noninstructional time" in such a way as to defeat the purpose of the Act. 130 Cong. Rec. H7735-36 (daily ed. July 25, 1984) (statement of Rep. Bonker).

143. 20 U.S.C.A. § 4072(4) (West Supp. 1985).

144. 130 Cong. Rec. S8353 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

145. Senator Denton's original bill, S. 1059, did not define "noninstructional periods." A committee report, however, interpreted the term to include time before and after "the regular school day, as well as a lunch period, a study hall period, a homeroom period in which student choice of extracurricular activities is allowed, or a student activity period set aside for meetings of voluntary extracurricular student groups." S. Rep. No. 357, 98th Cong., 2d Sess. 38, *reprinted in* 1984 U.S. Code Cong. & Ad. News 2348, 2384.

146. 130 Cong. Rec. S8356 (daily ed. June 27, 1984) (statement of Sen. Denton).

B. Scope of the Equal Access Act: What Groups Get Access?

The Equal Access Act on its face bars discrimination against political and philosophical, as well as religious, student groups. Many legislators and others supporting the Act solely for its protection of religious speech relied on the policing mechanisms contained in the Act to counteract its potential protection of groups which they considered objectionable. The language of the Act and prior case law, however, indicate that these exceptions are not so easily invoked.

Three different situations illustrate the limits of Congress' commitment to political and philosophical speech. In the first situation, a group of students¹⁴⁷ requests to use school facilities to hold a religious cult meeting. In the second situation, a student group advocating an unpopular political viewpoint makes a similar request. Organizations typically associated with this scenario include the Ku Klux Klan, the Nazi Party, the Young Communist League, and the Social Democrats. In the final situation, a student group advocating particular social or civil rights, such as a gay rights organization, requests to use school facilities to hold a meeting. Although Congress probably did not want to allow these kinds of groups to meet in secondary schools, the Equal Access Act appears to guarantee them the same rights enjoyed by other more conventional noncurriculum related student groups. In order to take advantage of this protection, however, unpopular groups will have to argue that they are not excluded under the policing provisions of the Act.

The Equal Access Act contains a number of policing provisions with which unpopular groups attempting to gain access must contend. The school need not provide access if the meeting "materially and substantially interfere[s] with the orderly conduct of educational activities"¹⁴⁸ or if the meeting is unlawful.¹⁴⁹ Similarly, the Act expressly refuses to limit a school's authority "to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary."¹⁵⁰

The primary issue raised by these exceptions in the Act is

147. Where an activity is not student-initiated, the Equal Access Act is not applicable and the school is free to bar the activity. 20 U.S.C.A. § 4071(c)(1), (5) (West Supp. 1985).

148. 20 U.S.C.A. § 4071(c)(4) (West Supp. 1985).

149. 20 U.S.C.A. § 4071(d)(5) (West Supp. 1985).

150. 20 U.S.C.A. § 4071(f) (West Supp. 1985).

whether school administrators must wait to see if a group causes a disruption or, instead, may determine in advance that a group is by its nature disruptive and summarily bar the group from access. Do the provisions of the Equal Access Act mean that school administrators can exclude groups merely because they consider them to be "bad?"¹⁵¹ Or must the group be doing something illegal, dangerous, or disruptive at its meetings to justify exclusion?¹⁵²

The language of the "material and substantial interference" clause of the Act, taken literally, permits exclusion of a group only when actual disruption occurs.¹⁵³ Congress borrowed the phrase "materially and substantially interfere" from *Tinker v. Des Moines Independent School District*,¹⁵⁴ a Supreme Court case upholding secondary students' right to wear black armbands in public schools to symbolize their protest of the Vietnam War. In *Tinker*, the Court stated that potential discomfort is not a sufficient ground for abridging speech.¹⁵⁵ Noted the Court:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.¹⁵⁶

In *Tinker's* terms, a meeting of an unpopular organization involves

151. "Bad" group" is merely shorthand for any of a number of unpopular groups traditionally viewed by society with dislike or distrust.

152. Treating high school students as adults includes exposing them to *all* groups and letting them arrive at their own conclusions. While suppressing such unpopular ideas or groups is more tidy and convenient, it insulates students from reality and does not eliminate the hate group. Moreover, attempts to bar nonviolent hate groups will undermine the efforts of other groups, viewed with equal disdain by overprotective school administrators, to gain access. Even adults, however, may need protection from groups that practice violence. Clearly, a school should be free to bar a group which conspires to oppress or commit violence, or in fact commits acts of oppression or violence.

153. "There is nothing in this statutory language that talks about . . . [meetings] possibly being disruptive." 130 Cong. Rec. S8345 (daily ed. June 27, 1984) (statement of Sen. Metzenbaum) (emphasis added).

154. 393 U.S. 503, 509 (1969). That the authors borrowed language from *Tinker* is clear from the legislative history. See, e.g., S. Rep. No. 357, 98th Cong., 2d Sess. 40, reprinted in 1984 U.S. Code Cong. & Ad. News 2348, 2386; 130 Cong. Rec. S8348 (daily ed. June 27, 1984) (statement of Sen. Denton).

155. 393 U.S. at 509 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

156. 393 U.S. at 508-09 (citation omitted).

"pure speech"¹⁵⁷ and pure speech enjoys "comprehensive protection under the First Amendment,"¹⁵⁸ even in a high school setting.¹⁵⁹ So the material and substantial interference clause will almost certainly be interpreted in accord with *Tinker*, thereby permitting unpopular groups to use school facilities for meetings.¹⁶⁰

Court decisions permitting unpopular access will undoubtedly come as a surprise to numerous legislators who supported the Act primarily for its religious access provisions,¹⁶¹ relying on the material and substantial interference clause to restrict access of unpopular organizations.¹⁶² During Senate debate, co-sponsor Senator Mark Hatfield stated that school authorities could bar divisive groups because school settings are "volatile."¹⁶³ The language of the statute, however, admits of no such interpretation and is unambiguous so as to make unnecessary any reference to the Act's legislative history. Moreover, the legislative history, even if referred to, is inconsistent with the approach taken by the federal courts in pure speech cases. Argued Senator Slade Gorton during Senate debate on the equal access bill:

I am convinced that the limited open forum which . . . Senator [Mark Hatfield] has described clearly covers the Ku Klux Klan—as long as it agrees not to engage in any violent activity—clearly allows an organization, discussions of which involve promoting the idea of racial superiority of one group or another; clearly beyond the slightest peradventure of argument protects a gay rights organization in a school.¹⁶⁴

Another major policing provision is the Danforth amendment,¹⁶⁵ which states that schools retain the authority to maintain discipline, protect student and faculty well-being, and assure that student attendance at meetings is voluntary.¹⁶⁶ The provision is

157. *Id.* at 505-06.

158. *Id.*

159. *Id.* at 506.

160. Two senators who opposed the bill share this interpretation. Said Senator Metzenbaum: "I think the issue is this: Can a school board stop some groups from using their facilities? Unless an organization is there to be disruptive or to break the law, I read the language . . . as saying that they cannot." 130 Cong. Rec. S8345 (daily ed. June 27, 1984) (statement of Sen. Metzenbaum). Senator Gorton agreed with this interpretation. See *infra* text accompanying note 164.

161. Taylor, *supra* note 13.

162. 130 Cong. Rec. S8343 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

163. Said Senator Hatfield, "I think anything like that [Nazi Party, Ku Klux Klan], that is dedicated to the purpose of dividing people, on grounds of race or religion could be disruptive in as volatile a situation as a school." *Id.*

164. 130 Cong. Rec. S8344 (daily ed. June 27, 1984) (statement of Sen. Gorton).

165. The Danforth amendment was incorporated into the Denton-Hatfield amendment as a modification to the Hatfield Amendment. See, 130 Cong. Rec. S8341 (daily ed. June 27, 1984).

166. 20 U.S.C.A. § 4071(f) (West Supp. 1985).

not a grant of authority but merely a reaffirmance of current policing authority. Courts adhering to *Tinker* are unlikely to be satisfied by mere threat of disruption as a justification for barring student access.¹⁶⁷

The most noteworthy aspect of the Danforth amendment is the voluntariness clause. The voluntariness clause was intended as an anti-cult device designed to permit school authorities to intervene if students are being "brainwashed."¹⁶⁸ Even without the Danforth amendment, school administrators faced with a cult actually "brainwashing" students would undoubtedly have the authority to intervene. Of course, it is the very enactment of the Equal Access Act which allows religion into the schools in the first place and places school administrators in the impossible position of having to distinguish cults from acceptable religions, and then monitor the behavior of both.¹⁶⁹

C. Remedies

The Equal Access Act contains no enforcement mechanism and no express remedy. It does, however, explicitly forbid withholding federal financial assistance from any school which violates the Act.¹⁷⁰ Predecessor bills provided for federal fund cut-offs¹⁷¹ and the bill which served as a basis for the Denton-Hatfield amendment¹⁷² provided for damages or equitable relief or both

167. See *supra* text accompanying notes 153-160.

168. 130 Cong. Rec. S8348 (daily ed. June 27, 1984) (statement of Sen. Danforth). Said Danforth:

Under this amendment, as it is presently drafted at least, it is the intent of the author of this language that it would continue to be possible for the school boards and the school administration to take such action as is necessary to prevent kids from being in effect brainwashed within the school premises; that is to say, in the event that, for example, a cult were to set up a cell, hold meetings, attempt to go out, draw other kids into this religious organization, and use what amounts to psychological warfare in order to accomplish that objective.

Id.

169. As Senator Denton put it, "[W]e still have a problem determining what is a good and what is a bad religion." 130 Cong. Rec. S8348 (daily ed. June 27, 1984) (statement of Sen. Denton). Of course, before the enactment of the Equal Access Act, schools were not burdened with making this determination.

For purposes of this article, it is not important to distinguish between cults and religions. The Equal Access Act suggests that students should be exposed to diverse, and even unpopular, ideas, not just conventional ideas. The Act protects smaller, less popular groups by prohibiting schools from "limit[ing] the rights of groups of students which are not of a specified numerical size." 20 U.S.C.A. § 4071(d)(6) (West Supp. 1985).

170. 20 U.S.C.A. § 4071(e) (West Supp. 1985).

171. See, e.g., H.R. 2732, 98th Cong., 1st Sess. (1983); H.R. 5345, 98th Cong., 2d Sess. (1984).

172. S. 1059, 98th Cong., 2d Sess. (1984).

and action by the attorney general.¹⁷³ The Equal Access Act appears to leave the question of remedies to the courts. This section discusses the likelihood that courts will recognize either an implied cause of action or a cause of action under section 1983 and concludes that the courts will probably recognize both remedies. These remedies should be available to all student groups seeking access to public secondary school facilities.

1. Recognition of an implied private remedy.

The analytical framework for finding an implied private remedy from a federal statute was set out by the Supreme Court in *Cort v. Ash*.¹⁷⁴ A court must inquire:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted . . . ?" Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, . . . so that it would be inappropriate to infer a cause of action based solely on federal law?¹⁷⁵

Four years later, the Court reformulated *Cort's* four seemingly independent factors¹⁷⁶ into the test currently used by the Supreme Court.¹⁷⁷ It later reaffirmed the reformulated *Cort* test in *Touche Ross & Co. v. Redington*:¹⁷⁸

The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose—are ones traditionally relied upon in determining legislative intent.¹⁷⁹

As recently as 1984, the Supreme Court indicated that the reformulated *Cort* test remained vital. In *Daily Income Fund, Inc. v. Fox*,¹⁸⁰ the Court reiterated that legislative intent is the touch-

173. *Id.* §§ 3-4.

174. 422 U.S. 66 (1975).

175. *Id.* at 78 (citations omitted) (emphasis in original) (quoting *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916)).

176. *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

177. For a thorough analysis of the development of the implication doctrine, see George Brown, *Of Activism and Erie—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 Iowa L. Rev. 617 (1984); see also, Susan Gluck Mezey, *Judicial Interpretation of Legislative Intent: The Role of the Supreme Court in the Implication of Private Rights of Action*, 36 Rutgers L. Rev. 53 (1983).

178. 442 U.S. 560 (1979).

179. *Id.* at 575-76 (citation omitted).

180. 104 S. Ct. 831 (1984).

stone in inferring an implied right of action.¹⁸¹ The Court noted that factors in discerning legislative intent include "the legislative history and purposes of the statute, the identity of the class for whose particular benefit the statute was passed, the existence of express statutory remedies adequate to serve the legislative purpose, and the traditional role of the states in affording the relief claimed."¹⁸²

The Supreme Court has made the second *Cort* factor, legislative intent to create or deny an implied remedy, the single most important criterion in implication cases. Indeed, one commentator has suggested that the inquiry into implied remedies begins and ends with legislative intent.¹⁸³ Although the legislative history of the Equal Access Act is silent on the question of remedies,¹⁸⁴ some suggest that Congress intended to leave the task of selecting remedies to the courts.¹⁸⁵ Senator Hatfield, in discussing promotion of religious activities by teachers, alluded to remedies:

[W]henever any violation of this occurs the House bill provided for Federal cutoff of Federal moneys. We provided here due process and an implied judicial remedy. In other words, what we are trying to do is to take away the Federal cutoff of funds, and all of that would be found in the formal procedures that are set forth. I do not think we can set it here.¹⁸⁶

He made no other attempt to elaborate on the phrase "due process and an implied judicial remedy." Conversely, the legislative intent nowhere suggests an intent to deny an implied remedy.¹⁸⁷

The silence of the Equal Access Act on the question of remedies bolsters this interpretation. Logic dictates that a statute creating a right in a private plaintiff¹⁸⁸ includes some form of remedy.¹⁸⁹ When a statute creates no express remedy, "implication may be the only way to avoid drawing the unlikely conclusion

181. *Id.* at 839.

182. *Id.*

183. Mezey, *supra* note 177, at 71.

184. According to Jeffrey Arnold, a legislative assistant who worked on the Equal Access Bill, Congress' silence on the issue of remedies was intentional. Arnold said there were three primary reasons for the silence: 1) to give flexibility in shaping remedies to the courts, 2) to discourage lawsuits and encourage settlement, and 3) to avoid snags in getting the bill through Congress. Telephone interview with Jeffrey Arnold, legislative assistant to Sen. Hatfield (Jan. 24, 1984).

185. Arnold supports this interpretation. *Id.*

186. 130 Cong. Rec. S8355 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

187. Evidence of legislative intent to deny a cause of action is rare. Brown, *supra* note 177, at 633.

188. See *infra* text accompanying notes 195-197.

189. Comment, *Oneida Indian Nation v. County of Oneida: Tribal Rights of Action and the Indian Trade and Intercourse Act*, 84 Colum. L. Rev. 1852, 1866 (1984).

that Congress legislated entirely in vain."¹⁹⁰ At the very least, the Act's silence rules out one argument that courts commonly use in refusing to infer remedies: *expressio unius*.¹⁹¹

Finally, it is clear from the legislative history that the purpose of the Equal Access Act was to apply *Widmar v. Vincent*,¹⁹² recognizing a right of equal access in a public university setting, to public secondary schools.¹⁹³ The remedy sought by the excluded student religious group in *Widmar* was a declaratory judgment and injunctive relief.¹⁹⁴ Arguably, Congress intended the Act itself to provide the remedies sought by the *Widmar* plaintiffs. More likely, Congress intended to extend only the right of access to public secondary school students and left its implementation and enforcement for the courts.

In the original *Cort* test, the first factor was whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted."¹⁹⁵ It is unclear how much weight is to be accorded this factor and the Supreme Court has been inconsistent in its handling of the matter.¹⁹⁶ Several commentators agree that the first factor is of relatively little importance.¹⁹⁷

Regardless of its weight, the first factor can only help plaintiffs under the Equal Access Act. The Act unequivocally grants public secondary school students the right to use school facilities during noninstructional hours once a limited open forum exists. In other words, high school students wishing to use school facili-

190. *Id.* (citing *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838)).

191. *See, e.g.*, *Touche Ross & Co. v. Redington*:

[Section] 17(a) [of the Securities Exchange Act of 1934] is flanked by provisions of the 1934 Act that explicitly grant private causes of action. Section 9(e) of the 1934 Act also expressly provides a private right of action. Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.

442 U.S. 560, 571-72 (1979) (citations omitted).

192. 454 U.S. 263 (1981).

193. *See, e.g.*, 130 Cong. Rec. S8331-32 (daily ed. June 27, 1984) (statement of Sen. Hatch).

194. *Chess v. Widmar*, 480 F. Supp. 907, 908 (W.D. Mo. 1979).

195. 422 U.S. at 78 (emphasis in original).

196. Notes one commentator:

Forced to defend *Cort* as something that it is not, the Supreme Court engages in continuing reformulation of the factors and refinement of their application. For example, the first factor—concerning the existence of rights-benefits or duties—appears to play a major role in the opinion denying a right of action in *Touche Ross & Co. v. Redington* [442 U.S. 560, 569-71 (1979)]. On the other hand, the Court in *Merrill Lynch* [456 U.S. 353 (1982)] found an implied right, but virtually ignored the first factor.

Brown, *supra* note 177, at 635.

197. *Id.* at 634; Mezey, *supra* note 177, at 65-66.

ties have the right not to be discriminated against based on the political, philosophical, or religious content of their speech.

The third *Cort* factor is whether an implied private remedy is consistent with "the underlying purposes of the legislative scheme."¹⁹⁸ This test has a very low threshold and courts have expressed an attitude that the more enforcement the better.¹⁹⁹ Thus, the Equal Access Act probably satisfies the third factor. Permitting aggrieved students to bring an action under the Act is clearly consistent with the Act's goal of ensuring political, philosophical, and religious organizations the same right of access as other student groups enjoy. Making a right enforceable is undoubtedly consistent with the granting of that right. Moreover, portions of the Act's legislative history indicate that Congress intended just such a remedy.²⁰⁰

The final *Cort* factor focuses on whether the area is one typically governed by state law.²⁰¹ The courts give little weight to this factor because "[t]he presence of a federal norm creates a strong temptation to declare the area federal."²⁰² Moreover, the protection of constitutional rights is traditionally an area governed by federal law. Finally, the legislative history indicates that confusion among courts, school boards, and students as to the permissibility of religious organizations using public school facilities concerned Congress.²⁰³ Elimination of this confusion requires uniformity among the states.

Thus, it is quite likely that the federal courts will find an implied private remedy from the Equal Access Act despite the Supreme Court's recent pruning of the implication doctrine.²⁰⁴ While the Court has been reluctant to infer a remedy in cases involving statutes with weak legislative histories,²⁰⁵ the legislative history of the Equal Access Act strongly suggests Congress intended to imply a remedy. Furthermore, the implication doctrine is "inherently capable of manipulation,"²⁰⁶ a fact of which the conservative Burger Court is probably aware. The Court has been chipping away at the wall of separation between church and

198. 422 U.S. at 78.

199. *Brown*, *supra* note 177, at 633.

200. *See supra* text accompanying notes 184-194.

201. 422 U.S. at 78.

202. *Brown*, *supra* note 177, at 633.

203. *See, e.g.*, 130 Cong. Rec. S8336 (daily ed. June 27, 1984) (statement of Sen. Denton); *id.* at S8331-32 (statement of Sen. Hatch).

204. *Mezey*, *supra* note 177, at 65-66.

205. *See, e.g.*, 442 U.S. at 568, 571.

206. *Brown*, *supra* note 177, at 644.

state²⁰⁷ and has recognized a right of equal access in a public university setting.²⁰⁸ Thus, despite the "unpredictable and chaotic"²⁰⁹ state of the law of implied rights of action, it is likely that the courts will, at least in a religious speech case, find that the Equal Access Act contains an implied right of action. Once the courts have recognized an implied right of action for religious groups, political and philosophical groups will probably also be able to sue under the Act.

2. Private right of action under section 1983.

The Court's constriction of the implication doctrine has led numerous plaintiffs to invoke section 1983²¹⁰ to enforce federally guaranteed rights.²¹¹ To ascertain whether a plaintiff can maintain a section 1983 action, the court must inquire into two essential elements: "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities se-

207. Norman Redlich, *Some Cracks In The Wall*, 239 *Nation* 277, 280 (1984) ("[A] shifting majority of the Burger Court, while paying lip service to Jefferson's metaphorical 'wall of separation' between church and state, is unfortunately taking the politically expedient route of permitting government accommodation to dominant religious views.").

See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984) (holding that city's display of nativity scene did not violate the establishment clause).

Last term the Supreme Court seemed to toll the erosion of the wall of separation between church and state. In *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985), the Court ruled unconstitutional Alabama's moment-of-silence statute authorizing a period of silence "for meditation or voluntary prayer" in public schools. In two rulings the Court struck down the use of the money to finance shared time religious school programs. *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985); *Aguilar v. Felton*, 105 S. Ct. 3232 (1985). Finally, in *Estate of Thornton v. Calder, Inc.*, 105 S. Ct. 2914 (1985), the Court ruled that a Connecticut statute granting Sabbath observers an absolute right not to work on their Sabbath had the primary effect of advancing religion and thus violated the establishment clause.

It would be premature as well as foolhardy to suggest that the Supreme Court is moderating its stand on separation of church and state. A more accurate interpretation is that a sharply divided Court (6-3 in *Wallace* and *Aguilar* and 5-4 in *Ball*) invalidated laws representing particularly egregious government intrusions into religion.

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

209. *Brown*, *supra* note 177, at 635.

210. 42 U.S.C. § 1983 (1981) reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

211. *Mezey*, *supra* note 177, at 76.

cured by the Constitution or laws of the United States.”²¹²

The requirement that the impermissible conduct be under color of state law should be easy to satisfy in a typical claim brought under the Equal Access Act. In the typical case, a student group will submit a request to the school administration or the school board. Courts will almost certainly consider any action taken by the school authorities to be under color of state law. That was the reasoning of the district court in *Brandon v. Board of Education*.²¹³ In *Brandon*, the principal of the high school, the superintendent of the school district, and the Board of Education all denied the request of a student religious group to use a classroom before each school day to conduct a communal prayer meeting.²¹⁴ Although the court ultimately granted the defendants' summary judgment on other grounds,²¹⁵ it ruled that the defendants' actions constituted state action so as to permit a cause of action under section 1983.²¹⁶ This conclusion was based on the court's determination that the defendants were "charged with the supervision of public schools pursuant to statutory authority."²¹⁷

The second inquiry in a section 1983 case is whether the conduct deprived the complainant of rights, privileges, or immunities secured by the Constitution or federal law. In the case of a religious group seeking access, it would seem that a plaintiff could argue that prohibiting student religious groups from using school facilities violates the constitutional guarantees of free speech, free association, free exercise of religion, and equal protection. The courts, relying primarily on the establishment clause, have not interpreted section 1983's protections as creating a right of equal access for students wishing to use public secondary school facilities for religious purposes.²¹⁸ It would seem, then, that secondary school students attempting to meet for religious purposes will have to rely on the Equal Access Act if they are to have a cause of action in such situations.

It is well established that a federal statutory law may serve as an independent basis for a cause of action under section 1983.²¹⁹

212. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

213. 487 F. Supp. 1219 (N.D.N.Y. 1980), *rev'd on other grounds*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

214. *Id.* at 1222.

215. *Id.* at 1233.

216. *Id.* at 1225-26.

217. *Id.* at 1226.

218. *See, e.g.*, *Brandon v. Board of Educ.*, 635 F.2d 971, 977-79 (2d Cir. 1980).

219. *Maine v. Thiboutot*, 448 U.S. 1 (1979). The *Thiboutot* Court, in reaching its conclusion, gave the phrase "and laws" used in § 1983 its plain meaning. *Id.* at 4. Additionally, noted the Court, Congress had not taken action in response to numer-

To determine if an individual may use section 1983 to sue under a federal statute, a court must examine congressional intent.²²⁰ The inquiry focuses on whether the inclusion of statutory remedies reflects Congress' intent to preclude a section 1983 action; the more comprehensive the remedial provisions of a statute, the more likely Congress intended to preclude actions under section 1983.²²¹ The Equal Access Act's complete lack of remedy provisions creates a strong inference that Congress intended to permit section 1983 actions to enforce the Act. While the legislative history does not go so far as to state that Congress intended to preserve a cause of action under section 1983, it does suggest that the question of remedies was intentionally left to the courts.²²² Although recent years have seen a constriction of causes of action under section 1983,²²³ the conservative Burger Court might well be swayed by the merits of an Equal Access Act case to recognize a section 1983 action under the Act.²²⁴

IV. The Wisdom of the Equal Access Act

In all likelihood, the Equal Access Act is constitutional²²⁵ and does provide a private cause of action.²²⁶ But that does not mean that it is good policy. In fact, the Equal Access Act is bad policy, at least to the extent that it permits religious groups to meet in public schools. Experience should tell us that public education is not the place for something as private and potentially divisive as religion.²²⁷ As Representative Gary Ackerman noted during House debate on the equal access bill:

It has lately become politically very chic to flaunt one's reli-

ous Supreme Court cases interpreting § 1983 as providing a remedy for violation of federal statutory law. *Id.* at 8.

220. *Mezey, supra* note 177, at 88.

221. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1980).

222. *See supra* text accompanying notes 184-191.

223. *Mezey, supra* note 177, at 88.

224. *See supra* text accompanying notes 207-208.

225. *See supra* text accompanying notes 32-124.

226. *See supra* text accompanying notes 170-224.

227. Explained Justice Brennan:

For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions and between religion and nonreligion.

Grand Rapids School Dist. v. Ball, 105 S. Ct. at 3222.

gion. Everyone from Jesse Jackson to Ronald Reagan speaks of bringing Christian values and traditions to Government. As a Member of Congress who is not a Christian but who is nonetheless very proud of his religion, this troubles me. As a person whose grandparents and ancestors were persecuted throughout recorded history because their religious beliefs did not jibe with the mainstream, this trend frightens me.²²⁸

Supporters of the Act respond that the Equal Access Act is well within the bounds of the Constitution and in no way mandates religion in the classroom.²²⁹ Certainly the Act is less constitutionally repugnant than, say, a mandated school prayer.²³⁰ The point is, however, that the Equal Access Act represents both an alarming legislative trend and an important first step toward infusing more and more religion into the classroom. As one newspaper editorial wondered, "Why is the concept of keeping public schools completely separate from sectarian religious activity so hard for some legislators to accept?"²³¹

Equally distressing is the Act's pretextual protection of other forms of speech in order to enact a bill intended solely to protect religious speech. An examination of the legislative history of the Equal Access Act exposes the web of hypocrisy on which the Act rests. For example, freedom of speech is discussed with much enthusiasm when that freedom will be exercised by a conventional, mainstream group,²³² but that enthusiasm is noticeably lacking when the freedom of speech is to be exercised by an unpopular group.²³³ There seems to be freedom of speech if a "good" group exercises that freedom.

This exposes an even greater hypocrisy. Supporters of the Equal Access Act argue that the Act recognizes teenagers as mature and sophisticated individuals capable of resisting peer pressure.²³⁴ Thus, argue supporters, students will not feel coerced into joining a religious group nor will they be ridiculed for their participation or nonparticipation. Yet, an almost convulsive fear exists among the Act's supporters that fanatical religious, political, and social groups will descend upon unsuspecting students who will be

228. 130 Cong. Rec. H7733 (daily ed. July 25, 1984) (statement of Rep. Ackerman).

229. *See, e.g.*, 130 Cong. Rec. S8337 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

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

231. *Equal Access Revised*, Wash. Post, July 25, 1984, § 1, at 16, col. 1.

232. *See, e.g.*, 130 Cong. Rec. S8337 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

233. *See, e.g., id.* at S8343-44; *id.* at S8349 (statement of Sen. Denton).

234. *See, e.g.*, 130 Cong. Rec. S8338 (daily ed. June 27, 1984) (statement of Sen. Dixon).

powerless to resist.²³⁵ Apparently, legislators believe either that high school students are mature enough to resist mainstream groups but not mature enough to resist unpopular groups, or that high school students are not mature enough to resist either mainstream or unpopular groups but they do not care if students are coerced into joining "good" religious groups. Put another way, the Equal Access Act tells teenagers, "You are mature enough to resist joining a 'good' group but not mature enough to resist joining a 'bad' group."²³⁶ The maturity argument, like the Act's "protection" of political and philosophical speech, is mere pretext intended to defeat future establishment clause objections. The Act is cast, however, in terms of diversity and, therefore, should be interpreted as treating teenagers as mature enough to freely analyze, discuss, and promulgate any and all ideas, whether popular or unpopular.

At a very practical level, the Equal Access Act will embroil public schools in even more litigation.²³⁷ If a school allows popular groups to meet and excludes controversial or fringe groups, unpopular groups will probably sue the school for denying equal access; if a school allows any religious groups to meet, proponents of separation of church and state will probably sue the school under the establishment clause.²³⁸ This may lead some schools to take the safe road and avoid creating a limited open forum by banning all student extracurricular activities.²³⁹

Still, the Equal Access Act is not all gloom and doom. Administered evenhandedly, it will genuinely empower teenagers by exposing them to a variety of ideas and viewpoints.²⁴⁰ Teenagers will be exposed to popular and unpopular ideas, be they political,

235. For a discussion of the maturity of teenagers and courts' treatment of it, see Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983).

236. Representative Ackerman pointed out the pretextual nature of the maturity argument:

A scant few days ago we . . . declared that we no longer trust 18- and 19-year-olds or even 20-year-olds to exercise a rational and careful judgment not to drive after they drink. The peer pressure would be too strong, we said. Yet today we are on the verge of declaring that young children, some as young as 11 and 12 and 13 years, in our junior high schools have the courage and the wisdom and the maturity to stand up to the peer pressure that would be exerted on them to practice and participate in the religious beliefs of their friends in their own public school building.

130 Cong. Rec. H7733 (daily ed. July 25, 1984) (statement of Rep. Ackerman).

237. Taylor, *supra* note 13.

238. *Id.*

239. *Id.*

240. Nat Hentoff, *'Equal access' offers teenagers a chance to grow*, Minneapolis Star & Tribune, Sept. 18, 1984, at A15, col. 1.

philosophical, or religious. This, in turn, is a crucial first step toward ensuring that teenagers are capable of thinking for themselves.²⁴¹ Of course, the Supreme Court had already recognized these rights in *Tinker*, and thus we are once again reminded that the real purpose of the Equal Access Act is to put *religion* into the schools.²⁴²

V. Conclusion

The Equal Access Act's legislative history indicates that the Act is a blatant push to get religion into the public schools in violation of the establishment clause. Although the Supreme Court could sever the Act's religious speech provisions, it will probably uphold the entire Act's constitutionality. Congress intended the Act's policing provisions to keep unpopular groups from meeting in public schools but the Act should, in light of first amendment case law, enable virtually all groups to meet. Moreover, the courts will probably interpret the Act as providing a remedy for any student group denied access to public secondary school facilities. Thus, the Equal Access Act should prove to be invaluable to students interested in hearing and sharing diverse ideas. Observed one writer: "As most teen-agers will tell you, it's hard to find many adults who see teen-agers as individuals. But unwittingly, as is his custom, Reagan has signed a bill affirming that teen-agers can be trusted to think for themselves."²⁴³

241. *See id.* The author argues that students are unable to think and function because they are insulated from divisive issues. It is this, the author argues, that makes students susceptible to proselytizing by cults.

242. Although the Equal Access Act applies only to public secondary schools, it is likely that attempts will be made to extend the Act. Commented Senator Denton: "A sealed door has had its seal broken. We can probably get [the Equal Access Act] to grade schools." *Schoolhouse Free-for-All*, N.Y. Times, July 25, 1984, at A22, col. 1.

243. Hentoff, *supra* note 240.