Voluntary Religious Activities in Public Schools: Policy Guidelines

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by
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Introduction

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

— First Amendment

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

— 14th Amendment

Do school officials violate the establishment clause of the First Amendment if they permit voluntary religious meetings in public schools? Do they violate the First Amendment’s free-exercise or free-speech clauses or the equal-protection clause of the 14th Amendment if they do not permit them?

There is no easy answer to these questions. The law concerning voluntary religious meetings in public schools can be confusing. But school officials must consider these questions in order to avoid costly lawsuits.

The problems become more complex when a school establishes a public forum by allowing students to organize after-school activities that are not directly related to the school’s curriculum or by allowing community groups to use the school facilities in the evenings or
weekends. Indeed, a school that establishes such a public forum may be required to permit voluntary religious activities.

While it may seem easiest for schools simply to prohibit all meetings that are not directly related to the curriculum, such a policy is not always possible. Community needs and interests differ, and it may be important for the community to use the school's facilities. For example, a school in a rural area might need to open its facilities to students and the community simply because there are few other places where people can meet.

This fastback provides some policy considerations for schools concerning public forums and voluntary religious activities. Major Supreme Court decisions regarding religion and public schools are reviewed; and the Equal Access Act, which may require schools to accommodate voluntary religious activities, is discussed.

This fastback is not intended as a substitute for the advice of a school attorney. State laws differ, and the courts' interpretations of the law vary among jurisdictions. Implementing a policy on voluntary religious activities in the school requires precise knowledge of the laws that pertain to a particular area. In this case, as in so many others that face school officials, “He who is his own lawyer has a fool for a client.”
Establishment of Religion

To the casual observer, it would not seem that a group of students was creating a problem by getting together on their own initiative to pray, read scripture, and discuss their religious experiences in a vacant classroom. But under current interpretations of the First Amendment establishment clause, such meetings may violate the U.S. Constitution.

There is a clear and definite doctrinal distinction between the application of the establishment clause in primary and secondary education and its application in other areas of life. While the Supreme Court has never been troubled by the possibility that government will advance religion through such actions as the use of “In God We Trust” on coins or the opening of Congress with a prayer, it has very often been troubled by government actions that appear to advance religion in schools. This distinction is illustrated in the Court’s decisions in cases involving state aid to parochial education. There, for example, the Court has distinguished state aid to parents of parochial school students or to the students themselves, about which it has expressed relatively little concern, from aid to parochial schools, about which it has expressed a great deal of concern. It also has distinguished aid to church-affiliated colleges and universities, which it often has approved, from aid to parochial elementary and secondary schools, which it often has rejected.
The special concern with the establishment of religion in the schools has a number of sources. The most fundamental is the central role that primary and secondary education play in preparing children for democratic citizenship in a pluralistic society. A second is the intimate and vital role — reflected in compulsory attendance laws and immense expenditures from the public purse — that government has come to play in primary and secondary education. A third is the resultant power of government to “cast a pall of orthodoxy over the classroom” (Keyishian v. Board of Regents 1967). “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein” (Board of Education v. Barnette 1943). And a fourth is the very real possibility that if the state becomes involved in supporting religious activities in schools, the political community will become divided over whose faith shall be supported.

Courts have found the possibility of state endorsement of religious activities in school particularly worrisome. They have held that there is implied endorsement even if religious activities are voluntary and non-denominational. They have found such activities especially likely to convey an “imprimatur” of state endorsement when they are initiated or conducted by teachers or other school officials, when they seem to be a part of the school curriculum, when they involve younger and therefore more impressionable students, or when they occur on school premises during school hours.

The language of the religion clauses in the First Amendment is firm, but provides no clear guidelines for policymakers. The establishment clause prohibits government from assisting religion; the free-exercise clause prohibits it from hindering religion. Precisely what is forbidden, what allowed, or required?

Two opposing interpretations emerged in early establishment-clause cases. The first, a principle of “separation,” was articulated by Justice Black in Everson v. Board of Education (1947):

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up
a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

The second interpretation, a principle of "accommodation," discussed more fully in the next chapter, was introduced by Justice Douglas in Zorach v. Clauson (1952):

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . . But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

The problem for the Supreme Court has been "to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme,
would tend to clash with the other" (Walz v. Tax Commission 1970). Two “tests,” one for the establishment clause and one for the free-exercise clause, have been developed to solve that dilemma. The remainder of this chapter addresses the establishment-clause test.

In Lemon v. Kurtzman (1971), then-Chief Justice Burger offered what is now the commonly accepted establishment-clause test. To be constitutional, state action first must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, it must not foster an excessive government entanglement with religion. All three parts must be satisfied for a state action to be constitutional.

The Court in Lemon never defined “religion” or what is “religious,” but two general tendencies can be discerned in its decisions: 1) activities (for example, classroom exercises) will be considered religious when they involve such practices of organized religion as prayer and scripture reading; 2) organizations (for example, student groups) will be considered religious when they are affiliated or identified with avowedly religious groups or have a stated or otherwise obvious religious or sectarian objective.

The first, or secular purpose, component of the Lemon test is the easiest to satisfy. Evidence of an obviously secular purpose on the part of the state normally will suffice; that is, the Court will not invalidate state action unless there is no arguably secular purpose for it or the purpose is obviously religious. On the other hand, the sheer avowal of a secular purpose on the part of the state, absent any credible evidence, will not be sufficient.

The second, or primary effect, component of the Lemon test is both more complex and more rigorously applied. The Court has defined impermissible advancement of religion as “sponsorship, financial support, and active involvement of the sovereign in religious activity” (Walz). However, a state action that has as its primary objective the advancement of some legitimate secular goal but that also provides some merely incidental benefit to religion is not thereby automatically disallowed. Benefits are considered incidental when they are inseparable from the achievement of a legitimate secular purpose, are equally available to religious and nonreligious groups or individuals,
and do not carry an imprimatur of state endorsement of religion or religious beliefs and practices. For example, loan of secular textbooks and provision of bus transportation have been held to confer merely incidental religious benefits.

Religious activities on school premises during school hours are problematic because the state's compulsory attendance laws serve to make students a captive audience. Furthermore, such religious activities occur in a highly structured curricular environment, in which it is difficult for students to distinguish them from secular educational functions. Students are closely regulated and controlled in that environment and therefore may find it difficult to avoid exposure to unwanted religious activities. And teachers or other school officials are almost always present at in-school religious activities, thus making it likely that they will at least appear to endorse the religious views involved.

The third, or excessive entanglement, component of the Lemon test has two aspects. The first has been called "administrative" or "procedural" entanglement; the second is "political" entanglement.

Administrative entanglement may be defined as the need for excessive and continued monitoring, supervision, or surveillance of religious groups or activities by officials of the state. It has been most commonly invoked in cases involving state financial aid to parochial schools. Practices found to produce entanglement in state-aid cases are surveillance of parochial school teachers to ensure that religious incultation does not occur when teaching secular subjects, auditing of parochial school budgets and other records to ensure that state funds are not used for religious instruction, and frequent professional interaction between public and parochial school teachers and administrators on such matters as curriculum and counseling that may involve religious views.

Student religious activities in public schools also can create administrative entanglements. Administrative supervision of such activities to maintain order, safety, and discipline, which normally is required by school policy or state law, and official monitoring of religious activities to ensure that they are completely voluntary have been found to create excessive entanglement.
Most administrative entanglements create still another kind of entanglement because they "involve the government in the task of defining what was religious and what was non-religious speech or activity — an impossible task in an age where many and various beliefs meet the constitutional definition of religion" (O'Hair v. Andrus 1979).

Political entanglement results when government actions lead to excessive and continuing sectarian strife in the political community. As the Court said in Lemon, "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."

Political entanglement, like administrative entanglement, has been most commonly invoked in cases involving state aid to parochial schools. State aid may benefit some religious groups and not others, and thus create sectarian tension. An initial aid program may lead to requests for continuing appropriations, thereby generating continuing sectarian debate. There may be demands for more aid as costs and populations grow, and therefore more political strife is generated and aggressive political constituencies force public debate into hostile sectarian channels.

In contrast to decisions concerning state aid to primary and secondary parochial schools, those concerning state aid to church-affiliated colleges and universities reflect almost no concern with the problem of political entanglement. The reasons are informative. The constituencies who benefit from state aid to these colleges and universities usually are geographically dispersed, while those who benefit from aid to parochial schools are localized in a particular political community. College students are more mature and less impressionable than primary and secondary students, and therefore presumably better able to distinguish between the secular educational purposes of state aid and the aid as a sign of state endorsement of religious views. Church-affiliated colleges and universities are less pervasively sectarian than parochial schools, more open to debate and criticism, and thus more characterized by academic freedom than by sectarian indoctrination. The aid provided to colleges and universi-
ties is almost always for clearly identifiable non-ideological purposes, such as building construction, while that to parochial schools is usually for purposes in which the secular and the religious are less clearly separable, such as teacher salary supplements or curriculum enhancement. Aid to colleges tends to be of a one-time, single-purpose nature rather than continuing and general, and thus is less likely to lead to increasing demands and financial dependency. Finally, aid to colleges is almost invariably extended to a wide range of institutions, many of which are not religiously affiliated at all.

An interesting twist to political entanglement is that it has sometimes been found to follow from administrative entanglement:

The numerous judgments that must be made by agents of the state [where there is] detailed monitoring and close administrative contact . . . concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase. (Aguilar v. Felton 1985)

The Supreme Court has occasionally used both administrative and political entanglement to justify a decision, but it has ruled that political divisiveness alone will not invalidate otherwise permissible conduct (Lynch v. Donnelly 1984). Indeed, although the problem of divisiveness along religious lines could be relevant to cases involving student religious activities — for example, if out-of-school groups compete with one another to organize in-school religious clubs or strive among the clubs creates strife in the community — the application of political entanglement to such cases may have been foreclosed:

The Court's language in Lemon respecting political divisiveness was made in the context of . . . statutes which provided either direct payments of, or reimbursement of, a proportion of teachers' salaries in parochial schools. We think, in light of the treatment of the point in later cases . . . the language must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools. (Mueller v. Allen 1982)

The future of the Lemon test is unclear. Justice Powell has written that it "identifies standards that have proven useful in analyzing case
after case both in our decisions and in those of other courts. It is the only coherent test a majority of the Court has ever adopted" (Wallace v. Jaffree 1985). Justice Brennan has said that "we have particularly relied on Lemon in every case involving the sensitive relationship between government and religion in the education of our children" (Grand Rapids School Dist. v. Ball 1985). But in Wallace, then-Chief Justice Burger, who wrote the Lemon opinion, complained that "the Court's extended treatment of the 'test'... suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues." And now-Chief Justice Rehnquist has said that Lemon "has simply not provided adequate standards for deciding Establishment Clause cases."

At the least, it must be said that Lemon has proven vague in application to cases involving religion in education:

What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the states — the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth — produces a single, more encompassing construction of the Establishment Clause. (Committee for Public Education v. Regan 1979)
Accommodation of Religion

The early school prayer decisions (Engel v. Vitale 1962; Abington School District v. Schempp 1963) made it clear that the establishment clause prohibits the state from requiring religious activities in school. The most recent school prayer decision (Wallace v. Jaffree 1985) and the earliest religious instruction case (McCollum v. Board of Education 1948) make it equally clear that the establishment clause prohibits the state from actively encouraging religious activities in school. But in Zorach v. Clauson (1952), in which the Supreme Court held that a program allowing students to be released from regular classes to attend devotions and religious instruction in off-campus religious centers did not violate the establishment clause, the Court made it clear that it is permissible for the state to accommodate some kinds of student religious activities in some circumstances. Might accommodation be permissible or even mandatory for voluntary, student-initiated meetings for prayer and scripture reading that are held in school facilities on the same basis as other voluntary, nonreligious meetings?

Before 1981 federal courts had almost uniformly held that voluntary, student-initiated religious meetings in public schools violated the establishment clause. In 1981, however, the Supreme Court held in Widmar v. Vincent that because a public university policy created
a "limited public forum" for meetings of voluntary student groups of all kinds, student religious meetings did not violate the establishment clause and were protected from official interference by the free-speech clause unless the university could show a compelling state interest. In *Bender v. Williamsport* (1983) the United States District Court for the Middle District of Pennsylvania extended the *Widmar* holding to public high schools.

The facts in *Bender* were deceptively simple. Williamsport Area High School scheduled two 30-minute voluntary student activity periods each week during school hours. Officially sanctioned groups were permitted to meet in school facilities and given access to school bulletin boards and the public address system. All meetings were voluntary; students who did not wish to participate were free to use the school library, computer station, or career and college materials collection, or to study in home rooms.

A group of students asked the principal for permission to form a club called "Petros" (The Rock) "to promote spiritual growth and positive attitudes in the lives of its members." The club would meet during the activity periods for scripture reading, prayer, and religious discussion; its meetings would be voluntary and supervised by a faculty advisor; it would not use school media to promote its activities.

The group was allowed to hold one meeting, which was attended by 45 students and a faculty monitor. The students read the Bible and prayed; the monitor graded papers and did not participate. Following the meeting the principal informed the students they could not meet again until he had discussed their request with the superintendent.

The students wrote the superintendent, expressing their desire to form a voluntary, nondenominational club "to read some scriptures and pray to God that he might edify [their] minds." After talking with the school attorney, however, the principal and superintendent informed the students they would not be allowed to meet in school, but might meet off campus during the activity periods if they could find a suitable location and advisor. The students appealed to the school board, but the board affirmed the decision. The board president wrote the students:
The solicitor advised the Board that to approve your proposal would be a violation of existing case law and therefore, an improper action. The Board decided, therefore, to deny your appeal.

Please be assured that neither the School Board nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.

The students brought suit in U.S. District Court under the Civil Rights Act (42 U.S.C. § 1983) claiming violation of their rights to free exercise of religion, freedom of speech, and equal protection.

At the time of the Petros request, Williamsport had no formal procedure for applying for school sponsorship of voluntary activities; students just asked the principal, orally or in writing, for permission to meet. The only qualifications for sponsorship were that the proposed activity “contribute to the intellectual, physical or social development of the students” and be “otherwise considered legal and constitutionally proper.” No previous request had been denied; approved activities had included archery and art, bowling and business English, chemistry and chess, poetry and photography, Spanish and skiing. The activity periods also were used regularly for meetings of student government, class and service organizations, band and choir, and student publications.

It was unwritten policy that all student activities have an adult advisor or monitor approved by the principal. Advisors typically were members of the faculty, but other school employees or parents could serve. There was no policy concerning the appropriate role of advisors, though one had to be present at all student meetings.

In ruling in favor of the students, Chief Judge William Nealon of the district court wrote: “At the outset, it is necessary to emphasize what this case does not involve.”

This is not a case where school administrators have adopted a rule or policy requiring, or even allowing, students to meet for religious purposes... where a school teacher or other school official has adopted a practice of requiring or encouraging school prayer or other religious
discussion in his classroom... where a teacher or other school official encouraged or counseled the students to request the opportunity to meet... [or] where the students represent a particular denomination.

The students, apparently acting on their own initiative, simply requested permission to hold obviously religious meetings on the same basis as nonreligious student groups. The school district denied their request solely on the basis of the religious content of the meetings.

A year later in 1984 the Court of Appeals for the Third Circuit reversed the district court decision, holding that while voluntary, student-initiated religious meetings in a limited forum in a public high school were protected by the free-speech clause, the state’s interest in prohibiting them to avoid a violation of the establishment clause was sufficiently compelling to outweigh the students’ public-forum rights. The case was then appealed to the U.S. Supreme Court.

On the same day that the Third Circuit Court handed down its decision in Bender, Congress passed the Equal Access Act (20 U.S.C. § 4071), which was signed into law in August 1984. The Act, based on Widmar, prohibits public secondary schools in which a limited public forum has been created from discriminating against meetings of student groups “on the basis of the religious, political, philosophical, or other content of the speech at such meetings.” The Act was explicitly designed to make accommodation of religious meetings mandatory in public schools whenever school facilities were opened for other voluntary meetings.

There was considerable hope that Bender would settle the constitutional status of voluntary religious activities in school and, with it, of the Equal Access Act. Instead, in March 1986 the Supreme Court vacated the circuit court decision on procedural grounds by a five-to-four vote. The circuit appeal, it said, had been brought by only one member of the school board, while the district court decision had been against the board as a whole; a single member had no standing to pursue the suit.

The Court majority (Blackmun, Brennan, Marshall, O’Connor, Stevens) entirely avoided the constitutional questions, a tactic not uncommon in difficult, controversial cases. The minority (Burger,
Powell, Rehnquist, White) argued that voluntary student religious meetings in high schools were protected by the free-speech clause.

Whatever the explanation, the decision, in the words of the New York Times, “was an anticlimactic denouement for one of the most widely publicized issues pending before the Court.” It allowed the district court decision to stand, at least in the jurisdiction of the Middle District of Pennsylvania and at least for the time being, thus allowing student religious groups to meet on the same basis as nonreligious groups. It left the Equal Access Act untouched, and it failed to resolve the essential constitutional conflict between establishment of religion and freedom of speech. The next chapter examines the relationship of the free-speech and free-exercise clauses and its implications for public school officials.
Free Exercise of Religion and Freedom of Speech

While students do not have a right under the free-exercise clause to meet for religious purposes on school premises during school hours, they may have a right to do so under the free-speech clause.

The right of free exercise of religion is determined by a two-step test derived from *Sherbert v. Verner* (1963). First, one must show that some action of the state burdens his or her ability to practice religion and adhere to religious beliefs. A burden exists "where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or . . . denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs" (*Thomas v. Review Board* 1981). Second, once a burden is shown, the state may defend by showing that its action is the least restrictive means of achieving some compelling state interest.

The definitions of "religion" and "religious belief" are considerably broader under the free-exercise than under the establishment clause. The central consideration is whether beliefs play the role of a religion and function as a religion in an individual's life. What is crucial is that beliefs be sincerely held and central to one's faith.

Federal courts uniformly have held either that prohibition of voluntary religious meetings in school does not burden students' faith, since
students are free to worship as they please outside of school, or that the wish to hold such meetings is not based on a central, deeply held tenet of faith. This is not to say that all student free-exercise claims in a public school setting will be held invalid; for example, in the case of a Moslem who must prostrate himself five times daily in the direction of Mecca, a school board might have to make accommodations to permit him to withdraw momentarily from the class. But all the cases thus far decided have involved Christian students, and there is nothing in any version of Christianity that requires religious practice in school. The most that can be said is that students or their parents might prefer to have religious activities in school; but the free-exercise clause protects fundamental beliefs, not personal preferences.

If the free-exercise clause does not protect a right to engage in voluntary religious activities in school, the free-speech clause seems to. In *Widmar v. Vincent* the Supreme Court held that voluntary student meetings for religious worship and discussion in a public university are forms of speech and association protected by the public-forum doctrine. *Bender v. Williamsport* applied *Widmar* to public secondary schools.

The public-forum doctrine governs freedom of speech and association in spaces owned or controlled by government. Three kinds of spaces are distinguished: 1) those which by long tradition have been devoted to assembly and debate; 2) those which were not designed, intended, and primarily used for purposes of expression and association but which the state has opened for use by the public as a place for expressive activity; and 3) those which have not been given over to expression and association either by long tradition or government fiat.

Spaces of the first kind, called “pure” public forums, include streets, sidewalks, and public parks. Spaces of the second kind, called “limited” forums, have been found in university meeting facilities, state fair grounds, school board meetings, and municipal theaters. Spaces of the third kind, called “nonpublic” forums, have been found in U.S. Postal Service letterboxes, military posts, jails and prisons, municipal transit cars, and the grounds of public schools and courthouses.
Spaces do not become public forums merely because they are owned or operated by government or merely because members of the public are allowed to come and go in them. Pure public forums exist because they "have immemorially been held in trust for the use of the public and, time out of mind . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions" (*Hague v. C.I.O.* 1939).

Limited forums exist because they have been established and maintained as a result of specific government policy or action. If a government agency, such as a school board, explicitly opens school facilities for communication or association activities, or does not require permission to use the facilities for such activities, or grants permission to use them as a matter of course, or has no stated policy at all concerning their use, then for First Amendment purposes it has turned them into limited public forums.

Creation of a limited forum for some groups, such as students, or some activities, such as meetings of student clubs, does not automatically create a right of access for all groups or activities. Parents or members of the public do not possess a right of access to a school forum just because students have been granted one, nor do students possess a right to hold meetings of voluntary, noncurricular clubs just because they have been allowed to hold meetings of curriculum-related ones. It is in these senses that public forums of the second kind are said to be "limited."

Public-forum doctrine distinguishes two types of regulation of expressive and associative activities in public spaces: 1) regulation of the content of such activities and 2) regulation of the time, place, or manner in which they occur. Basically, content regulation is prohibited; time, place, and manner regulations are permitted.

Content regulation is regulation of speech or association based on its topic or subject matter; speaker or group identity; or message, ideas, or viewpoint. In nonpublic forums the state has broad power to regulate content. It may prohibit access to all but those groups, topics, and activities for which the space was designed and intended and for which it has traditionally been used. Even with respect to speech and association, it may "make distinctions in access on the
basis of subject matter and speaker identity . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view" (Perry Education Assn. v. Perry Local Educators' Assn. 1983).

Once property becomes a public forum, limited or otherwise, regulation of content is sharply curtailed even if the state was not required to create the forum in the first place. To justify regulating content in public forums, the state must show that it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. It cannot be justified on grounds that there are alternative means of communication and association available to potential users, or that the users or their activities or views are unpopular, even offensive. Even the fact that the audience is "captive," as students are in public school, will not normally justify content restriction, unless it can be shown that "substantial privacy interests are being invaded in an essentially intolerable manner" (Cohen v. California 1971) as, for example, when unwilling recipients have pornographic materials thrust upon them.

This is not to say that content restriction is never allowed; certain kinds of content — libel, pornography, obscene words, incitement to violence — have long been held outside the bounds of First Amendment protection. But, in general, once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say (Police Department of Chicago v. Mosley 1972). It may close the forum altogether, but selective exclusions may not be based on content alone.

Selective content-based exclusions may even run afoul of the equal-protection clause of the Fourteenth Amendment as well as the free-speech clause of the First Amendment. The equal-protection clause is violated if the state intentionally imposes a classification or distinction that leads to unequal treatment of groups or individuals otherwise similarly situated. As the Supreme Court said in Mosley:

Necessarily . . . under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those
wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an “equality of status in the field of ideas,” and government must afford all points of view an equal opportunity to be heard.

Thus far, federal courts have held that exclusion of all religious groups from a forum does not violate the equal-protection clause. Exclusion of some groups and not others on the basis of their religious views almost certainly would; and in light of 
Widmar and Bender, it is possible that in the future courts will hold that exclusion of religious as opposed to secular content (for example, political or environmental) from an otherwise open forum also constitutes an equal-protection violation.

The state has considerably greater freedom to regulate the time, place, and manner of activities in a public forum than it has to regulate content. Time, place, and manner regulations are essentially “rules of the road” designed to maintain order. They must be clearly and precisely defined, because a vague rule carries the danger of arbitrary and discriminatory application. They must be content neutral; that is, the content of what a speaker has to say may not affect the regulation of time, place, or manner of presenting it (Young v. American Mini Theatres, Inc. 1976). And they must be reasonable, given the nature of the place and the pattern of its normal activities (Grayned v. City of Rockford 1971). For example, a parade on a major thoroughfare is incompatible with rush-hour traffic. Among the time, place, and manner restrictions that have been approved by the Supreme Court are those limiting use of sound trucks on city streets, banning demonstrations near a courthouse, regulating by zoning ordinance the location of adult theatres adjacent to residential housing, and banning willful disturbance of school sessions by making loud noises in areas adjacent to a schoolhouse.

The Supreme Court has held that the streets and sidewalks that border school grounds do not lose their “pure” public forum status just because they are near schools, but no court has ever held that schools per se are pure public forums. Instead, they have held that school
officials can, at least in some circumstances, turn schools or some of their facilities into “limited” public forums.

The landmark case is *Tinker v. Des Moines Community School Dist.* (1969), in which a small group of students were prohibited from wearing black armbands to school in silent protest of the Vietnam war. The Court said:

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

The Court also said, “students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate” nor “confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, [they] are entitled to freedom of expression of their views.”

On the basis of *Tinker* and later public-forum cases, courts have held that school officials have created public forums in school by supporting extracurricular student newspapers, by operating a school-to-parents distribution system for carrying politically partisan messages home, and by making school facilities available to outside speakers and military recruiters during school hours. Similarly, they have held that formal recognition of student groups or associations may not be withheld except on a showing that the groups would materially and substantially disrupt the work of the school or violate the rights of others.

On the other hand, courts also have held that school officials did not create public forums when they sponsored plays and newspapers that were integral parts of the school’s educational program, operated a school-to-parents message distribution system that was not used
to carry partisan messages, or operated an internal school mail system for school-related messages.

The public-forum doctrine was first applied to in-school voluntary religious activities in *Widmar*, where the Court held that through its policy of accommodating student meetings, the university created a forum generally open for use by student groups. In contrast, the school district in *Bender* argued that its voluntary student activities period was a mere extension of the curriculum and not a public forum. However, the district court could find nothing to preclude the application of *Widmar* to a high school; and the circuit court held that the district "did indeed create a forum — albeit a limited one — restricted to high school students at Williamsport and also restricted to the extent that the proposed activity promote the intellectual, physical, or social development of the students." In a similar case, another court held that a school district that opened school facilities for community meetings during non-school hours had created a limited forum for those groups and could not deny access to groups that wished to meet for religious purposes (*Country Hills Christian Church v. United School District No. 512, Johnson County, Kansas* 1983).

"A high school," said the *Bender* court, "unlike the public streets and parks, is not by tradition a forum for public expression";

Clearly, use of school premises as a public forum by anyone or any group desiring to avail themselves of full and unrestricted use of first amendment rights would disrupt the educational purpose of a secondary school and thus be inconsistent with the special interests of the Government. The Williamsport Area School District, therefore, would have been justified in refusing to reserve high school property for use as a public forum for expression and would violate no constitutional constraints in doing so.

But the court went on to say:

when the state decides, albeit on its own motion, to open its facilities for use as a "limited forum," for particular purposes, it assumes a responsibility to explain its exclusion of a qualified group under applicable constitutional criteria. Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.
The Equal Access Act

When it passed the Equal Access Act in 1984, Congress framed the public forum doctrine in statute and applied it to public secondary schools. The relevant part of the Act reads:

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.

The Act does not authorize the United States to withhold or deny federal financial assistance to any school; the appropriate remedy for violation is a suit in U.S. District Court to compel compliance.

Under the Act a secondary school is one that provides secondary education as determined by state law. A limited open forum is a period during noninstructional time when one or more noncurriculum-related student groups have been given an opportunity to meet on school premises. Noninstructional time is that set aside by the school before actual classroom instruction begins or after it ends. Meetings are activities of student groups permitted under a school's limited open forum that are not directly related to the school curriculum.

The Act sets conditions under which a fair opportunity for access to a school forum exists. These conditions include: the school uni-
formly provides for voluntary and student-initiated meetings; the meet-
ings are not sponsored by the school or its agents; meetings do not
materially and substantially interfere with the orderly conduct of
educational activities; and nonschool persons do not direct, conduct,
control, or regularly attend them. Sponsorship means "the act of
promoting, leading, or participating in a meeting"; assigning a teach-
er or other school employee to a meeting for custodial purposes does
not constitute sponsorship. Employees or agents of the school may
attend religious meetings only in a nonparticipatory capacity.

The Act explicitly does not authorize the school or government to:

influence the content of any prayer or other religious activity . . .
require any person to participate in prayer or other religious activity
. . . expend public funds beyond the incidental cost of providing the
space for student-initiated meetings . . . 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 . . .
sanction meetings that are otherwise unlawful . . . limit the right of
groups of students which are not of a specified numerical size . . .
or . . . abridge the constitutional rights of any person.

On the other hand, the Act does not limit the authority of the school
to maintain order and discipline on school premises, protect the wel-
being of students and faculty, or ensure that attendance of students
at meetings is entirely voluntary.

Informal guidelines for interpreting the Act were developed by its
sponsors together with a variety of civil libertarian, educational, and
religious groups and were placed in the Congressional Record of 11
October 1984 (S 14473-76). Though nonbinding, they clearly are de-
signed to instruct the courts and school officials of congressional intent.

The guidelines indicate that the Act is not intended to compel any
school to open a limited public forum for its students, although "the
request of a single student group to organize a meeting or a club which
is not directly related to the school curriculum requires the school
to determine whether it wants to create such a forum." Allowing
curriculum-related groups such as math or science clubs to meet does not involve establishing a public forum. But allowing religious, political, service, or other clubs interested in topics not related to the curriculum to meet does create a public forum.

The Act is intended to apply only to the times before individual students' school days begin and after they end, including times when other students may be receiving classroom instruction because of split, staggered, or flexible school schedules. A school is not prohibited from opening a limited forum at other times, of course.

School officials may not set a minimum membership requirement as a condition of a group's access to a forum, but they may establish appropriate time, place, and manner regulations, including rules for allocation of available resources (for example, classrooms). They are encouraged to formulate and publish a uniform policy for access to school facilities to avoid problems when access is denied.

Teachers and other school officials may be present at all student meetings. The assignment of a teacher to supervise a meeting, expenditure of public funds for minimal costs of use of facilities, and use of school media to announce meetings (as long as the school does not promote them) do not violate the Act and are not to be taken as evidence of sponsorship or endorsement of groups or activities. A school may demonstrate that it is not promoting, endorsing, or otherwise sponsoring groups by publishing a disclaimer to that effect.

Students are entitled to discuss changes in existing law and controversial social and legal issues in school forums and may not be prohibited from doing so because their views are unpopular or because students, parents, teachers, officials, or members of the community disagree with them. On the other hand, the school may exclude meetings of groups in which unlawful activity occurs and may prohibit meetings that "materially and substantially interfere with the orderly conduct of educational activities." It is not clear whether meetings of student groups must have an open-admission policy; that probably depends on the requirements of state civil rights law.
At the time of its passage there was some concern that the Equal Access Act might violate the First Amendment establishment clause. In the spring of 1990, however, the Supreme Court in *Board of Education of the Westside Community Schools v. Mergens* held that it did not.

The facts of *Mergens* are substantially the same as those of *Bender v. Williamsport* (see pp. 18-19). The *Mergens* Court, in finding the Equal Access Act constitutional, relied entirely on *Widmar v. Vincent*, as had the lower court in *Bender*. Said Justice O'Connor, writing for the Court: “We think the logic of *Widmar* applies with equal force to the Equal Access Act.” First, “The Act's prohibition of discrimination on the basis of 'political, philosophical, or other' speech as well as religious speech is a sufficient basis for meeting the secular purpose prong of the *Lemon* test.” Second, “a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion.” And finally, “custodial oversight of the student-initiated religious group, merely to ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities . . . [and] denial of access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur.”

The Act has important consequences. First, if school officials allow even one noncurriculum-related group to meet in school facilities, they have created a limited open or public forum and surrendered most of their ability to make educationally sound decisions about what happens in it. Not incidentally, they have also surrendered the power to arbitrarily exclude expression of views of which they or the community disapprove. Once a forum is opened, it must be made available to groups of all kinds; and school officials may find it difficult — perhaps impossible — to ensure that outsiders are not promoting
or substantially controlling student groups for their own purposes. Of course, all of this was already a consequence of public forum doctrine, but it has been easier to ignore little-known court decisions than it will be to ignore a highly publicized Act of Congress endorsed in an equally highly publicized decision of the United States Supreme Court.

Second, the Act subjects school officials to even more political pressures than they already face. Its very existence encourages groups of all kinds to seek to open school forums; a school that declines will likely be confronted with numerous objections. This will inevitably tend to further politicize education, and groups disgruntled by the outcome of the local political process will have another means to bring litigation to the federal courts.

Finally, and most important in practical terms, the Act virtually compels school officials to decide immediately whether to restrict school time and facilities to purely curriculum-related matters or to open them for noncurricular student expression and association as well. Given the central place of public schools in local communities, the increasing demands made on them to do more and more things as part of the instructional program, and the decreasing availability of funds and resources, this is a decision of considerable educational, political, and legal importance.
Policy Guidelines

The principal lesson to be learned from the controversy over voluntary student religious meetings is that the public forum status of school facilities should not be left to chance. A school can either explicitly establish a policy for use of its facilities in a formal statement, or it can implicitly establish one through the actions and decisions, conscious or otherwise, of school officials. The latter course is unwise; if even one group is given access to school facilities for other than curriculum-related activities, a court will almost certainly find that a limited open forum has been created.

Neither the public forum doctrine nor the Equal Access Act requires school officials to permit voluntary student religious meetings in school. Such meetings may be prohibited if the school has a policy that restricts school facilities to curriculum-related uses. But if the school has a policy that opens facilities to noncurriculum-related uses, school officials may not deny their use for voluntary student religious meetings.

The crucial variable is school policy. Officials, with the help of legal counsel, should devise a sound written policy for use of school facilities. They should negotiate it with the school board and, through the board, with the local community. They should effectively communicate it to students, parents, teachers, school employees, and the community. And they should rigorously adhere to the policy once it is in place.
A sound policy for use of school facilities has three parts: a definition of the kind of forum (nonpublic or limited) they constitute, rules for regulating their use, and procedures for administering access to them.

A complete definition of the forum status of school facilities will specify appropriate uses of the facilities, appropriate users of them, the actual facilities available for use, and the times at which they are available.

School facilities will constitute a nonpublic forum when their use is restricted to student groups whose activities are directly related to the school’s curriculum. Under such a policy, officials will retain broad power to restrict the activities that take place in the facilities; but they will also be prevented from allowing some activities — meetings of certain hobby groups, social fraternities, senior men’s and women’s clubs, for instance — that traditionally have taken place in school. If use of school facilities is permitted to groups whose activities are not related to the curriculum, then the facilities will constitute a limited open forum and officials will retain only very limited power to restrict activities in them and will have to allow, for instance, meetings of political and religious clubs, which traditionally have not been allowed in school.

The distinction between nonpublic and limited public facilities hinges on what is and is not a “curriculum-related” student group. Justice O’Connor defined “curriculum-related” in Board of Education v. Mergens.

“The common meaning of the term ‘curriculum’,,” wrote Justice O’Connor, is “The set of studies or courses for a particular period, designated by a school or branch of a school.” Thus curriculum-related student groups are those whose activities are “directly related to the subject matter of courses offered by the school” and “have more than just a tangential or attenuated relationship” to those courses and subject matter. “A student group directly relates to a school’s curriculum,” she said, “if the subject matter of the group is actually taught,
or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit."

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

On the other hand, unless a school could show that groups such as a chess club, a stamp collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be "noncurriculum related student groups" for purposes of the Act.

Before Mergens, "curriculum-related" had no clear definition; schools were left to create their own, as long as they did not create an all-encompassing one that arbitrarily resulted in all but a few clubs being defined as curriculum-related. Apparently, that is just what Westside Community Schools tried to do in Mergens. For example, the Board of Education argued that Subsurfers, a scuba diving club, furthered "one of the essential goals of the Physical Education Department — enabling students to develop lifelong recreational interests," while a chess club "supplements math and science courses because it enhances students' ability to engage in critical thought processes."

Justice O'Connor made short work of such spurious reasoning. "To the extent that petitioners contend that 'curriculum related' means anything remotely related to abstract educational goals . . . we reject that argument," she wrote.
Allowing such a broad interpretation of "curriculum related" would make the Act meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit.

If school facilities are closed to all but curriculum-related student groups as defined in *Mergens*, use of them can be restricted to enrolled students. If facilities are to constitute a limited open forum, on the other hand, use of them may be extended to only students, to only members of the public (in evening hours, for instance), or both. Thus the decision to allow a limited open forum is a very important one.

The problem of specifying the actual facilities available for use is not a serious one in the case of a nonpublic forum. Officials may simply designate appropriate spaces for activities other than regular classroom instruction. In the case of a limited open forum, however, the facilities included must be precisely delineated. Presumably, vacant classrooms will be included. But what about the auditorium, cafeteria, and gymnasium? If there is no precise specification and all normally used space is occupied, a new group may claim that some other space should be made available. The basic rule is that space limits must be reasonable given the normal pattern of activities in the school; spaces such as the teachers' lounge and administrative offices can justifiably be excluded.

The problem of specifying the times during which facilities are available for use in a limited forum can be complex. While the Equal Access Act applies only to those times before and after formal classroom instruction, the public forum doctrine applies at all times. Particularly important times to consider are those in the morning and afternoon immediately preceding and following formal instruction, lunch or study hours, free periods, and evenings (summer use may raise
a question in some districts as well). A limited open forum may even be created accidentally during formal classes, as it would be, for example, if a social studies teacher invited a local political candidate to speak to a class. Therefore, appropriate uses of teacher-controlled time should also be determined; and teachers should be instructed in their public forum responsibilities. As with space, time constraints in a limited forum must be reasonable given the normal pattern of school activities; if study halls are only for study, they may be excluded.

The rules for regulating conduct are particularly important. Even in nonpublic forums, they may not unreasonably infringe on First Amendment rights, as they did, for example, in Tinker v. Des Moines. In limited forums, any attempt to impose restrictions may be seen as an infringement on protected rights if the rules are not narrow, clear, precise, and communicated to users.

Rules for maintaining order, discipline, and security; preventing interference with the work of the school; meeting curricular objectives; preventing infringement on the rights of others; assigning advisors and regulating their roles; regulating the activities of outsiders; and regulating the use of school bulletin boards and other media should be spelled out. Other rules also may be appropriate. However, while the school retains the right to establish rules for the manner in which activities are conducted as well as the times and places in which they may occur, the rules must serve a compelling state interest and be narrowly drawn to achieve that end.

The final part of a successful policy for use of school facilities is a set of procedures for administering access. These should include at least the following: a statement that permission is required to use the facilities, a method for requesting permission, a specified brief period of time after which a request will be granted or denied, the criteria under which permission may be denied or withdrawn, a method for appealing denial or withdrawal, and a method for speedy review and resolution of appeals.
Because school officials are legally responsible for all activities that take place in the school, the permission requirement for activities that are not part of official school business is always in order. What must be remembered is that denial of permission is a form of censorship or prior restraint. The First Amendment, and through it the public forum doctrine, has been held to include a requirement of due process whenever prior restraint of protected activity occurs. Access to public facilities for any First Amendment activity can be denied only in accordance with fair and reasonable procedures. Officials may not deny access arbitrarily; procedural safeguards are essential.

The rules for requesting permission to use school facilities should include: those to whom requests should be directed (normally the principal or chief administrative officer), those who may make requests, how the requests should be made (in person, in a letter, on a specified form), and what the request should contain (name of the person making the request, description of proposed activities, others who will be involved, prospective advisor, etc.).

Once a request is received, officials may allow themselves time to study it, seek additional information, and consult with others (the superintendent, the local board). The decision to approve or deny permission may not be unreasonably delayed, however. A few days should be sufficient.

The criteria by which a request may be denied or withdrawn must be precise, narrow, and specific. As noted above, if facilities are restricted to curriculum-related uses, "curriculum-related" must be understood in light of the interpretation given in Board of Education v. Mergens. If facilities are opened to other activities, criteria for exclusion must be content neutral and must not allow arbitrary or capricious application. In the case of improper activity on the part of groups already using the forum, there should be provision for a warning prior to final withdrawal of access. The school retains the power to enforce its regulations for use of facilities, to exclude unlawful groups and conduct, to allocate resources, and to adjust requirements to the
age and maturity of students; but this power must be exercised fairly and reasonably.

Provision for appeal when permission is denied or withdrawn should be handled in a manner similar to the original request for permission. The person(s) to whom an appeal may be addressed, the deadline by which the appeal must be made, and the time by which a decision on the appeal will be reached are especially important.

Of course, records should be kept of all requests, including all actions taken and the reasons for denial or withdrawal of access whenever either occurs.

The creation and operation of a sound policy for use of school facilities is not just a matter of effective educational administration; it is also a matter of protecting basic rights. And protecting basic rights is not just a matter of administrative duty; it is a positive opportunity to educate our students and ourselves about the rights we possess and the philosophy behind them. The controversy over voluntary religious activities and use of school facilities provides an eminently “teachable moment,” if we have the presence of mind to grasp it. As Justice Jackson wrote so eloquently many years ago in Board of Education v. Barnette: “That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms . . . if we are not to strangulate the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”
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